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"The Common Law is no other than pure and tried reason."

—*Serjeant Plowden.*

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Actio Personalis Moritur Cum Persona.

The maxim *actio personalis moritur cum persona* has few friends and one would need to search diligently and long to find in the literature of the law much in the way of commendation of its operation or of justification of its existence. Sir Frederick Pollock in his work on *Torts* (13th edn., pp. 63, 64) says of the rule:

> "At one time it may have been justified by the vindictive and quasi-criminal character of suits for civil injuries. . . . . But when once the notion of vengeance has been put aside and that of compensation substituted, the rule . . . . seems to be without plausible ground. . . . . It is impossible to see why a wrong-doer's estate should ever be exempted from making satisfaction for his wrongs."

The late Sir John Salmond (*Law of Torts*, 7th edn., p. 92) condemned it also as seeming "destitute of any rational basis."

We propose to deal here only with that branch of the maxim which operates to prevent a person suing the personal representatives of another for a wrong done to him by that other during his lifetime. To the operation of this branch of the maxim (which applies, of course, only to actions in tort, and not to actions in contract) there are two exceptions. First an action will lie at common law against a deceased's personal representatives for a tort committed by the deceased involving the wrongful appropriation or acquisition of the property of another. Secondly, by S. 2 of the Civil Procedure Act, 1833 (Eng.), which is in force in this country, the personal representatives may be sued for injuries committed by the deceased within six months of his death in respect of the real or personal property of the plaintiff. But these exceptions do not touch the case of personal injuries done by the deceased.

The great injustice of the present position is being brought into prominence by the increasing number of deaths occurring through collisions on the highway. If the person killed is the innocent party his or her relatives can recover, of course, only such compensation as the Deaths by Accident Compensation Act, 1908, will give them, but this relates to the other branch of the maxim and is outside the scope of the present discussion. If, on the other hand, as is not infrequently the case, the negligent driver is killed and his negligence results in injuries to others, those others have, notwithstanding the Motor Vehicles Insurance (Third Party Risks) Act, 1928, no right of redress for personal injuries unless, anomalously enough, the negligent deceased driver was not the owner of the vehicle which he was driving.

Attention was recently drawn by Myers, C.J., to the anomalous nature of the present position in *Findlater v. Public Trustee and Queensland Insurance Co. Ltd.* (April 20th). In that case the plaintiff received serious injuries in a collision between a car which she was driving and another car owned and driven by one Wiggs; on the facts, Wiggs was held to have been negligent and the plaintiff not. Wiggs himself received serious injuries and died shortly after the collision. The plaintiff sued Wigg's executor, the Public Trustee, and the insurance company which was his indemnifier under the Act of 1928, claiming £566 general and special damages for her personal injuries and £31 for damage to her clothing and effects. By reason of the provisions of the Civil Procedure Act, 1833, she was held entitled to recover £29 for the damage to her property, but by reason of the operation of the maxim *actio personalis moritur cum persona* she recovered nothing for her personal injuries. It was argued for the plaintiff that S. 10 of the Motor Vehicles Insurance (Third Party Risks) Act, 1928, which makes certain provision "in the event of the owner *dying* insolvent," etc., as to "the amount of the owner's *liability*," showed that the Legislature had impliedly abrogated the common law rule, but Myers, C.J., was unable to accede to that contention. It is to be hoped, however, that the learned Chief Justice's observations will be noted and acted upon by the Attorney-General:

> "I am conscious of the anomaly of the position. If instead of Wiggs himself driving his car on the night of the accident, another person had been driving it and was killed, but Wiggs whether a passenger or not had remained alive, an action would have lain at the suit of Miss Findlater against Wiggs, and the insurance company would have been liable on its indemnity. . . . . My conclusion has been arrived at with much reluctance because I appreciate the anomaly of the result. It may be that the draftsman of the Act intended to abrogate what I call the second branch of the *actio personalis* rule. If so, then, if I am right, there is an omission which only the Legislature can cure."

Curiously enough, the same anomalous position exists under the English legislation of 1930 as to the compulsory insurance of motor vehicles; on September 20th last our contemporary the *Law Journal* drew attention to the position:

> "Whatever justification there may be for the continuance of the *actio personalis* rule generally, a matter which we are not concerned to discuss at the moment, it is obviously an anomaly that the liability of an insurance company, which has contracted to discharge its insured's liabilities to third parties, should be discharged by the death of the insured, but should remain enforceable if the person killed is a person for whose negligence the insured is liable. We doubt if insurance companies, in fixing rates for third party insurance take into account the fact that they may be relieved from liability by the death of the insured; but whether they do or not, does not, of course, affect the merits of the matter. An amendment of the law on this point should not be difficult to frame, and would correct a state of affairs which, as matters stand, may result in grave injustice to individuals."

In its number of May 9th last it takes even a stronger stand:

> "The probability that a motorist may himself receive fatal injuries as the result of the negligence or criminal conduct which causes injury to another has called attention to the absurdity of the legal doctrine that to such a case the maxim *actio personalis moritur cum persona* strictly applies. . . . . If the rule cannot be got rid of entirely, there should at least be a further exception to meet the present case."

New Zealand led England as regards the compulsory insurance of motorists against third party risks; it is to be hoped that it will also be the first to rectify the injustice of the present anomalous position. We would go so far indeed as to suggest that the *total* abolition of at all events that branch of the *actio personalis* rule here discussed ought to be seriously considered.

Court of Appeal.

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

March 31, April 15; May 22, 1931.
Wellington.

RHODES-MOORHOUSE v. COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duty—Estate Duty—Estate Tail—Contingent Remainder—Will Creating Trust of Residue for Daughter During Life and From and After Her Death Trust as to Certain Lands for First and Every Other Son of Daughter Severally and Successively in Tail Male—Son of Daughter Predeceasing His Mother—Rule in Shelley's Case Discussed—Abolition of Rule in New Zealand—Interest of Deceased Son a Mere Contingent Remainder—Remainder Not Vested at Date of Death—Entailed Lands and Proceeds of Sale Thereof Not Part of his Dutiable Estate—Conveyancing Ordinance, 1842, S. 36—Death Duties Act, 1921, S. 5.

Appeal from an assessment of the Commissioner of Stamp Duties. The Honourable William Barnard Rhodes by his will, dated 9th February, 1878, created an estate tail by the following provisions of his will: "And from and after the decease of my said wife without leaving issue of our said marriage and subject to the foregoing devises, legacies, bequests and directions I direct that my said Trustees shall stand possessed of all the undisposed of residue of my real and personal estate in trust for my said daughter Mary Ann for and during the term of her natural life . . . . and from and after the decease of my said natural daughter leaving issue subject as aforesaid I direct that my trustee shall stand possessed of the said Highland Park Estate near Wellington and the aforesaid Heaton Park Estate at Rangitikei with the appurtenances to the same respectively so far as the law relating to real property in New Zealand will admit upon trust for the first and every other son of my said daughter severally and successively according to their respective seniorities in tail male. . . . . And I declare that the devise upon the trusts herein declared in favour of and concerning the Highland Park and Heaton Park Estates is absolutely so far as each and every of the said sons respectively is concerned whensoever he shall under this Will become entitled to the possession of the said lands on condition that he and they respectively shall assume the surname of Rhodes (as a prefix to his own) and the arms of Rhodes within twelve calendar months from his or their respectively coming into possession otherwise the trust in favour of the person or persons respectively coming into possession so entitled as aforesaid shall cease as to the person or persons respectively so refusing or neglecting to assume the said name and arms and descend to the next in entail subject to the same condition."

Mary Ann Rhodes (the daughter of the testator) inter-married with Edward Moorhouse and had four children. Her eldest son William Barnard Rhodes Rhodes-Moorhouse (hereinafter called the deceased) was killed in action in France on 27th April, 1915, being then 27 years of age. He had duly complied with the terms of the name and arms clause. He was survived by his mother, by his wife, the present appellant Linda Beatrice Rhodes-Moorhouse, and by his only son who was 2 years of age. The widow of the testator died on 2nd January, 1911. The deceased's mother died on 2nd April, 1930. At the date of her death the infant son of the deceased was still living. In assessing the estate duty in respect of the dutiable estate of the deceased the Commissioner included in it the estate tail created by the will of the testator. The present appeal was brought from that assessment.

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

ADAMS, J., delivering the judgment of the Court, said that the question for the opinion of the Court was whether the assessment so far as regards the inclusion of the estate tail in the unsold lands, and of an entailed estate in the proceeds of sales, was correct, and if not, what was the correct assessment. The answer depended on the true construction of S. 5 of the Death Duties Act, 1909, and was concerned particularly with subsection (1) para. (i) which, with the commencing words, provided that "in computing for the purposes of the Act the dutiable estate of a deceased person, his estate shall be deemed to include . . . . any estate tail, whether legal or equitable, vested in the deceased at the time of his death in land situated in New Zealand, whether that estate is in possession or not." In the present case the estate tail was equitable—the legal estate being in the trustees. In order to justify the claim of the Commissioner it must be shown that the property in the dutiable estate of the deceased, if any, was clearly within the words of para. (i) of subsection (1) of S. 5. The burden of proof that the estate tail was vested in the deceased was on the Crown.

In their Honours' opinion the appellant must succeed. The law relating to estates tail in England became the law of New Zealand upon the founding of the Colony, and the rule in **Shelley's case** would, therefore, at that time apply to any case falling within it in New Zealand. The rule was a rule of law and not of construction, and, as stated in **Jarman on Wills,** 7th edn. Vol. III p. 1815, it "simply is that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heir or the heirs of his body, the word 'heirs' is a word of limitation, i.e., the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail." The rule was of ancient origin, and in course of time was extended to cases where the intention to create an estate tail was clear, but the testator had not used the technical terms "heirs" or "heirs of the body," but had used words equivalent to or synonymous with those terms, such as "son," "issue," etc. In such cases the ordinary rules of construction must be applied to the words in the will to ascertain whether a life estate was given to "A," and whether an estate in remainder was limited to his heirs or to the heirs of his body: **Goodeve and Potter's Modern Law of Real Property,** (1929), p. 334. And even the word "heirs" might be construed according to the clear intention of the testator in some other sense. In **Van Grutten v. Foxwell,** (1897) A.C. 658, Lord Macnaghten, in a characteristically luminous judgment discussed the origin, history, and effect of the rule, in the course of which he said (p. 668) that it was hardly necessary to observe that any expression which imported the whole succession of inheritable blood had the same effect in bringing the rule into operation as the word "heirs." See also **In re Simcoe,** (1913) 1 Ch. 552; **In re Hammond,** (1924) 2 Ch. 276. Again referring to **Jarman on Wills,** 7th edn. p. 1816, the learned author said that the rule was usually stated in the terms already quoted, but by the word "limitation" must be understood a limitation by way of remainder, as distinguished from a limitation by way of executory devise or shifting use, which, though it were to the heirs of a person taking a previous estate of freehold, vested in the heir as a purchaser. Their Honours paused here to observe that the word "ancestor" in the first quotation made from **Jarman** meant the last person who took the land by "purchase" and not by descent, and in the present case meant the tenant for life; and the word "limitation" as used in the present case served merely to limit or mark out the estate taken by a grantee under a deed or other document. Their Honours for the purposes of the present case adopted a passage from **Goodeve and Potter's Modern Law of Real Property,** 1929, at p. 333. There could be no doubt that if the law of entail had remained unaltered by Statute, the position would have been as submitted by the Solicitor-General, but an important change was made by S. 36 of the Conveyancing Ordinance, 1842. The effect of that enactment was correctly stated in **Garrow's Law of Property,** 2nd edn., Vol. 1, at p. 310. The section negatived the rule in **Shelley's case** in all cases in which the limitations mentioned occurred in a deed or will. The limitation in tail therefore did not coalesce or merge in the preceding life estate, but was restored to the category of contingent remainders. The deceased then had nothing more than a contingent remainder in the entailed lands, and their Honours next had to ascertain the nature and effect of that interest. Mr. Fearne in his classic work on **Contingent Remainders,** 10th edn. (1844) Vol. 1, p. 2, gave a table which clearly showed the difference between a vested interest and a contingent remainder. After quoting that table, and footnote (b) thereto, and from p. 61 of Vol. 2 of the same work, their Honours said that the law as to contingent remainders had not altered since Mr. Fearne published his masterly treatise, and was in the same sense stated in the leading text books; their Honours quoted from **Williams on Real Property,** 23rd edn., 397, 398, stating that the illustration given in that passage covered the present case which was governed by S. 36 of the Conveyancing Ordinance and not by the law as it was before the Ordinance came into force. The remainder to the deceased was contingent by virtue of S. 36; the contingency being the death of his mother, Mary Ann Moorhouse, during his lifetime. It was, therefore, a contingency which could be converted into a vested estate or interest in the entailed lands only in the event of his surviving his mother, and

