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"The traditions of the legal profession have never been better cultivated than they are to-day."
—*Mr. Justice Luxmoore.*

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Proof of Adultery.

In New Zealand where, as in other countries, the tide of divorce continues to advance, approximately one-fourth of the decrees granted are made upon the ground of adultery. Two recent decisions—one of the House of Lords and the other of our own Supreme Court—on this branch of the law are of considerable interest to the general practitioner.

Ross v. Ross, (1930) A.C. 1, deals with the proof of adultery. Adultery is, of course, generally a difficult matter to prove. Direct evidence is seldom obtainable: some text-writers say that it is apt to be disbelieved though there is no reported case of which we are aware going quite to that length. In nearly every case, however, recourse must of necessity be had to proof of circumstances from which by fair inference adultery can be inferred. *Hall v. Hall*, (1902) 21 N.Z.L.R. 251, is the leading decision in our own Courts. There the Court of Appeal laid it down that to prove adultery the evidence must be such that guilt *must* be inferred (per Stout, C.J., at p. 262), or, in other words, that the evidence must be incompatible with innocence and consistent only with adultery having been committed (per Williams, J., at p. 262; per Edwards, J. at p. 263). In *Ross v. Ross*, which will, in England, certainly come to be regarded as the leading case, Lord Buckmaster who delivered the principal judgment said (p. 7):—

> "Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, e.g., letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might *reasonably* be assumed as the result of an opportunity for its occurence.'

Lord Atkin states the law thus (p. 21):

> "From opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties, prior, contemporaneous, or subsequent *justifies* the inference that such feelings existed between the parties that opportunities if given would be used for misconduct."

And Lord Thankerton tersely says (p. 25):

> "The respondent must prove facts which are not reasonably capable of an innocent construction."

It would appear that a *reasonable* or a *justifiable* inference of adultery is, according to Lords Buckmaster and Atkin, sufficient and there would seem to be little difference between their view and that of Lord Thankerton. Viscount Dunedin, who alone of their Lordships found adultery proved, refers to a *necessary* inference but the phrase is not used in any of the other judgments. It may possibly be suggested, in view of this decision of the House of Lords, that the standard of proof required by *Hall v. Hall* is somewhat too stringent, though it seems that probably the better view is that the difference between our Court of Appeal and the House of Lords is one merely of words. But, be this as it may, *Hall v. Hall* remains, of course, law in this country until the Privy Council decides the contrary. The difficulty in every case will always lie, not in resolving any slight difference which there may be between such phrases as "reasonable inference," "justifiable inference," and "necessary inference," but in applying the law to the facts proved—a fact which is amply illustrated by the marked divergence of opinion in *Ross v. Ross* between the majority of the House (Lords Buckmaster, Warrington, Atkin, and Thankerton) on the one hand, and Viscount Dunedin and four Judges of the First Division of the Scottish Court of Session on the other.

Woolcott v. Woolcott, 5 N.Z.L.J. 5, the second of the decisions mentioned above, deals not with the quantum but with the mode of proof. In *Wilkie v. Wilkie*, (1928) N.Z.L.R. 406, Blair, J., had expressed the view that admissions, written or verbal, by respondents are not proof of adultery, but amount to no more than corroborative evidence of adultery when other facts tending to prove the act have been established. This was not, at the time, we believe, generally accepted as being a correct statement of the law and this view has now, with the entire concurrence of Blair, J., been disapproved by Myers, C.J., in *Woolcott v. Woolcott*. The learned Chief Justice reviews the authorities and says that while they show that admissions of misconduct unsupported by corroborative proof ought to be received with the utmost circumspection, caution and distrust, nevertheless if the Court is satisfied that the confession is a clear, distinct and unequivocal admission and is *bona fide*, that there is no doubt of its genuineness and sincerity, and that there is no reasonable ground to suspect collusion a decree ought to be granted even though there be no confirmatory proof.

Woolcott v. Woolcott is useful also for a very clear statement of the law on the subject of corroboration, and, it is hoped, will be regarded as settling that there is no absolute rule to the effect that the uncorroborated evidence of a petitioner should not be acted upon. Some early cases would seem to indicate that such a rule exists, and indeed even in modern text-books the requirements of the law as to corroboration are too strongly stated—see for instance *Rayden on Divorce*, 2nd Edn., 79, and *Brown and Watts on Divorce*, 10th Edn., 242. *Curtis v. Curtis*, 21 T.L.R. 676; *Riches v. Riches and Clinch*, 35 T.L.R. 141, and *Dunstall v. Dunstall and Williamson*, 32 N.Z.L.R. 669, are reported cases where the Court has acted upon a petitioner's evidence alone and, in the two cases first cited, entirely without corroboration. *Stack v. Stack*, 25 N.Z.L.R. 209, and *Allom v. Allom* (No. 2), 28 N.Z.L.R. 771, plainly recognise that there is no absolute rule requiring corroboration.

Supreme Court

Myers, C.J. December 11; 18, 1929.
Wellington.

KIERNAN v. DONOVAN.

Deaths by Accident Compensation Act—Damages Paid Into Court—Apportionment Between Widow and Children of Deceased—Basis of Division—Deaths by Accident Compensation Act, 1908, Ss. 5 and 6—Public Trust Office Amendment Act, 1913, S. 13 (2).

Motion by the plaintiff for apportionment of the sum of £2,500 damages and £75 costs paid into Court by the defendants in an action brought by her under the Deaths by Accident Compensation Act, 1908, in respect of the death of her husband. The plaintiff, who was 31 years of age, sued on her own behalf and on behalf of the children of the marriage. There were four children, all girls, whose ages were respectively 14 years, 8 years, 4 years, and 4 months. The youngest girl was born on 12th August, 1929, just two days before the accident which resulted in her father's death.

C. A. L. Treadwell for widow.

Parry for children.

MYERS, C.J., said that it was suggested by counsel that with the exception of a sum of £300 to be paid to the widow the whole of the money should be paid to a trustee to form one trust fund for the benefit of the plaintiff and the children. In His Honour's opinion that course was not justified by the provisions of the statute, and he could not therefore see his way to adopt it. His Honour after referring to **Public Trustee v. Brewer,** 32 N.Z.L.R. 239, and **Public Trustee v. The Taupiri Coal-Mines Company (Limited)**, 34 N.Z.L.R. 991, where Chapman, J., and Cooper, J., respectively followed the analogy of the Statutes of Distribution and ordered that one-third of the available fund should be paid to the widow for her own use and the residue retained by the Public Trustee in trust for the children, said that while he thought that the analogy afforded by the Statutes of Distribution might be taken as some guide to the Court in framing its order, the analogy was one that could be pressed too far. In the ordinary case under the Deaths by Accident Compensation Act, 1908, where it was necessary for the jury to award damages, Section 5 of the Act provided that the jury might give to the parties respectively for whom and for whose benefit the action was brought, such damages as they thought proportioned to the injury resulting from the death. Section 6 provided that the amount so recovered, after deducting the costs not recovered from the defendant, should be divided amongst the before-mentioned parties in such shares as the jury by their verdict should find and direct. In **Bulmer v. Bulmer,** 25 Ch. D. 409, 412, Chitty, J., after referring to the sections of the English Act corresponding with the sections to which His Honour had just referred said: "When the questions are before the jury, undoubtedly the right way for the jury to proceed is either to take the individual claims of the persons on whose behalf the action is brought and to adjudicate on them separately, or to fix on an aggregate sum and then to divide such sum among the persons entitled." Chitty, J., then considered whether in the case of money paid into Court, and where there was no verdict of a jury, he had jurisdiction to apportion the fund, and he held that he had. That decision had been followed in New Zealand. Chitty, J., then proceeded: "The apportionment, however, must be made on the same principle as it would have been if the matter had been before a jury, and they would require to be satisfied that injury had in fact resulted to the persons claiming damages. In this case the principle of distribution must not be one of equal division, but in proportion to the damage sustained by reason of the death." That seemed to His Honour the true principle to be applied by the Court.

His Honour had said that in his view, as in the view of Chapman, J., and Cooper, J., in the New Zealand cases already cited, the analogy of the Administration Act might be used as a guide, but His Honour thought only as a guide. But even applying that analogy to the extent that the widow might be awarded one-third of the fund and the children two-thirds, it by no means followed that the children should share equally in their portion of the fund. That was expressly recognised by Cooper, J., in his judgment in **Public Trustee v. Taupiri Coal-Mines Co. Ltd.** (*cit. sup.*). The truth was, as it seemed to His Honour, that if a fund had to be apportioned by a jury, all the circumstances would have to be taken into consideration and similarly, in His Honour's opinion, they must be taken into consideration by the Court when the Court had to apportion the fund.

In the present case the eldest girl was fourteen years of age and might be expected in a few years to be able to earn her own living. On the other hand the youngest child was but a few months old and required to be provided for for a very long period. It would be unreasonable in His Honour's opinion to say that those two children were to have equal shares in the fund. His Honour proposed in the first place to allow the widow the sum of £970. It was suggested at the Bar that her share should in some way be settled, but in His Honour's opinion that was not permissible without the widow's consent. There was no reason, however, why she should not, if she wished, create a voluntary trust in respect of her share, or leave her money, or so much thereof as she did not immediately require, in the hands of the Public Trustee to invest in the Common Fund of the Public Trust Office and pay from time to time as she might direct. So far as concerned the sum of £75 paid into Court for costs, that amount might be paid out to the plaintiff's solicitors. His Honour understood that that sum of £75 was sufficient to cover the plaintiff's costs as between solicitor and client. His Honour allowed the sum of £10 out of the general fund for the costs of the solicitor and counsel appointed to represent the children on the hearing of the present motion. There was left the sum of £1,520 for the benefit of the children. The order of the Court would be that that sum be paid to the Public Trustee under the provisions of Section 13 (2) of the Public Trust Office Amendment Act, 1913. Those moneys were to be retained by the Public Trustee for the present in the Common Fund of the Public Trust Office until the shares of the children were defined. When the shares were defined the capital for the time being of each share would be invested by the Public Trustee in the Common Fund and be disbursed by him for the maintenance and education, or otherwise for the benefit of the child entitled thereto. The Public Trustee in disbursing those several sums would pay out of the capital and income of each fund for the maintenance and education or otherwise for the benefit of the child to whom the particular fund belonged such sums, and by such periodic or other payments, as he should think fit, with power to vary such payments as to amount and time of payment as he should think proper and to pay the same, if he thought proper, to the mother of the child, or any person having the actual care of the child, without calling for an account of the disbursement thereof, and from time to time to vary such mode of disbursement in such manner as to him should seem best. His Honour had already said that having regard to the varying ages of the children, it was plain that their portion of the fund should not be divided into equal shares. His Honour felt, however, that there was not at present before him sufficient information to enable him to say how much of the fund should be apportioned to each child. All relevant information should be submitted to enable the Court to make a fair and just division. The Public Trustee should as soon as possible make inquiries into that aspect of the matter and report fully to the Court. In doing so it would be necessary for him to report *inter alia* as to whether any of the children by reason of any special consideration seemed likely to have suffered a greater loss by the father's death than the others. Subject to any such special consideration, His Honour suggested that the fund might perhaps be divided on the assumption that each child would in the normal course of events, had the father lived, have been maintained by him up to the age of say 17 or 18 years. The probable expense of maintaining a girl up to the assumed age, taking due account of the different amounts required during different stages—a point upon which the Public Trust Office might reasonably be expected to have considerable knowledge—should then be taken into consideration with the object, if any portion of the fund would remain at the end of the assumed age, of providing that as each child attained the assumed age each would have left as nearly as possible the same amount of capital. His Honour did not suppose that that result could be worked out with accuracy; but he apprehended that with actuarial assistance it could at least be worked out with reasonable approximation. If information were supplied to the Court on some such lines as those indicated it should be possible to make a fair and just division. Pending the further order of the Court defining the shares of the children the Public Trustee was authorised in his discretion to pay the interest of the whole fund to the widow for the support of the children. The Public Trustee would have liberty

to apply *ex parte* to the Court in case he should require advice or directions and all parties would have liberty to apply generally.

