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" It is the work of barbarism to abolish the lawyer and the qualified Judge."

—Mr. Justice Roche.

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The Conference Remits.

There can be little doubt that the Auckland Committee's choice of remits to place before the Conference was, on the whole, a happy one, though there were many who shared the view which we ventured to express when the programme was first published that it was a matter for regret that only two remits—or, more correctly, only one double-barrelled remit—related to the domestic side of the profession. But, at the same time, one of the objects of the Conference must surely be to uphold the honour and dignity of the profession, and that object is not likely to be achieved in the public eye if domestic discussions take up the whole space, or even predominate, on the order-paper. As His Honour the Chief Justice said in his inaugural address: " It is a new side to the profession, as far as the public is concerned, to see that, although they may not be altogether altruists, lawyers have an eye to matters that affect the public interest." And, moreover, while there are, without question, very many matters relating to the profession itself that demand attention at the present time, it must be recognised that no small proportion of them, perhaps including some on which the profession feels most strongly, do not lend themselves as much, if results are to be obtained, to a public and general discussion as they do to more mature and deliberate consideration through the machinery already provided in the Council of the New Zealand Law Society. The chief value of the Conferences, so far as concerns domestic proposals, will probably always lie, not in propounding them or discussing them *in limine*, but in confirming them, and thus strengthening them, after they have been discussed, considered, and finally propounded by the Councils of the District Societies and the Council of the New Zealand Law Society.

Two remits of considerable public importance were carried by the Conference. The first advocates the adoption in collision cases on land of the admiralty rule of apportioning, where both parties are found to be negligent, the damages payable according to the degrees of fault. In those running down cases which are tried by juries—in the Supreme Court they are one of the few remaining classes of case that are so triable as of right—the result of the adoption of the admiralty rule may not make a very considerable difference, for, as Mr. H. F. O'Leary pointed out, the rule is, in the assessment of damages, frequently adopted by juries without their knowing it. A jury's natural tendency is, except where such a verdict would be flagrantly perverse, to find in favour of the pedestrian or cyclist who is run down, and, while refraining from finding him guilty of contributory negligence, to make allowance for any rash conduct on his part by reducing the amount of damages which would otherwise be awarded. The instance of which Mr. O'Leary informed the Conference will not be found, we believe, to be an isolated one. That the result of the admiralty rule is much fairer than that of the common law rule is not open to doubt, and it is to be hoped that the Government will notice the Conference's unanimous adoption of the remit and bring down at an early opportunity a bill to give effect to the recommendation.

The second remit of public importance carried was one recommending the abolition of a husband's liability for his wife's torts. That the expressed foundation of the common law rule is illogical must certainly be admitted, but there is a practical side to the question to which, at the same time, some consideration must be given. In New Zealand, where marriage settlements are comparatively unusual, the property of husband and wife is frequently intermixed, particularly in the case of spouses of inconsiderable means. More often the wife's money will be found to be mixed with the husband's than the husband's with the wife's. If the husband's liability for his wife's torts is abolished, this intermixing, and just a little collusion between the spouses, might in many cases make it difficult indeed for an injured third party to satisfy his claim.

Among the three other remits which affect the public in its litigation, that from Otago recommending that all appeals from the Magistrate's Court should be by way of rehearing alone was properly rejected. The debate however, was a useful one, if for nothing else, in that some expressed their views on our present not quite satisfactory methods of " note-taking." It is of the greatest importance that a proper note of the evidence should always be taken, and in our view there is only one really satisfactory way of doing it—a shorthand report of both question and answer. At once, of course, arises the question of expense, but this ought not to be found insuperable.

The remit from Wellington recommending that the statements of witnesses taken by the police in investigating running-down cases should be available to the parties concerned or their counsel in any subsequent proceedings would, we thought, have been carried; but the opposition of the Attorney-General and of the Solicitor-General carried considerable weight, and the remit was simply referred to the Council of the New Zealand Law Society. There seems, on examination, to be really only one argument against the remit—that witnesses might not come forward freely and give statements to the police; this fear, however, seems plainly exaggerated when the Solicitor-General admits that the names of the witnesses from whom statements have been taken are, and may properly be, divulged. One would have thought that the disclosure of their names would, if there were anything in the contention, have the same suggested effect.

For the last remit, that relating to workers' compensation claims, little time remained for discussion and the Conference contented itself with urging on the Government the necessity of ensuring that these claims be dealt with more expeditiously. Until the recommendations of the Committee, recently set up by the Government to consider the operation of the Workers' Compensation Act, have been made public, little would be served by a discussion here of this topic.

Supreme Court.

Myers, C.J.
Blair, J.

April 9; May 1, 1930.
Wellington.

BROWN v. McNEIL AND ANOTHER.

Imprisonment for Debt—Judgment Summons—Debt Collecting Agency as Assignee of Debt Obtaining Judgment in Magistrate's Court—Judgment Debt Re-Assigned to Original Creditor—Application by Original Creditor for Order for Committal of Judgment Debtor—No Jurisdiction to Make Order.

Action claiming a mandamus against Mr. T. B. McNeil, S.M., to compel him to hear and determine a judgment summons applied for by the plaintiff in the Magistrate's Court. The plaintiff had assigned a debt to a company whose business was that of collecting or recovering debts, and the company, as such assignee, recovered judgment in the Magistrate's Court against the debtor. The company assigned the judgment debt back to the plaintiff, and the plaintiff, as assignee of the judgment, applied for the issue of a judgment summons. The Magistrate refused to make an order on account of the proviso to S. 8 of the Imprisonment for Debt Limitation Act, 1908. The plaintiff accordingly applied to the Supreme Court for a mandamus as stated above.

Free for plaintiff.
No appearance of defendants.

MYERS, C.J., said that the only case that he had been able to find in which the question had arisen as to whether an assignee of a judgment debt was entitled to take out a judgment summons was **East End Benefit Building Society v. Slack,** 60 L.J.Q.B. 359, cited by Mr. Free, which arose under Section 5 of the Debtors Act, 1869. The Court, however, did not decide the point. The reason why it was unnecessary to decide the question was that, even if an assignee of a judgment debt was entitled to apply for a committal on a judgment summons, the assignee in the particular case had not complied with a rule providing that "where any change has taken place after judgment by death or otherwise in the parties entitled to take proceedings to enforce a judgment" the party alleging himself to be entitled to enforce the judgment might apply to the Court for leave to issue the necessary process accordingly. A year after the decision in that case the rule was altered by adding the word "assignment" between the words "by death" and "or otherwise." It would appear also from the rule and the forms in England that the title of the action must be altered in accordance with the facts. Whether or not **Ex parte Blanchett,** 17 Q.B.D. 303 and **Goodman v. Robinson,** 18 Q.B.D. 332 were cited to the Court did not appear from the report. In **Ex parte Blanchett** (*cit. sup.*) it was held that in S. 4 (1) (g) of the Bankruptcy Act, 1883, which enabled a creditor who had obtained a final judgment against a debtor to issue a bankruptcy notice requiring him to pay or secure the debt, the words "creditor who has obtained a final judgment" did not include an assignee of the judgment debt. In **Goodman v. Robinson,** (*cit. sup.*) it was held that the assignee of a judgment debt was a person who has "obtained" a judgment within the meaning of Order XLV r. (1) and was entitled to a garnishee order attaching debts due to the judgment debtor. **Ex parte Blanchett** (*cit. sup.*) was distinguished in that case by Huddleston, B. But for the dicta of the learned Judges in the **East End Benefit Building Society v. Slack,** His Honour should have thought that an assignee of a judgment debt was not entitled to take out a judgment summons. However that might be, as was pointed out by Richmond, J., in **Cresswell v. McArthur and Co.,** 12 N.Z.L.R. 730, the New Zealand Act differed materially from the English Debtors Act of 1869, so that decisions upon the latter enactment were no guide to the interpretation of our Imprisonment for Debt Limitation Act, 1908. That observation applied specially to S. 5 and the proviso to S. 8 of the New Zealand Act, under which sections the question in the present case arose. The proviso to S. 8 expressly provided that no order of committal should be made where the judgment creditor was a person, firm, or company whose business was that of collecting or recovering debts, unless the Court was satisfied that the judgment was incurred to the judgment creditor directly, and was not acquired by assignment from the original creditor. His Honour saw no reason why the words "judgment creditor" in that proviso should not be interpreted in their natural and primary sense. To give them the enlarged or extended meaning contended for by Mr. Free would have the effect, in His Honour's opinion, of nullifying the obvious intention of the Legislature and would be contrary to paragraph (j) of S. 5 of the Acts Interpretation Act, 1924. It appeared to His Honour that what the Court was being asked to do was to construe the provisions of an Act passed for the purpose of limiting imprisonment for debt in such a manner as to extend the facilities for such imprisonment. It was true that S. 5 of the Act provided that whenever and as often as any sum of money due under any judgment or order in any Court remained unsatisfied it should be lawful for "the person entitled to recover such money" to obtain a summons in the prescribed form, or to the like effect, directed to the person liable to pay such money. Mr. Free suggested that any but the enlarged or extended meaning of the words "judgment creditor" in the proviso to S. 8 was inconsistent with the words "the person entitled to recover such money" in S. 5. His Honour could not agree. The last words might well be construed as meaning the judgment creditor or his personal representatives. But, whether that were so or not, the difference between the words of the proviso to S. 8 and those of S. 5 was in itself significant. His Honour shared Mr. Justice Blair's difficulty in seeing any justification for so construing the Act as to hold that by an assignment of the judgment debt the debt-collecting agency could give its assignee a better title or any higher remedy than it had itself.

BLAIR, J., delivered a separate judgment concurring.

Solicitors for plaintiff: **Meek, Kirk, Harding, Phillips and Free,** Wellington.

Myers, C.J.

February 10; May 1, 1930.
Wellington.

ROSS v. McGREGOR.

Wages Protection and Contractors' Liens—Claim for Lien—Date of Completion of Work—Written Tender by Plumber Orally Accepted by Owner—Work Substantially Completed and Entry by Owner into Possession—Plumber Certifying to Local Authority that Work Completed—Work Passed by Engineer of Local Authority—Plumber Sending Accounts to Owner for Contract Price—Plumber later Effecting Minor Repairs and Installing Trivial Item Omitted—Subsequent Work Not Extending Time for Serving Claim for Lien—Practice—Appeal—Blank in Magistrate's Notes—Best Evidence Rule Not Observed in Lower Court—Power of Appellate Court to Disregard Inadmissible Evidence Given in Court Below—Admission of Further Evidence—Magistrates' Courts Act, 1928, S. 166.

Appeal on fact and law from a decision of Mr. R. M. Watson, S.M., whereby the plaintiff was held entitled to a lien under Part III of the Wages Protection and Contractors Liens Act, 1908, on certain land at Ngaio belonging to the defendant, Mrs. Ross. The plaintiff, a plumber, in February, 1928, contracted with the defendant to perform certain plumbing work at a house which she was erecting on the said land, for £161 3s. 3d. The tender, which was in writing, and which was accepted orally by the defendant's husband on her behalf, was not produced upon the original hearing, or upon the present appeal, although Ross was called as a witness on the plaintiff's behalf. The plaintiff commenced his work in March, 1928, and the main part of the work was finished in three-and-a-half months. All that he did subsequently was to fix a new ball tap, do certain minor repairs, and supply a toby-box of the value of 4s. 6d. In June, 1928, the plaintiff handed the work over to Mrs. Ross as completed, and she entered into possession of the house, which since then, or at all events since August, had continuously been actually occupied by herself or her tenants. On 7th June, 1928, Ross was adjudged bankrupt, and the Official Assignee later took proceedings under S. 76 of the Bankruptcy Act, 1908, to recover from Mrs. Ross moneys which Ross had expended within two years before the date of his adjudication in purchasing lands in his wife's name and erecting buildings thereon or otherwise improving the same. An order was made in the Official Assignee's favour on 30th April, 1929. It was not until after then, namely on or about 1st May, 1929, that the plaintiff installed the toby-box which he claimed as the completion of his work under his plumbing contract for the purpose of fixing the period within which he was entitled to claim a lien Notice of the claim for lien was served upon Mrs. Ross on 22nd May, 1929. In the meantime she had come to a settlement

with the Official Assignee, and in pursuance of the settlement she executed a transfer of the Ngaio land to the Official Assignee. The registration of that transfer was suspended on account of the present proceedings. If the plaintiff was entitled to a lien he would admittedly take priority over the Official Assignee's claim. Mrs. Ross was adjudged bankrupt in July, 1929, and though her name had remained on the record, it was agreed that the present appeal should be treated as if the Official Assignee had been substituted.

