New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"Accumulation, selection, rejection—these are the reading, writing and arithmetic of advocacy."
—Sir John Simon.

Vol. VI Tuesday, December 9, 1930 No. 21

Legality of the "Coupon" System.

At the present time throughout the length and breadth of the country Chambers of Commerce and other responsible bodies representative of sections of the commercial community are complaining of the evils of the now well-established "coupon" system of trading. The Minister of Internal Affairs (Hon. Mr. de la Perelle) advised, no doubt, by the Crown Law Office, has said that the Trading-stamps Prohibition and Discount-stamp Issue Act, 1908, is worthless; that if at all possible an Order-in-Council (presumably under the Board of Trade Act, 1919) will be made; failing that, the matter will have to stand over until the next Session of Parliament. It is interesting to examine the legal position.

It is, in the first place, essential to distinguish between the different forms in which the "coupon" system is operating to-day. First, there is the case of the retailer issuing his own coupons to all purchasers from him, coupons to a certain value being redeemable for cash or goods from his store to a value. No one, as we understand it, suggests that this is an evil, or that it is a breach of the law. Secondly, there is the case of the manufacturer or producer of such goods as cigarettes, tobacco, tea, or butter, who includes in each package a coupon, a certain number of these coupons being redeemable by him for articles of a kind quite different from those usually dealt in by him. Thirdly, there is the case of the coupon companies which have sprung into activity during the past few weeks, and which sell coupons to retailers, these coupons being issued by the retailers to their customers, and numbers of them being redeemable by the coupon company with goods.

The Trading-stamps Prohibition and Discount-stamps Issue Act, 1908, makes it an offence, punishable by a fine not exceeding £10, to issue any trading-stamps to any person, or to give or deliver any money or goods on presentation of any trading stamp. The efficacy or otherwise of the statute depends upon the following definitions in subsection (5) of S. 2:

> "'Trader' means any person, firm, or company carrying on any business who issues trading-stamps to customers:
>
> "'Trading-stamp' includes any stamp, coupon, cover, package, document, means or device issued by any trading-stamp company or by any trader which entitles the holder thereof to demand and receive *from any trading stamp company* any money or goods:
>
> "'Trading stamp company' means and includes any person, firm or company who supplies any trading-stamps to any trader, and undertakes to redeem the same by giving or delivering to the holder thereof any money or goods."

The Act was first placed on our Statute-book in 1900; there is no material difference in wording between the Act of 1900 and the Act of 1908. In *Brady v. Maddern*, 27 N.Z.L.R. 657, Chapman, J., had to consider the provisions of the earlier Act. In that case the appellant sold packets of tea containing his own coupons, six or twelve of which entitled the holder to receive an article from the appellant. The learned Judge, who discussed the matter with other Judges, held that the appellant had not committed a breach of the Act. The coupons which he issued were not trading-stamps for they did not refer the holder to any trading-stamp company to which he might resort to have the coupon honoured. This reason for the decision seems, if we may say so, obviously correct, for a coupon is not a trading-stamp as defined in the Act unless it "entitles the holder to demand and receive *from any trading-stamp company* any money or goods." For this reason then, and on the authority of *Brady v. Maddern*, it seems plain that the second form of the system as now in operation in this country is outside the provisions of the Act. Perhaps on a literal reading of the definition of "trading-stamp company" there might be some slight ground for arguing that the tobacco company which includes its own coupon in every packet of its cigarettes, and other owners of proprietary lines who adopt the same system, are themselves "trading-stamp companies" in that they supply trading-stamps to a trader when they sell their goods to the retailer; but this was certainly not within the contemplation of the Legislature at the time the Act was passed, and the better view seems undoubtedly to be that the definition does not include a person himself a trader trading in the goods with which he issues his own coupons redeemable by him.

The third form of the system, however, would appear to be plainly within the Act and to be a breach of its provisions were it not for the other ground for the decision in *Brady v. Maddern*. Chapman, J., said:

> "I think, moreover, that another point made by appellant's counsel stands in the way of the conviction. A 'trading-stamp' is defined to be something 'which entitles the holder thereof to demand and receive from any trading-stamp company any money or goods.' This coupon gives no such right. It must be presented with six or twelve others.... The mere act of supplying a coupon having no value in itself does not therefore come within the terms of the Act as describing an offence."

With all due respect to the learned Judge and to his colleagues who were consulted—if their approval went to this ground of the decision—this would not seem to be the commonsense view. The very object of the Act, as was well known at the time, was to suppress the operations of a particular trading-stamp company then issuing stamps no one of which by itself was redeemable. The definition of "trading-stamp" in the Act is not, it should be noted, exclusive—the section says "'trading-stamp' *includes*," etc.—but the learned Judge seems to have regarded the definition as exclusive. Such an interpretation makes the Act for all practical purposes useless and we very much doubt whether this ground of the decision in *Brady v. Maddern* would be followed to-day.

We would like to see a test case brought raising the question of the legality of this third form of the system; the Magistrate's Court would probably be bound to follow *Brady v. Maddern*, but that decision would not be binding on the Supreme Court, or at all events on a Full Bench, if it felt inclined to disagree with it.

Supreme Court

Myers, C.J.

April 10; October 7, 1930.
Wellington.

JOHNSTONE AND NICHOL v. COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duty—Estate Duty—Transfers by Testator to Three Sons of Parcels of Land on which Partnership Business Carried on by Him and Two Sons—Lands Continued to be Used by Partnership—Rent Paid Only to Non-Member Son—Donees Not Retaining bona fide Possession to Exclusion of Donor—Lands Part of Dutiable Estate of Testator—Additional Share in Partnership Assets Given to Sons Not Part of Dutiable Estate as No Benefit Reserved to Donor—Death Duties Act, 1921, S. 5 (1) (c).

Case stated under S. 62 of the Death Duties Act, 1921, and its amendments to determine whether the land comprised in certain transfers by a testator, G. Nichol, who died on 31st December, 1927, formed part of his dutiable estate. The testator prior to 1906 carried on a farming business in partnership with his brother, J. S. Nichol. They each had a half-share in the live and dead farming stock and plant, but the testator owned all the land on which the partnership business was carried on with the exception of one parcel of which they were tenants in common. In 1906, however, the testator's two sons, W. I. Nichol and G. B. Nichol purchased the interest of J. S. Nichol in the partnership and in the parcel of land last mentioned, and carried on the farm business in partnership with their father until his death. It appeared that until 1919 they paid him the sum of £730 per annum as rent. On 12th November, 1919, however, the testator executed separate transfers of portions of the lands owned by him to each of his three sons, W. I. Nichol, G. B. Nichol, and J. Nichol, and by transfer partitioned the land formerly owned by him and his two sons, G. B. Nichol and W. I. Nichol as tenants in common, so that the said G. B. Nichol and W. I. Nichol each acquired an undivided moiety in the land. After this date the testator ceased to receive payment of the sum of £730 per annum or any other sum as rent for the land occupied by the partnership business. No rent was received by any of the partners for the said lands. The annual sum first of £300 for two years and then of £500 was paid to J. Nichol as from the date of the transfer to him in 1919, the first payment of £600, being for two years, being made by the testator and the other payments by the partnership. No agreement for a lease of a tenancy was ever made with J. Nichol with respect to the lands on which the partnership business was carried on. In 1923 the partners agreed that their shares in the partnership assets and profits should be equal. The testator did not receive any payment for the one-sixth share in the assets transferred by this arrangement to the two sons who were partners. The Commissioner claimed that the lands separately transferred to the three sons, and the lands acquired by the two partners as the result of the partition formed part of the dutiable estate of the deceased. He similarly claimed estate duty on the one-sixth interest in the partnership assets transferred by the testator to the two sons in partnership with him. The appellants appealed from such assessment.

A. H. Johnstone for appellants.
Currie for respondent.

MYERS, C.J., said that it was emphasised in **Attorney-General v. Worrall,** (1895) 1 Q.B. 99, and had been oft repeated, that in cases of the present kind the Court must look at the real nature and substance of the transaction; and Mr. Johnstone contended that the real transaction between the testator and his sons so far as the lands were concerned was a gift not of the land but merely of a reversion. As the first step in his argument Mr. Johnstone, relying upon **Pocock v. Carter,** (1912) 1 Ch. 663, contended that up to the date of the gift in 1919 the testator and his two sons William and George as a partnership firm held a tenancy from the testator during the continuance of the partnership; and that such tenancy continued after the gifts were made until the testator's death. Although S. 19 of the Property Law Act, 1908, enacted that a person might convey property for any estate or interest to himself, or to himself jointly with another or others, it was difficult to see how he could grant a lease of his own land to himself and others. That point was dealt with by Isaacs, J., in his dissenting judgment in **Commr. of Stamp Duties v. Thomson,** 40 C.L.R. 394, 409. However that might be, in **Pocock v. Carter,** where the premises upon which a partnership was carried on were, and were declared by the partnership deed to be, the property of one partner, and the partnership deed contained no provision as to the tenancy of the partnership but only a general direction that all rent was to be paid out of profits, Neville, J., held that the Court would infer that the partnership was intended to hold the premises on a tenancy during the continuance of the partnership and not on a tenancy from year to year or at will. Mr. Currie did not challenge the decision in **Pocock v. Carter** or dispute its applicability to the present case. Mr. Johnstone then contended that the present case was indistinguishable from **Commr. of Stamp Duties v. Thomson,** 28 N.S.W.S.R. 195, 40 C.L.R. 394, a case decided in New South Wales under a provision substantially the same as S. 5 (1) (c) of the Death Duties Act, 1921. His Honour, after referring at length to the facts of that case and citing a passage from the judgment of Street, C.J. (at p. 202) which showed the *ratio decidendi* of the Supreme Court of New South Wales in that case, went on to consider the judgments of the various members of the High Court on appeal from the Supreme Court. He said that the judgments of those members of the High Court on the appeal were conflicting. As a matter of fact the judgment of the Supreme Court of New South Wales was reversed (Knox, C.J. dissenting), but upon a consideration of a different section altogether from that dealt with in the extracts that His Honour had quoted from the judgment of Street, C.J. His Honour was not concerned in the present case with the ground upon which the decision turned in the High Court in **Commissioner of Stamp Duties v. Thomson,** but only with the conclusions arrived at by the different members of the Court on the provision corresponding with that contained in S. 5 (1) (c) of the New Zealand Act. Knox, C.J., agreed with Street, C.J. that the transaction was really and in substance a settlement of the reversion expectant on the determination of a lease for seven years to the partnership firm of Currie and Smith, which was at the date of the settlement in occupation of the whole of the land passing under the settlement and the documents executed in pursuance thereof; and he further agreed with Street, C.J. in holding, on this view of the transaction, that *bona fide* possession and enjoyment of the property passing under the settlement was immediately assumed by the donee within the meaning of the subsection and was thenceforth retained by her to the exclusion of the settlor or of any benefit to him. Isaacs, J. came to the contrary conclusion and held that the transaction was within the section. Knox, C.J. stated at the conclusion of his judgment that Gavan Duffy, J. wished him to say that he too thought that the judgment appealed against was right though he did not adopt all the reasons relied on by the Judges of the Supreme Court. Higgins, J. and Powers, J. held on the subsection corresponding with our S. 5 (1) (c) that the judgment of the Supreme Court was right but they rejected the grounds upon which that judgment was founded. His Honour could find nothing in the report of the case to show whether or not Gavan Duffy, J., agreed with the criticisms of those learned Judges of the reasons of the Court below. His Honour quoted extracts from the judgment of Higgins, J. (at p. 418, 420, 421, and 424), and from the judgment of Power, J. (at p. 431). Turning to the facts of the present case, His Honour said that it would be convenient to consider first the gift to James Nichol, the third son, who was not at any time a member of the partnership. From the oral evidence that he gave at the hearing it appeared that the land the subject-matter of the transaction in which he was concerned was transferred to him by his father without his knowledge and without any reference to him at all; nor did he know of the gift till some time afterwards. After the transfer to him in 1919 he received from his father in 1921 £600, and thereafter from the partnership £500 per annum. The effect of his evidence was that he, his father, and brothers regarded those payments as rent of the land given to him which the partnership was using together with the lands belonging to the members of the partnership. If the partnership in the present case between the testator and his sons William and George was merely a partnership at will it would seem from **Pocock v. Carter** (*cit. sup.*) that so long as the land on which the business was carried on belonged to the testator there must be presumed to have existed a tenancy during the continuance of the partnership. But the partnership, being a partnership at will, could have been determined at any moment by any one of the three partners. A tenancy at will was determined by the landlord's alienation of the reversion and notice thereof: **Doe d. Davies v. Thomas,** 20 L.J. Ex. 367; 6 Ex. 854, 857. The testator himself of course knew of the alienation which he himself had effected, and, in the circumstances of the case it was plain that the other two members of the partnership knew also of the alienation.