Solicitors for plaintiff: **Treadwell and Sons,** Wellington.
Solicitors for representative of infant children: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

Ostler, J. December 9; 12, 1929.
Nelson.

NELSON CITY CORPORATION v. BUSBRIDGE.

Municipal Corporation—Gas—Electricity—No Power to Surcharge Overdue Accounts for Gas or Electricity Supplied—Municipal Corporations Act, 1920, Ss. 275, 277, 281.

Originating summons under the Declaratory Judgments Act, 1908, for a declaratory order determining (1) whether the plaintiff was entitled under S. 275 of the Municipal Corporations Act, 1920, to fix a uniform price at which gas should be supplied to all private consumers if paid within a fixed time, with a uniform proportionate increase or surcharge on such price if paid after the time so fixed; (2) whether the plaintiff was entitled under S. 281 of the said Act to do the same with regard to the supply of electricity.

Cheek for plaintiff.
Rout for defendant.

OSTLER, J., said that he assumed that the Borough Council had made contracts with suppliers embodying those terms. In such a case it had long been settled in equity that where in a contract a larger sum was agreed to be paid upon the non-payment of a certain sum on a certain date the creditor could not recover the larger sum so stipulated in the contract. He could recover only the fixed sum. The larger amount was not to be treated as liquidated damages but as a penalty. The authorities for that proposition were to be found in **White and Tudor's Leading Cases in Equity,** 8th Edn., Vol. 2, p. 273. Unless, therefore, borough councils had been given statutory power to make a surcharge on gas and electricity accounts not paid within a certain time, they had no power to do so.

S. 275 of the Municipal Corporations Act, 1920, provided that the Council might fix a uniform price at which gas might be supplied to all private consumers and the times when the same should be payable and might from time to time alter the same as it thought fit. S. 277 provided that all moneys receivable as the price of gas supplied should be deemed to be a separate rate and might be recovered accordingly. Those sections gave no power to a borough council either to make a surcharge without contract, or to make contracts with suppliers entitling them to surcharge. The gas must be supplied at a uniform price, and that price was recoverable as a special rate. With regard to the supply of electricity the plaintiff was licensed by an Order in Council dated 17th January, 1923, under the Public Works Act, 1911, to supply electricity to the citizens of Nelson. The terms of the license provided that the charges should not exceed one shilling per unit for lighting and sixpence per unit for power, provided that if accounts were paid within fourteen days after due date the charges should not exceed tenpence per unit for lighting and fivepence per unit for power. Those terms showed that it was contemplated that the Borough Council should give a discount for prompt payment but not that it could surcharge for delay in settlement. S. 281 of the Municipal Corporations Act, 1920, gave the Council power to supply electricity to the inhabitants of the borough and in so doing to exercise all the powers contained in Sections 267 to 280. It therefore gave the powers conferred by Sections 275 and 277, i.e., to supply electricity at a uniform rate and to recover the price as a special rate. In His Honour's opinion the Council had not been given statutory power to surcharge for delay in payment for either gas or electricity supplied. It could no doubt follow the uniform practice and give discounts for prompt payment, but before it could surcharge as it was trying to do it must have statutory authority to do so. It was said that the system of surcharging was more convenient because it saved unnecessary bookkeeping. His Honour saw no reason why borough councils should not be given the necessary power by statute. But as the law stood, they did not possess such power.

Solicitors for plaintiffs: **Pitt and Moore,** Nelson.
Solicitors for defendant: **Rout and Milner,** Nelson.

Ostler, J. November 6; 23, 1929.
Napier.

HAMILTON v. YATES.

By-law—County Council—Licensing of Hawkers—By-law Imposing Half-yearly License Fee of Five Pounds—Object to Restrain Hawking and Protect Ratepaying Shopkeepers—Amount of Fee Unreasonable—By-law Unreasonable and Void—Counties Act, 1920, S. 109, 2nd Schedule, Pars. 17, 18, and 19.

Appeal on point of law from a conviction of the appellant for a breach of the by-laws of the Waipawa County Council, in that he did on 8th June, 1928, trade as a hawker in the County without having obtained a hawker's license under the by-laws.

Wedde for appellant.

Strang for respondent.

OSTLER, J., said that by Section 109 of the Counties Act, 1920, and paragraphs 17, 18, and 19 of the Second Schedule to that Act, County Councils were given power to make by-laws "providing for the licensing of pedlars and hawkers and defining to what persons the by-laws under this paragraph shall apply; and fixing the sums payable to the County Fund for such licenses; prohibiting any persons trading as pedlars and hawkers, not being so licensed; regulating the conduct and providing against the misconduct of such licensed persons." Under those powers the Waipawa County Council joined with the other Hawke's Bay Counties in making joint by-laws, in which it was provided that hawkers trading within the County should pay a license fee of £5 for every half year. It was for a breach of that by-law that appellant was convicted and fined. The appeal was based solely on the ground that the by-law was void because unreasonable. It was claimed to be unreasonable upon two grounds: (1) that its object was to provide revenue for the County, and (2) that its object was to restrain hawkers carrying on a lawful business within the County, and that it was void as being in unlawful restraint of trade.

At the hearing of the information the County Clerk said that the by-law was made after a conference of the various County Councils concerned, and that the object of fixing the fee at £5 for every half-year was to discourage hawking and to protect ratepaying shopkeepers. However laudable such an object might be, a County Council had no power to make a by-law for that object. The trade of hawking was a lawful trade and County Councils had not been given any statutory powers to restrain such trade. The powers so given were given for the purpose of providing for the proper order and good government of the County. The County had not power either to make its by-laws in restraint of trade, or to impose license fees for revenue purposes: see **In re a By-law of the Auckland City Council,** (1924) N.Z.L.R. 907; **In re Invercargill By-law No. 6,** (1924) N.Z.L.R. 1142; **Re Robertson,** (1925) G.L.R. 14; **In re a By-law of the Hamilton Borough Council,** (1926) N.Z.L.R. 685. It was admitted that the fee was fixed as high as it was for the purpose of restricting the trade of hawkers in the County in favour of that of the local shopkeepers. The fee was so high that its effect was just what was intended. Its result was in effect prohibition, although the power given was not to prohibit but to regulate: see **Parker v. Bournemouth Corporation,** 86 L.T. 449; **Moorman v. Tordoff,** 98 L.T. 416. For that reason alone, in His Honour's opinion, the by-law was void for unreasonableness. Before a County Council could prohibit hawkers trading within its boundaries it would have to procure express statutory power to do so. The size of the fee also showed that its object was to obtain revenue. It was far more than necessary to pay the cost of preparing and issuing the license and the reasonable costs of supervision. For those reasons in His Honour's opinion the by-law was void for unreasonableness.

Appeal allowed.

Solicitors for appellant: **Wedde and Sandeman,** Waipawa.
Solicitors for respondent: **S. W. Strang,** Waipawa.

Blair, J. November 25; December 6, 1929. Auckland.

TAYLOR v. MOUNT ALBERT BOROUGH.

Rating—Adoption in District of System of Rating on Unimproved Value in Lieu of System of Rating on Capital Value—New Valuation Roll Necessary—Rates Levied on Basis of Unimproved Value as Shown in Valuation Roll Prepared Before Adoption of System of Rating on Unimproved Value Irrecoverable—Injunction Restraining Recovery of Rates—Rating Act, 1925, Ss. 6, 47.

Action by plaintiff for injunction to restrain the defendant Corporation from demanding, suing for, or collecting from the plaintiff the rates levied by the defendant Corporation in respect of the year 1929–1930 on some 99 acres of land in the Borough of Mount Albert, owned by the plaintiff. As from 31st March, 1928, pursuant to a poll taken on 27th April, 1927, the system of rating on the unimproved value became effective in the Borough of Mount Albert. Previously the system of rating on the capital value had been adopted in the Borough. No valuation roll of the rateable property in the Borough had, since the adoption of the system of rating on the unimproved value, been prepared under Section 47 of the Rating Act, 1925, The rates for the years 1928–1929, and 1929–1930 had been levied on the basis of the unimproved values shown in a valuation roll prepared in 1926.

Stanton and Duthie for plaintiff.
Rogerson for defendant.

BLAIR, J., said that the question in issue between the plaintiff and the defendant depended upon the construction to be placed on S. 47 (1) of the Rating Act, 1925, which provided: "As soon as conveniently may be after an adopting proposal is carried in any district, a valuation roll of the rateable property in the district shall, for the purposes of rating on the unimproved value, be prepared and supplied by the Valuer-General as provided by section six hereof." His Honour did not find much difficulty in construing the above subsection in relation to the question in this action. A new roll was required and it was required "for the purposes of rating on the unimproved value." Surely the natural meaning of that was that in order to proceed on the new basis of rating a new roll was required, and how could a rating authority proceed to levy rates without such new roll? The roll was the very foundation of rating. The defendant answered that before the new system came into force it had a roll which had been prepared for the purpose of rating on another basis, and it happened that on that roll there were *details of unimproved values*; and defendant said that until it obtained the new roll it would make use of that old roll and take from it the particulars as to the unimproved values which it contained. The roll which the defendant Borough was using for that new system of rating was not a roll prepared and supplied as required by S. 47, and until such a roll was provided it appeared to His Honour that the Borough could not validly make a rate. If that were not the construction then ratepayers were deprived of the right of objection conferred by S. 47 (2).

That construction appeared to His Honour to be the natural construction, but it was consonant also with previous legislation. His Honour, after referring to Ss. 12 and 13 of the Rating on Unimproved Value Act, 1896, and S. 9 of the Government Valuation of Land Act, 1896, and to the re-enactment of those provisions in the Rating Acts of 1908 and 1925, said that the history of the legislation showed that it was clearly intended to give ratepayers a new roll and a right of objection when the new rating system was adopted, and the only alteration made in the law was a consequential alteration due to the fact that a new authority, namely the Valuer-General, had imposed on him the duty of preparing the valuation rolls which were theretofore prepared by the local authorities themselves. No local body would have been heard to say that it could have refused to prepare a new roll, and the defendant Borough was compelled to resort to the argument that because S. 6 of the Rating Act, 1925, was referred to in S. 47 of the same Act that reference had the effect of depriving ratepayers of the right to a new roll and the right of objection which they undoubtedly had had prior to the introduction of valuation by a Government department. S. 6 of the Rating Act provided that where the system of rating was on the capital or unimproved value the roll from time to time supplied by the Valuer-General under the Valuation of Land Act, 1925, should be the valuation roll for the district. That was followed by the proviso: "Provided that nothing in this act shall be held to be binding on the Valuer-General in so far as it limits the date for transmitting the roll to the local authority." The defendant submitted that the effect of that proviso was to defeat ratepayers' rights to a new roll if the Valuer-General did not see fit to supply a new roll. The contention involved the proposition that statutory rights of ratepayers were entirely dependent on the untrammelled discretion of the Valuer-General. It might be that the Valuer-General, notwithstanding the provisions of S. 6, could be compelled to supply a roll, but whether that were or were not the position, it did not affect the present case because the matter was one between a ratepayer and a rating authority. The rating authority was attempting to rate such ratepayer upon a roll which was not the roll required by the statute and it was the business of such rating authority to use a proper roll. It would appear to be the case that the want of that roll was due to the refusal of the Valuer-General to supply it, and that refusal might cause grave inconvenience to the defendant. That was a matter between the Valuer-General and the local authority, but it could not affect plaintiff's rights as a ratepayer. In the circumstances the case of **Broad v. County of Tauranga,** (1928) N.Z.L.R. 702, was ample authority for the issue of an injunction restraining the defendant Council from demanding, suing for, or collecting the rates in question from the plaintiff until further order of the Court or until a new valuation roll as provided by S. 47 of the Rating Act, 1925, had been duly prepared and supplied.

Solicitors for plaintiff: **Ready and Duthie,** Auckland.
Solicitors for defendant: **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.

Blair, J. November 25, December 7, 1929. Auckland.

BROWN v. E. G. LAURIE LTD. (IN LIQUIDATION).