O. C. Mazengarb and **James** for appellant.

Cornish for respondent.

MYERS, C.J., said that it was somewhat significant that the repairs to the ball tap and the supply of the toby-box did not take place until so late as May, 1929. The plaintiff said that he repaired the ball tap on 24th April, but that had no bearing on the question of the lien, because it was at most a mere matter of effecting a repair nearly a year after the work was done and had nothing to do with the original contract. The toby-box, the plaintiff said, he supplied on 1st May. Although, looking at the matter from the point of view most favourable to the plaintiff, it was clear that the whole of the work, except the supply of that four-and-sixpenny toby-box, was completed before 7th June, 1928, the learned Magistrate, relying upon his view of **Walker Bros. v. Roberts,** 10 G.L.R. 629, and **Collins v. Cooper,** 31 N.Z.L.R. 277, 279, held that the date of the completion of the contract was in May, 1929.

In His Honour's opinion the two cases relied upon by the Magistrate were distinguishable. One of the statements in the plaintiff's evidence, upon which no doubt the learned Magistrate relied, was set out in the notes as follows: "The City Council Inspector passed the work in . . . . 1929." The circumstances of the case seemed to His Honour to be so extraordinary that it appeared to him necessary for the purpose of doing justice that the best evidence on that point should be obtained, particularly as the Magistrate, quite wrongly His Honour thought, and notwithstanding objection, accepted McGregor's oral evidence of the terms of the contract as the best evidence of that contract. The best evidence of the terms of the contract was the tender, which was in writing, and the plaintiff chose not to produce it, or to call any evidence, as he might have done from Ross (whom he called) or Mrs. Ross, as to the reason for its non-production, if it could not be produced. It might well be that His Honour could disregard the evidence as to the terms of the contract—**Jacker v. International Cable Co. Ltd.,** 5 T.L.R. 13—but, rather than adopt that course, it seemed more fair, in order to do justice, that His Honour should have before him, particularly in view of the blank in the notes of the plaintiff's evidence, such documentary evidence as might be available, in order to assist in determining the rights of the parties and doing justice between them. In all the circumstances, the case seemed to His Honour a proper one for the exercise of the power conferred on the Supreme Court by S. 166 of the Magistrates' Courts Act, 1928, to take additional evidence. A Mr. Kenny was then called on behalf of the appellant to produce the official documents in the Corporation's possession. He then produced a notice to the City Engineer signed by the plaintiff, and dated 23rd August, 1928, that the work had been completely finished and requesting inspection thereof. The records showed that Mr. Kenny inspected and approved the work and authorised the issue of a certificate in accordance with the bylaws, whereupon the City Engineer on 12th September, 1928, issued his certificate that the work had been examined and found satisfactory. The plaintiff acted upon this certificate by uplifting from the City Treasurer's Office, on 14th September, 1928, the sum of £3 which he had been required by the bylaws to deposit before obtaining a permit to do the work. The plaintiff was therefore quite wrong in saying that the certificate was given in . . . . 1929, and it was a fair assumption that, although the plaintiff left the month blank, the Magistrate was misled into believing that the certificate was given in May, that being the month in which the plaintiff said that the work was completed. In point of fact it was given, as already stated, on 12th September, 1928, after the plaintiff had himself notified the Corporation authorities that he had "completely finished" the work. There was no evidence that could be regarded as of any value that the original contract included the supply of the toby-box; but His Honour was prepared to assume in the plaintiff's favour that, as the bylaws required a toby-box, that article was either expressly or impliedly included in his contract. Even so, it was the duty of the Corporation Inspector to see that the toby-box was there before he approved the work and authorised the issue of the certificate. Had he given the certificate without seeing that the toby-box was there he would have been acting contrary to his duty. It was also probable that a toby-box was supplied originally and that it was stolen or removed after the Inspector's examination. Not only was the notification made by the plaintiff to the Corporation authorities in August, 1928, that he had completely finished his work, but on 21st November, 1928, he sent Mrs. Ross an "account rendered" for the sum of £161 3s. 3d., the total contract price. It should be remembered that at that time Mrs. Ross had already had possession of the premises for some months, that both parties had regarded the plumbing work as completed, and that Mrs. Ross must be assumed to have approved the work. In other words, the circumstances were such as in His Honour's opinion to raise the implication of an agreement that possession of the work was given, and accepted, as completed. In all those circumstances His Honour found himself unable to agree with the learned Magistrate that the plaintiff's work was not finished till May, 1929.

If the plaintiff's own notification to the Corporation authorities of August, 1928, was to be accepted—there was no reason why it should not be, and every reason, having regard to the peculiar circumstances of the case, why it should—the work was completed then. Even if the toby-box had not been then supplied, His Honour thought that in all the circumstances of the case, the work having been taken over by Mrs. Ross, the plaintiff would have been entitled to recover the amount of his contract less the sum of 4s. 6d., if the non-supply of the toby-box had then become known: **Dakin and Co. v. Lee,** 84 L.J.K.B. 2031; **Ramsay v. Brand,** 35 Sc.L.R. 927. It was said by Mr. Cornish that such authorities as **Dakin v. Lee** (*cit. sup.*) and **Ramsay v. Brand** (*cit. sup.*) did not apply when the point to be determined was the date of completion of work for the purposes of Part III of the Wages Protection and Contractors Liens' Act, 1908. So much, as a general proposition, might be conceded, but His Honour saw no reason why the principle of those cases should not apply where a claim of lien was made months after the work had been taken over and treated by all parties as completed, in circumstances from which an agreement to treat the work as completed must be implied. Mr. Cornish relied, as the learned Magistrate relied, on what was said by Williams, J., in **Walker Bros. v. Roberts,** (*cit. sup.*) and by Denniston, J., in **Collins v. Cooper,** (*cit. sup.*). Referring to the former case His Honour said that the judgment was not a considered judgment stating a general principle applicable to the circumstances of all cases, but was simply applicable to the particular facts which the learned Judge had to consider. It could not be said in the particular case that the plaintiff, Walker Bros., had completed their contract in face of the fact that they had received from the main contractor a requisition to rectify certain work in order to comply with the requirements of the specifications. Again in **Collins v. Cooper** (*cit. sup.*) the architect on 11th May gave a certificate of completion, subject to the completion of a small detail in the work, and that was not done until 12th July, which date Denniston, J., therefore held to be the date of completion of the sub-contract. The present case was quite different. First of all, as His Honour had said, he took a different view on the facts as to the date of actual completion from that taken by the learned Magistrate, and His Honour thought that in all probability, had the documents and the further evidence which came before him been before the Magistrate, he would have taken the same view as His Honour took. But, even assuming that the toby-box was not supplied originally, or until 1st May, His Honour did not for a moment think that Williams, J., in **Walker v. Roberts** (*cit. sup.*) could have intended his observations to apply to a case like the present, where there was no question of the approval of a third party such as an architect, no requisition within a reasonable time (or at all) to the plaintiff, and where nearly twelve months had elapsed since the work had been approved and taken over on an implied agreement to treat it as completed. The logical effect of a literal interpretation of the learned Judge's words would be that a contractor or sub-contractor might hand over work as completed but by accident or design leave—perhaps (especially if by design) in a more or less hidden manner—a few nails to be driven, or some other trivial thing to be done, and then months afterwards, if he had not been paid for his work, go back of his own accord without any requisition of any kind, drive the nails or remedy the trivial defect, and then claim a lien upon the land. His Honour could not think that that was what was meant either by the Act or by anything that Williams, J., said. If such a thing were allowed it might seriously affect the rights of third parties and leave the door wide open to fraudulent practices.

Appeal allowed.

Solicitors for appellant: **Mazengarb, Hay and Macalister,** Wellington.

Solicitors for respondent: **Webb, Richmond, Cornish and Swan,** Wellington.

Myers, C.J. March 11; May 1, 1930.
Wellington.

BRITTAIN v. McNEIL AND LINDSAY.

Destitute Persons—Maintenance Order Obtained by Wife Against Husband—Subsequent Discovery That Marriage a Nullity Owing to Prior Marriage of Complainant Subsisting at Date—Jurisdiction of Magistrate's Court to Cancel Order—Decree of Nullity by Supreme Court Not Necessary—Quaere as to Power of Supreme Court to Grant Maintenance in Suits for Nullity—Destitute Persons Act, 1920, S. 39—Divorce and Matrimonial Causes Act, 1928, S. 33.

Motion for writ of prohibition or alternatively an injunction, mandamus or certiorari.

On 9th September, 1929, on complaint under the Destitute Persons Act, 1910, of the defendant A.J.L. Lindsay (under the name of Agnes Brittain) claiming as the plaintiff's wife, an order for separation and maintenance was made by the Stipendiary Magistrate, the plaintiff being ordered to pay the complainant the sum of £2 per week maintenance. The parties had gone through a form of marriage on 25th March, 1900, the defendant being named in the marriage register as A. J. L. Lee and described as a spinster. Some time after the Magistrate's order was made, the plaintiff claimed to have ascertained that the defendant was married on 11th May, 1883 to one Lindsay, then a bachelor, and that Lindsay had died on 7th October, 1919. The plaintiff thereupon laid a complaint under S. 39 of the Destitute Persons Act, 1910, claiming an order cancelling the maintenance order of 9th September, 1929. The Magistrate dismissed the complaint on the ground that before any action could or should be taken by him there should be a direction from the Supreme Court on the position. The plaintiff thereupon commenced the present proceedings.

Sievwright for plaintiff.
P. W. Jackson for defendant, Lindsay.

MYERS, C.J., said that Mr. Jackson frankly admitted his inability to dispute that the Lindsay who died on 7th October, 1919, was the Lindsay named in the marriage certificate of 11th May, 1883, and that consequently he was alive on 25th March, 1900, when his wife (the defendant) went through the form of marriage with the plaintiff. The existence of the relationship of husband and wife was essential as a foundation of the Magistrate's jurisdiction to make the original order. If on a subsequent proceeding under S. 39 it was made to appear to his satisfaction that the relationship never in fact existed, then it seemed to His Honour that he should act under S. 39 and cancel the original order. The position would be different if the marriage were merely a voidable one. In that case it would be the duty of the Magistrate to treat the marriage as valid until a decree for nullity had been obtained in appropriate proceedings taken to avoid the marriage. It was true that even where a marriage was void *ab initio*, proceedings were frequently taken to obtain a decree, but such proceedings were generally taken mainly for the purpose of preserving the evidence; it was not essential to take them: **Browne and Watts on Divorce,** 10th edn., 117; **Rayden on Divorce,** 2nd edn., 140. It was clear that a marriage when a former husband or wife was alive was void without the necessity of any sentence of divorce: **Riddlesden v. Wogan,** Cro. Eliz. 858; **Elliott and Sugden v. Gurr.,** 2 Phill. Ecc. 16; **In re Wilson's Trusts,** L.R. 1 Eq. 247. If then the marriage between the plaintiff and the defendant in 1900 was void, the maintenance order should not be allowed to stand. As His Honour had pointed out, there was in S. 39 power to cancel the order and it seemed to His Honour that that was the most appropriate procedure. The Magistrate erroneously thought that he either could not or should not consider the matter until a decree for nullity had been made by the Supreme Court. Consequently either he had never heard the complaint made by the plaintiff under S. 39 or else he must be regarded as having dismissed that complaint without prejudice to its being again laid. His Honour thought that the latter was probably the true position and that there was no reason why the plaintiff should not lay another complaint under S. 39; and, if and when he did, it would be the duty of the Magistrate to hear the complaint on the merits. His Honour apprehended when that course was taken the same admission would probably be made as was made by Mr. Jackson in the Supreme Court, or that, if such admission was not made, the facts relied upon by the plaintiff would be readily capable of proof.

