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*"That there may be a strong Bench the profession should always be willing to give of its best for judicial service."*

*—Mr. Justice Trueman (Manitoba).*

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## Swadling v. Cooper.

In our last number we referred in these columns, when discussing the question of the proper form of issues in running down actions, to the recent decision of the House of Lords in *Swadling v. Cooper*. The only reports of that decision then available consisted of brief notes in the current English legal newspapers and upon these we suggested that the criticism of Myers, C.J., in the recent case of *Benson v. Chong* of the issues suggested in *Black and White Cabs Ltd. v. Anson* might now have to be read subject to the decision of the House of Lords in that case. A full report of *Swadling v. Cooper* is now available in the *Times Law Reports* (46 T.L.R. 597) and from this report it seems plain that nothing in that case is inconsistent with the judgments of our Court of Appeal in *Benson v. Chong*.

*Swadling v. Cooper* was not, as the first brief notices would lead one to suppose, a case dealing with issues as we understand them. For a proper understanding of that case and other recent English decisions on the subject of negligence and contributory negligence in collision cases it is necessary to bear in mind that the English practice is, except in special cases, not to submit specific issues to the jury. In *Dew v. United British Steamship Co.*, 98 L.J. K.B. 88, at p. 97, the present Lord Chancellor, then Sankey, L.J., said:

> "Although there are undoubtedly cases where specific questions may have to be left to a jury, that practice is not one to be encouraged. In most cases it is preferable, after a full and accurate summing-up, to leave two questions only to the jury: (1) Do you find for the plaintiff or for the defendant? and (2) If for the plaintiff, how much?"

But in New Zealand, of course, it is the invariable rule to submit issues. The English practice has been strongly criticised in our Courts. In *Stewart v. Mowat*, (1930) G.L.R. 256, 6 N.Z.L.J. 166, Reed, J., said:

> "It is undoubtedly very much simpler, but whether it would be in the interests of justice is another question. I very much doubt whether the obscure and difficult law of contributory negligence could be made clearer to a jury on a general question than when dealing with specific questions. The temptation to a jury, when not required to direct their attention to specific questions would be to throw on one side the refined niceties of the law and decide the matter on the bald question, whose fault was it, with a strong leaning in favour of the injured man."

These observations have now been re-affirmed in *Benson v. Chong* by our Court of Appeal, and added to as follows:

> "The legal principles that juries should apply to answering specific questions of fact can be much more clearly explained to them than by endeavouring to bring to their minds the intricate complexities of the law of contributory negligence generally, to be applied by them according to the very different ways in which they may view the facts. Is it to be wondered at that so many of the appeals in these cases in England are based on alleged misdirection or non-direction by the trial Judge?"

*Swadling v. Cooper* was an action brought by the administratrix of a deceased person under Lord Campbell's Act for damages for loss occasioned by the death of the deceased through the alleged negligence of the defendant while driving a motor-car along the road from Newmarket to London. The Newmarket-London Road is crossed at right-angles by a road leading from Saffron Walden to Cambridge. The defendant was proceeding in his motor-car from Newmarket towards London and was driving his motor-car about three feet from his near side of the road at a speed of between 30 and 35 miles per hour. The deceased was proceeding westwards from Saffron Walden to Cambridge on a motor-cycle; the car and the cycle came into collision at the cross-roads at a spot about four feet into the Newmarket-London road and opposite the south side of the Saffron Walden-Cambridge road. The defendant gave due warning of his approach to the cross-roads; no witness on either side heard any warning from the deceased. The distance from the position of the defendant's car, when he first became aware of the presence of the deceased, to the spot of the collision was not more than eleven yards. The learned trial Judge, Humphreys, J., following the usual practice, did not leave written issues to the jury. In the course of his summing up he directed them that, if they found that the accident was due to the negligence of both parties *substantially* there would be contributory negligence on the part of the deceased man and both would be to blame, and the jury would have to find for the defendant. Counsel for the plaintiff asked: "Does not the element enter into it, who was guilty of the last act of negligence?" To this the learned Judge replied: "Not necessarily. Whose negligence was it that *substantially* caused the injury?" The jury returned a verdict for the defendant. The Court of Appeal ordered a new trial on the ground that the learned Judge ought to have directed the jury that if they thought the deceased was negligent but the defendant, after the deceased was negligent, by taking reasonable care could have avoided him such negligence of the deceased was not, as a matter of law, negligence which contributed to the accident so as to prevent the plaintiff from recovering. The House of Lords has reversed this decision and upheld *in the circumstances* the direction of Humphreys, J. On the facts of the case there was no room for the application of the doctrine of last opportunity illustrated by *Davies v. Mann*, 10 M. & W. 546. The utmost limit of time between the moment when the defendant could have become aware of the deceased's approach and the moment of the impact was not more than one second; there could have been no time for the defendant to do anything to avoid the impact. The crucial question was, therefore, *in those circumstances* simply: "Whose negligence was it that *substantially* caused the injury?"

*Swadling v. Cooper* is not authority for saying that the question may be so simply stated for the jury in every case. The following observations of the Lord Chancellor as to the proper nature of a summing-up have, however, a general application and make a timely appearance:

> "In a summing up it is essential that the law should be correctly and fully stated, but it is hardly of less importance that it should be stated in simple and plain terms so that a jury unskilled in the niceties of legal phraseology may appreciate the direction which is being given to them. *Such direction should be adapted to the special circumstances of the case. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine.*"

# Court of Appeal.

Myers, C.J.
Herdman, J.
Blair, J.

July 11; August 29, 1930.
Wellington.

## ASPRO LTD. v. COMMISSIONER OF TAXES.

**Revenue—Income Tax—Deduction—Company—Directors' Fees—Company at End of Financial Year Fixing By Resolution Amount of Directors' Fees Payable out of Profits of that Year—Commissioner Not in Circumstances Bound to Allow as Deduction Whole Amount Fixed by Company—Land and Income Tax Act, 1923, S. 80 (2).**

Appeal under the Land and Income Tax Act, 1923, from a determination of the Magistrate's Court, removed by a consent-order into the Court of Appeal. The material facts were not in dispute. Messrs. G. R. H. Nicholas and A. W. Nicholas, manufacturers of and traders in a proprietary article known as "Aspro," incorporated the appellant in 1923 as a private company under the Companies Act, 1908. The consideration for the assets acquired by the company was £70,000 of which £20,000 was paid in shares of £1 each and £50,000 by the issue of debentures bearing interest at 10 per cent. per annum. The capital of the company was £20,000 represented by the 20,000 shares which were issued to the Messrs. Nicholas, each of them being the holder of one half the capital. The Messrs. Nicholas were and had been throughout the company's existence the sole directors as well as the sole shareholders of the company. For the first period of trading (a period of nine months) ending 31st March, 1924, the company paid them by way of directors' fees, a sum of £1,500 each, after payment of which there was a net profit of £1,418 made by the company; for the year ending 31st March, 1925, the company paid them by way of directors' fees a sum of £2,500 each and there was a net profit of £2,616: for the year ending 31st March, 1926, the company paid them by way of directors' fees a sum of £3,250 each and there remained a net profit of £3,170; for the year ending 31st March, 1927, the company paid them by way of directors' fees a sum of £5,000 each after which there was a net profit of £4,924; and for the year ending 31st March, 1928, the company paid them by way of directors' fees a sum of £5,000 each and there remained a net profit to the company of £5,145. In making his assessment of tax as against the company for the year last-mentioned the Commissioner disallowed £8,000 part of the £10,000 thus paid by way of directors' fees. To that assessment the company objected, and the learned Magistrate decided in favour of the Commissioner.

**Gray, K.C., and White** for appellant.
**Solicitor-General (Fair, K.C.)** for respondent.

MYERS, C.J., in the course of a dissenting judgment, said that the Commissioner admitted that the remuneration paid by a company to its directors, whether the amount were fixed after the profits were ascertained or antecedently, was a deductible item under S. 80 (2). The Acts relating to land and income tax had been frequently amended and several times consolidated, but such deduction had always been allowed under the existing system of taxation ever since (now many years ago) the original Land and Income Tax Act was passed; and the admission made on behalf of the Commissioner was, His Honour thought, properly made. But, in His Honour's opinion, the admission concluded the present case against the Commissioner if the remuneration fixed by the company was in fact paid to the directors, as admittedly it was. It seemed to His Honour that it was for the company, and the company alone, to say what amount it was to pay the directors as their remuneration. The alternative was that the amount to be paid to the directors was in effect to be determined by the Commissioner of Taxes, and for that view His Honour could find no statutory or other authority. The amount which the company might choose to pay its directors might seem to be excessive; but that, as it seemed to His Honour was a matter for the company itself to determine and for no one else. It would have been quite competent for the Messrs. Nicholas in the present case, had they thought fit, to require an agreement from the company on its incorporation to pay them £5,000 a year or any other sum as directors' fees, or a fixed sum and a share, however large, of the profits. Had such an arrangement been made His Honour did not see how it could possibly have been challenged by the Commissioner of Taxes. Or if, at the beginning of any year, a similar agreement were entered into in regard to remuneration for the year then commencing, His Honour did not see how it could be attacked by the Commissioner. That however was not done, but, having regard to the principles upon which companies did their business in accordance with legal sanction, His Honour could see no difference between such a course and the course which the company in fact adopted.

It was the almost invariable practice, except in the comparatively few cases where an antecedent agreement existed between a company and its directors, to fix the remuneration of the directors after the balance sheet for the year had been prepared and the profits had been ascertained. That was what was done in the present case. It was the fact of course that the two directors happened to be also the two, and the only two, shareholders of the company, but the remuneration was fixed by them not *qua* directors but *qua* shareholders. In other words it was the company that fixed the remuneration, and not the directors. The question in dispute must be decided on principle, and His Honour could not see what difference in principle there could be between a company consisting of only two shareholders and a company consisting of 200 shareholders. In each case the company was a separate legal entity, and the same principles of law applied to both. That was the view taken by the Court of Appeal in England in **Commrs. of Inland Rev. v. Sansom,** (1921) 2 K.B. 492, 516, 517. **Johnson v. Commissioners of Inland Revenue,** (1919) 2 K.B. 717, and **Roberts v. Hopwood,** (1925) A.C. 578, were, in His Honour's opinion, distinguishable.

It might be that private companies were disposed to pay fees to their directors which might be regarded as excessive. But it must not be forgotten that in a case like the present, where the company consisted of only two persons, it was in substance very much like a partnership though in law it was of course an entity separate and distinct from its members. If the Messrs. Nicholas had continued in partnership they would have been assessed to income tax separately in respect of the profits or income derived or earned by each of them. The controversy in the present case arose because, owing to the income tax being graduated, the company and the two Messrs. Nicholas would together pay in income tax a sum which the Solicitor-General stated was a little over £200 less than would be paid if the £8,000 which the Commissioner refused to allow were included in the company's return and not in the respective returns of the Messrs. Nicholas. In His Honour's opinion the appeal should be allowed.

HERDMAN, J., said that S. 80 (2) of the Land and Income Tax Act, 1923, provided that in calculating the assessable income of any person any expenditure or loss exclusively incurred in the production of the assessable income for any income year might be deducted from the total income derived for that year. The practice in New Zealand of allowing directors' fees to be deducted from the total income of a taxpayer was founded upon the principle that to produce the income such an expenditure was necessary for its production in the same way that wages of labourers or salaries of clerks were necessary for that purpose. Directors' fees were paid for services rendered to the company by persons duly appointed and the quantum of the amount to be paid was fixed and sanctioned by shareholders of a company who, no doubt, could vote what sum they pleased so long as they refrained from including assessable income in the sum or sums awarded. No doubt, the shareholders of a company might distribute profits as they pleased but it still remained for the company to satisfy the Commissioner of Taxes that an item of expenditure which they claimed to deduct, presumably on the ground that it was a sound commercial outlay, did in fact represent an expenditure exclusively incurred in the production of the assessable income. As the present case was the case of an assessment which was objected to by the taxpayer, it followed by virtue of S. 25 of the Land and Income Tax Act, 1925, that the burden of proof was on him to justify his claim and the Magistrate could receive evidence which in law was not strictly admissible. In the present instance it was for the company to prove that a payment of £10,000 by way of directors' fees to two directors, was an expenditure exclusively incurred in producing a net profit in the business of £5,145.