as he died in his mother's lifetime, he took nothing. It was, therefore, abundantly clear that the estate tail in the present case never was in any sense vested in the deceased at the time of his death. His estate was, therefore, not liable to assessment for estate duty under S. 5 (1) (i) of the Death Duties Act, 1909, (S. 5 (1) (i) of the Death Duties Act, 1921) in respect of any interest in the estate tail. It was interesting to observe that that result was apparently in the mind of the testator when the will was prepared. That was shown by the clause at the end of the will directing that the provisions of the Ordinance should be implied in it. The clause could apply to S. 36 only. Neither the estate tail, nor any interest in it, formed part of the final balance of the estate of the deceased at the time of his death; his contingent remainder was defeated by his death in his mother's lifetime.

The answer to the question submitted to the Court was that the estate tail did not vest in the deceased, that the assessment made by the respondent in assessing the estate duty in respect of the dutiable estate of the deceased was wrong, and that, the estate tail, not having been vested in the deceased, was not liable to assessment for estate duty under the Death Duties Act, 1909.

Solicitors for appellant: **Hadfield and Peacock,** Wellington.
Solicitors for respondent: **Crown Law Office,** Wellington.

Reed, J.
Adams, J.
Ostler, J.
Smith, J.

March 24, 25; May 22, 1931.
Wellington.

JOHNSTONE AND NICHOL v. COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duty—Estate Duty—Transfers by Testator to Three Sons of Parcels of Land on which Partnership Business Carried on by Him and Two Sons—Donees Not Retaining *bona fide* Possession to Exclusion of Donor—Lands Part of Dutiable Estate of Testator—Death Duties Act, 1921, S. 5 (1) (c).

Appeal from part of a judgment of Myers, C.J., reported 6 N.Z.L.J. 342; the facts sufficiently appear in that report and in the judgment of Smith, J., below.

Johnstone and **Young** for appellants.
Solicitor-General (Fair, K.C.) and **Currie,** for respondent.

REED, J., said that he had had the opportunity of reading and considering the judgments of Adams and Smith, JJ., and that he agreed with the conclusion arrived at; that was to say, that the judgment appealed from correctly adjudged that the testator retained a benefit, and that the Commissioner's assessment based on that finding should be sustained. His Honour was requested to say that Ostler, J. concurred in the result.

ADAMS, J., said that he thought the judgment from which the appeal was brought was right for the reasons stated by the learned Chief Justice. Referring first to the gifts by the testator to his two sons and partners, His Honour was at first impressed by Mr. Johnstone's argument that when the gifts were made there was in existence an arrangement between the testator and his two sons that the partnership business should be carried on upon the testator's lands, and that this arrangement was a tenancy for the duration of the partnership or, in the alternative, terminable by a month's notice in writing under S. 16 of the Property Law Act, which continued until the testator's death, but on further consideration His Honour was satisfied that that could not be maintained. The facts were against it, and were too strong to leave any reasonable doubt. Such a tenancy could be terminated at any time by the parties to it, and in His Honour's opinion it was so determined. A new arrangement was made under which the two donees and the testator agreed that the partnership should continue to carry on its business on the whole of the land as before the gifts were made, and that thenceforth no rent for the lands should be paid by the partnership. The obvious effect of that was to terminate the earlier arrangement, by whatever name it might be described, and to substitute a new contract under which the lands retained by the testator and the lands transferred to the two partners were occupied and used by the partnership. That was clearly a benefit to the testator, because he took a share in the profits of the business. That new arrangement took effect from the registration of the transfers and it was not easy to resist the impression that it was agreed upon on or shortly after the date of the gifts. However that might be, it was plain that, from the time rent ceased to be payable, the testator obtained a benefit from the use and occupation of the lands which were the subject of the gifts to the beneficiaries George Nichol and William Nichol. The facts relating to the land transferred to James Nichol, when examined, showed with equal clarity that, from the date of the transfer, the testator, as a member of the partnership, received a similar benefit from the occupation and use of the land under a contract evidenced by the possession and by payment and acceptance of rent. In each case the testator continued to receive this benefit up to the date of his death. After citing S. 5 (1) (c) of the Death Duties Act, 1909, which was in force at the time when those gifts were made, and which appeared unaltered in S. 5 of the Death Duties Act, 1921, His Honour said that the gifts in the present case were clearly within the section and must, therefore, be treated as part of the estate of the deceased for the purpose of computing the death duties payable in respect of that estate.

SMITH, J., said that no order was made by the Supreme Court for the determination of any disputed question of fact under subsection (3) of S. 5 of the Death Duties Amendment Act, 1925, but the parties agreed that each of them should be at liberty to produce to the Court such evidence as they thought fit upon the issue whether the payments made to James Nichol were paid and received by way of rent. The present position was that the questions in issue must be determined upon the facts set out in the case stated together with the Court's finding of fact upon the issue put to it regarding rent. The Court's power to draw inferences was limited to inferences from those facts. As was said by the Lord President (Lord Dunedin) in **Lord Advocate v. Stewart,** 8 Fraser, 579, 595, with regard to the power of the Court to draw inferences from a joint minute of admissions, "This seems to me to exclude all inferences except such as fall to be drawn from the terms of the admissions themselves." In determining liability to taxation under a taxing Act, the Court had regard to the substance rather then the form of the transaction. The Court would decide according to the real nature of the transaction, but in determining the substance, the Court was not entitled to disregard the conveyancing form altogether. It was, His Honour thought, to be taken into account in determining the substance. His Honour referred in this connection to the observations of Collins, M.R., in **Attorney-General v. Glossop,** (1907) 1 K.B. 163, at p. 172, and to the observations of Isaacs, J., in **Lang v. Webb,** 13 C.L.R. 503, 514. If due weight were not given to the form of the documents in determining the substance, then the Court would be in danger of assuming the existence of some transaction which was only imaginary, and not real.

His Honour accordingly proceeded to consider what was the substance of the transactions in question. In 1906, the assets of the partnership consisted of certain live and dead farming stock and plant. One half belonged to and was contributed by the testator and the other half by the two sons W. I. Nichol and G. B. Nichol in equal shares. From 1906 until 1923, that arrangement continued, and the partners were entitled to the profits in the proportion of one half share to the testator and one fourth share to each of the sons. In 1923, the shares were rearranged, each partner becoming entitled to one-third of the assets and one-third of the profits. At the time of the rearrangement, there were no partnership liabilities, and the partnership assets amounted to £27,703 13s. 6d., made up of cash and stock. No further alteration in the terms of the partnership was made until the death of the testator on 31st December, 1927. The partnership business in the aforesaid assets was commenced and carried on upon certain lands which belonged to the testator, and upon lands which belonged to the testator and the two partner sons as tenants in common, the share of the testator therein being one half, and the share of each son being one quarter. From 1906 to 1919 the testator regularly drew from the partnership the sum of £365 half-yearly for rent. The sons drew no rent and received no rent from the partnership or from the testator himself. All local rates and land tax were paid by the partnership and not debited to or recovered from any of the individual partners. The terms of the partnership were not in writing. None of the land was ever the property in fee of the partnership and there was no written agreement as to the tenure of the lands; and the use of the lands aforesaid for the business of the partnership was by verbal agreement or tacit understanding of the parties concerned, i.e. the three partners. The substance, then, of the arrangement between 1906 and 1919 as regards the use of the land of the testator by the partnership was that he charged the partnership £365 half-yearly for the use of his lands by the partnership. There was no statement as to whether that amount was less than it otherwise would have been if the sons' half share in the land in the fifth schedule had not been used by the partnership

without payment or credit of rent for the same; but as the sons received no rent, the implication was that it was not.

Mr. Johnstone contended on the authority of **Pocock v. Carter,** (1912) 1 Ch. 663, that the legal position was that the testator had granted a tenancy of his lands to the partnership for the duration of the partnership. There was a preliminary difficulty upon that view, viz.: whether the testator could lease to himself jointly with the other partners; and S. 19 of the Property Law Act, 1908, and the definition of "conveyance" in S. 2 of that Act were referred to. Mr. Currie submitted argument for the purpose of showing that the power to "convey" conferred by S. 19 should not be construed to include a power to lease, but His Honour did not find it necessary to determine that question. His Honour assumed, but did not decide, in favour of the appellants that the testator could and did let his lands to himself and his two partner sons jointly for the purposes of the partnership for the sum of £365 paid half-yearly to the testator by the partnerships. His Honour assumed also that such tenancy was to be regarded in its inception, and prior to the gifts made in 1919, as a tenancy from the testator to the partnership intended by the parties concerned to exist for the duration of the partnership. Such an arrangement did not prevent its cancellation and the substitution of another arrangement by verbal agreement or tacit understanding of the parties concerned. In 1919, the testator gifted (a) lands used by the partnership and then valued at £7,718 to his partner son G. B. Nichol; (b) lands used by the partnership and then valued at £12,830 to his partner son W. J. Nichol; (c) lands used by the partnership and then valued at £7,273 to his son J. Nichol who was not a partner. The testator also effected a partition of the lands held in common as the result of which a little more than one-fourth of the total area of the lands in the fifth schedule was transferred to him; and a little less than three-fourths was transferred to the partner sons as tenants in common in equal shares. The parcel so vested in the sons exceeded in value by £4,496 the value of the undivided moiety theretofore belonging to them. The testator himself retained the lands described in the first schedule, until the date of his death, when they were valued at £6,995. The aforesaid transfers and the transfer on partition were all of the unencumbered fee simple in the lands. No reservation of any kind was made in the transfers. There was no express statement in the case as to when the sons, William, George or James actually knew of the gifts to them. The evidence of James was admitted only for the purpose of determining the ultimate fact whether the payments to him were rent or not; and his statement that he did not know of the transfers to him until some time afterwards was evidentiary only upon that question and was not itself an ultimate fact in the case. In those circumstances it was plain that the presumption of law operated. The acceptance of a gift by a donee was to be presumed until his dissent was signified even though he was not aware of the gift; and that was equally so although the gift was of an onerous nature: 15 Halsbury 418, par. 830; **Siggers v. Evans,** 5 E. & B. 367; **Standing v. Bowring,** 31 Ch. D. 282. Upon the case as stated, there being no evidence that any son declined his gift, His Honour concluded as a matter of law that it was to be presumed that the three sons accepted the gifts at the time they were made.