It was suggested by Mr. Jackson that if the plaintiff took proceedings in the Supreme Court for a decree for nullity the Court might order the plaintiff to find some pecuniary provision for the defendant. In **Ramsay v. Ramsay (otherwise Beer)** 108 L.T. 382, where a petitioner obtained a decree for nullity of marriage on the ground that at the time of the ceremony the respondent had a husband living, Bargrave Deane, J., held that it was quite clear that a similar provision in the English Act to that contained in S. 33 of our Divorce and Matrimonial Causes Act, 1928, gave the Court power to grant maintenance in all suits for nullity of marriage. He said that he was unable to read into the Act any proviso concerning marriages void *ab initio*. It was to be observed, however, that the section used the terms "husband" and "wife," and His Honour should have thought at first sight that the section could not have been intended to apply to the case of a marriage void *ab initio*, where the relationship of husband and wife never existed. His Honour mentioned the case simply because it was referred to by counsel and because it seemed to His Honour that the point was one that required further consideration if and when it expressly arose. In the present case it did not arise. The proceedings out of which the present action arose were proceedings under the Destitute Persons Act, 1920, and the Magistrate's jurisdiction existed only if the parties before him were husband and wife. His Honour thought it would sufficiently meet the case if an interim injunction was granted for the period of two months or until the further order of the Court restraining the taking of any proceedings under the maintenance order or the continuing of any proceedings based thereon. That would give the plaintiff ample time to lay a fresh complaint under S. 39 of the Destitute Persons Act and have it disposed of. If upon such complaint the maintenance order was cancelled it would not be necessary to bring the matter again before the Supreme Court.

Interim injunction granted.

Solicitor for plaintiff: **A. B. Sievwright,** Wellington.
Solicitors for defendant Lindsay: **Levi and Jackson,** Wellington.

Herdman, J. April 7, 8; 10, 1930.
Auckland.

AUCKLAND AUTOMOBILE RACING CLUB LTD. v. CLARK

Motor-vehicles—Offences—Obstruction of Traffic Inspector in Exercise of his Powers—Company Liable to Conviction in Respect of Obstruction by its Servants—Motor-vehicles Regulations of 24th February, 1928.

Appeal by way of case stated from a decision of Mr. W. H. Woodward, S.M., at Auckland, convicting the appellant, the Auckland Automobile Racing Club Ltd., of the offence of obstructing, hindering and interfering with a traffic inspector in the exercise of his powers. The information was laid under paragraph 8 of regulation 2 of the regulations made under the Motor-vehicles Act, 1924, on 24th February, 1928. (See N.Z. Gazette, 1928, p. 512). That regulation provided: "No person shall obstruct, hinder or interfere with any police officer or traffic inspector in the exercise of the powers hereby conferred upon him." One of the powers conferred upon the traffic inspector by paragraph 1 of the regulation was generally to control the traffic of motor-vehicles, and to give such reasonable directions to persons driving or in charge of motor-vehicles upon any public road as, in his opinion, might be necessary for the safe and efficient regulation of the traffic thereon. The regulation also provided that every person should comply with all lawful directions given to him by a police officer or traffic inspector relating to the driving of a motor-vehicle driven by him or in his charge. On 14th December, 1929, the appellant company held a meeting for motor-vehicle racing on Henning's Speedway at Mangere. For the purpose of selling tickets to persons desirous of being admitted to the Speedway five persons, employed by the appellant, were stationed on the roadway at each of the five gates through which persons entered the grounds. These ticket sellers were standing on the roadway at or about the entrances to the Speedway selling tickets to motor car owners desirous of being admitted to the grounds. An official of the appellant company had, before the meeting, interviewed the traffic inspector and had obtained permission to station men on the road for ticket-selling purposes. Later, when it became apparent to the inspector that the operations of the ticket-sellers caused or threatened a congestion of traffic, he directed the official of the company to remove the ticket-

sellers from the road. The officials of the company declined to do so and instructed the ticket-sellers to continue their operations. The ticket-sellers remained on the road and traffic congestion resulted. The Magistrate convicted the appellant company. It was agreed that the appeal should be dealt with as if the appellant had been charged with "obstructing" only.

Holmden for appellant.
Prendergast for respondent.

HERDMAN, J., said that the ticket-sellers obstructed traffic and they obstructed the traffic inspector in the performance of his duty, for how could he perform his duties effectively—how could he regulate the progress of a long stream of cars—if the progress of that stream was hindered by ticket-sellers? He, on the one hand, would want cars to keep moving. The ticket-sellers, on the other hand, would want the cars to stop. The ticket-sellers were the employees of the company and acted under the direction of the officials of the company.

It was therefore necessary to decide whether a company could be convicted of an offence of such a kind? A company had no corporeal existence. It could not be seized and put in prison. But by S. 7 (1) of the Acts Interpretation Act, 1924, it was provided that in the construction of every enactment relating to an offence punishable on indictment, or on summary conviction, the expression "person" should unless the contrary intention appeared, include a body corporate. In a number of cases the matter of the liability of a company for offences committed had been considered. His Honour referred to **The King v. Hammond and Co. Ltd.,** (1914) 2 K.B. 866, **Mousell Brothers Ltd. v. London and North Western Railway Co.,** (1917) 2 K.B. 836, **Pearks, Gunston and Tee Ltd. v. Ward,** (1902) 2 K.B. 1, 11, and **Griffiths v. Studebakers Ltd.,** (1924) 1 K.B. 102. In the present case the obstruction of a traffic inspector in the exercise of his powers was prohibited, and there was nothing in the regulations to indicate that there must be proof of wilful obstruction. Just as the regulation in **Griffiths v. Studebakers Ltd.** (*cit. sup.*) was designed to limit the rights of owners of certain cars to use the roads, so in the present case a regulation had been devised for disciplining drivers of motor cars who might use the roads. If a man "obstructed" that was sufficient. His Honour could quite well believe that a driver of a car or a driver of another vehicle, or a pedestrian might seriously obstruct traffic without any definite intention of doing so, and in like manner might obstruct or hinder a traffic inspector who was attempting to perform his duties. In principle His Honour was unable to distinguish the regulation under which the appellant company in the present proceedings was convicted from the regulations that were considered in **Mousell v. London and North Western Railway Co.** (*cit. sup.*) and in **Griffiths v. Studebaker Ltd.** (*cit. sup.*). In the present case the interference with the traffic inspector originated with those who controlled the affairs of the company. The ticket-sellers aided and abetted. In **Mousell v. London and North Western Railway Co.** (*cit. sup.*) Atkin, J., said that, to ascertain whether a particular Act of Parliament had the effect of prohibiting an act or enforcing a duty absolutely, the words used must be considered, the nature of the duty laid down, the person upon whom it was imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty was imposed. One of the objects of the Act under which the regulations in the present case were made was to regulate the use of motor-vehicles and one of the objects of the regulations was said to be the regulation of motor traffic. The duty imposed was not to interfere with a traffic inspector in the exercise of powers which were of necessity wide, and that duty was imposed upon all members of the community. If a person committed an offence through the medium of his agent or servant, His Honour could not see why he should not be held liable, and if a company offended against the regulations through the medium of servants His Honour thought that it committed an act which had been absolutely forbidden because the Legislature had thought it important to prevent the act from being committed by anybody. Unless the authority of the traffic inspector were properly respected, and unless he were given proper protection in the exercise of his authority, regulations such as those at present under consideration would be of little use.

Appeal dismissed.

Solicitors for appellant: **Wynyard Wilson, Vallance and Holmden,** Auckland.

Solicitors for respondent: **Brookfield, Prendergast and Schnauer,** Auckland.

Reed, J. April 11; May 2, 1930.
Wellington.

SMITH v. HORLOR.

Chose-in-Action—Assignment—Charging Order—Plaintiff Run Down by Negligence of Defendant—Defendant Insured Against Third Party Liability—Assignment by Defendant After Date of Accident of All Real and Personal Estate to Trustee for Benefit of Creditors—Plaintiff Subsequently Obtaining Judgment for Damages Against Defendant and Charging Order Nisi Against Insurance Moneys—Trustee Entitled to Insurance Moneys Under Deed of Assignment—Charging Order Nisi Set Aside.

Motion for discharge of charging order *nisi*. On 14th July, 1928, a collision occurred between a motor-lorry driven by one of the defendant's servants and a motor-cycle ridden by the plaintiff, who was seriously injured. On 31st January, 1929, the defendant assigned to a trustee for the benefit of his creditors "All that the real and personal estate of the debtor whatsoever or wheresoever excepting only wearing apparel and household furniture and goods of the debtor." On 23rd December, 1929, the plaintiff issued a writ against the defendant claiming damages in respect of his injuries and the case came on for trial on 11th and 12th February, 1930, when judgment was entered for the plaintiff against the defendant for the damages assessed by the jury (£1,191 12s. 6d) and for costs (£115 5s. 7d.). The defendant was the holder of a motor car policy in the Ocean Accident and Guarantee Corporation Ltd. covering (*inter alia*) third party risk, but limited to £1,000. On 25th February, 1930 a charging order *nisi* was served on the company, which company also had notice of the assignment made on 31st January, 1929. It accordingly paid into Court £888 being the balance, less its costs in defending the action, which, by the terms of the policy, it was entitled to deduct. The trustee under the assignment moved that the charging order be discharged on the grounds that the insurance moneys were his property as trustee for the defendant's creditors; he also asked for an order that the moneys in Court be paid out to him.

Reid in support of motion.

Dunn to oppose.

Buxton for Ocean Accident and Guarantee Corporation Ltd.

REED, J., said that the first question to be decided was whether or not the right to indemnity under the policy passed to the trustee under the deed of assignment of 31st January, 1929. The defendant Horlor on that date assigned "all that the real and personal estate of the debtor whatsoever or wheresoever." A chose in action was included in the words "personal estate whatsoever": **Witherby v. Rackham,** 60 L.J. Ch. 511. A claim which had already arisen under the policy was an ordinary chose in action and might, therefore, be assigned like any other chose in action: **Welford's Accident Insurance,** 157; **Lloyd v. Fleming,** L.R. 7 Q.B. 299, 302, 303. The accident occurred before the execution of the assignment but no action was brought by the plaintiff in respect of it for many months afterwards. It was submitted on behalf of the plaintiff that at the date of the deed of assignment there was no existing chose in action and that a private assignment did not apply to after-acquired property. The latter question did not arise because it was clear that a claim for indemnity under the policy arose directly the accident happened, the quantum only being deferred pending an ascertainment of the amount: **Hood's Trustees v. Southern Union General Insurance Co. of Australasia,** (1928) Ch. 793. It was further claimed by the plaintiff that there was no legal assignment of the chose in action inasmuch as "no express notice in writing" of the assignment was given to the insurance company in compliance with S. 46 of the Property Law Act, 1908. The deed of assignment was executed by the insurance company. It was true that that was done as a creditor of the defendant, but the deed contained all the information required by the Act and the signature attested the knowledge of it. Mere notice of the deed of assignment would have been sufficient but in the present case there was in addition the acknowledgment of its contents being known: **Denny Gasquet and Metcalfe v. Conklin,** (1913) 3 K.B. 177; **Beyer v. Hingley,** (1928) G.L.R. 527, 533.