It seemed to His Honour, therefore, that the transaction was in substance a gift to James of the land itself. He did not, His Honour thought, take the land subject to a tenancy existing at the time of the transfer. But, even if that view were not correct, His Honour did not think that the position of the donee was improved so far as S. 5 (1) (c) was concerned, because the alternative was, as His Honour thought, that there was in any case such an arrangement as to prevent its being held that James (whatever the transaction was in substance) ever assumed, and retained, *bona fide* possession and enjoyment of the property comprised in the gift, to the entire exclusion of the testator or of a benefit to him by contract or otherwise. Prior to the date of the gift in 1919 the partnership had paid the testator the sum of £730 per annum as rental for the whole of the land that had belonged to the testator prior to the gifts, and after the gifts were made no rental at all was paid by the partnership to the testator, but an annual sum first of £300 and afterwards of £500 was paid to James; the first payment of £600, representing £300 per annum for two years, being made by the testator himself, and the subsequent payments by the partnership. James had nothing whatever to do with fixing the rent: that was fixed either by the testator alone or by the testator in conjunction with William and George. From the date of the gift until the testator died in December, 1927, no express agreement was made with James in regard to either the duration of any tenancy or the rental, but the testator in conjunction with the two sons William and George continued to use the land, paying James by way of what they called rent just so much as they (or the testator alone) thought fit. A new and differnt contract must, His Honour thought, be inferred so far as James's land was concerned. The doctrine of **Pocock v. Carter** (*cit. sup.*) was no longer applicable, because the land was not the property of a member of the partnership. The position as between James (the new owner) and the partners would, it seemed, be governed by S. 16 of the Property Law Act, 1908, and the tenancy deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing. So far at all events as James was concerned His Honour thought that the case was very much like **Lang v. Webb,** 13 C.L.R. 503. The essential facts of the present case were, His Honour thought, different from those in **Commr. of Stamp Duties v. Thomson** in several material respects and it would seem from the dicta of Higgins, J. and Powers, J. that, had they been dealing with a case where the facts were such as His Honour was dealing with, at all events so far as the gift to James was concerned, they would have held the transaction to be within the section.

His Honour could not help thinking that the transaction regarding the gift to James shed light and colour upon those constituting the gifts to the other two sons, William and George. Quite apart from the question of the determination of the tenancy upon the doctrine of such cases as **Doe d. Davies v. Thomas** (*cit. sup.*) the inference to be drawn from the facts of the case was that at or before the time when the gifts of the land were made to William and George a new arrangement must have been made between the testator and the two sons. That was clear, His Honour thought, from the fact that prior to the gifts the partnership paid the testator a rental of £730 per annum, while as from the date of the gifts no rental was paid by the partnership to any of the partners. The business continued to be conducted on the same lands. Those lands however were at no time the property of the partnership, but they were nevertheless by arrangement between the three partners used for the purposes of the partnership business, and the testator under that arrangement derived a benefit from the gifted lands. His Honour thought, therefore, that in the case of each of the gifts of the land the position was the same. The beneficiary did not in His Honour's opinion assume not less than three years before the testator's death, and thenceforth retain, *bona fide* possession or occupation of the land, to the exclusion of the testator, and further there remained to him until his death a benefit "by contract or otherwise" within the meaning of the section as interpreted by judicial authority. His Honour distinguished **Att.-G. v. Seccombe,** (1911) 2 K.B. 688., and **Commr. of Stamp Duties v. Byrnes,** (1911) A.C. 386, and held that all three transactions in the present case were within S. 5 (1) (c). His Honour stated that the same position obtained and for the same reasons in regard to the partition of the lands described in the Fifth Schedule to the case to the extent of the sum of £4,496.

As to the one-sixth interest in the partnership it was admitted by Mr. Johnstone that the transaction constituted a gift or gifts within the meaning of the Death Duties Act, 1921, on which gift duty had not been paid. That duty must admittedly be paid in accordance with the Commissioner's assessment.

It remained only to determine whether such interest in the partnership also constituted property comprised in a gift or gifts by the testator coming within the provisions of S. 5 (1) (c). In His Honour's opinion that question should be answered in the negative. In effect it was a gift of an interest in a partnership business. The mere fact that the partnership continued between the sons and the testator and that the assets (which were partnership property) continued to be used in the partnership business seemed to His Honour to be immaterial. So far as the shares of the sons in the partnership were concerned they entered into *bona fide* possession and enjoyment of the shares immediately the gift was made and retained their shares to the entire exclusion of the testator or of any benefit to him by contract or otherwise. The only benefit that the testator derived was from his own share of the partnership that he retained. In this respect the gift differed from the gifts of the land which were never partnership property. There was no reservation of any benefit to the testator, nor in fact did he obtain any benefit by or from the gift by contract or otherwise. The Commissioner's assessment must, therefore, be varied by excluding from the dutiable estate of the testator the one-sixth interest of the partnership assets. Subject thereto the assessment was upheld and the appeal dismissed.

Solicitors for appellants: **Downie Stewart and Payne,** Dunedin.
Solicitors for respondent: **Crown Law Office,** Wellington.

Reed, J. September 29; October 29, 1930. Auckland.

F. J. FAWCETT LTD. v. McLEOD.

Wages Protection and Contractors Liens—Practice—Statement of Claim Not Stating Period Within Which Work Done—Allegation That Work Done on or Before Date Named Not Sufficient—Requirement of Statute Mandatory—Non-compliance a Defectus Triationis Capable of Waiver—Filing by Defendant of Notice of Intention to Defend Not a Waiver—Wages Protection and Contractors Liens Act, 1908, Ss. 67, 68—Inferior Courts Procedure Act, 1909, S. 3—Code of Civil Procedure, Rules 465, 466.

Application under R. 466 for prohibition, and for a writ of *certiorari* to bring up and quash an order or judgment of Mr. F. H. Levien, S.M., charging against moneys payable to the plaintiff a sum of £209 14s. 6d. under Part III of the Wages Protection and Contractors Liens Act, 1908, in favour of the defendant J. McLeod. The claim under the Wages Protection and Contractors Liens Act stated, *inter alia*: "The work was done for the defendant N. J. Fawcett Ltd., on or before 17th April, 1930." It was submitted that S. 67 (1) of the Act had not been complied with in that the claim did not state the period within which the work was done.

Dyson for plaintiff.
Addison for defendant.

REED, J., said that it had been submitted: (a) that S. 67 (1) was mandatory, (b) that "on or before the 17th day of April, 1930" was not a compliance with the requirement that "the period within which it was done" should be stated, (c) that non-compliance ousted the jurisdiction of the Magistrate. His Honour thought the word "must" was imperative and that the section was mandatory. The meaning of the words "may" and "shall" was the subject of constant and conflicting interpretation but, so far as His Honour was advised, the meaning of the word "must" was not defined in any decided case. And the reason was obvious, nothing could be more imperative.

The next point was as to whether "on or before the 17th day of April 1930" stated "the period within which (the work) was done." His Honour did not think it did. Those words required a commencing and a finishing date. That that requirement was intentional was supported by the form of "Statement of Claim" given in the Schedule. The relevant clause was as follows: "The work was done (State the name, residence, and occupation of the person for whom or on whose credit the work was done), between the ——day of——and the——day of——last." S. 67 (2) read: "The claim may be in one of the forms given in the Third Schedule hereto . . . ." In the Schedule there were two forms only given, one for use by a single claimant, and the other where a number of workmen joined in claiming a charge or lien for their wages. In both cases the commencing and finishing date was a requirement of the form. That was not a purely formal matter but was a matter of substance, and it particularly affected persons who might desire

to intervene as being claimants to share in the fund: **Ball v. Scott Timber Co. Ltd.,** (1929) N.Z.L.R. 570.

