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"If the scales of justice hang anything like even, throw into them some grains of mercy."
—Lord Kenyon.

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Previous Convictions and Present Sentences.

It must always be a difficult matter to determine how to deal with a person previously convicted who comes before the Court for sentence for a fresh offence. In this country there has been apparent for some time a tendency on the part of certain Magistrates, and indeed on the part of certain Judges, to impose, because of the previous convictions, a sentence heavier than the particular offence would itself warrant. There are grave objections to such a course and it is satisfactory to observe that the whole question has been exhaustively dealt with by our Court of Appeal in *R. v. Casey*, *ante* p. 79.

It is in the first place of interest to notice that our Court of Appeal has followed and approved of the views which the Court of Criminal Appeal in England has expressed upon this subject; the daily press, it will be remembered, some months ago reported His Honour Mr. Justice Herdman as having said, in effect, that the English decisions on this question would not be followed. In recent years it has been laid down over and over again by the English Court of Criminal Appeal that in imposing a sentence regard must be had to the gravity of the offence in question, and the mere fact that a man has been convicted many times is not *of itself* sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself.

The English decisions are numerous and it is sufficient to refer only to a few. In *R. v. Raybould*, 2 Cr. A.R. 184, to take one of the earlier cases, Channell, J., said:

> "Some people think that on a second conviction a more severe sentence must *necessarily* be passed. That is not *universally* a right principle. The nature of the last offence must be considered to see whether it is so or not."

In *R. v. Maxwell*, 18 Cr. A.R. 13, Lord Hewart said:

> "It is a difficult question whether a man of bad character should be sentenced solely with reference to the substantive offence with which he is charged, or whether his previous convictions should always be considered. But at any rate it is clear that a heavy sentence should not be passed for a minor offence *merely* because the prisoner has previously committed serious offences."

And the learned Lord Chief Justice reiterated this statement in *R. v. Taylor*, 18 Cr. A.R. 143:

> "It has been said over and over again in this Court that the mere fact that a man has been convicted many times is not *in itself* sufficient reason for passing a heavy sentence on him for an offence which is trivial in itself."

Similar statements will be found in *R. v. Durand*, 18 Cr. A.R. 137, *R. v. Price*, 18 Cr. A.R. 138, *R. v. D'Arcy*, 19 Cr. A.R. 22, *R. v. Woodward*, 21 Cr. A.R. 137, and *R. v. Williams*, 22 Cr. A.R. 78. These English decisions —or rather such of them as the Court thought it necessary to refer to—were concurred in by our Court of Appeal in *R. v. Casey*, and Myers, C.J., put the position very plainly when he said:

> "The Court should always be careful to see that a sentence of a prisoner who had been previously convicted was not increased *merely* because of those previous convictions. If a sentence were increased *merely* on that ground it would result in the prisoner being in effect sentenced again for an offence which he had already expiated."

The words which we have italicised in the passages quoted above make it plain that the previous convictions must not be excluded altogether from consideration. But in none of the English cases, we think, will there be found as full and lucid an exposition of the extent to which and of the purpose for which regard to the previous convictions ought to be had as appears in the judgment of Myers, C.J., in *R. v. Casey*:

> "But it by no means followed that the previous convictions must be ignored. It was necessary to take them into consideration because the character of the offender frequently affected the question of the nature and gravity of the crime, and a prisoner's previous convictions were involved in the question of his character. Further, the previous convictions of a prisoner might indicate a predilection to commit the particular type of offence of which he was convicted, in which case it was the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of confinement accordingly. Their Honours thought that the learned Solicitor-General put the matter fairly and accurately when he submitted that the previous convictions might be looked at for the purpose of establishing the prisoner's character and assisting to determine the punishment that was appropriate to the case of a man of that character for the particular offence for which he was to be sentenced. . . . Where in reference to a man's character the question of previous convictions was considered, the Court should not lose sight of the nature both of the previous offences and of the offence upon which the prisoner was to be sentenced. Primarily and as far as possible regard should be had to the intrinsic nature and gravity of the offence on which the prisoner was to be sentenced."

R. v. Casey is of value also for the observations of the Court as to the nature of the sentence that should generally be imposed where by reason of a man's character, as evidenced wholly or partly by previous convictions, it is considered that the punishment should be increased. Ought the term of imprisonment with hard labour to be lengthened, or ought a term of reformative detention be added? Generally speaking, the latter course should be followed. This, as the learned Chief Justice pointed out, is more in accord with modern conditions and modern ideas. Notwithstanding previous convictions there is always the possibility of the prisoner's reformation, and this opportunity should be afforded him as far as possible. It may be that on one or more of his previous convictions the opportunity of reformation has been already extended, but this of itself does not mean that the opportunity should not be extended again: as Myers, C.J., said:

> "It was better to give another opportunity for reformation, which if availed of would be beneficial to both the prisoner and the State, and which if not availed of would do the State no harm, than to sentence him to a long term of imprisonment with hard labour and to deprive him of the opportunity of securing his release if he showed signs of reformation."

In view of the tendency above referred to on the part of certain Magistrates and Judges *R. v. Casey* is a most timely and valuable decision.

Court of Appeal.

Myers, C.J.
Reed, J.
Adams, J.
Smith, J.

March 30; April 17, 1931.
Wellington.

IN RE BANKS: HAMILTON v. LOUGHNAN.

Will—Construction—Gift of "All Dominion War Bonds which may form part of my Estate (other than a Sum of Four Hundred Pounds Available for Payment of Death Duties)"—Sum of Four Hundred Pounds Referred to Represented by Inscribed Stock at Date of Will—Further Inscribed Stock Subsequently Acquired by Testatrix—Inscribed Stock Not Included in Gift—Dictionary Principle—Ordinary Signification of "War Bonds" Not Excluded by Testatrix.

Appeal from a judgment of Kennedy, J., on an originating summons. Maria Banks, deceased, by her will made on 27th September, 1923, and confirmed by codicil made on 8th May, 1928, made the following provision: "I give and bequeath all Dominion War Bonds which may form part of my estate (other than a sum of Four hundred pounds available for payment of death duties) to the Church officers of St. Matthews Anglican Church St. Albans towards building a new church proposed to be erected in that Parish and I direct that the interest on the said Bonds shall be paid to the said Church officers and applied towards payment of the general expenses of the said Church until such time as the principal is required for building such new church." The testatrix left, forming part of her estate, £700 of New Zealand Government War Bonds and £900 Government Victory War Bonds. The question arising for determination was whether the above gift of Dominion War Bonds included £1,500 inscribed stock which the testatrix purchased after making her will but before the date of the codicil. The inscribed stock was issued under the War Purposes Loan Act, 1917.

Andrews for appellants.
R. J. Loughnan for respondent.

MYERS, C.J., delivering the judgment of the Court, said that the difficulty in the present case had arisen through the investment by the testatrix, subsequent to the date of her will, of £1,500 which she received as the proceeds of discharged mortgages and invested in New Zealand Inscribed Stock. If that sum had been invested in New Zealand War Bonds it was quite plain on the language of the will that, whatever the testatrix might have intended, the Bonds would have passed in the gift to the Church. At the time when she made the will the testatrix had War Bonds to the amount of £1,600 of which apparently two lots of £500 and £200 respectively though maturing on different dates were issued under the War Purposes Loan Act, 1917, and the other lot of £900 must have been issued under Part IV of the Finance Act, 1918, because that lot was referred to in the case as New Zealand Government "Victory" War Bonds, and it was by that name (though not mentioned in the Statute) that the issue under Part IV of the 1918 Act was called. The testatrix purported to give the Church "Dominion War Bonds." The name, however, was erroneous. The proper designation of the Bonds as known to the Treasury, and the public, was "New Zealand Government War Bonds," and, in the case of the Victory issue (at least so far as the Treasury was concerned) "New Zealand Government Victory War Bonds." The bonds of those issues were so designated in bold type by way of heading. In addition, the War Bonds issued under the War Purposes Loan Act, 1917, contained, after the heading "War Bonds," the words "Issued to raise money for War Purposes. Authorised by 'The War Purposes Loan Act, 1917, and under the provisions of 'The New Zealand Loans Act, 1908 and . . ." The Victory bonds also stated on their face that they were issued to raise money for War Purposes. Ordinary bonds issued in respect of loans for other than War purposes were headed merely "New Zealand Government Bonds." There could, of course, be no doubt that the expression "Dominion War Bonds" in the will must be taken as meaning New Zealand Government War Bonds, and there was equally no doubt that the gift to the Church included the Victory War Bonds as well as the ordinary War Bonds. There was also no doubt that War Bonds and Inscribed Stock were two entirely different things. Their Honours should have thought that to be quite clear from the nature and incidents of the two investments, but if authority were needed on that point it was to be found in the cases cited in the judgment appealed from: **In re Manners** (1923) 1 Ch. 220; **In re Balchin,** 38 T.L.R. 868: 67 Sol. J. 12. If, instead of using the term "Dominion War Bonds," the testatrix had used the expression "Dominion War Loans" the Church would have been in a stronger position in endeavouring to include in the gift Inscribed Stock acquired subsequent to the date of the will: **In re Ionides,** 38 T.L.R. 269. But even then, having regard to the New Zealand statutes and to the circumstances generally and the form of the certificate of title for Inscribed Stock, the contrary would still have been arguable.

When the facts of the case were understood it was quite intelligible that the testatrix should have thought it desirable as a matter of precaution to make it clear that the £400, which it was since known she held in Inscribed Stock at the time when the will was made, was not to form part of the gift to the Church. The War Purposes Loan Act, 1917, was passed on 9th August of that year. That Act empowered the Minister of Finance to raise certain moneys on the security of and charged upon the public revenues of New Zealand. Putting aside the question of War Loan Certificates which the Act empowered the Postmaster-General to issue and which had no bearing upon the present case, it was only possible under the 1917 Act and the New Zealand Loans Act, 1908, for the Minister to issue debentures—the terms "debentures" and "bonds" were in practice used synonymously by the Treasury—or other security. There was then no provision for the issue of Inscribed Stock in New Zealand. S. 5 of the Act of 1917 authorised the Minister of Finance to raise a sum of £1,000,000 (being part of the aggregate sum authorised by the Act) subject to the special provisions therein contained and to issue therefor debentures, scrip or other security to be available in satisfaction of death duties payable on the death of the holders. On 15th August, 1917, there was passed the New Zealand Inscribed Stock Act. That Act was to be read with and deemed part of the New Zealand Loans Act, 1908, and was a general statute authorising the issue of Inscribed Stock. That was to say its application was not limited to War loans but it applied to all loans. S. 76 of the Finance Act, 1917, which was passed on 15th September, provided that notwithstanding anything in S. 5 of the War Purposes Loan Act, 1917 (relating to securities available for the payment of death duties) no securities other than Inscribed Stock should be issued under that section. It would appear from the material submitted to the Court that, so far as concerned the £400 Inscribed Stock which the testatrix held at the time of making her will, such stock was originally issued as Inscribed Stock pursuant to S. 76 of the Finance Act, 1917, and the New Zealand Inscribed Stock Act, 1917. In all the circumstances, however, more especially if the testatrix when giving instructions for her will had not her securities actually before her, it was not surprising to find express words in the will excluding the possibility of that item of £400 passing in the gift to the Church.

The question then arose whether, upon what had been referred to in the books as the "dictionary principle," the words "Dominion War Bonds" must be read as including any Inscribed Stock which the testatrix acquired after her will was made. It appeared from the case that she purchased Inscribed Stock on or about 17th December, 1925, to the extent of £1,000, and on or about the 9th March, 1926, to the extent of a further £500. For the Inscribed Stock representing those two amounts she had a certificate of title dated 29th March, 1926. The document merely certified that Maria Banks was the registered holder of £1,500 4½ per cent. New Zealand Inscribed Stock maturing 15th November, 1938, and further that the certificate was conclusive evidence of the ownership of the stock to which it related. The document was described and headed as follows: "Interest Free of New Zealand Income Tax. New Zealand Inscribed Stock. Under 'The New Zealand Inscribed Stock Act, 1917.'" The stock must have been purchased by the testatrix in the market, because the issue of bonds and inscribed stock under the War Purposes Loan Act, 1917, closed many years before. She must, therefore, have obtained her certificate of title after having purchased the stock and satisfied the Treasury that she was entitled to the certificate. In the certificate of title there was no reference whatever to the War Purposes Loan Act, 1917, nor any statement that the money represented by the certificate of title had been lent to the Government for war purposes. It was, at least probable, if not more than probable, that when the testatrix purchased the stock she purchased it merely as New Zealand Inscribed Stock without knowledge of the fact that the moneys had originally formed part of a loan for war purposes. Their Honours said that, because, as already pointed out, the New Zealand Inscribed Stock Act, 1917, applied to all loans. His Honour referred to passages from the judgment in **Towns v. Wentworth,** 11 Moo.