Whether or not (1) the defendant had any interest in the insurance moneys rendering them liable to be attached or (2) the plaintiff had any legal or equitable right to such insurance moneys was really answered by two English cases, unless it were possible to distinguish them. The first of those was **Harrington Motor Company Ltd., ex parte Chaplin,** (1928) Ch. 105; the other was **Hood's Trustees v. Southern Union General Insurance Company of Australasia Ltd.,** (1928) Ch. 793. On a careful perusal of those two cases His Honour was unable to find that the judgments turned on any question of company winding-up law or bankruptcy law. The property in each of the English cases vested by operation of law; in the present case it vested by operation of the deed of assignment. It was just as definitely and legally vested in the present case as in the other two. In the present case it was clear that: (1) The defendant had a policy covering a third-party risk; (2) The covenant in the policy was *inter alia* to indemnify the defendant against all sums for which the defendant should become legally liable for compensation in respect of injury to a third party. (3) An accident occurred which was covered by the policy. (4) Immediately on the occurrence of the accident there became vested in the defendant a claim for indemnity under the policy. (5) That claim constituted a chose in action. (6) The defendant assigned to a trustee for his creditors *inter alia* all his personal estate whatsoever, which included choses in action. (7) The amount of the indemnity due having been ascertained the trustee was entitled to receive it from the insurance company. (8) The defendant no longer had any interest in it nor had he had since the date of the assignment. (9) The plaintiff never had any interest in it. The result was that the charging order must be set aside and there must be a declaration that the trustee for the creditors of the defendant was entitled to take out of Court the money paid in by the insurance company. His Honour pointed out that in New Zealand the situation had been remedied by the Motor Vehicles Insurance Act, 1928, which, however, was not passed in time to affect the present case.

Solicitors for plaintiff: **Alexander Dunn,** Wellington.

Solicitor for trustee: **J. Stanhope Reid,** Lower Hutt.

Solicitor for Insurance Company: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Blair, J.

MEMORANDUM RE PROBATE PRACTICE.

Probate—Practice—Attestation Clause—Affidavit of Due Execution Not Required Merely Because Word "Both" or "Together" Omitted From Attestation Clause—Code of Civil Procedure, Rule 519.

BLAIR, J., in a recent memorandum *re* probate practice, stated that a question frequently arose as to the effect of Chapman, J.'s decision in **In re Eastwood, deceased,** 13 G.L.R. 112. In the note to Rule 519 in **Stout and Sim's Practice** (6th Edn.) on the authority of the above decision it was stated that if the words "together present at the same time" were omitted from the attestation clause an affidavit of due execution was required. **In re Eastwood** was an authority for the statement that if there were omitted from the attestation clause the words "present at the same time" then an affidavit of due execution was required, but the decision did not insist upon the inclusion of the word "together" or of the word "both." An attestation clause in the following form, though not as full as some other forms, complied with Section 9 of the Wills Act: "Signed by the testator the said A.B. as and for his last will and testament in the presence of us present at the same time who in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses." Owing to certain misconceptions as to the effect of **In re Eastwood** and the question being one of practice, His Honour had consulted four of his brother Judges, and they agreed that **Eastwood's** case went no further than above stated.

Blair, J. April 10; 11, 1930.
Wellington.

IN RE ORR: ORR v. PUBLIC TRUSTEE.

Family Protection—Power of Court to Make Suspensory Order—Family Protection Act, 1908, S. 33.

Application by widow under the Family Protection Act, 1908, for further provision out of the estate of her deceased husband. The testator left him surviving a widow aged 70 years and a son who was stone-deaf, aged about 48 years. The net estate after payment of the administration costs was £2,667. The testator by his will gave a legacy of £300 to his widow and directed that she was to be paid the whole income from the estate during her life, and after her death the corpus was bequeathed to the Wellington Hospital Board. No provision was made for the son. It appeared from the evidence that the son had received the sum of £1,000 under his grandfather's will and that, notwithstanding his disability, he had been industrious and thrifty and had been able to save during his life the sum of £600. Blair, J., upon a consideration of all the circumstances of the case held that the widow's claims took priority to the charity and that the testator had not fulfilled his moral obligations towards her, and accordingly ordered that she be paid an annuity of £185 with restraint on anticipation, such annuity to be charged on the whole estate with a direction to the trustee to revert to capital for any deficiency in income. The son had no need for immediate assistance but the question arose whether or not in the circumstances the Court could make a suspensory order in his favour. The case is reported on this point only.

Hay for plaintiff.
McGrath for J. F. Orr.
Ward for Wellington Hospital Board.
Kelly for Public Trustee.

BLAIR, J., said that the son did not contest the widow's claim, and so as not to conflict with her asked only for a suspensory order similar in terms to that made by Smith, J., in **In re Birch,** (1929) G.L.R. 121. Although the son was not a plaintiff in the proceedings, he was, His Honour thought, entitled to have the widow's application treated as for him also. Smith, J., in **In re Birch** discussed the power of the Court to make suspensory orders, and expressed disagreement with the views on that point expressed by two of the Judges in **Welsh v. Mulcock,** (1924) G.L.R. 169. His Honour adopted the views expressed by Smith, J., on that matter. The son, His Honour thought, was deserving of consideration because he suffered from a serious permanent disability which one day might have grave consequences to him. The fact that he had demonstrated that he was of a thrifty disposition was in his favour. His position at the present time was that he did not need assistance and could afford to wait until the necessity for provision for the widow had ceased. His Honour thought him entitled to the suspensory order asked for.

Solicitors for plaintiff: **Mazengarb, Hay and Macalister,** Wellington.

Solicitor for J. F. Orr: **J. J. McGrath,** Wellington.

Solicitors for Wellington Hospital Board: **Brandon, Ward and Hislop,** Wellington.

Solicitor for Public Trustee: **Public Trust Office Solicitor,** Wellington.

Ostler, J. April 9; 15, 1930.
Auckland.

NEVILLE v. EDWARDS.

Licensing—Offences—Illegal Sales—Sale During Prohibited Hours by "General Hand" Without Knowledge of and Contrary to Instructions of Licensee—Duties of "General Hand" Including Serving in Bar During Part of Day—Licensee Liable for Offence—Licensing Act, 1908, S. 190.

Appeal by way of rehearing from the decision of Mr. F. K. Hunt, S.M., convicting the appellant of the offence under S. 190 of the Licensing Act, 1908, of selling liquor during the period

when his licensed house was directed to be closed. On 21st January, 1930, at 7.55 a.m. one Barker entered the Alexandra Hotel of which the appellant was licensee, and he was there served with liquor by one Chennery, an employee of the appellant. At about the same time Chennery served one McMasters, who was a lodger in the hotel, with a drink. The appellant was not in the bar at the time, and he did not know that either person had been served with liquor. Chennery as his excuse for supplying Barker said he thought Barker was going to book in as a lodger. Chennery said that he had been told by the appellant not to supply liquor to anyone not a lodger in the morning. Chennery's position was what was called in the award relating to hotel employees a "general hand." Such an employee received lower wages than a barman and he was not employed for the whole of his time in the bar. He did general cleaning work about the hotel. If required he could be called on to serve in the bar for not more than one-third of his working hours. Chennery's hours of service in the bar was in the lunch hour and from 4 p.m. to 6 p.m. At the time Barker was served Chennery had the keys of the bar and was engaged in cleaning it.

McVeagh for appellant.
Meredith for respondent.

OSTLER, J., said that the question arising was whether the appellant could properly be held liable in the circumstances for the illegal sale of liquor. In His Honour's opinion he could. In his view the case came within **Tocker v. Mercer,** (1917) N.Z.L.R. 156; **Crabtree v. Townsend,** (1922) G.L.R. 251; and **Woodley v. Lawrence,** (1924) N.Z.L.R. 1153. His Honour thought that there could be no question from the facts that Chennery had a general authority from the appellant to sell liquor to lodgers, therefore at the time he made such illegal sale he was possessed of a general authority to sell liquor on behalf of the licensee. His Honour referred to **Tocker v. Mercer,** (*cit. sup.*) at p. 162, per Hosking, J., The facts of the present case, in His Honour's opinion, brought it within the principle stated by Hosking, J. It was not within the facts of **Jull v. Treanor,** 14 N.Z.L.R. 513, or **Kenning v. Forster,** (1919) N.Z.L.R. 156. The employee in the present case was a part-time barman, familiar with the selling of the various liquors, and no doubt authorised by the appellant to make legal sales any time he was in the bar. The fact that he exceeded his authority and made the sale contrary to his instructions did not protect the appellant.

Appeal dismissed.

Solicitors for appellant: **Russell, Campbell and Co.,** Auckland.
Solicitors for respondent: **Meredith and Hubble,** Auckland.

Ostler, J. April 4; 15, 1930.
Auckland.

SORENSEN v. LEVIEN AND OTHERS.

Infants—Custody—Jurisdiction—Supreme Court on Decree Nisi of Divorce Giving Custody of Children to Petitioner Until Further Order of Court—Subsequent Orders by Magistrate on Complaint Under Child Welfare Act Committing Custody of Children to Superintendent Under Act and Fixing Sums Payable by Petitioner for Maintenance of Children—Orders of Magistrate Valid—Not Necessary for Order for Committal of Child to Care of Superintendent to Specify Period of Committal—Child Welfare Act, 1925, SS. 13 (4), 16, 21, 22, 23, 31, 45.

Motion for writ of certiorari for the removal into the Supreme Court of certain orders made by Mr. F. E. Levien, S.M., under the Child Welfare Act, 1925, in respect of three children of the plaintiff. The plaintiff, a married man with three sons and a daughter, in 1925 commenced divorce proceedings against his wife under which a decree nisi was pronounced on 2nd May, 1929. In that decree the plaintiff was given the custody of his three sons "until the further order of the Court." On 3rd August, 1929, the plaintiff could have obtained a decree absolute and an order for the permanent custody of the three children, but he did not do so. In July and August, 1928 (sic) complaints were laid by a constable at Pukekohe, and by the Child Welfare Officer, under S. 13 of the Child Welfare Act, 1925, that the three children were not under proper control, and on 7th August, 1929, those complaints were heard before the Stipendiary Magistrate at Pukekohe, and he made an order under S. 13 (4) in the case of each child ordering that he be forthwith committed to the care of the Superintendent appointed under the Child Welfare Act. The ages of the three children were fixed by the Magistrate under S. 40 of that Act as approximately 12, 10, and 6 respectively. Later on the Magistrate made an order fixing certain sums to be paid by the plaintiff as maintenance for his children. The plaintiff asked that the order for committal and the order for maintenance be quashed as having been made without jurisdiction.

Fotheringham in support.
Meredith to oppose.

OSTLER, J., said that two grounds were relied on by the plaintiff. The first ground was that in the order of committal no period was specified. It was contended that on the true construction of S. 13 (4) of the Child Welfare Act, 1925, when an order was made for the committal of a child to the care of the Superintendent the order must state the period for which the child was committed. His Honour, after quoting S. 13 (4), observed that the Magistrate had an alternative procedure open to him. He might either make an order for the committal of the child to the care of the Superintendent, or he might place the child under the supervision of a Child Welfare Officer to be named in that behalf. It was contended that the words "for such period as may be fixed in the order" referred to both the alternative orders that could be made. A close perusal of the whole of the statute, however, convinced His Honour that that was not the intention of the Legislature. A complete code had been enacted for the control of an infant placed under the care of a Superintendent, whereas no such code had been enacted for the control of a child placed under the supervision of a Child Welfare Officer and such an officer had merely a vague and unspecified right to supervise the control of the child which was still exercised by its guardian. The control of a child who had been committed to the care of the Superintendent was to continue till the child reached 21 years of age, subject to the right of the Superintendent to discharge such child before reaching that age: Ss. 21 and 23. S. 22 gave the Superintendent power even after the child had attained 21 in certain cases to apply to a Magistrate for an order extending that period of guardianship. By S. 16 on the making of an order committing a child to the care of the Superintendent he had to the exclusion of any other person all the rights of a guardian of the child. By S. 18 if a child was discharged by the Superintendent before attaining 21 then the rights of the child's former guardian revived. All those provisions were quite inconsistent with the fixing of a period in an order committing a child to the care of the Superintendent. Moreover, S. 31 provided that when a child was brought before a Children's Court charged with any offence the Court might make an order committing that child to the care of the Superintendent. In that section there was no mention of a period of time to be fixed by the Court. Those provisions convinced His Honour that it was the intention of the Legislature that when an order committing a child to the care of the Superintendent was made no period was to be fixed by the Court making the order. It was noteworthy that the regulations made under S. 45 of the Act showed that the Governor-General in Council so read S. 13: see New Zealand Gazette, p. 1111. Counsel had referred to the English Children's Act, 1908 (8 Ed. VII c. 67). A perusal of that Act, however, showed that its provisions were very different from those of the New Zealand Act, and were really of no assistance in construing our Act.