The company contended that the shareholders having sanctioned the payment that ended the matter, but it seemed to His Honour that the proper construction to put on the legislation was to hold that it meant that the Commissioner might say: "I want proof that this expenditure was in fact incurred in producing the assessable income." The word "exclusively" was used in the section, so it must be shown that unless the expenditure of £10,000 had been incurred, the net profit of £5,145 could not have been produced and that the sum of £10,000 was spent in making that profit and for no other purpose. A

loss might, under the section quoted, be deducted from the total income, but His Honour could discover nothing which prevented the Commissioner from challenging the validity of any loss incurred in the production of an income which the taxpayer claimed to be deductible. He could require proof that the loss had, in fact, been incurred and if the proof were not forthcoming the claims to deduct the loss would be disallowed. If His Honour had correctly stated the position in regard to deductions for losses, His Honour could not see why the Commissioner should not be entitled to insist that a taxpayer should establish the *bona fides* of a claim to deduct what appeared on its face to be an unconscionable fee for directors' service. The dispute between the taxpayer and the Commissioner in the present case could be stated as follows: On the one hand the company declared: "The shareholders sanctioned this payment, that is enough." On the other hand, the Commissioner said: "Part of that payment represents taxable income. This I must assume until you prove the contrary. This you have not done." If proof that the shareholders of the company fixed the directors' remuneration was to be the beginning and the end of that business transaction, then, if a company had an income of £50,000 the shareholders might vote away £49,000 for directors' fees without it being in the power of the Commissioner to call for proof of the *bona fides* of the transaction or to disallow the whole or part of the claim for deduction when satisfied that the transaction was merely a device for evading payment of tax and that included in the £49,000 was part of the taxpayer's assessable income. Could a company claim to deduct without question £2,000 for wages paid to a servant whose services could not possibly be worth more than £200 a year? That would depend upon whether the £2,000 had in truth been spent in earning the profits of the company. In **Inland Revenue Commissioners v. Sansom,** (1921) 2 K.B. 492, the findings on questions of fact could not be disturbed by the Court of Appeal, but the transaction that was impeached was described by members of that Court as highly suspicious and singular. In the present case the circumstances were more than suspicious or singular. That two directors had in one financial year in fact earned, for services rendered, the sum of £10,000 to produce a net profit of £5,145 was, having regard to the facts proved, incredible, and His Honour was not surprised that the Commissioner held that it had not been established to his satisfaction that £8,000 of the £10,000 was an expenditure exclusively incurred in the production of the assessable income. The Commissioner took the view that under the guise of directors' fees the directors were in fact receiving taxable profits.

The general principle upon which the Commissioner in New Zealand acted in allowing deductions was, as His Honour understood the position, that, following **Usher's Wiltshire Brewery Ltd. v. Bruce,** (1915) A.C. 433, deductions were allowed on the grounds that the expenses were incurred not as a matter of charity but as a matter of commercial expediency and were obviously a sound commercial outlay. Strong as were the inquisitorial powers vested in the taxing authorities they, of course, could not dictate to a taxpayer as to how he should carry on his business: His Honour referred to **Toohey's Ltd. v. The Commissioner of Taxes,** 22 N.S.W. S.R. 441, at p. 441, per Ferguson, J. **Johnson Brothers v. Commissioner of Inland Revenue,** (1919) 2 K.B. 717, was a case which had an important bearing upon the present one, because in it the Commissioner conducted an investigation into the relations which existed between a father and his sons in carrying on a business, and because it was held that the Inland Revenue Commissioners were entitled to say what amount of the share of profits paid to the sons should be allowed to be deducted as their remuneration for time and labour expended by them in the business. In principle His Honour could see little to distinguish **Johnson's case** from the present one. In **Johnson's case** the sons at one time received salaries for service rendered, then an arrangement was entered into by which each son was to receive 25 per cent. of the net profits as his reward for his labours, but the sons did not become partners. The deduction of the sums representing 25 per cent. of the net profits was challenged and the assessment was increased. The action of the Commissioners was upheld. The reason for the decision no doubt was that the sums deducted were not truly expended in earning the profits of the business. His Honour referred also to **Stokes v. Commissioner of Taxation,** 40 N.S.W. W.N. 130. It was said in argument that if the Commissioner of Taxes was to be allowed to question allowances made by shareholders of companies to directors, it would mean that he and not the shareholders of a private company would decide in every case what was to be allowed. The answer to that was that each case must be decided in the light of its own facts and that a reasonable expenditure would never be questioned. Moreover, in **Johnson's case** the sum representing the earnings of the sons was assessed by the Inland Revenue Commissioners and was allowed by way of deduction. In the present case the outlay was, in His Honour's opinion, so unreasonable and extravagant that it at once raised the presumption that it was illicit.

BLAIR, J., in the course of a judgment concurring in the dismissal of the appeal, said that the question was whether the so-called expenditure was really expenditure, and whether, if it was expenditure, such expenditure was "exclusively incurred in the production of the assessable income." The meaning His Honour took from those words was that the company was entitled to deduct from its assessable income any expenditure that it had exclusively incurred in order to obtain its income. All salaries and wages of clerks servants and workmen were naturally properly incurred. Directors' fees were also properly incurred by companies in carrying on their business. The company claimed that it could not have earned its income without expending the huge sums it claimed to have expended on directors' fees. It was claiming a deduction and the proof offered in support of such claim for deduction was a resolution signed by the two persons for whose benefit the money was claimed to have been paid. The present case was not one where the Commissioner claimed to usurp to himself the right of inquiring into the sufficiency or value of the services rendered by directors. His Honour could well appreciate that in all cases where a company was paying for service whether that of directors or of ordinary employees of the company the question of *quantum* of payment was necessarily one of which the company must be the judge. So long as a contract of service was a genuine one, and the service had been performed, then the fact that, in the opinion of the Commissioner, any such servant had been paid too much would not in His Honour's opinion entitle the Commissioner to arrogate to himself the right to fix what in his opinion was a proper remuneration for any particular servant, whether a director or the most menial of the company's servants. But where the genuineness of the contract of service itself was in question, or a serious question arose as to the genuineness of the whole transaction, it seemed to His Honour that the Commissioner was within his rights in calling for better evidence than was here supplied to him, namely, a document purporting to be a resolution of the company, whereby A and B, as shareholders, resolved to pay to themselves in their capacity as directors two-thirds of the profits of the company. When the history of the company showed that in past years the same persons had made a practice of disposing of virtually two-thirds of the profits ostensibly as directors' fees, one was driven to the conclusion that those so-called directors' fees were not what they purported to be, but were a method of distributing profits. If the Commissioner was not entitled to question the genuineness of the transaction because by so doing he would be interfering in the management of the company's affairs, then the position must be that if the two shareholders passed a resolution to vote themselves the whole of the profits as directors' fees the transaction could not be questioned.

A point had been made as to the admission by the Commissioner that directors' fees were a proper deductible item. The fact that the Commissioner had intimated that he would be prepared to allow £2,000 as reasonable directors' fees was sought to be construed against him as reducing the question to merely one of *quantum*. His Honour thought it would have been open to the Commissioner to have adopted the attitude that the whole arrangement as to directors' fees was bad and that, therefore there being no contract express or implied by the company as to directors' fees, no fees were payable. The proper construction that should, His Honour thought, be placed upon the Commissioner's offer was that, having treated as void any express contract for remuneration of directors, the Commissioner, aware, as he was, that the directors actually performed some services for the company, naturally assumed that such services should be remunerated by a reasonable sum. If the contract between the company and the directors had stipulated for only a reasonable sum the question of reasonableness of any particular named sum must necessarily have been one open to argument.

On the view His Honour took of the facts the position really was that there was no real contract for remuneration of the directors. Had there been a contract then the question as to whether the Commissioner could usurp the function of the management of a company as to fixing the remuneration to be paid to its servants would arise.

Solicitors for appellant: **Young, White and Courtney,** Wellington.

Solicitors for respondent: **Crown Law Office,** Wellington.

# Supreme Court.

Myers, C.J. May 12, 13, June 2; August 18, 1930. Palmerston North.

## CARR v. DANNEVIRKE COUNTY.

**Contract—Extras—Contract with County to Reform Road and to Supply Stated Quantity of Metal—Contractor Required to Supply More Metal than Specified Owing to County Engineer Taking View that Road Originally Cambered and Requiring Plaintiff to Camber Road—Road Not in Fact Originally Cambered—Provision that Works to be Completed to Satisfaction of Engineer and that Engineer to be Sole Arbiter of Meaning of Contract Not Making Engineer Sole Judge of Question of Fact Whether Road Originally Cambered—County Council by Resolution Requiring Contractor to Supply Metal as Required by Engineer—Plaintiff Entitled to Recover for Additional Metal Supplied Notwithstanding Provision That Extras Must be Ordered in Writing—Counties Act, 1920, S. 146 (4).**

Action to recover (*inter alia*) for metal supplied to the defendant county in excess of 1,540 cubic yards for which the defendant had paid. Other claims were also added and the defendant filed a counter-claim, but the case is reported in respect of this one claim only. On 8th November, 1926, the plaintiff entered into a contract with the defendant county for reforming 105 chains of, and delivering 1,470 cubic yards of metal on, a portion of the Mangaha Road, which portion of the road had been originally formed about two years earlier. The contract consisted of three documents namely: Specification, Printed Conditions, and a formal printed Agreement. The contract price was £808 10s. 0d. based on the sum of 11s. per cubic yard of metal. It was admitted by the defendant county that it had made an error in calculating the quantity of metal and that on the assumption that there was to be a uniform thickness of metal of eight inches, the correct figure was 1,540 yards of metal. The defendant had paid for this quantity, on the basis of 11s. per yard, £847. The metal supplied by the plaintiff was, however, greatly in excess of the 1,540 yards contemplated by the contract, the excess quantity being necessitated by reason of the fact that the defendant's engineer required the road to be filled up to a camber four inches higher than the sides of the road and, for that purpose, instead of using as his instrument of measurement a cubicle of wood eight inches in length, breadth and thickness as required by the Specification, the Engineer used an arched board or template eight inches in height at the ends and 12 inches in the centre. The result was that the metalling, instead of being eight inches deep on the road reformed to its original shape, was of an average depth greatly in excess of eight inches. There was a conflict of evidence as to whether or not the road as originally formed had a camber. Upon a consideration of the evidence the Court held that the road was not originally cambered. The defendant, however, contended that the plaintiff could not recover by reason of the provisions contained in clauses 2 and 4 of the printed Conditions of the Contract, which clauses were as follows: "(2) Works to be done to Satisfaction.—The Contractor shall provide all labour and materials, plant and machinery, required for the completion of all the works specified or implied in the specification, or shown or enumerated on or in any plans, drawings, lists, or tables, if any, attached thereto. He shall complete the works under the direction and to the satisfaction of the Engineer, who shall be the sole arbiter as to the meaning of all or any parts of the contract, and of the quality, quantity, or price of any work or materials, and whose instructions given from time to time on all subjects connected with the contract shall be followed by the Contractor. All materials, plant, or machinery brought to or near to the works, for the purpose of being used therein, shall be the property of the County." "(4.) Extra Works, etc.—The Engineer may from time to time order the execution of extra works, or alterations in the character of or omission of parts of the works, and shall estimate the difference in cost caused by such order, and shall add to or deduct from the contract price such estimated difference in cost. Such orders must be in writing. The Engineer shall also estimate the extra time, if any, which such additions or alterations will take to execute, and give suitable extension of the time for the completion of the works."

**Gibbard** for plaintiff.
**T. H. G. Lloyd** for defendant.

MYERS, C.J., said that the defendant relied upon the judgment in **Fraser v. Hamilton Borough Council**, 32 N.Z.L.R. 205. In His Honour's opinion however that decision did not help the defendant. In the present, as in that case, the engineer was for certain purposes the person whose decision was to be final; but he was in the present case, as he was held to be in that case, entitled only to construe the contract and specification in all matters connected with the progress or the proper performance of the work but not in collateral matters. The question in the present case was, what was the original shape or formation of the road? Had it a camber or not? That was a question of fact, and not, His Honour thought, a matter of interpretation of the contract. If the road as originally formed had no camber, then His Honour could not see, so far as the construction of the contract was concerned, how the defendant's case could be helped merely because the engineer chose to assert that something was a fact which was not a fact. His Honour found as a fact that there was no camber on the original formation of the road.

