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"The Judges invite discussion of their acts in the administration of the law."
—Mr. Justice Fitzgerald.

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Negligent Driving Causing Death.

Ever since the enactment of S. 27 of the Motor Vehicles Act, 1924, doubts have existed in the minds of the profession as to its effect. The section reads as follows:

(1) Every person commits a crime, and is liable on indictment to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred pounds, who recklessly or *negligently* drives any motor-vehicle and thereby causes bodily injury to or the death of any person, or who while in a state of intoxication is in charge of a motor-vehicle and by an act or omission in relation thereto causes bodily injury to or the death of any person.

(2) It shall be no defence to an indictment for the crime of manslaughter that the guilty act or omission proved against the person charged upon such indictment is an act or omission constituting a crime under this section.

Broadly stated, the doubts of the profession have been two: (1) as to the degree of negligence essential to the offence, (2) as to the effect of contributory negligence on the part of the person killed or injured by the accused. These matters, as well as other questions of importance, have now been dealt with by the Court of Appeal, both decisions of that Court sitting together, in *Rex v. Storey* on a case stated by His Honour the Chief Justice. As it would be impossible in the space here available to review properly the different judgments on all the points raised, we propose to confine our present observations to the effect of the decision so far as concerns the two points mentioned above.

As to the first question—the degree of negligence required—it was submitted by counsel for the accused that a charge of negligent driving causing death under the section was equivalent to a charge of manslaughter under the Crimes Act, 1908, and that therefore "criminal negligence" as opposed to merely "civil negligence" had to be proved; and in the alternative it was submitted that even if "criminal negligence" was not necessary on an indictment for manslaughter it was necessary on an indictment under S. 27. The learned Judges, however, were unanimously of the opinion that so-called "criminal negligence" was not necessary before an accused could be convicted of manslaughter in respect of negligent driving, holding that in such a case the standard of care was defined by S. 171 of the Crimes Act, 1908, which provides that every person who has in his charge or under his control anything which in the absence of precaution or care may endanger human life is under "a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty." The Court followed *Rex v. Dawe*, 30 N.Z.L.R. 673, and held that such English and Australian cases as *Rex v. Bateman*, 19 C.A.R. 8; *Rex v. Gunter*, 21 N.S.W.S.R. 282; and *Rex v. Newell*, 27 N.S.W.S.R. 274, were distinguishable by reason of the special provisions of this section. Myers, C.J. thus states the standard of care required:

"The test under both Sections 170 and 171 is that of 'reasonableness.' This term cannot be defined, but the standard must be set in each particular case by the jury by applying their common sense to the evidence as to the facts of the case and any admissible expert evidence that is adduced. The standard should be neither too high nor too low: it should be a 'reasonable' standard, the standard of skill or care that would be observed by a reasonable man."

This view as to the degree of negligence necessary to be proved on an indictment for manslaughter being taken, it followed almost as a matter of course that it would be held—as it was—that no higher degree of negligence was necessary for the crime under S. 27 of the Motor Vehicles Act of negligent driving causing death. It is well known that the object of the Legislature in enacting S. 27 was to overcome the reluctance of juries to convict persons indicted for manslaughter in respect of negligent driving; it could hardly be held, therefore, that the Legislature intended to require a higher degree of negligence under that provision than under the Crimes Act.

As to the second question the Court held that contributory negligence on the part of the person killed was not a defence to the accused. But so simple a statement of the Court's decision would, without more, be dangerous, for certain of the acts of the deceased may under some circumstances have an important bearing upon the question as to whether the accused by his negligence caused the death within the meaning of S. 27. The learned Judges appear not to have been entirely unanimous as to exactly what acts of the deceased may be availed of by the accused for this purpose. His Honour the Chief Justice, for instance, took the view that if it was proved that the death was a consequence of the deceased's negligence then such negligence caused the death; if the collision was caused or contributed to by the negligent driving of the accused, negligence on the part of the deceased *prior* to the collision would not afford a defence unless it could be shown that there was some *novus actus interveniens* with which the accused had nothing to do and which brought about the death of the deceased; if it appeared that in some way or other the deceased was negligent *after* the impact and *after the effect of the deceased's negligence was spent*, and that the death was due to that subsequent negligence, that would be a *novus actus*. Blair, J., on the other hand took the view that the acts of the deceased not only subsequent but prior to the impact must be examined to decide the cause of the death:

"If the Crown's case establishes negligence on the accused's part, and the accused, even if he admits that negligence, can produce evidence that the real and effective cause of the death was the victim's own negligence, surely the jury who are to try the question as to whether the accused's negligence caused the death must look at these additional facts for the purpose of saying whether the Crown has established that the death was the consequence of the accused's negligence."

To be fully appreciated, however, the whole of the different judgments on this point must be read; justice cannot be done to them by the quotation of isolated passages. Suffice it so say that *R. v. Storey* has gone far to settle some important and difficult questions; the individual judgments must be regarded as permanent contributions to our law.

Court of Appeal.

Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

October 15, December 10, 1930.
Wellington.

REX v. HOANI HETA HAKIWAI.

Criminal Law—Arson—Mischief—Rejection of Evidence Tending to Show That Act Not Done Without Legal Justification or Excuse or Without Colour of Right—Evidence Improperly Rejected—Accused Entitled to Call Evidence Showing Ground Upon Which Act Done Even Though Such Ground Not in Law Justification or Excuse—Rejection Resulting in a Substantial Wrong to Accused—New Trial Ordered—Practice—Time for Making Application for Leave to Appeal—Hearing of Motion for Leave Treated as Argument of Appeal Only With Concurrence of Trial Judge—Crimes Act, 1908, Ss. 328, 329, 339, 341, 443.

Motion for leave to appeal from a conviction. The accused was indicted, first, that he on or about 24th June, 1930, did wilfully set fire to two stacks of straw the property of one Potter, thereby committing arson; second, that he on the same date did wilfully destroy two stacks of straw the property of one Potter, thereby committing mischief; these offences were charged under Ss. 329 and 339 of the Crimes Act, 1908. The conviction was entered on 11th August, 1930, but the application for leave to appeal was not filed until 8th October, 1930. The ground upon which the application was based was that the learned trial Judge had refused to admit certain evidence to show that the act of the defendant in burning the stacks was not done without legal justification or excuse and without colour of right and that such act was therefore, by virtue of S. 328 (2) of the Crimes Act, 1908, not criminal. It would appear that counsel proposed by asking questions to prove that the prisoner honestly claimed that as he had terminated the lease of the land upon which the stacks stood he was entitled to burn them if he pleased. In other words he proposed to show, by evidence that the accused, who was a Native, believed that, having retaken land which he in conjunction with his sister owned, he was at liberty to do what he pleased with whatever was on the property. The learned trial Judge refused to admit the evidence upon the ground that, as then presented to him, the proposed questions raised only an issue of law which in his view was untenable, and not an issue as to the existence of a state of facts honestly believed by the accused, and which if it actually existed, would at law justify or excuse the act done—**Reg. v. Fetzer,** 19 N.Z.L.R. 438; and the learned Judge in effect directed the jury that the only question that they had to decide was whether or not the accused had committed the act of burning the stacks. The doing of the act was admitted by the accused.

Rogers for accused.
Taylor for Crown.

MYERS, C.J., delivering the judgment of MYERS, C.J., BLAIR and KENNEDY, JJ., said that an application of the present kind should be made promptly while the material facts were fresh in the minds of those concerned and particularly of the trial Judge. Section 443 of the Crimes Act, 1908 required amendment by prescribing a period within which a motion for leave to appeal might be made, but as no time was prescribed by the section as it stood their Honours could not now say that the application was too late. On the case as presented before the Court of Appeal their Honours were clearly of opinion that the evidence should have been admitted so that the accused might give and call evidence showing the ground upon which he did the act complained of with a view to setting up if he could that he had acted with legal justification or excuse or with colour of right. Their Honours gathered that the case was presented to the Court of Appeal not in the same form as it was presented to the learned trial Judge, and it was certainly much more elaborately argued in the Court of Appeal. Had the matter been presented to the learned trial Judge in the same way as it was presented to the Court of Appeal their Honours though that he would have admitted the evidence, or that, if he had refused to admit it, he would have stated a case for the opinion of the Court of Appeal. It might well be that, had the evidence been admitted, the learned trial Judge might properly have directed the jury that there was no evidence that the accused acted with colour of right, as was directed in **Reg. v. Fetzer,** 19 N.Z.L.R. 438, but whether or not such a direction was correct could not be determined until after the evidence had been given. Their Honours accepted the view expressed by Cooper, J., in **R. v. Lawrence,** 25 N.Z.L.R. 129, 142, in that connection, where the learned Judge said: "If evidence which might tend to influence a jury in favour of a prisoner is wrongly rejected, a prisoner is prejudiced in his defence. In such a case, even though if such evidence had been admitted there might still on the whole case be sufficient evidence to justify a conviction, I think the rejection of evidence might well be said to have resulted in a 'substantial wrong,' the prisoner having been prevented from placing before the jury the whole of the material constituting his defence." Applying that test, their Honours thought that there was a mistrial in the present case.

Subsection (5) of S. 443 of the Crimes Act, 1908, enacted that if leave to appeal were granted a case should be stated for the Court of Appeal as if the question had been reserved. On the argument counsel agreed that if leave were granted nothing more could be urged on the argument of the appeal than was said on the argument of the motion for leave, and they further agreed that, if the Court granted leave to appeal, the hearing of the motion for leave to appeal should be taken as the argument of the appeal unless the Court saw any reason to the contrary. Their Honours would not have been prepared to agree to that course except with the concurrence of the learned trial Judge, because, in the event of his stating a case, he might state it quite differently from the ex parte statement placed before the Court on behalf of the accused on the motion for leave to appeal. Their Honours had accordingly conferred with the learned trial Judge who informed them that, although he did not agree in all respects with the statement placed before the Court, such statement in so far as it contained matter relevant to the application was substantially in accordance with his recollection. Their Honours thought, therefore, and the learned trial Judge concurred, that the statement sufficiently set out the facts to enable the Court of Appeal to treat the hearing of the motion as the hearing of the appeal.

HERDMAN, J., delivered a separate judgment concurring.

SMITH, J., delivered a separate judgment concurring.

New trial ordered.

Solicitors for accused: **Rogers, Helleur and LePine,** Napier.
Solicitors for Crown: **Crown Law Office,** Wellington.

Supreme Court

Myers, C. J.
Ostler, J.

December 6; 18, 1930.
Wellington.

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.

Motion to review an order of Ostler, J., made in Chambers, reported *ante* p. 345, where the facts are sufficiently stated.

Spratt for defendants in support of motion.
Gray, K.C. and **Hanna** for plaintiff to oppose.

MYERS, C.J., said that he agreed with both the conclusion and the reasoning of the judgment sought to be reviewed. Assuming that the place for filing the statement of defence and the place for trial should have been stated as Auckland instead of Wellington, that was no more than an irregularity, and if the defendants had as their first step issued a summons for the amendment of the writ they would have been entitled to an order. Their filing of a statement of defence was, however, in His Honour's opinion a waiver of the irregularity, if irregularity there was, and after taking that step it was obviously too late for them to move to set aside the writ, and equally,

in His Honour's opinion, it was too late for them to ask to have the writ amended. **Rein v. Stein,** 66 L.T. 469, did not help the defendants. In **Moore v. Gamgee,** 25 Q.B.D. 244, Cave J., said: "I think that the objection to the jurisdiction of the Court may be waived by taking any step in the proceedings before applying to dismiss the action; and this view is borne out by a case which was not cited in argument: **In re Jones v. James,** 19 L.J. (Q.B.) 257." His Honour did not think it necessary to traverse the authorities cited by Ostler, J., in his judgment, or by Mr. Spratt during the argument on the present motion.