The second ground upon which it was contended that the orders were made without jurisdiction was that the plaintiff had by the order of the Supreme Court in the decree nisi been given the custody of those children until the further order of the Court. It was contended that the orders made by the Magistrate purported to interfere with the jurisdiction of the Supreme Court in a *lis pendens*. Such cases as **Craxton v. Craxton,** 23 T.L.R. 527, and **Brown v. Brown,** 3 C.L.R. 373, were merely illustrations of the principle that where two parties had engaged in litigation in the Supreme Court, it was not competent for either party to commence litigation dealing with the same matter and against the same party in an inferior Court. The superior Courts would not allow their jurisdiction to be ousted or whittled away by any such proceedings. In a divorce action, however, the jurisdiction which was exercised by the Court in giving custody of the children to one or other of the parties was a jurisdiction *inter partes* and the Court merely decided in the interests of the children themselves whether it would disturb the common law right of guardianship given to the father

or whether it would confirm him in his common law rights, see **Stark v. Stark,** (1910) P. 190. It was true that an order of guardianship was an order *in rem*, but all the Court had done in the present case was to confirm the plaintiff in his common law right *in rem* to the guardianship and custody of his three sons. The jurisdiction of the Supreme Court was not to be interfered with unless it was made clear by the Legislature that Parliament so intended. In His Honour's opinion the Child Welfare Act showed clearly that Parliament intended S. 13 in the special class of cases there mentioned to supersede all the rights of guardianship and custody whether given by the Common Law or by a Court order in divorce proceedings. S. 13 provided that if any child came in the class of a neglected, indigent or delinquent child, etc., the right of guardianship could be taken away from any person having the custody of the child. The words were wide enough to cover the case of a parent who had been given custody by the Supreme Court. It was not to be supposed that Parliament intended that a parent who in divorce proceedings had been given custody of his or her children should be exempt from the provisions of the Act and that it was not intended to apply to cases where the parents had been before the Divorce Court. But the plaintiff's contention involved that absurdity. His Honour thought it clear from a perusal of the Act that Parliament intended not to take away but to suspend the jurisdiction of the Supreme Court in the special class of cases mentioned in S. 13. That was made clear, in His Honour's opinion, by S. 18 of the Act which provided that where a child who had been committed to the care of the Superintendent ceased to be an inmate of an institution under the Act before attaining 21 then the right of custody that had been taken away from the guardian revived unless the Supreme Court made some other order. That section showed, in His Honour's opinion, that the Legislature was mindful of the fact that, in the special class of cases they were legislating for, the jurisdiction of the Supreme Court might be suspended. His Honour's attention had been drawn to a Canadian case, **Re Maher,** which was noted in **Vol. 28 Eng. & Emp. Dig.,** 256. Unfortunately the case was not available nor was the Ontario Statute therein referred to. The question there considered was apparently whether notwithstanding an order under the Act the Supreme Court had power to make a subsequent order dealing with custody. It was not necessary to determine that question in the present case. For the reasons stated His Honour held that the plaintiff had failed to show that the orders were made without jurisdiction.

Motion dismissed.

Solicitors for plaintiff: **Fotheringham and Wily,** Auckland.

Solicitors for defendants: **Meredith and Hubble,** Auckland.

Smith, J. December 7, 1929; April 11, 1930. Auckland.

BURTON v. DOVE & CO. LTD.

Practice—Costs—Payment Into Court—Claim for General Damages and Two Heads of Special Damages—Separate Sums Paid Into Court In Respect of Separate Items of Claim—Plaintiff Recovering in all More Than Total Amount Paid Into Court But Less in Respect of Heads of Special Damage—Plaintiff Awarded Costs as on Claim for Full Amount Recovered Less Certain Deductions in Respect of Items for which Less Recovered than Paid Into Court—Code of Civil Procedure, R. 556.

Question of costs reserved. The plaintiff sued the defendant company for damages caused by the negligence of the defendant company's servant in driving a motor car, and thereby colliding with the plaintiff, whereby he suffered physical injuries and was unable to attend to his business. The plaintiff claimed £500 for general damages, and £85 17s. 10d. as special damages being £400 for the loss of profits in his business and £85 17s. 10d. for medical expenses and the like. The defendant company admitted liability for the negligence causing the collision, and also that the plaintiff had suffered certain injuries which rendered him for a time unable to carry on his business, but generally denied the damages, and paid into Court the sum of £190 in respect of the claim for general damages, the sum of £125 in respect of the claim for special damages for loss of business, and the sum of £85 in respect of the claim for special damages for medical expenses and the like. At the trial counsel for the plaintiff agreed to treat the sum of £85 paid into Court as a satisfaction of the claim for £85 17s. 10d., and that item was therefore not litigated. The jury awarded the sum of £350 for general damages, as against £190 paid into Court; but it awarded only £50 in respect of the claim for loss of profits, in respect of which £125 had been paid into Court. They also returned a verdict, as they were directed to do, for the claim of £85. The plaintiff thus recovered on the whole cause of action the sum of £485, as against a total sum of £400 paid into Court.

Leary for plaintiff.

Richmond for defendant.

SMITH, J., said that the defendant's counsel submitted that the defendant was entitled to the costs of the day, as on two claims for £400 and £85 17s. respectively, and submitted that the plaintiff was entitled to costs on the issue of general damages on which he recovered £350. His Honour was unable to accept that contention. Although there was only one cause of action, the defendant was entitled, His Honour thought, to pay into Court separate sums in respect of the separate items of claim: cf. **Weir v. Harwood,** (1918) G.L.R. 632. If the plaintiff did not accept the whole of the amount paid in, so as to satisfy his cause of action, he was not entitled to take any of the money out of Court: **Maple v. Shrewsbury,** 19 Q.B.D. 463. In the present case, the plaintiff did not accept the total amount paid into Court, but went to trial on the whole cause of action. The jury awarded him, in all, more than the total amount paid into Court, but in respect of one important item of claim he recovered less. The plaintiff might, His Honour thought, have reduced the litigation by notifying the defendant that he (the plaintiff) would accept the sum of £125 in satisfaction for the loss of profits, although it could not have been paid out to him until the whole cause of action had been disposed of. That was, in effect, what the plaintiff did with regard to the claim for £85, and that claim was not litigated. But the amount paid into Court in respect of the claim for loss of profits was not accepted and that claim became a major issue in the action. As the plaintiff recovered less on that issue than the amount paid into Court, His Honour thought that the proper course was to make some allowance to the defendant, pursuant to what was termed by Sim, J., in **Cates v. Glass,** (1920) N.Z.L.R. 37, 55, "the spirit, if not the letter of R. 556." The order of the Court was, therefore, that judgment be entered in the action for the plaintiff for the amount awarded. Subject to the deductions to be mentioned, the plaintiff would have costs according to scale as on the sum of £485, together with all necessary disbursements to be fixed by the Registrar. The plaintiff would also have witnesses' expenses (except in relation to the issue of loss of profits), the amount thereof to be ascertained by the Registrar. The amount so ascertained should be subject to the following deductions: (a) 6 per cent. on the sum of £85; (b) 6 per cent. on the sum of £275, being the difference between the sum of £400 claimed for loss of profits and the sum of £125 paid into Court; (c) the expenses of defendant's witnesses in relation to the issue of loss of profits, the same to be ascertained by the Registrar. His Honour made no deduction from the costs of preparing for trial, as the amount recovered by the plaintiff on the first issue was sufficient to carry that allowance.

Judgment would be entered for the plaintiff for the final balance. The moneys paid into Court would be applied in satisfaction of the judgment, and should be paid to the plaintiff by the Registrar without further order of the Court.

Solicitors for plaintiff: **Bamford, Brown and Leary,** Auckland.

Solicitors for defendant: **Buddle, Richmond and Buddle,** Auckland.

"Our Judges are almost all able, and they are all incorruptible. The best of our advocates are eloquent, courageous, and high principled."

—Lord Birkenhead.

Transmissions

UNDER THE LAND TRANSFER ACT.

(By ROY FELLOWES BAIRD).

[*The views here expressed must not be regarded as binding upon the author in his official capacity as a District Land Registrar, nor, of course, are they in anyway binding on other District Land Registrars.*]

(*Continued from page 57.*)

In the case of registration of the original executors or administrators there are few difficulties; but as the right to registration of their successors presents many difficulties it may not be out of place to trace the succession to such personal representatives.

By the common law the duties of an executor were, in their order,—*first*, to bury the dead in a manner suitable to the estate he had left behind him; *secondly*, to prove the will in common form if its validity were not challenged, but in case its validity were challenged to prove the will in solemn form *per testes*; *thirdly*, to make an inventory of all the goods and chattels of the deceased, whether in possession or in action; *fourthly*, to collect such goods and chattels, which were called the assets (from the French *assez* meaning enough); *fifthly*, to pay the funeral and testamentary expenses and then the debts according to their legal order of priority; *sixthly*, to pay over the legacies in their legal order of priority; *seventhly*, to pay over any *residuum* to the person entitled: Blackstone's Commentaries, II pp. 508 *et seq.* These duties may be called the *executorial* or the *administrative* duties and are performed by the executor as representing the testator. Statutory additions have since been made to these duties.

It is of the essence of the office of an executor that he have some of the foregoing duties cast upon him. Unless he is directed to pay the debts and legacies a person cannot be granted probate as executor according to the tenor of the will—*In re Brisco*, 34 N.Z.L.R. 1058; 17 Gaz.L.R. 744; *In re Salt*, 34 N.Z.L.R. 727; 17 Gaz.L.R. 518—unless there be a duty or bequest annexed to the appointment of him by the name of trustee: *Re Benson*, 15 Gaz.L.R. 64; *In re Brodrick*, 16 Gaz.L.R. 80; *In re Wilkie*, (1918) Gaz.L.R. 249.

By Section 13 of the Public Trust Office Act, 1908, an executor or administrator, with or without the will annexed, may, with the consent of the Supreme Court, appoint the Public Trustee as executor or administrator in his stead, unless expressly prohibited from so doing. This appointment is not made by the Court but by the executor or administrator with the leave of the Court: *In re Steele*, 13 Gaz.L.R. 365. Where an executor or administrator is absent from New Zealand for six months without leaving a lawful attorney, or desires to be discharged from the office, or becomes incapable of acting, or is guilty of misconduct in the office, the Court may discharge or remove him and appoint another in his stead under the powers contained in Section 37 of the Administration Act, 1908. It is not necessary for the purpose of exercising this power of removal that the executor should have done anything immoral or criminal, it being sufficient ground if he has caused needless delay and expense: *In re Watts*, (1917) N.Z.L.R. 791; Gaz.L.R. 477. When the Court exercises this statutory power and makes a new executor it has no jurisdiction to increase the number of executors: *Re Curtis*, (1916) Gaz.L.R. 29. The executor so appointed by the Court in the place of a former executor is an ordinary executor and not merely an administrator: *In re Cotterill*, 32 N.Z.L.R. 784.

In other cases the Court will, where it sees sufficient cause, take into consideration the interests of the estate and issue letters of administration in such form as it deems suitable and will, if it thinks such course necessary, revoke a probate or recall a previous grant of administration.