It was contended on behalf of the defendant that the plaintiff could not recover for the difference between the 1,540 yards and the quantity actually supplied—that was to say the excess quantity of 647 yards—because no extra was ordered by the engineer in writing; nor, it was said, was there any contract by the defendant to pay for that excess quantity. The defence was certainly not a very meritorious one if, as His Honour found to be the fact, the excess quantity of metal was actually supplied. However, His Honour did not think that the defence could succeed. There was no provision in the printed conditions of contract as there was in **Fraser v. Hamilton Borough Council** (*cit. sup.*) that "no extras claimed by the contractor would be admitted or recognised or paid for under any circumstances unless ordered in writing." All that the specification said was that the engineer might from time to time order the execution of extra works and that such orders must be in writing. His Honour was inclined to think that the cases cited by Mr. Lloyd on that point were distinguishable, but His Honour did not base his judgment on that ground. The position was that in April, 1927, after the plaintiff had by reason of the engineer's demands and the results consequent upon the use of the template instead of the cubicle, actually supplied 1,540 cubic yards of metal, he laid the matter before the County Council which resolved on 8th April to inform the plaintiff that he must complete his contract, and on 27th April the County Clerk wrote to the plaintiff in pursuance of the resolution requiring the plaintiff to proceed with the metalling in accordance with the engineer's directions and demands. The Council had no more right than had the engineer to determine as a fact something that was not a fact, viz.: the question of the existence or otherwise of a camber on the original road formation. At that time the plaintiff had already supplied 1,540 yards of metal and according to him he had supplied all the metal that he had contracted to supply. His Honour thought that the Council's resolution and the subsequent letter of the County Clerk written by the Council's direction brought the case within subsection (4) of S. 146 of the Counties Act, 1920. The Council must be assumed to have known—as His Honour found the fact was—that the road as originally formed had no camber, and that the course demanded by the engineer involved the supply of a great deal more than 1,540 yards of metal. That, His Honour thought, distinguished the case from **Innes v. Piako County Council**, (1924) N.Z.L.R. 374. Mr. Lloyd suggested that the plaintiff could have overcome the difficulty from the outset by reforming the road with a four inch camber in which case he would have had to supply metal to a uniform depth of eight inches over the whole width required to be metalled. His Honour did not think that that was a good answer. In any case, if the engineer had required that to be done he should have so directed, if necessary in writing. But he did nothing of the kind. What the plaintiff said was that there was no camber on the road as originally formed and that in reforming the road he reformed it to its original shape and width. And it followed from what His Honour had already said that he found that to be the fact. In His Honour's opinion, therefore, the plaintiff was entitled to recover the sum of £355 17s. 0d. being at the rate of 11s. per yard for the 647 cubic yards supplied in excess of the 1,540 for which the defendant had paid.

Judgment for plaintiff.

Solicitors for plaintiff: **Gibbard and Yortt**, Dannevirke.
Solicitors for defendant: **Lloyd and Lloyd**, Dannevirke.

Ostler, J. August 13, 14 1930.
Wellington.

RICHARDS v. AUSTRALIAN TEMPERANCE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY.

**Defamation—Liability of Master for Slander of Servant—Privilege—Nurse Employed by Life Assurance Society to Visit and Advise Sick Policyholders—Words Defamatory of Medical Practitioner Spoken by Nurse to Patient in Presence of Third Person—Words Spoken in Scope of Employment—Qualified Privilege—Privilege Not Destroyed by Presence of Third Party Provided Nurse Acting *Bona Fide* and Without Malice—Question of Malice for Jury.**

Action claiming damages for slander. The plaintiff was a medical practitioner in Wellington. The statements complained of by him were alleged to have been uttered by a nurse in the employment of the defendant society. The nurse was engaged by the defendant solely to make calls on ailing policy-holders, to direct their treatment, and to advise them, if necessary, to consult a medical practitioner. On the receipt of a card from a superior officer the nurse visited Mrs. Bell. Mrs. Little, who had no interest in the society, was present during the visit. The patient appeared very ill, and the nurse diagnosed the case as one of diphtheria, although informed by the patient that her doctor was attending and treating her for a minor complaint. Then the nurse asked for the name of the doctor, and the patient gave the name of the plaintiff. The nurse was alleged to have thereupon uttered the following words: "Oh him! Just like a few more of his cases. I've never had the pleasure of meeting Dr. Richards, but when I do I'll tell him what I think of him." At the close of the plaintiff's case, counsel for the defendant society moved for a nonsuit on the grounds: (1) that the words were not in themselves defamatory and were not capable of bearing the meaning alleged in the Statement of Claim; (2) that the occasion was privileged, and if privileged there was no evidence of malice on the part of the nurse; (3) that the expression of any opinion of the nurse of or concerning the plaintiff was not within the scope of her employment, and in the expression of any opinion she was not acting under the express or implied authority of the defendant.

**Gray, K.C., and Hanna** for plaintiff.
**Bunny and O'Leary** for defendant.

OSTLER, J., said that the first question arising was whether the nurse had implied authority from the defendant to make the defamatory statement (assuming that it was made). She had implied authority only if she made the statement in the course of and within the scope of her employment. It was certain that it was in the course of the employment, and the only question was whether it was in the scope of the employment. In His Honour's opinion it was. She was employed to advise policyholders on questions of their health. It was not a charity on the part of the defendant, but, as it admitted itself, a matter of pure business on its part. The nurse was chosen because she was a nurse of experience. In advising policyholders, who would often be persons in humble life and with little education, the nurse would necessarily come into contact with many medical men who were attending the same persons, or see the result of their work. The medical profession was an honourable profession, and, speaking generally, its members were men of character and competence, but one could not shut one's eyes to the fact that on the edge of that profession, as on the edge of every honourable profession, a certain number, happily a small number, clung who were not fitted by character or capacity to properly fulfil the high duties of that profession. No lay person would be better qualified to appreciate that than a nurse of experience. In His Honour's opinion it was within the scope of such a nurse's employment to advise clients of the society on the question of employment of medical men. Therefore, in His Honour's opinion, it was within the scope of her employment to speak the defamatory words, assuming she spoke them. It was an improper mode of performing an authorised act.

The next question for consideration was whether the occasion was privileged. In His Honour's opinion it was. It was a statement made on a subject-matter in which both the defendant and Mrs. Bell had a legitimate common interest. It would be monstrous if a nurse employed by a life insurance company to look after the health of its clients, if she saw the health of one of those clients suffering from improper treatment or neglect on the part of an incompetent medical practitioner, could not utter a warning if she did so *bona fide* and without malice, without rendering herself liable to an action for defamation. The only question was whether the words having been uttered (assuming that they were uttered) in the presence of Mrs. Little, who had no common interest in hearing the communication, destroyed the privileged occasion. In His Honour's opinion it did not do so, provided that the nurse was acting *bona fide* and without malice. That was a question of fact which had to be left to be determined by the jury. The case of **Toogood v. Spyring,** 1 C.M. & R. 181, was in point. That case was a leading case, and was applicable to the facts of the present case. His Honour proposed, therefore, on the question as to whether the privilege was destroyed by being exceeded, to leave the question of fact to the jury as to whether the statement if made was made *bona fide* and without malice.

The only other question was whether there was any evidence of malice to go to the jury. In His Honour's opinion there was. In nearly all cases where qualified privilege was claimed the words complained of were admitted, but the defendant pleaded that they were spoken without malice and on a privileged occasion. In the present case the nurse denied that she uttered the words, or any words like those complained of. That would be the first question of fact for the jury to determine. If they accepted her evidence on that point the action necessarily failed. If, however, they decided that the words were uttered, then they must consider first the question as to whether they were uttered *bona fide* and without malice, because they were uttered in the presence of a person who had no common interest, and even if they decided that question in favour of the defendant it seemed to His Honour that there was still evidence of malice which they must consider. The nurse said she knew nothing against the competence of the plaintiff. If, therefore, she spoke the defamatory words, they must have been untrue to her knowledge. That would be conclusive evidence of malice. The jury might find that she did speak the words and that she knew they were untrue. If so they would have to find that she was actuated by malice. For those reasons His Honour was of opinion that there was evidence of malice to go to the jury.

Solicitors for plaintiff: **Gray and Sladden,** Wellington.
Solicitor for defendant: **E. P. Bunny,** Wellington.

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Smith, J. December 11, 1929, June 24; August 12, 1930.
Auckland.

IN RE CAMPBELL.

**Will—Charity—Uncertainty—Cy-pres Doctrine—Costs—Legacy to "Any Association in Auckland Established for Maintenance or Relief of Indigent Gentlewomen that may be in Existence at Time of My Decease"—Legacy Claimed by Several Institutions—Any and Every Institution of Kind Described Not Entitled to Participate in Legacy—Words Too Vague and Uncertain to Constitute Valid Gift to Any Particular Institution—General Charitable Intention—Legacy Applied Cy-pres—Scheme Approved Without Further Inquiry—Apportionment of Costs Between Fund and Residue—Code of Civil Procedure, R. 548—Declaratory Judgments Act, 1908, S. 13.**

Originating summons. Isabella Campbell died on 27th March, 1929, leaving a will dated 27th May, 1922. After bequeathing certain pecuniary legacies free of legacy duty she gave all her estate to her trustees upon trust for conversion. Out of the proceeds of conversion and her ready moneys, she directed payment of her funeral and testamentary expenses, estate and succession duties, and the legacies bequeathed by her. She then directed her trustees to stand possessed of the residue upon trust to pay the income to James Palmer Campbell during his life, and after his death to hold the trust fund for the purposes following, namely: "to pay to Amy Beatrice Campbell wife of the said James Palmer Campbell the sum of Two thousand pounds To pay to the following institutions the sum of Five hundred pounds each The Auckland Presbyterian Social Service Association The Home Mission Fund of the Presbyterian Church of New Zealand The Leslie Orphanage in connection with the Presbyterian Church St. Mary's Home Otahuhu in connection with the Anglican Church Any Association in the City of Auckland established for the Maintenance or relief of Indigent Gentlewomen that may be in existence at the time of my decease.

All the above bequests to be free of estate or succession duty." The testatrix then directed the payment of the residue of the trust fund to the Foreign Mission Fund of the Presbyterian Church of New Zealand to be devoted to missions to India and China. The trustees of the will were in doubt as to the validity and destination of the bequest of £500 to "any Association in the City of Auckland established for the maintenance or relief of indigent gentlewomen that may be in existence at the time of my decease." The Court was asked to determine: (a) whether that bequest was a valid one; (b) if valid, to which one or more of several claimant associations and charitable institutions it pertained; (c) if invalid, whether it fell into residue; (d) whether the case was one in which the executors should submit a scheme for the distribution of the trust cy-pres. The summons was first heard on 11th December, 1929, when counsel appeared to represent the various parties ordered to be served. At the hearing, the Presbyterian Church Property Trustees, being the residuary legatees of the will, were added as a party, and represented by counsel. Following upon the first hearing, Smith, J., made an order joining the Attorney-General as a party, and the originating summons was later further argued by counsel representing the Attorney-General, the residuary legatees and the trustees of the will.

**McVeagh** and **Elliott** for trustees.

**Meredith** for Attorney-General.

**Finlay** for St. Vincent de Paul Society.

**Northcroft** for Auckland Ladies' Benevolent Society.

**Goulding** for Salvation Army.

**Cocker** for Barstow Trust and Handcock Memorial Fund.

**Peak** for Tromson Benevolent Fund Trust Board.

**Drummond** for Young Women's Christian Association, Auckland.

**Weir** for residuary legatees.

SMITH, J., said that the first question was whether the bequest was valid. It had been submitted, in particular by the respective counsel for the Auckland Ladies' Benevolent Society, the Salvation Army, and the Barstow Trust, that the bequest was a specific bequest to a particular society, and that the particular society which they respectively represented was the society indicated. His Honour was of opinion that, however nearly those three claimant societies might comply with the description in the will, the true view was that the bequest was too vague and uncertain to constitute a valid bequest. The gift was to "any association." His Honour was of opinion that the testatrix intended only one association to take, and that the gift could not be construed as a gift to any and every association of the kind mentioned. In that respect, the case was distinguishable from **Waller v. Childs,** Ambler's Rep. Pt. 2, 524. The testatrix had overlooked the fact that there might be several associations equally qualified to take, and she had left it uncertain which should take in that event. The language of the gift in the present case showed that although the testatrix intended, as His Honour thought, to benefit only one society, it did not show that she intended to benefit only one particular society. In His Honour's opinion, the principle of **Smithwick v. Haydon,** 19 L.R.Ir. 490, and of **In the goods of Blackwell,** 2 P.D. 72, applied, but that of **In re Kilverts Trusts,** L.R. 7 Ch. 170, did not apply. Upon the construction of the will, the object of the gift could not be ascertained, and it could not help any one association or institution that it should turn out to be the only association or institution answering the description. His Honour concluded, therefore, that on the principle of **Smithwick v. Haydon** (*cit. sup.*) the gift was too uncertain to constitute a valid bequest. It followed that the gift would fail and fall into residue unless the gift was charitable in its nature, and the testatrix had evinced a general charitable intention so as to enable the Court to apply it cy-pres.