The first question to be determined was whether upon the making of the said gifts the tenancy from the father to the partnership for the duration of the partnership was determined. If it was not determined, then the sons took a gift of only the reversion. If it was determined, they took, in the eye of the law, a gift of the unencumbered fee simple in possession. The following facts were in evidence to enable the Court to determine that question: (1) The aforesaid gifts having been made, the partnership business in the assets aforesaid—cash and live and dead stock—continued to be carried on upon the lands and the interests of the partners in those partnership assets continued as before until 1923 when the rearrangement of interests to those assets set out above was made; and thereafter continued until the testator's death; (2) Upon and after the making of the gifts, the use of the aforesaid lands continued by verbal agreement or tacit understanding of the parties concerned, i.e. the testator and his sons William, George and James; but was never the subject of discussion among the partners, i.e. the testator and his two sons William and George; (3) As the result of that state of understanding among the parties concerned: (a) the local rates and land tax continued until the death of the testator to be paid by the partnership, and were not debited to or recovered from any of the individual partners or James Nichol; (b) the testator drew no more payments for rent; (c) the sons receive no payment or credit for rent, (in terms, that meant that neither William nor George nor James received any payment or credit for rent, but the question had been expressly left open as to James, so that, by implication, the sons referred to in paragraph 22 of the case were only William and George); (d) on 8th July, 1921, the testator paid £600 to his son James; (e) the partnership firm paid the following sums to James Nichol: on 3rd July, 1923, £300, on 15th July, 1924, £300, on 15th July, 1925, £500, on 15th July, 1926, £500, on 15th July, 1927, £500; (f) the partnership considered that they were indebted to James Nichol for a proportion of the sum of £500 for the portion of the year, 1928, during which the land of James Nichol was used by the firm. Upon the issue as to whether the payment of £600 by the testator to his son James was rent or not, there was no specific finding of the Court below. His Honour, upon a review of the evidence relating to this point, found that the payment of £600 was paid and received by way of rent. Upon the issue as to whether the payments made by the partnership to James Nichol were by way of rent or not, James was content to accept the amounts paid as the proper amounts which should be paid; and His Honour thought it clear that those amounts were paid and received as rent. Those being the relevant facts, the question whether the tenancy from the testator to the partnership, which His Honour had assumed was intended prior to the gifts of 1919 to be for the duration of the partnership, was determined upon the making of those gifts, rested upon the intention of the parties to be gathered from the facts. Upon His Honour's assumption, the question was not simply one of a tenancy at will being destroyed by the operation of law by a conveyance of the reversion with notice, as in **Doe d. Davies v. Thomas,** 20 L.J. Ex. 367, 6 Ex. 854, 857. The outstanding facts were that the testator gave clear transfers to his sons and that he drew no more rent after the gifts were made. Instead of receiving rent in respect of lands formerly held by him and then used by the partnership, but in 1919 transferred to James, he actually paid rent himself to James for the use of those lands by the partnership during the years 1920 and 1921. He remained a member of the partnership which paid rent to James for those lands in the following years. Clearly, in His Honour's opinion, the testator retained no reversion in the lands transferred to James. That involved a break in the previous tenancy from the testator to his other sons in respect of the lands transferred to James. In respect of the land transferred to the partner sons, the testator drew no more rent from the partnership. Those facts coupled with clear transfers made the conclusion irresistible, to His Honour's mind, that, both in strict law and in substance, what was given by the testator was the whole estate in the land, freed by the agreement or understanding of the parties from any tenancy from him to the partnership of any duration whatever. Each partner son then by verbal agreement or tacit understanding permitted the partnership, or his fellow partners as the case might be, to use his land without payment of rent by the partnership. Each then, by creating in that manner a tenancy of some nature—whether at will, by the month or for the duration of the partnership matters not—turned his own freehold into a reversion. The partnership continued to be carried on in manner aforesaid upon the same lands and the interests of the partners in the partnership assets and in the partnership profits continued as before. The fee simple of the greater part of the lands used by the partnership had, however, changed hands, and by the effect of agreement, verbal or tacit, had changed hands clear of any tenancy from the testator to the partnership upon the basis that the partnership would forthwith have the use of the lands from the new owners of the fee and not from the testator. The substance of the transaction would have been different, His Honour thought, if the partnership had continued to pay rent to the testator, notwithstanding the transfers. His Honour thought, then, that it would have been clear in substance that the intention was that the sons should take only the reversion consequent upon the determination of the tenancy in respect of which rent was being paid to the testator.

The foregoing conclusion upon the substance of the transaction might be inconsistent with the views of some of the Judges upon a similar state of facts in **Thomson v. Commissioner of Stamp Duties,** 28 S.R. (N.S.W.) 195, and 40 C.L.R. 394. The facts of that case were concisely set out in the judgment of Street, C.J., in the Supreme Court. His Honour had carefully considered the views of all the Judges both in the Supreme Court and in the High Court and had come to the conclusion, with respect, that the view expressed by Isaacs, J., Higgins, J., and Powers, J., the majority in the High Court, was to be preferred upon the question at issue. In their view, the substance of the transaction in **Thomson's case** was a transfer by Currie to his wife of the unencumbered fee simple. Isaacs, J., thought indeed that there was also a stipulation that the wife should grant a lease to the partners out of the estate transferred to her, but Higgins, J. and Powers, J. disagreed with him on the evidence upon that point. As His Honour agreed with the view of the majority of the High Court as to the substance of the transaction in **Thomson's case,** His Honour did not regard that case as a decision in favour of the appellant in the present case, even though the Court of Appeal in New Zealand was not bound by it.

If then the previous tenancy was determined and new tenancies immediately substituted by verbal arrangement or tacit understanding, were the gifts to the sons or any of them within S. 5 (1) (c) of the Act ? They were not, if the Crown failed to bring the case within the Section. His Honour was of opinion, however, that the Crown had brought each gift within the Section. There was one condition of *bona fide* possession and enjoyment which applied to every gift and with which none of the gifts complied as a condition of exemption. The possession and enjoyment of the property comprised in the gift must from the time of the assumption thereof by the beneficiary be to the entire exclusion of the deceased. Upon His Honour's view of the present case the testator as a member of the partnership became a tenant to each son in respect of the land gifted to that son; and in respect of that land it followed that the son had mediate possession and the testator had immediate possession. See **Salmond's Jurisprudence,** 7th Edn. 12. As the Statute aimed at the entire exclusion of the deceased from possession of any part of the property gifted after *bona fide* assumption thereof, by the beneficiary, it was plain, His Honour thought, that the deceased might not have immediate possession from the beneficiary as the mediate possessor. In other words if the deceased became tenant to the beneficiary at any time within the required period the deceased was not entirely excluded from the possession of the land which he had as the owner of the unencumbered fee simple. That was the view adopted, His Honour thought, by Hamilton, J., in **Attorney-General v. Seccombe,** (1911) 2 K.B. 688, 699, 700. In the opinion of the learned Judge in that case the Statute was aimed against all possession by the deceased derived under an enforceable right granted by the beneficiary when the right of possession so granted was part of the deceased's rights in the property before the transfer. That was the position in the present case because, upon the inference which His Honour thought must be drawn from the facts, the unencumbered fee simple was vested in the testator at some moment of time to enable him to transfer it in that state to the beneficiary. The view just expressed rested upon possession without any reference to enjoyment. In **Lang v. Webb,** 13 C.L.R. 503, 511, Griffith, C.J. said that the enjoyment of an estate in fee subject to lease was in the landlord and not in the tenant within the meaning of the section, although Barton J. and Isaacs J. did not appear to have taken that view. The Chief Justice, having so distinguished enjoyment from possession, said that there must be immediate assumption of possession as well as of enjoyment and that where an actual change of possession was possible it was essential. That statement of the Chief Justice with which Barton, J. and Issacs, J. agreed appeared to be inconsistent with the views expressed by Higgins, J. and Powers, J. in **Thomson's case,** 40 C.L.R. 394. In His Honour's opinion the proper construction was that adopted by Hamilton, J. in **Seccombe's case** and His Honour concluded that as between the beneficiary and the deceased, the deceased must have been excluded during the required period from the possession of the land under any enforceable contract when the right of possession so acquired was part of his own property before the gift was made.

Apart from the foregoing ground which applied to all three sons, it was clear in His Honour's opinion that the two partner sons did not retain possession and enjoyment of the land to the exclusion of the testator from "any benefit by contract or otherwise." That was not clear with regard to James because the partnership was paying him a substantial rent for the occupation of his land. There was nothing to show that that rent was not a rack rent, and if the partnership paid James fully for its occupation of his land neither it nor any member of it was, by reason only of that fact, receiving a "benefit" by contract or otherwise (**Attorney-General v. Seccombe,** (1911) 2 K.B. 688, 704) and such a conclusion followed from the judgments of Higgins, J., and Powers, J., in **Thomson's case.** In so far as the learned Chief Justice in the Court below had adopted a contrary view with regard to James's land His Honour was unable, with respect, to agree with him. It might, however, be the case that possession by a donor of the land gifted at a rack rent under a lease voluntarily granted by the donee would if coupled with other circumstances, such as that the land so held was surrounded by other land of the donor, amount to a "benefit" within the Section. That was a different question and it was expressly left open by Griffiths, C.J., in **Lang v. Webb,** 13 C.L.R. 503, 511. But in view of His Honour's conclusion that the testator was not entirely excluded from the possession of James's land the appellant could not succeed in respect of that land upon the basis that the Crown had failed to show that the rent paid to James was not a rack rent. In His Honour's opinion the appeal should be dismissed.

Solicitors for appellant: **Downie Stewart and Payne,** Dunedin.

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

Supreme Court

Myers, C.J. March 2, 3, 4, 5, 11; April 20, 1931. Wellington.

JORGENSEN v. FINDLATER AND FINDLATER.
FINDLATER v. PUBLIC TRUSTEE AND QUEENSLAND INSURANCE CO. LTD.
FINDLATER v. PUBLIC TRUSTEE.
FINDLATER v. DWAN.
BIGHAM v. DWAN.

Negligence—Collision—*Actio Personalis Moritur Cum Persona* **—Death of Negligent Driver in Collision—Executors Liable only for Damage to Property—Motor Vehicles Insurance (Third Party Risks) Act, 1928 not Affecting Operation of Maxim even if Insured Driver Dies Insolvent—Neither Executors Nor Insurers of Deceased Driver Liable for Damages for Personal Injuries—***Res Ipsa Loquitur***—Application of Maxim to Collision Cases Discussed—Collision Between Moving Vehicle and Stationary Vehicle—No Explanation by Driver of Moving Vehicle—Circumstances Relevant to Infer Negligence—Civil Procedure Act, 1833 (3 and 4 Wm. IV. c. 42) S. 2 —Motor Vehicles Insurance (Third Party Risks) Act, 1928, Ss. 3, 6, 10.**