P.C. 526, at p. 543, and of Lord Davey in **Van Grutten v. Foxwell,** (1897) A.C. 658, at p. 684. In the present case the testatrix gave to the Church all "Dominion War Bonds" which might form part of her estate. It had already been said that Dominion War Bonds must be regarded as meaning New Zealand Government War Bonds, which expression had a certain determinate meaning. The whole case submitted on behalf of the Church was that a different and wider meaning must be given to "Dominion War Bonds" because the testatrix had used the words in brackets "(other than a sum of Four hundred pounds available for payment of death duties)." It was contended that the Inscribed Stock acquired after the will was made was, according to a dictionary as it were made by the testatrix herself, included in the words "Dominion War Bonds." Their Honours were unable to construe the will in that way. Having regard to the will itself and to the surrounding circumstances—and included in the surrounding circumstances must be the history relating to the issue of war bonds and inscribed stock in New Zealand—their Honours did not think that the testatrix had beyond all (or beyond reasonable) doubt excluded the ordinary and well-known signification of "war bonds." It was to be observed that she did not in the words of exclusion refer to what was excluded as a "bond." She used merely the word "sum," which at most was in the circumstances an ambiguous expression. Their Honours thought that the words in brackets did no more than express the clear intention that the sum of £400 referred to, however it was represented, did not form part of the gift to the Church but was part of the residue of her estate. Any inscribed stock which the testatrix subsequently purchased, in their Honours' opinion, also formed part of the residue. Their Honours could not think that the will could be so construed as to include in the term "War Bonds" inscribed stock subsequently purchased simply because of a fact which more than probably the testatrix never knew, namely that the sum represented by the inscribed stock was originally part of a war loan. In the view that their Honours took of the case the argument as to the republication of the will by the codicil became unimportant. In their opinion the judgment of the Supreme Court was right.

Appeal dismissed.

Solicitors for appellants: **H. D. Andrews,** Christchurch.
Solicitor for respondent: **R. J. Loughnan,** Christchurch.

Supreme Court.

Blair, J. April 23; 30, 1931.
Auckland.

IN RE MILLER: MILLER v. GUARDIAN TRUST AND EXECUTORS CO. OF N.Z. LTD.

Family Protection—Practice—Originating Summons—Service of Proceedings—Public Trustee Ordered to Represent Adult Beneficiaries Abroad—Observations of Court as to Undesirability of Such an Order—Personal Service Desirable—Code of Civil Procedure R. 541B.

Application by a widow under the Family Protection Act for an order making more adequate provision for her out of her husband's estate. The executor was defendant. The persons interested in the will were a number of adult sons and daughters of the testator, and the shares of some of them were settled with remainder to their children born and unborn. The order for directions for service provided that the summons should be served upon the executor and the adult beneficiaries resident in New Zealand, and that a sealed copy of the summons should be served on the Public Trustee to represent the two other adult beneficiaries resident in Southern Rhodesia, and also to represent the children of all the said beneficiaries. When the matter came before Mr. Justice Blair for hearing counsel representing the Public Trustee appeared, but owing to the difficulty of communication he had not obtained full instructions from the adult beneficiaries in Rhodesia, nor was any evidence placed before the Court indicating the financial position of those adult beneficiaries. It was not clear that those beneficiaries were fully appreciative of the peril to which their interests under the will were subject. The counsel for the Public Trustee accordingly asked for an adjournment to enable the fullest instructions to be given to him, and the matter was adjourned.

Cocker for plaintiff.
Butler for defendant company.
Greville for F. M. Howard.
Singer for Forbes Eadie.
Johnstone for Public Trustee.

BLAIR, J., said that the present occasion was the second occasion upon which he had found himself embarrassed by the making of an order under Rule 541 B (f), where such order affected the interests of adult beneficiaries. Rule 541 B was primarily intended to be used where questions of interpretation of wills or documents, or other matters where the facts were not in dispute, came before the Court. His Honour did not think that Rule 541 B (f), which authorised the Court to direct the Public Trustee to represent any person or class of persons, should, unless there were some peculiar special circumstance, be acted upon when the interests of adult beneficiaries were in question in proceedings under the Family Protection Act. Ordering service in the present case upon the Public Trustee to represent the interests of two daughters resident in Southern Rhodesia really meant that the interests of those two persons were handed over to the Public Trustee without any request by the Public Trustee, who had no instructions and knew nothing of the circumstances of the persons he was to represent and was entirely without funds to prosecute any inquiries he might think necessary. That placed upon the Public Trustee the responsibility of instituting a series of inquiries, of taking steps to be represented at the hearing, and otherwise acting as solicitor for persons whom he had never seen or heard of. Moreover, those persons, had they been served personally with the proceedings, being of full age were quite capable of instructing their own solicitors to look after their interests. To indicate what mischief might arise by failure to serve personally adult beneficiaries whose interests were possibly in peril, it was worth while following through what could very easily happen: The Public Trustee might be served with such an order as was made in the present case and instruct a solicitor to represent him. That solicitor, handicapped by entire lack of information and provided with a postal address which might or might not be correct, might communicate with the beneficiaries and receive replies which he, with his limited knowledge, might easily think sufficient. The case might be heard and a judgment given having the effect either of seriously cutting down the legacies in the absentee's favour or perhaps of entirely abrogating their gifts. When the result of the case was communicated to them, and the grounds upon which the decision was arrived at reached them, they would appreciate that certain facts within their knowledge, which should have been brought to the notice of the Court, were not so brought because of the limited opportunity of communication with the representative imposed upon them by the Court's order. From their point of view the position would be that they would feel, and rightly feel, that the case had been decided against them without adequate representation. His Honour would make it a practice in future to require that all adult beneficiaries whose interests were in any respect imperilled by proceedings under the Family Protection Act should be served personally with a copy of the proceedings.

Solicitors for plaintiff: **Hesketh, Richmond, Adams and Cocker,** Auckland.
Solicitors for defendant: **Stewart, Johnston, Rough and Campbell,** Auckland.
Solicitors for Mrs. F. M. Howard: **Greville and Bramwell,** Auckland.
Solicitor for Mrs. Forbes Eadie: **R. A. Singer,** Auckland.
Solicitors for the Public Trustee: **Stanton, Johnstone and Spence,** Auckland.

Smith, J. November 25, 26, 1930; February 23, 1931.
Auckland.

BURGESS FRASER & CO. LTD. v. ROOSE SHIPPING CO. LTD. AND HOLM SHIPPING CO. LTD.

Shipping—Sea Carriage of Goods—Bill of Lading—Common Carrier—Shipment of Goods Involving Transit by Sea and River—Arrangement Between River Company and Shipping Company that Former Would Carry to Destination All Goods Delivered by Latter—Goods Carried by Shipping Company to Mouth of River and Transferred to River Company's Barge—Barge Tilting and Goods Capsized Through Neglect to Close Manhole—Shipping Company's Bill of Lading Not a Through

Bill of Lading—Shipping Company Not Liable for Loss after Discharge from Ship's Tackle—Provisions of Bill of Lading as to Transhipment Inapplicable—River Company Liable as Common Carrier and Bailee for Hire—Loss Not Due to Act of God—Unsuccessful Defendant Ordered to Pay Costs of Successful Defendant—Sea Carriage of Goods Act, 1922, S. 3.

Action claiming from the Roose Shipping Co. Ltd., or alternatively from the Holm Shipping Co. Ltd., £86 15s. 8d., the value of 82 sacks of wheat. The Holm Shipping Company owned or was agent for steamers trading on the New Zealand coast from southern ports to Port Waikato, at the mouth of the Waikato River. The Roose Shipping Company owned a steamer and barge service trading on the Waikato River, and carried for anyone who wanted goods carried on the river from Port Waikato, at the mouth of the Waikato River, up to Cambridge, a distance of approximately 160 miles. Some years ago the Holm Company and the Roose Company entered into an arrangement for a shipping business between southern ports and places on the Waikato River under which the Holm Co. provided the ships which undertook the coastal journey from southern ports to Port Waikato, while the Roose Company provided the river steamer and barges which undertook the journey up the river. According to the oral evidence the terms of the arrangement were that the Roose Company should carry up the river any cargo which arrived by the Holm Company's ships. The appeal of that service to merchants was based upon printed sheets which had been circulated to them showing separately: (a) the coastal freights from southern ports to Port Waikato and (b) the river freights from Port Waikato to various places on the Waikato River as far as Cambridge. The coastal freight was based on measurement. The river freight was calculated by weight, upon a basis similar to that used by the Railway Department. The addition of the two freights represented the total cost of shipping goods between southern ports and places on the Waikato River.

In April, 1929, the plaintiff bought from Nairn & Co. at Timaru, 100 sacks of wheat and instructed Nairn & Co. to ship the wheat to Hamilton. Nairn & Co. had it shipped upon a bill of lading in the following terms—(James Meehan & Sons Ltd. representing, no doubt, Nairn & Company). "Received for shipment per "Progress" (or other vessel) subject to the exceptions, conditions, and stipulations endorsed on the attached form of receipt, the under-noted packages from James Meehan & Sons Ltd. to be forwarded to Waikato via intermediate ports. Consigned to Burgess Fraser & Co. Hamilton. Freight payable at destination." The relevant exceptions endorsed on the bill of lading were as follows: "(3) The company will not hold itself responsible for the loss of or damage done to goods lying at any wharf awaiting shipment after discharge from ship's tackle. . . . Consignees or their assigns must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the company shall be at liberty to land or warehouse the goods, etc. . . . (5) The company are to be at liberty to carry the goods to their port of destination by the within-mentioned or other steamer or steamers, ship or ships, either belonging to themselves or to other persons proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their Port of destination, and to tranship or land or store the goods either on shore or afloat, and reship and forward the same at the company's expense, but at shipper's risk. . . (16) Where lighterage, railage, etc., is incurred for transit of goods, either to or from the company's steamers the sole risk of same shall be borne by the shippers, notwithstanding in some instances it may be the custom of the company to defray the cost of such transit."

The "Progress" arrived at Port Waikato with the goods and there delivered them on to a barge owned by the defendant, the Roose Shipping Company Ltd., delivery being completed by 4 p.m. on Saturday 27th April, 1929. No receipt was given by the Roose Company to the Holm Company for the goods. The barge had been built twelve months. It was an oblong steel box with three watertight compartments. There were three manholes of an approved type in the deck for each compartment. The barge was watertight below the waterline, but the manholes were not watertight; and it was not standard practice to make them so. The barge became a floating platform for the goods after their delivery from the coastal steamer at Port Waikato until their arrival at Hamilton. The particular barge lay by the "Progress" during Sunday, 28th April, but on the night of that day the barge tilted and threw a great part of its cargo into the river before it could be salved. His Honour found that water had entered through a manhole at one end of the barge during rough weather on the Sunday evening, and that if the manhole had been on or properly closed the water could not have entered in such quantities as to so tilt the barge. Only 18 sacks of the plaintiff's wheat were saved and those were later delivered to the plaintiff. The plaintiff claimed the value of the balance of the sacks of wheat.

Johnstone and **Mackay** for plaintiff.

Inder for Roose Shipping Co. Ltd.

Hislop for Holm Shipping Co. Ltd.