In case the defendants should decide to carry the matter further His Honour thought that he ought to express his view on the question as to whether the writ was irregularly issued. The plaintiff alleged in his statement of claim that the defendant was a company having its registered office at Auckland and was the proprietor of the "Auckland Star" newspaper, Auckland, a paper with a large circulation in the North Island of New Zealand. The plaintiff, when issuing his writ, filed an affidavit, pursuant to Rule 10, stating that some material part of the cause of action in respect of which the writ was to be issued arose at Wellington in the Wellington District of the Court. Affidavits filed on behalf of the plaintiff on the defendants' summons to set aside or amend the writ made it plain that the plaintiff relied upon alleged publication of the newspaper in Wellington as well as in Auckland and elsewhere in the North Island of New Zealand. Apart from those affidavits His Honour should have thought that, though the statement of claim was not very artistically framed, and although the allegation was that the defendants published the alleged libel in the "Auckland Star" on 14th August, 1930,—and, therefore, it could not have been received in Wellington until the following day—the proper inference to be drawn from the allegation in the statement of claim regarding "the large circulation in the North Island of New Zealand" was that, read with the affidavit of jurisdiction, what the plaintiff alleged was a publication in Wellington and elsewhere throughout the North Island of New Zealand.

It was not necessary, however, if His Honour was right in thinking that the irregularity, if any, was waived, for the plaintiff to rely upon that point. In His Honour's opinion the motion failed and should be dismissed.

Motion dismissed.

OSTLER, J., concurred.

Solicitors for plaintiff: **Duncan and Hanna,** Wellington.
Solicitors for defendants: **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.

Myers, C.J. September 11; December 17, 1930. Wellington.

IN RE MACKIN: PUBLIC TRUSTEE v. LAVERTY.

Will—Charity—*Cy-près*—Masses—Gift to Parish Priest to Build Mortuary Chapel or Vault in Ireland to Hold Remains of Testator and Containing an Altar on which Mass could be Offered—Gift to Parish Priest for "the aforesaid Masses"—Testator Not Buried in Ireland—Failure of Gift to Build Mortuary Chapel or Vault—Gift for Masses Charitable—General Charitable Intention—Gift for Masses to be Applied *Cy-près*—Power of Executor to Erect Tombstone on Testator's Grave in New Zealand—"Testamentary Expenses"—Costs of Originating Summons "Testamentary Expenses."

Originating summons. Patrick Mackin, deceased, by his will dated 1st December, 1928, after appointing the Public Trustee his executor and trustee expressed a desire as follows: "I desire if my trustee thinks it reasonably possible that my body should be embalmed and conveyed to Ireland to be buried in my parents' grave at Massforth Church at Dunavan Kilkeel." As well as making certain bequests to the Parish Priest of St. Coleman's Church, Massforth, for certain purposes connected with the church, and a bequest to him personally, he directed his trustee to pay to him the sum of £1,000 "to build a mortuary chapel or vault lined with Carrara marble to hold the remains of myself and of my wife if she should choose to be buried there, and containing an altar on which Mass could be offered occasionally, if possible once a month, for the repose of our souls and of our deceased relatives and friends" and the sum of £500 "for the aforesaid Masses to be offered for the repose of our souls." Subsequently to the execution of his will the testator orally expressed the desire to be buried in New Zealand. The widow of the testator also advised the Public Trustee of her desire that the testator should be buried in New Zealand. After taking all the circumstances into consideration the Public Trustee decided that the provision in the will expressing the testator's desire to be buried in Ireland should not be given effect to and the testator was accordingly interred in the Karori Cemetery at Wellington.

The testator also by his will directed that a sum of £17,000 should be set aside on trust to pay the annual income thereof to his wife during her life and he directed the trustee immediately after his wife's death to dispose of the £17,000 held in trust for her during her lifetime "in the following manner." He then directed payment to various persons of specific sums aggregating only £12,000, thus leaving £5,000 undisposed of.

The Court was asked: (1) to define the position with regard to the bequest of £1,000 for the erection in Ireland of a mortuary chapel or vault; (2) to define the position with regard to the bequest of £500 to the Parish Priest of St. Coleman's Church for masses; (3) whether the executor and trustee of the will was at liberty to expend any and if so what amount of estate funds in the erection of a tombstone or memorial upon the testator's grave at Karori; (4) to determine the destination of the £5,000 undisposed of balance of the fund of £17,000 on the death of the testator's widow; (5) in what matter the costs of and incidental to the proceedings were to be borne.

Cooke for Public Trustee.
Treadwell and **Cresswell** for Parish Priest.
Taylor for Attorney-General.
Hanna for pecuniary legatees.
James for residuary beneficiary.
O'Regan for widow and next of kin of testator.

MYERS, C.J., said: (1) So far as the gift of £1,000 for the erection of a mortuary chapel or vault was concerned it must be regarded as having been made in contemplation of effect being given to the testator's desire that his body should be embalmed and conveyed to Ireland. The object of the gift was the building of a mortuary chapel or vault for the very purpose of holding the testator's remains. The gift was not an absolute gift of £1,000 to the Parish Priest but must be construed as a conditional gift to take effect only if the testator's desire was given effect to that his body should be embalmed and conveyed to Ireland for burial in the Massforth Churchyard. The condition was not, and could not now be, complied with. In His Honour's opinion, therefore, the gift failed with the failure of its object. Even assuming (but without deciding) that the bequest to build a mortuary chapel or vault containing an altar was a charitable gift His Honour did not think that it could be said to show such a general charitable intention as would be necessary to enable the *cy-près* doctrine to be applied. The testator's intention was not to build a place for public worship but a private chapel. The case was not unlike in that respect that of **Hoare v. Hoare,** 56 L.T. 147: and see **In re Vaughan,** 33 Ch. D. 187. In the present case the chapel was intended to be erected in the graveyard of the Church but nevertheless it would, as it seemed to His Honour, be a private chapel. Apart from that point however the very purpose of the erection of the chapel or vault in the present case was that it should contain the testator's remains, and that purpose had failed. His Honour did not think that the purpose of the gift was the endowment of an altar for the Roman Catholic community. True, the chapel or vault was to contain an altar, but that was, as His Honour thought, a purpose merely secondary or ancillary to the real purpose or object of the gift. His Honour referred to **Clark v. Taylor,** 1 Dr. 642, and said that most of the cases where it had been held that a gift to a particular private charity failed the particular charity had ceased to exist during the lifetime of the testator or settlor—for example **Fisk v. Attorney-General,** L.R. 4 Eq. 521, 528; **In re Rymer,** (1895) 1 Ch. 19. On an examination of **Clark v. Taylor** (*sup.*) in Drewry's report it would appear that the particular charity did not cease to exist until after the testator's death, but that the case could not be regarded as decided on that basis was shown by the statements of Lord Herschell, L.C. in **In re Rymer** (*sup.*) at p. 32 and of Kay, L.J. in **In re Slevin,** (1891) 2 Ch. 236, 242. But His Honour could see no distinction in principle between the case of a gift to a particular charity where that charity existed when the testator made his will but ceased to exist in his lifetime and the case of a gift to a particular charity which was contemplated by the testator to come into existence after his death but which had never, and could not now, come into existence by reason of the failure of the very object for which it was to be established. If the gift was for a particular purpose and it was impossible to carry out that purpose the gift failed: **In re Wilson,** (1913)

1 Ch. 314, 320, 321. The present gift came in His Honour's opinion within the second class of case referred to by Parker, J., in that case, that was to say the gift was a particular gift—a gift for a particular purpose—and it was impossible to carry out that particular purpose. The particular charitable purpose for which the gift was made was impracticable and as no paramount general charitable intention was implied by the will, the charitable bequest failed: **In re Wilson** (*sup.*); **In re Packe,** (1918) 1 Ch. 437; **In re Monk,** (1927) 2 Ch. 197, 211. In His Honour's opinion, therefore, the gift of the sum of £1,000 failed and the amount fell into residue.

(2) As to the gift of £500 to the Parish Priest for masses, it did not at all follow in His Honour's opinion that that gift necessarily stood or fell with the gift of £1,000 for the mortuary chapel or vault. Assuming that the gift of the £1,000 was charitable but was given to a particular charity, that did not negative the possibility of there being a general charitable intention in so far as the gift of £500 was concerned. The intention of the gift of £500 depended, His Honour thought, upon the true nature of a mass. That a bequest by a testator for public masses to be offered for the repose of his soul was a good and charitable use and valid in New Zealand was held by Cooper, J., in **Carrigan v. Redwood,** 30 N.Z.L.R. 244. At that time such a bequest was, according to the authorities, void in England as a gift to superstitious uses, but those authorities were overruled by the House of Lords in **Bourne v. Keane,** (1919) A.C. 815, and the validity of such a bequest established. In Ireland it was held in **O'Hanlon v. Logue,** (1906) 1 Ir. R. 247, that a bequest for masses in perpetuity was a good charitable gift whether there was a direction that the masses should be celebrated in public or not. The Court there overruled the previous decision in **Attorney-General v. Delaney,** Ir. R. 10 C.L. 104, but the report of that case was still of great value because there was set out in it at length the evidence of Dr. Delaney, Roman Catholic Bishop of Cork, as to the nature of a mass, and that evidence, which had been accepted in other cases, had also been adopted and relied on by counsel for all parties in the present case. Although a gift for masses for the repose of a testator's soul might be a good charitable gift there was still the question as to whether it connoted a general charitable intention giving rise to the application of the *cy-près* doctrine if it turned out that the masses could not be said according to the precise directions contained in the testator's will. As to the nature of the masses His Honour referred at length to **Carrigan v. Redwood** (*sup.*) at p. 254; and **Nelan v. Downes,** 23 C.L.R. 546, and to **Bourne v. Keane** (*sup.*) at p. 833, per Lord Birkenhead. Where a Roman Catholic testator gave a legacy for masses there must surely be imputed to him a knowledge of the true nature of the mass, and, if that was so, it followed, His Honour thought, that such a gift was one to which if necessary the *cy-près* doctrine must be applied. It was true that there was an isolated statement in the speech of Lord Buckmaster in **Bourne v. Keane** (*sup.*) at p. 863, which at first sight might seem contrary to that view; but His Honour could not help thinking that Lord Buckmaster did not have in mind the possible application of the *cy-près* doctrine. He was merely considering the question whether or not a gift for masses was valid according to English law, and no question arose as to the application of the *cy-près* doctrine. In the present case the testator first gave £1,000 to build a mortuary chapel or vault to hold his remains and those of his wife if she should choose to be buried there and containing an altar on which masses could be offered occasionally, and then he directed payment to the Parish Priest of £500 for "the aforesaid masses to be offered for the repose of our souls." But for the words "the aforesaid" no difficulty could arise. No doubt the testator contemplated his burial in the graveyard of St. Coleman's Church and consequently that the masses would be offered on the altar in the contemplated mortuary chapel or vault. But His Honour could not help thinking that from the very words of the bequest (and that view was strengthened by other provisions in the will) the testator's real object and desire was that masses should be offered by the Parish Priest of St. Coleman's Church—but offered on the altar in the mortuary chapel or vault if it were erected. In any case His Honour felt satisfied that his paramount intention was that the masses should be offered, and, if that were so, then in His Honour's view (having regard to the nature of a mass) a general charitable intention was disclosed. It was clear, His Honour thought, that the testator knew that the legacy to the Parish Priest for masses would not go to him for his own benefit but for the Church because the bequest of £500 for masses was immediately followed by a bequest to the Parish Priest of a like sum for his personal use. His Honour held, therefore, that the gift of £500 did not fail, but, as it could not be applied in the precise manner directed by the testator, must be executed *cy-près*. If that view were accepted it seemed to him that it was hardly necessary to propound a scheme, as the proper application of the *cy-près* doctrine would require payment of the money to the Parish Priest of St. Coleman's Church for masses as directed by the testator, but to be offered at that Church. Subject to the consideration of any representations that the Attorney-General might wish to make His Honour was prepared to make an order in those terms.