About midnight on 17th November, 1930, a collision occurred on the Hutt Road between two motor cars driven by Anna Findlater and one Wiggs respectively. Miss Findlater's car was proceeding Northwards to Petone, Wigg's car Southwards to Wellington. The car that Miss Findlater was driving belonged to her sister, Dr. Findlater, who was a passenger in the car. There was another passenger named Bigham. In Wigg's car there were two passengers, Mrs. Jorgensen and Wallace. The evidence was that the night on which the accident took place was an ordinarily fine night, dark, and that there was no moon. After the impact Dr. Findlater's car came to rest in a position on the Western side of the bitumenised portion of the road—half on the bitumen and half on the metal—facing west. Wigg's car came to rest on the eastern side of the road on the metal between the edge of the bitumen and the kerb, in a position 45 feet nearer Wellington than the Find later car. As a result of this collision both the Findlater car and the Wiggs car were seriously damaged. Miss Findlater and Mrs. Jorgensen sustained serious bodily injuries. Wiggs himself sustained injuries from which he died. His executor was the Public Trustee. After the two cars had for an appreciable time been stationary in the positions described, another motor car, driven by Mrs. Dwan, travelling in a northerly direction from Wellington, ran into the Findlater car, doing further damage to that car and causing bodily injury to Dr. Findlater and Bigham. There was spread over the road a certain amount of debris in the shape of small pieces of glass which had been broken at the time of the compact between the Findlater and Wiggs car. It appeared that after the Findlater car came to rest the mechanism of the horn in some way became and continued active, and the horn sounded continuously from the time of the collision with the Wiggs car until the time that the Findlater car was run into by Mrs. Dwan's car. The Wiggs car was on the eastern side of the road entirely off the bitumen and on the metal. Behind the Wiggs car was a car driven by one Walters which had passed the Findlater car but had stopped upon the occurrence of the accident. It was apparently on the metal and off the bitumen, well on the eastern side of the road. On either side of the road, but 45 feet away from each other in a straight line, and a further distance diagonally, were the two partially wrecked cars, one at either edge of the bitumen. In these circumstances there came along Mrs. Dwan's car which ran into the Findlater car and converted it from a partial into a total wreck. Mrs. Dwan's car must have been travelling at a fairly considerable speed because it seemed from the evidence of Westerby to have moved the Findlater car a substantial distance. As the result five actions were commenced as follows: (1) Mrs. Jorgensen against Dr. Findlater and Miss Findlater for special damages and £500 general damages for injuries alleged to have been sustained through the negligent driving of the Findlater car. (2) Dr. Findlater against the Public Trustee as executor of Wiggs claiming the sum of £250 for damage to her motor car which damage she claimed was caused by the negligent driving of Wiggs. (3) Anna Findlater against the Public Trustee as executor of Wiggs, and the Queensland Insurance Company

Limited, claiming against the Public Trustee £31 12s. 5d., being the value of clothing and effects alleged to have been damaged as a result of the collision, and as against the Queensland Insurance Company £566, being special and general damages in respect of bodily injuries sustained by reason of the alleged negligence of Wiggs; and alternatively (if judgment could not be had against the Insurance Company), claiming £597 12s. 5d. against the Public Trustee. (4) Dr. Findlater against Mrs. Dwan claiming three sums of £274 11s. 6d., £27 0s. 0d. and £19 18s. 0d. special damages, and £1,000 general damages for damage which the plaintiff alleges was caused by the negligence of Mrs. Dwan. (5) Bigham against Mrs. Dwan for £55 1s. 0d. special damages and £300 general damages consequent upon the defendant's alleged negligence in respect of the second collision. The five actions were tried together.

C. A. L. Treadwell and **James** for plaintiffs Dr. Findlater, Anna Findlater and Bigham.

P. B. Fitzherbert and **A. J. Mazengarb** for plaintiff Jorgensen.

P. B. Cooke and **Christie** for defendants Dr. Findlater and Anna Findlater.

Leicester and **Watterson** for defendants Public Trustee and Queensland Insurance Co. Ltd.

O'Leary for defendant Dwan.

MYERS, C.J., said that he proposed to consider the five actions seriatim:

(1) **Jorgensen v. Dr. and Miss Findlater.** His Honour reviewed the evidence and held on the facts that there was no negligence on the part of Miss Findlater. Judgment must therefore be for the defendants.

(2) **Dr. Findlater v. Public Trustee.** His Honour said that it followed from what he had said in connection with the Jorgensen action that Dr. Findlater would have been entitled to damages as against Wiggs because the collision was brought about by his negligence. Indeed Mr. Leicester expressly said that he found himself unable to contend that there had not been negligence on the part of Wiggs. He also conceded that as it was damage to property only that was being claimed in this action, the plaintiff was by virtue of S. 2 of the Civil Procedure Act, 1833, (3 & 4 Wm. 4 c. 42), which he admitted to be in force in New Zealand, entitled to recover against the Public Trustee as executor of Wiggs. His Honour thought it reasonable on the evidence to say that the damage to the car was caused in equal proportions by the Wiggs car and the Dwan car respectively. His Honour thought that the car was overvalued at £250, and that a reasonable sum to award for the damage done would be £200. As in the action under consideration Dr. Findlater was entitled to recover one half that amount, she was accordingly entitled to judgment for £100.

(3) **Anna Findlater v. Public Trustee and Queensland Insurance Company Ltd.** His Honour said that the case raised an interesting question of law arising out of the construction of the Motor Vehicles Insurance (Third-party Risks) Act, 1928, in so far as concerned the claim against the Queensland Insurance Company, which company was the indemnifier of Wiggs for the purposes of the Act. The argument for the Company was that at common law the plaintiff could not have succeeded in an action against Wigg's personal representative, that that position was not affected by the 1928 Act, and that consequently there was no liability on the part of the Company. It was properly admitted by counsel for the plaintiff that the Company was not liable unless it was made so by subsection (1) of S. 10 of the Act. It was said that, in the present case, Wiggs did die insolvent—whatever the expression "dying insolvent" might mean—and for the purposes of the present judgment, without so deciding, His Honour assumed that he did die insolvent. It was necessary, therefore, to ascertain what was the "owner's liability" in the existing circumstances. To ascertain that it was necessary to refer to S. 3 (1) and perhaps to the title of the Act. The Act was described in the title as an Act to require the owners of motor-vehicles to insure against their liability to pay damages on account of deaths or bodily injuries caused by the use of such motor-vehicles. S. 3 (1) in so far as it was material enacted that every person being the owner of a motor-vehicle should in accordance with the Act, and subject to certain exceptions and limitations which were not material to the present case, insure against his liability to pay damages on account of the death of any person or of bodily injury to any person in the event of such death or bodily injury being sustained or caused through or by or in connection with the use of such motor-vehicle in New Zealand. The subsection then proceeded to extend in one direction and in one direction only the owner's common law liability. The extension was in the following words: "For the purposes of this Act and of every contract of insurance thereunder every person other than the owner who is at any time in charge of a motor-vehicle, whether with the authority of the owner or not, shall be deemed to be the authorised agent of the owner acting within the scope of his authority in relation to such motor-vehicle." S. 6 (1) of the Act enacted that on payment of the insurance premium required under S. 5 to be paid by every owner of a motor-vehicle on making application for the issue of a license or of registration plates, the insurance company nominated by the owner should be deemed to have contracted to indemnify him to, the extent provided by the section, from liability (including the extension of liability created by subsection (1) of S. 3 and previously referred to) to pay damages on account of the death of or of bodily injury to any person or persons, where such death or bodily injury was the result of an accident happening at any time during the period in respect of which the insurance premium had been paid and was sustained or caused by or through or in connection with the use of such motor vehicle in New Zealand. With the exception of the special provision in S. 3 (1) already mentioned, His Honour could find nothing in the Act which extended the owner's liability at common law. At common law the maxim *Actio personalis moritur cum persona* applied, and a right of action for tort was put an end to by the death of either party in the event of such death occurring before the recovery of judgment. The Civil Procedure Act, 1833, S. 2 dealt only with injuries to property and it did not affect the case of a personal injury causing death. Counsel for the plaintiff contended that the words "the amount of the owner's liability" in S. 10 (1) were sufficient in themselves to abrogate the common law rule and created a new liability. His Honour was unable to accede to that contention. The subsection referred to a number of different events and then proceeded to say that upon the happening of any of those events the amount of the owner's liability should be a charge on the insurance moneys. That to His Honour's mind could only mean the amount of the owner's liability where there existed liability which was to be found outside S. 10. The object of that section was to create a charge in respect of any existing liability that there might be and to prevent the injustice that was shown to exist in such cases as **In re Harrington Motor Co. Ltd., Ex parte Chaplin,** (1928) 1 Ch. 105, and not (as His Honour thought) to create a new liability on the part of either the owner of a motor-vehicle or the insurance company except of course to the extent of covering the extended liability under S. 3 (1). His Honour was conscious of the anomaly of the position. If, instead of Wiggs himself driving his car on the night of the accident, another person had been driving it, and was killed, but Wiggs whether a passenger or not had remained alive, an action would have lain at the suit of Miss Findlater against Wiggs, and the insurance company would have been liable on its indemnity. That, however, was not the position. Wiggs was in fact driving his own car and was killed in the accident. The *actio personalis* rule applied with the result in His Honour's opinion that Wigg's liability to pay damages ended with his death, and it was "his liability to pay damages" that was insured against under S. 3 (1) of the Act. If then his liability ended with his death His Honour did not see how the Insurance Company could be made liable. The conclusion at which His Honour had arrived made it unnecessary to consider the meaning of the words "dying insolvent" in S. 10 (1). Whatever the meaning of the words might be, it seemed plain enough that S. 10 (1) had no application to the case of the owner of a motor-vehicle dying insolvent. To give S. 10 (1) the meaning sought to be placed upon it by counsel for the plaintiffs would involve the absurdity that there would be no liability on the part of the personal representatives or the indemnifying insurance company where the owner died solvent before judgment was recovered against him, but that there would be a liability on the part of the insurance company where the owner died insolvent. His Honour's conclusion had been arrived at with much reluctance because he appreciated the anomaly of the result. It might be that the draftsman of the Act intended to abrogate what His Honour called the second branch of the *actio personalis* rule. If so, then, if His Honour was right, there was an omission which only the Legislature could cure. His Honour suggested that, if and when an amendment of the Act was being considered, it might be advisable to amend S. 10 in such a way as to leave the charge against the insurance company to be enforced by summary process after the liability of the owner of the vehicle had been established in an action against the party primarily liable. For the reasons given there must be judgment in the action under consideration for the defendants save as to the damage to property, for which there must be judgment for the plaintiff against the Public Trustee for the sum of £29.

Dr. Findlater v. Mrs. Dwan. His Honour said that at the conclusion of the plaintiff's case Mr. O'Leary on behalf of Mrs. Dwan applied for a nonsuit, an application which His Honour