SMITH, J., said that the contract contained in the bill of lading covering the goods was for shipment of certain packages to be forwarded to "Waikato via Intermediate Ports." In His Honour's opinion that was the clause which fixed the duration of the voyage covered by the bill of lading. The use of the words "Intermediate Ports" indicated that "Waikato" represented a terminal port. There was such a port and particularly such a port for the steamer "Progress" or other vessel which could undertake the coastal journey, viz.: "Port Waikato" at the mouth of the Waikato River. The "Progress" was not a river boat and was obliged to discharge her cargo at Port Waikato. His Honour was of opinion, therefore, that the destination of the goods under the bill of lading was "Port Waikato." In His Honour's opinion the other terms of the bill of lading did not lead to a different conclusion. The words "consigned to Burgess Fraser & Co. Hamilton" described the goods. They indicated the ultimate destination of the goods, but they did not indicate that Hamilton was the destination of the goods under the bill of lading. His Honour's opinion was that the word "Waikato" was used for the port to which the goods were to be forwarded under the bill of lading while the word "Hamilton" was used to describe the place to which they were consigned and which they might be expected ultimately to reach. It could not be said, in His Honour's opinion, that the bill of lading provided for a transit, under the bill of lading, broken into two parts. The bill of lading was not in the form of a through bill of lading. If transhipment were to take place under the bill of lading at Port Waikato one would expect the fact to be stated. The next clause was "freight payable at destination." His Honour was of opinion that that meant "Port Waikato" and that upon the strict terms of the contract the Holm Company could have insisted on its freight at Port Waikato. His Honour next referred to Clause 3 of the exceptions above quoted. The "Progress" discharged the goods at "Port Waikato" and she was not a vessel which could discharge them further up the river. His Honour thought, therefore, that the Holm Company became exempt from liability after discharge of the 100 sacks from the ship's tackle. The Roose Company in conjunction with the Holm Company had published to the merchants concerned, among whom the plaintiffs and Nairn & Co. were included, the freight for the Waikato River Southern Ports shipping service. Shippers, aware of the arrangements, who entrusted their goods to that service might expect the one shipping company to make arrangements with the other shipping company for the carriage of goods from the place of shipment to the place of consignment, even if the bill of lading itself should be limited to one portion only of the journey. In such a case, a shipper would be working with the companies not only upon a particular bill of lading but upon the freight schedules. If then the Holm Company received goods at a Southern Port upon a bill of lading limited to the carriage to Port Waikato, the shipper would be justified in assuming that the Holm Company would make arrangements for the delivery of the goods to the river carrier, viz.: the Roose Company. Port Waikato itself had no facilities as a port, for the storage or handling of goods. In view of the freight schedules published by both shipping companies to the merchants, His Honour's opinion was that the Holm Company had an authority from any such merchant who shipped goods consigned to a place on the river under a bill of lading limited to the coastal journey, to entrust those goods to the river carrier, viz.: the Roose Company. The Holm Company itself understood that that was the course which it should take because, as stated above, it had arranged with the Roose Company for the Roose Company's boats to meet the coastal steamer upon its arrival. His Honour thought, then, that when the Holm Company arranged for the delivery to the Roose Company's river service, of goods shipped under a coastal bill of lading, providing that the ship's liability should cease after discharge from the ship's tackle, the consignee was then entitled to say that he was ready to take delivery. The provision of Clause 3, —that consignees must be ready to take delivery of goods as soon as the ship was ready to discharge—then operated. When the goods were discharged onto the river boat, the coastal steamer's liability ceased and the consignees had thereafter to look to the Roose Company. His Honour referred to clause 5 of the exceptions. In His Honour's opinion that clause related only to carriage by the "Progress" or other steamer to Port Waikato which was the port of destination; and the provision for transhipment was limited accordingly.

Clause 16 of the exceptions did not, in His Honour's opinion, apply. No lighterage was incurred under the bill of lading. When the goods were unloaded from the coastal steamer on to a barge, the coastal steamer had performed its contract; and its liability for transit under the bill of lading was at an end. Moreover, His Honour doubted whether the clause applied to anything but the cost of transit by lighter or railway. Clause 18 of the exceptions did not show that the freight was payable at Hamilton. A comparison of that clause with Clause 19 showed that the "port of consignment" referred to in Clause 18 was the equivalent of the "port of destination." It followed His Honour thought, that the Holm Company lost its lien for freight when it parted with the goods to the Roose Company at Port Waikato. Its position in the matter must be judged by the terms of each bill of lading and by its actions in respect thereof. Clause 21 provided that, if required by the company, the shipping order must be presented or given up duly endorsed in exchange for the goods. According to the contract His Honour was of opinion that the Holm Company could have required the shipping order presented to them before delivery of the goods on to the barge.

Some assistance might, His Honour thought, be gained in the interpretation of the contract by reference to the conduct of the parties. The Roose Company debited to the plaintiff the whole of the freight from Timaru to Hamilton amounting to £17 19s. 0d., showing on the margin against that item the sum of £11 10s. 0d. The steamer's manifest was put in evidence and showed that the freight payable to the "Progress" for the journey from Timaru to "Waikato" was £11 10s. 0d. The plaintiff did not pay the £17 19s. 0d. but paid to the Roose Company the freight for the sea journey upon the 100 sacks and freight for the river journey upon the 18 sacks of wheat delivered; and the plaintiff refused to pay freight for the river journey upon the missing sacks. The Roose Company accepted the payments made and paid the Holm Company its amount. The Holm Company admitted that the whole of the freight paid and payable in respect of the carriage from Timaru to Port Waikato was collected by the Roose Company and paid to the Holm Company. As the contract in the bill of lading was expressed to be made between the Holm Company and the plaintiff and not between the Roose Company and the plaintiff that answer indicated, His Honour thought, that the plaintiff owed the Holm Company a separate sum from that which it owed the Roose Company and it indicated also that that sum was collected by the Roose Company as the Holm Company's agent. If the contract were ambiguous, then the conduct of the parties pointed to the construction of the bill of lading as a contract limited in its operation to the sea journey from Timaru to Port Waikato. That construction involved the existence of another contract outside the bill of lading covering the rest of the journey to Hamilton.

The next question was as to the capacity in which the Roose Company, received the goods from the "Progress." In His Honour's opinion the Roose Company received those goods as common carriers on the river or as persons having the liability of common carriers: **Liver Alkali Company v. Johnson,** 9 Exch. 338. With regard to their liability as common carriers it was to be noted that the Roose Company had undertaken with the Holm Company to carry up the river all the goods arriving by the Holm Company's ships at Port Waikato, but the Roose Company would also, His Honour thought, have carried for anyone else at the same time. It was really the only carrier on the river. There was no railway for many miles from the heads up the river. Substantially there was no one in competition with the Roose Company on the river from the heads to Cambridge. In His Honour's opinion the Roose Company exercised a public employment over that route and His Honour thought that they undertook the carriage of goods as common carriers. But if that were not correct and if the Roose Company was to be regarded, in the present case, as having let out the whole of the carrying capacity of the barge and river steamer to the Holm Company or its shippers, then His Honour's opinion was that the **Liver Alkali case** (*sup.*) showed that the Roose Company, having arranged the freight in advance according to schedules and having been silent as to the other terms upon which the goods were to be carried, assumed the role of a common carrier—see Rowlatt, J.'s explanation of the **Liver Alkali case** in **Watkins v. Cottell,** (1916) 1 K.B. 10, 18. His Honour concluded, therefore, that the Roose Company was liable as a common carrier for the loss of the goods. As such, it was, upon His Honour's construction of the bill of lading, not entitled to the benefit of any exceptions in the bill of lading such as "dangers and accidents of the seas, rivers etc.," and it was liable as an insurer for the loss of the goods unless protected at common law or by Statute.

The only ground of exemption from liability at common law which could be suggested was that the loss was due to an "Act of God." In His Honour's opinion the facts showed no such loss. There was nothing in an occurrence such as the present one to show that the loss was due to an "act of God."

The defendant next invoked the statutory protection of S. 3 of the Sea Carriage of Goods Act, 1922. Upon His Honour's finding, the barge was unseaworthy. His Honour did not think that the Roose Company exercised due diligence to make her seaworthy. But assuming they did, the unseaworthiness was the proximate cause of the loss and not "dangers of the sea or other navigable waters." The Roose Company could not, therefore, rely on S. 3 of the Act. **Wanganui Herald Company v. Coastal Shipping Company,** (1929) N.Z.L.R. 305. Upon His Honour's view of the facts, the plaintiff might also recover against the Roose Company as a bailee for hire. In **Aurora Trading Company v. Nelson Freezing Company,** (1922) N.Z.L.R. 662, at p. 674, the Court of Appeal laid down the following rule, citing (*inter alia*) **Travers and Sons v. Cooper,** (1915) 1 K.B. 73: "Where goods delivered to a bailee for hire are lost injured or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would use in relation to his own property." Salmond, J., applied the same principle in **United States and Australia Steamship Co. v. Lyons,** (1921) N.Z.L.R. 585, at 611; and Reed, J., in **Wilson v. N.Z. Express Co. (No. 3),** (1924) N.Z.L.R. 890. In His Honour's opinion that rule might be applied in the present case. All was not conjecture in the present case as was the case in **Ajum Goolam Hossen v. Union Marine Insce. Co. Ltd.,** (1901) A.C. 362. At the least, in His Honour's opinion, the cause of loss was not conjecture to such an extent that the case could not be decided upon the principle of the onus of proof. It was clear that water got into the barge through a manhole or manholes when it should not have got in, according to the evidence, if the usual reasonable precautions had been taken. In His Honour's opinion, the onus of proof had not been shifted back to the plaintiff. Upon that aspect of the case, the Roose Company must likewise fail to prove that it was entitled to claim the benefit of S. 3 of the Sea Carriage of Goods Act, 1922. The plaintiff was accordingly entitled to judgment against the Roose Company for the amount claimed. The Holm Company was added as a defendant because the Roose Company said it was not responsible for the loss as it was the agent of the Holm Company. The Holm Company came into Court and submitted that the Roose Company was its agent for the river journey. It was clearly reasonable for the plaintiff to join the Holm Company as a defendant and His Honour thought that the present case was one in which the rule applied by Reed, J. in **Enderby v. Scott and Mayor and Councillors of the City of Wanganui,** (1928) G.L.R. 313, should, if necessary, be applied. Judgment was accordingly entered in favour of the Holm Company against the plaintiff. The Holm Company had liberty to apply for costs if it thought fit, but whatever costs might be allowed to the Holm Company would be ordered to be paid to it by the Roose Company.

Solicitors for plaintiff: **Stanton, Johnstone and Spence,** Auckland.

Solicitors for Roose Shipping Co. Ltd.: **McGregor, Lowrie, Inder and Metcalfe,** Auckland.

Solicitors for Holm Shipping Co. Ltd.: **Brandon, Ward and Hislop,** Wellington.

Kennedy, J. March 25; 26, 1931. Christchurch.

IN RE HANCOCKS.

Infant—Guardianship—Opposing Applications by Paternal Grandmother and Maternal Grandparents for Guardianship of Orphan Children—Benefit of Children Paramount Consideration—Wishes of Father as Evidenced by Informal Documents Considered—Religion of Applicants a Material Consideration—Practice of Courts Not to Appoint Married Woman Sole Guardian of Infant Children.

Two applications heard together for the appointment of a guardian for infant children. The applications were made by Mary Ann Hancock, a paternal grandmother, and by Alexander Keane and Mary Keane, maternal grandparents.

Mary Joan Hancock, Alexander James Hancock, Reginald Condrey Hancock and Henry Gilbert Hancock were the infant children of Kathleen Hancock and Henry Gilbert Hancock.

Their ages were respectively four, five, eight and nine years. Kathleen Hancock died on 18th February, 1929, and Henry Gilbert Hancock was killed on 23rd April, 1930. Neither parent appointed a guardian. After the death of Kathleen Hancock, the children of Henry Gilbert Hancock were disposed of as follows: Mary Joan Hancock went to her maternal grandparents on 4th June, 1929, her father giving her grandmother a note that he did thereby "willingly entrust to Mary Keane wife of Alexander Keane the care of my daughter Mary Joan Hancock." By the same note he agreed to pay 10/- per week for such time as his daughter would be under her care. That child had since remained in the custody of Mary Keane. The three boys were, after consultation with and by the help of a priest of the Roman Catholic Church, received into St. Joseph's Orphanage on 3rd July, 1929, or thereabouts, Henry Gilbert Hancock agreeing to pay 7/6 per week for the three boys and paying until his death £4 10s. 0d. per month. All the above children were baptised in the Roman Catholic Church, into which their father had himself been received prior to his marriage. The paternal grandmother was not of that religion, but had intimated that, if appointed, she desired to bring the children up in the religion of their father. The maternal grandparents were themselves of the Roman Catholic religion.