Wages Protection and Contractors' Liens—Company—Liquidation—Architect Claiming Lien for Fees Due in Respect of Professional Services—Architect a "Contractor" and Preparation of Plans and Specifications and Superintendence of Erection of Building "Work"—Semble Leave of Court Not Required to Action Claiming Lien Against Company in Liquidation—Proceedings Commenced Without Leave of Court Not Void—Power of Court to Grant Leave *nunc pro tunc*—Wages Protection and Contractors' Liens Act, 1908, Ss. 48, 49—Companies Act, 1908, S. 244.

Summons to set aside or stay proceedings issued in the Magistrate's Court by the plaintiff, an architect, who had prepared plans and specifications and supervised the re-erection of a building for the defendant company, claiming a lien under the Wages Protection and Contractors' Liens Act, 1908, for £109 4s. 6d. for professional fees for such services. By agreement between the parties the proceedings were removed into the Supreme Court. The defendant company at the time of commencement of proceedings was in liquidation. The defendant asked that the proceedings be struck out or stayed, and claimed that architects' professional fees for designing and supervising the carrying out of a building could not be the subject of lien proceedings because such services were not "work" within the meaning of S. 48 of the Act.

J. B. Johnston for plaintiff.
Towle for defendant.

BLAIR, J., said that S. 49 of the Wages Protection and Contractors' Liens Act, 1908, gave to a contractor, subcontractor or worker who did or procured to be done any work "upon or in connection with" any land or building on land a lien upon the employer's interest in such land. It was admitted that plaintiff was not a worker or subcontractor within the Act but it was claimed that he was a contractor. "Contractor" was defined in S. 48 as a person "who contracts directly with the employer for the performance of work for him"; and "work" was defined as including any "work or labour whether skilled or unskilled executed or done by any person of any occupation upon or in connection with . . . . the construction of any building." As originally framed the definition of "work" was limited to the meaning as above, but in 1914 the word "means" was amended to "includes." The result of that amendment was to retain the ordinary and natural meaning of the word "work" and to give it also the meaning defined in the statute: see upon that point **Watkins v. Scott,** (1928) N.Z.L.R. 628, 657; **Haynes v. McKillop,** 24 N.Z.L.R.

833. It would require courage if not temerity to suggest that to-day the word "work" was confined to manual labour only. An architect in designing and superintending the erection of a building unquestionably performed work although the result was attained mainly by the brain, and the manual element in it was negligible. The use of the words "work" or "labour" in the definition clearly contemplated work which was not manual. In many cases the contractor for a building confined the whole of his time in the execution of a building contract to supervision only but it had never yet been suggested that he was barred from the rights conferred by the Act. The defendant contended that an architect did not contract for the performance of work, but contracted that he himself would perform the work. That was not the case as it was well known that an architect kept a staff to assist him. But even if it were, the contention did not help defendant because by S. 49 a contractor's lien covered work done or procured to be done, in connection with any land. Nor could His Honour see any absurdity in an architectural draughtsman claiming a worker's lien for unpaid wages on professional fees owing to his employer for draughtsman's work on the plans for the building the subject-matter of such fees. There was no decision in New Zealand upon the question of an architect's right to claim a lien for his fees, but logically there was no reason why he should not be included. In **In re Williams, ex parte Official Assignee,** 17 N.Z.L.R. 712, the Court held that work in connection with a building could be done away from a building. If authority were needed to accord to architects the benefit of the Act there were several American authorities where under what appeared to be similar statutory provisions such claims were recognised. A number of such cases were mentioned in Volume 60 of the **American Law Reports Annotated,** p. 1257, *et seq.*

The remaining point arose under S. 244 of the Companies Act, 1908, wherein it was provided that no action or other proceeding should be commenced or proceeded with after liquidation of a company except with the leave of the Court. Those proceedings were taken after liquidation and no leave was applied for. The short and important question was whether that section had any application to proceedings under the Wages Protection and Contractors' Liens Act and if so whether it was competent for the Court to make an order ratifying proceedings actually commenced after liquidation without leave. In **In re Williams, ex parte Official Assignee,** (*cit. sup.*) the Court decided that the true meaning of the sections of the Act taken together was that the lien or charge was created by the Act and not by the notice creating the lien or charge, though until the notice was given the lien or charge was of a floating character and was liable to be defeated to the extent and in the manner provided by the Act. The fact that the Act conferred a statutory right liable to be defeated by failure to take the prescribed steps for its preservation was of importance because if it were the case that the discretion conferred upon the Court by S. 244 to grant or withhold leave to proceed, or impose terms, applied to proceedings to establish that right, then it followed that a statutory right was liable to destruction at the discretion of the Court. Moreover the right might be lost by inability to obtain leave owing to liquidation taking place during the Court's vacation, or it might easily happen that liquidation took place without any knowledge of the fact reaching the holder of a lien. In **In re Williams, ex parte Official Assignee** (*cit. sup.*) the Court held that S. 55 of the Bankruptcy Act, 1892, which had been re-enacted in S. 53 of the 1908 Act, had no application to a proceeding lawfully taken for the realisation of a contractor's lien. S. 53 provided for the vesting in the Official Assignee on adjudication of all property of a bankrupt, and that upon adjudication being advertised, all proceedings to recover any debt provable under the bankruptcy should be stayed. If adjudication in bankruptcy did not prevent the holder of a lien enforcing his rights there seemed no reason why a similar result should not follow in the case of liquidation of a company.

But even if that view were not sound it was clear that in a proceeding touching the establishing of a lien which was liable to defeat if not prosecuted within a fixed time, leave if required should be granted as a matter of course. Plaintiff submitted that proceedings commenced without leave were void and that it was not possible for this Court to grant leave *nunc pro tunc.* S. 244 made a distinction between proceedings by way of levying execution and other proceedings. The former it declared void. As to other proceedings the section merely forbad their commencement or prosecution without leave. His Honour did not think that the commencement of proceedings without leave made them void. Proceedings might be commenced in complete ignorance of the fact of liquidation. The Court could always administer the appropriate punishment whether by the imposition of costs or in a more drastic way in all cases where the section was disregarded. His Honour referred to **Gray v. Raper,** L.R. 1 C.P. 694, and **In re Wanzer Ltd.,** (1891), 1 Ch. 305. In **Stiebel's Australian and New Zealand Company Law,** 241, the learned author said, quoting a New South Wales case the report of which was not available, that where an action against a company had been commenced without leave, leave would in a proper case be given *nunc pro tunc.* If it were necessary His Honour would grant such leave.

Summons dismissed.

Solicitors for plaintiff: **Stewart, Johnston, Hough and Campbell,** Auckland.

Solicitors for defendant: **Towle and Cooper,** Auckland.

Smith, J. November 18; 20, 1929. Auckland.

IN RE TAKAPUNA WOMEN'S PROGRESSIVE LEAGUE (INCPTD.).

Religious, Educational and Charitable Trusts—Fund Raised by Voluntary Contribution—Impracticable to Carry Out Objects For Which Fund Raised—Application to Court for Approval of Scheme—Procedure for Obtaining Approval Prescribed in Part IV of Act—Application Under Part III Irregular—Application Dismissed—*Religious Charitable and Educational Trusts Act, 1908, Sections 32, 33.*

Motion for an order approving a scheme for the disposal of certain trust moneys. The Takapuna Women's Progressive League (Incorporated), a society incorporated under The Incorporated Societies Act, 1908, and the petitioner, Mrs. Gunn, stood possessed as trustees, of a trust fund totalling £695 5s. 8d. composed partly of contributions raised in the years 1921 to 1924 as the result of the activities of the League, and partly of accumulated interest thereon. The original purpose for which contributions were made was to establish a memorial to commemorate the patriotic and humanitarian efforts of women during the Great War. On 27th June, 1921, the League passed a resolution that the memorial should take the form of a Public Hospital, but that object was discouraged by the Auckland Hospital Board and the Department of Health, and it became impossible, owing to public apathy, to acquire sufficient money to secure a site. Accordingly, on 17th April, 1923, the executive committee of the League resolved that the purposes of the fund should be altered so that the memorial should take the form of a "community hall" with a room attached for a district nurse. At about this time, the League by a public advertisement notified subscribers that contributions to the fund might be reclaimed in view of the altered scheme. One contribution of £10 was reclaimed and repaid. A scheme for the disposal of the fund had since been formulated. The fund was to be used in erecting a women's community hall on land to be vested in trustees by Mrs. L. H. Wilson who had agreed to give land worth approximately £400, provided the scheme was approved by the Attorney-General and the Supreme Court. The scheme then provided for the use of the hall for the purposes of women's organisations (non-political and non-sectarian in their objects) and including particularly some six organisations, namely the St. John's Ambulance Association, the Plunket Society, the Girl Guides' Association, the League of Mothers, the Mayoress' Relief Committee of Takapuna, and the petitioning League.

Gould in support of motion.

Cocker for Auckland Hospital Board.

SMITH, J., said that the question whether the application of the trust fund to the purposes of all or any of those bodies would be an application for charitable purposes had not been argued, but for the purposes of the present application, His Honour assumed that the purposes of the aforesaid bodies were charitable, within the definition of "charitable purposes" either in Part III or in Part IV of the above-mentioned Act, as amended by Section 3 of the amending Act of 1928. Assuming then the purposes proposed to be charitable, the question arose as to the Part of the Act under which the scheme should be prepared. In His Honour's opinion, Part IV of the Act was the only Part which was applicable. Section 32 provided that Part IV was applicable to cases in which money had been raised by way of voluntary contribution. Section 33 provided that if it became impossible or impracticable or inexpedient, or the amount proved inadequate to carry out the charitable purpose, then the moneys raised might be appropriated to some other charitable purpose in the manner and sub-

ject to the provisions thereinafter mentioned. The remaining Sections set out the specific procedure to be followed. It was clear in the first place that the fund here in question was raised by way of voluntary contribution, and in the second place, in the very words of the petition, that it "became and still is impracticable to carry out the objects for which the said fund was raised." The application was then directly within Part IV of the Act, and as a specific procedure was provided under that Part to meet such a case, it must be followed. His Honour distinguished the case of **In re the Door of Hope, etc.,** 26 N.Z.L.R. 96, on the ground that Edwards, J., in that case assumed that the moneys paid over became as effectually part of the funds of the Auckland Women's Home as if they had been originally subscribed for that purpose and proceeded to deal with the matter under the statutory provisions then corresponding to Part III of the Act of 1908, whereas in the present case His Honour did not think that he was entitled to make any similar assumption. Accordingly, as the procedure of Part III and not of Part IV had been followed, the present application must be dismissed.

Solicitors for applicant: **Morpeth, Gould and Wilson,** Auckland.

Smith, J. September 6; November 25, 1929. Masterton.

SOUTHERN MINES DEVELOPMENT LTD. v. HULME.

Company—Mining Company—Calls—Whether Contract One For Payment of Balance Unpaid on Shares by Calls or by Instalments—Whether Company a Mining Company—*Ultra vires* **and Not Substratum Proper Test—Companies Act, 1908, Ss. 352-361.**

Appeal in law from a decision of the Stipendiary Magistrate at Masterton, holding that the respondent was not liable to the company in respect of the amount claimed as owing by him upon his shares in the appellant company. The facts out of which the appeal arose were as follows. The appellant company was incorporated on 21st June, 1926, with a nominal capital of £125,000. The certificate of incorporation showed that the company was registered under the Companies Act, 1908. Underneath the words and figures "The Companies Act 1908" in the certificate was inscribed "Part XII." On 11th September, 1926, the respondent signed an application for shares in the appellant company addressed to the directors of the company in the following terms:—

"I hereby request you to allot me 100 shares of £1 each in the above-named Company, and I hereby agree to accept the same or any less number that may be allotted to me.

"I enclose herewith the sum of £10 being 2/- per share the amount payable on application for the said shares and I agree to pay the further sum of 2/- per share on allotment and the balance in instalments of 1/- per share payable on the first day of each month the first of such payments to fall due on the first day of the month next succeeding that in which allotment is made.

"And I request and authorise you to register me as the holder of the shares so allotted.

William Hulme."