Administration *durante absentia*, formerly granted where the executor was out of the jurisdiction of the Court, has been largely displaced in New Zealand by the operation of the Public Trust Office Act.

Administration *durante dementia* is a grant to enure for the duration of the insanity of the executor: *In re McIndoe*, 28 N.Z.L.R. 104.

Administration *durante minore aetate* is granted to last until the executor is no longer a minor: *In re Matheson*, 27 N.Z.L.R. 99. Such an administration granted where both of two executors are under age ceases when the first comes of age: *Taylor v. Watts*, 1 Freeman (K.B.) 425. The administrator under this grant is an ordinary administrator with full powers until the minor comes of age: *Cope v. Cope*, 16 Ch. D. 49.

Administration *pendente lite* is granted where litigation is pending and it is desirable that someone should act in the estate. The administrator acting under such a grant has all the powers of an ordinary administrator except that of distributing the residue of the estate: *Re Toleman*, (1897) 1 Ch. 866.

Administration *de bonis non administratis* (usually abbreviated as *de bonis non*) is given where an estate has been partially administered, as happens where an executor or administrator, who has taken a grant, dies, departs from the locality, or refuses or becomes unable to complete the administration: *In re Smith*, 16 Gaz.L.R. 201.

Administration *cum testamento annexo* is granted where there is a will but either no executor has been appointed in express terms or by implication, or there is a failure in the appointment by death or renunciation of the executor or otherwise. The will is set out as for probate but the grant by the Court is in the form of letters of administration. The administrator, who is referred to with all solemnity as an *administrator cum testamento annexo*, acts according to the directions of the will but is liable as an administrator.

When revoking probate and issuing letters of administration *cum testamento annexo*, in *Warren v. Milsom*, (1919) Gaz.L.R. 445, Chapman, J., made the following quotation from the judgment of Sir Francis Jeune in *Re the Goods of Loveday*, (1900) P. 154, 156: "After all the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto," and he added, "I can see no good reason why the Court should not take fresh action in regard to an estate when it is made clear that its present grant has turned out abortive or inefficient. If the Court has in certain circumstances made a grant in the belief and hope that the person appointed will properly and fully administer the estate, and it turns out the person so appointed will not, or cannot, administer, I

do not see why the Court should not revoke an inoperative grant and make a fresh grant."

Grants of probate are sometimes made to persons as attorneys of the persons who have been appointed executors by the will but are outside the jurisdiction of the Court. The person who is given such a grant is *in loco executoris*. On a grant to the attorney of the executor the estate vests in such attorney for the lifetime of the executor but ceases on such executor's death as the attorney's power to act for his principal has then ceased: *Webb v. Kirby*, 7 De G.M. & G. 376; *Suwerkrop v. Day*, 8 Ad. & E. 624. A grant may, however, be made to a non-resident executor: *In re Wallen*, (1926) N.Z.L.R. 729.

It will be noticed that the jurisdiction over the estates of deceased persons formerly in the hands of the Church officer termed the "Ordinary" is now exercised by the Court and the real estate of a deceased person vests in his executor or administrator as if it were personalty. There is, however, no alteration in the rules as to the transmission of the estates upon death of such personal representatives. Allowing for the change in the jurisdiction the chain of representation to a deceased person is still aptly set out in Blackstone's familiar statement: "The interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor of A's executor is to all intents and purposes the executor and representative of A himself; but the executor of A's administrator, or the administrator of A's executor is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of A is merely the officer of the ordinary, prescribed to him by Act of Parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator, and this administrator, *de bonis non*, is the only legal representative of the deceased in matters of personal property." (Vol. II p. 506).

It should, however, be noticed that although an executor takes by virtue of the will it is necessary for evidentiary purposes that probate be taken out. An order for probate without actual grant does not prove the will: *Mahamidu Mohideen Hadjiar v. Pitchey*, (1894) A.C. 437. Hence if the executor of the original testator dies before he takes out probate, the executor of such executor does not become executor of the original testator: *Isted v. Stanley*, 3 Dyer 372a; *Day v. Chatfield*, 1 Vernon 200. Nevertheless, where an executor died after grant but before sealing of probate, in Queensland, Lukin, J. instructed that the grant of probate be sealed and issued: *In re Holroyd*, (1921) Q.W.N. 32. If the will of the original testator is proved outside the jurisdiction and the will of his executor is proved inside the jurisdiction, such executor of the executor does not become the executor of the original testator: *Twyford v. Traill*, 7 Sim. 92, 104. It was laid down by Lord Romilly, M.R., that an executor cannot accept the office in part and reject it in part, and so if he accepts the office under the will of the immediate testator he accepts the office of executor of the will of any person being administered by the immediate testator and becomes the executor under the wills of any of the original testators: *Brooke v. Haymes*, L.R. 6 Eq. 25. Thus if A makes B his sole executor, who proves his will, and then dies, leaving C his executor, then if C proves B's will without noticing that of A, he becomes the personal representative of both B and A; but C is at liberty, if he pleases, to prove the will of B and at the same time to renounce the probate of the will of A before taking probate of the will of B: *Hayton v. Wolfe*, Cro. temp. Jac. 64; *Wankford v. Wankford*, 1 Salk. 308.

With the exceptions of the power of an executor to transmit his interest to the executor of his own will and of the powers given by Section 13 of the Public Trust Office Act, 1908, and Section 37 of the Administration Act, 1908, there is no power for an executor or administrator to assign his office as by the common law it was not assignable: *Bacon's Abridgment, tit. Executors and Administrators*, B2; *Bedell v. Constable*, Vaughan 177, 182. So long as the executor lives he represents the person of his testator. He is *eadem persona cum defuncto*: *Taylor v. Glass*, (1912) S.C. 169. While he lives the executor has the disposal of the estate; but when he dies his authority has ceased and the property goes to the use of the testator whose executor he was. The executors of such executor take the property not as part of the estate of the executor but as the estate of the original testator and hold it not as executors of such executor but as executors of the original testator: *Bransby v. Grantham*, 2 Plow. 525. The ultimate executor thus becomes the executor of the original testator and the legal estate in the property follows the office: *Barr v. Carter*, 2 Cox 429.

The title of the executor is derived not from the probate but from the will: *Chan Kit San v. Ho Fung Hang*, (1902) A.C. 257, 260. So when a grant has been made to a person *in loco executoris* this does not break the chain of representation through the executors. Examples of such grants of administration *cum testamento annexo* granted under a power of attorney for the use and benefit of another, administration *durante minore aetate*, etc.: (*Williams on Executors*, 11th edn., p. 175). The reason for this is that in such cases, although the administrator *durante minore aetate* of an executor of an executor represents the original testator because of being *in loco executoris*, (*Anon.* 1 Freeman, (K.B. 288), the chain follows through the persons appointed by the will and not through those to whom the Court has given a mere limited grant. This is well illustrated by the case of *In re Donna Murgiua*, 9 P.D. 236. The attorney of the executor who lived abroad proved inside the jurisdiction the will of a foreign testator. Such foreign executor afterwards died and the attorney of his executrix then proved the will of such foreign executor inside the jurisdiction and became the personal representative inside such jurisdiction of the original testator. On the other hand, a grant of letters of administration to the attorney of a widow, who has not herself taken out administration confers no standing on such widow to make her a personal representative: *In re Rendell*, (1901) 1 Ch. 230.

If there are several executors appointed and one of them dies, leaving one or more of his co-executors

living, no interest in the executorship is transmissible to his own executor, but the whole representation survives, and will be transmitted ultimately to the executor of the surviving executor, unless he dies intestate. Thus if A makes B and C executors, then B makes J.S. executor and dies, and afterwards C dies intestate, the executor of B shall not be the executor of A, because the executorship wholly and solely vested in C by survivorship: *Williams on Executors*, 11th edn., p. 176.

If probate is granted to an executor reserving the right to grant probate to another and such other has absented himself so long as to appear to have died and does not answer citation, the executors of the executor who has acted are considered as executors of the original testator: *In re Reid*, (1896) P.D. 129; *In re Noddings*, 2 Sw. & T. 15.

If two executors are appointed by a will and one proves and then dies and the remaining executor renounces, the original testator becomes intestate *in law*: *House v. Lord Petre*, 1 Salk. 311. If one executor renounces in the life-time of another he may subsequently retract his renunciation: *Arnold v. Blencowe*, 1 Cox 426. The Court will usually allow retraction of renunciation of probate if administration has not been sealed: *McDonnell v. Prendergast*, 3 Hagg. Eccl. 212. In New Zealand there is no statutory provision forbidding an executor to retract his renunciation. If, however, one who has renounced subsequently desires to retract such renunciation the Court is not bound to allow it: *West v. Willby*, 3 Phill. 374. The Court will for good cause refuse in like manner to allow an administrator to retract a renunciation: *In re George Park*, 6 Jur. N.S. 660. Where one of several executors had renounced but after the death of his co-executors who had proved the will desired to retract his renunciation, the Court refused to grant him probate and granted him letters of administration *cum testamento annexo* so that a practice might not arise which would make it difficult to follow the chain of representation: *In re William Thorndon*, 3 Add. 273. Where a person has been appointed executor and trustee but has not proved the will or taken upon himself the execution of the trusts or intervened in them, it has been held necessary that a proper deed of disclaimer be obtained from him: *Hackett v. Hackett*, (1922) N.Z.L.R. 242, 247. One who had renounced administration was allowed, for sufficient cause, to retract such renunciation after the death of the person who had obtained administration: *In re Amy Heathcote*, (1913) P. 42.

(To be continued)

Chief Justiceship of Australia.

The *Law Institute Journal*, the official organ of the Law Institute of Victoria, speaking of the recent appointment of His Honour Sir Isaac Isaacs to the office of Chief Justice of the High Court of Australia, says: "The appointment of His Honour to the highest judicial office in Australia, an office for which his high legal attainments and his distinction as a scholar so eminently fit him, has met with the unanimous commendation of all members of the legal profession in Victoria."

Barristers' Qualifications.

The "Backdoor" Method.

If, at a time when systems of examination are being made the object of general animadversion, the legal profession should begin to call for the imposition of an examination as the sole means of approach to a status to which it has hitherto been only an alternative route, the phenomenon is at least curious enough to attract attention. There is some fear that the profession may be stampeded by a wickedly clever catchword and a false analogy from overseas conditions.

In New Zealand the distinction between barrister and solicitor is not the clear-cut logical division of *avocat* and *avoue*, nor even the equally definite, if less logical, traditional cleavage between barrister and solicitor that exists in England, Ireland, New South Wales and perhaps other British jurisdictions. With us, the difference between solicitor on the one hand and barrister-and-solicitor on the other, is that the former may undertake conveyancing work of every kind, give opinions, conduct litigation in any court so far as it involves documentary pleadings and processes, and act as advocate in every court with two exceptions; while the barrister-and-solicitor may do all this and, in addition, appear as advocate in the Supreme Court and Court of Appeal. The difference between solicitor on the one hand and barrister-who-is-not-a-solicitor on the other is, of course, the same, the barrister-who-is-not-a-solicitor being able to do substantially all that the barrister-and-solicitor can do, (apart from the taking of affidavits, the filing of documents, and a few minor matters), but only under instructions from another practitioner, himself a solicitor or barrister-and-solicitor.

As the law at present stands, a person admitted as a solicitor may immediately prepare conveyancing documents of the utmost responsibility, (and, what is often more responsible still, complete the transactions with which they are connected), may give any opinions that he can get people to ask him for, initiate and carry through on his own responsibility litigation however important, and act as advocate in the Magistrate's Court, before Justices, in the Warden's Court (with a jurisdiction unlimited in amount), in the Native Land Court and Appellate Court, before Magistrates exercising any additional jurisdiction, before arbitrators, in the Court of Arbitration (when lawyers are allowed there at all), in the Supreme Court in its bankruptcy jurisdiction, and in the Supreme Court in Chambers. In every such forum he opposes on equal terms any practitioner who may be a barrister. Only he may not act as advocate before Judges sitting in open court, whether in the Supreme Court or Court of Appeal.