It was contended by counsel for the residuary legatees that it did not clearly appear that the particular gift was itself charitable; and that it was not to be deemed such unless the intention of the testatrix to devote the money to charitable purposes was made clear, either expressly or by necessary implication: **Hunter v. Attorney-General,** (1899) A.C. 309, 315, 319. Counsel pointed out that the gift was to the following "institutions" including "any association" for the maintenance or relief of indigent gentlewomen, and that no obligation was expressly imposed upon the association to apply it for the purposes of the association. He contended that there was no necessary implication that the gift should be so applied, but said on the contrary, that so far as appeared from the terms of the will, the association might apply it to any other purposes. His Honour was of opinion, however, that the authorities were sufficiently strong to justify the Court in concluding that the gift was charitable in its own nature. His Honour referred to **Public Trustee v. Denton,** (1917) N.Z.L.R. 263: **In re Maguire,** L.R. 9 Eq. 632, and **In re W. T. Parkes,** 25 T.L.R. 523, stating that in his opinion, the principle of those cases applied. The idea in the mind of the testatrix was clearly to assist the purposes of the association, viz., the maintenance or relief of indigent gentlewomen. That was a charitable purpose: **Attorney-General v. Power,** 1 Ball & Beatty 148, where the words were "reduced gentlewomen"; and it was not necessary that the gentlewomen should be destitute in order to permit of the purpose being charitable: **In re Estlin,** 72 L.J. Ch. 687; **Verge v. Somerville,** (1924) A.C. 496. In His Honour's opinion, the cases of **Aston v. Wood,** L.R. 6 Eq. 419, and **In re Freeman,** (1908) 1 Ch. 720, cited on behalf of the residuary legatees, did not apply.

In order to permit of the application of the cy-pres doctrine, however, the testatrix must have evinced a general charitable intention, and that conclusion must be gathered from the whole will. It could not be said that the present case was one of a gift to a charitable institution which existed at the date of the will but had ceased to exist at the testator's death. In that class of case, there was a lapse: **In re Rymer,** (1895) 1 Ch. 19. In the present case, the words of gift were uncertain, and the case bore analogy to the case where there was a gift to a society which had never existed. It was not possible to say what was the precise object of the gift. His Honour thought there was as much reason for the Court to lean towards a general charitable intention in the one case as the other, and to accept even a small indication that the testatrix intended to benefit a purpose and not a person. The words "any association" in themselves indicated a general purpose. Furthermore, the gift was one of five gifts to "institutions," and it was clear, in view of the affidavit evidence, that the gifts to the other four were charitable gifts. The gift of the residue was also charitable. It was clear, in His Honour's opinion, that in those circumstances the testatrix had indicated a general charitable intention: **In re Maguire** (*cit. sup.*); **Standing Committee of the Diocese of Auckland v. Campbell,** (1930) G.L.R. 162. The gift must accordingly be applied cy-pres.

As the legacy was held upon trust, the Court had authority to direct an inquiry in Chambers to settle a scheme. There had, however, been an exhaustive inquiry for claimants in the City of Auckland, they had been represented before the Court, and the Attorney-General had been heard. As a result, the trustees of the will had suggested that, in the event of a distribution cy-pres, the legacy should be divided between the Auckland Ladies' Benevolent Society, the Salvation Army for its Eventide Home, Auckland, and the Mary Ann Barstow Trust, Auckland; and the Attorney-General had approved such a scheme. His Honour did not propose to go through the evidence in detail, but, upon the evidence, he agreed with the scheme proposed. In his opinion, further inquiry was unnecessary, and he proposed to follow the course taken in **Bennett v. Hayter,** 2 Beav. 81, where, after the Master had reported that there was no sufficient evidence produced before him as to what charity was meant by the testator's description "the Jews' poor, Mile End," a legacy was applied cy-pres without further inquiry, after the Court had determined that it must be applied cy-pres. See also **In re Maguire** (*cit. sup.*) at p. 635. There would be an order accordingly that, subject to the deduction of the costs to be allocated to the fund, the fund should be divided equally among the Auckland Ladies' Benevolent Society, the Salvation Army Eventide Home, Auckland, and the Mary Ann Barstow Trust, Auckland.

As to costs, the executors rightly retained the legacy of £500 under their control, in order that the validity of the bequest should be determined. The testatrix herself rendered such a determination necessary. For the determination of that question, as well as of the question of the destination of the fund, the Court ordered all the parties represented at the first hearing to be served, and His Honour thought that in the present case the question was concluded as to whether it was necessary that they should all have been represented at the hearing of the originating summons. His Honour found it necessary to add the Attorney-General as a party, so as to bind all charities. The general rule was that the costs of proceedings to establish a charitable legacy must come out of the residuary estate, because until the determination of the Court that a legacy did not fall into residue, the legacy had not been separated from the general estate: **Attorney-General v. Lawes,** 8 Hare 32; **Jackson v. Watkinson,** 34 N.Z.L.R. 243. Cases such as **Re Lycett,** 13 T.L.R. 373, **In re Buckley,** (1928) N.Z.L.R. 148, **Standing Committee of the Diocese of Auckland v. Campbell** (*cit. sup.*), **Re Jacob Joseph deceased,** 26 N.Z.L.R. 504, and

**In re Clergy Society,** 2 K. & J. 615, in which costs had been ordered to be paid out of the fund, must be treated either as cases where the legacy had been regarded as severed from the estate or as cases in which the Court had exercised its discretion as to costs. R. 548 of the Code of Civil Procedure stated that the costs of any originating summons should be dealt with as the Court or a Judge directed and S. 13 of the Declaratory Judgments Act, 1908, placed the costs of any proceeding in the discretion of the Court. In **McLean and Others v. Levin (No. 2),** 29 N.Z.L.R. 752, there were special circumstances, and the costs were thrown partly on the general estate, and partly on the fund. In the present case, the proceedings were instituted to determine not only the validity of the bequest, but also its destination. The result of the proceedings, so far as they had gone, was that they must be substantially regarded as having been rendered necessary by the testatrix, in order to determine the validity of the bequest, but that, in the course of the proceedings, the Court had been able, incidentally, to obtain sufficient information to direct a scheme without further inquiry. There had not been, first, a determination of the validity of the bequest, and then a separate inquiry to determine the application of the fund cy-pres. If that had taken place, the costs of the first inquiry would have been payable out of the general estate, and the costs of the second inquiry out of the fund: **Daly v. Attorney-General,** 11 Ir. Ch. Rep. 41. The present case was special in its circumstances, but His Honour thought that he should endeavour to apply the principle of **Daly's case** as nearly as possible. So doing, he found that the only costs which could be allocated to the fund were those of any inquiries made by the trustees of the will and by the Attorney-General, relating exclusively to the selection of the societies most qualified to take upon an application cy-pres, and any matters incidental thereto, and to the carrying out of the present judgment, including the actual distribution of the fund. Such costs would not comprise the costs of the general inquiries made by the trustees, as shown by Mr. Elliott's affidavit, as those inquiries were, His Honour thought, incidental to bringing before the Court the question of the validity of the bequest. The costs of all parties would, therefore, be taxed by the Registrar as between solicitor and client, and paid out of the residuary estate, save as regards that limited portion of the costs of the trustees of the will and of the Attorney-General, hereinbefore referred to, which would be paid out of the fund.

Solicitors for trustees: **Russell, McVeagh, Bagnall and Macky,** Auckland.

Solicitors for residuary legatees: **Buddle, Richmond and Buddle,** Auckland.

Solicitors for Attorney-General: **Meredith and Hubble,** Auckland.

Solicitors for the respective claimants: **G. P. Finlay; Earl, Kent, Massey and Northcroft; Goulding and Rennie** (agents for **Bell, Gully, Mackenzie and O'Leary,** Wellington); **Hesketh, Richmond, Adams and Cocker; Peak, Kirker and Newcomb; Stewart, Johnston, Hough and Campbell,** Auckland.

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Smith, J. July 3; August 18, 1930. Auckland.

GUARDIAN TRUST AND EXECUTORS AGENCY CO. OF N.Z. v. SOLER AND ROGERS.

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**Practice—Costs—Amended Statement of Claim—Successful Plaintiff Not Allowed Costs of Original Statement of Claim Where Amended Statement of Claim Filed to Meet Point Taken in Statement of Defence Which Plaintiff Might Have Anticipated—Code of Civil Procedure, R. 148.**

Question of costs. The plaintiff company had filed a statement of claim purporting to set out covenants to pay the principal sum, and covenants for insurance, under a memorandum of mortgage. It alleged default in payment of the principal sum, of interest thereon, and of a fire insurance premium. The defendant Rogers filed a defence in which he merely denied the allegations in the statement of claim. The plaintiff then moved to strike out the statement of defence on the ground that it was frivolous and vexatious and an abuse of the process of the Court. That motion was not granted, as it appeared that there was a question of law to be argued arising out of the construction of the mortgage, but the defendant was given leave to file a proper statement of defence. That defence was filed, and showed that the defendant admitted that he was a covenanting party to the mortgage only to the extent to which he was liable upon the proper construction of the mortgage. The plaintiff then filed an amended statement of claim setting out its original cause of action, and setting up in the alternative other causes of action, pursuant to which it claimed, if necessary, rectification of the mortgage to carry out the intention of the parties and payment under an agreement for sale and purchase, if the liability of the defendant were not comprised in the mortgage. The defendant then took out a summons to strike out the alternative causes of action in the amended statement of claim, but that summons was dismissed. At the hearing, the plaintiff succeeded in holding the defendant liable upon the true construction of the mortgage, and for that purpose his original statement of claim would have been sufficient. At the trial, however, the plaintiff entered upon all the matters mentioned in the amended statement of claim. The question at issue was whether the plaintiff should have the costs of both statements of claim.

**Huband** for plaintiff.

**R. N. Moody** for defendant Rogers.

SMITH, J., said that the plaintiff submitted that R. 148 as interpreted in **Cantwell v. Wairarapa Farmers' Co-operative Association Ltd.,** (1929) G.L.R. 262, should not apply because: (a) in that case the plaintiff appeared to have succeeded on his amended claim, whereas in the present case the plaintiff had succeeded on its original claim, and (b) that the plaintiff's amended statement of claim was occasioned solely by the nature of the statement of defence filed by the defendant pursuant to the leave reserved to him upon the motion to strike out the original defence. In His Honour's opinion, the true view of the present position was as follows: In the first place, the plaintiff succeeded upon his amended statement of claim. That was the pleading upon which the trial proceeded. In the second place, the defendant could not by his pleadings alter the legal position which existed under the mortgage: that was a matter of construction of the mortgage. Alternative views as to the true construction of the mortgage must be deemed to have been as apparent to the plaintiff as to the defendant before the writ was issued. It followed that the plaintiff should have raised in his original statement of claim all the questions finally at issue. The present case appeared to him to be no other than the usual case in which the defendant had taken a point in his statement of defence which a plaintiff thought fit to meet, in his own discretion, by filing an amended statement of claim. His Honour thought that R. 148 applied to such circumstances, and His Honour could see no reason for exercising the discretion conferred by the Rule to vary the ordinary rule as to costs laid down by the Rule. The plaintiff would, therefore, have costs of the writ and the amended statement of claim. The defendant would not have any costs of his first defence. That must be dealt with as comprised in the motion to strike out that statement of defence, in respect of which costs were awarded to the plaintiff. The defendant would have the costs of the statement of defence filed pursuant to the leave reserved.

Solicitors for plaintiff: **Endean, Holloway and Hubbard,** Auckland.

Solicitors for defendant Rogers: **Hosking and Simpson,** Auckland.

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Smith, J. July 25; August 6, 1930. Auckland.

IN RE ALISON: EX PARTE BOYD.

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**Bankruptcy — Creditor's Petition — Evidence — Non-compliance with Bankruptcy Notice—Existence of Deed of Assignment for Benefit of Creditors Not "Sufficient Cause" for Dismissing Petition Except Where Petition Founded on Such Deed—Petitioner Secured Creditor—Affidavit Evidence only as to Insufficiency of Security—Necessity for Oral Evidence—Petition Adjourned to Enable Oral Evidence to be Given—Bankruptcy Act, 1908, Ss. 37 (3), 39, 40, 118—Bankruptcy Rules 105-109.**

Bankruptcy petition founded upon non-compliance with a bankruptcy notice requiring payment of £528/16/10, being the amount of a final judgment recovered by the petitioning creditor against the debtors. The petition stated that the debt was secured by a mortgage from the debtors to the petitioner securing the principal sum of £500 and interest; and that the petitioner valued such security at £300. Paragraph 4 of the affidavit of the petitioner supporting the petition set out the security and concluded with the words: "and I the above-named creditor value such security at the sum of £300." Notice of objection was given by each debtor in the following terms: "Take notice that I, . . . intend to appear and show cause against the petition for adjudication . . . in that I did in accordance with the terms of the bankruptcy notice compound the debt with the petitioner and further that I have assigned my whole estate for the benefit of all my creditors." At the hearing of the petition, counsel for the debtors abandoned the first ground and relied only upon the second. The notices by the debtors took no objection to the petitioner's valuation of her security. The relevant facts were: (1) Each debtor committed an act of bankruptcy upon the expiration of 26th June, 1930, by reason of a failure to comply with a bankruptcy notice served on 19th June, 1930. The bankruptcy notice required payment of a final judgment against the debtors amounting to £528/16/10. (2) The creditor's petition based upon the aforesaid act of bankruptcy was filed on 2nd July, 1930. (3) The debtor E. W. Alison executed a deed of assignment of his estate to Mr. Spinley as trustee for the creditors on 11th July, 1930, and the debtor W. Alison executed the said deed upon the following morning. The deed of assignment had at the time of the proceedings been signed by 6 creditors out of a total of 39, but it was anticipated for the debtors that all the creditors except a Bank were prepared to sign the deed. It was submitted that the advantages of a private deed of assignment might be "sufficient cause" for dismissing the petition pursuant to the provisions of S. 40 of the Bankruptcy Act, 1908, and that in the present case the deed of assignment did constitute "sufficient cause."