The requirements of the Statute, therefore, being mandatory and not having been complied with, the plaintiff company submitted that the Magistrate acted without jurisdiction in adjudicating upon the claim. His Honour thought the submission was well founded. The Statute was a very special one conferring on certain persons special rights and privileges. It prescribed in imperative language the exact requirements before the special jurisdiction could be exercised. His Honour thought that failure to observe such requirements deprived a Magistrate of the jurisdiction conferred: **Taylor v. Taylor,** 1 Ch. D. 426, per Jessell, M.R. at p. 431; and **Craies on Statute Law** (3rd Edn.) 235. It was, however, contended that S. 3 of the Inferior Courts Procedure Act, 1909, applied and that the plaintiff had waived or acquiesced in the "error, irregularity, omission or defect." That section had not, so far as His Honour was aware, been judicially interpreted. His Honour thought that subsections (1) and (2) were intended to deal with a case of what was known as *defectus triationis*—that is where the defect was of a power to try the particular issue only—whilst subsection (3) dealt with *defectus jurisdictionis* where the defect was jurisdiction over the cause: **Mayor of London v. Cox,** L.R. 2 H.L. 239, 282. An example of the distinction between the two was given by Denniston, J., in **In re Skene's Award,** 24 N.Z.L.R. 591, and see **Waikare v. Florance,** (1918) N.Z.L.R. 46. In the case of *defectus triationis* waiver or acquiescence would give the Court jurisdiction but where it was *defectus jurisdictionis* mere waiver or acquiescence would not give jurisdiction. His Honour thought that the defect in the present case was of the former class. In an ordinary case in the Magistrate's Court it was the plaint note that gave the Magistrate jurisdiction and unless there was strict compliance with the statutory provisions with regard to the necessary particulars to be inserted in such plaint the Magistrate had no jurisdiction to try the case: **Hewitt v. Carew,** 22 N.Z.L.R. 569; **Loram v. Brabant,** 22 N.Z.L.R. 990; **Friedlander v. Miller,** 28 N.Z.L.R. 97. But that was a *defectus triationis* and might be waived: **Gledhill v. Haselden,** 30 N.Z.L.R. 255; **Kirkness v. Young and Kirkness,** (1916) N.Z.L.R. 1161. The statement of claim in the present case was analogous to the plaint note in the sense that it was the basis of the proceedings—**Manning v. Craddock,** 12 G.L.R. 394—and, as His Honour had shown, must be in strict conformity with the requirements of the Statute before the Magistrate had jurisdiction to adjudicate, but, as in the case of a defective plaint note, was *defectus triationis* only, and the defect might be cured by waiver or acquiescence. It became necessary to enquire, therefore, whether the acts of the plaintiff (the defendant in the Magistrate's Court) amounted to a waiver of the defect or of acquiescence in it. One of the acts relied on was that the company filed a notice of intention to defend. S. 66 provided that proceedings in respect of a lien or charge should be commenced by summons, which might be in any form prescribed by rules of Court or other practice of the Court. An ordinary Magistrate's Court summons was served on the plaintiff together with the statutory statement of claim, on 18th June. Endorsed on such summons were the words: "If you desire to defend this action you must, within five clear days after the service of this summons upon you, file in the Court a notice, signed by you or on your behalf, stating that you intend to defend the action." On 21st June the plaintiff filed the ordinary printed form provided which read: "I, the above-mentioned defendant, hereby give notice that I intend to defend this action." It was signed on behalf of the plaintiff company by its solicitor. It was submitted by the plaintiff that that notice of intention to defend must be treated as a nullity, it not being essential under the provision of the Wages Protection and Contractors' Liens Act, 1908, and not being directed to the claim for a charge. The procedure was laid down in S. 68. That section, as pointed out by Edwards, J., in **Manning v. Craddock** (*cit. sup.*) was confusing. It provided in subsection (1): "The summons shall be served in such manner and be returnable on such date as the rules or practice of the Court prescribes," and in subsection (2): "In the absence of and until the making of rules on the subject by any Court, the practice of the Court in matters relating to summary applications to the Court shall, as nearly as possible, be followed." The provisions were applicable alike to the Supreme Court as to the Magistrate's Court. In the Supreme Court it was clear that the words "summary application to the Court" did not refer to the ordinary writ of summons. Edwards, J., in **Manning v. Craddock** (*cit. sup.*) held that the person against whom the proceedings were taken should have been summoned to appear before the Court, as in the case of an originating summons, and there were rules under the Judicature Act prescribing a special form of summons in proceedings in the Supreme Court. To a summons under those rules the defendant would be heard without filing any defence or notice of intention to defend. No special rules had been made under the Magistrates Courts Act and there was no provision in the existing rules under that Act for "summary applications to the Court" other than the ordinary summons which was not in truth a "summary application to the Court" at all, as the term was usually interpreted. How far, therefore, was the procedure under the Magistrates Courts Act and rules relating to an ordinary summons applicable to a "summary application to the Court" under the Wages Protection and Contractors' Liens Act? The Court of Appeal in **In re Williams,** 17 N.Z.L.R. 712, had to consider the general scope of that Act, and Edwards, J., who delivered the judgment, said (at p. 724) that the proceeding under the Act was not a proceeding against the debtor to recover the debt, but a proceeding against the person in whose hands were the moneys sought to be charged, for the purpose of enforcing the charge. Such proceeding began with the statement of claim against such person and resulted in an order against him." Edwards, J., pointed out that the person bringing such a proceeding might also bring an action for debt against the debtor, but that was quite distinct from the proceeding under the Act. See **Ball v. Scott Timber Co. Ltd.,** (1929) N.Z.L.R. 570, 578. In the present case the summons purported to be for the purpose of obtaining a charge under the Act and a judgment against the debtor. His Honour was not concerned to enquire whether that double-barrelled procedure was in order but, for the purposes of the present question, it must be considered as two independent proceedings. Under S. 3 of the Magistrates Courts Amendment Act, 1909, a notice of intention to defend was required only where the action was for the recovery of debt damages or other moneys. It was not required in respect of a claim for a charge under the Wages Protection and Contractors' Liens Act, 1908. The defendant was compelled to file such a notice in answer to the claim for judgment for moneys due if he desired to defend. The notice, therefore, could not be taken to be filed in respect of the claim for a charge. It was unnecessary in those circumstances to consider the cases cited on the question of the filing of a defence being evidence of waiver. When the case was called for hearing in the Magistrate's Court, counsel for the plaintiff (the then defendant) challenged the jurisdiction of the Court upon the same grounds as were at present urged, that was to say, that the statement of claim did not comply with the requirements of the Act inasmuch as it did not state the period within which the work was done in respect of which the claim was made. The learned Magistrate reserved the question for further consideration, and, by arrangement, proceeded to hear the case without prejudice to the objection. On a subsequent day he over-ruled the objection and made an order allowing the charge. In that respect His Honour thought he erred. The defendants had not suggested that on the above view of the case the plaintiff company was not entitled to the relief claimed. Prohibition was undoubtedly the proper remedy—**McPherson v. Andrew Lees Ltd.** (1926) N.Z.L.R. 523—and as that would leave the judgment or order still on the record a writ of *certiorari* should issue on the ground of want of jurisdiction through the absence of essentials preliminary to the inquiry and the omission of an essential element of jurisdiction: see notes to R. 465, Stout and Sim's Code.

Prohibition and *certiorari*.

Solicitors for plaintiff company: **Morpeth, Gould and Wilson,** Auckland.

Solicitors for defendant: **Addison and Adams,** Auckland.

Adams, J. September 26; October 31, 1930. Christchurch.

WRIGHT v. THOMAS L. JONES LTD.

Industrial Award—Wages—Improver Engaged in Electrical Wiring Work as Assistant to Registered Electrical-Wireman Entitled to Award Wages in Respect of "Electrical-Workers' Work" Although Not a Registered Electrical-Wireman—Worker Entitled to Recover from Employer Difference Between Wages Paid and Award Wages—Contract for Service at Less than Award Wages Void—Industrial Conciliation and Arbitration Act, 1925, S. 2.

Action commenced in the Magistrate's Court to recover £105 8s. 4d. alleged to be due for wages, removed on the defendant's application into the Supreme Court. The facts were admitted. The plaintiff served the full term of apprenticeship to the electrical-wiring trade, and passed the practical exam-

ination prescribed by regulations under the Electrical Wiremen's Registration Act, 1925, but failed in the examination on theory. He was, therefore, not entitled to registration under the Act. After the completion of his apprenticeship he was employed by the defendant, and while in such employment did electrical-wiring work as assistant to a registered electrical wireman in accordance with the provisions of S. 4 of the Amendment Act, 1928. Being an "improver" within the definition of that term in subsection (4) of that section, his employment in such work as assistant was therefore lawful. The wages paid to him were at the rate of £1 15s. per week. An award of the Arbitration Court was made on 23rd November, 1928, in the matter of a dispute between the N.Z. Council of the Amalgamated Engineering and Allied Trades Industrial Association of Workers and the employers in the industries affected. The defendant was a party to the award and bound by its provisions. Clause 2 defined electrical worker's work; clause 3 (a) awarded that the rate of wages shall be 2/3 per hour; clause 17 contained the usual provision for the employment of under-rate workers under which any worker who considered himself incapable of earning the minimum wage might be paid such lower sum as might from time to time be fixed on the application of the worker, after due notice to the Union, by the local Inspector of Awards. No such application had been made. The question at issue was whether the plaintiff was entitled to the award rate of wages—2/3 per hour.

Archer for plaintiff.
Sim for defendant.

ADAMS, J., said that counsel for the defendant contended that the award as to wages was applicable only to registered electrical wiremen, but His Honour saw no reason to so restrict what he conceived to be the plain meaning of the clause. The expression "the wages" in clause 3 followed immediately after clause 2 which defined, not "electrical wiremen," but "electrical worker's work," and the expression "the wages" in clause 3 obviously meant the wages to be paid to all workers employed in work described in clause 2. His Honour was of opinion, therefore, that all such workers, except under-rate workers who had a permit to accept a lower wage under clause 17 and apprentices whose wages were fixed by Statute, were entitled under the award to receive wages not less than the minimum fixed by clause 3 while employed on such work. The question was concluded by **Baillie and Co. v. Reese,** 26 N.Z.L.R. 451, where it was held by the Court of Appeal, affirming Stout, C.J., that where the Court of Arbitration had, by an award, fixed a minimum rate of wages, a contract by a worker to work for less than the award rate of wages was void, and that the worker had a common law right to recover the difference between the wages he received and the minimum rate fixed by the award. The term "worker" was defined in S. 2 of the Industrial, Conciliation and Arbitration Act, 1925, as meaning "any person of any age of either sex employed by any employer to do any work for hire or reward." The work in respect of which the claim of the plaintiff was made was within the definition of "Electrical worker's work" in clause 2 of the award. The plaintiff was, therefore, entitled to judgment. It was agreed that the difference between the wages paid to him and the minimum fixed by the award, while he was employed as an assistant on work falling within clause 2 of the award, was £45 12s. 7d.

Judgment for plaintiff.

Solicitor for plaintiff: **K. G. Archer,** Christchurch.
Solicitors for defendant: **Duncan Cotterill and Co.,** Christchurch.

Ostler, J. October 24; 25, 1930. Wellington.

RICHARDS v. SUN NEWSPAPERS LTD.
RICHARDS v. N.Z. NEWSPAPERS LTD.

Practice—Writ—Issue of Writ in Wellington District Requiring Defendant to File Statement of Defence and Attend for Trial at Wellington—Statement of Defence Filed by Defendant in Wellington—Defendant Subsequently Alleging that No Part of Cause of Action Arose in Wellington Deemed to Have Waived Irregularity By Pleading—Code of Civil Procedure, Rs. 4, 6, 599.

Summons in each of the above actions taken out on behalf of the defendants calling upon the plaintiff to show cause why an order should not be made setting aside his writ, or in the alternative changing the place of trial from Wellington to Auckland. The plaintiff caused the writs to be issued in Wellington and the writs required the defendants in each case to file their statements of defence and to attend for trial at the Supreme Court in Wellington. The plaintiff, before issuing the writs, filed in the Supreme Court in Wellington affidavits under Rules 9 and 10 stating that some material part of the causes of action arose within the Wellington Judicial District. The ground of the summonses in both cases was that no material part of the cause of action arose in the Wellington District. Before taking out the summonses the defendants in both cases had filed statements of defence in Wellington.

Gray, K.C. and **Hanna** for plaintiff.
Cousins for defendant, Sun Newspapers Ltd.
Spratt for defendant, New Zealand Newspapers Ltd.

OSTLER, J., said that counsel for the plaintiff raised the preliminary objection to the summonses that even assuming that no part of the cause of action arose in the Wellington District, the issuing of the writs was no more than an irregularity which could be waived, and that the filing of the statement of defence in each case amounted to a waiver of the irregularity. If no material part of the causes of action arose in the Wellington District the place for the filing of the statements of defence and for the trial should under Rules 4 and 6 have been in Auckland. It was to be noted that Rules 4 and 6 did not provide that non-compliance with those rules should render the proceedings void. Therefore by Rule 599 such non-compliance was merely an irregularity. The Court had always so treated it. In **Kirby v. Connell,** 14 N.Z.L.R. 456, a writ not complying with Rules 4 and 6 was set aside because the Court was satisfied that the noncompliance was intentional, but in **Woolven v. Frecklington,** (1921) G.L.R. 16, and in **National Bank of New Zealand v. Dalgety and Co.,** (1922) G.L.R. 56, the writ was amended. If non-compliance with the rules had been considered to make the writ absolutely void, then the Court would have had no power to amend it. Rules 4 and 6 were for the benefit of the defendant, and as was said by Fletcher Moulton, L.J., in **Lloyd v. Great Western Dairies Co.,** (1907) 2 K.B. 732, the defendant could always waive a provision enacted for his benefit. In His Honour's opinion the filing in each case of the statement of defence was clear evidence of a waiver. There was ample authority for that proposition. The filing of a statement of defence in New Zealand was equivalent to an unconditional appearance in England under Order 12, Rule 30, which had been held again and again to operate as a waiver of any objection to the jurisdiction of the Court: see **Forbes v. Smith,** 10 Exch. 717; **Fry v. Moore,** 23 Q.B.D. 395, **Boyle v. Sacker,** 39 Ch.D. 249; **Oulton v. Radcliffe,** L.R. 9 C.P. 195. Even assuming, therefore, without deciding the point, that no part of the cause of action in either action arose in the Wellington District, the defendants, having with full knowledge of their rights filed statements of defence, must be held to have waived any non-compliance with Rules 4 and 6.

Summonses dismissed.

Solicitors for plaintiff: **Duncan and Hanna,** Wellington.
Solicitors for defendant, N.Z. Newspapers Ltd.: **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.
Solicitors for defendant: Sun Newspapers Ltd.: **Earl, Kent, Massey and Northcroft,** Auckland.

Smith J. September 17, October 24; November 6, 1930. Hamilton.

IN RE MAIN'S TRANSMISSION.