(3) As to the third question, it seemed to have been held in England that the cost of a tombstone was not a funeral expense—**Bridge v. Brown,** 2 Y. & C. (Ch.) 181—though in **Goldstein v. Salvation Army Assurance Society,** (1917) 2 K.B. 291, where the Court had to consider the effect of the term "funeral expenses" in a section of the Assurance Companies Act, 1909, it was held to be quite open to find that the cost of an ordinary stone or tablet upon the grave containing the body of the dead was a funeral expense within the section. McCardie, J., said that in deciding what should be allowed as a funeral expense there must be remembered the station in life, the occupation, and the creed of the dead person, and the general circumstances of the case, but that nothing should be allowed as a funeral expense beyond those reasonable and proper limits. In Victoria in **Grunden v. Nissen,** (1911) V.L.R. 97, 105, 106,, (approved by the Full Court—*ibid.* 267, 273) A'Beckett, J., explained his view of **Bridge v. Brown** and said that it was not a judicial decision that nothing should be allowed an executor for a tombstone. In **Chesterman v. Mitchell,** (1924) 24 N.S.W. S.R. 108, 111, 112, a similar question was considered by Harvey, J. He held that executors might out of the testator's estate spend a reasonable sum of money having regard to the estate and the circumstances in life of the testator in erecting a headstone or in some other way marking the testator's grave. His Honour referred also to **In re Hudson deceased,** 25 N.Z.L.R. 626, and answered the question by saying that the Public Trustee might out of the testator's estate spend a reasonable sum of money having regard to the estate and the testator's circumstances in life in erecting a tombstone or memorial marking the testator's grave. His Honour did not feel in a position on the material before him to indicate what amount His Honour thought reasonable to be expended but, if he considered necessary, the Public Trustee might make a further application to the Court in that connection.

(4) The fourth question asked by the summons seemed to present no difficulty. The sum of £5,000 undisposed of at the widow's death fell, on the determination of the widow's life interest, into residue and passed to the residuary legatee.

(5) As to the fifth question, it was admitted by all counsel during the argument that the costs of the proceedings were "testamentary expenses" and were payable and to be borne in the manner in which the will directed that testamentary expenses were to be paid and borne: **Jarman on Wills,** 7th Edn., Vol. 3, p. 1968; **In re Hall-Dare,** (1916) 1 Ch. 272, at p. 277.

Solicitors for Public Trustee: **Chapman, Tripp, Cooke and Watson,** Wellington.

Reed, J. November 27; December 9, 1930. Blenheim.

SIMPSON v. SCHWASS.

Mortgage—Power of Sale—Sale Through Registrar—Mortgage of Land Held Under Deferred Payment License—Mortgagee Buying in at Estimated Value and Suing Mortgagee for Deficiency—Instalment of Purchase Money Payable Under License Due and Unpaid at Date of Application to Sell Not Recoverable by Mortgagee from Mortgagor—Land Transfer Act, 1915, Ss. 2, 110, 111, Fourth Schedule, cl. 12—Property Law Act, 1908, S. 58.

Action against a mortgagor by a mortgagee for the deficiency upon a mortgagee's sale through the Registrar at which the mortgagee became the purchaser of the property. The mortgage was one of land held under a deferred payment license. Under the terms of the deferred payment license the defendant was required to make to the Crown annual payments on the first of January of each year of £410 3s. 9d. in reduction of the purchase money. The instalment due on the 1st January, 1930, was unpaid upon the date (12th April, 1930) when application by the plaintiff as mortgagee was made to the Registrar of the Supreme Court at Blenheim to conduct the sale of "all the estate and interest of the said Christopher Frank Schwass in the lands and premises comprised in the said Memorandum of Mortgage."

The plaintiff estimated "the value of the said estate and interest in the lands and premises comprised in the same Memorandum of Mortgage to be £10,200." The grounds upon which the application was made were stated to be that the mortgagor had made default in his covenant to pay all instalments of principal and interest as and when the same should respectively become due and payable under the said occupation license and that a sum of £410 3s. 9d. for principal and £112 16s. 0d. for interest fell due on the 1st day of January, 1930, and was still due and owing. The plaintiff bought the property in at the estimated value. The defendant objected to the inclusion in the mortgagee's statement of (*inter alia*) the sum of £410 3s. 9d. the instalment of purchase money due on 1st January.

Reid for plaintiff.
Nathan for defendant.

REED, J., said that the question was whether the plaintiff, who bought the property in at the estimated value, was entitled to claim from the defendant the amount of the unpaid instalment of purchase money. The estimate of value was made in accordance with the provisions of S. 110 of the Land Transfer Act, 1915. The plaintiff as mortgagee was strictly bound by that estimate, and any claim against the defendant as mortgagor must be upon that basis. The Act required that the mortgagee should state the value at which he estimated the land to be sold. "Land" extended to and included every estate or interest therein (S. 2) so that the estimate was correctly made of "the estate and interest" of the mortgagor in the land to be sold. Now what was that estate and interest? It was a license from the Crown to occupy the land, with the right of purchase for the sum of £10,254 14s. 5d., payable by annual instalments of a fixed amount. At any point of time, therefore, the value of the estate or interest of the mortgagor was the freehold value of the land less the amount required to complete the purchase. In the present case the amount required was £4,512 1s. 11d. at the time the estimate was made, and was unaltered on the day of sale. Of that amount the instalment of £410 3s. 9d. ought to have been paid on the first of January preceeding but had not been paid. Had it been paid the value of the estate and interest of the mortgagor in the land, at the respective dates of the estimate and sale, would have been greater to that extent. The plaintiff was strictly bound by his estimate: **Bank of Australasia v. Scott,** (1926) G.L.R. 274. It was, therefore, not open to him now to say that, in making the estimate, he did so on the basis of that instalment having been paid. The test was: What would have been the position of a third party buying at the auction sale? Would he have been entitled to a deduction of the amount of the unpaid instalment from the purchase money payable? The property sold under the Particulars and Conditions of Sale was "all the estate and interest of the lessee or licensee" subject to a first mortgage of £1,800. His Honour had already shown that that estate and interest was the value of the freehold less the amount, £4,512 1s. 11d., required to complete the purchase. An intending purchaser had the right to see the application of the mortgagee to the Registrar and the estimate of the value—**Re Trustees of Marlborough Lodge,** 12 G.L.R. 271—and a prudent man would inspect these documents and ascertain from the Receiver of Land Revenue the balance of purchase money due. He would thus have explicit notice that there was an instalment overdue. Clearly, in those circumstances, he would not be entitled to claim a deduction of such unpaid instalment unless he could show that it came within the term in the Conditions of Sale which read as follows: "All outgoings will be paid by the vendor up to the date of completion and shall be apportioned for the purposes of this condition." It was unarguable that in those circumstances the unpaid instalment was an outgoing. The purchaser then being unable to claim against the mortgagee it was clear that the latter could not claim the amount from the mortgagor.

The question might be tested from another angle. By S. 111 of the Land Transfer Act, 1915, it was provided that at any time before the sale the mortgagor might pay to the mortgagee the value of the land, as estimated by the mortgagee, together with the expenses already incurred by the mortgagee in connection with the intended sale, and the moneys expended by him on or about the land subsequently to the time when he estimated the value thereof as aforesaid. On such payment the duty of the mortgagee was as defined by the twelfth clause of the Fourth Schedule that was to say to execute a discharge of the mortgage. If in the present case the mortgagor had acted under that provision the mortgagee would have been entitled, if the amount paid to him had been less than the amount owing under the mortgage, to sue the mortgagor for the balance. There was no conceivable ground upon which he could be held to be entitled to recover the unpaid instalment in such an action. It was not a debt due to him as would be the case if it were overdue interest. It was only recoverable by him if previously paid by him to the Receiver of Land Revenue.

It being clear, therefore, that neither, in the case of the purchase by a third party nor of redemption by the mortgagor, would the mortgagee have any claim against the mortgagor for the unpaid instalment, it was necessary to consider whether the position was different when the mortgagee bought in. It was contended that the case must be decided upon the ordinary law relating to vendor and purchaser—that when the property went to sale the relations of buyer and seller were created between the mortgagee and mortgagor, and that the particulars and conditions of sale alone regulated the terms of the contract, and that the only load on the title there revealed was the first mortgage. On that basis it was contended that as the license was subject to forfeiture through non-payment of the instalment the mortgagee *qua* purchaser was entitled to have the covenants by the mortgagor *qua* vendor performed to the date of the sale. It was claimed that the license was analagous to a lease and S. 68 of the Property Law Act, 1908, was referred to as to the covenants to be implied. The fallacy underlying that argument was that in a case where a mortgagee bought in the statutory position created by the sections of the Land Transfer Act, 1915, dealing with a sale of mortgaged property by the Registrar of Supreme Court, was entirely different from the ordinary case of sale and purchase. In the former the mortgagee was thoroughly conversant with the title, he was compelled by law to estimate the value of the estate and interest of the mortgagor as it stood, he drew his own conditions of sale subject to the approval of the Registrar, he must account to the mortgagor for the purchase money—**Bagnall v. Clements,** (1928) N.Z.L.R. 737—and finally the Registrar executed the transfer to the mortgagee as purchaser. The difference between that position and that of an ordinary vendor and purchaser was obvious. The right of purchase under a license similar to the present bore no analogy to a lease.

For the reasons, therefore, (1) that the mortgagee was bound by his estimate of the value of the mortgagor's estate and interest, (2) that in the present case such estate and interest was the value of the freehold less the balance of purchase money due, and (3) that the unpaid instalment was part of the balance of purchase money due, the mortgagee was not entitled to recover the amount of such instalment from the mortgagor.

The result was that the plaintiff failed in his claim and the defendant succeeded in his counter-claim, there being a surplus instead of a deficiency.

Solicitors for plaintiff: **Burden, Churchward and Reid,** Blenheim.
Solicitor for defendant: **A. C. Nathan,** Blenheim.

Reed, J. November 13, 14; 18, 1930.
Wellington.

HEFFERON v. THE KING.

Damages—Special Damages—Hospital Expenses—Public Hospital—Damages Ordered to be Paid into Court and Amount Allowed for Hospital Expenses to be Retained in Court Until Receipt or Order of Hospital Authority Produced to Registrar.

Petition of right in respect of injuries sustained by the suppliant through being knocked down by a motor-lorry driven by an employee of the Railway Department. The jury awarded the suppliant (1) Special damages (a) hospital expenses £37 16s. 0d., (b) loss of wages £85; (2) General damages £260. The case is reported only as to Reed, J.'s judgment as to payment of the hospital expenses allowed.

Ongley and **Arndt** for suppliant.
Leicester for respondent.

REED, J., said that the plaintiff was entitled to recover judgment for the amount awarded by the jury, but it had been represented to His Honour that in a large number of cases of the present nature where the hospital expenses had been

awarded as special damages the plaintiff, after collecting, had appropriated the amount to himself and the hospital had not been paid. That, of course, was dishonest, and might conceivably bring the defaulter within the criminal law. His Honour thought the public hospitals of the country were entitled to the protection of the Courts and His Honour had no doubt that there was jurisdiction to give that protection. Hospital expenses were only allowed as special damages on the assumption that they had been paid, or, on the implied promise of him who claimed them as damage sustained, that they would be paid. The Courts were ever vigilant to prevent fraud and it was a fraud to appropriate money to a different purpose than that for which it had been received.