overruled. He called no evidence for the defendant and subsequently renewed his application for judgment for the defendant or alternatively for a nonsuit. He contended upon the authority of **Wing v. London General Omnibus Co.,** (1909) 2 K.B. 652, and particularly upon the judgment of Fletcher Moulton, L.J., that the doctrine of *res ipsa loquitur* could not be applied in the circumstances of the case and that there was no evidence of negligence on the part of the defendant. He relied also upon the case decided in the Court of Appeal of **Thompson v. Leatham,** 4 N.Z.L.J. 187 (apparently not reported elsewhere) In that case Sim, J., in an oral judgment in which the other members of the Court concurred, said it was clear that the maxim *res ipsa loquitur* did not apply to an accident on a highway, and that there was nothing in the circumstances of the collision to justify the learned Judge in the Court below in holding that it necessarily involved negligence on the part of one or both of the drivers. His Honour had looked at the Record in that case and His Honour found, as he had expected to find, that although the accident happened in broad daylight in a public street and there was no other traffic in the vicinity, it was nevertheless the case of a collision between two moving vehicles. His Honour could not help thinking that the learned Judges in the Court of Appeal when they said that the maxim did not apply to an accident on a highway had in mind such an accident as they were then actually considering, namely a collision between moving vehicles. His Honour could not think that they necessarily intended to exclude the operation of the maxim from an accident on a highway where a moving vehicle ran into a stationary object. His Honour did not, of course, mean to suggest that whenever a moving vehicle ran into a stationary object the maxim necessarily applied. All he said was that **Thompson v. Leatham,** in His Honour's opinion, did not, nor could His Honour find any authority that did, necessarily exclude the operation of the maxim from such a case. The question as to whether or not it did apply must, His Honour thought, depend upon the circumstances of the case. That seemed to have been the view taken by the Court of Appeal in England in **McGowan v. Stott,** 99 L.J.K.B. 357, and **Halliwell v. Venables,** *ibid* 353. The judgment of Fletcher Moulton, L.J., in **Wing v. London General Omnibus Co.** (*sup.*) was considered in **McGowan v. Stott** and the opinion was expressed that he had gone considerably beyond anything said in **Scott v. London and St. Katherine's Dock Co.,** 34 L.J. Ex. at p. 222 : 3 H. & C. at p. 601. And the Court in both **McGowan v. Stott** and **Halliwell v. Venables** acted upon the rule laid down in **Scott v. London and St. Catherine's Dock Co.** Even in **Wing v. London General Omnibus Coy.** it was said by Fletcher Moulton, L.J., in reference to road accidents : "Exceptional cases may occur in which the peculiar nature of the accident may throw light upon the question on whom the responsibility lies." In that case there was evidence that a motor omnibus had skidded upon a road the surface of which was greasy from rain and that it ran into an electric light standard. It was not disputed that motor omnibuses had a tendency to skid when the road was greasy. The circumstances of the present case were quite different. His Honour next referred to the observations of Lord Dunedin in **Ballard v. North British Rly. Co.,** (1923) S.C. (H.L.) 43 at p. 54, upon the *res ipsa loquitur* rule. It was sufficient in the present case, His Honour thought, first to repeat that the collision did not happen between two moving vehicles driven by persons each of whom had an equal duty not to collide with the other, but between a moving vehicle and a stationary object ; and then to say that the fact of the accident in the circumstances of the case was relevant to infer negligence, and that the cogency of the fact of the accident remained by reason of the defendant having shown no way in which the accident might have happened without negligence. Lord Shaw in **Ballard's case** at p. 56 expressed his view in terms very similar to those used by Lord Dunedin. In **Henderson v. Mair,** (1928) S.C. 1, (1928) Sc. L.T. 16, the Lord Justice-Clerk (Alness) said he was not satisfied that the doctrine of *res ipsa loquitur* applied "in its entirety" to a car accident of the kind then under consideration. But the accident that His Honour had to deal with was an accident of a different nature from the accident in that case : and moreover His Honour was not applying the doctrine in its entirety, but was saying no more than that, to use the words of Lord Dunedin, the fact of the accident in the circumstances was relevant to infer negligence, and that no reasonable explanation was offered by way of answer. In the present case the car that did the damage was under the management of the defendant, and, in His Honour's opinion, the circumstances of the case were such as that the accident was one which in the ordinary course of events would not happen, or should not happen, if the person who had the management of the car used proper care. It must be assumed, of course, that the defendant's car was equipped with powerful headlights as required by the regulations in that behalf and that the lights were lighted. Subject to any explanation that there might be, and Mrs. Dwan had vouchsafed none, it was difficult to see how the accident could have happened if she was using proper care and keeping a proper look-out. There was the additional fact that there was spread over the road a certain amount of debris in the shape of small pieces of glass which had been broken at the time of the impact between the Findlater and Wiggs cars. His Honour could not see, however, that that really affected the matter. Mrs. Dwan should have seen from some distance away the two partially wrecked cars, one on either side of the road, and one would think that her duty was to slow down or perhaps even stop, especially if and when she saw the small pieces of glass on the road. His Honour thought, then, that the circumstances showed a *prima facie* case of negligence against Mrs. Dwan which required an answer. She had failed to answer and, therefore, His Honour must hold the plaintiff entitled to succeed and to recover £71 9s. 6d. special damage, £100 for damage to her car, and £300 general damages.

(5) **Bigham v. Dwan.** It followed that if Dr. Findlater was entitled to succeed against Mrs. Dwan, so was Bigham, and His Honour accordingly awarded to Bigham £53 special damages and £150 general damages.

Solicitors for plaintiff Jorgensen : **P. B. Fitzherbert,** Wellington.

Solicitors for plaintiffs Dr. and Miss Findlater and Bigham : **Treadwell and Sons,** Wellington.

Solicitors for defendants Dr. and Miss Findlater : **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitors for Mrs. Dwan : **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for Public Trustee and Queensland Insurance Co. Ltd. : **Leicester, Jowett and Rainey,** Wellington.

Herdman, J. March 9 ; April 18, 1931.
Auckland.

WILLIAMS v. SUBRITZSKY.

Practice—New Trial—Evidence—Application for New Trial Challenging Decision of Court on Questions of Law—No Dispute as to Findings of Fact—Appeal Proper Remedy—Objection that Evidence Improperly Admitted by Judge Not Sustainable where No Objection Taken at Trial—No Substantial Wrong or Miscarriage of Justice—Evidence that Person Described in Written Agreement as "Vendor" was Agent for Undisclosed Principal Properly Admitted—Code of Civil Procedure, Rule 276.

Motion by defendant for a new trial in an action in which Herdman, J. gave judgment for the plaintiff for £150 and costs. The application was made on nine separate grounds. Two of those grounds were abandoned upon the hearing of the motion and two of them were stood over for further consideration. The motion is reported only as to the remaining five grounds which in substance amounted to this—that the learned Judge improperly admitted parol evidence to prove that one Williams was acting as agent for an undisclosed principal, his wife, the plaintiff in the action, at the time when he gave a certain option to purchase.

Hall Skelton in support of motion.
Prendergast to oppose.

HERDMAN, J., said that there was no question of setting aside the findings of a jury for the case was tried without a jury ; nor was any attack made upon the findings upon any question of fact. In the five grounds relied upon by Mr. Hall Skelton the decision of the trial Judge upon questions of law were challenged. There was in effect an appeal on point of law from the decisions of one Judge. His Honour after referring to Rule 276 said that the course that should be followed in such circumstances had been laid down in **McKay v. Oram,** 7 N.Z.L.R. 250, and in **Klingenstein v. Walters,** 3 N.Z.L.R. C.A. 18. The party dissatisfied should appeal to the Court of Appeal and not move for a new trial. If in the present case there had been a misconception of the facts and upon that misconception a judgment had been pronounced His Honour might order a new trial. But there had been no misconception about the facts. Subritzsky agreed to buy the store and actually got possession of it. The applicant sought to attack the judgment alleging

that it was erroneous in point of law. As His Honour understood Mr. Hall Skelton's argument the substantial ground upon which he relied was that parol evidence was inadmissible to prove that Williams was acting for an undisclosed principal—his wife—when he gave an option for the purchase of the store. His Honour had no note that any objection was taken at the trial for the admission of the evidence of Mrs. Williams so, under Rule 278, a new trial could not be granted upon the ground that her evidence was improperly admitted. Under the guise of a motion for a new trial an attempt was being made to set aside a judgment upon a ground which was not raised at the trial. In **Formby v. Formby,** 102 L.T. 117, evidence was admitted in the County Court to contradict a written document. It was sought to prove the existence of an undisclosed principal. No objection to the admission of that evidence having been taken in the Couty Court the judgment pronounced in that Court stood.

There was yet another reason why the application must fail. Assuming that the evidence was improperly admitted, His Honour was satisfied that no substantial wrong or miscarriage of justice had been thereby occasioned. Rule 277 therefore applied, for it declared that in such circumstances a new trial should not be granted. Miscarriage of justice was the fundamental ground upon which an application for a new trial was always founded.

It was really not necessary for His Honour to pursue the matter further, but it would probably be more satisfactory to all concerned in the case if he stated that having regard to the special form of the contract, evidence was, in his opinion, properly admitted to prove that Mrs. Williams and not Williams was the owner of the store. When the hotel property was sold Mr. Williams was the owner of the freehold but he was not the owner of the store which was a chattel and the property of Mrs. Williams. The store was not leased by Williams to his wife. That was indisputable. On the other hand it was equally certain that the land on which the store stood was leased by Williams to Mrs. Williams. The language used in the schedule to the contract was lacking in certainty, but it was susceptible of the interpretation that certain hotel property, upon which the store upon skids stood, was leased to Mrs. Williams. In other words the reference to leasing related to the land upon which the store stood, and not to the store over which, as vendor, Williams purported to give an option. It followed, therefore, that the words of the written instrument were not inconsistent with the conclusion that Williams was acting as agent for his wife in respect of the chattel which she owned. The whole of the document must be looked at for the purposes of interpretation. Throughout the contract Williams was designated as the "vendor." He was not described as the "owner" or "proprietor." A person might be a "vendor" but he need not necessarily be an "owner." The terms of the contract in so far as they related to the chattel were not incompatible with the existence of an undisclosed principal, so the rule laid down in **Williams on Vendor and Purchaser,** 3rd Edition, 1046, applied, namely: "But if the one contractor did in fact make the contract as agent for some principal who had authorised him to make it, the principal may, as a rule, sue or be sued on the contract, and the facts necessary to establish his right or liability may be proved by parol evidence. For such evidence does not contradict or alter the written agreement, but merely adds something to it." The present case being one which dealt in part with the sale of a chattel, resembled in principle the case of **Fred Drughorn Ltd. v. Rederiaktiebolaget Transatlantic,** (1919) A.C. 203. In that case a person contracted as "charterer," but evidence was admitted to show who the principals were. The term "vendor" in His Honour's judgment was something very different from such terms as "owner" or "proprietor." An agent who was authorised to sell might in a memorandum style himself "vendor," but that did not make him the owner. His Honour's attention had been called to **Jacker v. International Cable Coy.,** 5 T.L.R. 13, but that case dealt with the right of the Court of Appeal to reject evidence improperly admitted in the Court below. In the present instance there was no appeal, but an application for a new trial. In England an application for a new trial was made to the Court of Appeal. In New Zealand it was generally made to the Judge who had tried the case in the Supreme Court.

In the result, therefore, His Honour held that a new trial could not be granted upon any of the five grounds relied upon by Mr. Hall Skelton. Two remaining grounds had yet to be considered.

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

Solicitors for defendant: **Hall Skelton and Skelton,** Auckland.

MacGregor, J. May 1, 4, 1930. Wellington.

GILMOUR v. GAVEGAN.

Practice—Slander—Striking Out Statement of Claim—Whether Frivolous or Vexatious—"Crook"—"Criminal"—Slanders Divisible into Allegations as to Plaintiff's Past Conduct and Allegations as to Plaintiff's Present and Future Conduct—Plaintiff's Answers to Interrogations Admitting Truth of Allegations as to Past Conduct—Statement of Claim Not Struck Out.

Summons by defendant for an order striking out a statement of claim in an action for damages for slander and for judgment for the defendant upon the grounds that the admissions made by the plaintiff on oath in answer to certain interrogatories revealed that the plaintiff had no cause of action and that the action itself was frivolous and vexatious. The plaintiff in his statement of claim alleged the publication of four separate slanders between 21st October, 1930, and 12th November, 1930: (1) "You won't see Gilmour again unless he is fetched back. He is a crook and a criminal"; (2) "Gilmour is a crook with a very bad record. You have seen the last of Gilmour unless you have him fetched back"; (3) "Gilmour has gone to Australia to unload vendors' shares and he won't come back. He is a crook"; (4) "Gilmour is a crook and a criminal. You won't see him back from Australia unless he is fetched back." The plaintiff in answer to interrogatories admitted that on 10th November, 1927, he was convicted: (1) of theft of £350; (2) of forgery of a receipt for £350; (3) of theft of a sum of about £750; (4) of theft of £100; (5) of theft of £400, and (6) of forgery of a certain letter, and that in respect of his conviction for forgery of the receipt he was on 16th November, 1927, sentenced to three years' imprisonment with hard labour and to two years' hard labour in respect of each of the other matters. He admitted also that he was released from prison on 6th May, 1930, under the charge or direction of a probation officer and was discharged from probation on 14th November, 1930.