Land Transfer Act—Joint Tenancy—"No Survivorship"—Sanction of Supreme Court to Registration of Transmission to Executor of Deceased Joint Tenant Not Necessary—Transmission Not a "Dealing"—Land Transfer Act, 1915, Ss. 133, 134.

Motion ex parte to sanction the registration of a transmission under Ss. 133 and 134 of the Land Transfer Act, 1915. In 1890, A. W. Pearson of Melbourne, Victoria, was the owner of 482 acres shown on Deposited Plan 801 in the Land Transfer Office at Auckland and thereon marked "No. 1 Portion," and

H. J. Pearson of London, England, was the owner of 568 acres being land shown on the same Deposited Plan and thereon marked "No. 2 Portion." A strip of land shown on the said Deposited Plan comprising part lots 8 and 9 of the Parish of Tamahere, being the whole of the land included in certificate of title Volume 57 Folio 90 (Auckland Registry) and known as "The Avenue" was situated between those two portions. It was used for some years as a means of access to No. 1 Portion and to No. 2 Portion. In 1890, "The Avenue" was vested in A. W. Pearson and H. J. Pearson jointly. In 1899, A. W. Pearson sold No. 1 portion to A. Main. In the same year, A. W. Pearson and H. J. Pearson jointly transferred "The Avenue" to the said H. J. Pearson and the said A. Main, as joint proprietors and in the said transfer authorised the Registrar to enter the words "No Survivorship" upon the said Certificate of Title Volume 57 Folio 90 and also upon the duplicate of such Certificate of Title, and the words "No Survivorship" were accordingly endorsed upon the title. Subsequently H. J. Pearson sold No. 2 Portion and that piece had since passed through a number of hands. A. Main and H. J. Pearson did not transfer or otherwise deal with their interest in "The Avenue." A. Main died on 16th April, 1926, and probate of his will was granted to the present applicant, W. Main, on 7th May, 1926. No. 1 Portion was now vested in the applicant as executor of the estate of A. Main deceased. H. J. Pearson resided in England and was a very old man. The applicant W. Main desired to have transmission of the estate of A. Main in "The Avenue" registered against the title to the land.

F. A. Swarbrick in support.

SMITH, J., said that he had made the order asked for, in Chambers, but upon further consideration he had come to the conclusion that the order should not have been made. His Honour communicated his view to counsel and he agreed to return the order into Court and to have it vacated. His Honour accordingly dealt with the matter *de novo*. S. 133 of the Land Transfer Act, 1915, provided, in effect, that after the words "No Survivorship" had been entered upon a certificate of title it should not be lawful for any less number of joint proprietors than the number then registered to transfer or otherwise deal with the land without obtaining the sanction of the Supreme Court or a Judge thereof. A "dealing" was defined by S. 2 of the Act, if not inconsistent with the context, to include both a transfer and a transmission. Counsel took the view that that definition had been overlooked by Cooper, J., in **In re Tararua Club,** 27 N.Z.L.R. 928, where the learned Judge assumed that transmission of the estate of a deceased trustee who was a joint proprietor holding under a title upon which the words "No Survivorship" were entered, could be registered without an order under Ss. 133 and 134 of the Land Transfer Act, 1915. In His Honour's opinion Cooper, J.'s assumption was correct. Neither an application by the executor of a deceased joint proprietor to register a transmission of his estate as executor nor the registration of such transmission itself, constituted a transfer or dealing with the land by a joint proprietor. Such an applicant for registration was not a joint proprietor dealing with the land and he could not effect such a dealing until he became a joint proprietor by registration of the transmission. His Honour was of opinion, therefore, that where an applicant was entitled, as executor, to succeed to the interest of a deceased joint proprietor in land held under a title upon which the words "No Survivorship" had been entered, he could have a transmission of that interest registered without infringing the provisions of S. 133 of the Land Transfer Act.

Motion dismissed.

Solicitors for applicant: **Swarbrick and Swarbrick,** Hamilton.

Smith, J. July 7; October 3, 1930. Auckland.

IN RE MAURICE.

Will—Construction—Joint Tenancy or Tenancy in Common—Trust of Residue for Two Named Children—Trustee Empowered to Use Capital and Income Towards Their Education Maintenance and Advancement—Trustee Directed to Divide Capital and Accumulated Income Equally Between Them on Younger Attaining Twenty-one—Tenancy in Common.

Originating Summons for the interpretation of the will of E. M. G. Maurice, late of Te Kaha, farmer. The testator's wife had died on 26th January, 1921, and he made his will on 9th May, 1921. At the time of the making of the will he was the father of two illegitimate children born to a native woman. After appointing the plaintiff company his executor and trustee, the testator by his will devised and bequeathed all his real and personal property to his trustee upon trust to convert the same, with a power of postponing conversion, and after payment of his just debts, funeral and testamentary expenses upon trust "to hold the balance (hereinafter called my said trust fund") in trust for my natural children (naming them) And I empower my said trustee during the infancy of the said children to use such part of the capital as well as the income of my said trust fund as they shall think fit towards their education, maintenance and advancement in life And on the younger of the said children attaining the age of twenty-one years I direct my trustee to divide the capital and any accumulated income of my said trust fund equally between the said children." One of the natural children named died on 23rd December, 1921, and thereafter the testator had three other illegitimate children by the same native woman. The testator did not alter his will and died on 20th August, 1926, leaving, so far as was known, no legitimate children, but the aforesaid illegitimate children, him surviving. On 10th February, 1927, orders were made under S. 16 of the Destitute Persons Act, 1910, adjudging the deceased to be the father of the three children last referred to, and ordering payment out of the estate of the deceased of 8/- per week for each of such three children, until they respectively reached the age of sixteen. The estate of the deceased would realise £1,900 and the annual income was approximately £107 5s. 0d. The principal questions asked in the Originating Summons were: (1) whether the surviving beneficiary named in the will took the whole or one half only of the estate of the said deceased; (2) whether, if the Court should be of opinion that the deceased died intestate as to one half of the said estate, the trustee might expend the whole or any part of the estate and the interest therefrom for the maintenance education and advancement in life of the surviving beneficiary; (3) if the Court should be of opinion that the surviving beneficiary was entitled to the whole of the estate of the deceased, then could the trustee pay out of the said estate the maintenance for the natural children of the deceased which the Stipendiary Magistrate sitting at Opotiki, on February 10th, 1927, ordered to be paid pursuant to S. 16 of the Destitute Persons Act, 1910?

Gould for plaintiff.

Cocker for defendant E. T. Maurice.

Glaister for natural children of testator.

De la Mare for Public Trustee.

SMITH, J., said that with regard to the first question, the first matter for determination was the character of the gift. Was it a gift to two persons as tenants in common or as joint tenants? His Honour dealt with that matter in disregard, for the time being, of the fact that one of the named children died before the testator. The testator directed his trustee to hold the residue of his estate which he defined as "my said trust fund" in trust for his two natural children named. If the will had stopped there, it could not be doubted that the named children would have taken the trust fund as joint tenants. The will proceeded, however, to empower the use of part of the trust fund during the infancy of the children for their education maintenance and advancement and then to direct the trustee "To divide the capital and any accumulated income of my said trust fund equally between the said children." It was significant that it was not the balance of the said trust fund remaining after the expenditure of any moneys for the education maintenance or advancement of the children which was to be divided. It was the capital and any accumulated income of "my said trust fund." As the testator had defined the residue of his estate by the words "my said trust fund" it followed that he had directed the division of the residue of his estate equally between his children, although that division was postponed according to his direction until the younger child attained 21. That was sufficient to create a tenancy in common. **Jolliffe v. East,** 3 Bro. Ch. Cas. 25. That conclusion was strengthened by the power conferred upon the trustee during the infancy of the said children "to use such part of the capital as well as the income of my said trust fund as they shall think fit towards their education maintenance and advancement in life." Grammatically the word "they" referred to the children, and not to the trustee, but His Honour thought that the word "they" was the obvious mistake of a solicitor's clerk for the word "it." The testator could not have intended his children to have control over the fund during their infancy. The result was that the testator had given to the trustee a power to use capital for the purposes of advancement. In **L'Estrange v.**

L'Estrange, (1902) 1 I.R. 467, the Irish Court of Appeal held that a power of advancement was inconsistent with a joint tenancy and that the children were tenants in common of the residue. As pointed out by Joyce, J., in **Bennett v. Houldsworth,** 104 L.T. 304, the Court came to that conclusion although the word "share" did not occur in the power, i.e. there was no direction to advance out of the share of each child. That authority was, therefore, even more in point in the present case than the cases of **In re Dunn,** (1916) 1 Ch. 97, and **In re Ward,** (1920) 1 Ch. 334. It was submitted by Mr. Cocker that as the words used in the present case were "to use" such part of the capital and income of the said trust fund towards "their advancement in life," the term "advancement" was not to be regarded as a term of art to indicate an advance out of a share. His Honour thought, however, that the testator had expressed the idea of advancement and that the words used imported the legal meaning. His Honour thought also that the words "their education maintenance and advancement" must be read distributively and that the form of the clause was sufficient to enable some part of the capital or income of the trust fund to be applied to the maintenance education or advancement of each of the children taken separately. That implied—to adopt the essential language of Lawrence, J., in **In re Gardner,** (1924) 2 Ch. 243, 250—a severance of the very subject matter of the gift, viz., the trust fund, the tenure of which was under consideration. That implied then a severance of the trust fund so as to bring about a tenancy in common, because to the extent of the amount advanced, the other members of the class took nothing by survivorship, a result which was inconsistent with the notion of joint tenancy. In His Honour's opinion the cases cited by Mr. Cocker of **Cookson v. Bingham,** 3 De G. M. & G. 668, and **Jury v. Jury,** 9 L.R.Ir. 207, did not apply to the wording of the present will. The result was, in His Honour's opinion, that the will, upon its true construction, gave the trust fund to the two named children as tenants in common in equal shares, but that it purported to postpone the division until the younger child attained twenty-one. Such being the character of the gift, it was clear that there was no right of survivorship. The next question for determination was the destination of the share of the tenant in common who died in the lifetime of the testator. As the gift was to named persons, and as the child died before the testator, her share lapsed—**In re Whorwood,** 34 Ch. D. 446; as it was a share of residue there was a partial intestacy and the lapsed bequest went to the testator's next of kin.

The next question was whether the share of the surviving named child vested on the death of the testator. Counsel were agreed that it did and His Honour was of opinion that their view was correct. The gift was a gift of residue to two named children determined at the date of the will; there was a maintenance clause during infancy and the period of division was merely postponed until the happening of a particular event—see **Cooper v. Cooper,** 29 Beav. 229, and **In re Gossling,** (1903) 1 Ch. 448. As the gift was vested, the surviving named child was entitled to his one-half share of the trust fund upon his attaining the age of twenty-one years—**In re Bartrum,** (1922) G.L.R. 93.

With regard to the second question, His Honour had held that the gift constituted a tenancy in common and the words of the maintenance and advancement clause must be interpreted accordingly. The answer to the second question was that the trustee might during the infancy of the surviving named child expend such part of his one-half share of the estate as the trustee should think fit for his "education maintenance and advancement in life."

The third question assumed that the Court might be of opinion that the surviving beneficiary was entitled to the whole of the estate. The question was, therefore, not answered in the form submitted. His Honour answered, however, that the moneys payable under the maintenance orders constituted debts of the deceased although postponed to the other debts and liabilities—see S. 3 of the Destitute Persons Act, 1910. The result was that the residue could not be ascertained until the debts were paid. It followed that the maintenance moneys were a charge upon the whole estate.

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

Solicitors for defendants: **Hesketh, Richmond, Adams and Cocker; Glaister and Ennor,** (Auckland); **F. A. De La Mare** (Hamilton).

Court of Arbitration.

Frazer, J. September 24; November 11, 1930. Dunedin.

GEDDES v. N.Z. EXPRESS CO. LTD.