The company, on 17th September, 1926, answered the application, informing the applicant that the directors had allotted him 100 shares and that the total amount payable on application and allotment was £20. The letter acknowledged the receipt of £10 on application, and said that the balance of £10 was due and must be paid to the secretary at the registered office of the company. The respondent duly paid the £10 due on allotment. Thereafter the directors of the appellant company by resolution made a series of calls of 1/- per share on the contributing shares in the appellant company. These were made at various times down to December, 1927, the due dates of the calls being November 15th, 1926, January 17th, March 2nd, April 29th, July 26th, September 5th, October 20th, November 21st, and December 21st, 1927. All such calls except the last were, therefore, payable at intervals exceeding one calendar month. On the respondent's shares, the amount of each call was £5. In respect of the first three calls, the respondent paid the sum of £5 on December 1st, 1926, February 17th and June 22nd, 1927, respectively. In 1928, the appellant company instead of making calls, purported to debit the respondent with an amount of £5 (being 1/- per share) as an instalment due on 1st March, 1928, pursuant to what it alleged was a contract entered into by the respondent with the appellant company as a condition of the allotment of the shares. It debited the respondent similarly with £5 on 1st April, 1928, on 1st June, 1928, and on 1st October, 1928. The respondent refused to pay any further call or instalments after the first three calls had been made on him. The appellant company then set up that the whole of the moneys payable on respondent's shares, other than the application and allotment moneys, were comprised of instalments of 1/- per share, the first of which was payable on October 1st, 1926, and the remainder on the 1st day of each succeeding calendar month, and it gave credit to the respondent for the sums collected from him by way of calls. On this basis, the company sued to recover the sum of £50 so alleged to be due up to 1st October, 1927. The respondent contended that no contract existed between himself and the company whereby he agreed to pay the amount of 1/- per share, the first of which was payable on 1st October, 1928, and the remainder on 1st day of each succeeding month thereafter. He contended that he was liable to pay the unpaid balance on his shares only by calls duly made by the directors, and that as the company was a mining company, and as calls remained unpaid and unrecovered contrary to the provisions of Part XII of the Companies Act, 1908, the shares had been forfeited, and he was not liable thereunder. The Magistrate decided in favour of the respondent, and the present appeal was brought from his decision.

C. S. Brown for appellant.
D. K. Logan for respondent.

SMITH, J., said that the first question concerned the true construction of the application for shares and the letter of allotment. In His Honour's opinion the two documents did not constitute a complete contract to pay by instalments. The time for payment of the first instalment was the only time which was fixed. The other instalments were merely "payable on the first day of each month." What "each month" was, required to be determined. If the offer had been to pay the balance by instalments of 1/- per share, the first of which was to fall due on the 1st day of the month next succeeding that in which allotment was made, and the remainder to fall due on the 1st day of each succeeding calendar month thereafter, the case for agreement to pay by instalments on defined dates might well have been established against the respondent. The letter of allotment did not, however, specifically refer to the terms of payment of the balance, and, in His Honour's opinion, in order to fix, at least, the commencing date for the payment of the next instalment after the first, it was necessary for the directors to take such action as was open to them to do so. They did that by making a call. It would appear that the directors also considered it necessary to fix what "each month" was, for they did not regard the phrase as meaning "each succeeding calendar month." When the respondent acquiesced in that construction of his offer by paying the first call, within 21 days after it became payable, he could not be heard to say that he had not agreed to take the shares upon the terms that the unpaid balance was payable as determined by calls. It was clear that the company, by commencing to make calls, and the respondent, by paying the first three, interpreted the contract as one pursuant to which the unpaid balance on the shares was to be paid by calls. Effect should be given to the interpretation placed by the parties upon their documents: See **Cranton v. Worthington,** 27 N.Z.L.R. 677. The next question was whether the company was a mining company. His Honour said that it was clear in the first place that the appellant company was formed both for mining purposes as defined by S. 340 of the Act, and for other purposes. The question then arose which was foreshadowed by Edwards, J., in **King Gold Mining Co. Ltd. v. Cock,** 31 N.Z.L.R. 1166, 1176, when he said, with reference to that case: "It is not necessary to consider the question, which will probably some day arise, and may prove difficult of determination, as to which parts of the Act apply to a company incorporated both for mining and for other purposes." That enquiry might have two aspects, namely whether Part XII of the Act applied to such a company, and also to what extent the provisions of the other parts of the Act affecting joint stock companies applied. As His Honour had held that the question of payment by instalments was not in issue, it was not necessary for him to consider whether shares in the company, if it were a mining company as defined, might be paid not only by calls, which would be subject to the provisions of Ss. 352 to 361 of the Act, but also by instalments which the shareholder had contracted to pay as part of the price of acquiring his status as a shareholder, and which would not be calls, and therefore not subject to the provisions of Ss. 352 to 361. As to that question, compare the remarks of Edwards, J., in **King Gold Mining Co. Ltd. v. Cock,** (*cit. sup.*) at pp. 1176, 1177, with those of Stout, C.J., in **Lysnar v. Mammoth Molybdemite Mines,** (1918) N.Z.L.R. 759, 761.

The only enquiry in the present case was whether Part XII of the Act applied to the appellant company. The mere fact that the Registrar had inserted the words and figures "Part XII" in the Certificate of Incorporation did not affect the legal position; for there was only one registration, and that was under the Companies Act, 1908. But, in His Honour's opinion, Part XII clearly applied to the appellant company. A mining company was defined by S. 340 as "a company . . . for mining purposes." "Mining purposes" were defined, and indicated, in effect, the purpose of obtaining any precious metal or precious stone of any kind from the earth. In His Honour's opinion, wherever "mining purposes" as defined might be pursued as the sole business of the company, notwithstanding that it had other objects, the company must be regarded as a "mining company." Such a test was based on the doctrine of *ultra vires*. His Honour did not venture to say that it was an exclusive test. But His Honour thought that it might legitimately be taken as a test, because the rights of creditors were affected by the character of the company. A creditor looking at the memorandum of association should be able to ascertain whether the shares in the company were liable to forfeiture or not by reason of the non-payment of a call for the period of 21 days after the due date for payment: S. 353. He would then know what credit, if any, he should give, and what other precautions, if any, he should take. To apply as the test whether "mining purposes" as defined, constituted the substratum of the company would, in His Honour's opinion, limit the test unduly. The substratum test might be fair from the point of view of the shareholder, for he had no doubt contributed his capital on the basis that the company would fulfil its main or dominant object or objects, but the substratum test would be unfair to the creditor, for his concern was not with the equities subsisting between the company and its shareholders, but with the lawful extent of the company's operations. His Honour's conclusion then was that one test of whether a company incorporated both for mining and for other purposes, was a "mining company" as defined, was as follows—that if, tested by the doctrine of *ultra vires*, the sole business of such a company might be operations for "mining purposes" as defined in Part XII, such a company was a mining company. Part XII then applied to it: **King Gold Mining Company Ltd. v. Cock** (*cit. sup.*). For the purposes of the test suggested, the sole business of the company might clearly be operations for "mining purposes" if such were one of the main or dominant objects of the company. So also such operations might be the sole business of the company if carried out pursuant to a specific object such as "mining purposes," as defined, if by the terms of the memorandum of association such a specific object were freed from the control of any other object. On any question of *ultra vires*, words requiring that objects specified in one paragraph should not be limited or restricted by reference to or inference from the terms of any other paragraph must be given their full effect: **Cotman v. Brougham,** (1918) A.C. 514. In the present case, both conditions were fulfilled. In the first place, the company had in paragraph 1 of the objects clause at least two main or dominant objects, namely: (a) that it might take over all or any of certain options (three out of the four being for "mining purposes" as defined) exercise them and itself carry out "mining purposes" as defined, and (b) that it might promote other companies to take over all or any of the options and to carry out "mining purposes" as defined, with or without finance provided by the appellant company. Apart from the provisions of paragraph 32 declaring that the objects of each paragraph should not be limited or restricted by reference to or inference from the terms of any other paragraph, it was clear that the fulfilment of one of those objects was not incidental to the fulfilment of the other. Each of those objects must then be regarded as a main or dominant object of the company. In the second place, paragraph 2 of the objects clause stated that a specific object of the company was "mining purposes" as defined in Part XII. By paragraph 32 that object was to be read without limit or restriction by reference to or inference from the terms of any other paragraph. It was clear, then, that whether the company did or did not carry on any business at all pursuant to paragraph 1 of the objects clause, the sole business of the company might at any time be operations for "mining purposes" as defined. The company was, therefore, in His Honour's opinion, a mining company, and Part XII applied to it.

It was clear, then, that as the company was a mining company subject to Part XII of the Act, and as it made a call on the respondent's shares which remained unpaid at the expiration of 21 days after the due date for payment, the respondent's shares became absolutely forfeited, pursuant to S. 353 of the Act. It followed that the company could not succeed in its claim.

Appeal dismissed.

Solicitors for appellant: **C. P. and C. S. Brown,** Wanganui.
Solicitor for respondent: **D. E. Logan,** Masterton.

Kennedy, J. October 22, December 5, 1929. Dunedin.

A. J. ALLEN LTD. v. SHIP "ORETI."

Ship—Maritime Lien—Claim for Lien for Moneys Advanced to Master for Wages and for Moneys Paid to Harbour Board for Berthage and Dock Dues—No Lien in Respect of Moneys Paid to Harbour Board—Moneys Advanced to Master in Reliance Not on Ship but on Managing Agents or Owner of Ship—No Lien on Ship for Such Advances.

Claim by the plaintiff, A. J. Allen Ltd., as agents for the Oreti Shipping Co. Ltd., to recover the sum of £456 19s. 3d. of which sum £233 12s. 8d. was stated to be for wages to January, 1929, paid for and on behalf of the Oreti Shipping Co. Ltd., and the balance, namely £222 16s. 7d., was stated to have been owing for necessaries supplied by it to the ship "Oreti" from 1st January, 1929, to 28th February, 1929. The ship "Oreti" was owned by the Oreti Shipping Co. Ltd., and was subject to a first mortgage to one Alexander Dunn securing approximately £700 and to a second mortgage securing a large amount. The Oreti Shipping Co. Ltd. went into liquidation on 4th March, 1929, and the "Oreti" was, on 6th March, 1929, arrested on the plaintiff's application and, later, on the application of the liquidator of the company, and with the consent of the first mortgagee, the ship was sold. The contest was as to the right of the plaintiff on the one hand, and of the first mortgagee on the other, to part of the proceeds of the sale.

Hay for plaintiff.
Lascelles for liquidator.
Sinclair for mortgagee.

KENNEDY, J., said that at the hearing it was admitted by counsel for the plaintiff that it could not properly be contended that the plaintiff had any maritime lien for necessaries supplied by it to the ship and the plaintiff's claim was confined to a claim to a maritime lien for £167 1s. 8d. alleged to be money advanced to the master for his own wages and for the wages of the crew and for the sums of £4 16s. 0d. and £38 11s. 0d. berthage and dock dues paid by the plaintiff to the Otago Harbour Board. For the latter charges no maritime lien arose. The agent did not, on payment to the Otago Harbour Board, become entitled to any maritime lien entitling it to a claim to the proceeds of the sale of the ship in priority to the claim of the mortgagee or to that of the liquidator.