**Grant** in support of petition.

**Northcroft** to oppose.

SMITH, J., said that it was clear on the facts that each debtor had committed an act of bankruptcy anterior to the act of bankruptcy constituted by the execution of the deed of assignment. It followed that the provisions of S. 37 (3) of the Act did not apply to the present case: **In re Bowen,** 14 N.Z.L.R. 720, 724. As S. 37 (3) did not apply, it followed also, in His Honour's opinion, that the reasoning of the English Court of Appeal in **Ex parte Dickson,** 13 Q.B.D. 118, did apply. Although in that case, the act of bankruptcy alleged was the execution by the debtors of a deed of assignment, and in the present case, the act of bankruptcy alleged was the failure to comply with a bankruptcy notice, both cases corresponded essentially in that no special statutory provision applied in either case enabling the Court to dismiss the petition if it was satisfied that it would be to the advantage of the creditors that the estate of the debtors should be administered under a deed of assignment. The reasoning of the Court of Appeal applied in the present case because S. 18 of the Imperial Statute of 1883 corresponded with S. 118 of our Act of 1908. Subsection 20 (a) and (b) of S. 118 showed that the composition there referred to was not limited to the mere distribution of a sum by way of dividend, but comprised trusts, powers and covenants respecting the custody, distribution, inspection, management and winding-up of the bankrupt's property or affairs. In **In re Katavich,** 30 N.Z.L.R. 449, 459, Edwards, J., expressed the view that S. 118 corresponded with S. 18 of the Imperial Statute of 1883 although not identical with it. In His Honour's opinion, S. 118 corresponded sufficiently with S. 18 to make it clear that where S. 37 (3) did not apply, it was not the policy of the Statute to facilitate liquidation outside the Act and thereby to compel a dissenting creditor to be bound by any deed of assignment other than a deed of composition which would be approved by the Court, after adjudication, under S. 118. His Honour thought, therefore, that the deed of assignment in the present case could not be "a sufficient cause" within S. 40 enabling the Court to dismiss the petition. His Honour thought further that the enactment of the special provisions of S. 37 (3) showed that the power of the Court to refuse an adjudication on the ground that it would be to the advantage of the creditors that a debtor's estate should be administered under a deed of assignment, was limited to the case specified in S. 37 (3), viz., the case where the act of bankruptcy alleged was the assignment of the debtor's property to a trustee for the benefit of his creditors generally. The decision of Sim, J., in **In re Falconer,** 16 G.L.R. 340, was not opposed to that conclusion, but tended to support it. His Honour was of opinion, therefore, that the objection of which notice was given could not be sustained, and it was not necessary to consider whether in the particular circumstances of the present case, the deed of assignment and the assent of the majority of the creditors would or would not in fact make it advisable for the debtors' estates to be administered under the deed of assignment instead of under the Act.

The next question was whether the petitioning creditor had so far proved her case as to entitle her to an order of adjudication. After the close of the evidence, and at the conclusion of his argument on the question of the deed of assignment, counsel for the debtors submitted that the petitioning creditor had not shown that her security was worth less than the amount of her claim to the extent of at least £30, and that, therefore, although no objection had been taken by the debtors to the valuation of the security in the petition, the petitioning creditor had not established her right to be treated as a petitioning creditor under S. 35 of the Act; and he cited **In re Ewing,** 24 N.Z.L.R. 808. In argument, counsel for the petitioning creditor relied upon the affidavit of verification to establish that the petitioning creditor valued the security at only £300. It appeared from the judgment of Williams, J., in **In re Ewing,** (*cit. sup.*) as interpreted by Cooper, J., in **In re Sommerville,** 28 N.Z.L.R. 1055, 1060, that the effect of S. 39 of the Act of 1908 was that if the Court should not dispense with the attendance of witnesses, pursuant to R. 109, and so be enabled to act upon evidence by affidavit, the allegations in the petition must be proved by oral evidence. Williams, J., did not appear to have declared that to be a rule of law, but to be a rule of practice. A contention therefore arose before His Honour as to whether the evidence offered by affidavit was either admissible or sufficient, and His Honour did not before reserving the case for consideration give any ruling upon the point. His Honour thought, however, that the proper course for a Judge to take, when hearing a petition in bankruptcy which was either unopposed or in which, if opposed, a point was taken of which no notice was given by the debtor, was to rule upon the evidence. The ruling must necessarily be given after the case for the petitioner had been closed, and in an opposed case, if the point was taken after the evidence for the defence had been called, after the close of that evidence. But His Honour thought that before a petition was dismissed in such circumstances a ruling should be given. That view was, His Honour thought, supported by the course taken by Williams, J., in **In re Ewing,** 24 N.Z.L.R. 808, 812. Such a rule of practice depended, no doubt, upon the view that a bankruptcy petition should not be treated merely as a proceeding *inter partes*, because the rights of other creditors were affected. All that a secured creditor had to do in order to be admitted as a petitioning creditor was to give a genuine estimate of the value of his security so as to show a balance due to him of not less than £30. If the estimate was a genuine one, the Court would not enter upon an enquiry into its correctness, although the result of that enquiry might be to show that the unsecured balance of the debt would not be sufficient to support the petition: **In re Button ex parte Voss,** (1905) 1 K.B. 602. It was a corollary that when the petitioning creditor came to prove in bankruptcy, he would not be allowed to depart from his estimate except possibly upon proof of mistake: **In re Button** (*cit. sup.*). Had His Honour then ruled before reserving consideration of the case that he would not dispense with the attendance of witnesses to prove the petitioning creditor's debt, and that oral evidence must be given, the omission could apparently have been rectified, without injury to either party, as the petitioning creditor was present in Court. If that could not have been done, then, as the point taken was not included in the debtors' notice of objection, the proper practice was to grant an adjournment to enable proof to be given: **In re Sanders,** 1 Manson 362, 386. That case was decided upon the English Bankruptcy Rules of 1886, corresponding to our Rules 105—109 inclusive, but the report in Manson misapplied the numbers. For the correct numbering, see the other reports, e.g., 63 L.J.Q.B. 734.

The view which His Honour took in the present case was, accordingly, that he must rule upon the question of evidence, and accordingly ruled that oral evidence must be given to establish the petitioning creditor's debt, and that the petitioning creditor must have the opportunity to adduce such evidence. The petition would, therefore, be adjourned to the next bankruptcy sittings of the Court, so that the proceedings might be then continued, and oral evidence adduced by the creditor as to the value of her security.

Solicitor for petitioning creditor: **R. M. Grant,** Auckland.

Solicitor for debtors: **H. R. A. Vialoux,** Auckland.

# Compensation under the Public Works Act, 1928.

By A. C. STEPHENS, LL.M.

(*Continued from page 255.*)

SPECIAL CASES.

1. If the land taken under the Act is held by natives, and is subject to restrictions on alienation, the amount of compensation payable is assessed as if the land was not subject to any such restrictions: *Re Putiki Rifle Range*, 26 N.Z.L.R. 33; 8 G.L.R. 129 (sub. nom. *re Wanganui Rifle Range Lands*); *Re Johnsonville Town Board*, 9 G.L.R. 636; 27 N.Z.L.R. 36.

2. Where the land is subject to a lease, the lessor and lessee are entitled to receive, by way of compensation, the value of their respective interests in the land at the time it was taken. The lessee should receive the value of the residue of the term and the lessor the value of the fee simple subject to the lease: *Re Putiki Rifle Range* (*supra*). See also: *Compton v. Hawthorn and Crump*, 22 N.Z.L.R. 709; 5 G.L.R. 286.

If there is a sub-lease, the Court must assess the value of the respective interests of the sub-lessee and the lessor: *Re Putiki Rifle Range* (supra).

If the lease contains an option to purchase, the compensation payable to the lessor and lessee should allow for the existence of the option: *Compton v. Hawthorn and Crump* (*supra*).

3. Where the interest of the claimant is precarious, that is a factor to be taken into account in assessing compensation: *Plimmer v. Wellington Harbour Board*, 7 N.Z.L.R. 264. This case went to the Privy Council (9 App. Cas. 699) which reversed the judgment of the Court of Appeal on the ground that the claimant had an estate or interest in the land within the meaning of the Wellington Harbour Board and Corporation Act, 1880, under which the claim was made.

4. The Court must also take into account any doubt as to the exact legal rights of the claimant: *Paterson and Barr Ltd. v. Otago University*, (1925) N.Z.L.R. 191; (1925) G.L.R. 119.

5. Where land has been taken under the Act, and subsequently a second proclamation is issued, revoking the first proclamation as to part of the land taken, the compensation should include the value of the land retained and the full amount of any loss arising from issue of the second proclamation: *Pike v. Mayor of Wellington*, 30 N.Z.L.R. 179; 13 G.L.R. 221.

6. Where the work which gives rise to the claim was not executed by the local authority but was taken over by it and continued in operation, if the claim is based on the continuance, compensation can be recovered from the local authority: *Fortescue v. Te Awamutu Borough*, (1920) N.Z.L.R. 281; (1920) G.L.R. 214, per Hosking, J.

7. As to compensation on resumption of land by the Crown, see Sec. 43.

BETTERMENT.

In determining the amount of compensation to be awarded, the Court is bound to take into account by way of deduction any increase in the value of lands in which the claimant has an interest which is likely to be caused by the execution of the works: Sec. 79.

The following points are to be noted in connection with the application of the principle of betterment as embodied in this section:

(a.) The term "execution of such works" is extended to cover execution and operation. The estimate of increase in the value of the claimant's land is made on the basis of a work which is completed and in operation: *Fitzgerald v. Kelburne Tramway Co. Ltd.*, 4 G.L.R. 42, 46. See also *O'Brien v. Minister of Public Works*, 12 G.L.R. 744, 751; *O'Brien v. Chapman*, 29 N.Z.L.R. 1053.

(b.) The increase in value mentioned in the section means the actual increase in value of the claimant's land. The fact that the execution of the work benefits other land in the neighbourhood does not prevent the respondent from deducting the whole increase in value: *Ross v. Minister of Public Works*, 16 G.L.R. 47; 32 N.Z.L.R. 1155.

(c.) The words "such lands" in the section mean lands likely to be injuriously affected, so that in assessing betterment it is only these lands which are to be considered, and the betterment is to be deducted from the amount allowed as compensation for injurious affection and cannot exceed it: *Ross v. Minister of Public Works* (*supra*); *Hone Te Anga v. Kawa Drainage Board*, 33 N.Z.L.R. 1139, 1148; 16 G.L.R. 696; Cf. *Handley v. Minister of Public Works*, 16 G.L.R. 683.

(d.) Where land is taken under the Act, but there is no claim for injurious affection, there can be no deduction for betterment. The position is the same if the claim is only for damage arising from the exercise of the powers under the Act: *Ross v. Minister of Public Works* (*supra*); *O'Brien v. Minister of Public Works* (*supra*). Cf. *Handley v. Minister of Public Works* (*supra*).

A claim for compensation for the dedication of land for widening a street is in a different position, Sec. 128 (5). In *Riddiford v. Mayor of Lower Hutt*, 24 N.Z.L.R. 54; 6 G.L.R. 424, Stout, C.J., gave a decision to this effect but there was apparently no statutory foundation for his decision at the date of the case. The law was altered in 1906.

In *Sullivan v. Mayor of Masterton*, 28 N.Z.L.R. 921, 12 G.L.R. 136, there was a special statutory provision enabling the local authority to recover for betterment arising from street widening when no land was taken from the owner of the property which was increased in value. See also Municipal Corporations Act, 1920, Sec. 193 (1), and *Auckland City Corporation v. Dawson*, (1929) N.Z.L.R. 614; (1929) G.L.R. 335.

(e.) As to assessing betterment so as to include betterment to arise in the future, see *Handley v. Minister of Public Works* (*supra*) at p. 687. Under the terms of Section 79 the Court is bound to take into account any increase in the value of the land "*likely*" to be caused by the execution of the works.

QUALIFICATIONS ON RIGHT TO RECOVER COMPENSATION.

1. A claim for compensation does not arise unless the acts of the respondent, if done without statutory authority, would have given rise to an action for damages: *Hone Te Anga v. Kawa Drainage Board*, 33 N.Z.L.R. 1139, 1149; 16 G.L.R. 696; *Chamberlain v. Minister of Public Works*, (1925) G.L.R. 510; (1926) N.Z.L.R. 96. See also *Lyttle v. Hastings Borough*, (1917) N.Z.L.R. 910; (1917) G.L.R. 553.