Workers Compensation—Out of and in Course of Employment—Hernia—Onus of Proof Not Discharged by Worker—Failure to Give Notice of Accident Prejudicing Employer.

Claim for compensation for an injury by accident, which the plaintiff alleged he received while employed by the defendant on 17th December, 1929. The plaintiff was employed by the defendant at Dunedin, as a carter. He had sustained a right (indirect) hernia at his work in September, 1929, and had received compensation in respect of that injury. He said that during the morning of 17th December, while engaged in moving a heavy case at a railway shed, he suffered a severe strain and developed a left (direct) hernia. The evidence relative to the alleged occurrence of the accident is referred to in the report of the judgment. It appeared from the evidence that no notice, written or verbal, was given of any accident.

J. S. Sinclair for plaintiff.

A. N. Haggitt for defendant.

FRAZER, J., delivering the judgment of the Court, said that the plaintiff's evidence was corroborated by that of another carter, Mullins, but the evidence of that witness was rendered doubtful by the production of other evidence, which went to show that it was extremely improbable that Mullins was in the shed on the morning of 17th December. Further, the evidence of the defendant company's loader at the shed was to the effect that it was improbable that an accident could have happened there, as alleged by the plaintiff, without his knowledge. It was proved that the plaintiff sustained a hernia on the morning of 17th December, but there was no clear evidence that it was due to an accident arising out of and in the course of the plaintiff's employment. Though he said that he realised that he had strained himself, and Mullins said that the two men discussed the question of a rick or a strain immediately afterwards, the plaintiff merely reported sick. He spoke to the manager, the assistant manager, and the head stableman about his condition, but did not suggest that an accident had happened. That seemed extraordinary in view of his having had another accident, only a few months previously, that caused a hernia to develop. He did not enter a hospital for treatment until several days after 17th December, on which date he was advised by Dr. de Latour that he was suffering from hernia, and there was no explanation as to why he neglected to mention an accident, if one really happened, within a day or two of its occurrence. The medical evidence proved that some strain was necessary to cause the hernia, though there was a predisposing condition. The Court must be satisfied, however, that the strain arose out of and in the course of the plaintiff's employment, before it could regard it as the basis of an award of compensation. The evidence as to the strain was of doubtful probative value, and the Court could not find that the plaintiff had discharged the onus of proving that the hernia was in fact caused by a strain that arose out of anything connected with the employment.

There was also the question of failure to give notice of the alleged accident. No written notice was given, and the manager, assistant manager, and head stableman, to whom the plaintiff said he gave verbal notice, all denied that mention was made of any accident, or of any happening that might be regarded as an accident. In view of the obvious difficulty that existed in proving the whereabouts of either the plaintiff or Mullins on the morning of 17th December, it was clear that the defendant company had been prejudiced in its defence through not having been supplied with the necessary notice.

Judgment for defendant.

Solicitors for plaintiff: **Solomon, Gascoigne, Sinclair and Solomon,** Dunedin.

Solicitors for defendant: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Recent English Cases.

Some of the Latest Decisions of Dominion Interest.

Below will be found a review, so far as reports are available at the time of writing, of the leading English decisions of the year. It is necessary to make the observation that the reader must not, owing to considerations of space, expect to find reference to all the important cases; rigid care has been exercised in their selection and, in the main, cases dealing with branches of the law dealt with in an average practice have been preferred to cases dealing with the more specialised branches. Omissions, however, there must necessarily be. It may be as well to draw attention to the possibility of some of the decisions included being reversed on appeal.

BANKRUPTCY.

In re Drabble Bros., (1930) 2 Ch. 211, deals with the subject of fraudulent preference. The Court of Appeal in this case decided that if a principal leaves the control of his business in the hands of an agent so that the agent is employed to determine which of the creditors of the principal shall be paid, when they shall be paid, and why they shall be paid, a payment made by such an agent with an intention to prefer a creditor of his principal is, in the event of the bankruptcy of the principal, a fraudulent preference by the principal. It makes no difference that the agent had not authority to sign the cheques he drew and presented to his principal, nor that the principal when signing them had no intention to prefer any creditor, but honestly believed the payments so made to be proper and in the ordinary course of business.

CHARITABLE TRUST.

In *In re Roadley, Iveson v. Wakefield*, (1930) 1 Ch. 524, Bennett, J., held that a trust for the application of the yearly income of a trust fund "in payment of the expenses and maintenance of patients" from certain named parishes at two named hospitals or either of them was a valid charitable bequest.

In *In re Bain, Public Trustee v. Ross*, (1930) 1 Ch. 224, the Court of Appeal held that a bequest to the vicar of a named Church "for such objects connected with the Church as he shall think fit" was a valid charitable bequest as on the true construction of the words the discretion vested in the vicar must be exercised within the scope of church and not parochial purposes. *In re Jackson*, (1930) W.N. 195, shows how fine the distinction may be. There the testatrix gave part of her residuary estate to the Archbishop of Wales "to be paid and applied in or towards the general fund belonging to the Church in Wales, or in his discretion in any manner for helping to carry on the work of the Church in Wales." Eve, J., held that the disjunctive "or" would enable the fund to be applied for objects which were not "charitable" and that the gift therefore failed. And see also *Re Stratton*, (1930) W.N.127.

COMPANY.

Edwards v. Ransomes and Rapier Ltd., (1930) W.N. 180, is a decision on transmission of debentures and the right of an executor to be registered in his own name without reference to his representative character. A testator appointed an executor and the probate was duly registered in respect of certain debentures held by him issued by the defendant company. The executor was one of the residuary legatees, and after winding up the estate he accepted the debentures as part of his share, and applied to be registered in his own name as debentureholder; but the company refused to register him unless he as executor transferred the debentures to himself. Luxmoore, J., held that the company was not entitled to require a transfer. They had accepted the probate as evidence of title, and must register the plaintiff in his own name without reference to his representative character.

Long Acre Press Co. Ltd., Odhams Press Ltd., (1930) 2 Ch. 196, deals with the meaning of the words, "profits available for dividend." A company issued notes which entitled the noteholders to a fixed amount per cent., and to an additional share in the "profits available for dividend." Maughan, J., held that the directors were entitled to apply the whole of the profits of any one year, after payment of the fixed amount per cent. to the noteholders, in reduction of the adverse balances of previous years, and the noteholders were not entitled to a share in any such profits.

In re Services Club Estate Syndicate Ltd., (1930) 1 Ch. 78, lays it down that the conduct of a debenture-holder's action begun by a person whose transactions with the company the Court considers to require investigation, or whose interests are shown to be adverse to those of the remaining debenture-holders, may be given by the Court to an independent party.

CONFLICT OF LAWS.

In re Ross, Ross v. Waterfield, (1930) 1 Ch. 377, deals with what is meant by "the law of the domicil." Luxmoore, J., held that the law of the domicil, which governs the succession to movable property belonging to British nationals dying domiciled in a foreign country means, on the English authorities, the whole law of the country of domicil, including the rules of private international law administered by its tribunals. The English Courts are, therefore, solely concerned to inquire what the Courts of that country would decide in the particular case.

In re Askew: Marjoribanks v. Askew, (1930) 2 Ch. 259, is an interesting decision of Maugham, J., on the subject of legitimation. An English marriage settlement made upon the marriage of a husband domiciled in England with his first wife created trusts, after the deaths of the spouses, for the issue of the marriage. The settlement provided that if the husband should marry again he might appoint part of the trust fund for the benefit of any wife who might survive him and of any child of that marriage. There were two children of the first marriage. The husband separated from his first wife and acquired a German domicil before 1911 in which year the German Courts dissolved the marriage; the divorce was made final in July, 1911. In April, 1912, the husband married a second wife in Berlin. On January 30, 1911, a daughter had been born in Switzerland to the second wife, and she was acknowledged to be the husband's daughter. In 1913 the husband exercised his power of appointment in favour of the daughter last-mentioned. Maugham, J., held that the power had been validly exercised. In matters coming before English Courts and depending upon foreign domicil, the *lex domicilii*, in the widest sense, must *prima facie* apply. The daughter had acquired

the status of legitimacy in Germany and she must, therefore, be treated in an English Court as a legitimate child of the husband.

CONTEMPT OF COURT.

In *In re William Thomas Shipping Co. Ltd.*, (1930) W.N. 156, the point was taken that what would have been a plain contempt of court (a publication of criticism of the conduct of a party in a pending cause)if the cause had been one for trial by a jury was not such if the cause was one for trial before a Judge alone in the Chancery Division, as there was no likelihood that a Judge would be prejudiced by statements made in the Press. Maugham, J., held, however, that the Court's jurisdiction was not limited to cases where the order of the Court was likely to be prejudiced in some way; if improper attacks on parties to proceedings were permitted, their course of action might be deflected, and the administration of justice thereby hampered.

CONTRACT.

Blay v. Pollard, (1930) 1 K.B. 628, is a decision of the Court of Appeal on "*non est factum.*" The Court of Appeal held that as the defendant knew that the agreement which he signed was an agreement for the dissolution of the partnership existing between him and P., it was not open to him, in the absence of fraud or misrepresentation by P. as to the legal effect of the document, to rely on the plea of *non est factum* merely because if he had carefully read and understood the document he would have objected to one of its terms as not in accordance with their oral agreement.

DAMAGES.

In *Herbert Clayton and Jack Waller, Ltd. v. Oliver*, (1930) A.C. 209, the question arose as to the measure of damages for breach by theatrical producers of their contract to engage a player in a leading comedy part. The House of Lords held that it was competent to the jury, having regard to the character of the contract, to give damages for loss of publicity.

DISCOVERY.

Ankin v. London and N.E. Rly. Co., (1930) 1 K.B. 527, deals with two points as to discovery. The defendants had in their possession a copy of a report of an accident made by them to the Ministry of Transport under regulations. The plaintiff was injured in the accident. The defendants claimed privilege on the ground of public interest; the Minister of Transport stated he always declined, in the public interest, to allow inspection of such reports. The Court of Appeal held that as it was the practice of the Court to accept the statement of a Minister of the Crown upon the question whether production of a document would be contrary to the public interest, the document in question was privileged from production. Privilege was also claimed for other documents on the ground that they were "confidential communications at the instance and request, and for the use of the defendants' solicitor between the officials of the defendant company and between those officials and third persons after this action was threatened or anticipated for the purpose of obtaining for and furnishing to the defendants' solicitor evidence and information as to the evidence which will be obtained and otherwise for the use of the said solicitor to enable him to defend this action and to advise the defendants." The Court of Appeal held that these documents also were privileged.

DIVORCE.

Prinsep v. Prinsep, 46 T.L.R. 29, deals with the question of variation of settlements on divorce, and lays it down that in varying a settlement the provisions of the settlement should not be interfered with, even by agreement, further than is necessary to provide for the injured spouse and the children of the marriage.

Ross v. Ross, (1930) A.C. 1, deals with the proof of adultery. This case has already been discussed in our columns (Vol. V, p. 401).

HUSBAND AND WIFE.

S. 16 of our Married Women's Property Act, 1908, relating to insurances by a husband on his own life for the benefit of his wife corresponds with S. 11 of the English Married Women's Property Act, 1882 (formerly S. 10 of the Act of 1870). In *In re Collier*, (1930) W.N. 102, Clauson, J., held that where a policy was effected by a husband under the section last-mentioned for the benefit of his wife, and the wife predeceased the husband, the policy moneys formed part of the husband's estate and did not form part of the wife's estate.

H. S. Wright & Webb v. Annadale, (1930) W.N. 123, is of special interest to solicitors as it deals with the liability of a husband for payment of his wife's costs of a divorce suit. It was argued that the common law rule by which a solicitor acting for a wife cannot recover his costs against the husband if the wife has been guilty of a matrimonial offence applies only where the wife is living in adultery and does not apply where she has been guilty only of an isolated act of adultery. It was also contended that the rule applied only where the solicitor was acting for a wife who was the petitioner, and did not apply where she was defending a petition brought by the husband. The Court of Appeal overruled both contentions.