The question, then, arising for decision was whether, in the circumstances, the plaintiff was entitled to the benefit of a maritime lien for the sum of £167 1s. 8d. paid to the master of the ship. It was contended that the master was entitled to a lien for this sum and that the plaintiff, having advanced the money to the master, should stand in his shoes and be entitled to his lien. The ship "Oreti" was chartered in 1924 for the Marlborough Shipping Co. Ltd. by Mr. D. Reece, who was intimately associated with the management of the plaintiff company and with Reece Brothers and later with Reece and Co. Ltd. Mr. D. Reece was a director of the plaintiff company and also a director of the Oreti Shipping Co. Ltd. in which company the plaintiff held shares. His colleagues, however, on the directorate of the plaintiff company were content to leave all matters relating to the Oreti Shipping Co. Ltd. in his hands and to rely on him. They looked to him to keep them in touch with the conduct of affairs with the Oreti Shipping Co. Ltd. and he always assured them, so Mr. Allen said, that everything was all right. Advances were made in the same way as payments for what were necessaries for the ship. Necessaries supplied to a ship were *prima facie* presumed to be supplied on the credit of the ship and not solely on the personal credit of the owner, but the form in which accounts were rendered by an agent, who had supplied or paid for necessaries, to his principal, was evidence to rebut that *prima facie* presumption: **Foong Tai Co. v. Buchheister and Co.,** (1908) A.C. 458, 469. Advances for wages were only a part of the payments the plaintiff company regularly made. Although no actual advance for wages was made until the master notified the amount required, and although the master signed a receipt for the amount advanced, yet all the circumstances showed that the advance was really to the managing agents or the owner for whom the plaintiff was the agent. The heading "Oreti" in the accounts was a matter of bookkeeping practice and did not alter the

substantial nature of the arrangement, which was that the plaintiff was the Dunedin agent and made advances as required and, in case the freights received were not sufficient, looked to the managing agent or to the owner to be reimbursed, receiving for remuneration as such agent a percentage on freight and a two guinea fee in respect of each inward trip. The advances or payments sued for did not differ from advances and payments made every time the ship was in the local port, and even when the ship was not in the local port, except in this, that all previous advances or payments had on request been promptly reimbursed by the Oreti Shipping Co. Ltd. The proper inference to draw from the evidence, in His Honour's opinion, was that the master did not, in receiving the advance, incur a liability on account of the ship and that the plaintiff did not make the advance in reliance on the ship as the source of payment but made it in reliance on the managing agents or on the owner. As the indorsement of the plaintiff's writ stated, the advances were made to the master "for and on behalf of the Oreti Shipping Co. Ltd." The course of dealing between the parties, the actual accounts rendered and the accompanying correspondence and the admissions made in cross-examination showed, in His Honour's opinion, that the advances were properly to be taken to be made on the request of the Oreti Shipping Co. Ltd. or the managing agents under promise of reimbursement when the monthly statement was sent of any excess over and above the amount of freight received. The accounts produced showed continuous and substantial payments by the plaintiff for which it could not in any event claim a maritime lien. His Honour did not think that some of these payments were made in reliance on the managing agents or on the owner and that others were made in reliance, not on the managing agents or on the owner, but in reliance on the ship. What the plaintiff did was to institute the present action to recover the balance of a general account and then to abandon all items but certain particular and selected items and to claim a lien for them. His Honour found in fact that the payment for wages was not made in reliance upon the ship but in reliance on the managing agents or on the owner, and it consequently followed, as pointed out by all the Judges in **Clark v. Bowring,** 10 Ct. of Sess. (5th Ser.) 1168, that in such circumstances the plaintiff never acquired a maritime lien. The plaintiff had failed to establish its claim and there would be formal judgment against the plaintiff.

Solicitors for plaintiff: **Duncan and MacGregor,** Dunedin.

Solicitors for liquidator and mortgagee: **Aspinall and Sim,** Dunedin.

Rules and Regulations.

Dairy Industry Act, 1908: Amended regulations relating to the inspection and registration of Dairies.—Gazette, No. 9, 6th February, 1930.

Judicature Act, 1908: Amendment of Table of Sheriff's fees.—Gazette No. 9, 6th February, 1930.

Native Townships Act, 1910: Amended regulations regarding the disposal of lands acquired by the Crown.—Gazette No. 5, 30th January, 1930.

Compared with those of recent years, the new statute-book shows a marked decrease both in number of Acts and in size. The latter is due in part to the cessation of those bulky but useful measures of consolidation which have been a feature of the statute-book, from a lawyer's point of view, for the last four years, but which have come to an end with the death of the late Mr. E. Y. Redward, Compiler of Statutes, and the non-appointment of any successor to the post. One matter worthy of comment is the number of short titles that cannot in any sense be called short. Names like "The Local Authorities Empowering (Relief of Unemployment) Extension Act, 1929," "The Native Land Amendment and Native Land Claims Adjustment Act, 1929,"—both previous offenders,—"The Local Authorities Empowering (Aviation Encouragement) Act, 1929," and "The Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929," will cause endless inconvenience in citation. They ignore the primary purpose of a short title, that of being a handy nickname.

The Onus of Proof.

A Divergence of Opinion in Two Recent Australian Cases.

By H. F. von Haast, M.A., LL.B.

The law as to the amount of proof required from him on whom the burden of proof rests is concisely stated thus in *Powell on Evidence*, 9th Edn. 163: "It is not necessary for him to prove his case up to the hilt. He need not give all the evidence which it is possible for him to procure. It is sufficient if he has made out a *prima facie* case. The burden of proof will then shift to the other party. And very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side. But where the party on whom the onus lies of proving an allegation gives us evidence which is as consistent with one view of the case as with the other, he fails in his proof." Sir James Stephen in his *Digest of the Law of Evidence*, 9th Edn., 111, Art. 96, expresses the rule thus: "In considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

The principle is simple enough. It is in the application of it to any particular set of facts that the difficulty begins. Two recent Australian cases illustrate the divergence of opinion that can exist among experienced judges in applying the rule to the facts.

In *Houston v. Wittner's Proprietary Limited*, 41 C.L.R. 107, upon the hearing of an information against the defendant for selling milk which did not comply with the required standard, the summons describing the defendant as Wittner's Proprietary Ltd. of Belmore Road, Balwyn, the informant gave evidence that on the date in question he saw in the street a milk cart with the name Wittner's Pty. Ltd. and the address Belmore Rd., Balwyn thereon; that he spoke to the driver of the cart and purchased some milk from him and that such milk was adulterated. The defendant appeared to the summons but offered no evidence. It was held by four of the Judges of the High Court of Australia that the evidence was insufficient to establish even *prima facie*, that the milk-cart was the cart of the defendant or was used in its business or that there was any relationship between the driver of the cart and the defendant, and that, therefore, the information should have been dismissed. This majority held that the evidence was consistent with different conclusions and if anyone were to suffer from deficiency in evidence at the trial it must be the person on whom the burden of proof lay.

Isaacs, J., however, in a long and ably reasoned judgment in the course of which he examined the authorities from *Joyce v. Capel and Slaughter*, 8 C. & P. 370, to *Timaru Borough v. Squire*, (1919) N.Z.L.R. 151, came to the opposite conclusion. He held that the case raised a distinct question of law, whether in the proved and uncontroverted circumstances, the tribunal of fact—i.e., the Justices in Petty Sessions—were lawfully entitled to draw the inferences they drew as to (1) the ownership of the milk-cart and (2) the employment of the driver. The Court had to say whether the evidence

fell short of the required standard of law and that standard must be capable of expression. The test, in his view, was whether the evidence was sufficient to enable the magistrates as a jury, that is as fair and reasonable men with a knowledge of the common events of business and of life generally, and guided by their experience as citizens, in *the absence of any contradiction or explanation by the defendant showing some exceptional circumstance*, to draw the inference that the defendant was the owner of the milk-cart and that Bambury was its driver and in charge of the cart and the milk. He had not the least doubt on the matter.

Among other matters that weighed with Isaacs, J., were the facts that the offence was one of those which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty, that Courts, like individuals, act upon a balance of probabilities and that there was a balance of probability that the milk-cart belonged to the company and that the driver was in its employ, that the defendant was a limited company and that there could not be two limited companies with an identical name, and that the Police Offences Act made it an offence to drive a cart in a public place without having the name and residence of the owner painted in a legible manner on the cart; and that if the milk-cart belonging to the defendant company was openly used and controlled by a man apparently as the employee of somebody and as selling milk from the cart in the usual way of such business, that should, if unexplained, be *prima facie* evidence that the person is in the defendant's employ.

A study of the case will, I think, impress the reader with the soundness of the conclusions of the dissenting Judge.

Morgan v. Babcock and Wilcox Ltd., (1929) Argus L.R. 313, was a case in which the High Court of Australia reversed the decision of the Supreme Court of New South Wales, (1929) N.S.W. S.R. 256, and confirmed the conviction of the respondent company. The respondent company, an English company registered and carrying on business in New South Wales, was charged under the Secret Commissions Act, 1919, with having given Maling, an agent of the Municipal Council of Sydney, a bribe of £10,600 for having recommended his principal to accept the company's tender for plant. Maling, in 1926, told Arnot, the attorney and general manager of the company, that he would have to pay £10,000 if he wanted to secure a certain order and indicated that the money was to go to certain aldermen. Arnot replied that he would have to recommend his managing director or directors to pay the blackmail. The company's tender was accepted, and after the contract was signed Arnot told Maling that the latter would have to nominate somebody to receive payment, and that Arnot would pass the name on to Sir James Kemnal, his managing director in England, who no doubt would pay it. Maling arranged for the money to go to the account of Buckle, in the E.S. and A. Bank, Sydney, and told Arnot this and that he would want £600 more for expenses. Arnot wrote to Kemnal, giving reasons for the payment of the money, £10,600, and supplying him with the name of Buckle and his bank. He also stated that payment to Buckle would be sufficient discharge for the payment. The letter was in manuscript, marked "Confidential," and did not go through the company's files in Sydney. On 7th September, 1926, Buckle's account in the E.S. and A. Bank, Sydney, was credited with the sum of £10,600 on the authority of some document purporting to come from the bank's head office in London, and the money was passed on to Maling. The company was convicted and fined £1,000, and ordered to pay to the Municipal Council of Sydney the sum of £10,600.

The main arguments for the appellant on an application for prohibition were: (1) There was no evidence that an offence was committed in N.S.W. The case for the prosecution left open a hypothesis of innocence, viz., that the premium on the money passed from the company in England. (2) There was no proof of authority in the managing director to make this payment, and the company would not be liable for his act unless it were established that he was authorised to do the particular act complained of. For the respondent, the contentions were: (1) That the course of business was for all negotiations to be conducted through Sir James Kemnal and therefore a presumption was raised that the company authorised him to conduct private negotiations as in this case. (2) On an examination of all the proved facts there was found a concurrence of circumstances, all pointing one way and reasonably entitling the Magistrate to hold that a *prima facie* case had been established, and that the onus was upon the company to explain the circumstances which, standing unexplained, pointed to its guilt.

Ferguson, A.C.J.; and James, J., considered that the transaction could not be put higher than this: Maling asked the company to pay him £10,600, somebody thereupon paid him that sum, also it was possible that Kemnal not the company paid the money, it was consistent with the facts that even if the board paid the money they did so without any knowledge that it was not part of the ordinary legitimate expenses of the Sydney office. Halse Rogers, J., dissented on the grounds: (a) that there was an irresistible inference that the £10,600 came into Buckle's account through the instrumentality of Kemnal. (b) That the hypothesis that Kemnal paid his own money was fanciful, and not a possibility reasonably to be inferred from the facts proved. (c) That the hypothesis that he paid the company's money without authority and deceived his fellow-directors as to the facts connected with the payment was a fanciful and remote conjecture. (d) That it was clearly open to the Magistrate to find that the money in accordance with the agreement between Arnot and Maling was paid by the company to Maling in N.S.W. and consequently the offence was committed in N.S.W.

In the High Court of Australia, (1929) Argus L.R. 313, Knox, C.J., Isaacs and Dixon, JJ., found no difficulty in reversing the decision of the Supreme Court. Starke, J., dissented: seeing that Sir James Kemnal was dead, that the payment to the credit of Buckle at the E.S. and A. Bank in Sydney was the only evidence in support of Arnot's story, and that it failed to identify the party paying the money, he considered that the impression left on his mind by the evidence was one of doubt and uncertainty and that it would be unsafe to convict anyone of gross dishonesty and corruption upon it.