Judgment would be for the suppliant for £382 16s. 0d. with costs. His Honour ordered that the amount of the judgment be paid into Court and that the sum due for hospital expenses, namely £37 16s. 0d., be retained until there be produced to the Registrar either a receipt from the hospital authorities for the amount or an order by such authorities upon the Registrar to pay same to the suppliant or his solicitor. In that way "right may be done" as prayed by the suppliant in the proceedings.

His Honour should like to add that he did not want it thought that he had any reason to suspect that the present suppliant would do anything but honourably pay the hospital, but His Honour proposed to adopt the same course in every similar case in the future, whatever might be his views as to the probable honesty or otherwise of a successful plaintiff.

Solicitors for suppliant: **Ongley, O'Donovan and Arndt,** Wellington.

Solicitors for respondents: **Leicester, Jowett and Rainey,** Wellington.

Ostler, J. June 11, 12; December 1, 1930. Auckland.

WAKE v. AUCKLAND TOBACCO GROWERS LTD.

Mortgage—Submortgage—Purchaser from Original Mortgagor Entering into Deed of Covenant with Original Mortgagee to Pay All Monies Due Under Mortgage and to Perform All Covenants of Mortgage—Deed of Covenant Executed Subsequent to Submortgage—Breach of Covenant by Purchaser from Original Mortgagor—Action by Original Mortgagee for Principal Sum—Submortgagee Not a Party to Action—Original Mortgagee Entitled to Sue—Judgment for Principal Sum Less Amount Secured by Submortgage.

Action to recover principal sum secured by a mortgage on the ground of breach of covenant, the mortgage containing a provision that if any instalment of interest was not paid within the specified time, or if there was a breach of any of the covenants on the part of the mortgagor, the principal sum should immediately become payable.

The plaintiff was the owner of a mortgage given by the Southern Cross Land Co. Ltd. and secured upon land sold by plaintiff to that company. The mortgage contained a provision that upon the sale of the land by the mortgagor the principal should immediately become payable unless the purchaser should execute a deed of covenant making the purchaser personally liable for all the covenants in the mortgage. The Southern Cross Land Co. Ltd. sold the land subject to the mortgage to the defendant company, Auckland Tobacco Growers Ltd., and instead of paying off the mortgage the defendant company entered into a deed of covenant with the plaintiff by which it covenanted with him personally that it would pay the monies due thereunder and perform all the covenants of the mortgage. This deed was dated 7th August, 1929. Before this date the plaintiff had submortgaged his mortgage to the Reliance Loan, Mortgage and Discount Corporation by deed of submortgage dated 31st July, 1929.

Mason for plaintiff.

Tong for defendant.

OSTLER, J., said that the defendant company raised a nonsuit point, that as the plaintiff by his submortgage had made an absolute assignment within the meaning of S. 46 of the Property Law Act, 1908, which assignment had been completed by notice given by the submortgagee, the plaintiff had no right of action without joining the submortgagee. In His Honour's opinion there was a good answer to that contention. After the assignment the defendant company entered into a deed of covenant with plaintiff personally, and plaintiff had a right of action on the contract contained in that deed. Having covenanted with plaintiff personally the defendant company cannot be heard to say that it is not liable under its contract with him which was entered into after it had knowledge of the submortgage. On that ground His Honour held that the nonsuit point failed. Holding that view, it was unnecessary for His Honour to decide the further points whether there was an absolute assignment, and whether, even if there was, plaintiff had a right of action to protect his security.

The plaintiff had proved the breach of a substantial covenant. His Honour thought, therefore, that he was entitled to judgment for the principal sum due under the mortgage, less the amount due by him by way of submortgage to the sub-mortgagee. Judgment would be given for the plaintiff against the defendant for that sum and costs.

Solicitors for plaintiff: **Mason and Mason,** Auckland.

Solicitor for defendant: **S. W. W. Tong,** Auckland.

Adams, J. December 9; 18, 1930. Christchurch.

SMITH v. FENNELL.

Contract—Vendor and Purchaser—Deposit—"Agreement Shall be Null and Void and of no Effect and Neither of the Parties shall have any Claim against the Other"—No Right of Restitution in Event of Agreement Becoming Null and Void—Purchaser Not Entitled to Recover Deposit Paid.

Action to recover £150 paid as a deposit on a contract for the exchange of properties. The plaintiff's claim turned on the construction of paragraph (1) of a contract dated 9th May, 1928, which read as follows: "The said Albert Fennell and May Rex Fennell shall construct and complete a traffic bridge (described) this bridge to be completed to the satisfaction of the Waimairi County Council and in the event of such bridge not being constructed and completed as aforesaid this agreement shall be null and void and of no effect and neither of the parties shall have any claim against the other." The writ was issued on 26th April, 1929, and the contract was rescinded on 16th September, 1929. It was part of the agreement for rescission that the plaintiff's right to recover the amount of the deposit, being dependent on the construction of paragraph (1) already referred to, should remain open.

Donnelly for plaintiff.

Wilding for defendants.

ADAMS, J., said that to his mind the words "and neither of the parties shall have any claim against the other" plainly meant that there was to be no right of restitution in the event of the contract becoming null and void and of no effect. It is no doubt difficult to understand why that should have been agreed upon, but the words were too strong to admit of any other meaning, and the parties were free to make their own bargain. It was agreed that the right of the plaintiff to recover the deposit depended on the construction of paragraph (1).

Solicitors for plaintiff: **Raymond, Stringer, Hamilton and Donnelly,** Christchurch.

Solicitors for defendants: **Wilding and Acland,** Christchurch.

Ostler, J. December 3, 4, 5; 16, 1930. Wellington.

TRADERS FINANCE CORPORATION v. GENERAL MOTORS ACCEPTANCE CORPORATION.

Sale of Goods—Mercantile Agent—Estoppel—Motor Finance Corporation Purchasing Motor Car from Manufacturer Selling to Agent of Manufacturer Under Hire Purchase Agreement and Allowing Other Person Known to be Agent by Estoppel of Manufacturer to Have Possession of Car—Sale by Agent by Estoppel of Manufacturer in Fraud of Finance Corporation to bona fide Purchaser in Ordinary Course of Business—Purchaser Taking Good Title—Quaere as to Position if Purchaser from Finance Corporation and Agent by Estoppel of Manufacturer Same Person—Agent by Estoppel Selling Other Car to Finance Corporation—Car Resold by Finance Corporation to Third Party under Hire Purchase Agreement but Remaining in Possession of Agent by Estoppel.—Bona fide Purchaser from Agent by Estoppel Taking Good Title—Mercantile Law Act, 1908, S. 3 (1)—Sale of Goods Act, 1908, S. 23, 27—Chattels Transfer Act, 1924, S. 57 (5).

Action for £272 6s. 6d. damages for the conversion of two motor cars. The plaintiff was a duly incorporated company carrying on business in Auckland and elsewhere as a financial corporation, its business being chiefly to finance the selling of motor cars on credit. The defendant was a company incorporated in the United States of America, and carrying on business in New Zealand by an attorney. The defendant was a subsidiary company of the well-known American General Motors Corporation. A subsidiary company of General Motors, incorporated in New Zealand under the name of General Motors New Zealand Limited, sold annually a large number of motor cars in New Zealand. The defendant had established its business in New Zealand to assist in selling the cars by providing finance for purchasers who were unable to pay cash. The evidence established that although the two companies were working together in close harmony, the defendant was an entirely separate entity from the New Zealand company, with a different staff, a separate set of books, and a separate management. The New Zealand company never sold its cars except for cash. The scheme of business which had been evolved was for the New Zealand company to appoint agents (or "distributors" as it called them) for its cars throughout New Zealand. If those agents were able to pay cash for the cars they purchased, the New Zealand company dealt with them direct. They purchased at the wholesale cash price, and sold again to the public at the retail price fixed by the company. If, on the other hand, the agent was unable to pay cash, General Motors New Zealand Ltd. sold to the defendant company for cash, and the defendant company supplied the car to the dealer under a hire purchase agreement; it was not the practice of the defendant company to register these hire purchase agreements under the Chattels Transfer Act, 1924.

In October, 1927, General Motors New Zealand Ltd. appointed S. Bishara Ltd. its agent in the Taumarunui district for the sale of its cars. S. Bishara Limited took a lease of a garage in October, 1927, and commenced business in Taumarunui as agent for General Motors vehicles. S. Bishara ran the business for about a month, sold four or five cars, and then passed it over to his son J. Bishara. It had been intended that another son would go into partnership with J. Bishara, and the business was run by J. Bishara under the name of "Bishara Brothers," but the other son did not enter the partnership, and the business of Bishara Brothers was run entirely by J. Bishara. His Honour held on the facts that whatever was the real state of matters between themselves, it was abundantly proved by the clearest evidence that for a period of nearly two years, not only had General Motors New Zealand Ltd. allowed Bishara Brothers to hold themselves out to the public as the agents in the Taumarunui district for all General Motors cars and trucks, but General Motors New Zealand Ltd. itself actually held out Bishara Brothers as its local agents, and His Honour held that in view of the manner in which it permitted them to hold themselves out, and in which it held them out as its agents, General Motors New Zealand Ltd. could not be heard to say as against members of the public who had changed their position on the faith of that representation that they were not their agents. His Honour held further that the defendant company must have been aware of the *de facto* appointment by General Motors New Zealand Ltd. of Bishara Brothers, and that it itself treated them as *de facto* agents.

The present action concerned only two motor cars, but it was stated that there were a number of other cases in which the facts are similar. The facts with regard to the first of those two cars were as follows. Four Chevrolet touring cars were ordered by Bishara Brothers from General Motors New Zealand Ltd. on the 8th March, 1929; the purchase was to be financed by the defendant company. In pursuance of that order one of those cars was supplied by the defendant company on the 1st July, 1929. The hire purchase agreement which was sent to be signed by the buyer before he could obtain possession of the car was made out in the name of S. Bishara Limited. It was signed "S. Bishara Limited per J. Bishara." The agreement provided that the defendant company, the General Motors Acceptance Corporation of America, carrying on business in Wellington as dealers in motor vehicles "hereinafter called the 'owner'" agreed to sell and S. Bishara Limited "hereinafter called the buyer" agreed to purchase the motor car on the terms and conditions set out in the agreement. Those terms were that the buyer should pay £30 18s. 10d. as a deposit, and should pay the balance of £148 on the 1st November, 1929; that the property in the car should not pass to the buyer until completion of the payment; that the buyer should not work or use the car or permit it to be worked or used until the completion of the purchase without the previous written consent of the owner; that until the completion of the purchase the buyer should keep the car in his own possession and control and free from any lien or charge and should not without the previous written consent of the owner purport to sell, let, pledge, transfer or part with the possession of the car. On 28th August, 1929, Bishara Brothers sold the car to one Young for £268 15s. 6d., of which £80 was paid as a deposit by Young, and the balance was made payable by eighteen monthly payments of £10 9s. 9d. Young signed a hire purchase agreement on the date of the sale, in which J. Bishara trading as Bishara Brothers was described as the owner of the vehicle. On the same day as the sale was made, J. Bishara assigned by way of mortgage to the plaintiff all his right and interest under the agreement, and also his property in the car. On the 6th September, 1929, the plaintiff company gave written notice of the assignment to Young. Young received possession of the car on the date of the sale and used it until about the 19th September, 1929, when the defendant company seized the car from Young. The facts with regard to the second motor car involved in the action were as follows. The car was a secondhand "Pontiac" car which had been taken over by Bishara Brothers as part payment from a purchaser on the sale to him of a new car. It was the property of Bishara, who conceived the fraudulent idea of obtaining money for it from the defendant company on a bogus sale to one Hall, who was apparently a man of straw. The application was to the defendant company to finance the sale of the car to Hall for £310 12s. 0d. The defendant company agreed to do this, and it agreed to do it by purchasing the car from Bishara and selling it direct to Hall under a hire purchase agreement dated 30th July, 1929. It paid Bishara for the car, and entered into a hire purchase agreement with Hall, but the car was not taken possession of by Hall who was not a *bona fide* purchaser: it remained in the possession of Bishara. While in his possession he sold it on the 17th day of August, 1929, to a Maori, Hoani te Heuheu. The purchaser paid a deposit of £140 and agreed to pay the balance, amounting to £88 10s. 0d. in eighteen monthly instalments of £4 12s. 10d. each. The purchaser signed a hire purchase agreement, which was on the printed form of the plaintiff company, and on the same day as the agreement was made Bishara assigned all his interest under it, and his title and property in the car, to the plaintiff company in consideration of the payment of £740 2s. d. Te Heuheu took possession of the car on the day of the sale and retained it for about a month, when it was seized on behalf of the defendant company.