INDUSTRIAL SOCIETY.

Hole v. Garnsey, (1930) A.C. 472, decides that an alteration in the rules of a society registered under the English Act of 1893, requiring members of the society to subscribe for additional shares is not binding on members who have neither voted for the alteration nor otherwise assented to it. Our Court of Appeal has a judgment reserved in which a similar point arises as regards companies and the applicability or otherwise of this decision to companies will, no doubt, be considered.

(*To be concluded*).

"A charge of dishonesty is surely much more injurious to a domestic servant than is the imputation of unchastity to a garage proprietor. In the occupation of domestic service honesty is a necessary virtue; whereas it cannot be said that chastity is a necessary qualification for the management or ownership of a garage."

—Mr. Justice Macnaghten in *Ralston v. Ralston*, (1930) 2 K.B. 238.

The Judicial Attitude.*

The judicial mind is a rare possession. It can be acquired by endeavour, but needs a basis of intellectual honesty and firm character which seem to be among those gifts given only in germ to the children of men, to grow, in favouring circumstances, into great and useful qualities, or to be crushed out by bad early training or the accidents of unpropitious fortune. A polite, and perhaps necessary, convention assumes the existence of the judicial mind in those selected to judge the people; but, in an imperfect world, where the office of magistrate is on occasion conferred on the unfit, its absence is sometimes lamentably demonstrated by judgments affected by prejudice and haste.

What are the marks of the truly judicial attitude? First comes what is commonly called "the open mind." Here again we are called to attempt, not definition, for the open mind is as difficult to define as the judicial mind, but some analysis which shall clear our vision as to the end we seek. In a sense no man can keep the open mind. What we really mean when we speak of one possessing it, is that he makes no final judgment until he has all the materials available upon which to base it, and that even then he makes his judgment with the mental reservation that though this is the sentence he must now pronounce and give effect to, yet its finality has but a practical quality, and he may be wrong. Let us mark well that this reservation is not the weakness of the undecided, but the strength of the man who, having done his best with the means at his disposal, including his own limited capacity for ascertaining truth, is satisfied to leave the result and get on with his next task. Only the weak are reluctant to confess failure. The wise man starts with the certainty that if he is to make anything he will sometimes make mistakes. The weak buttress their own unsureness of themselves with an obstinate refusal to admit ignorance or error that has been perhaps the most fruitful source of injustice in the whole career of mankind.

The qualities of the judicial mind can perhaps be best illustrated by their opposites, for much of the judicial attitude is merely a steadfast refusal to be stampeded by ignoble motives. A mind well informed and so truly poised as not to be easily misled or shaken is one great simple fact rather than a bunch of characteristics. In the weak mind are allied two qualities which at first sight would seem to be mutually exclusive, but which can be found existing side by side, with devastating effects—a readiness to believe, and a haste to disbelieve. In criminal cases this weakness exhibits itself often as a readiness to believe the prosecution and to disbelieve the defence, a process assisted by the fact that the story of the prosecution is the tale first told. Says Montaigne, "The mind being most empty and without counterpoise, so much the more easily doth yield under the burden of the first persuasion." The counterpoise in the mind of the good judge is his ever present recollection that he has yet to hear the other side. He will, indeed, arrive at some provisional conclusion upon what he has heard, but it will be subject to "ifs" and "buts." Indeed, the whole process by which he works involves a succession of such provisional judgments, continually revised, up to the saying of the last word addressed to him. But he who is "empty and without counterpoise" will have built a strong wall, through which the truth cannot penetrate. What confirms him in his vicious method is that he often arrives at a correct result. Usually the prosecution has a good case. It is the very frequency of this which makes it more imperative upon the judge to keep the sharpest look out for the unusual; a thing he will remember is that a true defence often consists of unusual circumstances. Innocent men are unlikely to be charged unless the case looks black against them, though one must never quite lose sight of the possibility of a malicious and perjured prosecution. "It is," says the author already quoted, "a sottish presumption to disdain and condemn that for false which unto us seemeth to bear no show of likelihood or truth," and with a stern finger he points his bitter truth that this, "is an ordinary fault in those who persuade themselves to be of more sufficiency than the vulgar sort." It is a great and terrible world, where the unlikely is constantly happening, and the first recoil from the claim that the unlikely has happened must not be allowed to blind judgment to its possibility. On the other hand we have to judge with such faculties of experience and knowledge as we have, and one element in a case is the probabilities. It was once said of a defence most highly complicated and ingenious, that the accused really had no right to be a victim of circumstances to that extent, and this, though flippant sounding, contains an element of truth.

One wide open avenue of escape from doubt in a criminal case is to discharge the accused because the evidence is insufficient. The doubt, as has a thousand times been said, must be the doubt of a robust mind, and not the wobble of a vacillating one. Given the doubt, which *ought* to be present in a number of cases, judgment is easy. But apart from the reluctance of some hard natures to take the hook out of any fish however harmless or unsuitable for the table it may be, vanity forbids some to admit inability to resolve a problem. This is, on the whole, the most distressing quality of the small mind, and one which can work infinite injustice.

We have not yet spoken of prejudice, the mother of unfairness and inequity. There are men who cannot believe a witness who declines to take an oath; there are others who cannot be just to a poacher. These are the extreme instances. But no man can get away from his age, his upbringing, his religion or his politics. The sum total of these things, and others, is a man's philosophy of life, and he can do no other than judge in its light. It will even affect his interpretation of the particular law he is administering. This is not altogether wrong. Especially where discretion is permitted, as in magnitude of sentence, he must of necessity look at things through his own eyes. But if he be honest and seek justice he will also take account of opinion other than his own. He will not set up a moral standard greatly in advance, or fancied advance, of his fellows. He will not judge upon theories current in his youth but now generally discarded. We offer a counsel of perfection, but then perfection, though never to be attained, is forever to be striven after.

A strong judge will refuse to be abashed by authority. He will, of course, as he is bound to do, follow decisions which are legally binding upon him, whether he like them or not. This is both compulsion of legal conscience and commonsense, for continuity and consistency are elements of justice. But he will not accept the arguments of eminent counsel unless their reasons

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satisfy him. He will not surrender his own judgment to expert witnesses of however great repute. No man's *ipse dixit* is in itself worth consideration, unless he can demonstrate the why of it to ordinary intelligent men. True, there are varied limits to capacity, but fortunately the profounder mysteries of mathematics and physics do not thrust themselves on all of us. Most of the matters we are called upon to judge of in court are matters of daily life wherein by mere living we have all become more or less expert. Of the residue the enormous majority are capable of explanation in simple terms by those who really understand them. The function of judgment is entrusted to the judge, whether it be a justice of the peace, a jury member, or the Lord Chief Justice. He is behaving badly if he abdicate his judgment in favour of anyone, however great. Often, tragically enough, the person to whom he surrenders is a lesser man than himself, for the great are rare, and there are innumerable laths painted to look like iron.

At its best, human judgment is fallible, and the most judicial mind is flecked with weak spots. But though life be short and perseverance difficult, persevere we must, for in a society such as ours, where innumerable men and women are called to exercise judgment and apply law, undaunted perseverance in seeking justice is one condition of the continued existence of the state.

A Conflict of Evidence.

In *Attorney-General v. Poor Law Guardians of Tynemouth*, 94 J.P. 191 , there was a conflict of evidence as to the duration of a meeting of the guardians : the meeting was variously estimated by witnesses to have lasted from fifteen minutes to half-an-hour. Eve, J., decided for the longer period and thus expressed his reasons :

> "I have heard evidence on both sides as to what took place at this meeting from guardians and officers who were present, and a report from a local newspaper was read disclosing certain interchanges of personalities—not dissimilar from those of increasing frequency in a more august assemblage—on all of which the witnesses were discreetly silent or charitably oblivious. Half-an-hour soon slips away in a fusilage of uncomplimentary pleasantries, and I am quite content to assume that not less than that period was devoted in part to these diversions and in part to the business in hand."

Separation Orders.

Lord Merrivale has had some hard words to say recently concerning the number of cases in which English justices are making separation orders, "assuming one of the most difficult jurisdictions which could be exercised, namely, that of dealing permanently with the marital relations of people." "Prolific of mischief," was what he called it. "Their differences," he said, "may not be hopeless ; and yet the justices go and decree a separation order, break up the family, and give the custody of one child to the mother and the custody of the other to the father."

Execution of Documents by Crown.

Form of Testimonium and Certificate.

The following memorandum relative to the execution of documents by the Crown has been sent by the Commissioner of Crown Lands to the Wellington District Law Society :

"Documents for execution by the Crown, execution of which is obtained through this Department, are nowadays almost invariably executed under the provisions of the Official Appointments and Documents Act, 1919. Section 3 (4) of that Act expressly provides that the signature of the Minister executing the document does not require attestation as long as the certificate of the Clerk of the Executive Council is forthcoming.

"It is observed that documents prepared by Solicitors for execution nevertheless frequently bear some form of attestation clause, probably, owing to the fact that it is not known that the provisions of the Official Appointments and Documents Act, 1919, will be made use of. Such attestation clauses are, when execution is effected under that Act, ignored and left uncompleted, but their presence disfigures the document and exception has been taken to their presence as tending to misstate the way in which the document is actually executed. It is desired, therefore, for the future in documents to be executed on behalf of the Crown under the Official Appointments and Documents Act, 1919, that no attestation clause at all should appear relating to execution on behalf of the Crown.

"I would further add for the guidance of practitioners in your District that in documents actually prepared under instructions from this Department the following rule should be followed. If the instrument is dated at its commencement in the usual way ('This Deed made the.....day of.....' etc.) the testimonium should read : 'In witness whereof these presents have been executed (under the Public Seal of the Dominion) the day and year first above written.' Where the instrument is not dated at the commencement the testimonium should read : 'In witness whereof these presents have been executed (under the Public Seal of the Dominion) the.....day of.....193.' In neither case should there be any attestation clause relating to execution by the Crown. The Certificate of the Clerk of the Executive Council should be in the following words :

> 'I.....clerk of the Executive Council, hereby, in pursuance of the Official Appointments and Documents Act, 1919, certify that this instrument has been executed by the Minister of Lands, acting by the direction of the Governor-General of the Dominion of New Zealand, in pursuance of the said Act.
>
> Dated this.....day of.....
>
> .....
>
> Clerk of the Executive Council.'

"Where the document is to be passed under the Public Seal suitable space should be left for the seal to be affixed."

Sir John Simon's Speeches.

A number of speeches delivered by Sir John Simon have been collected and edited by his secretary, Mr. Rowland Evans, under the title "Comments and Criticisms."* They commence with his maiden speech in Parliament, delivered on the Third Reading of the Trade Disputes Bill of 1906, and this is appropriately followed by his two speeches on the General Strike, one delivered in the House of Commons during the progress of the strike, and the other to his Spen Valley constituents just after its close. Then there is a long list of speeches on various matters; some, like those on Home Rule in February, 1912, and on Welsh Disestablishment in April, 1914, both in the House of Commons, dealing with matters which have ceased to be of current interest; others which show the versatility of the speaker, like the speech on Sir Walter Scott in December, 1913, at the Annual Dinner of the Edinburgh Sir Walter Scott Club; on Parliamentary Golf at a Parliamentary Golfers' Dinner in February, 1927; on British Sport on the occasion of the visit of the Australian Cricket Team to Old Trafford in July, 1926; and on the Profession of Accountancy in December, 1920; and there is "The Scene at Amiens (March, 1918)," an article reprinted from *Blackwood's Magazine*—a description of the desolation of retreat. There is the speech in the House of Commons on November 7, 1929, in which Sir John Simon, as Chairman of the Indian Statutory Commission, explained how the Commission stood entirely outside the conflicts of political life. And there are speeches on subjects which are now and will remain of practical interest; on Socialism, and on Unrestricted Aerial Bombardment, delivered in the House of Commons in July, 1923, and March, 1924; on The International Court of Justice, an address delivered at a League of Nations Union Conference, in June, 1928; and a speech at the Annual Banquet of the Association of British Chambers of Commerce in April, 1928, on The British Commonwealth of Nations.