Treadwell and **James** for defendant in support of summons.

Powles for plaintiff to show cause.

MACGREGOR, J., said that curiously enough, there was no express provision in the New Zealand Code of Civil Procedure authorising the Court to stay or dismiss an action that was frivolous and vexatious. At the same time it was clear that the Supreme Court had an inherent jurisdiction, to stay or dismiss any action which was frivolous or vexatious or otherwise an abuse of its procedure. That jurisdiction, however, was one which ought to be very sparingly exercised, and only in very exceptional cases. It might be said, indeed, that before that jurisdiction was exercised it ought to appear that the claim was so bad in law that it was impossible in any circumstances for the plaintiff to succeed: see the cases collected in **Stout and Sim,** 7th Edn. 187. The question His Honour had to decide was whether the present action was a claim of that very exceptional nature. The action was one of slander. In his statement of claim the plaintiff alleged that the defendant made four several false and slanderous statements concerning him in the way of his business, during his temporary absence in Australia in October and November, 1930. The defendant filed a statement of defence in which he justified all four statements as being true in substance and in fact. The burden was, of course, on the defendant of alleging affirmatively and proving that each defamatory statement which he published was true. In the present case the defendant contended that the plaintiff himself by his answers to interrogatories had admitted the truth of each of the four defamatory statements of which he complained. As at present advised His Honour did not think that contention could be upheld. The four defamatory statements in question were each clearly divisible into two parts. They referred: (1) in part to the plaintiff's past character, and (2) in part to his present and future conduct. In so far as they referred to his past character they might be said to be justified by his own answers to interrogatories, but that in His Honour's opinion was not the case in so far as they related to his present and future conduct. In the result His Honour found it impossible to say, with certitude, either that the plaintiff's admissions on oath revealed that he had no cause of action, or that the action itself was frivolous or vexatious. In other words, it did not appear to His Honour in the present case that it was impossible for the plaintiff to succeed. In **Moore v. Lawson,** 31 Times L.R. 418, on an application to strike out the statement of claim in a libel action, the Court of Appeal in England declined to do so, but left the question whether the words were capable of a

defamatory meaning to be dealt with by the Judge at the trial. His Honour thought that an analogous result must follow in the present case. His Honour referred to the judgment of Swinfen Eady, L.J., at p. 419 of that case, and said that the observations of the learned Lord Justice had a clear application to the present case. On that account His Honour had been careful to deal with the facts in a somewhat guarded and tentative manner, so as not in any way to prejudice the fair trial of the action, or to hamper or embarrass the Judge when the case came on trial.

Summons dismissed.*

(*The action was, on the next Chambers day, dismissed for want of prosecution.—ED. N.Z.L.J.)

Solicitors for plaintiff: **Brandon, Ward and Hislop,** Wellington.
Solicitors for defendant: **Treadwell and Sons,** Wellington.

Court of Arbitration.

Frazer, J. March 18; April 16, 1931. Wellington.

DAVIDSON v. DAYSH.

Workers' Compensation—Independent Contractor—Admission by Defendant of Liability to Pay Compensation Not Precluding Him from Raising Defence that Plaintiff not a Worker—Relationship of Master and Servant Condition Precedent to Binding Agreement for Settlement of Claim for Compensation Under Act—Workers Compensation Act, 1922, Ss. 18, 19.

Claim by the plaintiff, a share-milker, against the defendant, a farmer, to recover compensation from the defendant in respect of an injury by accident suffered by him on 13th May, 1928. There was no dispute as to the happening or circumstances of the accident, or as to the serious nature of the injuries received by the plaintiff, from the consequences of which he was still suffering. It appeared that the plaintiff was engaged by the defendant as a share-milker on the defendant's farm at Dyerville. On the day of the accident, the plaintiff, while driving cows in the course of his duties, was thrown from his horse, receiving injuries to his head and spine. The plaintiff's claim was based on the ground: (a) that he was a worker within the meaning of S. 2 of The Workers Compensation Act, 1922; or alternatively (b) that the defendant had agreed to pay compensation, and that the agreement to pay compensation was, by virtue of Ss. 18 and 19 of the Act, binding on and enforceable against the defendant.

Macassey and **Lawson** for plaintiff.

O'Leary for defendant.

FRAZER, J., delivering the judgment of the Court reviewed at length the provisions of the written agreement between the plaintiff and the defendant and said that looking at the document as a whole, it appeared to the Court to be a contract for services rather than a contract of service. It resembled in many respects the document considered in **Jones v. Allison,** 17 G.L.R. 786, which was held by Edwards, J. to be a contract to perform certain services; and the judgment in **Simpson v. Geary,** (1921) G.L.R. 50, 52, distinguished such a contract from a contract of service. The Court held, therefore, that the plaintiff was not a "worker" within the meaning of S. 2 of the Act.

It was next necessary to consider the alternative ground upon which the plaintiff based his claim: that was that a binding agreement had been entered into by the defendant or his insurers for the payment of compensation. A voluminous mass of correspondence was put in, which it was unnecessary to examine in detail. For the purposes of the present action, it might be summarised as amounting to an admission by the defendant of the plaintiff's claim, the exact amount of compensation payable being left to be determined later, when fuller medical opinion would be available. There was a full disclosure of the plaintiff's relations with the defendant, and the defendant's insurers, after being placed in possession of all the relevant facts, undertook to settle the claim for a sum to be subsequently ascertained. At a later date, the defendant's insurers repudiated the undertaking, on the ground that they had been advised by counsel that the plaintiff was not a worker within the meaning of the Act. Counsel for the plaintiff relied on the judgments in **Hamilton v. N.Z. Crown Mines Ltd.,** 5 G.L.R. 182; **Stevens v. Kauri Timber Co.,** 5 G.L.R. 255; **Shaw v. Burns,** 11 G.L.R. 96; and **Reardon v. Haslett,** 15 G.L.R. 87. Those cases laid down the rule that where an admission of liability had been made, or where payments of compensation had been made under such circumstances as to imply an admission of liability, the defendant was bound by his express or implied admission, and would not be permitted to raise the defence of serious and wilful misconduct, lapse of the statutory time for commencing proceedings, or that the accident did not arise out of and in the course of the employment. With the exception of **Reardon v. Haslett,** those cases were decided under the Act of 1900 and the consolidated Act of 1908. **Reardon v. Haslett** was decided under The Workers Compensation Act of 1908 (No. 248). S. 8 of the Act of 1900 was re-enacted as S. 8 of the Consolidated Act of 1908, and provided that if any question arose as to (a) the liability to pay compensation; (b) the amount or duration of compensation; or (c) whether the employment was one to which the Act applied, such question, if not settled by agreement, should be referred to the Court for settlement. It enabled the parties to agree, *inter alia*, on the question of liability, and the Court held, in the cases referred to, that an agreement entered into under the section was binding. The Consolidated Act of 1908 was repealed by the Workers Compensation Act of 1908 (No. 248), and an entirely different provision was substituted for S. 8 of the repealed Act. S. 18 (2) of the Act of 1908, which, with certain additions that were immaterial to the consideration of the present question, was reproduced in S. 18 (2) of the Act of 1922, provided that an agreement might be made between an employer and a worker for the settlement of any claim to compensation or of any question arising with respect to compensation. S. 18 (3) declared that such an agreement should be binding on the parties, and S. 19 (2) provided for its enforcement in the Court of Arbitration. It appeared to the Court that on the true construction of S. 18 (2), the relation of employer and worker must exist between the parties as a condition precedent to their making a binding and enforceable agreement under the Act. The repealed Acts permitted a binding and enforceable agreement to be made in respect of three specified matters, including that of liability. The Act of 1922 permitted such an agreement to be made in respect of any matter whatever arising in respect of compensation, but restricted the right to make such an agreement to persons who were in the relation of employer and worker towards one another. They were of the opinion, therefore, that the plaintiff and the defendant, not being a worker and an employer respectively within the meaning of the Act, were not empowered to enter into a binding agreement under S. 18 (2). The judgment in the case of **Reardon v. Haslett,** which was decided under a section substantially the same as the present S. 18 (2), did not assist the plaintiff, for in that case the claimant's status as a worker was not in dispute, and the substantial question, which the Court held was concluded by agreement, was whether the accident had arisen out of and in the course of his employment. The earlier judgments would, of course, hold good in such a case, and were properly cited as authorities in the judgment in **Reardon v. Haslett.** They did not, however, hold good when there was a question as to the existence of the relation of employer and worker. It was of interest to note that the Imperial Act of 1926, contained (S. 21) a provision somewhat similar to that contained in S. 8 of the repealed New Zealand Acts of 1900 and 1908 (Consolidated Act), with the additional provision that a question as to liability to pay compensation included a question as to whether the person injured was a workman to whom the Act applied. The English cases dealing with the effect of admissions and agreements when a question as to the existence of the relation of employer and worker had arisen were, therefore, not in point. The Court might, however, usefully quote a passage from the judgment of Eve, J., in **Dutton v. Sneyd Bycars Co. Ltd.,** 12 B.W.C.C., 345, which was of general application: "It is not competent by agreement *inter partes* to extend the statutory jurisdiction under the Act to cases outside the Act, and, even if an agreement such as was asserted by the applicant in this case had been established, it could not have been enforced by the procedure adopted, but must have been made the subject of an action."

Judgment for defendant.

Solicitors for plaintiff: **Card and Lawson,** Featherston.

Solicitors for defendant: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

The Earthquake.

Notes Upon Some Legal Aspects.

By F. O. Langley.

(Continued from p. 119).

The Case of *Kingston General Commissioners v. Sun Insurance Office* was tried in Jamaica. The jury finding that the fire started before the earthquake and judgment being entered for the plaintiffs, the Chief Justice in the local Court of Appeal said : " Earthquake is always a remote rather than a proximate cause of fire and to apply the maxim (*causa proxima non remota spectatur*) would be to strike the exception out of the contract." This case never went further because the issues raised were substantially the same as, and the appeal to the Privy Council was abandoned owing to the decision, in *Pawsey's case*, to follow. It is to be noted that the question put to the jury was one only : " Have the plaintiffs proved to your satisfaction that the fire which originated at 87 King Street started before the commencement of the earthquake on January 14th, 1907 ? "

The Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the Appeal of *The Scottish Union and National Insurance Company v. Alfred Pawsey and Company*, from the Supreme Court of Judicature of Jamaica, were delivered on the 16th October, 1908, by Sir Arthur Wilson, there being present at the hearing Lords Macnaughten, Atkinson and Collins, and Sir Arthur Wilson. The following paragraphs come, in the main from the Reasons for the Report in this case.

The action out of which the Appeal arises was brought in the Supreme Court of Jamaica, by the respondents, against the appellants, upon four policies of fire insurance, issued by the appellants in favour of the respondents, the subject-matter insured being the stock-in-trade in the premises No. 104 Harbour Street, Kingston, and adjoining premises. Each of the first three policies contained a clause to the effect that the policy did not cover " loss or damage by fire occasioned by or happening through . . . earthquakes." The fourth policy contained a clause to the effect that the policy did not cover " loss or damage by fire during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of . . . earthquake." The appellants denied liability.

At the trial it was not disputed that the property insured was destroyed by fire, on the 14th January, 1907. The principal question, stated in its broadest form, was whether the fire that did the damage was occasioned by earthquake, so as to fall within the clauses of the policies protecting the appellants from liability for damage caused by such fires.

Upon this question the learned Judge placed upon the appellants the burden of establishing the affirmative, and that ruling seems to have been accepted at the trial. Nor was it disputed on the argument of this Appeal so far as the first three policies are concerned. As to them, therefore, there is no question before their Lordships of the burden of proof. Objection was taken on the argument of this Appeal to the ruling as applied to the fourth policy. And it may be convenient to deal with this point at once.