2. No claim for compensation arises unless the acts done are such as to justify a claim for compensation under the Act: *White v. Minister for Railways*, 16 N.Z.L.R. 71, 74. See also *King v. Shand*, 23 N.Z.L.R. 297.

3. Special statutes may deprive a person of his right to compensation, but the Court will not readily construe a statute so as to produce that effect: *Wright v. Dunedin Drainage Board*, 25 N.Z.L.R. 664, 8 G.L.R. 574. See also *Chamberlain v. Minister of Public Works* (*supra*).

4. There is a restriction on the right to compensation where the land taken affords special means of access to other persons: Sec. 44.

5. The claimant may affect his right to compensation by doing an act on the land with the purpose and effect of making the execution of the work more difficult and costly: Sec. 81.

6. Although a gas company has an estate in that part of the soil of the street occupied by its pipes, it will not become entitled to compensation from the local authority on account of anything done by it in the construction and repair of the streets, unless the local authority thereby makes it practically impossible for the company to repair or otherwise deal with its pipes: *Auckland Gas Company v. Mayor of Auckland*, (1922) G.L.R. 463; (1922) N.Z.L.R. 1041.

7. In the case of a dedication of land for the purpose of widening a street, no claim for compensation can be made till the instrument of dedication has been registered: *Cooper v. Karori Borough Council*, 30 N.Z.L.R. 273; 13 G.L.R. 322.

## Procedure.

### *Making a Claim.*

1. *By Whom.*—A claim for compensation under the Act may be made by any person seized, possessed of, or entitled to the land or to any estate or interest therein, whether such person has or has not the power to sell or convey the land, or by an executor or administrator: Sec. 47.

As to claims on behalf of *cestuis que trustent*, wards, mental defectives, or idiots, and also as to claims in respect to lands taken out of a native reserve, see Secs. 47, 48.

Special procedure is provided by the Act for cases where the owner is an absentee or is unknown or has no known agent in New Zealand: Sec. 49.

The claim must be made by the person who was the owner of the land or the interest therein at the time the right to compensation arose. *Fern Hill Railway Co. v. Mayor of Dunedin*, 3 N.Z.L.R. 86; *Kingdon v. Hutt River Board*, 25 N.Z.L.R. 145, 166; 7 G.L.R. 634, 642; *Re Public Works Act*, (1916) G.L.R. 547.

The power of a municipal corporation to levy rates is not an interest in land within the meaning of the Act: *Mayor of Wellington v. Minister of Public Works*, 22 N.Z.L.R. 915. As to the position of a gas company in regard to pipes laid in public streets, see *Auckland Gas Co. v. Mayor of Auckland*, (1922) N.Z.L.R. 1041; (1922) G.L.R. 463.

A claim may be made by an attorney if he is duly authorised to make it under his power of attorney: *Johnston v. Mayor of Wellington*, 19 N.Z.L.R. 733.

The claim may be signed by a solicitor on behalf of the claimant: *Johnston v. Mayor of Wellington* (*supra*).

As to disputing the title of the claimant, see below.

2. *Particulars in Claim.*—The claimant serves on the respondent a claim in writing in one of the forms prescribed in the second schedule to the Act.

The claim must state (see Sec. 51 (1)):—

(i) The area and description of the land taken or injuriously affected in respect of which the claim is made.

(ii) The nature and particulars of the claimant's interest therein.

(iii) If he claims as owner, particulars of any encumbrance, lease or easement.

(iv) Each matter on account of which he claims compensation with full particulars of nature and extent of the claim.

(v) The amount claimed respectively for land taken and land injuriously affected, giving in both cases the amount of each item of the claim separately.

(vi) The total amount claimed.

(vii) The claimant's full name and address.

Provision is made for compelling the claimant to give further particulars if he does not give full particulars in his claim or does not specify therein the amount claimed for each matter on account of which he claims compensation: Sec. 52.

It is important for the claimant to omit no item from his claim, as at the hearing he cannot adduce evidence in relation to any matter not disclosed therein, unless he obtains an amendment, which will be subject to terms, and which will not be granted so as to enable him to introduce a new cause of action or make a new claim: Sec. 74.

If the claimant's land is injuriously affected by the execution of a public work and is subsequently taken in exercise of the powers under the Act, the claimant may make separate claims in respect to the taking of the land and the injurious affection: *Easson v. Ward*, 7 G.L.R. 398; *Ross v. Minister of Public Works*, 32 N.Z.L.R. 1155; 16 G.L.R. 51.

An error in the heading of the claim is a mere irregularity and will not affect the claim: *Kaihu Railway Co. v. Nimmo*, 7 N.Z.L.R. 699.

3. *Service of claim and proof thereof.*—The Act prescribes the mode of service of the claim when it is against the Public Works or Railways Departments or against a local authority: Sec. 51 (2). In such case the claimant is entitled to receive from the officer in charge of the office of the Department or local authority a receipt stating the day on which such claim was received: Sec. 51 (3). Production of this receipt is necessary in order to prove service of the claim: Sec. 51 (4).

Although it has been held that a receipt by a subordinate under the direction of a Town Clerk is sufficient for the claimant, there is some doubt upon the point, and it would be safer to insist on a receipt signed by the highest executive officer in person: *Johnston v. Mayor of Wellington*, 19 N.Z.L.R. 733.

If the receipt is defective, a further receipt in proper form may be demanded and obtained from the corporation: *Ibid.* Service of the claim may be effected by delivering the claim to any one found at the office of the corporation: *Ibid*, p. 771.

An irregularity in the service of the claim is waived by the respondent on giving a receipt for the claim: *Puhoi Road Board v. Straka*, 6 N.Z.L.R. 574. Presumably, however, the respondent can, on giving the receipt, reserve any rights which it may have to object to the mode of service.

4. *Steps to be taken by claimant.*—

(i) He effects service of the claim on the respondent in the prescribed manner and obtains a receipt: Sec. 51.

(ii) If the respondent does not, within sixty days after service, give notice in writing to the claimant that he does not admit the claim, the claimant may, on the expiration of the said sixty days, file a copy of the claim with the receipt for service in the Supreme Court. The claim then has the effect of an award filed in the Supreme Court, unless it is set aside in the manner provided by the Act: Sec. 53.

It was held by the Court of Appeal in 1901 in *Johnston v. Mayor of Wellington*, 19 N.Z.L.R. 733, that the Supreme Court had no power to extend the above-mentioned period of sixty days. It was not until 1909 that paragraph (b) to Sec. 53 was enacted to give the Supreme Court power to set aside the filing of the claim and allow further time to the respondent.

After the claim has been filed in the Supreme Court, it becomes equal to an award and if it can be altered at all, it can only be altered by a Court: *Symons v. Mayor of Foxton*, 25 N.Z.L.R. 59; 7 G.L.R. 477. In this case an order was made by the Supreme Court setting aside the filing of a claim on the ground that no claim for compensation had arisen.

Where the claim arises under the Mining Act, 1926, failure by the respondent to give notice that he does not admit the claim does not entitle the claimant to succeed by default: *Minister of Mines v. Heslop*, 23 N.Z.L.R. 361: 5 G.L.R. 283.

(iii) If the respondent gives the aforesaid notice to the claimant but makes no offer, or if the claimant does not accept any such offer, the latter may file a copy of his claim in the Court for filing the claim with a notice in the prescribed form that he requires the claim to be heard by a Compensation Court. In such notice he appoints an assessor and gives his name and address. The notice must be filed within thirty days after the time limited for the respondent to make his offer; otherwise the claimant is deemed to have abandoned the proceedings in respect to the claim, and will not be entitled to prosecute the same any further without the leave of the Court: Sec. 54. The respondent may, however, waive the benefit of this time limit: *Joseph v. Mayor of Wellington*, 3 N.Z.L.R. S.C. 291.

(iv) Notice in writing of the appointment of the assessor must be given to the respondent: Sec. 54 (2).

(v) The appointment of the assessor is not valid unless he signs a consent and declaration in the prescribed form which is appended to the notice of the appointment and filed in the Court: Sec. 57.

5. *Steps to be taken by respondent.*—

(i) He should give notice within sixty days of the service of the claim that he does not admit it: Sec. 53. As to failure to do so, see paragraph 4 (ii) above. The form of the notice is immaterial so long as it is in writing and discloses a determination not to admit the claim: *Donald v. Mayor of Masterton*, (1921) G.L.R. 12.

(ii) He may within ninety days after the service of the claim, by notice in writing, make the claimant an offer of the amount he is willing to pay and he may also file a copy of the notice in the Court for filing the claim: Sec. 54 (1).

There is no formality in regard to the form of the offer: *Puhoi Road Board v. Straka*, 6 N.Z.L.R. 574.

The respondent is not estopped by making an offer from contesting the right of the claimant to receive the compensation awarded by the Compensation Court: *Penn v. Stratford County Council*, 13 N.Z.L.R. 33.

(iii) He must within thirty days after receiving notice of the appointment of an assessor by the claimant, appoint an assessor for himself and give notice thereof to the Registrar or Clerk of the Court for filing the claim and to the claimant. If he fails to make such appointment within the prescribed time, the Registrar or Clerk appoints an assessor for him: Sec. 55.

(iv) As to obtaining a consent and declaration from the assessor, see paragraph 4 (v) above.

(v) Under certain circumstances, the respondent may himself take steps to have the claim heard by a Compensation Court: Sec. 56.

6. *General.*—If a claimant, after a Court has been constituted under the Act, files a new claim for the purpose of commencing proceedings *de novo*, the filing of the new claim has no legal effect and does not operate as an abandonment of the former claim: *Chairman, etc. of County of Kairanga v. Bannister*, 33 N.Z.L.R. 1184, 1190; 17 G.L.R. 77.

*(To be Continued)*

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# Women Witnesses.

## Hats in the Witness Box.

"On 18th July, according to the evening press, a girl incurred the displeasure of Mr. Justice Roche by appearing in Court without a hat, and the learned judge instructed an usher to tell her that next time she came into Court she must wear a hat. The same day, a woman witness who asked permission of Mr. Justice Bateson to remove her hat, so that she could hear better, was given permission, the judge remarking that he wished all women would take off their hats when giving evidence.

"That women should be covered when taking an oath may seem appropriate on religious grounds. That a man should be uncovered in court seems natural and proper on grounds of ordinary good manners. But why there should be any hard and fast rule, one way or the other, as to women's hats when women are giving evidence, we are unable to see. However, as learned judges differ, this is evidently a matter for the Court of Appeal! The only difficulty is how to get the question raised there."

—*Justice of the Peace and Local Government Review.*

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"Judges are human, the same as anyone else."

—Mr. Justice Henchman.

# Australian Notes.

WILFRED BLACKET, K.C.

Mr. K. M. White, barrister, of Sydney, against whom an application to the Supreme Court was made in August last (see *ante* p. 241) has again been called upon to answer charges of misconduct. These were three in number, the most serious, in the opinion of the Court, being that he had obtained from a tradesman goods and cash for a valueless cheque drawn for £3 3s. 0d. The cheque purported to have been signed by one Wilson, but the Court, without deciding whether Wilson was really the drawer, held that the circumstances in connection with the drawing of the cheque as stated by White were such that he should have had a reasonable doubt as to its genuineness, and that his action in negotiating it and some other cheques of his own showed him to be "a man who had no hesitation in cheating and defrauding people by means of valueless cheques." There was also a charge against him that he had received money from a Mrs. McGovern for legal work not proper to be performed by a barrister, and had not properly applied the amounts received. The judgment of the Court was that Mr. White's name should be struck off the roll of barristers, and that he pay the costs of the application.

In the morning papers now one sees daily from ten to twenty advertisements stating that certain properties have been sold, or withdrawn from sale, and in either case requesting all agents to take notice of the fact. This custom so perturbed the Sydney Real Estate Institute that it sought the opinion of counsel on the matter and has been advised that such an advertisement is not a sufficient notice of withdrawal, and that the agent is entitled to receive notice by letter or other direct communication. The advertisement, it was advised, can only be effective when the vendor is able to prove that it was seen by the agent. As a matter of public convenience the practice of advertising in this way has much in its favour, for, in every suburb where the agents are of an enterprising nature, as soon as one man puts up his 18 in. by 14 in., or larger canvas, all others rush in and erect their notices, for there is no place where "agents fear to tread" in putting up "for sale" notices. The advertisement, therefore, is useful to them, and enables them to act promptly before a new owner requiring a stock of firewood for the winter comes into possession.