Grant for plaintiff.

O'Leary and **Cleary** for defendant.

OSTLER, J., said that in his opinion the plaintiff was entitled to succeed as to the first car. Bishara, to the knowledge and with the concurrence of the defendant company, was put into the position of a mercantile agent. He was allowed by the defendant company to hold himself out to the public as the sole agent for the sale of General Motors cars (which included Chevrolet cars) in his district. He was held out with defendant company's knowledge and consent as an agent, having in the customary course of his business as such agent authority to sell Chevrolet cars. Defendant company itself dealt with him as such agent. It actually on three occasions made its hire purchase contracts with him. It was true that in respect of that particular car the contract was made with S. Bishara Limited. But it knew that the car had been ordered by Bishara Brothers

for its business; it knew that the car would be taken possession of by Bishara Brothers, and that it would eventually be sold by Bishara Brothers acting within the scope of that firm's ostensible authority as the agent who was carrying on the business of selling its cars in the district. It treated Bishara Brothers as the agent having in the customary course of its business authority to sell Chevrolet cars, and it was content to allow the car to get into Bishara Brothers' possession on that footing. Therefore, in His Honour's opinion, it put Bishara Brothers in the position of a mercantile agent in respect of that car. That being so, the provisions of section 3 (1) of the Mercantile Law Act, 1908 applied. Bishara Brothers by the two transactions with Young and the plaintiff company really sold the car to plaintiff company subject to the conditional purchase by Young. The plaintiff company was acting in good faith, and had no notice that Bishara Brothers had no authority to make the disposition. Therefore, the sale to plaintiff company was valid, and conferred on it a good title to the car as against the defendant company. As against the plaintiff company, the defendant company could not be heard to say that Bishara Brothers were not its agents. It represented to the whole district that they were; it allowed them to have possession of the car, and the plaintiff company on the faith of that representation entered into a contract and parted with its money. All the elements were present to create an estoppel against the defendant company, the true owner of the car, in favour of the plaintiff company. As against it, the defendant company was estopped from denying that Bishara Brothers were its agents for the sale of its cars, or to use the words of S. 23 of the Sale of Goods Act, 1908, it was by its conduct precluded from denying Bishara Brothers' authority to sell the car.

It was contended on behalf of the defendant company that it was protected by S. 57 (5) of the Chattels Transfer Act, 1924. In His Honour's opinion that section was no protection. The sale to plaintiff company was not by the purchaser under the hire purchase agreement, but by a mercantile agent allowed to have possession of the car for the purpose of his business, and held out by the makers and their agent for the sale of that make of car in that district. If the purchaser under the hire purchase agreement had been Bishara Brothers, then a most important question of law would have had to be decided as to how far, if at all, S. 57 (5) of the Chattels Transfer Act, 1924, had impliedly repealed S. 3 of the Mercantile Law Act, 1908, and S. 27 (2) of the Sale of Goods Act, 1908. That question did not arise, however, because the purchaser under the hire purchase agreement was S. Bishara Limited, who was not the seller.

It was contended on behalf of the defendant company that Bishara Brothers were not mercantile agents because they held this car in effect *qua* purchasers and not *qua* agents for sale. That was not so, however. The contract of purchase was not with Bishara Brothers, but with J. Bishara Limited. The position of Bishara Brothers was, as His Honour had pointed out, that of agents for the sale of the car in the district.

It was further contended that as Bishara in the transaction with the plaintiff company and Young described himself as the owner of the car, and purported to sell it as owner, and not as agent for General Motors, S. 3 of the Mercantile Law Act, 1908, did not apply. A similar contention was raised in **Oppenheimer v. Attenborough,** (1908) 1 K.B. 221, and was there rejected. See also **Spencer Bower on Estoppel by Representation,** 399.

Counsel for the defendant company relied on **Farquharson Brothers v. King,** (1902) A.C. 325, which was followed in New Zealand in **Galyer v. Massey Harris Company,** 33 N.Z.L.R. 1392. The facts of that case were, however, entirely different. In that case the true owners of the goods did not hold out the person who fraudulently sold their goods to the purchaser as their agent, and there were no facts upon which estoppel could arise. In the present case the publicity of the holding out was, in His Honour's opinion, sufficient to justify the inference that plaintiff company knew of it and acted upon it.

As to the second car the plaintiff company was entitled, in His Honour's opinion, to succeed in its claim for conversion. His Honour thought there could be no doubt that the car was sold by Bishara to the defendant company, but Bishara remained in possession of the car. S. 27 (1) of the Sale of Goods Act, 1908, applied. In the present case both Te Heuheu and the plaintiff company entered into the transaction in good faith and without notice of the previous sale. In His Honour's opinion, therefore, that transaction conferred a good title upon the plaintiff company.

It was contended that S. 57 (5) of the Chattels Transfer Act, 1924, protected the title of the defendant company. In His Honour's opinion that subsection had no application to the facts of the case. The sale was not an attempted sale by Hall, who was the purchaser under the hire purchase agreement. It was a sale by Bishara, who had already sold the car to the defendant company, but remained in possession of it.

Judgment for plaintiff.

Solicitors for plaintiff: **R. M. Grant,** Auckland.
Solicitors for defendant: **Barnett and Keesing,** Wellington.

Smith, J. 21st November, 1930. Hamilton.

IN RE AMALGAMATED DISTRIBUTORS LTD.

Company — Time — Special Resolution — "Seven Clear Days' Notice"—Day of Service of Notice and Day of Meeting Ordinarily Excluded in Computing Time—Quaere as to Application of Article Providing that where a Number of Days' Notice to be Given Day on which Notice Expired to be Included in such number of Days—Article Providing that Notice sent by Post Deemed Served on Day Following Date of Posting—Notice Posted on 29th July for Meeting on 6th August Insufficient—Companies Act, 1908, S. 91, Table A, Arts. 53, 120-127.

Petition for the approval of the Court to the change of the name of the above company to "Malga Stock Minerals Ltd." Table A of the Companies Act, 1908, applied except where it was expressly excluded or modified by the company's articles: in the result Article 53 and Articles 120-217 (*inter alia*) of Table A applied. The special resolution upon which the petition was founded was passed for the first time at a special general meeting of the company held on 6th August, 1930, at 7 p.m. Notices convening this meeting were posted by the company on 29th July, 1930.

W. H. Adams in support of petition.

SMITH, J., said that the special resolution was the foundation of the procedure to change the company's name and the Court must be satisfied that it had been passed at meetings of the company of which notice has been duly given: S. 91 of the Companies Act, 1908. The giving of due notice depended upon the provisions of the company's articles in that behalf. In the present case, Table A of the Companies Act applied except where it was expressly excluded or modified by the company's regulations. In the result, Article 53 of Table A required that the company must give "seven clear days notice, specifying the place day and hour of any meeting, and the purpose for which it is to be held," and Articles 120-127 regulated the procedure when notice was given by post. The requirement of seven clear days' notice for a general meeting meant, of itself, that the day of service of the notice and the day on which the meeting was to be held should not be counted: **Watson v. Eales,** 23 Beav. 294. In the present case, under Article 123, a notice sent by post was deemed to have been served on the day following the day on which it was posted. Therefore the notice posted on the 29th July was deemed to have been served on the 30th July. Article 127 provided that where a given number of days' notice or notice extending over any period was required to be given, the day of service should not be, but the day upon which such notice would expire should be, included in such number of days or other period. It was not manifest that that article applied where a number of clear days' notice was required to be given. A distinction was made in Article 53 itself between the seven *clear days'* notice required for the calling of a meeting and the four *days'* notice required for the adjourned meeting therein referred to. (See also Article 13 of Table A which applied to the company, providing for fourteen days' notice of a call. If Article 127 did not apply, it was plain that seven clear days' notice had not been given: **Watson v. Eales** (*supra*). But if it did apply, then the counting of the seven days began on the 31st and ended on the 6th. The whole of the 6th until midnight was required, as in the present matter the law did not regard fractions of a day: **In re Railway Sleepers Supply Co.,** 29 Ch. D. 204. The notice had not expired when the company passed its resolution. The meeting was invalid and the resolution was bad. It was clear that Article 54 could not apply to cure such a defect. It might be a hardship upon the company to refuse an order upon the present petition, as it was said that the resolutions were passed unanimously by those present. Yet it was better to observe settled rules in those matters and His Honour was not at liberty to allow the company to depart from its own regulations.

Petition dismissed.

Solicitor for company: **W. H. Adams,** Hamilton.

Refreshing Memory.

A Brief Review of Some of the Cases.

It is a well established principle that a witness can only speak to facts within his own knowledge and recollection, and that he is not allowed to refer to any document, unless it be for the purpose of refreshing his memory. In other words a witness will not be allowed to read his evidence.

What is the extent, however, to which a witness will be permitted to refresh his memory ?

The circumstances in which a document may be used for the purpose of refreshing memory will be found carefully summarised in " Powell on Evidence " (9th edition at page 169), where the learned author says : " A witness may refresh his memory by looking at any memorandum :—

(1) Which revives in his mind a recollection of the fact to which it refers ; (2) which, although it fails to revive such a recollection, creates a knowledge or belief in the witness, that at the time when the memorandum was made, he knew or believed it to contain an accurate statement of such facts ; (3) which although it revives neither a recollection of the facts, nor of a former conviction of its accuracy satisfies the witness that the memorandum would not have been made unless the facts which it reports had actually occurred."

There is, however, this qualification to the rule that a witness cannot look at any document to refresh a memory which never existed. Thus where a witness is asked to look at a book in order to refresh his memory, and after doing so says that the entries do not refresh his memory, but that if they were analysed and the calculations made the particulars asked for might be obtained, that would be making the entries evidence and not refreshing the memory of the witness : *Rex v. Borrett*, 24 N.Z.L.R. 584.

Where a witness does not speak from any recollection of the fact, and his statements are founded solely on the fact that a record of the facts would not have been made by him, had they not occurred, the actual record must be produced before his evidence can be admitted : *Dupuy v. Truman*, (1843), 2 Y. & C. (Ch.) 341.

The document from which the witness refreshes his memory need not be one that has been made by him personally. Thus in the *Duchess of Kingston's* case, 20 How's " State Trials," a witness was allowed to refresh his memory from a copy of memoranda, copied at the witness's request, from his own notes and in his presence, which copy was kept in his custody ever since.