The learned Judge at the trial, in dealing with the burden of proof, treated all the four policies alike, placing the burden upon the appellants. It was contended that in this there was misdirection as to the fourth policy ; that as to it the proper direction was that, if the loss by fire occurred during the earthquake, the burden lay upon the respondents to show that the earthquake was not the cause.

Their Lordships are of opinion that the contention of the appellants on this point is correct, and that the proper ruling would have been that suggested. But the difference between the one ruling and the other is material only if the loss by fire occurred during the earthquake, and whether it did so or not was a question for the jury. That question was left to the jury, and left with a proper direction, and answered in the negative. The misdirection complained of thus became inoperative.

The trial lasted for sixteen days, and much evidence was called on both sides. At the close of the trial the questions left by the learned Judge to the jury and the answers of the jury thereto were as follows :

1. Was the fire which destroyed the respondents' property occasioned by or did it happen through an earthquake ? No.
2. Did the fire which destroyed the respondents' property occur during or in consequence of an earthquake ? No.
3. Was there any intervening force sufficient of itself to cause the fire to destroy the respondents' property ? The Jury did not answer this question.

Upon these findings judgment was entered for the respondents.

The appellants moved the Supreme Court to set aside the verdict and judgment, and to order a new trial or to enter judgment for the appellants : the motion was dismissed.

Certain facts not in dispute must be kept in mind in order to appreciate the matters which are the subject of controversy. Harbour Street, on the south side of which the respondents' premises were situated, is a broad street nearly fifty feet wide, running east and west. It is crossed at right angles by King Street at a point some distance to the west, and by Church Street at a point a short distance to the east of the respondents' premises, both King Street and Church Street being streets of about the same width as Harbour Street. On the day on which the respondents' property was burned, the 14th January, 1907, a violent shock of earthquake occurred causing widespread destruction in Kingston. The hour is accepted by both sides as 3.30 p.m., and the duration of the shock is stated by witnesses as about half a minute. During the night and day that followed minor shocks seem to have been perceived, but the substantial mischief was done by the first shock, and it is the only one with which the present Appeal is directly concerned. In the afternoon of the 14th January, near the time of the great earthquake shock, three fires broke out in Kingston. Of these, two fires and the questions arising as to the origin of each and the connection of either or both with the destruction of the respondents' premises formed the subject of inquiry at the trial, and are the matter for consideration upon this Appeal.

The verdict of the jury was in favour of the respondents, and the substantial ground of appeal is that that verdict was wrong. It is for the jury to decide questions of fact, and their decision upon such questions cannot be interfered with by an appellate tribunal unless it be shown that that decision was one which could not reasonably have been arrived at upon the evidence before the jury. That is the test to be applied in the present case; and this was clearly recognised by the learned counsel for the appellants.

On behalf of the appellants it was contended, first, that the fire which destroyed the respondents' property was due to the extension of the Harbour Street conflagration which broke out in No. 92 of that street. It was contended, secondly, that the Harbour Street fire arose independently of any other fire, and that it was caused by earthquake. It was contended, thirdly, that, even if the first contention failed, and if it could be supposed that the fire which destroyed the property insured came from the extension of the King Street fire, still that fire was a fire caused by earthquake.

The respondents denied each of the allegations of the appellants. They further contended affirmatively that the fire which destroyed the property insured either was or might have been caused by an extension of the King Street fire, and that that fire was not an earthquake fire, but had broken out before the shock occurred. Three questions thus arose: first, where did the fire come from which destroyed the property insured? Secondly, what was the origin of the Harbour Street fire?

As to the first of these questions, three answers have been suggested, and each has credible evidence to support it. If the jury accepted any of them (whether they did so or not it is impossible to say as to each particular view) they certainly acted not unreasonably.

The second question relates to the origin of the Harbour Street fire, whether it was a fire occasioned by the earthquake. The earthquake shock is admitted on both sides to have occurred at 3.30. The outbreak of the Harbour Street fire is put by various witnesses at an interval of half to three-quarters of an hour after the shock. It cannot, therefore, in their Lordships' opinion, be said that the fire followed the earthquake shock so quickly as to lead to any very strong presumption that the one event was the cause of the other. Apart from any such presumption the case of the appellants on this point rests entirely upon the theory that the fire in the Army and Navy Stores began with the ignition of certain boxes of matches in those stores. The stores were overthrown by the earthquake; and the evidence is that there were standing upon a shelf in the stores, near where the fire was first perceived, 10 or 12 parcels each containing a gross of boxes of safety matches. It was contended that some of the matches must be presumed to have come in contact with some of the prepared surface, in consequence of the fall of the shelf when the premises were wrecked. This, however, is necessarily a somewhat speculative view. Their Lordships think it impossible to say that the jury were bound to accept it as conclusively correct. They might well have been of opinion that that view was insufficiently supported, and that the origin of the fire was not accounted for.

Their Lordships are of opinion that the jury might reasonably have formed the opinion that the King Street fire had broken out before the earthquake shock, or, at least, that it was not conclusively shown to have resulted from that shock. The evidence relied upon on behalf of the appellants to show that the fire followed the earthquake, was very important, and if the jury accepted it, it would be impossible to say that their doing so was unreasonable. But it was not in all points evidence of a wholly satisfactory character, and their Lordships are of opinion that on the whole of the evidence the jury might reasonably have found that the fire was not shown to have resulted from the earthquake.

The result is that, in their Lordships' opinion, the jury might reasonably have considered that the fire which destroyed the respondents' property was due to the spread of the Harbour Street fire, or that it was due to the spread of the King Street fire, or that it was uncertain to which it was due, or whether to both. Their Lordships are further of opinion that the jury might reasonably have thought that the Harbour Street fire was not shown to have resulted from the earthquake. They also think that on the materials before them, the jury might reasonably have held that the King Street fire broke out before the earthquake.

It is interesting to observe that in the cases tried by juries in Jamaica the verdicts were for the claimants and against the insurance companies, whereas in the only case arising out of the 1907 calamity to be tried in England at first instance, the verdict was the other way.

(*To be continued.*)

Audit of Trust Accounts.

Taranaki District Law Society's Scheme.

The following scheme with reference to the audit of solicitors' trust accounts has been voluntarily adopted by the members of the profession in the Taranaki District:

(a) That the appointment of auditors shall be in the hands of the Society, fees payable for audits to be arranged by the Council if necessary.

(b) That each appointment of an auditor be for one year, with a recommendation that it be not renewed for more than a total period of three years with intervals of two years before re-appointment.

(c) That firms shall have a right of appeal regarding such appointments to a Disputes Committee consisting of one member to be appointed by the firm and one by the Law Society, such two persons to appoint a third person.

(d) That practitioners authorise their bankers at the commencement of every financial year to give to auditors any information that may appear to the bank to be pertinent to the purposes of the auditor's report.

This scheme is being put into operation immediately, and the Council now has in hand the matter of making appointments for the current year.

Land Transfer Act.

Equitable and Unregistered Interests.

By H. F. von Haast, M.A., LL.B.

(Continued from p. 213).

Notice.

The application of the principle of notice is illustrated by the two cases following:

In *Cowell v. Stacey*, (1887) 13 V.L.R. 80, Mrs. Cowell entered into a contract with Stacey to purchase land from him held by him under a lease from the Crown, paying a certain sum in cash and giving a P.N. for the residue of the purchase money. Shortly afterwards she heard that Cotter was about to purchase the land from Stacey and wrote to him telling him not to do so. On 11th August Stacey sold the same land to Cotter for £160, of which £60 was paid in cash, the balance was to be paid when Cotter obtained a certificate of title; and Stacey executed a transfer of the land to Cotter and gave him possession. On 22nd September Cotter lodged a caveat, on 28th September Mrs. Cowell lodged her caveat, on 30th September Cotter produced his transfer for registration. Mrs. Cowell therefore brought an action against Stacey, Cotter and the Registrar of Titles, to restrain the Registrar from issuing a certificate to Cotter, for a declaration that she was entitled to the property, and that all the necessary instruments should be executed to transfer the land to her. Webb, J., held that Cotter had notice, both before and after his contract, of the plaintiff's rights under contract, and laid down the law thus: "The Statute was never intended to abolish the entire principle of notice, and to provide that a man getting a transfer when he had notice of another's rights ought to have it registered and defeat these rights. The principle of notice still exists as it did before the Act. Notice of an equitable interest in another given to a purchaser before he had completed his title by procuring a conveyance was sufficient under the old law, and under the new law until a person has completed his title by getting his transfer registered he is just as amenable to notice. The policy of the Act is that, when once registration is affected, the holder of a certificate shall have a good title, whether he had notice or not of out-standing equitable interests; but the whole scheme providing for caveats is to prevent him from obtaining a clean certificate while any rights are outstanding in others. Till the transfer is actually registered a person having an equitable interest in the property can stop the issue of such a certificate.

Cowell v. Stacey was followed in *Baker's Creek Consolidated G.M. Co. v. Hack*, (1894) 15 N.S.W.L.R. (Eq.), 207, in which Owen, C.J. in Eq., said at page 223: "When the legal title under the Act has been completed, and the transfer has been registered . . . the transferee is not affected by notice of anything he may have found out in the course of his negotiating, nor is he held to have been bound to make enquiries and he is entitled to retain his legal interest free from all prior equities. Not until that is done, until the transfer has been completed and registered and the legal estate has been obtained by the transferee . . . a person who is merely contracting with the registered proprietor remains subject to all the prior equities effecting the property while the contract is *in fieri*." This view appears in effect, though not in express words, to have been taken by the Privy Council in the case of *Gibbs v. Messer*, (1891) A.C. 248, at p. 254.

Finally we have an authoritative statement of the law by the High Court of Australia in *Templeton v. The Leviathan Proprietary Ltd.*, (1921) 30 C.L.R. 34 in which Knox, C.J., at p. 54, referring to the section corresponding with our S. 197, quotes *Hogg on the Registration of Title to Land Throughout the Empire*, pp. 125–127 . . . "The immunity which the purchaser is to enjoy from the effect of notice is only to be afforded him if and when he does become registered and not before. Before he does become registered it is open to any adverse claimant to step in and assert his claim, and for the purpose of trying his claim registration may be stayed by caveat or otherwise. . . . The doctrine of notice is not in fact, affected by these enactments except as regards registered interests, and any questions of priority between unregistered interests that depend on that doctrine will have to be decided on general principles of equity jurisprudence." And adds: "This statement appears to me to be in accordance with the current of authority in New South Wales, Victoria and New Zealand, as illustrated by the decisions in *Baker's Creek Consolidated Gold Mining Co. v. Hack*, (1894) 15 N.S.W.L.R. (Eq.), 207; *Cowell v. Stacey*, (1887) 13 V.L.R. 80; *Crout v. Beissel*, (1909) V.L.R., 207, and *Solicitor-General v. Mere Tini*, (1899) 17 N.Z.L.R. 773."

Registration After Notice. Fraud.

This brings us face to face with the question of the position that arises when the existence of an equitable and unregistered interest is brought to the notice of a person who subsequently with knowledge of the existence of such interest gets a transfer to himself registered and claims a title clear of all equitable interests. That is when the question of fraud begins to operate.

The judgments in New Zealand lay it down distinctly that a transferee taking with notice of an unregistered interest, and with notice that the holder of such an unregistered interest does not consent to such transfer, is guilty of such fraud as will prevent him from relying upon the registration of his transfer as against the holders of such unregistered interest.