KENNEDY, J., said that the Court in appointing a guardian would appoint those who appeared best suited and who would act with most advantage to the infants. Nearness of relationship was considered and the Court would pay much regard to the wishes of the father as evidenced by any informal documents left indicating his wishes, so long as it was not disadvantageous to the infants: **Simpson on Infants,** 4th Edn., p. 169. While the paternal grandfather or grandmother had acted since the father's death as guardian *ad litem* in an action for the benefit of the children, the maternal grandparents had had the actual custody of one child during the father's lifetime and subsequently. The terms of the letter entrusting the grandmother with custody were more formal and deliberate than was usual where a child was taken charge of and the custody was expected to be of a merely temporary nature. No doubt the father hoped ultimately to establish a home for all his children, but his resources did not apparently permit him to expect that for some time. The maternal grandparent had an advantage in resources and lived in the country. There was some advantage to a child, who was to be brought up in a particular religion, being in a home in which that faith was held: **In re Eddy,** 33 N.Z.L.R. 949. On the whole, having regard to what was best for the infants themselves, and without discussing in further detail the respective circumstances of the grandparents, all of whom were good citizens and worthy people, His Honour said that he had come to the conclusion that the maternal grandparents should be appointed. Apart, however, from that conclusion, there was the objection that the paternal grandmother, a married woman, alone, had applied for guardianship and it had not been the practice of the Court to appoint a married woman to be sole guardian of orphan children: see **In re Kaye,** L.R. 1 Ch. App. 387, and 17 **Halsbury,** at p. 127. Petition of Mary Ann Hancock dismissed. Order made appointing Alexander Keane and Mary Keane joint guardians of the above-named infant children.

Solicitors for M. A. Hancock: **Stacey and Penlington,** Christchurch.

Solicitors for A. Keane and M. Keane: **Wilding and Acland,** Christchurch.

Kennedy, J. March 18; 25, 1931. Christchurch.

THOMSON v. THOMSON.

Divorce—Desertion—Petition by Husband for Divorce on Ground of Desertion for Three Years—Desertion of Wife Terminated by her *bona fide* Offer to Resume Cohabitation—Onus on Petitioner of Proving That Offer Not *bona fide*.

Petition by husband for divorce on the grounds of his wife's wilful desertion without just cause for a period of three years and more. The respondent left her husband's home to live elsewhere with her son and her sister, who, respondent said, "was going to spend her money on them now." The evidence left no doubt that in so doing the respondent wilfully deserted the petitioner. More than two and a-half years after the desertion commenced the wife, through her solicitor, wrote to her husband intimating that, notwithstanding her protests, her sister had left to live with other relations. The respondent's solicitor said, "In the circumstances Mrs. Thomson (the respondent) is without means and she has instructed me to write to you to notify you that she will be returning to your home. I should be glad if you would let me know when it would be convenient to you for her to do so." The petitioner's solicitor, under instructions, replied that the petitioner would not take his wife back on any account, but that he was willing to pay 35/- per week and enter into a deed of separation. After some correspondence the petitioner's solicitor wrote stating that the petitioner did not feel justified in signing any agreement but that he would keep up his payments. The petitioner and the respondent continued to live separate and apart and the petitioner stated that as far as he was concerned he was quite decided that he was not going to have the respondent back. He had been in the same state of mind ever since his wife had left him.

Malley for petitioner.
Haslam for respondent.

KENNEDY, J., said that there was no doubt, to use the words of Butt, J. in **Lodge v. Lodge,** 15 P.D. 159, that the wife behaved badly and that one would be glad to give the husband the relief asked for. But divorce could not be granted unless the desertion had continued for three years and upwards. That period would expire only in September, 1930, and in April of that year the respondent offered to return and the petitioner refused that offer. Desertion was terminated by a proper offer to resume cohabitation but not by an offer that was not *bona fide*. **Harris v. Harris,** 15 L.T. 448, **Kershaw v. Kershaw,** 51 J.P. 646, **R. v. Davidson,** 5 T.L.R. 199, **In re Duckworth,** 5 T.L.R. 608, and **Jones v. Jones,** 11 T.L.R. 317, afforded illustrations of offers to resume cohabitation which were held not to be *bona fide* offers. In some circumstances the spouse deserted might impose conditions upon the partner desiring to resume cohabitation. In other cases a deserted spouse might refuse to receive the deserter without terminating the desertion. Illustrations occurred in cases of constructive desertion where there was a reasonable and well founded apprehension that if the wife returned, the husband would be guilty of fresh acts of misconduct: see for example: **Thomas v. Thomas** (1924) P. 194, and **Bowron v. Bowron,** (1925) P. 187. In the present case the offer to return was unconditional and the refusal to receive the respondent absolute. That was the ordinary case of a wife without good cause leaving her home and after intimating on leaving that she had left for good, subsequently desiring to return. His Honour was unable, in the circumstances disclosed in the evidence, to infer that the offer to return was not a *bona fide* offer. While it was easy to imagine cases in which a letter might be written making an offer in the expectation and desire that it might not be accepted and merely to afford colour for an application for maintenance, His Honour did not think there was evidence in the present case sufficient to warrant his treating the offer to return as so made. A personal offer would have been more tactful and the letter announcing the intention to return might have been phrased in terms less blunt. Nevertheless, upon the material before him, His Honour was unable to conclude that it had been proved that the offer to return, made when circumstances had changed and after a considerable lapse of time since the desertion commenced, was not *bona fide*. The onus of showing that an offer, on the face of it genuine, was not *bona fide* lay upon the petitioner—see **Lodge v. Lodge** (*sup.*) at p. 161—and His Honour was of opinion that that had not been shown in the present case.

Petition dismissed.

Solicitor for petitioner: **A. J. Malley,** Christchurch.
Solicitor for respondent: **C. S. Thomas,** Christchurch.

Kennedy, J. March 12: 18, 1931. Christchurch.

CANNON v. WILSON.

Magistrate's Court—Appeal—Equity and Good Conscience—Magistrate Acting Within Jurisdiction Giving Judgment According to Equity and Good Conscience—No Circumstances Existing Preventing Such a Judgment—No Appeal From Such Judgment on Point of Law—Magistrate's Courts Act, 1928, S. 100.

Appeal on a point of law from the determination of a Stipendiary Magistrate. The respondent, the plaintiff in the Court below, claimed judgment for £35 5s. 6d. damages for breach of

an agreement. The learned Magistrate, finding that the plaintiff had suffered damages in excess of that claimed, gave judgment on the whole matter in equity and good conscience for the full amount claimed.

Saunders for appellants.
Sim for respondent.

KENNEDY, J., said that there were no circumstances existing preventing the Magistrate from giving his judgment according to equity and good conscience such as appeared to exist in **Elliott v. Hamilton,** 2 N.Z.J.R. 95, **Tait v. McCallum,** 13 N.Z.L.R. 232, and **Karori Borough v. Buxton,** (1918) N.Z.L.R. 730, and in similar cases. The present case was not one where, to adopt the words of Chapman, J., in **Peachey v. Duncan and Co.,** (1918) N.Z.L.R. 821, at p. 823, as a matter of state policy and of substantive law, the Legislature had either made a particular contract illegal and void and consequently unenforceable or had declared in explicit terms that a certain sum should be paid and recovered. If, as His Honour concluded, the Magistrate had in the circumstances power under S. 100 of the Magistrates' Courts Act, 1928, to give such judgment between the parties as he found to stand with equity and good conscience, then no appeal lay from such a judgment on the ground that it was erroneous in point of law. That had been understood to be the position in New Zealand ever since the decision of Richmond, J., in 1864, in **Pearson v. Clark,** 1 Mac. 136, and the stream of authority had been uniform since. So clear was the position that no useful purpose would be served by discussing the cases, which would be found collected and discussed by Denniston, J., in **Canterbury Motor, etc. Industrial Union of Workers v. Armstrong,** (1916) G.L.R. 130, and by Chapman, J., in **Karori Borough v. Buxton,** (1918) N.Z.L.R. 730, and in **Peachey v. Duncan and Co.,** (1918) N.Z.L.R. 831. The Supreme Court accordingly had no authority to question the learned Magistrate's decision.

Appeal dismissed.

Solicitor for appellant: **R. L. Saunders,** Christchurch.
Solicitors for respondent: **Duncan, Cotterill and Co.,** Christchurch.

Kennedy, J. February 27; March 14, 1931. Hokitika.

IN RE McLACHLAN'S APPLICATION.

Mining—Ordinary Prospecting License—Holder of Ordinary Prospecting License Not Entitled Absolutely to Priority in Respect of Fresh Application Over Other Applicants—Priority Given Only if Special Conditions Complied With—"Mining Privilege"—Mining Act, 1926, Ss. 4, 73.

Special case prepared by the Warden of the Warden's Court, Kumara, pursuant to S. 365 of the Mining Act, 1926, reserving a question for the opinion of the Supreme Court. That question was, briefly, whether the holder of an ordinary prospecting license had a right, by virtue of S.73 (1) of the Mining Act, 1926, of obtaining a prospecting license, in respect of land to which his license related, in priority to any other person, although his application was not entitled to any priority under S. 73 (g) and (h). The facts upon which that question arose were as follows: Before the expiry of his ordinary prospecting license, the applicant McLachlan re-marked the land to which his license related and during the currency of his existing license made application for a prospecting license in respect of the same land. After the expiry of McLachlan's prospecting license, one Corbett marked out portion of the land previously mentioned and applied for a prospecting license and the following day lodged an objection to the grant of McLachlan's application. Priority was claimed by McLachlan under the Mining Act, 1926, and the sole question was whether by virtue of S. 73 (l) McLachlan "was on the said 21st day of January, 1931, entitled to priority to any other person to re-mark the said land and apply for the same as an ordinary prospecting license under the Mining Act, 1926."

Elcock for applicant.
Murdoch for objector.

KENNEDY, J., said that, subject to the provisions of the Act, the holder of a prospecting license, whilst it continued in force, was entitled to enter and prospect on the land to which it related for gold and any other metal or mineral. That right was exclusive. An ordinary prospecting license was, so S. 73 provided, to "continue in force for one year," and it was expressly enacted that it "shall not be renewed; but if on the expiry thereof the holder so desires he may make a fresh application." It would be noted that that paragraph accordingly prohibited the grant of what might be termed reversionary prospecting licenses to the holder of a prospecting license, by enacting that a prospecting license should not be renewed and by its permission of a fresh application by the holder if he so desired only on the expiry of the existing license. A corresponding provision appeared in the Mining Act, 1898, and in the consolidated Act of 1908. Paragraph (h) first appeared in S. 3 of the Mining Amendment Act, 1914. Paragraph (h) gave priority to applications permitted under paragraph (g) but only if the conditions therein set out were satisfied. The applicant must give notice in writing not less than fourteen days before the expiry of the license of his intention to apply for a new license; the application must be made not later than seven days after the expiry of the license and the land within that period had to be identified or marked out; and finally the applicant had to furnish with his application full particulars in writing of the work done and money expended by him in the prosecution of prospecting operations during the preceding twelve months, and the Governor-General or the Warden, as the case might be, had to be satisfied that the applicant had satisfactorily carried out the terms and conditions of the expired license. Such language was inconsistent with an application by a holder of an ordinary prospecting license for a reversionary prospecting license or with a grant to him of such a license. The application itself that was entitled to priority, was one made after the expiry of the license though one of the conditions, namely notice of the application, must be complied with before the expiry of the license. In paragraph (l) it was enacted that the holder of a prospecting license should, in such manner and subject to such conditions as were prescribed, have the right, in priority to any other person, of obtaining a license for any mining privilege in respect of the land to which his prospecting license related. That occurred in the same section as that containing a prohibition against the renewal of prospecting licenses and expressly defined the conditions upon which priority was given to an application for a license. If it gave the priority contended for by the applicant McLachlan, then it cancelled the effect of the express prohibition against renewal contained in paragraph (g), and the holder of an ordinary prospecting license, by making application during the currency of his license, could obtain in result a perpetual license. The application provided for by paragraph (l) was one by a person who was the holder of a prospecting license, and was not one to be made after the holder had ceased to be the holder, that is after the expiry of the license. If "mining privilege," where used in paragraph (l) included an ordinary prospecting license, the prohibition against renewal was completely nullified. The definition of "mining privilege" contained in S. 4 was expressed to be if not inconsistent with the context, and it was, in His Honour's view, for the reasons given, inconsistent with the context to ascribe to the words "mining privilege" where used in paragraph (l) a meaning inclusive of "ordinary prospecting license." No priority was accordingly, in the circumstances, conferred on McLachlan by S. 73 (l) of The Mining Act, 1926, and the answer to the question put was in the negative.