In his maiden speech on the Trades Disputes Bill of 1906, Sir John Simon argued that the measure was required in order to avoid the effect of the *Taff Vale Case* (1901, A.C. 426) and restore to trade unions the immunity for their funds which they had in practice previously enjoyed. A note prefixed to the speech states that Mr. Balfour, who closed the debate as Leader of the Conservative party, advised his party not to vote against the Third Reading, saying that Sir John Simon's speech "really summed up the case for the Bill, and employed arguments which, so far as they went, were not, in his opinion, susceptible of effective answer." The speech on Socialism indicated the limits within which State control can properly replace private enterprise. That there is a sphere for State control is admitted; but it cannot replace production of wealth by private enterprise: "The system cannot be applied successfully to industry as a whole unless it can be confidently asserted that the incentive to production under private ownership and democratic control is greater than under private enterprise and competitive energy."

The speech on Aerial Bombardment dealt with a subject which the developments of the Great War have brought into prominence. It was made in the course of a debate on the Air Estimates of the first Labour Government, and Sir John Simon, as a matter of necessity, supported the increased estimate which the House was asked to vote. But he pointed out the disaster to which the system of aerial warfare pointed. "Unrestricted development of air competition, especially in the production of aeroplanes for bombing purposes, means the definite abandonment of restriction upon warfare which it has been the effort of centuries of humanity to establish and to respect." In his address on the International Court of Justice, Sir John Simon pointed out the limits of that tribunal. It bases its decisions on existing rights, and cannot, any more than any other Court of Justice, deal with matters not susceptible of judicial treatment. This is a limitation on the power of the Court which should not be lost sight of. It can only give a judgment in accordance with the law as applicable to the facts so far as the law and the facts can be ascertained. "A just judgment," said Sir John Simon, "on a judicial problem, on strictly judicial lines, does not in itself necessarily lead to contentment and peace." In his speech on "The British Commonwealth of Nations," he made a suggestion that the Judicial Committee, "on the whole, the greatest judicial organ in the history of the world, may find itself going on circuit through the Empire; for to-day it is as quick—and I would add far more comfortable—to go from London to Ottawa as in the old days it was to go from London to Edinburgh."

But for lawyers the main interest of this collection of speeches lies in the two which were delivered when Sir John Simon visited America in 1921; the first to the American Bar Association on "Our Common Inheritance of the Common Law"; the second to the Canadian Bar Association on "The Vocation of an Advocate." It has been the practice, apart from such an occasion as the visit of last August, for English judges and lawyers, to express to the profession in America the thoughts and ideals which inspire lawyers who have a common jurisprudence and language. Lord Haldane's Address to the American Bar Association at Montreal in 1913 on "The Higher Nationality" was a notable instance, and equally well known are Lord Shaw's two Addresses in 1922 on "The Widening Range of Law" and "Law as a Link of Empire," which have been published in "The Law of the Kinsmen"; and Lord Hewart's in 1927 on "The Roman Law" at Toronto, and "The Common Law" at Buffalo. The latter subject is always for lawyers an inspiring one, and Sir John Simon took it as one of his subjects in 1921. "Love of Liberty, a joint literature, the same language, and the Common Law—these," he said, "are the four Evangelists of the Gospel of Anglo-American friendship." And "The Vocation of the Advocate" was a natural theme for one who is among the foremost advocates of his time. It is a subject which has a perennial fascination. It is not long since Sir Edward Parry took it for one of the best of his numerous books, "The Seven Lamps of Advocacy." For Sir John Simon, the chief point in the advocate's life is not its brilliancy, but the hard work and minute mastery of detail on which success is founded, though it may be that little of this he really requires to use. "Accumulation, selection, rejection—these are the reading, writing, and arithmetic of advocacy."

* *Comments and Criticisms*, by the Rt. Hon. Sir John Simon, G.C.S.I., K.C.V.O., etc. Edited by D. Rowland Evans. Hodder and Stoughton.

Summary of Legislation.

The following brief summary of the public legislation of general application passed during last session is published for general information; the classification adopted below is for practical convenience of reference and general indication of subjectmatter—many of the Acts might, with propriety, be classified under others or another of the headings adopted. Sessional numbers and dates of coming into force are inserted following the titles of Acts.

The number of public Acts which passed both Houses is 45. The number of local Acts is 18, and of private Acts, 6. The corresponding figures for last year were 34, 19 and 5.

Part 1. CONSOLIDATION.

(Neither of the statutes noted hereunder was presented as pure consolidation under the Statutes Drafting and Compilation Act, 1920).

Canterbury Agricultural College. (No. 31; 1st January, 1931). Mainly a consolidation of Acts from 1896 onwards. The members of the corporation are henceforth to include, besides the Board of Governors, the following: professors, and lecturers, graduates and undergraduates on the books, and diploma-holders. There is to be a Principal of the College, and a Professorial Board, the latter including three members of the Professorial Board of Canterbury College, appointed by the latter board.

Native Trustee. (No. 33; 25th October, 1930). Mainly consolidation of the Native Trustee Act, 1920, and its five amendments. New provisions include power to sell any deceased person's estate vested in the Native Trustee, unless expressly prohibited, and full powers to administer any Native lands, if vested in the Native Trustee by the Native Minister or the Native Land Court, including power to allow Native owners to occupy, to carry on farming, to deal in stock, engage servants, borrow and mortgage, and to farm different properties conjointly and apportion profits and losses. Land so vested is inalienable by the owners except through the Native Trustee.

Part 2. INDUSTRIES AND COMMERCE.

Apprentices Amendment. (No. 25; 1st January, 1931). Miscellaneous amendments of the Apprentices Act, 1923. In future Apprenticeship Committees are to be so constituted that respective majorities of members representing employers and workers are persons who are, or have been, actually engaged in the industry concerned. In the absence in any locality of an Apprenticeship Committee, the District Registrar may, by order of the Court of Arbitration, discharge similar functions. "Localities" under the principal Act are to be restricted to an area of twenty miles from an agreed point, or, for Committees hitherto appointed, from the principal post-office of the locality. Priority in bankruptcy, or on liquidation, may by order of the Court of Arbitration be given to an apprentice for a sum (up to three months' wages) for any period between the lapsing of his articles by the bankruptcy or liquidation and his obtaining employment as an apprentice elsewhere. The Committee may permit the discharge of an apprentice for misconduct or incompetence, or authorise a suspension of his wages. A wages and time-book must be kept relating to apprentices. To articles under the Pharmacy Act, 1908, this Act does not apply.

Disabled Soldiers' Civil Re-establishment. (No. 38; 25th October, 1930). The Minister (he who administers the War Pensions Act), or the Commissioner of Pensions as his delegate, may, to assist disabled soldiers (of the Boer War or the European War) to obtain suitable employment or engage in suitable occupations, appoint local advisory committees, establish schemes for vocational training, make arrangements with employers, make payments to disabled soldiers, and appoint (as public servants) employment officers and "vocational officers." As far as practicable, every advisory committee is to have representatives of war fund societies, organisations of employers and workers, the Returned Soldiers' Association, and the British Red Cross and Order of St. John (Incorporated). Such committees will exercise advisory and consultative functions, and any of the Minister's functions he may delegate to them.

Stock Amendment. (No. 32; 25th October, 1930). To drive stock by night, on roads or Crown lands, or convey them by night by water, is forbidden, unless with a permit from a Justice, auctioneer, postmaster, constable, or government inspector. Exemptions cover a drive up to six miles to other land of the owners, droving within boroughs, droving to and from a public saleyard up to six miles away, horses led, driven in harness, or ridden, and cattle driven in harness, besides Railway Department hands and shipmasters carrying stock under a bill of lading.

Part 3. PROFESSIONAL AND EDUCATIONAL.

Law Practitioners Amendment. (No. 37; 1st January, 1931). Regularises the practice by which the University conducts professional examinations. Courses of study and practical training may be prescribed, but not for students living ten miles from a college, or, in the Minister of Education's opinion, prevented from attending lectures by acquiring a profession or trade or earning a livelihood. There are consequential amendments in the principal Act, including deletion of references to examiners appointed by the Judges, and to Judges' rules regarding examinations. The year covered by practising certificates is to run to 31st January. The Council of Law Reporting is empowered to make grants to the New Zealand Law Society.

New Zealand Institute Amendment. (No. 18; 11th October, 1930). The Westland and Southland Institutes are dropped from the principal Act, and the Manawatu Philosophical Society added. Slight amendments are made in the constitutional rules imposed on the Institute by the principal Act.

New Zealand University Amendment. (No. 36; 1st January, 1931). To enable the University to carry out the Law Practitioners Amendment Act, 1930, a Council of Legal Education is set up, comprising two judges, two nominees of the Law Society, and two college teachers of law, nominees of the University Senate. The Council is to make recommendations to the Academic Board touching legal education, and such recommendations are to go in all cases to the Senate, which receives express power to make "statutes" about legal education, and impose examination and certificate fees.

Nurses and Midwives Registration Amendment. (No. 21; 25th October, 1930). The Registration Board may approve as a nurses' training-school, besides a public hospital, a licensed private hospital, or a private charitable institution, if satisfied that the latter has for a principal object the relief of the sick on virtually charitable terms. There are elaborate safeguards and restrictions. Refusal or revocation of approval may be the subject of appeal to a Judge in Chambers. To the membership of the Board are added a representative of the Hospital Boards Association and another Government nominee.

Part 4. COURTS.

Coroners Amendment. (No. 11; 11th October, 1930). On the Attorney-General's application, the Supreme Court may direct an inquest to be held, or (by reason of fraud, irregularity, fresh evidence, or otherwise) that an inquisition be quashed and a new inquest held. Inquests on deaths and fires are both included. Where a body has been destroyed or is inaccessible, if it is believed that a death has occurred the Attorney-General may order an inquest to be held. A Coroner may at any time make an order for burial, whether he intends to hold an inquest or decides that no inquest is necessary.

Destitute Persons Amendment. (No. 44; 25th October, 1930). When an order of the Supreme Court has been registered in the Magistrate's Court under the 1926 Amendment, a Magistrate may cancel, vary, or suspend it, or substitute a new order, but with an upward limit of £3 a week. (In **Wilson v. Morris**, (1930) G.L.R. 1, such powers were held not exercisable under the 1926 Act, and their existence would, in the opinion of Smith, J., cause obvious difficulties to arise. The case cited becomes obsolete).

Divorce and Matrimonial Causes Amendment. (No. 43; 25th October, 1930). Separation as a ground for divorce is to include a foreign judicial separation, separation order, or judgment of similar effect, if in force for three years. A wife petitioner who has lived three years in New Zealand with an *animus manendi* that would have given a *feme sole* a domicil here is deemed to have been so domiciled for two years for the purposes of the principal Act.

Judicature Amendment. (No. 14; 1st January, 1931). Sets up a Rules Committee, to consist of the Chief Justice, four other Judges, the Attorney-General, and three barristers or solicitors. The latter are nominated by the Law Society and approved by the Chief Justice. The Judges and they are appointed by the Chief Justice, and for a term not exceeding three years. Rules of Court (Civil Procedure Code and Rules of the Court of Appeal) are to be made by the Governor-General in Council with the concurrence of the Chief Justice and four

or more other members of the Committee. General power to fix scales of fees and costs is included, and may include power to impose. Rules under the Companies Act and eleven other scheduled Acts, and rules of the Supreme Court or Court of Appeal under any other Act, are henceforth to be made as noted above.

Magistrates' Courts Amendment. (No. 16; 11th October, 1930). The existing jurisdiction for recovery of tenements (otherwise than on determination of tenancy) if rent is in arrear is extended to tenancies for a term not exceeding three years, and to cases in which no contractual power of re-entry has been conferred.