On this point reference may also be made to *Doe v. Perkins*, (1790), 3 T.R. 749, the headnote to which case is as follows :—" A witness may refresh his memory by *any* book or paper, if he can afterwards swear to the fact from his own recollection. But if he cannot swear to the fact from recollection any farther than as finding it entered in a book or paper, the *original* book or paper may be produced." And in the same case is cited the following note from the case of *Tanner v. Taylor* (unreported, Hereford Spring Assizes, 1756). " In an action for goods sold, the witness who proved the delivery, took it from an account which he had in his hand, being a copy, as he said of the day book, which he had left at home ; and it being objected that the original ought to have been produced, Mr. Baron Legge said, that if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it. But if he could not from recollection swear to the delivery any further than as finding them entered in his book then the original should have been produced, and the witness saying he could not swear from recollection, the plaintiff was non-suited."

A distinction, therefore, must be observed between cases where the witness swears from his own knowledge of the fact, though his memory may be assisted by memoranda, and where he does not speak from any recollection which he has but merely from such memoranda ; in the latter case, the original, must, it is submitted, be produced, because otherwise the door might be opened to fraud and concealment.

Thus where the question at issue was as to the dates on which certain tenancies expired and the evidence tendered was that of a witness who said that he had called on the various tenants with the receiver of rents, and that the declarations of the tenants as to the times when they severally became tenants were minuted down in a book at the time when the declarations were made, some of the entries being minuted by the witness and some by the receiver, and that he (the witness) was now speaking as to the dates of the several tenancies from *extracts* made by him from the minute book (which, however, was not produced), but that he had no memory of his own of those facts, the evidence he was giving as to those facts being founded altogether upon the extracts which he had made, it was held that such evidence could not be given from the extracts and that it was necessary for that purpose that the original minute book should be produced (*Doe v. Perkins, supra*).

Doe v. Perkins was referred to in the later case of *Rex v. Inhabitants of St. Martin, Leicester* (1834), 2 A. and E. 215, Patterson, J., observing that all that was decided in *Doe v. Perkins*, was " that a witness could not refresh his memory by extracts ; that if he could not recollect the facts independently of the writing, the original writing ought to have been in court, in order that the other party might cross-examine, not that such writing is to be made evidence itself, but that the other party is to have the benefit of the witness's refreshing his memory by every part."

Reference again may be made to *Burton v. Plummer* (1834), 2 A. and E. 341. In that case a tradesman's clerk entered the various transactions as they occurred into a waste book, from his own knowledge. The tradesman then copied these entries every day into a ledger, in the presence of the clerk, who checked them as they were copied. In an action brought by the tradesman for goods sold and delivered, the clerk might use the entries in the ledger for refreshing his memory although the waste book was not produced, nor its absence accounted for, the entries in the ledger being regarded as in the nature of entries made by the clerk himself.

In his judgment, Patterson, J., said at page 344 : " The rule is, that the best evidence must be produced ; and that rule appears to me to be applicable, whether a paper be produced as evidence in itself, or used merely to refresh the memory." In this case, however, this rule was not infringed, since the ledger made actually by the tradesman was not a copy, because when

it was made from the original, the clerk checked it and saw that it was correct, this being done at a time when the transactions were fresh in his memory. The entries, in other words, stood on the same footing as if they had been made by the clerk himself. But as Patterson, J., observed, "the copy of an entry, *not made by the witness contemporaneously*, does not seem to be admissible for the purpose of refreshing the witness's memory."

In other words, the principle of *Burton v. Plummer* would seem to be that a witness may not use a *copy* of an entry for the purpose of refreshing his memory unless such copy is to be regarded as an original entry, which effect, semble, can only ensue where the copy was in any event made *contemporaneously;* or where it was made either by the witness himself, or by a third person in *his presence* in which latter event it must also have been checked by the witness *contemporaneously.*

Jones v. Stroud (1825), 2 C. and P. 196, seems to show that a witness may not refresh his memory from a copy of an entry even though the copy was also made by him, unless the copy was made contemporaneously with the events purported to be recorded therein.

The headnote to the above case is in the following terms: "A witness has no right to refresh his memory with a copy of a paper made by himself six months after he wrote the original, although the original is proved to be so covered with figures that it is unintelligible; the original paper having been written near the time of the transaction." The observations of Best, C.J., in that case might also be usefully noted: "I remember a case," said the learned Chief Justice, "in which a witness proved, from memory, an unconditional promise of marriage. I perceived him searching his pockets for a paper, which, when found, I asked to look at. I saw from it, that the promise was qualified by a condition, and corresponded with the terms of the declaration. He said, the paper had been made that morning. The first thing I did, was to call the plaintiff, and next to commit the witness. A man's life and property would be in a wretched situation if evidence of the description attempted to be introduced to-day were to be allowed. The importance of seeing the original paper in this case is clearly shown; for without it, the witness proved that all the words were addressed to the plaintiff; and from the paper it appeared that great parts of them were spoken of him and addressed to others."

In conclusion, it should be noted, that the other party may cross-examine upon such part of the memorandum as is referred to by the witness, without making the memorandum part of his evidence; it would be otherwise, however, if he were to cross-examine upon other parts of such memorandum.

"Nearly all ambiguous words begin by the phrase 'It is understood,' and when they begin with that phrase you probably find that nobody understands it."

Sankey, L.J., in *William Jacks and Co. v. Palmer's Shipbuilding and Iron Co. Ltd.*, 34 Com. Cas. 107, at p. 118.

Australian Notes.

(By Wilfred Blacket, K.C.)

Several constitutional questions have been raised as to the validity of the appointment of Sir Isaac Isaacs as Governor-General of the Commonwealth, and although these may be decided before these Notes are seen by your readers, it may be interesting for them to have fuller details than will be contained in cable messages. The material facts have their beginning in the Imperial Conferences of 1928 and 1929 at which it was strongly urged on behalf of the Dominions that the Home Office was not concerned with the appointment of Governors-General and that these appointments should be made by the King by his assent to the nomination by the Prime Ministers of the Dominions. This view seems to have had such complete acceptance that it is asserted that the British Ministry took no part in the appointment of Sir Isaac Isaacs and that it was made by the King on the advice of Mr. Scullin. On the assumption that the appointment was made in this way and not by the "King in Council," Sir E. F. Mitchell, K.C., a constitutional lawyer of the highest repute, and Mr. Fullagar, K.C., have advised that the appointment is invalid and that Bills assented to by Sir Isaac Isaacs would not be valid laws. Soon after the opinion was published a meeting of Mr. Scullin, Sir Isaac Isaacs, and Mr. Justice Evatt occurred and the daily papers assert that during the course "of a long conversation" Mr. Scullin said that Senator Daly had "quite effectively answered the opinion—apparently by his statement that he was not prepared to admit that such eminent authorities could blunder into the error which the opinion suggests"—and it is also stated that Sir Isaac Isaacs does not concur in the opinion. If the facts are as stated the question will almost certainly come before the High Court and Mr. Justice Evatt will then have the advantage of knowing that the Prime Minister, Senator Daly, Acting-Attorney General, and Sir Isaac himself are agreed there is nothing in the point.

There is, however, another very plain point which is certain to be raised. The appointment was made in December last, and Sir Isaac still holds the office of Chief Justice and intends to defer his resignation until a day or two before the 22nd January, when he is to be sworn-in as Governor-General. Now Section 8 of the Commonwealth Judiciary Act is in these words:

"A justice of the High Court shall not be capable of accepting or holding any other office or any other place of profit within the Commonwealth, except any such judicial office as may be conferred upon him by or under any law of the Commonwealth."

No opinions have yet been published as to this point, and I am not able to obtrude mine.

The appointment of Dr. Evatt, K.C., and Mr. McTiernan to the High Court Bench was hurriedly ordered by the Caucus which now governs the Commonwealth, although the names of its members are not publicly known, while Mr. Scullin was still absent. He disapproved of the appointments, as it is stated, "because they had a political flavour." Strongly worded resolutions stating similar disapproval were passed in Melbourne and Adelaide, and when the two Justices were sworn-in no congratulations were publicly offered. It is said, however, that when the Court sits in Sydney,

on March 24, there will be some belated congratulations forthcoming; but this after all may be only a rumour. Dr. Evatt's eminence as an advocate might well have justified his appointment to the Bench, but he has been prominent as a politician and member of the Labour Party, and the appointment was indiscreetly preceded by the statement that it was "intended to appoint men who were in harmony with all the ideals of Labour." Undoubtedly he was prejudiced by the fact that Mr. McTiernan was appointed at the same time, for the latter was not as eminent as a lawyer, and, as a member of the Federal Labour Party, had just before then been able to prove upon a special inquiry that he was not guilty of having disobeyed the directions of the Caucus as to how he should act with regard to certain political matters.

The question of appointment of a successor to Chief Justice Isaacs has been much considered by the Caucus. Senator Daly's name was one of the first to be mentioned; but after the lapse of some days he thoughtfully allayed public anxiety by stating that he would not accept it. Mr. Piddington, President of the N.S.W. Industrial Commission, was also mentioned as likely to receive the honour; but his name has not been prominent in recent discussions. Attorney-General Brennan has declared that he does not covet the position. The appointment of Mr. Justice Dixon would not be in the nature of a surprise for he is renowned as a lawyer and has proved that he possesses in a high degree the judicial temperament. The English tradition of course was, and I think still is, that a Chief Justice must be chosen from the Bar. That was formerly the rule in New South Wales. Mr. Justice Pring, Senior Puisne Judge, was greatly annoyed because it was suggested that he should be "promoted" on the death of Sir Frederick Darley, C.J. "Once appointed to the Bench a judge should never think of promotion," he said. But the rule had to be broken when Mr. Justice Street was elevated to the higher position of Chief Justice for he had proved his supreme qualifications for the post.

Mr. Lamaro who had unfavourable mention ante p. 368, is fast following in his own footsteps. Some time ago 15 men were charged with having used much violence, even amounting to mayhem, and stoush, in an attempt to prevent the furniture of a "comrade" from being seized by bailiffs, and as several of the comrades of this man were convicted and sentenced to imprisonment Mr. Lamaro arranged for an inquiry into the case by Mr. Gates who lately retired with honour from his position of Stipendiary Magistrate. Evidence having been given before Mr. Gates in support of an *alibi* on behalf of two of the men Mr. Lamaro, upon perusal of the depositions and without waiting for a report, wrote a minute directing their immediate release and Cabinet assented thereto. This case is the converse of the happenings at the first trial by jury in Texas. There, while the jury were considering their verdict they were ordered to "get out" as the "room was wanted to put the prisoner's corpse in."

Questions of very great importance are involved in the N.S.W. case of *Trethowan and others v. Peden and others*. The abolition of the Upper House has been a political battle-ground for some years. In 1927 Mr. Lang tried to induce the Governor to nominate enough good Labourites to enable the Council to vote itself out of existence, but was unable to do so. Then, in 1929, the Bavin Ministry passed an Act providing that the Council should not be absolved until after a referendum affirming abolition had been taken, and providing further that no Bill to repeal that provision should be presented to the Governor for his assent until such referendum had been taken. In 1930 Premier Lang passed two Bills: one to abolish the Legislative Council and one to repeal the Referendum Act of 1919. Then the Court was moved by Trethowan and others, Members of the Legislative Council, to restrain Sir John Peden, President of the Legislative Council, from presenting the Bill to repeal the Referendum Act to the Governor for his assent. Five Justices to one sitting in Banco decided that the Referendum Act provisions were *ultra vires* and that one Parliament had power to bind its successors in this way, and the case is now on appeal to the High Court and may go to the Privy Council. Of course, I cannot in these Notes deal fully with the relevant arguments on the points of law raised, but may mention some matters revealing the importance of the issues involved. For instance, under the Constitution the two Houses of Parliament and the Governor may now enact a valid law; the Referendum Act would introduce a majority vote as a Fourth Estate of the Realm. And if a popular vote is a good condition precedent to the Governor's power of assent why may not other conditions be equally valid. For instance why may not Parliament pass an Act providing that the basic wage shall be £2 a day, and that no Bill to reduce that wage or to repeal the Act declaring it should be presented for assent or shall come into force until ten years after it has passed through Parliament? Another point that has not yet been mentioned but may prove to be of paramount importance is whether under our Constitution Act the Governor has power to assent to either Bill, or whether on the other hand they must not both be reserved for His Majesty's assent.