Solicitors for objector: **Park and Murdoch,** Hokitika.
Solicitor for applicant: **A. R. Elcock,** Hokitika.

Kennedy, J. March 24, 1931. Christchurch.

GRANT v. McKAY.

Practice—Writ—Place for Trial—Plaintiff Residing at Dunedin and Defendant at Ashburton—Cause of Action Arising at Timaru—Convenience of Access—Christchurch Substituted in Writ for Timaru as Place for Trial.

Summons to amend a writ by substituting "Christchurch" for "Timaru" as the place of hearing. The plaintiff resided at Dunedin, the defendant at Ashburton and the cause of action alleged arose at Timaru.

K. M. Gresson in support of summons.
Wanklyn to oppose.

KENNEDY, J., said that Ashburton, in a direct line on the map, was 50 miles from Christchurch and 45 miles from Timaru. By rail the distances were 53 miles and 47 miles. The relative distances by road were for all practical purposes, the same. There were convenient train and motor services available to the defendant between Ashburton and Christchurch but only a train service was reasonably available between Ashburton and Timaru. Available trains between Ashburton and Timaru took appreciably longer than available trains between Ashburton and Christchurch. The train for Timaru left at an earlier, and His Honour thought, less convenient hour than the train for Christchurch. The difference in convenience of access was small, but as Sim, J., delivering the judgment of the Full Court in **Scott v. Gallagher,** 31 N.Z.L.R. 1136, said: "A very slight advantage may be sufficient to turn the scale in favour of one place as against another."

Under the present conditions of transport and under the present railway time-table, there was a slight advantage in favour of Christchurch. An order would be made amending the writ by substituting "Christchurch" for "Timaru" as the place for the trial of the action.

Solicitors for plaintiff: **Statham Brent and Anderson,** Dunedin.
Solicitor for defendant: **K. M. Gresson,** Christchurch.

Kennedy, J. March 4, 1931.
Greymouth.

BOUSTRIDGE v. BOUSTRIDGE.

Divorce—Custody—Maintenance—Deed of Arrangement Drawn Before Decree *Nisi* Giving Custody of Male Child to Wife—Decree *Nisi* Giving Interim Custody to Wife—Remarriage of Wife—Motion by Husband for Custody—Court Refusing to Disturb Custody—Quaere Whether Motion Proper Procedure—Decree Silent as to Maintenance—Quaere as to Power of Court to Vary Provisions of Deed of Arrangement as to Maintenance—Quaere Whether Deed of Arrangement a Post Nuptial Settlement—Divorce and Matrimonial Causes Act, 1928, Ss. 37, 41—Divorce Rules, R. 91.

Application by the petitioner for the custody and control of the child of his marriage with his divorced wife (the respondent) and for an order rescinding, suspending or varying a deed providing for the maintenance of the respondent, and the said child. The decree *nisi* for dissolution of the marriage was made on 17th June, 1928, upon the ground that the petitioner and respondent were parties to a separation order made by a Stipendiary Magistrate in New Zealand and that such order had been in full force for not less than three years. That separation order had been made on the respondent's complaint that the petitioner had failed to provide her with adequate maintenance. It provided that the petitioner should pay £1 10s. per week as maintenance for the respondent until after confinement and after that date £2 per week. The circumstances preceding the order were that in January, 1925, the petitioner insisted that a child, that the respondent was then carrying, was not his child and that the respondent would have to leave his home and she was taken to her parents' home. The proceedings resulting in the order above referred to followed. The petitioner did not provide the full maintenance for the said child in terms of the order but paid approximately the lesser sum of £1 10s. per week. The child was the same child whose custody was claimed by the petitioner in the present proceedings. It remained from birth in the home of its grandparents: the respondent, after decree absolute, earned her living as a waitress elsewhere. The respondent married a farmer in comfortable circumstances and thereafter the child was taken to the respondent's home where it was at the date of the proceedings. By a decree *nisi*, the petitioner was given the interim custody of the child and also of another child of the marriage. The petition for divorce was defended and an answer was filed claiming that the separation order was due to the wrongful act or conduct of the petitioner. A deed of arrangement was entered into. It was expressed to be dated 20th June, 1929, but it appeared at least to have been drawn, if it was not executed, prior to the date on which the decree *nisi* was pronounced. It referred to respondent's answer and to respondent's intention to withdraw the same and further recited that certain questions would arise as to the payment of maintenance and the custody of the child of the parties. Under the arrangement, the respondent was to have the sole control and custody of the child and the petitioner was to have the custody of the other child of the marriage. On the petitioner's application, the decree *nisi* was made absolute on 6th December, 1929, and the respondent was given the custody of the child, and the custody of the other child was given to the petitioner. The only change since the Court so granted custody, was that the respondent had married. She had a suitable home in the country for the child and the child was taken from its grandparents and removed to its mother's home.

McCarthy in support of motion.
Haslam to oppose.

KENNEDY, J., said that the respondent's circumstances and opportunities of attending to the child were better than they had been before. Having regard to the petitioner's own conduct in repudiating the child as spurious, to his failure to provide for its maintenance though under order of the Court, and to his agreement to the respondent having its custody in 1929, His Honour thought that there had not been exhibited such a sincere regard for the child that, although it was a male child, its best interests would be promoted by taking it from its mother and its present home, and giving it to the petitioner. It had at present its mother's care, and no doubt her husband's concern. The only matter on which the petitioner could creditably rely was the provision in the deed of arrangement for the child's secondary education. If he was regarded, as being in 1929 solicitous for the child's welfare, then he agreed to the present custody, when it must have meant that for a time at least the child would be brought up by the respondent's parents, whereas, if he did not think that the child's welfare was promoted by giving it to the respondent, then it would mean that he was prepared to sacrifice the child's welfare to the withdrawal of opposition to his own petition for divorce. The respondent had remarried, and there was no evidence that she was lacking in affection for her child, or that she had ever failed in her duty to it. In particular, His Honour did not infer, upon the present evidence, that the respondent's conduct as a married woman could be other than that of a woman who might properly be entrusted with the upbringing of her child. Upon all the material before him, His Honour could not say that it had been made to appear that it was in the child's best interest to disturb the existing custody, although he desired to guard himself against expressing a view which might prejudice a subsequent application upon different material should one be made later.

It was objected that the present application could not be made by way of motion, but as His Honour held the view that no order changing the present custody should be made, His Honour found it unnecessary further to refer to objections to the procedure. The motion also asked for a revision of the provisions as to maintenance. No order was made adopting the provisions of the deed of arrangement for the maintenance of the respondent and her child and the Court made no order for maintenance. S. 41 of the Divorce and Matrimonial Causes Act, 1928, did not accordingly apply. Nor would it assist the petitioner if he were to rely on S. 37 of the Act. The question was not argued whether the arrangement previously referred to which appeared to be made in contemplation, not of the continuance of marriage, but rather of its dissolution, was a post-nuptial settlement within the meaning of that section: see **Worsley v. Worsley,** L.R. 1 P. & D. 648, and **Soler v. Soler,** 17 N.Z.L.R. 49, and that question would not, on the present application, be determined. If it was not, then the petitioner could not rely upon S. 37. But if it was, then the proper procedure was an application by separate petition: see Rule 91. The petitioner appeared, however, to have misconstrued the terms of the deed, which expressly provided that "the weekly sum" should continue to be payable for so long as the respondent "shall not re-marry and shall remain chaste" and the fact was that the respondent had re-married. No order was made upon the motion so far as it asked for rescission, suspension or variation of the deed of arrangement, but that was without prejudice to the petitioner applying to the Court by separate petition therefor, if he was so advised.

Solicitor for petitioner: **W. P. McCarthy,** Greymouth.
Solicitor for respondent: **C. S. Thomas,** Christchurch.

Rules and Regulations.

Motor-vehicles Act, 1924. Regulations relating to registration plates.—Gazette No. 31, 23rd April, 1931.

Motor-vehicles Insurance (Third-Party Risks) Act, 1928. Motor-vehicles Insurance (Third-Party Risks) Regulations Amendment No. 1.—Gazette No. 31, 23rd April, 1931.

The Earthquake.

F. O. Langley.

(Continued from p. 88).

Further and more deliberate research and enquiry leads to the conclusion that loss of documents, public and private, is the main complication likely to follow upon such upheaval as has been experienced in Napier and Hastings. As to public documents, it must be confessed that no information or guidance has as yet been got, with reference to the burning of the Four Courts in Dublin; but it well may be that the course of Irish politics of the time, involving as it did, if not contemporaneously at any rate consequently, a rapid change of personnel, accounts for the lack of knowledge and data in the present Government's High Commissioner's possession. There is a means, however, available for enquiring at another source, and resort will be had to this during the impending recess. For the present, it must be taken that information is not available; should any member of the profession have urgent need of such precedent as may exist in the Irish case, it is said that the most likely place to obtain it is from Messrs. McDonnell & Company, the Solicitors recommended by the High Commissioner's Office and to be addressed at 3/7 Southampton Street, Strand, W.C. The Authority to which we hope to refer with success is a representative of the old Crown Office legal authority, not at the moment available.

Of lost documents, perhaps the most acutely to be missed will be (as we observed in our last article) mercantile securities. Of Bearer Bonds, or Debentures, in New Zealand, it is said that a very large proportion is deposited at Banks but with the coupons detached. The lawyer's mind is staggered, or the lawyer's appetite for work is whetted, by the thought of the results which this fact may produce, whether with regard to interest rights or with regard to redemption or other capital questions. Generally upon this aspect of matters, it may be of use to cite the Japanese enactments; if these be compared with the Californian emergency legislation already mentioned in summary, it may be guessed what lines the legislature must take in New Zealand.

Imperial Ordinance 447 (October 19th) and Communications Department Ordinance 81 (October 24) enacted together, that there should be re-issue or confirmation of savings books, money orders and the like documents, upon a claim being made by a claimant producing a surety who is ready to be liable to the Government to the extent of indemnifying it against loss caused by fraud. The claims had to be in before the end of 1923.

Imperial Ordinance 450 (October, 1926) provided for the case where depositors had not the necessary document enabling withdrawals. Here again there was a "securing" to be done; in this instance it was to be achieved by hypothecation of certain specified securities (or, rather, class of securities) of the gilt-edged type.

Imperial Ordinance 451 (October 31) enacted that if a company had lost its list of shareholders and had "Name" shares, of which it could not trace the owners, a notice must be published in the prescribed manner; thereafter the shares are to be deemed bearer shares for the purposes of and so far as concerns, meetings. This, presumably, contemplated only voting rights; it may be a very useful precedent to the New Zealand legislature, if we are correct in understanding that the whole of a local company's registration and records may be localised in such a centre as Napier, without the availability of any duplicates, elsewhere.