The way in which the evidence appealed to Knox, C.J., and Dixon, J., was thus stated by them (p. 315): "The question involved largely depends upon the degree to which coincidence of events and circum-

stances warrant a belief in their causal connection. An examination of hypotheses logically consistent with proved facts is the received method of testing their sufficiency to establish the conclusion. In the end, however, the reasonableness or the probability of such hypotheses determines their admissibility, and when coincidence of fact and concurrence of time are relied upon the sufficiency of the circumstances must inevitably be judged by considering whether general human experience would be contradicted, if the proved facts were unaccompanied by the fact sought to be proved. In our opinion it would be so astonishing if the crediting of £10,600 to Buckle's account were not the result of Sir James Kemnal receiving the letter which counselled him to pay that sum to that account, that, in the absence of further evidence, it may be inferred that Kemnal caused the credit to be made." They found that in paying the bribe he acted in the course of his authority and that the arrangement that payment should be accomplished by crediting the money at the bank in Sydney was a completion and commission of the offence within the jurisdiction.

Isaacs, J., was of opinion that, estimating the evidence according to its own intrinsic force, there was not only sufficient, but in the absence of any explanation or exculpatory testimony on the part of the company most convincing, proof of the company's guilt. He quoted the observation of Lord Mansfield in *Blatch v. Archer*, 1 Cowp. 65: "All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted," and continued: "Here the prosecution could not possibly have produced stronger evidence, but it was in the power of the defence to have repelled the inference that arises from the evidence as it stands. Consequently, since the affirmative evidence in the case raises, to say the least, a strong probability that it was the company that paid, or caused to be paid, the bribe demanded by Maling, the silence of the company and its failure to explain materially weakens any attempt to suggest in its favour possible hypotheses of innocence."

The Right to Lie.

We have recently had a somewhat lurid case from across the Channel of the "right to kill." Now we are treated to a novelty from that country of novelties, the United States of America—"the right to lie" in the witness-box. "A woman," said Judge Marcus Kavanaugh, of Chicago, "is entitled to lie if she thus protects her honour and her name." And at a later stage the same learned Judge laid down that "there are circumstances when a woman does not have to tell the truth," particularly "where a falsehood materially hurts nobody else." This is surely carrying the chivalrous instincts of man somewhat far. But perhaps we are doing the learned Judge an injustice. May there not be times when a man "is entitled to lie" if he thus protects his honour and his name? It may perhaps be hopeless to test the question in a country which has a Slander of Women Act without any equivalent statutory provision for men; but perhaps some unselfish male reader will benefit his kind by testing, within the jurisdiction of Judge Marcus Kavanaugh, whether that learned Judge's chivalrous instincts are or are not confined to women.

—*The Solicitors' Journal.*

A Retrospection.

By W. E. Leicester.

Recently, while glancing through the pages of Hocken's "Bibliography" in search for some material dealing with early criminal history in New Zealand, I found recorded in this arid legal desert a lecture delivered to the Otago Law Clerks' Association on the 6th December, 1871. Its author, James Macassey, is probably best known to the present generation of lawyers as the compiler of Macassey's "Reports" which cover the cases heard in the District of Otago and Southland and on appeal from there to the Court of Appeal during the years 1861–1872; but in that hectic period, when the glory of the gold-fields had not passed away, Dunedin was the headquarters of the most important judicial district of the Colony, and Macassey, although a young man, became, a short time after his admission, the leader of its Bar. Indeed, until the last few years, a lengthy residency in Dunedin seemed a condition precedent to election to the Bench, but Wellington as the winner of the last five tests must now be regarded as the holder of the judicial "ashes".

It may not be amiss, in dealing with this interesting pamphlet[1] to give a brief summary of the career of one whom Sir Frederick Chapman, in 1895, described as "the most distinguished lawyer we ever had"—an opinion that he was careful to add was not "merely fanciful." James Livingston Macassey was born at Carrickfergus, in the County of Antrim, Ireland, on the 24th day of September, 1841, and was placed through the influence of some friends in Christ's Hospital, known as the Blue Coat School, London, where, it will be remembered, Charles Lamb, Leigh Hunt, and Coleridge all received their early education. A mere boy, he went to Adelaide where he eventually became articled to Mr. Gwynne (later Mr. Justice Gwynne) and then went to Melbourne, his articles being transferred to Mr. J. W. Stephen (afterwards Mr. Justice Stephen). On his arrival in Otago during the gold-fields rush of 1862, he joined the firm of Messrs. Richmond & Gillies, both of whom took a seat on the Bench, and while employed there as a common-law clerk his marked ability so attracted the commendation of Mr. Justice Gresson that he resolved to commence in practice for himself, prompted in a measure, no doubt, by the unfortunate habit of his employers of forsaking him for the judiciary. Called to the Bar in 1865, his success was immediate and from that time until 1880, when he died in his thirty-ninth year, he was unexcelled in New Zealand as a "Banco" advocate and received Court of Appeal briefs from all parts of the Colony. On the criminal side his appearances were not so numerous, but he successfully defended two murderers from neither of whom would he accept any fee as he regarded money paid by a person on trial for his life as "blood-money." Such an attitude is in marked contrast to that taken up by the late Sir Edward Marshall Hall in his defence of George Joseph Smith, an addict to the practice of murdering his wives in the bath, whose publicity value was so great that certain newspapers contracted to find his counsel's fees if the accused assigned to them the copyright of his outpourings—

1. *A Lecture delivered to the Otago Law Clerks' Association* by James Macassey, Esq., in the Supreme Court House, Dunedin, 27 pp. Henry Wise, Dunedin, 1872.

an arrangement which suited the penurious Smith admirably but which, much to the disgust of Marshall Hall, the Home Secretary, (then Sir John Simon) vetoed as contrary to public policy.[2]

It is with Simon that Macassey would have sided, for both in the legal and the political arena he did not hesitate to advocate measures just and equitable in in his view but incomprehensible or obnoxious to the majority. He begins his lecture by dwelling upon the encouraging prospects of the law, its strong traditions and its inducements of influence and distinction for those who seek to enrol under its banners. Many of our most eminent lawyers, he points out, have been essentially self-made men. A hairdresser was the father of Lord St. Leonards regarded as the greatest real property lawyer of his time. Lord Tenterden was the son of a barber. Lord Cairns, a Chancellor of England and Attorney-General during Lord Derby's government, had an origin almost as humble as that of the present Prime Minister, Ramsay MacDonald. Another Attorney-General, Sir John Rolt, who became a Lord Justice of Appeal was entirely self-educated, being at one time an usher in the Prerogative Court during the presidency of Dr. Lushington. Sir Frederick Pollock, Chief Baron of the Court of Exchequer, was the son of a London saddler who, one may imagine, used his leather with admirable discretion in the upbringing of his children, for one of Sir Frederick's brothers, Sir David Pollock, became Chief Justice of Bombay, while another, Sir George Pollock, rose to be a Field-Marshal and Constable of the Tower.[3]

It is, however, with the union of the two branches of the profession that the lecturer mainly concerns himself, and seeing in this unity the prospect of a lengthy continuance he considers both its advantages and its drawbacks. He admits that the unity tends to elevate the standard of practising solicitors, since instead of running to a counsel for a consultation on every question of more than average importance, they have in a great measure to rely upon their own resources, the client in this way being the gainer in point of expense. On the other hand, he observes:—

> "While I am inclined to think that, upon the whole, the unity of the profession is beneficial in its operation upon those who have been trained, and who practice as solicitors, it is, I am convinced, prejudicial to the tone and influence of the Bar. To one who is engaged the best part of every day in the dull and dreary routine of a solicitor's office, the opportunity of adding to the already acquired store of knowledge (especially on the subjects of general importance) must be rare indeed. And the more one becomes immersed in the petty details of an extensive practice, the less competent he must feel himself daily becoming to grasp in a large and comprehensive manner, with the important questions which occasionally call for adjudication in a court of justice."

He then proceeds to remind the students of the duty which the members of the profession owe to each other and to the Court. The advocate who abuses the privilege which the law allows him by bullying witnesses, insulting jurors or engaging in personal rencontres with the Court or his brethren at the Bar is, in his opinion, a poor creature. Even then, almost sixty years ago, these methods were fast disappearing, and he deplored any endeavour to implant in our soil the traditions of the Old Bailey. At the same time, though he disapproved strongly of the sort of scenes that turn the Court into a bear garden and lower the tone of the profession, he commends the advocate who takes, when occasion demands, an unflinching stand on behalf of his client, and instances Erskine's attitude to Mr. Justice Buller in the Dean of St. Asaph's case. The incident is too long to quote, but anyone interested to read it will find the record in Campbell's "Lives of the Chancellors," Volume 8, page 277. Curran was another advocate who refused to accept insult with meekness:—

> "Curran (to Judge Robinson): 'I do not find the law so stated in any book in my library.'
>
> "Judge Robinson: 'Your law library, I suspect, is rather contracted.'
>
> "Curran: 'My books may be few but the title pages give me the writers' names; my shelf is not disgraced by any of such rank absurdity that their very authors are ashamed to own them.'
>
> "Judge Robinson: 'If you say another word I'll commit you.'
>
> "Curran: 'Then, my lord, it will be the best thing you have committed.'"[4]

The Judge refers to Curran's poverty which was well known, as were Robinson's political pamphlets for their extreme scurrility.

Yet the scene that appears to me the most remarkable of any was that which took place between John Clerk, then appearing in the Justiciary Court as counsel for the ill-famed Deacon Brodie, and the Justice-Clerk, Lord Braxfield. The latter, quite properly, admitted the evidence of the informers, whereupon Clerk in his address to the jury maintained that such testimony should not have been received as the jury were themselves the judges of the admissibility as well as the credibility of witnesses. When Braxfield declared this to be nonsense, Clerk refused to continue his speech and sulkily sat down; but as His Lordship began to charge the jury, Clerk jumped up, shook his fist at the Judge and said, "Hang my client if ye daur, my Lord, without hearing me in his defence!" After the Justice-Clerk had consulted with his brother judges and intimated that counsel might "gang on" with his address, the incident closed;[5] and it is upon the forbearance shown by Braxfield in this instance that his supporters rely in their endeavours to show that his nickname of the Scotch "Jeffreys" was unjustified. Certainly, as we have seen, judges may be tried as well as trying, but the real solution may be found in the adoption of the words of Mr. Justice Coleridge in his farewell address to the Bar:—

> "We can well afford to bear with broad pleasantries, but we cannot afford that our professional standard of honour should be questioned, or that it should be said that we would do as advocates in Court what, as gentlemen, we should scorn to do."

2. *The Life of Sir Edward Marshall Hall* by Edward Marjoribanks, M.P. Victor Gollancz Ltd., London, 1929.

3. *Lord Chief Baron Pollock, a Memoir*, by Lord Hanworth. Murray, 1929.

4. O'Flanaghan's "*Lives of the Irish Chancellors*," Volume II, 149.

5. *With Braxfield on the Bench* by William Roughead. 1918 Juridical Review 16.

Administrative Law.

Views of President of Liverpool Law Society.

The subject of administrative law is at present, and has been now for some time, attracting the earnest attention of lawyers in all parts of the British Empire; the question is without doubt one of the most important of the day so far as concerns the profession of the law. The President of the Liverpool Law Society (Mr. A. E. Chevalier), at the recent annual meeting of that body, devoted the greater part of his presidential address to a consideration of the whole subject, and we reprint his observations below.

"I now turn for a brief space to a somewhat kindred subject which looms large to-day, by reason of the strong views expressed upon it, both in their speeches at important functions and in publications, by such distinguished men as Lord Hewart and Lord Sankey, and by the late Dr. F. J. Port, a Doctor of Laws of, and who, I believe, held the responsible office of Superintendent of Examinations in, the University of, London in his recent book entitled "Administrative Law." I refer to what was aptly described, in a paper read at the recent Provincial Meeting of the Law Society of Bournemouth, as "The Rise of Bureaucracy or the growing interference of the Government Official with the liberty of the subject," and has been even more tersely defined by the Lord Chief Justice in his book, just published, as "The New Despotism."