In Sydney a prisoner was applying for bail. The Crown opposed the application. "I admit," said the applicant "what the Crown Prosecutor says—that I absconded from bail once before, but I have learned a lesson from that." "So has the Court," said His Honour; bail refused."

Trading Stamps.

In our issue of December 9th we reviewed the law applicable to trading stamps and expressed the view that notwithstanding the judgment of Chapman, J., in *Brady v. Maddern*, 27 N.Z.L.R. 657, certain forms of the coupon system of trading at present in vogue are a breach of the provisions of Trading Stamps Abolition and Discount Stamps Issue Act, 1908. On the 30th ultimo reserved judgment was given at Auckland by Mr. W. H. Woodward, S.M., on an information laid by the New Zealand Master Grocers' Federation against Universal Distributors Ltd., in respect of the issue of coupons known as "Universal Certificates." The learned Magistrate held that an offence had been committed.

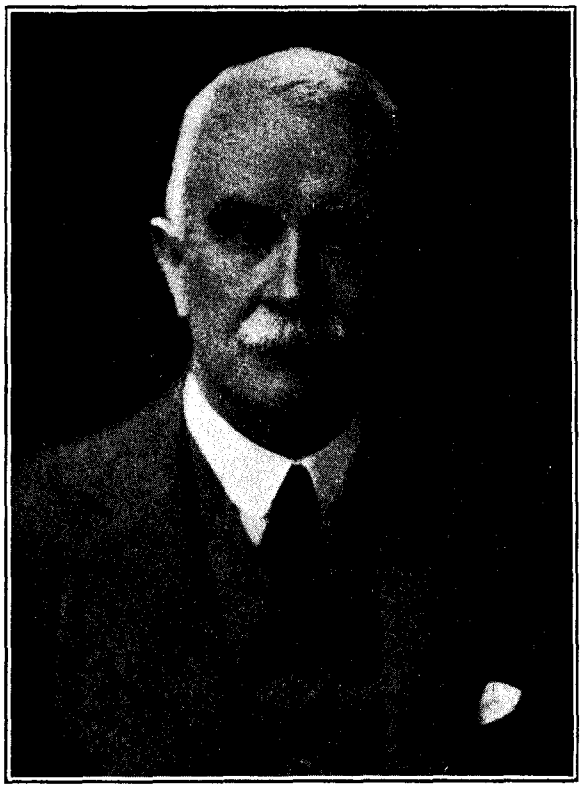
Owing to the fact that a telegram published in the daily press suggests that an appeal is pending it would be improper, at present, for us to comment upon the decision.

Obituary.

The Honourable Mr. T. S. Weston.

We regret to record the tragic death of the Honourable Thomas Shailer Weston, of Wellington, on the 20th ultimo.

The late Mr. Weston was a son of the late Mr. Thomas Shailer Weston, who was for some time a District Court Judge and later was in legal practice in New Plymouth. He received his education at Christ's College, Christchurch, where he distinguished himself by becoming head of the school. At Canterbury University College he took the degree of M.A. (1890) with first class honours in political science and history, and LL.B. (1898) and also carried off a Senior Scholarship. Mr. Weston's legal training was begun as associate to the late Mr. Justice Denniston. Later, he commenced practice on his own account at Inglewood and, after a time,



moved to New Plymouth, where his practice was signally successful. From New Plymouth Mr. Weston moved to Wellington, joining Messrs. Skerrett and Wylie in partnership under the style of "Skerrett, Wylie and Weston." From this partnership Mr. Weston retired in 1906 when he joined the late Mr. Charles H. Izard; the firm of Izard and Weston soon became widely known throughout the Dominion. In 1920, Mr. J. F. B. Stevenson, and in 1923, Mr. S. J. Castle, both of whom had been for a long period associated with Mr. Weston, were admitted into partnership and the firm changed its name to Izard, Weston, Stevenson and Castle. Mr. C. H. Izard died in September, 1925. Some years ago the late Mr. Weston was prominent as a barrister, but of recent years he had gone only occasionally into the Courts, apparently preferring the life of a busy commercial solicitor.

Mr. Weston throughout his life took an active interest in politics and public affairs and was a deep, yet practical, student in the fields of industry and economics. In recognition of his valuable public services he was, in 1926, appointed to the Legislative Council. Last year he represented New Zealand at the Labour Conference of the League of Nations at Geneva. Among the public and semi-public positions which he held at different times may be mentioned: President of the New Zealand Employers' Federation, President of the New Zealand Academy of Fine Arts; Chairman of the Repatriation Board for the Wellington District; Chairman of the Taranaki Chamber of Commerce; member of the New Plymouth High School Board of Governors; member of the Taxation Commissions of 1922 and 1924; captain of the Wellington Golf Club; steward and member of the Taranaki Jockey Club. He for some time represented Taranaki on the Council of the New Zealand Law Society. For a number of years he was examiner in history for the matriculation examination of the New Zealand University, and he was also examiner in the law of property for the LL.B. and solicitors' examination.

As, apart from the law, the late Mr. Weston's chief public interest was the New Zealand Employers' Federation it is fitting that we should publish the appreciation of Mr. T. O. Bishop, a prominent officer of that body: "To know him intimately was to hold him in affection. The keynote of his life was service. He helped every one whom he thought needed help with a whole-hearted thoroughness. In fact he took other people's troubles too much to heart for his own peace of mind. He had an intense love of New Zealand, and for many years had given himself to the service of his country with a real desire to promote the welfare and happiness of his fellow-citizens. To me his outstanding quality was his perfect loyalty to his friends and colleagues. It was a positive inspiration to work with him; he gave one such wonderful support. He was always willing to shoulder a full share of responsibility while work was being done, and when it reached a successful termination, to stand modestly aside and give others the credit. By his wonderful personal qualities he had reached an honourable position in his profession of the law, and had won a place in the affections of a very wide circle of friends. Many will feel with me that we are the poorer for his passing."

The late Mr. Weston is survived by his widow and three brothers, Mr. C. H. Weston of the legal firm of Weston and Billing, New Plymouth: Mr. W. C. Weston, proprietor and editor of the "Taranaki Herald," and Mr. G. T. Weston of the legal firm of Weston, Ward, and Lascelles, Christchurch.

"An advocate, by the sacred duty which he owes his client, knows in the discharge of that office, but one person in the world, that client and none other."

—Lord Brougham.

Mr. Justice Mackinnon has recently criticised the English circuit system as "an elaborate and magnificent construction for cracking a very small nut."

Law Officers in England.

A Review of Their Fates in Recent Times.

Not every law officer becomes a judge. Like some shining examples in our own time and century, as Sir John Simon and Sir Patrick Hastings, to say nothing of Sir Edward Clarke who is still with us, they may not have desired it when the opportunity arose; others were just unfortunate.

In the last 120 years there have been forty-nine Attorney-Generals each lasting, as such, an average of something less than three years. Of these, apart from those who may still have a chance, Sir John Lawson Walton, Sir John Karslake, Sir William Follett, Sir William Atherton, and Sir Charles Wetherell never held judicial office; while Sir William Horne achieved no more than a Mastership in Chancery. Only ten of the forty-nine, or about one in five, climbed to the Woolsack—Lords Loreburn, Cairns, Selborne, Westbury, Chelmsford, Truro, Campbell, Lyndhurst, Birkenhead, and Hailsham. And of the ten only six leaped from the Bar direct to the Chancellorship. Of the remaining four, Cairns had been, like Lord Sankey, a Lord Justice of Appeal; Campbell had been Lord Chancellor of Ireland and Lord Chief Justice; Truro had been Chief Justice of the Common Pleas; and Lyndhurst Chief Baron of the Exchequer and Master of the Rolls.

Of the forty-nine A.-G.'s, Lords Alverstone, Russell of Killowen, Denman, Coleridge, Reading, and Hewart, Sir Alexander Cockburn, Sir John Jervis and Sir Vicary Gibbs became Chief Justices. The Chief Barons of the Exchequer were Sir Fitzroy Kelly, Sir Frederick Pollock, and Lord Abinger. Lord Romilly, Lord Gifford, and Sir Thomas Plumer became Masters of the Rolls. Lords Justices were Sir J. Rigby, Sir J. Holker, Sir R. Baggallay, and Sir J. Rolt. Two—Sir W. S. Robson and Lord Carson—became Lords of Appeal in Ordinary.

Another, an infant prodigy, to wit, Sir Samuel Shepherd, found a seat on the Scottish Bench. He refused a silk gown in 1793 when he was 33 years of age. Three years later, however, he assumed the Serjeant's coif and he became King's Serjeant in 1797 at the age of 37. In 1813 he was Solicitor-General and in 1817 Attorney-General. History records that he could then have had either of the "Chiefships" for the asking. But he was very deaf and scrupled to accept any judicial post which involved the trying of criminal cases. Thus it was that he took his seat in Edinburgh as Scotch Chief Baron of the Exchequer.

One of them, no lawyer and a poor performer in the House of Commons, ended with a puisne judgeship as Baron of the Exchequer. So indifferent was his command of legal topics that he is said on more than one occasion to have read his argument in the House of Lords from a manuscript prepared for him by a more learned friend. This was Sir William Garrow. Yet he started well. Called to the Bar at the age of 23, he was a K.C. at 33. He was S.-G. in 1812 and A.-G. in 1813, and that was his meridian. But for fifteen years he tried prisoners admirably, and causes not so well.

S.-G.'s who never become A.-G.'s appear to have a better chance of the Woolsack. There have been twenty-nine since 1813. Eight of the twenty-nine became Lord Chancellors—Cave, Buckmaster, Herschell, Halsbury, Hatherley, Cranworth, Cottenham, and St. Leonards. "Chiefs" were Dallas and Tindal, C.JJ.; Masters of the Rolls, Romilly, Jessel, and Esher; Selwyn and Slesser became L.JJ., Sir Horace Davey a Law Lord, Sir Henry Keating a Judge of the Common Pleas, and Sir Samuel Evans President of the Probate, Divorce and Admiralty Division. Of those dead or otherwise out of the reckoning, six of the twenty-nine have held no judicial office.

Bench and Bar.

His Honour Mr. Justice MacGregor, after spending a year's leave of absence travelling abroad, has returned to Wellington and has resumed his duties.

Messrs. Glasgow & Rout, Nelson, have taken into partnership Mr. Hillier Cheek, who has for the past nine years been with Messrs. Pitt & Moore, Nelson. The practice will in future be carried on under the name of Glasgow, Rout & Cheek.

Mr. B. Heaton Rhodes has taken over Mr. A. M. Dunkley's practice at Otaki and is practising under the style of Dunkley & Rhodes.

Messrs. M. O. Barnett and P. Keesing, Wellington, practising under the style of Barnett & Keesing have dissolved partnership. Mr. Barnett will continue his practice at 126 Featherston Street, and Mr. Keesing at 217 Lambton Quay.

Lord Watson.