The detail of the emergency legislation, in Japan, to deal with the pecuniary aspect of the loss of bearer securities is not available; the provisions perhaps in detail are not necessary to be considered here, having regard to the more appropriate and analogous Californian: Statutes of California, Extra Session of the Thirty Sixth Legislature, 1906: Chapter LXIII. Here, it will be remembered, the scheme adopted was that of rectification or renewal by Petition to a superior Court. The method adopted, in the Japanese instance, was the appointment of a Government Committee to hear claims of persons who had lost bonds, etc., and the empowering of that Committee, without any measure of "securing" on the part of the claimant, to renew bonds, in accordance with claims and upon satisfactory proof of destruction or loss. The Committee was vested with powers to take evidence on oath; and its proceedings were attempted to be made effectual and fair by a further power, entrusted to it, to commit to the equivalent of penal servitude, for long terms in case of falsehood. It will be realised that the means of verifying all this material, in London, is limited by the natural paucity of authorities (in English) and by a fundamental difference in the judicial constitution and method; this is illustrated by the last foregoing matter, if the available translated authority correctly represents it, and by the fact, hardly to be reproduced in any country having our systems, of a committee being able thus drastically to deal with perjured evidence in its own causes. No doubt, the Japanese draftsman would be as astonished (as we are at this provision) to learn that when a puisne Judge, or even a Chief Justice, sitting as judge in a civil suit, sees perpetrated before him what he is satisfied is the crime of perjury, this Judge or Chief Justice cannot convert himself into a criminal tribunal and act accordingly, but must promote a prosecution before a criminal court, even though it be the fact that he himself will preside over the latter.

With regard to the bearer securities, we are given to understand that some 60/70 millions of pounds worth of investment of this type emanate from local bodies, in New Zealand, and are for the most part so handled as to be easily susceptible to the loss or destruction we are now contemplating. One wonders, in passing, if this experience will produce a tendency in favour of inscribed stock; however that may be, it is more to the point to return to the Californian legislation for a moment. (The Jamaica legislation, it may be mentioned, does not help in this respect). "Whenever it shall appear," the statute runs, "that the minutes, records, seal, assessment book, stock journal, stock ledger, certificate book, certificate of stock or bonds or other papers or records of any corporation, municipal, quasi—or otherwise, in this State, shall have been or shall hereafter be lost or destroyed by conflagration or other public calamity, such corporation by a vote of its Board of Directors, or any stockholder or bondholder of such corporation, may petition the superior court of the county, or city and

county, in which the principal place of business of such corporation is located, to restore such lost, destroyed . . . papers or records." Given the provisions, which follow, as to the particulars to be furnished; the filing and verification (by affidavit as in our divorce petitions?); publication of day fixed for hearing; general notices in the press on the one side and by particular notices, served as directed, on the other; the proof of such notices, as to which the requirements are exact; and the supplying of the defect, where notice has not been possible; there is created a jurisdiction in the court "to enquire into and determine the loss, etc. . . . and to fix and determine by its judgment or decree the ownership of . . . stock or bonds and the persons entitled thereto, and to direct such corporation to restore . . . and to issue new bonds or certificates of stock, or other paper or document, to any person or persons to whom same may belong or who may be entitled thereto, as determined by the judgment of the court."

There remain, of course, the unidentifiable cases. "Any stock, bond, or other paper, the ownership of which cannot be determined, shall be found by the court, by its judgment, to belong to unknown owners; and in all proceedings of such corporations, including proceedings for assessment of stock, and the collection of such assessment, and the payment of dividends, and notice of sale and sale for delinquent assessments, said stock or dividends shall be so designated as belonging to unknown owners, without giving the name of the owner thereof or the number of the certificates or series of issue."

The last of the enactments, mentioned in the preceding article of this series, dealt, it will be remembered, with "the proof, establishment, re-issuance, re-execution, and re-acknowledgment of *private* documents and instruments in writing, where the same have been lost, etc." and provides a means by action. "If such document," the enactment *inter alia* provides, "or instrument be a negotiable instrument, the court must compel the person, in whose favour it is drawn, to give a bond executed by himself and two sufficient sureties to indemnify the person re-issuing, re-executing or re-acknowledging the same against any lawful claim thereon." As to this indemnification, an old, reported case may be considered.

It may be observed, before citing the case, that legislators, for some reason good or bad, seem determined never to follow the law which the Courts attempt to lay down. A legislature will readily supply any defect, or correct any mistake or particular misuse, to which a Court calls attention; but except in such codifying instances as were in our Sale of Goods Act, it is remarkable that the drafting mind, either by caprice or by necessity born of experience, prefers to go upon its own ideas and does not adopt ideas which the judicature is, at the time of the legislation, evolving. In the Parliamentary Draftsman's Office you will find but little reference to, or citation of case law; and as the matters we discuss must, sooner or later pass through the Draftsman's hands, it is to be assumed that a like experience will be here. It is our opinion that, in this matter, there should be some re-orientation; and the case, to be cited, may justify that view, by an instance. *Pierson vs. Hutchinson*, 2 Campbell 211, was an action by an indorsee against an acceptor of a Bill of Exchange, the bill having been lost but there being no proof of, if indeed there was the fact of, destruction. Plaintiff's counsel quoted Marius to the effect that if a bill be lost and an indemnity against claims by finder, and those deriving title from him, be given to the acceptor, he must pay on it without its production. Lord Ellenborough said, and his pronouncements seem apposite to our subject: "If the bill were proved to be destroyed, I should feel no difficulty in receiving evidence of its contents and directing the jury to find for the plaintiff. . . . Here, however, the instrument is not destroyed. It is lost after being endorsed by the payee. It may now be in the hands of a *bona fide* endorsee, for value, who might maintain an action upon it against the defendant. This brings us to the indemnity. But whether an indemnity be sufficient or insufficient is a question which a court of law cannot judge. There are *dicta*, to be sure, that upon an offer of an indemnity, the endorsee of a lost bill may recover at law, but . . . I cannot venture to proceed upon them. Since the plaintiff can neither produce the bill, nor prove that it is destroyed, he must resort to a court of equity for relief." There follows the reporter's note: "If the bill when lost was not endorsed, and consequently no good title can be made to it, there seems to be no reason why an action at law may not be maintained upon it, as in the case of a lost deed."

We cannot help thinking that the legislator expert or political, would do well to consider, as well the observations, difficulties, suggestions and decisions of reported judgments, as the enactments of other States or other times. Even the single quotation, above, seems to us to afford guidance or to open up avenues for anyone confronted with the problems which the upheaval produces, in that aspect to which we have so far, devoted attention. Save for the question "*prima facie* or *conclusive*?" which we raised in the earlier article as to the appropriate provision for effectuating restoration of documents upon proof and after argument and which we will deal with in a final article, this concludes our treating of loss of documents, as dealt with by legislatures. There are incidental questions to be discussed, as to loss of insurance policies (which we shall deal with in dealing with the wide subject of insurance), and as to the loss of declarations of trust (a matter arising from the modern tendency to keep trusts off titles, with the result that measures for the registration and preservation of title are ineffective to register and preserve record of the trust). For the rest, we propose to deal with the questions of Insurance and of Town Planning, as to both of which the Japanese precedent is, incidentally, of the greatest interest. Jamaica, providing the leading case upon Insurance, also provides leading legislation upon the last-mentioned subject.

(*To be continued.*)

"Every now and then the formality of the oath gives rise to perplexity in Court and sometimes to humour. One of the oddest errors occurred last year at Willesden Police Court when a Communist who would not take the oath desired to affirm. A card was handed to him from which he duly read a form of words. Then the Court suddenly realised that he had been given the wrong card and had trustfully taken the oath of allegiance as a special constable."

—*Solicitor's Journal.*

Australian Notes.

WILFRED BLACKET, K.C.

An anti-nationalist revolt in Australia in 1929-30, made Mr. Scullin Prime Minister of the Commonwealth and John Lang, the repudiationist—he had to repudiate his own policy speech when he advocated repudiation—Premier of New South Wales. The performances and non-performances of these Labour Governments had, in or before December of last year, convinced an overwhelming majority of electors that Labour Governments under Caucus control, as the fashion is now, are not a blessing to any Christian country, and it is certain beyond all doubt, and is even publicly admitted by Labour politicians that a General Election in the Commonwealth, or in any State, would compel many of the present Labour members to retire from politics, and get work. Quite naturally Mr. Scullin does not want to learn the secrets of the ballot-box before August, when a double dissolution of the House of Representatives and the Senate is inevitable, and Mr. Lang wants to retain his 55 to 35 majority in the Assembly until the Communists are ready to attempt to introduce the Soviet form of government.

Under these circumstances it is quite natural that there should be some desire to expel a ministry or rather two Ministries which, to state it in the mildest possible terms, are despised and condemned by the great majority of electors. Some writers, having knowledge of constitutional law, quote Todd's statement in "*Parliamentary Government*" that "the right of the King to dismiss his Ministers is unquestionable," and also the dictum of Ridges in his book, *Constitutional Law of England*, where in the course of his review of the occasions on which this power has been exercised he says:

> "In such cases it has been recognised that the test of constitutionality in adopting such a course is whether or not there are good grounds for the Crown to believe that the wishes of the electorate are opposed to the wishes of the House. If there are good grounds for such belief, then the Crown would be acting constitutionally in opposing the wishes of the House. This ultimate predominance of the electorate is expressed by saying that, whilst Parliament alone is the legal sovereign, the electorate is the political sovereign."

Article VI of "Instructions to the Governor," reads thus:

> "In the execution of the powers and authorities vested in him, the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to us without delay, with the reasons for his so acting."

In the Commonwealth Parliament the marvellous measures of the Scullin-Theodore Ministry bludgeoned through the House of Representatives are usually obliterated by 27 to 7 votes in the Senate, but there is no expectation that the Governor-General, Sir Isaac Isaacs, will dismiss his advisers, or hasten the day when they shall have to hear the verdict of the ballot-box. But in New South Wales it is different, for Sir Philip Game will have the support of a petition denouncing repudiation and asking for a dissolution signed by at least 500,000 electors, and he will also have knowledge of the fact that all the members of the Labour Party in Parliament were selected by a Committee of Communists, that most of them wear the badge of the Red Army in the House, and that the Federal Military Barracks and manoeuvering area have been given up to Mr. Lang, nominally to house single unemployed men, but actually for the purpose of drilling the Red Army. Some very nice questions of law as to the power of a Government to achieve a revolution by executive action, and as to the rights of returned soldiers and other citizens to resist attempts to overthrow the Constitution, are necessarily in deep consideration. At least 95 per cent. of the men of New South Wales are loyal to their King and Constitution, and some of them may become a little impatient if they see the Red Army drilling at Liverpool.

On our Continent one often hears of the "Casual Australian." His latest representatives are 2,000 persons who during the last ten years have neglected to draw their share of distributions made by Bawra—The British Australian Wool Realisation Association. Some of them did not even apply for their share of capital returned prior to 1921, and the liquidators, who have £52,000 of unclaimed moneys on hand, are applying to the Victorian Supreme Court to know what they ought to do with these moneys. All the persons entitled to share in this sum has been written to more than twenty times but they seem satisfied "to hear of something to their advantage" without taking further steps in the matter. Being fully apprised of the casualness indicated by the unclaimed £52,000, the liquidators will also ask for a direction as to the time to elapse after declaration of the final dividend, and steps to be taken, before non-claiming beneficiaries may be classed as *dormientibus* for all legal and equitable purposes.

In the pending appeal of the Australian Investment Trust against Strand Properties Limited the Privy Council will have to decide the question whether a bare underwriting agreement, for a consideration of one shilling a share to the underwriter, but without any undertaking to procure subscribers for shares, is valid. The agreement in question contained an undertaking to apply for 175,000 £1 shares and for a commission of 1/- per share, but when the defendant company sought to enforce the contract the plaintiff company refused to apply on the ground that as the defendant company could not issue shares at a discount it could not perform its part of the contract. The defendant company allotted the plaintiff company 16,308 shares and threatened to sue for moneys due thereon. Thereupon the plaintiff company sought to have its name removed from the register and an injunction, but the Court allowed a demurrer on the ground that its statement of claim disclosed no equitable title to relief.

A Judge sitting in Divorce, in fixing permanent alimony to be paid by a husband who is in poor circumstances, has no power to provide for an increase of the amount, even if the husband eventually becomes a millionaire. This anomaly in the law was mentioned recently by Mr. Justice Owen in a Sydney suit. His Honour said further: "At the present time, by making an order for permanent alimony and maintenance, I may be putting a millstone round a man's neck which he cannot get rid of. Yet unless I make a fairly large order I may be doing what would eventually be an

injustice to the wife, because in the event of the husband's financial position improving I have no power to increase the amount accordingly." From this it would appear that the prevailing depression is of some benefit to husbands who are now suddenly stricken with orders for alimony.