The system objected to has also been briefly, yet accurately, described as the gradual and progressive transfer of an extensive jurisdiction in matters intimately affecting the rights of the private citizen from the courts of law to the officials of executive government departments. We must all admit, even if reluctantly, that sections of Acts of Parliament are often expressed in very involved language, difficult to construe and, not infrequently, requiring the assistance of the courts to elucidate their exact meaning. The responsibility for much of this obscurity must I think, be placed on the members of both Houses of Parliament. In the course of discussion on a Bill, amendments, or, more correctly speaking, revisions, in particular clauses are frequently made, sometimes without proper regard to other provisions in the Bill, with the result that clauses become twisted and distorted from the clear meaning which the parliamentary draftsman had been originally instructed to convey and in which, at the outset, he had been successful. But Lord Hewart goes further and expresses, as his considered opinion, the view that, on occasions, the ambiguity in drafting would appear to be not wholly unintentional and may sometimes come from a fixed and settled determination not to set out the matter clearly and completely, for—to use his own words—'to be intelligible is to be found out and to be found out is to be defeated.' In Lord Hewart's view, the aim of the departmental official, on occasions, is to induce Parliament to provide the mere skeleton of the project and to leave the official to clothe it and give it his own outlook, with power to instil into it obedience to his decisions and to shut out any sort of appeal to the regular courts of law. In a Foreword by the present Lord Chancellor (then Lord Justice Sankey) to Dr. Port's interesting book, which deals exhaustively with the history of such procedure from mediæval times, the Lord Justice expresses the view that the time is now ripe for considering to what extent, if at all, the system should be continued and under what procedure. He very fairly, however, points out what we all know, namely, that many of the questions and situations which arise under Acts of Parliament, relative to our present-day affairs, are of a purely administrative character, and he specially instances those which are concerned with unemployment and sickness insurance. Instances which will also readily come to mind, amongst numerous others, are matters under the control of the Board of Education, the Ministry of Health, the Ministry of Labour, the Electricity Commissioners, the Insurance Commissioners, the Income Tax Commissioners, the Controller General of Patents and Designs, the Superintendent of the Board of Trade and even the General Medical Council. These administrative bodies or persons all exercise certain judicial functions with, in some cases, little or no legal or judicial training. Dr. Port discusses in his book the relation of administrative bodies to judicial power and compares the English method of what was until recently, uncontrolled law, with administrative controlled law in America, established by the imposition of certain constitutional standards, without provision for any Crown prerogative, but with the opportunity, though not the necessity, of securing a proper hearing, the chance to be present during the taking of evidence, and the right to know of what the evidence of the other party consists and to offer refuting evidence. He also deals very fully with the corresponding French Droit Administratif, consisting, to-day, of a uniform system of administrative tribunals coupled—in bygone days, though not, of course, to-day—with a very powerful Crown prerogative. There appears to be no satisfactory equivalent in English for the expression 'Droit Administratif,' but its principal object is very largely the protection of the citizen against the encroachment of the authorities. It is, moreover, a regular system of law, applicable to all disputes between the Government or its servants on the one hand and private citizens on the other hand.

In the course of a review of Lord Hewart's book, *The Times* remarks in this connexion: 'Attempts have been made to compare the arbitrary power of the departmental official with the administrative law of France and with other Continental systems, but they break down at every turn. These systems are indeed incompatible with what we, in this country, have for centuries regarded as fundamental principles of liberty and justice. But they are at least systems of law with established courts, regulations and precedents and they are administered by trained lawyers who state and record the reasons for their decisions. The practice of some of our British departments under their statutory power is no rule at all.' In a leading article, in the same issue, the editor reminds us that, at the Lord Mayor of London's banquet to the Judges in July last, the Lord Chancellor drew attention in very pointed fashion to the 'growing tendency to transfer decisions on points of law or fact from the Law Courts to the Minister of some Government department,' and to the general agreement both within and without the profession that it is a matter which requires further and careful investigation.

The writer of the paper read at Bournemouth averred that to such an extent had the custom of 'Legislation by Department' grown that, in 1920, eighty-two Acts

of Parliament were passed, and no less than 2,473 Statutory Rules and Orders were made and issued. In 1927, we are told, there were forty-three public Acts of Parliament and more than 1,400 of these Orders, Rules and Regulations registered in that year, while in the Rating and Valuation Act, 1925, s. 67 (1) the Minister is even given power to 'modify the provisions of this Act so far as may appear to him necessary or expedient'—truly a far-reaching provision which might easily become oppressive. George Bernard Shaw, in a serious vein, during one of his recent broadcastings, thus summed up rather neatly the point at issue. 'We cannot govern ourselves yet if we entrust the immense powers and revenues which are necessary to an effective modern government, to an absolute monarch or dictator he goes more or less mad, unless he is a quite extraordinary and therefore very seldom obtainable person. Besides, it is not a one-man job; it is too big for that. If we resort to a committee or parliament of superior persons they will set up an oligarchy and abuse their power for their own benefit. Our dilemma is that men in the lump cannot govern themselves and yet, as William Morris put it, no man is good enough to be another man's master. We need to be governed and yet control our governors.'

This many-sided and ever-increasing evil of Bureaucracy is no new invention. So far back as 1912, our then President, Mr. Robert Norris, referred to two subjects which, he said, were at that time causing anxiety, namely, first, the attempts by the executive to interfere with the judiciary, and, secondly, the increase of officialism. In the following year, we find his successor, Mr. Bromfield, reminding us of the same evils and pointing out the increasing seriousness of the practice, on the part of the Legislature, of empowering a Department of State or a specially constituted body or even a public official, to make and issue rules, having the force of statute, regulating, and even extending, the application of the Act to which the rules relate and to determine, without appeal or, in fact, without recourse to the courts, questions arising under a particular enactment. In his view, supported as it was at that time by the public utterances of the late Viscount Alverstone, the increase, even then, of the bureaucratic element in the government of this country, threatened to become so serious a menace to the liberty of the subject that it behoved all who were interested in the nation's welfare to take every means in their power to warn the public of the impending danger.

Lord Hewart thus describes the situation created through the decision of important points being left to some official in a particular department. He says: 'One of the parties is absent; there is no hearing; the decision is given by the opposite party; and there is no appeal,' and in suggesting remedies for what he regards as a deplorable and un-English state of things, he asks: 'Is it too much to hope, in the first place, that the worst of the offending sections in Acts of Parliament may be repealed or amended? And in the second place, is it not comparatively easy to prevent similar sections from being enacted in future? To this end, what is necessary is simply a particular state of public opinion and in order that that state of public opinion may be brought into existence what is requisite is simply a knowledge of the facts.' In this, as in other fields, 'prevention is better than cure.' It would be presumptuous on my part to appear to differ from the conclusions thus stated by the Lord Chief Justice. I feel, however, I must remind myself and you all that, although public opinion in this country may move very quickly on occasions, yet, generally speaking, it is difficult to arouse. Public support to what are regarded even as popular proposals is not easy to obtain and usually involves, as a preliminary measure, a thorough preparation of the ground. How much more difficult is it in the present case, when the ordinary citizen knows and hears so little of administrative law—and cares still less about it—to arouse in him or her any real enthusiasm for reform in such a matter!

It has been said that, in England, we have a legislature which is so powerful that it can 'do anything but make a woman a man and a man a woman,' but which, in practice, finds itself unable to perform half the work which falls within its own peculiar sphere' Consequently the real defence for the 'new despotism' is necessity. Modern legislation is so complex and intricate in many of its subjects that it would be impossible to deal with every small point of difficulty arising out of it except by some administrative system such as now obtains in practically every important government department. I venture, however, to urge that, in almost every such case, an appeal to an independent and, at the same time, a judicial body should not be denied, under proper safeguards, to any aggrieved person. The permanency of the administrative staff and its flexibility are its chief virtues as compared with a judicial tribunal which cannot possess the special knowledge acquired—often out of a long experience—by departmental administrators, many of whom may themselves be trained lawyers. But what should be aimed at, in my submission, is:—

(*a*) The reduction of the risk of administrative authorities being, as often now occurs, judges in their own cause.

(*b*) That questions of law, as distinct from those of fact, as well as questions of mixed law and fact be never left wholly, without appeal, in the discretion of an administrative authority.

(*c*) That every effort should be made to reduce to a mimimum the possibility of bureaucratic influence over administrative jurisdiction; and

(*d*) That all formal tribunals set up, under statute, for particular purposes should come under the supervision of the Lord Chancellor and not under that of the government department concerned.

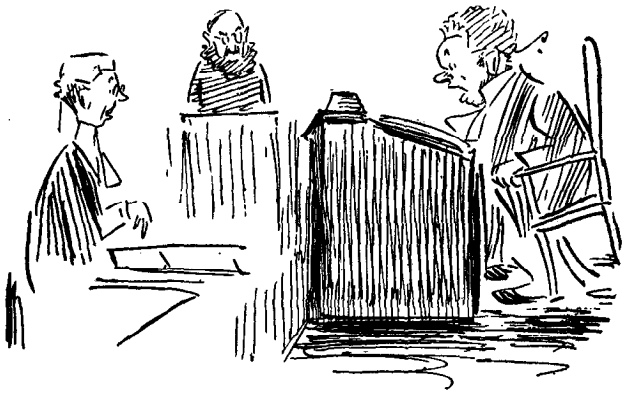
The legal newspapers have recently, and under the heading, in one of them, of 'Powers of the Bureaucracy' announced that the Lord Chancellor, after consultation with the Prime Minister and the Chancellor of the Exchequer has appointed a select committee under the chairmanship of the Earl of Donoughmore, K.P., and consisting of six Members of Parliament, two being women, several King's Counsel and other prominent men, including Sir Roger Gregory, the Vice-President of the Law Society, 'to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (*a*) delegated legislation, and (*b*) judicial or quasi-judicial decisions; and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law.'

May we venture to express the fervent hope that the deliberations of this committee will indeed result in all desirable or necessary safeguards being ultimately imposed by statute."

Forensic Fables.

THE BEGINNER WHO THOUGHT HE WOULD DO IT HIMSELF.

A Beginner, in the Temporary Absence of his Leader, Found himself Opposed to a Big Pot in the Commercial Court. Though Greatly Alarmed, the Beginner Bore himself Bravely. To his Surprise and Delight the Beginner Managed to Cross-Examine the Big Pot's Principal Witness with Such Effect that he Needed a Good Deal of Rehabilitation. Rising to Re-Examine, the Big Pot Airily Observed to the Principal Witness: "I suppose What You Meant by Your Last Answer was this," and Proceeded to Tell the Principal Witness



Quite Clearly what he Meant. When the Beginner made a Dignified Protest the Judge Smilingly Suggested that the Big Pot might Shape his Question rather Differently. The Next Day the Beginner was in a County Court. The Plaintiff (for whom the Beginner Appeared) having Made an Awkward Admission to his Learned Friend on the Other Side, the Beginner Thought he would Employ the Excellent Formula of the Big Pot. He Did so. The Scene that Followed Beggars Description. The County Court Judge in a Voice of Thunder Ordered the Beginner to Sit Down. He then Rebuked the Beginner for his Gross Misconduct and Discussed the Question whether he would Commit him for Contempt, or Merely Report him to the General Council of the Bar. Finally he Expressed the Hope that the Incident would be a Lesson to the Beginner and Directed that the Case should be re-Heard on a Later Date before a Fresh Jury.

MORAL: *Wait till You're a Big Pot.*

"It is our duty as members of the legal profession to watch the trend of modern legislation and to take steps to ensure that nothing shall be done to infringe the inalienable right of the citizens of this realm to have recourse to the Courts of justice."

—Mr. S. C. Davis, President of the Plymouth Law Society.

"To permit a law to be modified at discretion is to leave the community without law."

—Dr. Johnson.

The Bicycle in Law.

The motor-car or automobile, which in otherwise stagnant times has kept the Common Law Courts going on issues of fact in "running-down" cases, is from a purely legal point of view a thing of no importance as compared with the push bicycle in its early days. The rapidity and legal simplicity of the motor has not prevented legislation and litigation in plenty, with a full promise for 1930 of more and greater ;. but it has not and never will perplex the judicial and legal mind as the bicycle did for thirty years or more.