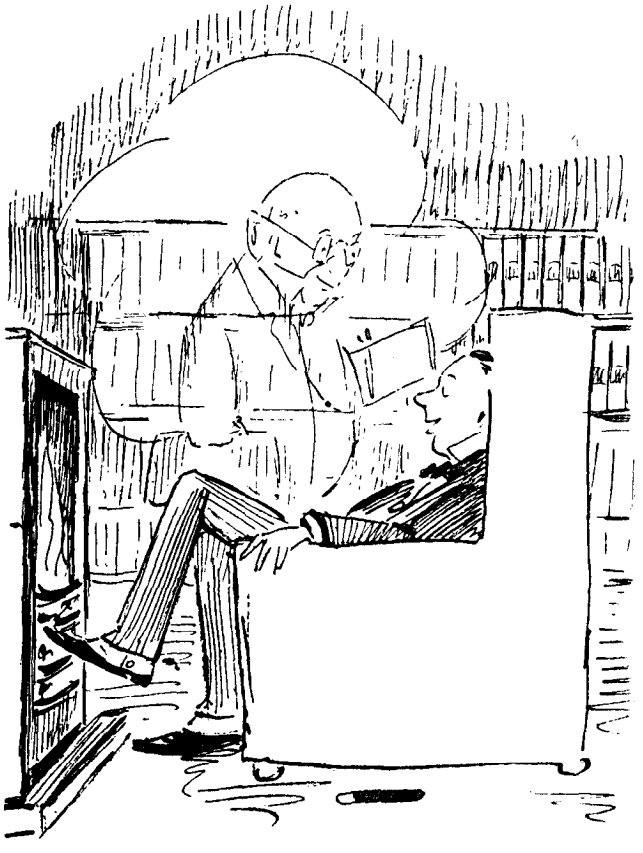
Lord Watson must without doubt be ranked as one of the greatest judges who have sat in the House of Lords but, according to Sir Alfred Hopkinson, K.C., in his newly-published volume of reminiscences, *Penultima*, he was by no means free from the judicial fault of talking overmuch. "I remember," says Sir Alfred Hopkinson, "Lord Davey once saying that in his later days Lord Watson talked the whole time while a case was going on and in the same tone of voice, but that one part of what he said consisted of observations intended for counsel to hear, and he was angry if they did not reply promptly, and the other of observations which were only addressed to himself, and he was still more angry if any notice was taken of them."

Sir Henry Maddocks, K.C., Recorder of Birmingham, in a recent public address on "Criminal Courts: Petty Sessions to Court of Appeal," said that although he would not be surprised if some day a law reformer arose to reform the administration of the civil law, he thought that the present day criminal law was so advantageous from the point of view of the liberty of the subject that he could not imagine how the procedure, although it might be simplified, could be bettered.

Forensic Fables.

THE JUNIOR WHO LUNCHED AT THE CLUB, THE BALD OLD GENTLEMAN, AND THE HEAVY BRIEF.

A Junior sat in his Chambers after Lunching at the Club. There was a Good Fire, and the Arm-Chair was Comfortable. Suddenly a Bald Old Gentleman of Dignified Appearance Stood before him. He Carried a Black Bag. Having Wished the Junior a Good Afternoon he Observed that he was Leaving a Brief for him, and that he would Like to Tell him Something about the Case. It was a Big Affair in the Commercial Court, and there would be Three Leaders who had all Pledged their Word to be Present throughout the Hearing. "You will have," the Bald Old Gentleman Proceeded, "another Junior with you. He has already Settled the Pleadings." "The Case," he Proceeded, "must Last for at Least Three Weeks, and it is bound



to Go to the Court of Appeal and the House of Lords. And when the Questions of Principle have been Decided there will be Further Heavy Litigation hereafter." The Bald Old Gentleman then Drew Out his Fountain-Pen and a Cheque-Book, and said that the Clients Wished that all the Brief-Fees should be Paid forthwith. Just as he was Asking the Junior whether he could Tell him what was Two-Thirds of Two Thousand Five Hundred Guineas, the Clerk Crashed into the Room and Woke the Junior up. The Clerk Wished to Remind the Junior that the Petty-Cash was Exhausted, and that if he Wanted to be in Time for the County Court Case To-morrow Morning he would have to Catch the Eight Twenty-Two at Fenchurch Street. The Junior Swore Horribly and, Composing himself once more to Slumber, Sought to Recapture this Delicious Dream.

MORAL: *Dormientibus Felicitas Venit.*

"Supposing."

The Hypothetical Question.

One illustration of the use of supposition and its dangers is the hypothetical question, usually put in cross-examination. "Suppose my client had had a long and tiring day, suppose he is a highly nervous man, would not this collision of his car with another have produced all the symptoms you found?" This is a perfectly legitimate question addressed to an expert, whose business is not only to give evidence as to the facts which his special training has equipped him to observe and describe, but who is also required to give an opinion. Even so, the hypotheses contained in the question are apt to present themselves to persons, untrained in the examination of evidence, as facts. But the process is carried further. To a non-expert witness a question will be put, "Suppose my client was intending to turn the corner, and saw a car approaching on his left, on the wrong side of the road, and thought it better to accelerate and proceed right across the crossing, would not that exactly account for what happened?" The proper answer to this is, of course, "I don't know," followed by a steady refusal to give evidence other than that of facts perceived by the sense organs of the witness. But many witnesses will fall into the trap, and give some answer, and many courts will not check an irregular form of cross-examination. An answer once given, counsel, either wily or unreflecting, will pop in and out of the open gate between the realms of actuality and hypothesis till the witness is discredited and the judges of fact, whether a jury or a bench of justices, confused.

This is a reprehensible form of advocacy which ought to be stopped by the court whenever attempted. It leads to muddled thought and unsound inferences.

"*Justice of the Peace.*"

Leaving it to the Clerk.

Mr. Justice Swift sitting in a Divisional Court on an appeal from a County Court recently had something to say about leaving matters to clerks. The papers were apparently not in order and his Lordship asked: "Why is it that this case has appeared in this way?" Counsel, after conferring with the clerk of the solicitor retaining him, said that the solicitor's clerk had no explanation to offer. "It is not your fault," replied the Judge, "It is not the solicitor's clerk's business to prepare cases for this Court; it ought to be done by some responsible person. There might not be a solicitor at all for all the assistance we are given."

"There are some limits to the power of a jury."
—Lord Justice Scrutton.

Legal Literature.

Supplement No. 2 to Butterworth's Annotations of New Zealand Statutes.

Compiled by W. NELSON MATTHEWS, LL.B.
(pp. 485 : Butterworth & Co. (Aus.) Ltd.)

The second annual supplement to the now well-known volumes of *Butterworth's Annotations of New Zealand Statutes* made a prompt appearance just before the legal vacation began. The publishers seem to recognise that if such a work is to be of the greatest value to the subscribers it must be on their shelves at the earliest possible moment, and one who considers the size of this *Supplement*, and the amount of labour involved in its compilation and printing, can have nothing but praise for the organisation which enables a solicitor to have before him in handy form the effects of the year's legislation long before the annual volume of the Statutes makes its appearance through the ordinary channels.

So far as concerns Volume I of the parent work, the annotations of cases, the *Supplement* proceeds along the same lines as the now well-understood Supplements to *Halsbury's Laws of England*. It contains all the cases in which provisions of our Statute law have been considered by our Courts since the issue of the 1861–1928 volume, up to and including the October number of the New Zealand Law Reports and Part XXI of the Gazette Law Reports for last year. The *Supplement* repeats the feature adopted in last year's volume of including after each annotation a brief note indicative of the general nature of the case annotated. This is a good plan and should greatly facilitate research, for one will be able to tell in most cases at a glance whether or not it is worth while considering, for the purpose of the point being pursued, the particular decision noted. As before, references are made also to cases decided by the Magistrates—printed in smaller type, they are readily distinguishable from the decisions of the higher Courts ; this feature ought to be welcomed by those who practise in the Lower Court.

Turning now to that part of the *Supplement* which deals with Volume II of the main work—the Statutes annotations—it is interesting in the first place to note that in that part which deals with Table 1 (the historical table) there is given, in addition to matter of a supplementary nature, a historical table to the present rules of the Supreme Court, Court of Appeal and Privy Council. As to Table 2—Imperial Acts in force in the Dominion—there is, of course, little supplementary matter, and no alteration has been rendered necessary in Tables 3, 4 or 5. As to Table 6—Annotations of Local, Personal and Private Acts—there is a good deal of supplementary matter ; this table, with its annotations, should be invaluable to the lawyer engaged in advising upon a matter of local legislation, for there is, so far as this reviewer is aware, no other work in which the information given in this table is collected. Tables 7 and 8, as was done last year and as will be done in the future, are entirely reprinted. Table 7 is the alphabetical table of all the public Statutes passed between 1841 and 1930, and it shows as well how each Act has been affected by subsequent legislation. Table 8 gives a complete chronological table of our legislation from 1841-1929, and a complete and detailed annotation of all amendments, etc., and of all rules made under the provisions of the Statutes. It is, of course, one of the most valuable features of the whole work. As can readily be done when a publication is kept up to date by periodic supplements, the opportunity has been taken of correcting a few typographical and other errors in the main volumes, thus ensuring an otherwise unattainable standard of accuracy.

Each annual supplement will supersede its predecessor ; and through the adoption of this cumulative system it will be at no time necessary to consult more than the latest of the supplements. Subscribers should note, therefore, that the 1929 *Supplement* can now be discarded.

The publishers, in a foreword, make the following interesting announcement with regard to the *Annotations* and to their *Consolidated Reprint of New Zealand Statutes* now in the course of preparation :

"With regard to *Butterworth's Annotations* and the *Consolidated Reprint of New Zealand Statutes* it is our intention when the forthcoming Consolidated Reprint of Statutes is published to provide a complete service to keep it fully annotated year by year as part of our annotations service. The full text of all amending legislation, and a digest of all cases in which any section of any statute has been judicially considered, will be set out, so that only two books will be required from which to ascertain the exact wording of any Act which has been amended.

"To do this, it will not be necessary to consult the various statutes volumes containing the amending Acts. Although the Consolidated Statutes will be annotated, the editorial notes will not cover all the annotations in our original volumes. These books will still continue to provide the best available assistance for research work, and they will still retain their value.

"All original subscribers to Butterworth's Annotation Service will be entitled to a permanent preferential rate for their annual annotations, after the consolidation is issued."

New Books and Publications.

Public and General Meetings. Twelfth Edition. By A. Crew. Price 6/-.

Underhill's Principles of the Law of Partnership. Fourth Edition. By Milner Holland, B.C.L., M.A. Price 12/6.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Certain birds absolutely protected.—Gazette No. 1, 9th January, 1931.

Customs Act, 1913. Notification by Acting-Comptroller of Customs *re* rates of exchange for Customs purposes.—Gazette No. 4, 15th January, 1931.

Dairy Industry Act, 1908. Amended regulations as to the manufacture and export of dairy produce.—Gazette No. 90, 23rd December, 1930.

Health Act, 1920. Amendments to the Drainage and Plumbing Regulations.—Gazette No. 1, 9th January, 1931. The Hairdressers (Health) Regulations, 1931.—Gazette No. 1, 9th January, 1931.

Mining Act, 1926. Certain provisions of the Act to apply to prospecting and mining for and the storage of petroleum and other mineral oils and of natural gas within certain portions of the Southland Land District.—Gazette No. 1, 9th January, 1931.

Shipping and Seamen Act, 1908. Rules for examination of Masters and Mates.—Gazette No. 87, 15th December, 1930.

Unemployment Act, 1930. Regulation exempting certain classes of persons from unemployment levy.—Gazette No. 89, 18th December, 1930. The Unemployment Sustenance Regulations, 1931.—Gazette No. 6, 15th January, 1931.