Theodore Johnson was purchasing a restaurant business at Hay, N.S.W., and the agent who was acting for the vendor, and was also local agent for the Guardian Assurance, obtained from that company a cover note for £500 over the goods and chattels included in the sale, pending completion of the purchase. No proposal form was signed by Johnson, nor did he in fact see the cover note, or the extension granted. A fire occurred during the period of cover and Johnson sued and obtained a verdict for £500. The company in defence relied upon the statement in the cover note that it was subject to the terms included in the policy form to be issued thereafter, and that the plaintiff had omitted material matters as he had not disclosed the facts that he was a Greek by name Doukakis and that he had previously had a fire on premises occupied by him. The company appealed against the verdict but the Full Court, N.S.W., dismissed the appeal, holding that the stipulation in the cover note only incorporated such terms as were applicable. Here there had been no proposal, and the Court construed the cover contract as one differing from the complete contract made by an accepted proposal and policy issued thereon. "It was open to the jury," said Halse Rogers, J., delivering the unanimous judgment of the Court, "to find on that evidence that in making contracts of this kind the insurers did not take into consideration matters similar to those considered when determining whether or not a policy should be issued, but were willing without any consideration of the history or nationality of the proponent to take whatever risk might arise up to the time of the receipt of a proposal duly completed, and that the company did so as a matter of business, and with a view to securing as many clients as possible."

The Australian Council of Churches at its recent annual conference discussed perjury among other matters. Representatives of the Society of Friends desired the abolition of the oath and said that perjury was rife, but a Congregational representative thought that a magistrate's recent dictum that 95 per cent. of the witnesses called were perjurers was excessive, and another gentleman said it appeared to him "that the persons prone to commit perjury were professional witnesses. Other witnesses realised the importance of the oath . . . We would do much better if we could prevent solicitors defending in cases where they know their clients are guilty." Ultimately the Conference resolved that the prevalence of perjury was "a gross violation of Justice" and that judges and magistrates should have power to punish perjurers in the Court in which the perjury was committed. Having condemned witnesses without evidence in support, and without calling for any defence, the Conference turned to other matters in respect of which it is probable that they had some knowledge.

Mr. Lysaght, Attorney-General, N.S.W., outlined his Law Reform Bill on motion for its first reading but for some unknown reason no copies of it are yet available. Its provisions as stated by him would seem to indicate that he had thought it out in the interval between the fish and the entree on some night when the waiter had an extra table to attend to. The District Court is to have jurisdiction in Equity matters and at Common Law jurisdiction up to £10,000. All Judges are to retire at 65. Barristers are to continue but there is to be amalgamation. Vacations are to be swept away and wigs and gowns discarded. Also it is said to contain a provision making it a crime to defame any politician. Incidentally it may be mentioned that the day before the Bill was introduced a Sydney paper had an article descriptive of John Lang, his works, his associates, his faults and his fate as soon as the electors have a chance of getting hold of him. The Bill has been approved by caucus and quite probably drafted by the same authority.

Commenting upon the proposal to compel judges to retire at 65, the Hon. D. R. Hall mentioned that he had put through the Act compelling judges to retire at 70, but said he was "not proud of his handiwork" for it had meant the loss to the State of the best years of service of our most eminent judges, and would soon compel the retirement of Sir Philip Street, C.J., and Mr. Justice Ferguson. He was in error in including Mr. Justice Pring in his list of compulsory retirements, for that great Judge, stricken by mortal disease, had to resign when he was 69. He it was who in his letter to his brother Judges announcing his resignation concluded with those memorable words: "I have tried to do my duty. No man can do more: none should do less."

Recently in the Federal Parliament the Speaker "could not hear" Mr. Scullin during a division because he was not wearing a hat, so the Prime Minister had to hold a notice paper over his head to obtain audience, it being an invariable rule that at such a time a member must sit down and keep his hat on just as if he were in a bar parlour. It has been stated in your columns (Vol. VI, p. 271) that Mr. Justice Roche has ruled that a lady appearing in Court must wear a hat, while Mr. Justice Bateson said that all ladies should remove their hats before going into the witness box. As no photographs of the ladies "before taking" and "after taking" their hats off were shown it is impossible to decide which of the two Judges displayed the better taste, but the difference in these rulings recalls the fact that with regard to policemen the practice in the various States is not uniform. In New South Wales a constable must remove his helmet when he comes into Court, but in Queensland, and I think in Victoria and Western Australia, he keeps it on, the theory apparently being that the Crown is properly represented by a helmet.

Just as I am concluding this instalment of Notes I see by an evening paper that Mr. Lysaght has mentioned two other things which he remembers to have noticed in the Legal Reform Bill. One is that "if a person makes or publishes any defamatory statement he shall be liable on conviction to imprisonment for 12 months or £100 fine or both." Apparently fair comment and truth and the public benefit are not to be available as defences. Another clause is quoted by Mr. Lysaght, for the Bill has not even yet been produced in the House, as follows:

> "No barrister and solicitor shall demand or take for any work done by him as a barrister and solicitor any costs or fees in excess of two-thirds of the amount which if this Act had not been passed he would be entitled to demand and take for such work."

The only comment on this absurd clause that seems necessary is that it would seem to have been thought out at a later stage of the dinner mentioned in an earlier paragraph.

Sir Edward Clarke, K.C.

With the death of Sir Edward Clarke a few weeks ago the Bar of England lost one of its most successful and honourable members. Though Sir Edward had not practised for some years his reputation is as well known as that of the best known barrister of to-day.

The career of this great man should provide for any young man imbued with ambition and a desire to leave his country the better for his having lived, an object lesson. Had it not been for his indomitable spirit and high-mindedness he could never have risen from the humble circumstances into which he was born to the preeminence he attained. From the son of a humble silversmith and jeweller in St. Paul's Churchyard, London, he became His Majesty's Solicitor-General and one of the most deservedly successful barristers in England.

He was born ninety years ago, and in spite of the inadequate educational facilities available to youths of his humble station in life he early manifested great industry. His affection for one master whose chief interests were literature and play-acting laid the seed which bore for Sir Edward the fruits later of forensic success. Added to his humble station Sir Edward's mother was deeply religious and of very narrow views. This handicap was counterbalanced to some extent by his father's encouragement in his son of a liking both for debate and the stage. By gaining certain scholarships, which were rarer in those days than they are to-day, Sir Edward ensured for himself a good working education. At the age of fourteen his father took him into his small shop as an assistant, and had it not been for his natural industry and desire to improve himself he might have ended his days obscurely there. By securing a Society of Arts Prize he was able to gain some kind of secondary education which enabled him to develop his taste for literature. By winning a Tancred scholarship he obtained admission to India House where he carried out the monotonous duties of a clerk for less than two years. As a Tancred scholar he started to study for his Bar entrance examination. He devoted much of his energies to various debating societies. In 1864 he became a barrister of Lincoln's Inn. His circuit was one necessary for a poor man, the Home Circuit, and shortly after his admission he was briefed in some small matters. He was most assiduous in his attention to his profession. Whether briefed or not he always attended Court and took notes of the cases being tried. He was soon known as a young man who could take a note intelligently, and this brought him the beginning of his junior practice. His first prominent brief was to obstruct the extradition of Charles Windsor to America. He succeeded. He had two more extradition cases and then in his spare time he wrote his well-known treatise on the Law of Extradition. This brought him into some prominence and his industry and brilliant work enabled him to reap the reward of his early successes.

In 1865 he took an active interest in politics in the interest of the Conservative Party, though he did not contest a seat till 1880, when he was elected for Southwark. Sir Edward's decision to take an interest in the government of the country is understandable from his own words when, at the beginning of his Autobiography, he hopes that the story of his life would encourage young men " to combat the besetting selfishness of life by interesting themselves in the public affairs of their country and the community in which they live, and in the movements of spirit and intellect—social, industrial, moral, and religious—which are forming the character and so determining the future of our race."

He found no disadvantage in combining politics with an enormous practice at the Bar and he earned fabulous fees. The Penge and the Detective cases were early great successes and from them he proceeded onwards in the legal profession with great honour to himself and advantage to his clients. In 1886 he was appointed Solicitor-General.

In this necessarily fragmentary note of this great man one cannot refer to his individual successes. They are all modestly recorded in his " Story of My Life." That book should hearten any young man to greater efforts. Apart from his legal and political activities Sir Edward was initiated into Masonry in 1871, and rose to eminence in the craft. Later, his friends founded a Masonic lodge and called it Sir Edward Clarke Lodge. In 1897 he refused the Mastership of the Rolls and continued taking active part in politics until he retired in 1900. Later he was elected as a member for the City of London, a position he had coveted for many years. Ill health compelled him to resign in the same year and thenceforward he lived in retirement.

In July, 1914, two hundred-and-fifty members of the profession, from both Bench and Bar, entertained Sir Edward and bade him farewell from all active association with the profession he had so long adorned.

Of Lord Halsbury it has been said, and it might as truly be said of Sir Edward Clarke : " His life was thus not only long in years but full of achievement, for of much of what he had seen he could say : '*quorum pars magna fui*' ; but long days and high achievement are not everything, and from what he saw and what he did we look beyond, to the man himself, and what he was : a highly gifted but simple-hearted, industrious, plain living, quietly devout, cheerful and kindly English gentleman, typical of his race and time . . . . And let us admit that if their length of days argues a vitality which is a gift of Nature, the preservation unimpaired of physical and mental powers so long beyond the allotted span argues also 'plain living and high thinking' and the steady outlook which maintains the tranquil mind '*rebus in arduis haud secus ac bonis.*' "

—C. A. L. Treadwell.

" We are all of a mind that in these days no man and no woman shall be denied access to His Majesty's Courts by reason of poverty alone."

—Sir Roger B. Gregory, President of the English Law Society.

" Beneath the robes of a Judge there always beat the heart and the sympathies of a man. We recognise the call for justice, the demand for fair play, and we try to satisfy it. We realise that this call for justice will persist until the final darkness descends upon a weary universe, and the last vestige of the human race has vanished from the face of the earth."

—Mr. Justice McCardie.

The Woman Unknown.*

Hotel Divorces.

Those who practise in the Divorce Court have lately become conversant with a new rule which is not to be found in any text-book or in the Divorce Rules, or in any direction with regard to procedure. It was a rule made *per curiam* by Mr. Justice Hill before his retirement, and approved by the President (Lord Merrivale) in subsequent cases. This rule may be put thus: Where a wife petitioner charges her husband with adultery and she does not know the identity of the adulteress, her solicitors must ask the husband or his solicitors for the name and address of the adulteress.

This practice arose mainly out of the great increase in "hotel" cases which followed the Matrimonial Causes Act, 1923, the measure that enabled a wife to divorce her husband for adultery alone, instead of adultery coupled with cruelty or desertion as theretofore. One curious result was that it enabled men who had become infatuated with some other woman to put pressure upon their wives to divorce them. Proof of a single act of adultery by a husband sufficed for a decree in favour of the wife, and the Judges became aware of the development of a class of case in which a husband, who had apparently lived the life of a reputable citizen, suddenly resorted to a hotel with "a woman unknown," and sent his wife the evidence of his own adultery by way of a letter and a hotel bill. How the President took steps to put a stop to this class of case, if it were merely a blind to shelter a known woman, in the year 1928 was reported in these columns. In *Aylward v. Aylward*, (1928) 44 Times Law Reports, Lord Merrivale said:

> "It is time that this practice of resorting to hotels in order to make a *prima facie* case for dissolution of marriages, as the effect of a conclusion at which the parties have arrived between themselves, should be stopped."

In this and other cases it turned out on inquiry that there was a known woman with whom the husband was associating. The old principle that the Court must definitely hold adultery to have been committed when a husband spent a night in the same bed or bedroom with a woman not his wife was thus modified, and the Court had to be satisfied that it was not merely a colourable pretence for the purpose of securing a divorce for the guilty party without discredit to some woman in the background.