For example, in *Williams v. Ellis*, 5 Q.B.D., 175, Lush and Bowen, JJ., after much anxious thought, came to the conclusion that the words "every carriage of whatever description and for whatsoever purpose which should be drawn or impelled or set or kept in motion by steam or any other power or agency than being drawn by any horse or horses or other beast or beasts of draft," were not wide enough to include a bicycle. Twenty years later that view was shaken by Bigham and Phillimore, JJ., in *Cannan v. Earl of Abingdon*, (1900) 2 Q.B. 66. They held that a bicycle was covered by the words "every coach, chariot, berlin, hearse, chaise, chair, calash, wagon, wain, dray, cart, car or other carriage whatsoever." In Phillimore's view, a "carriage" was "any mechanical contrivance which carries people or weights over the ground, carrying the weights or taking people off their own feet, so that the foot of man and the body and trunk of man do not support his own weight or the weight of the burden carried."

Three years later Halsbury, L.C., blew out the candle so lit by Phillimore, J., and contributed his own light to the legal darkness surrounding the revolutionary machine. In *Simpson v. Spaldon Bridge Co.* he disapproved of Phillimore's analytical method, "analysing the different functions and objects of each machine." A bicycle, he declared, was not "a carriage hung on springs. . . . The true principle was to ascertain what would, in any ordinary intendment be considered to be a carriage as contemplated by the Legislature." But obviously, there might be difficulty in the "ordinary intendment" theory where the Legislature never dreamt of such a thing. Moreover, the House of Lords, by the mouth of the same Lord Halsbury, had earlier, in *Plymouth, etc., Tramways Company v. General Tolls Company*, 14 T.L.R. 531, laid down a somewhat different canon of interpretation: "The first thing, looking at the statute itself, one has to do is to see whether there is any word in the list which would within its generality include the vehicle under debate." Vaughan Williams, L.J., once found himself faced with the difficulty of selecting which of the two canons he should adopt. He had to assume that the House of Lords could not err, and that both canons of construction were consistent, each with each, and binding upon him. He solved the problem by holding that while the facts before him most closely resembled those in the *Plymouth* case, he preferred the judgment of the Lord Chancellor in *Simpson's* case.

"Outlaw," in the "*Law Journal*."

"It is a common delusion that when the opinion of counsel is taken he encourages litigation."

—Lord Haldane.

Bench and Bar.

At a special meeting of the Executive Council held on the 8th inst., His Honour the Chief Justice was sworn in as Administrator of the Government by His Honour Mr. Justice Reed.

Mr. D. G. A. Cooper has resigned from the office of Chairman of the War Pensions Board. His successor is Mr. T. E. Y. Seddon, of the firm of Hannan and Seddon, Greymouth.

Messrs. Callan and Galloway, Dunedin, have admitted into partnership Mr. G. M. Lloyd, LL.B.

Crown Departments and Crown Proceedings.

The Lord Chancellor holds the views apparently of the profession both in England and here on the subject of the powers of Government Departments as well as on the vexed question of Crown proceedings. A possibility of reforms being made in England in both directions is indicated in his Guildhall speech. "My Lord Mayor," he said, "the anxiety which has been felt both inside and outside the profession on the subject of what has been described as 'a growing tendency to transfer decisions on points of law or fact from the Law Courts to the Minister of some Government Department' is certainly on the increase. It is cause for congratulation that attention has recently been drawn to it, and I hope that the Committee set up last week to consider the subject will find for us some solution of a really pressing public problem. Another matter which engaged the attention of a strong Committee appointed by my predecessor, Lord Cave, is the question of civil proceedings in which the Crown is a party. That Committee has framed a draft Bill which has been before the various departments. It is in an advanced state of preparation, and I hope that it will be introduced in the House of Lords in the very near future."

Reserved Defences.

Views of Mr. Justice Rowlatt.

An *obiter dictum* by Mr. Justice Rowlatt in the *Goddard* action should be noted by all who practise advocacy in criminal Courts :—

"There is nothing better for an innocent man—and this is seldom appreciated by an innocent man—than for him to give at the very first moment a full explanation of everything that can possibly be said against him. It is considered to be more clever by innocent people to reserve their defences. On the other hand, not saying anything at the time is not affirmative evidence against a man. I do not believe in reserved defences."

Legal Literature.

Butterworth's Annotations of New Zealand Statutes Supplement, 1929.

(pp. 449 : Butterworth & Co. (Aus.) Ltd.)

With commendable but necessary promptitude the first annual *Supplement* to *Butterworth's Annotations of New Zealand Statutes*, a work which, in the opinion of this reviewer, takes pride of place among our New Zealand legal publications to date, has appeared ; it is in every way a credit to the parent work. So far as concerns Volume I, the annotations of cases, the *Supplement* proceeds along the same lines as the now well-understood Supplements to *Halsbury's Laws of England*. It contains all the cases in which provisions of our Statutes have been considered by the Courts since the issue of the 1841-1928 volume, up to and including the December number of the New Zealand Law Reports and Part XXV of the Gazette Law Reports for last year. A new feature introduced in the *Supplement* is the inclusion after each annotation of a brief note indicative of the general nature of the decision. This is a good plan and one facilitating research, and the publishers, we understand, intend adopting it throughout when Volume I comes to be reprinted. Another innovation which should be of assistance to those who practise in the Magistrates' Court, is the inclusion of references to cases decided in that Court : printed in smaller type, they are readily distinguishable from the decisions of the higher Courts. Turning over to that part of the *Supplement* which deals with Volume II—Tables III and IV and V of the main volume remain unaffected by the year's legislation, and there is very little supplementary matter that has required to be added to Tables I and II. The portion of the *Supplement* dealing with Table VI contains an alphabetical table to the local and personal Statutes for 1929, and shows all amendments, etc., of the local and personal Acts from 1847 to 1928 arising out of last year's legislation. Table VII of the main volume is entirely superseded by Table VII of the *Supplement*, and we have here a complete alphabetical table of the Dominion's public Acts from 1841 to 1929 showing as well how each Act has been affected by subsequent legislation. This table will be brought up-to-date and entirely reprinted each year. Similarly Table VIII of the main volume is entirely superseded by the corresponding portion of the *Supplement*, giving a complete chronological table of our legislation from 1841-1929, and a complete and detailed annotation of all amendments, etc., and of all rules made under the provisions of the Statutes. This table again will be entirely reprinted each year. As can readily be done when a work is kept up to date by periodic supplements the opportunity has been taken of correcting a few typographical and other errors in the main volume, thus ensuring an otherwise unattainable standard of accuracy. Perhaps it is advisable to add, though the fact seems to be generally understood, that each annual supplement will supersede its predecessor ; it will be at no time necessary to consult more than the latest of the supplements.

Requiring only the mimimum of labour, the practitioner now has an absolutely accurate and up-to-date guide through the maze of our statute law and of its judicial interpretation.

Changes in Company Law.

By P. J. Sykes, M.A.
(pp. xiv; 128: Butterworth & Co. (Publishers) Ltd.)

The Companies Act, 1929 (Eng.) is a consolidation of all the English statutes dealing with companies including, of course, the very important amending Act of 1928. We, in New Zealand, are not, at present at all events, concerned much with the changes in the law recently made in England for no corresponding alterations have yet been made here. Nevertheless a work indicating concisely and plainly the value of these alterations is of considerable assistance to the Dominion practitioner, particularly when he is considering the application to the New Zealand law of the English decisions under the Act of 1929. For this purpose this reviewer can confidently recommend Mr. Syke's book. The work sets out, in alphabetical order of subject-matter, all the alterations: the amendments on any particular point are thus accessible literally at a glance. Added to the work are some comparative tables of the sections of the various Acts which should be found a useful guide by anyone engaged in a detailed research. For its purpose the work is in every respect an ideal one.

New Books and Publications.

The Law Relating to Contract of Sale of Goods. Six Lectures by W. Willis. Third Edition. Edited by W. E. Hibbert. (Sweet & Maxwell Ltd.). Price 12s.

A Digest of the Law of Partnership. Twelfth Edition. By Rt. Hon. Sir Frederick Pollock, Bart, K.C., D.C.L. (Stevens & Sons Ltd.). Price 18s.

Palmer's Shareholders, Directors and Voluntary Liquidators' Legal Companion. By A. F. Topham and A. M. H. Topham. (Stevens & Sons Ltd.). Price 5s.

Where to Look for Your Law. Fourth Edition. (Stevens & Sons Ltd.). Price 1s. 6d.

Essays and Excursions in Law. By F. A. A. Russell. (Sweet & Maxwell Ltd.). Price 8s.

A First Book of Jurisprudence for Students in Common Law. By Rt. Hon. Sir Frederick Pollock, Bart. (MacMillan & Co. Ltd.). Price 9s.

The English Courts of Law and Their Constitution, Jurisdiction and Procedure. (Extracted from Odger's Common Law). (Sweet & Maxwell Ltd.). Price 4s. 6d.

Laws of Ceylon. By The Hon. Mr. K. Balasingham. Volume I, Law of Persons. (To be completed in five volumes). (Sweet & Maxwell Ltd.). Price 37s.

The Dominions and Diplomacy. The Canadian Constitution. (Two volumes). By A. Gordon Dewey. (Longmans Green). Price 50s.

The Economic Development of India. By Vera Austey. (Longmans Green). Price 29s.

The Bloody Assizes (Notable British Trials). Edited by J. G. Muddiman. (Butterworth & Co. (Aus.) Ltd.) Price 9s.

Sheriffs' Fees.

Amendment of Provisions as to Poundage.

His Honour the Chief Justice, in exercise of his powers under S. 40 of the Judicature Act, 1908, has revoked the existing provisions as to poundage to be paid and taken by Sheriffs, and substituted the provisions following.—N.Z. Gazette, 1930, p. 357. The new provisions came into force on February 1st.

Poundage on Writs of Execution other than Writs of Possession.

On the sum levied or for which the body shall be taken in execution:—	s.	d.
For every 20s. of such sum up to and including £200 ..	1	0
For every 20s. over and above £200	0	6

In the case of execution against goods, land, or estate, the poundage is to be calculated on the gross proceeds of the execution, but not exceeding the amount to be levied under the writ, together with all fees and expenses in connection with or incidental to the issue and execution of such writ. Where the property is subject to mortgage or other security the value of such security shall not be included in computing the gross proceeds aforesaid.

Poundage on Writs of Possession.

On delivery of goods and chattels:—	s.	d.
For every 20s. of the total market value thereof up to and including £200	1	0
For every 20s. over and above £200	0	6
On delivery of land:—		
For every 20s. of the capital value thereof as determined by the Government valuation, less the amount owing in respect thereof under any registered mortgage thereon, up to and including £200	1	0
For every 20s. of the value as so ascertained over and above £200	0	6

Provided that the total poundage on delivery of land shall not be less than £10 nor more than £25 in respect of any one writ.

Provided, further, that where under a writ of possession, possession of land is given to a mortgagee thereof or to an immediate purchaser from such mortgagee, the poundage shall be £10 in respect of any one writ.

Rating and Valuation (Apportionment) Act, 1928 (Eng.)

At the recent Provincial Meeting of the English Law Society, the President, Mr. W. H. Foster, dealt in the course of his address with the recent English legislation dealing with local government and rating, and he quoted the following lines, written, he said, by some unknown humourist after a meeting of an assessment committee sitting to deal with objections under the Act of 1928:—

"O hear the sad, sad story of a man pursued by Nemesis.
For trying to reduce the rates upon his business premises.
He read the Act of '25, that famous Valuation Act
(Which now he will refer to as 'The Lawyers' Sustentation Act'),
And then the Act of '28, called 'Rating and Apportionment'
(Which now he calls the 'Statute of Additional Extortionment'),
And duly made objection, with his Counsel and Solicitors,
The Committee of Assessment sitting round like Grand Inquisition;
Heard Counsel each submitting to the other side, 'with deference,'
That this or that contention was entitled to the preference;
It appeared of vast importance if his factory was 'contiguous'
(A point on which it seems the Act is just a bit ambiguous).
They argued that its user was not primal but 'ancillary,'
And they asked him lots of questions (which he said was like the pillory).
Unfortunately in the end his careful schemes all went awry,
And now he uses language which is quite unparliamentary;
Calls the Valuation Acts a blanky swindle (—it's been said before—)
For now his rates are just exactly double what he paid before."