Having for five years done as much of this work as he can get to do, whether in a one-man practice, in partnership, or as a managing clerk, he is entitled, by admission as a barrister, to discharge also the one reserved function, and address His Honour in open court. And they call this "getting in by the back door." Rather does it seem to be getting in by the high road, the hard road of practice and experience. The man who holds the status of barrister by right of five years' practice can at least point to something in

the nature of the old apprenticeship or pupillage which his brother qualified by examination may or may not possess.

The solicitor and the examined barrister have both passed the same examination in subjects of general knowledge, and in practical law. The latter has also given proof of his capacity to pass an examination, not very profound in its requirements, in International Law, Roman Law, Latin, and English or Philosophy. (In one of the three last-mentioned subjects a solicitor must also pass). It may be well enough that this further examination should, for the more responsible forms of advocacy, rank equally as a preliminary requirement with five years spent in the general practice of the law. The new proposition is that it is so much better a criterion that the other ought to be abolished.

If anyone familiar with the conditions of the profession were unhappily compelled to trust his liberty or his fortune to the advocacy of one of two newly-admitted barristers, of whom he knew nothing save that one had been admitted by virtue of five years' practice, without examination, the other by examination with no previous practice, there can be little doubt that the gentleman who came straight up in the elevator would be second choice to him who climbed the stairs.

The truth is that those rather indefinable qualities which distinguish the more capable of our brethren, young and old, from those who are less so, are qualities largely cultural, which can neither be acquired by the study of text-books nor assessed in a written examination where the identity of the candidate is scrupulously concealed from the examiner. Some people have them innately ; some never acquire very much of them ; others get them by that personal contact and tradition for which there is really no substitute. This seems to be recognised when it comes to the further step from barrister-and-solicitor to King's Counsel ; though to be consistent, those who advocate that a solicitor (in the New Zealand connotation of that term) should not proceed barrister except by examination, ought to call for a further examination before the next rank is conferred. When the value of an examination test is being considered, it may be pertinent also to remember that it is only within the last half-dozen years or so than any Supreme Court Judge has held even the bachelor's degree in law of the university ; and the advent of Masters of Law is still more recent.

It is open to argument whether, in the public interest, any further safeguard by way of examination is advisable in respect of those practitioners who are permitted to act as advocates in the Supreme Court than in respect of those who are to exercise every other function of the legal profession. The advocate stands in the limelight ; defective work is fairly evident to the public ; the charlatan is soon found out. Moreover, the court can often protect the client from some of the results of incompetence. Faulty work in the office is not so surely disclosed, nor can its consequences be so averted. This, therefore, is where it would seem necessary to impose the stricter test of competency. I am not decrying the need for legal study ; whether the academic standard for admission to the profession should not be raised is quite another issue. Merely I submit that for the special privilege of appearing robed in the Supreme Court the present qualification of a legal examination and legal experience is as likely to produce a competent advocate as the other present qualification of a legal examination and another examination.

The two modes have now been running side by side for many years, and their fruits should be evident. The onus lies on those who advocate the change to show that the one method has not operated to give us as capable advocates as the other.

A. E. C.

[This Journal will welcome further contributions on this subject. It is desirable that all contributions should bear the name or the initials of the contributor. Ed. N.Z.L.J.]

Taranaki District Law Society.

Annual Meeting.

The annual meeting of the Taranaki District Law Society was held in the Supreme Court Library, New Plymouth, on Tuesday, 29th April, 1930. Mr. G. M. Spence presided over an attendance of thirty members. The election of officers resulted as follows :

President, Mr. C. H. Weston ; Vice-President, Mr. F. W. Horner ; Hon. Treasurer, Mr. T. P. Anderson ; Council, Messrs. G. J. Bayly, S. Macalister, G. M. Spence, and J. C. Nicholson ; Hon. Auditor, Mr. I. W. B. Roy. Delegate to New Zealand Law Society : Mr. G. M. Spence.

Judicial Censure.

Views of Privy Council.

Censure on an unnamed judge of the High Court at Madras was passed by the Judicial Committee of the Privy Council in a judgment given on February 25th in an appeal against a decision of that Court. Lord Atkin, who delivered the judgment of the Board, said :

" Their Lordships regret that they cannot leave this case without adverting to the judgment of one of the learned judges in the Madras High Court, who allowed himself to say of the judgment of the subordinate judge that, from beginning to end, it was full of misstatements and special pleading. The learned judge did not proceed to specify any of the alleged misstatements, and counsel for the respondent was unable to refer their lordships to any. Their Lordships feel bound to express disapproval of judicial criticism couched in such a form. It is, no doubt, the right and the duty of an appellate judge to criticise fearlessly where necessity arises by pointing out judicial shortcomings in a lower Court, but respect for the judicial office and common fairness require both that the criticisms should be expressed temperately, and that the grounds for the criticism should be stated."

" There are good Judges and other Judges ; quiet Judges and tactful Judges. Every Judge should have a wife who should write above his bed, on behalf of the Bar, the motto : " Judges should be seen and not heard."

—Sir Patrick Hastings, K.C.

Australian Notes.

WILFRED BLACKET, K.C.

The charge of embracery made against Beckman and Davies, mentioned in my last letter, broke down at the Police Court. It had been initiated upon the truth of certain statements made by Beckman, but these upon investigation proved to be unreliable. Beckman seems from his own statement to have been in the habit of carrying about with him some poison admirably adapted to successful suicide, but he also seems to have had great disinclination to use it for that purpose. In Sydney a notable speculator long since deceased was wont to show to his friends the safety razor blade with which he was about to commit suicide. Several of his friends still treasure these blades and they may well do so, for they cost from £5 to £20 each. Mine cost a "fiver."

In *McGinty v. Dubbo Despatch*, libel, tried at Sydney, the defendant paid one shilling into Court, and the jury gave the plaintiff a farthing. Thereupon counsel for defendant asked that the verdict should be entered for the defendant, presumably for 11¾d. The Judge ruled that these must be postea to the plaintiff, but refused to certify for costs.

In *Tomlinson v. McDonald Garage Proprietary Ltd.*, negligence, tried at Melbourne, the plaintiff claimed on account of injuries sustained under remarkable circumstances. The defendant's premises, a large garage, caught fire, and a cylinder containing gas used for oxy-welding burst and its fragments flew in all directions. The plaintiff, who was in a yard a considerable distance away, was struck by one of these fragments and severely injured. The negligence alleged was that the defendants had not taken reasonable precautions against fire on their premises, and that they had not removed the cylinder when the fire was discovered. The plaintiff obtained a verdict for £150.

The whole system of Industrial Arbitration in New South Wales seems to be about to collapse. So long as the Courts and Boards were able to order an increase of wages upon every application, their awards were popular with the workers, but now that diminished wages are inevitable, these tribunals are of little use to anyone. Strikes against awards have occurred on several occasions—notably in the case of the timber workers—and when the Newcastle coal-owners wanted to reduce wages they did not trouble to make an application for variation to the Court but gave the men fourteen days' notice. That was nearly thirteen months ago, but the owners have not been prosecuted for a lock-out, nor has there been any application to the Court which made the still existing award for any variation. Events are happening so rapidly too, that the long delay involved in an application for variation makes it necessary to find some speedier method of re-arranging industrial matters. The Bavin Ministry, urgently pressed for funds required to meet public needs, has stated its intention to levy a tax of two or three per cent. on wages and the Railway Commissioner has announced alterations of working hours and other changes in wages and conditions without making application to any tribunal. There are two recent instances of the cost and delay in procedure of Industrial Courts which show their inability to meet the suddenly arising emergencies of to-day. In one case the Railway Commissioner had promoted an exceptionally able officer over the heads of some other officers: the appeal against this promotion has already lasted for some weeks at a cost of £1,500 to the Commissioner and this hearing is merely preliminary to another appeal. In the Bank Officers' case evidence has been heard during two years on the first two items of the claim and an interim award in respect of these will shortly be made, but there are 89 other items still to be considered. Nothing has yet been heard of the new and improved system of Industrial Arbitration promised by the Scullin (Federal) Ministry in November last.

Mrs. Emily Conrad of Sydney had some reason to believe that her husband was in the habit of taking a certain lady out in his motor car at night. Therefore she had two private detectives follow the husband on a night when he went out with Miss Eva McGeary, and she with a safety razor blade was able to slash each of them across the face. Prosecuted for having maliciously wounded Miss McGeary, Mrs. Conrad explained that she did not know that lady, and wished no harm to her, but had intended to mark her husband and another lady for identification in certain proceedings later on, and when the jury heard these things they rose up in haste and said she was not guilty of anything worth mentioning and so she was acquitted and discharged.

Another case relating to motor-cars has just been decided by Judge Thompson, at Parramatta, N.S.W., Quarter Sessions. A defendant, appropriately named William Tipling, had been convicted by a Magistrate upon a charge of driving a motor-car while under the influence of liquor. The facts were that the defendant had been found drunk in a car which was standing at the road side. He was at the driving wheel and the engine was running. On appeal His Honour quashed the conviction. He held that as there was no evidence of the car having been driven to the place where it was standing, the charge of "driving" it had not been proved. There can be no appeal from this decision, but that is not of much consequence for it must be a question of fact in every case whether the defendant was "driving" the car. Possibly in this case the decision would have gone the other way if there had been evidence that Mr. Tipling had started the engine, or had made any endeavour, however futile, to "step on the gas."

In a recent accident in Sydney a motorist recovered £25 damages from the owner of a dog that had got under the near-side wheel causing the car to hit a post.

In *Lapin v. Heavener Abigail and Others* (see my Notes, Vol. 5, p. 127) on appeal to the High Court the question whether a solicitor, who lends £89,000 during three years upon seventy-one securities, is a "money-lender" was not decided, the Court holding that the solicitor was not entitled to register the mortgage under which he claimed. On the question whether Abigail was a money-lender Sir Isaac Isaacs said: "The only mode of escape that occurs to me is simply to style Abigail a 'financier,' and under that colourless but euphemistic and dignified appellation, leave him to lend systematically at interest and on security, much as a money-lender does, but with susceptibilities saved, and immunity preserved." Any difficulty that might have arisen as to the true meaning of this dictum is fortunately avoided by the fact that it is *obiter*.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,—

Municipal Activities.

Out of the hundred-and-forty-odd remits considered at the recent conference of the Municipal Association, number 80, which was submitted by the executive committee of the Association, and adopted by the conference, is of particular interest to the profession. It reads thus:

> "That provision be made to prevent councillors taking part as barristers and solicitors or assessors in connection with actions in which their respective Councils are parties."

Whether any explanation of the reason for putting forth this proposal was given, I am unable to say. It would be interesting to have an opinion as to whether such a proposal, if carried into legislative effect, would be in the interests either of the public or the profession. That solicitors should not act in person in matters, such as applications for licenses, which come directly before councils of which they are members, may be conceded. But the remit refers only to matters coming before some independent tribunal, to which the "council"—meaning, no doubt, the corporation which the council represents—is a party. It is a truism that lawyers frequently give their services as members of local bodies, and by reason of their knowledge of affairs they are not the least valuable of the members of the average board or council. If they are to be permitted to discharge such services only at the cost of abandoning a portion of their practice which, with the present many-sided activities of local-body enterprise, is far from negligible, it will be necessary for them to consider whether they can afford the sacrifice. After all, a member of a council is in no better position than any other ratepayer in acting against its corporation, as long as he does not put himself in a false position by seeking "inside information" not placed on the table at one of its meetings, at which, of course, the public may attend and newspaper reporters are present.

I am, etc.,
"OBSERVER."

[The existing ruling of the General Council of the English Bar on this subject is as follows: "A barrister should not appear either for or against a county council or other local authority of which he is a member." Another ruling relevant to the matter is: "A barrister who is a member of a county council should not appear as counsel before a committee of such county council."—ED. N.Z.L.J.]