*Ross v. Ross*, Divorce, N.S.W., was an application for permanent alimony. The marriage took place in England in 1919, and the husband and wife came to Australia in the following year. In 1924 the wife went to America and stayed there. In 1928 the husband obtained a rule absolute in divorce on the ground of desertion, the suit being undefended. The husband paid money for her maintenance up to the time of the decree and for some time afterwards, but discontinued these payments recently when his income as an accountant became seriously diminished. The wife then returned from America and applied for permanent alimony. The Registrar in Divorce made an order in her favour, but this, on appeal, has been reversed by Owen, J. His Honour held that there was no jurisdiction to make the order as it had not been applied for at the hearing, and stated further that if such an order had then been applied for he would not have granted it as the wife had been proved to have deserted her husband.

His Honour Judge White, sitting in Quarter Sessions, Sydney, remitted a fine of £20 imposed upon a defendant for street betting, and bound him over to be of good behaviour, the reason for this clemency being that the defendant could not have been doing much bookmaking because he had only a little money in his pocket. This rule would not of course apply to a "punter," for the more he bets the less money is he likely to have left. Judge White is almost invariably restrained and judicial in his utterances, but on a recent appeal he is reported to have blurted out the statement: "I have known juries find verdicts which were a disgrace to the community. They must have forgotten their common sense, or their oath. I do not say all juries, but some of them." Then the Court resumed its business. We have heard similar disparagement of jury verdicts before, and perhaps have cherished some doubt whether judges are always right in these conflicts of opinion. For instance, I do well remember one case tried before Mr. Justice Windeyer many years ago wherein he took an extremely favourable view of the defendant's case and impressed this view very strongly in his charge to the jury. However, after a very short retirement, the jury returned with a verdict for the plaintiff for £1,500, the amount claimed. "You find for the plaintiff!" exclaimed His Honour, "Why, I thought the evidence was all one way!" "So it was, your Honour," placidly replied the foreman. I was not in the case but I confess that I thought that the verdict was undoubtedly right.

At Ryde, N.S.W., Police Court, one W. I. Weiss, showed to the satisfaction of the magistrate that he on the date charged had proper control of his motorcycle although there were three adult passengers in the side-car and two other adults sitting behind him on the machine. He was sitting on the petrol tank, and this arrangement seemed to the magistrate to be sufficiently satisfactory. The incident goes to prove the great popularity of motor-cycling at Ryde, N.S.W.

The direct result of the taxation imposed by the Commonwealth Government in its endeavour to bring in a new era of prosperity is that the New South Wales Railways will show a loss of £5,000,000 in the current year, unless something happens and is done. The tramway deficit will be only about £800,000, but as the railways in other States are in a similar non-paying position an application was made to the Federal Arbitration Court to reduce award rates of pay, and Victoria and New South Wales also moved to suspend the awards on the ground of national emergency. The application might have succeeded if the Federal Ministry had not, with marvellous promptitude, appointed Conciliation Committees under the recent Amending Arbitration Act, and thus ousted the jurisdiction of the Court appealed to by the Railway Commissioners of the States. I am not permitted to give my opinion regarding the recent actions of the Scullin–Fenton Ministry, and this is well, for profane expressions would be out of place in the *Law Journal*.

*Ex parte Cormack*, cor. Stephen, J., in Chambers, Sydney, raised an interesting point under the Maintenance Orders (Facilities for Enforcement) Act of 1923. An order to maintain his wife and children had been made against Peter Cormack by the City Police Court, Liverpool, England, in 1908. He afterwards came to Sydney, and in June, 1929, this order was registered at Burwood, N.S.W., Police Court. In August, 1930,

proceedings were taken in that Court and an order made that he be imprisoned until the sum of £1,013 for arrears under the original order should be paid. Against the order of the Burwood Court an application for prohibition was made and granted upon the ground that there was no evidence of the arrears or of non-payment when the order was registered at Burwood Court. A sworn complaint issuing out of the Liverpool Court stating that there were such arrears had, on the Burwood hearing, been accepted by the magistrate as proof of these arrears but His Honour could not find in the Act any power to proceed upon any evidence not within the ordinary meaning of the word "deposition" contained in the Act. The prohibition was, therefore, granted but without prejudice to the right of the complainant to proceed again upon proper and sufficient evidence.

Mr. McMahon, Stipendiary Magistrate of Sydney, has been considering the subject of perjury in the Law Courts, and his considered opinion is expressed in such forceful words as to deserve verbatim quotation. He said: "Reflecting on the value of the oath as we find it in the Courts it seems to me, after a long Court experience, that really the oath has been reduced to what I might well call a 'blasphemous informality.' To the truthful man the oath makes no difference—he will tell the truth in any circumstances, but to the untruthful man—and I suppose 95 per cent. of the witnesses that go into the witness-box are untruthful—to ask him to take an oath is to invite him to commit a blasphemy. One with any regard for honesty and truth becomes appalled when he sees in the Courts of the city every day so much barefaced lying, after calling on the Almighty to witness that they are about to tell the truth. I think it would be very much better if the oath were abolished from the Courts altogether, for it would make no difference in the administration of justice. The truthful man would still tell the truth: the liar would be just the same as before—still a liar." The sentiment expressed is somewhat lacking in the element of surprise. Unfortunately there do seem to be quite a number of witnesses who seem to think that the oath they have taken requires that they should tell "the whole truth and as much more as may be necessary."

## Consolidation of Statutes.

Mr. J. Christie, the permanent head of the Parliamentary Law Drafting Office, sailed for England on the "Rangitikei," on the 16th September.

It is understood that on his arrival in England Mr. Christie will link up with the New Zealand Delegation to the Imperial Conference and will render legal assistance to the Delegation in connection with their work. The main object of the visit, however, arises out of the contract entered into by the Government with Butterworth & Co. (Aus.) Limited for the publication of a Consolidated Reprint of the New Zealand Statutes. Mr. Christie will confer in London with the Editorial Staff of Butterworths.

"A thing of shreds and patches, resembling a kind of statutory Joseph's coat," is Mr. Justice Rich's latest description of the Commonwealth's income tax legislation.

# Queen Caroline.

### Sir Edward Parry's New Book.

In a series of books written when he was on the County Court Bench Sir Edward Parry gave us an insight into the conditions with which a County Court Judge has to deal, and from the legal point of view he told with sympathetic mind "the short and simple annals of the poor." No doubt the themes which went to the making of such a volume as *The Law and the Poor* have not ceased to interest him, but since he retired from judicial work he has widened his scope, without forgetting that he is a born champion of the oppressed, and he has found a congenial subject in the defence of the memory of Queen Caroline.* "The real Caroline," he says in the Preface, "is overwhelmed in a mass of slander and hearsay, and I am inclined to believe that the rescue of this jewel of a woman from the slag of her surroundings is not to be achieved. Nevertheless, the attempt has been an exciting and agreeable adventure." And, indeed, it has not been so unsuccessful as Sir Edward fears. It will be difficult after this to refuse belief to the inscription she herself directed for her coffin: "Here lies Caroline of Brunswick, the injured Queen of England."

Since so many at the time of her trial by the House of Lords gave credence to the false testimony sedulously collected at the instigation of her husband, the Prince of Wales, and used against her as soon as, on the death of George III, he ceased to be Prince Regent and became King, it is not surprising that in after years the epigram suggested by Denman's unfortunate quotation from scripture at the end of his speech in her defence has told against her in a manner he did not forsee. "If no accuser can come forward to condemn thee, neither do I condemn thee: go and sin no more." Denman quoted the words by way of contrast, but they were quickly turned into the well-known lines:—

"Gracious lady, we implore,
Go away and sin no more.
And if that effort be too great,
Go away at any rate."

And what Denman admitted to be an indiscretion gave him afterwards, in his own words, "some of the bitterest moments of my life." Neither Denman's peroration, nor the wit of the versifier, affected the question of Caroline's innocence, but it is easier to remember the epigram, with its facile insinuation of guilt, than to unravel the subornation of evidence on which the case against the Queen was based.

Had Caroline been a woman of less spirit she would have sunk under the heartless treatment of her husband and would not have won her way to victory in the manner Sir Edward Parry describes in a narrative of absorbing interest; a victory at once followed by death. But she was a Brunswicker, and from infancy was imbued with the spirit of an heroic race. "In what country is the lion found?" asked her tutor in a natural history lesson. "In the heart of a Brunswicker," according to family tradition, was the child's reply; and this was matched in after years when she used to say: "My father was a hero; they married me to a zero." Sir Edward Parry has an interesting opening chapter on

*Queen Caroline. By His Honour Sir Edward Parry. (Ernest Benn, Ltd.)

the father, the Duke of Brunswick, who married the Princess Augusta, sister of George III, so that that King became at once Caroline's uncle and father-in-law. The Duke in his youth gained distinction in the Seven Years' War, and after a long life spent in the field or in government of his Duchy, he was wounded in leading his troops at Jena in 1806, and died soon afterwards. His son, Frederick, one of Caroline's brothers, succeeded him and died at Quatre Bras. He was the "Brunswick's fated Chieftain" of Byron's lines:

"His heart more truly knew that peal too well
Which stretched his father on a bloody bier,
And roused the vengeance blood alone could quell;
He rushed into the field and foremost fighting fell."

"They were," says Sir Edward Parry, "a brave fighting race, these Brunswickers, and once roused to anger and revenge feared no enemy and no danger."

And so, he adds, after the fashion of the family, when it was clear that her husband meant mischief, Caroline rushed into the field with such supporters as she could rally round her, the leader in the struggle being Henry Brougham. His interest at first was "purely professional, or, more strictly speaking, political," for the division of public men into the King's friends and the Queen's friends had an important influence on party rivalries. And at the beginning he may not have been specially concerned to decide for himself whether the charges against his client were true or false, though later he affirmed in the most solemn way his belief in her innocence. But before this stage in the history is reached Sir Edward Parry prepares the way for understanding the conditions which surrounded her on her coming to England, and her marriage in 1795 to the Prince of Wales, by a story of the early years and the successive amatory adventures of George the third's eldest son. "It would be unfair," says Sir Edward, "to compare him to Nero, Caligula, Elagabalus, and fabulous human Minotaurs. But to put it frankly, he was a decadent and degraded personality in his relations with women." The comparison with Nero, however, and his treatment of his newly married wife Octavia, was made by Denman in the speech at the trial of the Queen, which "gained the lasting hatred and enmity of the King, who for many years refused him the silk gown to which his professional status entitled him."

We shall not attempt to follow the history of the Prince's relations with Mrs. Robinson—the two were known as "Perdita and Florizel"—and the rest. There was a real marriage with Mrs. Fitzherbert—a marriage stoutly denied at the time by his friends, even by Fox, who knew all about it—and she was displaced by the Countess of Jersey, the reigning favourite at the time of his marriage with Caroline, who revolted against the Prince's wish that she should remain the actual mistress of the household. There follows an interesting chapter on the mission of Lord Malmesbury—James Harris, the first Earl—who was sent by George II to the Court of Brunswick to arrange the marriage and bring Caroline home. He tried to school her for her new position and to get her to abandon the independence of manner with which she had grown up. But it was not an easy task. "I wish to be popular," she said to him, "and I fear you recommend too much reserve, and probably you think me too prone *a se livrer*." This independence was, as we have already said, part of her nature, and in the country of her adoption it did her both service and disservice. It was the foundation of the charges brought against her, but, combined with her husband's treatment, it made her the idol of the people.

The marriage was soon followed by separation, though the union lasted long enough for the birth of the Princess Charlotte. The upbringing of the little Princess, the expectant successor to the Crown, was one of the causes of contention between the parents, and her death in childbirth after her marriage to the Prince of Orange—the loss, in Byron's Lament, of the "fond hope of many nations"—was a catastrophe only balanced later by the reign of Victoria. Sir Edward Parry describes Caroline's household at Blackheath, where Canning, always her staunch friend, Lord Eldon, and his brother Sir William Scott, afterwards Lord Stowell, were frequent visitors; and where another Scott also came. To Blackheath, says, Mr. Donald Carswell, in his recent *Sir Walter*, Scott repaired, "full of ardent sympathy for the poor victim of Whig malignity. He came away thoughtful. The Princess had tried to flirt with him." No more, of course, than the freedom of manner which, as we have said, did her disservice. And during the Blackheath period began the attempts of the Prince and his friends to make out charges of misconduct. A chapter is devoted to the "Delicate Investigation," the curious name, says Sir Edward Parry, "given to an inquiry made by a tribunal of the Prince's friends into the conduct of his wife. It was an indecent travesty of justice, and it is sad to record that English lawyers and gentlemen should have consented to play a part in it." It failed, but only "whetted her husband's appetite for further adventures of a similar character." These included the Milan Commission, headed by Sir John Leach, which, after Caroline had in 1814 gone into exile and spent six years in Italy and in travels in the East, employed well paid agents to try to collect evidence against her. The expenses are said to have exceeded £30,000, but the witnesses made a sorry show when the trial, in the shape of the "Bill of Pains and Penalties," was staged in the House of Lords. It was from the start a denial of justice, for Lord Eldon got the House to reject Lord Erskine's motion that she should be furnished with a specification of the times and places where the offences alleged against her were supposed to have been committed. This hindered the preparation of her defence, and, moreover, the Government took steps to prevent her witnesses from reaching England in time to be available. One of her greatest supporters was Alderman Wood, and his son William Page Wood, afterwards Lord Hatherley, who had been studying on the Continent, and was just about to come to the Bar, had been instrumental in collecting evidence. He left it on record in his Autobiography that from his evidence, and after considering the evidence against her, he was "satisfied of her innocence of the crimes laid to her charge." Even Eldon had to abandon nearly all the evidence collected by the Milan Commission, and confine himself to the adultery alleged to have been committed by Caroline with her attendant Pergami in a tent on the deck of a small vessel—a polacre—in the East. As to this Sir Edward Parry says: "The incidents of the tent on the polacre always seem to me more worthless than the rest of the stories," and he gives his reasons. Technically the charges were held by the votes of the Peers—123 to 95—to be proved; but this result carried no weight, and practically the Bill was lost. A motion that it should be read "this day six months" was carried without dissent and the popular joy was unbounded. "Not," says Lord Campbell, in summing up the deplorable history, "until examples of purity

and all the domestic virtues had afterwards been displayed on the throne was it that the people of this country were again affectionately attached to the monarchial government under which they and their forefathers had so long flourished." Sir Edward Parry's book is as interesting as it is convincing.