Part 5. LAND LAWS AND CONVEYANCING.

Land Laws Amendment. (No. 35; 25th October, 1930). Inferior lands, not, in the opinion of the Lands Development Board, suitable for close settlement, may be disposed of by tender or auction to anybody who, in that Board's opinion, will promote their development. The terms are three per cent. cash, and the balance, with interest at 5½ per cent., by half-yearly instalments for 20 years. Not more than 50,000 acres, and unless both Houses of Parliament so resolve not more than 5,000 acres may be so granted to any one applicant. Such land is not to be subject to Part XIII of the Land Act, 1924. Other Crown lands not disposed of within three months after being offered for selection may be disposed of by tender instead of auction, at a reduced price or rental, and on modified terms. There are various detailed extensions and alleviations of the previous law.

Native Land Amendment and Native Land Claims Adjustment Act. (No. 29; 25th October, 1930). Where by a Native lease the lessor is to appoint a valuer, arbitrator, or umpire for any purpose, the Maori Land Board may make the appointment, and make the lessee deposit his expenses. Various minor amendments. The Board's powers of management of lands over which it has assumed the development powers created in 1928, are enlarged by power to lease, but to Natives only, unless the Native Minister permits. A Maori Land Board may, with the Minister's approval, engage in any industry or business which it may deem to be in the interests of Natives. In the will of a Native who dies after the commencement of the Act (the section is not limited to wills thereafter made) "heir" and "next of kin" are presumed to be those who would be successors to his property on intestacy. The section extends to wills not yet proved of persons already dead. Further power is given to the Minister to compound with local authorities for rates on land owned by or leased to Natives, the Crown's advance to be an equitable charge on the land. Boundaries may be re-adjusted, and the adjustment may affect "European-owned" land with the consent of a majority of the owners. The Court is given a new power to define, declare, and vary trusts of lands and moneys.

Rent Restriction. (No. 4; 31st July, 1930). Part I of the War Legislation Amendment Act, 1916, as hitherto amended, is further continued in force until 1st August, 1931. But to the grounds on which a landlord may recover possession of a dwellinghouse to which that Act applies is added the following: "That the premises are reasonably required by the landlord for any purpose not being the letting to another tenant."

Statutory Land Charges Registration Amendment. (No. 23; 25th October, 1930). Retrospectively as from its passing the principal Act is to be read as saying that statutory charges shall be void against purchasers claiming under instruments *executed after the creation of the charge and* registered before registration of the charge. (The words in italics give the effect of the amendment; the marginal note reads: "charges to which the principal Act is applicable not affected by prior purchases.") Priority of registered charges in relation to other interests is to be determined in accordance with the provisions of the Deeds Registration Act or the Land Transfer Act; but statutory priority, otherwise arising, of a statutory charge is not affected.

The attention of conveyancers may also be directed to the stamp duty changes in the **Finance Act,** noted below in **Part 7, Revenue and Finance.**

Part 6. LOCAL GOVERNMENT.

Electric-Power Boards and Supply Authorities Association. (No. 42; 25th October, 1930). Incorporates the body of that name. Any electric-power board, or any county or borough council or town board supplying electricity under a Public Works Act license can become a member. Members are graded in six classes according to the quantity of their supply of electrical energy, and until the Association otherwise decides pay annual subscriptions graduated from ten to twenty-five guineas. Members may also pay up to £40 a year for their representative's travelling-expenses. The Association's powers include the obtaining of legal opinions, the joining in advertising contracts, with apportionment of costs among members (perhaps the main purpose for which the Act was sought), and general furtherance of interests. A fairly detailed constitution is provided.

Local Authorities Empowering (Relief of Unemployment) Extension. (No. 2; 30th June, 1930). Existing borrowing powers under the principal Act of 1926 are extended until 30th June, 1931.

Slaughtering and Inspection Amendment. (No. 27; 25th October, 1930). No fees to be payable to abattoir authorities in respect of meat from stock slaughtered in meat-export slaughterhouses and sold for bacon, hams, tinning, or export.

Tramways Amendment. (No. 28; 25th October, 1930). On an electric tramway system using none but "one-man" cars, a candidate for examination for a position as motorman need not have served as a tramway conductor, if he has, on that system, served a year as cleaner or car-examiner, and has traversed all routes at least six times with an experienced driver.

(To be concluded.)

Legal Duties.

"As a citizen, where are my legal duties? The reply is: 'In some thousands of reported legal decisions, in some thousands of statutes, and in regulations which no man's mind can possibly compute or understand.' Yet, if you consider the main duties of life, it is an odd thing how easily you can state them, and in how small a compass First, be honest; secondly, be moral; thirdly, fulfil your contracts; fourthly, pay your debts; and fifthly, be careful in everything you do, say or write."

—Mr. Justice McCardie.

Professional Services.

A prominent lawyer in Georgia had been successful in obtaining an acquittal for his client, who had been tried on a serious charge. The case had attracted wide attention and accounts of the trial had been published in a number of newspapers, including those in some of the larger cities. A Chicago gangster was in jail charged with a very serious crime and read of the methods of defence alleged to have been used by the Georgia barrister. The Chicago man wired the attorney as follows: "Am in jail charged with ——. How much will you charge to defend me?"

'Fifty thousand dollars," wired the Georgian.

"Your offer accepted. Come at once and bring your witnesses," answered the gangster.

—"*Case and Comment.*"

Rules and Regulations.

Samoa Act, 1921. Amendment to Rules of High Court of Western Samoa Consolidation Order, 1924.—Gazette No. 82, 27th November, 1930.

Stamp Duties Act, 1923. Amended regulations.—Gazette No. 82, 27th November, 1930.

Unemployment Act, 1930. Unemployment Levy Regulations. Gazette No. 82, 27th November, 1930.

Forensic Fables.

THE MATURE JUNIOR AND THE DILIGENT PUPIL.

A Mature Junior had a Diligent Pupil who Wanted to Know All about Everything. So Insatiable was his Thirst for Knowledge that the Patience of the Mature Junior was Sorely Tried. From Morning till Night the Diligent Pupil Plied him with Questions about Practice and Procedure, Professional Etiquette, Case-Law and Legal Biography till his Head Span. The Time Came when the Mature Junior Felt he Could not Stand It Much Longer. One Fine Day the Mature Junior was Unexpectedly Deserted by his Leader at a Critical Moment. The Case had Taken a Nasty Turn and the Leader Suddenly Remembered that he had to Send a Telegram. The Diligent Pupil (who was Sitting Behind the Mature Junior) Asked him whether the Leader would Soon Come Back, and Expressed the View that the Judge Seemed to be Rather Against them. He also Begged to be Told the Name

of the Leader on the Other Side. When the Mature Junior was about to Address the Jury the Diligent Pupil Wanted to Know why the Judge was Wearing Violet Robes. He Thought the Mature Junior had Told him they were Never Worn in Jury Cases. The Case was Part Heard when the Court Rose and the Mature Junior was Feeling Distinctly Irritable. In Particular he was Worried about his Engagements for the Following Day. As Soon as he Got Back to his Chambers the Diligent Pupil Asked him when his Case would be Reached in the Court of Appeal, what he Would Do if it Came on before the Part-Heard Case was Finished, and Whether the Diligent Pupil could Join more than one Circuit. The Mature Junior Saw Red, and Struck the Diligent Pupil a Heavy Blow with a Blunt Instrument, to wit, the Poker. When the Diligent Pupil had Recovered Consciousness the Mature Junior Ordered him, on Pain of Death, never to Reappear in his Chambers.

MORAL: *Suffer Pupils Gladly.*

Court of Appeal.

Divisions and Sittings for 1931.

The Court of Appeal has been constituted as follows for 1931:—

First Division: Myers, C.J., Herdman, MacGregor, Blair and Kennedy, JJ.

Second Division: Myers, C.J., Reed, Adams, Ostler and Smith, JJ.

The sittings of the Court will commence on the following dates:

Monday, 9th March:	Second Division.
Monday, 22nd June:	First Division.
Tuesday, 22nd September:	Second Division.

Supreme Court.

Sittings for 1931.

The dates for the commencement of the sittings of the Supreme Court in the various centres have now been fixed and are as follows:—

NORTHERN JUDICIAL DISTRICT.

Auckland: 3rd February; 5th May; 28th July; 27th October.

HAMILTON JUDICIAL DISTRICT.

Hamilton: 23rd February; 1st June; 24th August; 16th November.

TARANAKI JUDICIAL DISTRICT.

New Plymouth: 16th February; 25th May; 17th August; 16th November.

GISBORNE JUDICIAL DISTRICT.

Gisborne: 24th February; 2nd June; 18th August; 10th November.

WANGANUI JUDICIAL DISTRICT.

Wanganui: 23rd February; 18th May; 10th August; 9th November.

WELLINGTON JUDICIAL DISTRICT.

Wellington: 2nd February; 4th May; 27th July; 27th October.

Palmerston North: 3rd February; 5th May; 28th July; 27th October.

Napier: 16th February; 25th May; 10th August; 2nd November.

Masterton: 3rd March; 1st September.

NELSON JUDICIAL DISTRICT.

Nelson: 28th April; 28th July; 1st December.

Blenheim: 21st April; 21st July; 24th November.

CANTERBURY JUDICIAL DISTRICT.

Christchurch: 10th February; 5th May; 18th August; 27th October.

Timaru: 3rd February; 28th April; 28th July; 20th October.

WESTLAND JUDICIAL DISTRICT.

Hokitika: 25th February; 10th June; 9th September.

Greymouth: 25th February; 10th June; 9th September.

Westport: 25th February; 10th June; 9th September.

OTAGO AND SOUTHLAND JUDICIAL DISTRICT.

Dunedin: 2nd February; 27th April; 27th July; 27th October.

Invercargill: 16th February; 11th May; 17th August; 9th November.

Oamaru: 3rd March; 1st September.

Mr. C. J. Wray of the London firm of C. J. Wray & Co., Solicitors, 19 Buckingham Street, Strand, W.C.2, intends visiting the Dominion in February. Mr. Wray's many professional correspondents will no doubt be glad of the opportunity of meeting him personally. His address will, we understand, be C/o Bank of New Zealand, Wellington.

Mr. Justice Hill, who retired in October from the Judgeship of the Probate, Divorce and Admiralty Division, had when at the Bar a commercial and admiralty practice. He never concealed his dislike of divorce business and is said to have observed that as a Judge of Probate, Divorce and Admiralty he sat "with one foot in the sea and the other in a sewer."

New Books and Publications.

Arnold's Municipal Corporations. Sixth Edition. By Sir Lynden L. Macassey, K.B.E., LL.D., K.C., and Francis Cecil Minshull. Price 75/-.

Changes in Motor Car Law. By N. R. Fox-Andrews and A. C. Crane. (Solicitors' Law Stationery Society.) Price 15/-.

The Death Duties. By R. Dymond and S. M. Green, LL.B. (Lond.). Sixth Edition. (Solicitors' Law Stationery Society). Price 29/-.

The Mandates System. By N. Bentwich, Attorney-General of Palestine. (Longmans, Green & Co.) Price 18/-.

A Summary of Company Law. Being Revision Notes for the Professional Examinations. By W. de Creux Hutchinson. (Effingham Wilson). Price 5/-.

Income Tax Law and Practice. By C. A. Newport and E. Staples, F.S.S. Fourth Edition. (Sweet & Maxwell). Price 12/6.

The Housing Acts (1925 and 1930). By A. Henderson, B.A., LL.B., and L. Maddock, B.A. (Oxon.). Foreword by Rt. Hon. A. Greenwood, M.P. (Eyre & Spottiswoode). Price 32/6.

A Manual of Rating (Outside the Metropolis). By S. H. C. Bosanquet, K.C. and P. Frere Smith. (Chapman & Hall). Price 29/-.

The Canons of International Law. By T. Baty, D.C.L., LL.D. (John Murray). Price 24/-.