In *Parsonage v. Parsonage* on February 10, 1930, Mr. Justice Hill definitely laid it down that where a husband is charged with adultery and the woman is unknown to the petitioner, the latter's solicitors should write to the husband pointing out that the Court required the name and address of the woman to be disclosed. It is true that by the law of evidence, a party charged with adultery cannot be compelled to provide evidence in support of the charge, but, nevertheless, he may incur heavy costs for extensive inquiries if he does not give this information. In this case Mr. Justice Hill said:

> "I hope that husband respondents will take notice of the practice, because costs incurred in further investigation in ascertaining the name of the woman will all fall on the husband."

In a later case, his Lordship ordered the costs of an inquiry as to the identity of an unknown woman to be taxed against the husband respondent, and such costs have been allowed in several such cases since.

Where, however, it is the wife who is the real and *bona fide* initiator of the petition, and inquiries before the petition is filed have failed to reveal the unknown woman's identity, it is not the usual practice of the Court to insist upon inquiries, the costs of which would fall upon a wife, who has been unable to get security owing to the husband's lack of means. But this exception is subject to the proviso that there is every likelihood that the husband went to a hotel with a woman of accommodating propensities, and was not associating with some particular woman with whom he had fallen in love, and whose good name he wished to protect.

In a hotel case, *Woolf v. Woolf*, in March, 1930, Mr. Justice Hill adjourned the case for inquiries as to the woman's name. A request to the husband respondent was fruitless, and when the case came on again, the papers were sent to the King's Proctor for inquiries. On November 5 the President had the case before him, and quoted the husband's answer to the request for the woman's name as follows: "Once again I must state that I absolutely refuse to give the name and address of the woman. . . . The lady is a perfectly respectable and honourable lady, and most naturally I would not think of behaving in a most dishonourable way by disclosing her particulars." His Lordship, in dismissing the petition, pointed out that it was the husband who wanted a divorce, and he condemned him in the solicitor and client costs of the petitioner and King's Proctor.

In a recent case, which was not reported, no evidence could be obtained from the hotel except the receipt for the bill and the entry in the hotel register of the names of husband and respondent and a woman who was named therein as his wife. In answer to the now usual inquiry, the husband said that he did not know the name of the woman with whom he spent the night. The President granted a divorce *nisi* on the particular facts of this case, but it should not be taken as a precedent for relaxing the usual inquiries at a hotel, not only for proving that a husband occupied a bedroom with a woman not his wife, but also for ascertaining the identity of that woman and any other woman with whom he might be suspected of carrying on an adulterous association.

Indeed, in a case tried on February 4 of this year, Mr. Justice Bateson held that the husband respondent had tried to pervert the course of justice by pretending to go and commit adultery with the object of allowing his wife to present a false case in order to deceive the Court. In fact, the husband and a girl whom he took with him to a hotel slept in different beds, and no adultery occurred. In dismissing the petition, the Judge said that the respondent had put himself in great jeopardy, and he thought something ought to be done to stop these trumped-up cases. He directed that the papers should be sent to the proper quarter.

It will thus be seen that the Divorce Court continues to uphold the law against collusions, connivance, and divorce by consent, despite the popular notion that there is a more lax practice in these matters.

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Corroboration.

A Short Review of the English Authorities as to Corroboration in Affiliation Cases.

To our learned contemporary, the *Justice of the Peace*, we are indebted for the following review of the English authorities on the question of corroboration in affiliation cases.

The policy of the rule which requires corroboration of the mother's evidence in some material particular is open to criticism. As the editor of the latest edition of *Lushington's Law of Affiliation and Bastardy* says: "It seems to have been enacted in a moment of reaction against a cruel procedure which whipped a man at the cart's tail on the slenderest of evidence. The rigid rule probably produces more injustice than it prevents. The more modest the unmarried mother, often the less likely is corroboration to be forthcoming; while on the other hand the formal requirement is sometimes held to be satisfied by very inadequate materials." The learned editor quotes *Wigmore on Evidence*, as saying: "In the light of modern psychology this technical rule of corroboration seems but a crude and childish measure if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charge. The problem of estimating the veracity of feminine testimony in complaints against masculine offenders is baffling enough to the experienced psychologist. This statutory rule is unfortunate in that it tends to produce reliance upon a rule of thumb."

It has to be remembered that an application for an affiliation order is in a different category from a criminal charge. A wrong acquittal in the latter does not directly injure the complaining party. A refusal to make an affiliation order against a man who is actually the father involves a severe punishment to the complainant, in that she will have to bear, unaided by the partner of her breach of morals, the whole burden of their anti-social conduct. What makes the position more illogical is that on a charge of rape, corroboration is not a requirement of the law. Yet on an application for maintenance of a child whose birth may be directly due to an act of rape for which a man has been convicted, corroboration is by law a *sine qua non*. It is debateable whether a verdict of guilty on a charge of rape, although conclusive proof of the act of sexual connection charged, would, if properly proved before justices, amount to corroboration. (But see 91 J.P. 216). An acquittal certainly would be a bar to the making of an order based on the same alleged act of intercourse (see 92 J.P. 214), and it is harsh if the law should always operate against the unfortunate woman.

There is no complete definition of corroboration to be found in the decided cases. The courts have deliberately refused to lay down general rules: *Reffell v. Martin*, (1906) 70 J.P. 347; *R. v. Baskerville*, (1916) 80 J.P. 448. The editor of *Lushington* submits as a useful test, but of course not as a complete definition: "Corroboration is either the direct confirmation of a statement, or the proof of some fact which is consistent with the truth of that statement and inconsistent with its denial." It involves something more than mere possibility—*Burbury v. Jackson*, (1917) 1 K.B. 16; and no accumulation of facts, none of which taken alone is corroboration, can, added together, amount to corroboration: *Oliver v. Jeffrey*, (1925) 89 J.P.N. 355.

So much for general ideas on corroboration. To be "material," the evidence must have some relation to the conduct of the putative father, or at least have some relation to the probability of his being the father: *Reffell v. Martin, supra.*

An actual admission of paternity, if satisfactorily proved, cannot be bettered. Fortunately, many defendants in bastardy cases frankly admit, in Court, their paternity.

Admissions out of Court have to be proved by the oath of a witness. There is no more dangerous ground for justices to tread. For one thing, where the mother is obviously telling the truth, and evidence of admission is slight, there is a temptation to shut the eyes to its exiguity, and the case of *R. v. Pearcy*, (1852) 17 Q.B. 902, shows that the High Court will not be too exacting on the point. Another danger is the amazing way in which witnesses will, consciously or unconsciously, make changes, often none the less fatal because minute, in reporting spoken words. Indeed, sometimes the presence or absence of a comma (were the words written) would make all the difference. Even a slight change of emphasis is enough. One has heard the words, "I did it" given in evidence in a monotone which makes them an admission, whereas what the accused said was, "*I* did it?" a startled exclamation amounting almost to a denial.

How far admissions by agents can be used as evidence is dealt with in a note at page 199 of *Lushington*. Upon admissions by agents no English case can be cited; those given are *R. v. Segal*, (1926) a South African case, noted 90 J.P. 699, and two magisterial decisions at 89 J.P. 466, and 92 J.P. 410.

As to particular incidents which have been held to be or not to be corroboration, there are the following:—

The provision of mere accommodation for the mother at the time of her confinement and for her and her child for some time thereafter is not necessarily any corroboration: *Thomas v. Jones*, (1921) 1 K.B. 22. The silence of the defendant when taxed may amount to corroboration: *Bessela v. Stein*, (1877) 2 C.P.D. 265. In a breach of promise case mere neglect to answer letters alleging the promise of marriage was held not to be corroborative evidence of the promise: *Wiedemann v. Walpole*, (1891) 2 Q.B. 534—and the same would seem to follow of neglect to answer letters alleging paternity of a bastard child, but the whole circumstances must be considered: *see Quirk v. Thomas*, (1916) 1 K.B. 516; *Richards v. Gellatly*, (1872) L.R. 7 C.P. 131.

The rules of the criminal law as to silence when an answer to an accusation might be expected are in point, and *Director of Public Prosecutions v. Christie*, (1914) 30 T.L.R. 471; and *R. v. Feigenbaum*, (1919) 14 Cr. App. R. may be consulted.

Acts of familiarity may be corroboration: *Hill v. Denmark*, (1895) 59 J.P. 345; *Harvey v. Anning*, (1903), 87 L.T. 687; *Cole v. Manning*, (1877) 2 Q.B.D. 611.

Evidence of opportunity for intercourse is not sufficient corroboration—*Burbury v. Jackson, supra*—but proof of opportunity, and denial of it may suffice. There is no English case directly in point. The Scottish and Dominion courts have pronounced upon the matter, and the relevant decisions will be found summarised at pages 47 and 48 of *Lushington*, together with a passage from Lord Atherstone's judgment in *Reffell v. Martin*,

(*Continued in second column of next page.*)

Crime.

Some Views of Mr. Justice McCardie.

At the Sussex assizes, at Lewes, on 10th March, Mr. Justice McCardie, in charging the grand jury, expressed his pleasure that he had the assistance of a grand jury (1) because he thought the grand jury was one of the bulwarks against the undue growth of bureaucracy in the country; (2) because he thought it was a good thing that the leading men of the country should participate with the Judge in the administration of the high criminal justice of the Kingdom. Commenting on the fact that the calendar was one that might be described as light, His Lordship said he would say advisedly that in his opinion the assize calendar was not to be taken as a true measure of the serious crime in the country. There were the courts of summary jurisdiction and the courts of quarter sessions, and there was this to be remembered that it was most vital to mark the distinction between crimes which were detected and prosecuted and crimes which, though detected, were not prosecuted because the offender was unknown. The grand jury of Sussex, and of other counties, should realise that the body of serious crime in the country was greater to-day in bulk than it had been at any time during the last sixty years. The increase in crime was not an increase in crimes of violence, but an increase of such offences as shopbreaking, housebreaking, larceny, false pretences, embezzlement, blackmail, and theft of postal letters. His Lordship said he mentioned these facts because he felt that grand jurymen, who were the responsible citizens of the country, ought to take a deep and increasing interest in crime because this question of crime touched them not only in the cost of convict establishments, not only in the cost of prisons, but in the wreckage of many lives. He felt bound to point this out because for many years he had watched these matters closely. In His Lordship's view there were in the country at the present time far more persistent criminals than in previous years. He was satisfied that the criminal of to-day was cleverer than the criminal of a generation ago; hence a large number of crimes which, although detected, were not prosecuted.

His Lordship went on to say that he thought it right also to point out that in his opinion the attention of the most able police of the country had been in recent years distracted by their being called upon to deal with innumerable minor offences, whether breaches of the motoring Acts or breaches of by-laws, and they had, in consequence, been unable to give adequate attention to the detection and prosecution of serious offences. "I feel this matter of crime," Mr. Justice McCardie concluded, "is not as some folk think, a mere matter for the Judge of assize, or those who are in court as spectators. It is a question which touches you and all citizens in this country of which we are all proud to belong."

"You are not to be confident in your own opinion that a cause is bad; but to say all you can for your client; and then hear the Judge's opinion."

—Dr. Johnson.

Council of Legal Education.

Under the terms of the New Zealand University Amendment Act, 1930, the Council of Legal Education has been constituted as follows:

(1) His Honour the Chief Justice and His Honour Mr. Justice Ostler.

(2) Mr. P. Levi, M.A., and Mr. A. H. Johnstone, B.A., LL.B. (representing the Council of the New Zealand Law Society).

(3) Professor J. Adamson, M.A., LL.B., and Mr. J. B. Callan, B.A., LL.B. (representing the University Senate).

(*Continued from page 107.*)

supra, which tends the same way, and a somewhat adverse criticism by Avory, J., in *Thomas v. Jones*, *supra*.

The same work deals with "resemblance" as a test. So far as the matter has received attention it has been discussed upon facial resemblance alone, but science is now engaged in elaborating a technique which may result in more subtle and certain tests, such as blood grouping, becoming available. It is to be feared, however, that scientific evidence will be too costly in an application where the means of the complainant make an order of not more than one pound a week of importance to her; and, moreover, so far as the physiologists have gone, their tests have more value in tending to prove a negative for the man, than a positive for the woman.

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