## Crown Procedure.

### Lord Chancellor's Latest Intimation.

Reviewing at the Lord Mayor's Banquet what had been done in matters of law reform since his assumption of the office of Lord Chancellor, Lord Sankey had a word to say on the subject of Crown procedure:

"I have not been so successful in my endeavours to introduce a Bill dealing with cases where an individual is engaged in a dispute with the Crown or a Department of State. It is true that on taking office I found a Bill had been prepared, but it has not commanded universal assent. Although such assent might have been obtained where the litigation in question arose out of contract, there was a great conflict of opinion as to whether it would be wise to deal with torts or with the vexed question of discovery against the Crown. In these circumstances it was quite impossible to put forward an agreed measure, nor was there time, having regard to the Government's social legislation, to introduce one which might have met with considerable opposition."

## Court of Arbitration.

The following fixtures have been arranged by the Court of Arbitration:—

Gisborne: Thursday, 9th October, at 10 a.m.
Napier: Monday, 13th October, at 10 a.m.
Greymouth: Monday, 20th October, at 10 a.m.
Westport: Wednesday, 22nd October, at 10 a.m.
Reefton: Thursday, 23rd October, at 2.15 p.m.
Nelson: Tuesday, 28th October, at 10 a.m.
Blenheim: Wednesday, 29th October, at 3 p.m.
Christchurch: Thursday, 6th November, at 10 a.m.

"The barrister's day very often ends with: 'If your Lordship pleases'; the solicitor's ends in a walk home with the lay client. I would be grateful for a formula which would enable a solicitor to break away from a lay client whom his Lordship had not pleased to remember, and yet keep him for the morrow."

—Dr. Leslie Bergin, M.P.

## The Art of Debate.

### Sir John Simon's Views.

Proposing the toast of the Hardwicke Society at its recent annual dinner, Sir John Simon, K.C., described it as the most famous debating society in the legal profession.

The art of debate was essentially a British art, he said, and was the art of keeping to the point, keeping the temper, and addressing oneself to the actual issues which arose in the course of discussion rather than to any prearranged lines of argument. In the United States a prepared oration was more usual, and the speech could often be handed to the reporters in type beforehand, while, in the Supreme Court, counsel handed his brief to the judge to study after he had delivered his speech. There could be no doubt that upon the cultivation of the art of debate depended the British method of hand to mouth, face to face, each riposte suggested by the latest stroke of the adversary.

Nothing, said Sir John Simon, interested him more than to look back upon an experience of the House of Commons lasting over a quarter of a century and observe the practice of that noble art by some of its most famous exponents. In his early days a distinguished ex-President of the Society, Sir Edward Clarke, had given him a piece of advice that he had treasured all his life. The advice was: "First, never speak on a lawyer's subject; secondly, do not suppose that you can take part in a House of Commons debate by merely coming in just before your name is called and making such observations as occur to you—you must accommodate yourself to the current of the moment like rowing on tidal water; thirdly, "unless the debate has taken that turn which enables you to feel that what you had in mind to say really fits, do not say it." The public did not appreciate the degree and strength of the influence exerted in the House of Commons by men who effectively used the art of debate. The effective presentation at the right moment of an argument which came from the heart and hit the point profoundly influenced public judgment and the ultimate action of the Government. The best speeches were not delivered impromptu, but when the speaker transfused a carefully thought-out speech under the heat and temper of the controversy of the moment. Sir John Simon illustrated his point by many anecdotes of famous speakers; he cited Mr. Winston Churchill as an example of a man who devoted immense care to preparation when this was possible, yet could speak eloquently without preparation when necessary.

The art of debate was an effective retort at the point when the opponent thought he had scored, and the debater must listen to what the other man was saying rather than recite to himself what he was going to say. A member of the House of Commons might do much to help his country by cultivating, using, and believing in the art of debate. We did not live under a fixed cast-iron constitutional plan, but were all part of an immense growth and development. To this lawyers made an important contribution, no part of which was more important than the practice and preservation of the essentials of the art of debate.

# Bills Before Parliament.

**Education Amendment Bill.** (MR. MASON). Where any permanent appointment of a teacher to a school or training college is made any teacher who is dissatisfied with such appointment may within the prescribed time and in the prescribed manner appeal to the Teachers' Court of Appeal referred to in Ss. 147 and 148 of principal Act—Cl. 2. Provisions relating to appeals—Cl. 3. If by decision of the Court it appears that the appointment of the appellant is more suitable than the appointment made by the Board, the appointment made by the Board may be rescinded by the Court and appellant shall be entitled to be appointed to the position.—Cl. 4.

**Incorporated Societies Amendment.** (HON. MR. RANSOM). By the Incorporated Societies Amendment Act, 1920, provision is made whereby an incorporated society with not less than 500 members may have its branch societies incorporated. Clause 2 (a) of the Bill removes this restriction as to the minimum number of members. In lieu of this restriction the minimum membership of an incorporated branch is fixed by Clause 2 (b) at 15 members.

**Local Legislation.** (HON. MR. DE LA PERELLE). Fifty-two clauses of local application.

**Post and Telegraph Amendment.** (MR. MASON). S. 236 of principal Act amended by striking out words "to hold office during his pleasure" in par. (a) of subsection (2), and substituting words "one being a person approved in the prescribed manner by the officers of the Department and to be Chairman of the Board, and both to hold office for respective terms not in either case exceeding three years."—Cl. 2.

**Property Law Amendment.** (MR. MASON). Forty years substituted for sixty years as the root of title.—Cl. 2. No land or rent to be recovered but within twelve years after the right of action accrued.—Cl. 3. Provision for case of future estates: time limited to six years when person entitled to the particular estate out of possession, etc.—Cl. 4. In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.—Cl. 5. No time to be allowed for absence beyond seas.—Cl. 6. Thirty years utmost allowance for disabilities.—Cl. 7. In case of possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of twelve years after the period at which the assurance, if then executed, would have barred them.—Cl. 8. Money charged upon land and legacies to be deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in meantime.—Cl. 9. Act to be read with 3 & 4 Wm. IV., Ch. 27: 7 Wm. IV and Vict., Ch. 28 to be read with this Act.—Cl. 10. Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.—Cl. 11.

**Reserves and Other Lands Disposal.** (HON. MR. RANSOM). Twelve clauses of local application.

**Statutory Land Charges Registration Amendment.** (HON. MR. RANSOM). S. 5 of principal Act amended by inserting, after the words "any deed, contract or instrument" in subsection (1), the words "which, being registered after the creation of the charge, is."—Cl. 2. Clause 3 provides as follows: (1) Except as provided in the next succeeding subsection, the order of priority of charges registered in accordance with the provisions of the principal Act in relation to other mortgages, encumbrances, charges, or interests shall be determined in accordance with the provisions of the Deeds Registration Act, 1908, or the Land Transfer Act, 1915, as the case may require. (2) Where any charge registered before or after the passing of this Act in accordance with the principal Act is entitled, by virtue of any Act or otherwise howsoever, to priority over any other mortgage, encumbrance, charge, or interest then, notwithstanding anything to the contrary in the Deeds Registration Act, 1908, or the Land Transfer Act, 1915, such priority shall not be affected by reason of the registration of the charge under the principal Act: Provided that if before registration such charge becomes void against a subsequent purchaser in accordance with the provisions of section five of the principal Act, it shall thereupon lose its priority over all mortgages, encumbrances, charges, and interests (if any) that have priority over the interest of such subsequent purchaser,"

# Wellington Law Students' Society.

The following case was argued recently before Mr. H. F. VON HAAST: "A, batting in a cricket match on a ground owned by a cricket club which is a limited company, in size and situation similar to the Basin Reserve, hits a ball out of the ground. It strikes B, a passer-by, on the head and kills him. C, B's widow and executrix, brings an action for damages under "The Deaths by Accidents Compensation Act, 1908," against A and the Club. Can she succeed?"

*Blundell* for plaintiff. Both batsman and company liable. Former in negligence and trespass. Company created public nuisance; escape of dangerous object; vicarious liability. Batsman failed to observe due care. See *Thomas v. Quartermain*, (1887) 18 Q.B.D. 685. Election to take risk. Trespass to person. See 27 *Halsbury*, 871; *Leame v. Bray*, (1803) 3 East. 593. *Beven on Negligence*, 4th Edn., Vol. I, 701. Company created public nuisance: *Castle v. St. Augustine's Links*, (1922) 38 T.L.R. 615. Absolute liability under rule in *Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330. Vicariously liable for batsman who is either servant or agent.

*Longuet* in support. Even if not negligent batsman still liable to plaintiff. See *Salmond on Torts*, 7th Edn., 63; *Dickenson v. Watson*, Jo. 205, illustrating liability for trespass. See also *Beven*, 701. Defendants also created nuisance on highway. See *Benjamin v. Storr*, (1874) L.R. 9 C.P. 400; *Penny v. Wimbledon Urban Council*, (1899) 2 Q.B. 72.

*Jessep* for defendants. Defendants owed no duty to plaintiff in law. See dicta in *Lane v. Cox*, (1897) 1 Q.B. 415; *Butler v. Fife Coal Co.*, (1912) A.C. 149. Playing cricket a natural user of ground: 21 *Halsbury*, 395; *Ward v. Abraham*, (1910) 47 S.L.R. 252. No negligence. See *Street's Foundations of Legal Liability*, Vol. I, pp. 68, 84; *Salmond on Torts*, 6th Edn., pp. 21, 27. Rule in *Rylands v. Fletcher* restricted to damage to land: *Clerk and Lindsell on Torts*, 8th Edn. 393; *Salmond on Torts*, 7th Edn., 348. Trespass to person same head as negligence.

*Toogood* in support. Case of inevitable accident. No liability on defendants. Neither wilful harm nor negligence. Too high a standard of care demanded of batsman. Ground of full size and protected by high fence. *Castle's case* (*cit. sup.*) distinguishable. There a nuisance had been created. This an isolated instance. *Ward v. Abraham* (*cit. sup.*) a guiding authority. Defendants have right to reasonable user of their ground: *Fanshawe v. London and Prov. Co.*, (1888) 4 T.L.R. 694.

MR. H. F. VON HAAST, delivering "judgment," observed that the Act of 1908 plainly presupposed some want of care, and referred to the words "wrongful act, neglect or default." The case of *Leame v. Bray*, (*cit. sup.*) was decided at a time when forms of action very important. Rule in *Rylands v. Fletcher* applied to cases where materials containing inherent vice dealt with by human agents. Club and player not liable unless nuisance created, which was not proved in this case by isolated instance of damage. *Castle's case* was one of nuisance and not applicable. Defendants were playing lawful game in lawful way. Case would be different if evidence of frequent occurrences of similar act. Then nuisance plainly created.

Judgment would, therefore, be for defendants.

# Rules and Regulations.

**Administration Act, 1908**: Norwich Union Fire Insurance Society Ltd., approved by Governor-General in Council for purposes of Act.—Gazette No. 61, 28th August, 1930.

**Administration of Justice Act, 1922**: Reciprocal application to Norfolk Island.—Gazette No. 61, 28th August, 1930.

**Nurses and Midwives Registration Act, 1925**: Amendments to regulations of 7th July, 1930.—Gazette No. 61, 28th August, 1930.

**Administration Act, 1908**: Pyne, Gould, Guinness Ltd., approved by Governor-General in Council for purposes of Act.—Gazette No. 62, 4th September, 1930.

**Shipping and Seamen Act, 1908**: Additional rules for examination of masters and mates.—Gazette No. 62, 4th September, 1930.