According to the recent annual report of the Sheffield Incorporated Law Society the proposed bill empowering the Law Society (Eng.) to raise a guarantee fund by means of compulsory contributions has received so much criticism that it does not appear practicable to proceed with it.

"Truth will out, even in an affidavit."
—Lord Justice Matthew.

Forensic Fables.

THE TEARFUL PERFORMER AND THE PLAINTIFF WITH A PAST.

There was Once a Tearful Performer in the King's Bench Division. He Knew All the Tricks of the Trade, but his Real Strong Point was the Sob-Stuff. He Often Appeared for Plaintiffs. First he would Give the Jury a Simple Outline of the Facts. Then he Assured them that he had no Wish to Work upon Their Feelings. Later, in a More Cooing Tone of Voice, he Reluctantly Went into the Harrowing Details. By the Time he Got to the Blasted Reputation, the Shocking Injuries, or the Agony of Mind (as the Case might be), there was not a Dry Handkerchief in Court.

So Formidable was his Advocacy that Insurance Companies and Newspapers Usually Settled Up on Hearing that the Tearful Performer had been Retained. One Fine Day, when his Engagements were Many, the Tearful Performer Rushed into Court Just in Time to Make the Final Speech for the Plaintiff in an Accident Case. He had not Heard Any of the Evidence, and his Agitated Junior only had Time to Inform him that the Plaintiff had Admitted in Cross-Examination a Conviction for Perjury at the Old Bailey Some Years Ago. The Tearful Performer was Undisturbed. He Begged the Jury not to allow themselves to be Misled by any Red Herring which his Learned Friend might Seek to Draw across the Track. He Reminded them that the Question was whether the Defendant's Driver had been Negligent, and not whether the Plaintiff's Evidence on Another and a Different Occasion had, or had not, been Accepted. The Tearful Performer then Asked the Jury what they Thought of

a Case which had to be Bolstered up by Deplorable Irrelevancies, and Invited them to Say that it was a Cruel Thing to Drag Out of a Crippled Man a Story which Must have Caused the Utmost Pain and Distress to his Innocent Wife and Children. And (Praying the Conviction in Aid) the Tearful Performer Enquired what was Better Calculated to Make a Man Absolutely Accurate in the Witness-Box for All Time than a Sentence of Imprisonment for Perjury. By the Time he had Got to the Bit about Praying the Conviction in Aid, the Tearful Performer was so Choked with Emotion that he could Hardly Proceed with his Address. And as at that Moment his Clerk Told him he was Wanted in Another Court he Left the Matter there. Was the Speech of the Tearful Performer a Success? It was. The Jury Gave the Plaintiff such Enormous Damages that the Tearful Performer Advised him to Accept Half the Amount rather than Run the Risk of a New Trial being Ordered.

Moral—TEARS BRING RELIEF.

Police Evidence.

Corroboration in Charges of Dangerous Driving.

The House of Commons a few weeks ago decisively rejected an amendment to the Road Traffic Bill which had for its object the requirement that upon a charge of dangerous or reckless driving there should be corroborative evidence in some material particular before a person should be convicted. The mover's argument was that a motorist ought not to be convicted, on the evidence of one policeman, of an offence for which he could be punished severely. But to place motorists in a different position from other people would, as the Solicitor-General said, be dangerous and irritating. There is no general rule of law requiring two witnesses to a criminal charge before a conviction can take place; the few exceptions are based upon reasons easily understood. It would be dangerous to treat police evidence as different from other evidence, as if a policeman's word were less trustworthy than that of other people. To do so would tend to lower the police in the eyes of the public. The correct attitude towards police evidence is that it is subject to the same tests as other evidence, and that its face value is no less, just as it is no more, than that of other witnesses.

Preparation of Wills.

In *In re Thomas Field, deceased*, before the Supreme Court of Victoria, Mr. Justice McArthur strongly denounced the practice of trustee companies in Victoria appointing auctioneers and commission agents to transact legal business in the country, particularly the preparation of wills. The Council of the Law Institute of Victoria views this practice with grave concern and is taking steps to arrive at some better understanding with the Associated Trustee Companies on the subject and to prevent a repetition of such practice as that which received the judicial censure.

Bench and Bar.

Mr. Cyril W. Tanner died on the 22nd inst., at Wellington. The late Mr. Tanner was born in Wellington in 1861, and was educated at Christ's College, Christchurch. He was articled in 1880 to Messrs. M'Donald and Russell, of Invercargill, and was admitted shortly afterwards as a barrister and solicitor. In 1888 he came to Wellington where he for many years practised in partnership with the late Mr. Hindmarsh, and, after the death of the latter, on his own account. Mr. Tanner retired a year or two ago from active practice. He was actively interested in public affairs and was for some time a Councillor of the City of Wellington. Twice he stood unsuccessfully for Parliament, once for the Wairarapa seat, and once for Wellington Central. The late Mr. Tanner was an enthusiastic chess-player and was for many years secretary of the New Zealand Chess Association.

The partnership previously subsisting between Messrs. F. C. and J. B. Jordan, at Auckland, has been dissolved. Mr. F. C. Jordan will continue to practise in partnership with Messrs. R. F. Jordan and W. E. B. Dunningham, at Auckland, and Mr. J. B. Jordan will practise at Auckland on his own account.

Mr. E. M. Kelly, who has been for some years on the staff of Messrs. Young, White and Courtney, has commenced practise on his own account at Wellington.

Mr. R. J. O'Dea, of Hawera, has been credited by the New Zealand University with gaining both scholarships in Law at the 1929 examinations. The statutes of the University preventing him from holding two scholarships, he receives the emoluments of the scholarship in Contracts and Torts, the scholarship in Roman Law going to the candidate next on the list.

Revenue Cases.

Appeals by the Crown.

Considerable criticism has been directed from time to time at the practice of the Crown in carrying adverse decisions in revenue cases, involving only small amounts so far as the individual taxpayer is concerned, from Court to Court and ultimately to the House of Lords, casting tremendous expense upon the taxpayer even if he should be ultimately successful. In some cases it is true that the Crown undertakes to pay the respondent's costs of appeals to the House of Lords, but this seems to be done only exceptionally. Delivering judgment in the House of Lords in a recent case, Lord Dunedin, with the concurrence of Lords Warrington and Atkin, made some very pungent observations on the matter. He said:

> "It is high time—and I say this insistently—that those who advise the Crown should make up their minds that the Crown can be wrong, and that it is not absolutely necessary to take every case, however trivial and simple, to this House because the Crown has been found to be wrong."

Procuration Fees.

Wellington District Law Society's Announcement.

The attitude of the Wellington District Law Society on the subject of the charging of procuration fees by solicitors is being clearly indicated to the public by the insertion at frequent intervals in the daily press of an announcement in the following terms:

"It being reported to the Council of the Wellington District Law Society that procuration fees have been charged by one or two solicitors in Wellington in connection with the raising of loans on mortgage, the Council wishes to announce to the public that the charging of procuration fees is not customary amongst the members of the profession in Wellington and the Council strongly disapproves of the practice, unless a special contract has been made in a special case."

Legal Literature.

The Law of Bills, Cheques, Notes and I.O.U's.

By J. W. Smith, LL.D.
1930 Revision by E. Borregaard, M.A.
(pp. ii; 184; xxiii: Effingham Wilson).

The fact that of this book there have already been 79,000 copies printed is the best evidence, not only of its being in great demand, but also of its undoubted usefulness. It is a very full summary of the law, and this edition brings the law up to date. The most recent authorities, as is pointed out by Mr. Borregaard, anent the liability of innocent parties, where the effect has been to alter in any degree the existing law, have been considered and the text brought up to date. The book should be of considerable value to the law student. As a concise statement of the law containing all essentials, and certainly no surplusage, it will enable him to grasp the principles readily. The book would be of greater value to the practitioner if the leading cases were referred to by name. The fact that there is no mention of any of the authorities reduces its value except to the layman. But to the layman who has need to consider this phase of our law the volume provides a ready reference. It is written in language which, while explicit and clear in its expression, is not so technical as to be intelligible only to the lawyer.

—C. A. L. Treadwell.

New Books and Publications.

Elementary Principles of Jurisprudence. By George W. Keeton, M.A., LL.M. (A. & C. Black). Price 15s.

Jarman on Wills. Seventh Edition. By C. P. Sanger and I. C. Willis. Three Volumes. (Sweet & Maxwell Ltd). Price £6.

Inwood's Tables of Interest and Mortality. Thirty-third Edition. By Sir William Schooling, K.B.E. (Crossby Lockwood). Price 11s.

Air Power and the Cities. By J. M. Spaight. (Longmans Green). Price 18s.

Legal History of Trade Unionism. By R. Y. Hodges, LL.M., and A. Winterbottom. (Longmans Green). Price 9s.

The Colonial Service. By Sir Anton Bertram. (Cambridge Press). Price 15s.

The Law Relating to Women. By E. Ling-Mallison, B.Sc. (Solicitors Law Stationery Society). Price 10s. 6d.

The Relation Between Barristers, Solicitors and the Public, or Lawyers and Their Clients. Third Edition. By a Barrister. (Effingham Wilson). Price 6s.

Rouse's Practical Man. Nineteenth Edition. By Albert Sanvil Oppe, B.A., and Charles Livingstone Milligan, F.I.A. (Sweet & Maxwell Ltd.). Price 24s.

Glen's Poor Law Act, 1930. Introduction by R. A. Glen. Index-Tables. By H. A. C. Sturgess. (Eyre & Spottiswoode). Price 15s.

Grotius Society Transactions. Volume 1. (Reprint). (Sweet & Maxwell Ltd.). Price 12s.

The Ames Foundation Year Books of Richard II. 1389–1390. By T. F. T. Plucknett. (Sweet & Maxwell Ltd.). Price 37s.

Law of Property in Land. By H. Gibson Rivington, M.A. (Oxon.). (Law Notes). Price 24s.

Palmer's Private Companies. Thirtysixth Edition. By A. F. Topham and A. M. R. Topham. (Stevens & Sons Ltd.). Price 3s.

Procedure in an Action in the King's Bench Division. By A. M. Wilshere. (Sweet & Maxwell Ltd.). Price 15s.

Everyman's Own Lawyer. By a Barrister. (Crossby Lockwood & Co.). Price 18s.

Paterson's Licensing Acts with Forms. Fortieth Edition. 1930. (Butterworth & Co. (Pub.) (Ltd.) Price 26s.

Crew's Company Law. Third Edition. 1930. By Albert Crew, LL.B., and W. G. H. Cook, LL.D. (Butterworth & Co. (Pub.) Ltd.). Price 9s.

Stone's Justices Manual. Sixty-second Edition. 1930. By F. B. Dingle. (Butterworth & Co. (Pub.) Ltd.). Price 43s.

Paget's Law of Banking. Fourth Edition. 1930. By Sir John Paget, Bart., K.C. (Butterworth & Co. (Pub.) Ltd.). Price 20s.

The Law of Stamp Duties on Deeds and other Instruments. By E. N. Alpe. Twentieth Edition. Revised and Enlarged by A. R. Rudall and H. W. Jordan. (Jordan and Sons, Ltd.). Price 18s.

Rules and Regulations.

Austria-Hungary. Notification by Controller of New Zealand Clearing Office regarding claims against the former Austro-Hungarian Government.—Gazette No. 32, 1st May, 1930.

Aviation Act, 1918. Amendment to the aviation regulations, 1921.—Gazette No. 32, 1st May, 1930.

Animals Protection and Game Act, 1921-22. General Regulations under Part III of the Act, respecting opossums.—Gazette No. 36, 16th May, 1930.

Education Act, 1914. Amendments to regulations relating to examinations in technology.—Gazette No. 37, 22nd May, 1930.

Motor Vehicles Act, 1924. Amendment of regulations of 12th December, 1924, relating to registration plates for licensing year commencing on 1st June, 1930.—Gazette No. 37, 22nd May, 1930.