The New Zealand cases: *National Bank of New Zealand v. National Mortgage and Agency Co.*, N.Z.L.R. 3 S.C. 257; *Locher v. Howlett*, 13 N.Z.L.R. 584; *Merrie v. McKay*, 16 N.Z.L.R. 124, and *Smith v. Essery*, 9 N.Z.L.R. 449, are referred to and reviewed and the foregoing summary of the opinion by the New Zealand Judges given by A. H. Simpson, C.J., in Eq. in *Oertel v. Hordern*, 2 N.S.W.S.R. (Eq.) 37. He pointed out, however, that this opinion conflicted with the view expressed by Molesworth, J., in *Robertson v. Keith*, 1 V.L.R. Eq. 11, and that a still stronger decision was given in *Cooke v. Union Bank*, 14 N.S.W.L.R. Eq. 280, and he says: "The absence of any caveat lodged before the negotiation between himself and the vendors may also very well have led the defendant to form a *bona fide* view that the lease was invalid. . . . The intention of the legislature was that parties should protect whatever rights they have by lodging the prescribed caveat; if they chose to omit so to do, they cannot afterwards complain of the consequences of their own negligence."

But this opens up the whole question of fraud, which requires a series of articles to itself. It is enough to say that while Hogg (*Law Quarterly Review*, Vol. 29, p. 437) considers those three Australian cases as overruled by *Loke Yew v. Port Swettenham Rubber Co.*, (1913) A.C. 491, Kerr in *The Australian Lands Titles (Torrens) System*, p. 216, while criticising the dictum in *National Bank of New Zealand v. National Mortgage and Agency Co.*, admits that there has been a greater tendency in New Zealand to lean towards the dispossessed person than in Australia, and that the net result of the dicta of the Privy Council in *Loke Yews' case* and *Waimiha Sawmilling Co. v. Waione Timber Co.*, (1926) A.C. 101, supports the New Zealand attitude, and that in future cases less enquiry will be made as to whether or not a caveat has been lodged, and more attention given to whether or not the facts disclose a designed contention to become registered in face of and to the deprivation of another known existing right.

PRIORITY OF COMPETING UNREGISTERED INSTRUMENTS.

The law as to the application of principles of equity in a contest between two equitable claimants is put thus concisely by Kerr in the *Australian Land Titles (Torrens) System*, p. 128: "As between competing unregistered instruments conferring equities, that equity which was first created in point of time prevails, unless the person entitled has lost his rights by *failure to caveat*, or other conduct, whereby he induced the subsequent taker to deal."

The New Zealand cases *Paora Torotoro v. Sutton*, 1 J.R.N.S. S.C. 57; *Honeybone v. National Bank of New Zealand Ltd.*, 9 N.Z.L.R. 102; *Kissling v. Mitchelson*, 3 N.Z.L.R. 261; *Sinclair Bros. v. Matenga Te Hiko and Wall*, 2 G.L.R. 89, are just illustrations of the already stated principles of equity, *Honeybone's case* being an exemplification of the rule, that of two innocent parties to a fraud, the one who by his negligence has made it possible for the fraud to be committed should be the sufferer. They do not, however, deal, as the Australian cases do, with the result of the failure to caveat.

From a series of Australian cases we may deduce the following propositions:

(a) The holder of a prior equity who fails to lodge a caveat to protect his interest loses his priority as against a subsequent taker who *has searched the title* and been misled by the absence of a caveat into dealing with the registered proprietor.

(b) But, if the subsequent taker does *not* search the title, he is not misled by the failure to caveat, and therefore the equity first in time retains its priority.

(c) Failure to caveat at the earliest possible occasion may lead to the loss of such priority, if, before the caveat is lodged, the subsequent taker completes his negotiation for a sale and obtains a transfer, even if the transfer is presented for registration only after the caveat has been lodged.

As illustrations the following cases may be cited: *General Finance Agency Co. v. Perpetual Executors*, 27 V.L.R. 739.; *Barnes v. James*, (1902) 27 V.L.R. 749; *Connolly v. Noone and Cairns Timber Ltd.*, (1912) St. R.Qd. 70; *Butler v. Fairclough*, (1916) V.L.R. 533, 23 C.L.R. 78; *National Bank of Australasia Ltd. v. Joseph and Hindmarsh Square Congregational Church Incorporated*, (1918) S.A.L.R. 72.

In *Connolly's case* the *ratio decidendi* was thus stated at p. 81: "The plaintiff has dealt with a registered proprietor in good faith, relying on information conveyed by the register, and the defendant company and their predecessors (who had the prior equitable interest in time) by neglecting to take those precautions to record and safeguard their rights required by the policy and the provisions of the Act, (viz. to lodge a caveat), have misled the plaintiff into an erroneous belief as to the nature of Margaret Noone's (the registered proprietor's) interest. Under these circumstances, we think that as between these two claimants, not only in conformity with the policy and scheme of the Real Property Act, but also on well-recognised principles of equity, we are bound to hold that the rights of the defendant must be postponed to those of the plaintiff."

Butler's case and the *National Bank case* may be concurrently contrasted. In the former case, on 30th June, 1915, Good, the registered proprietor of a Crown lease subject to a registered mortgage, gave the plaintiff an agreement to charge the lease with a debt and to execute a mortgage on request. On 2nd July, 1915, Good agreed to sell the lease subject to the registered mortgage and on the same day the price was paid and Good executed a transfer to the defendant, who had had the title searched and found Good's title clear except for the registered mortgage. He had no notice of the agreement with the plaintiff. On 7th July the plaintiff lodged his caveat. Griffiths, C.J., said: "Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat. In the present case, the plaintiff might, if he had been sufficiently diligent, have registered his charge of 30th June on that day. The defendant, having before parting with the purchase money to Good, found on searching the register that Good had a clear title, and relying on the absence of any notice of defect in Good's title, paid the agreed price. The question then seems to be: Had the plaintiff when the defendant acquired his equitable right taken or failed to take all reasonable steps to prevent Good from dealing with the land without notice of the plaintiff's title? . . . . It is contended that the holder of an equitable charge is entitled to a longer time than a day before protecting his title by a caveat. If a man having a registrable instrument neither lodges it for registration nor lodges a caveat to protect it, it is clear that a registrable instrument later in date, but lodged before his, will have precedence, notwithstanding notice of the earlier instrument received before lodging his own. That is by reason of the express provisions of the Statute. Then why should not the same principle apply in the case of equitable interests. The alternative view would in effect give as great validity to an unregistered equitable assignment unprotected by caveat as to a registrable instrument lodged for registration. I feel unable to draw any line prescribing the time within which a caveat should be lodged. The person who does not act promptly loses the advantage which he would have gained by promptitude. For these reasons I come to the conclusion that if a suit had been brought on 3rd July between the plaintiff and the defendant raising the question of priority, the defendant would have been entitled to succeed."

In the *National Bank Case* the defendant Church had the prior equitable interest. The Bank had a

subsequent deposit of certificates of title and an unregistered charge, to protect which it lodged a caveat. The defendant Church lodged a caveat four days later and on the same day the Bank first received notice of the Church's claim. It was held that as the respective equities were equal they must rank in order of date on the ground that although the Church had been negligent in not lodging a caveat the plaintiff had been negligent in not searching, and could not claim to have been misled or prejudiced by the conduct of the Church.

Taranaki District Law Society.

Annual Meeting.

The Annual Meeting of the Taranaki District Law Society, was held in the Law Library at New Plymouth, on 29th April last, when the President, Mr. C. H. Weston, was in the chair and forty-six members were present or were represented by proxies. The election of officers for the current year resulted as follows:

President: Mr. J. C. Nicholson, New Plymouth.

Vice-President: Mr. Sinclair Macalister, Stratford.

Treasurer: Mr. T. P. Anderson, New Plymouth.

Council: Messrs. A. K. North, N. H. Moss, C. H. Weston, and G. M. Spence.

Auditor: Mr. I. W. B. Roy.

Delegate to New Zealand Law Society: Mr. G. M. Spence.

Certain suggested amendments to the Law Practitioners Act were discussed and referred to the incoming Council, which has forwarded them on to the New Zealand Law Society for consideration.

The Chinese Oath.

Officials and practitioners in courts where men from the docks are frequent visitors, become accustomed to a variety of forms of oath. The most dramatic, perhaps, is that of the Chinese witness, who usually requires a saucer, which he breaks, concluding his oath with words such as "If I do not tell the truth, may my soul be broken in a thousand pieces, even as I break this saucer." Sometimes, so it is said, Chinese have wished to decapitate a cock, but we cannot imagine such a horrid spectacle being permitted nowadays in an English court of justice. But drama, even in the taking of an oath, ought not to miscarry. The bathos of an appeal for soul-destruction to follow lying, "even as I break this saucer," when the saucer obstinately remains intact, must be painful, not only to the witness, but also to all the trained observers who have a sense of fitness. Yet this actually happened last week at Liverpool, three attempts being unsuccessful, and the saucer refusing to break until the witness, abandoning the dramatic pose, knelt on the floor and hammered the saucer till it broke.

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

Australian Notes.

Wilfred Blacket, K.C.

The Waterside Workers regulations referred ot *ante* p. 67 having been disallowed by the Senate, the High Court having held that the disallowance was valid, Mr. Brennan, A. G., and Mr. Scullin resolved to make some deplorable precedents. It is hardly credible that it should be done under a British constitution, but the fact is that they announced their intention of gazetting a new set of regulations, almost identical with those previously gazetted, as soon and as often as the Senate exercised its right of disallowance. Four times in as many weeks this game was played and then the Senate framed and adopted a petition to the Governor-General. This set out that the action of the Ministry in re-gazetting regulations disallowed by the Senate was an attempt to control Legislative by Executive power, and was an interference with the privileges of Parliament, and also that as it was the law of Parliament that no matter could be voted upon twice in one Session, the Senate could not be compelled within that period to vote twice upon the disallowance of the same set of regulations, and praying that His Excellency would not approve of any new editions of the four-times-disallowed regulations. The Petition was presented to His Excellency on Thursday, 28th June, and on Friday the 29th in pursuance of their published determination Ministers attended Cabinet with the latest edition of the regulations. There was no other business before the Cabinet, but the regulations have not been gazetted, so whether it was that the Government acted as advisers to His Excellency, or whether he acted as adviser to them is not known. The Governor-General has the next move—unless the Ministery announces an intention to leave off playing the silly game.

These incidents remind me of a remarkable curiosity in legislation. The Legislative Council when New South Wales was a Colony passed a Bill making valid securities of liens on wool and on crops, and this was disallowed by Her Majesty in Council, the idea of giving security over things that were not in existence being abhorrent to English lawyers. The Council then passed a similar Bill containing the remarkable enactment that as it was of great importance to farmers and others that they should be able to borrow money upon the security of such liens, and as it was probable that the Bill would be disallowed by Her Majesty in Council, all such securities given between the date of the passing of the Bill and the receipt of official notification of disallowance should be as good and effectual to all intents and purposes as if the Bill had not been disallowed. I cannot verify the exact words, but am sure that my memory is accurate as to the contents of the clause.

By the decision of the High Court in the appeal *Shepherd v. Fell and Textiles of Australia Ltd.* the law and practice relating to the stamping of documents which existed in New South Wales prior to the *Wagga Finance Case*, 30 N.S.W. State Reports 76, has been restored. Before that decision a document liable to duty, if not stamped, could be stamped in Court and penalty paid at the hearing, but it was therein laid down that such a document could not be pleaded or tendered in evidence. Referring to the *Wagga Finance*

Case in his judgment in *Shepherd's Case*, Mr. Justice Evatt said: "It caused many difficulties in the administration of justice in New South Wales. It suddenly brought to an end the recognised practice of stamping documents during the hearing of a case. Actions which had been commenced before the promulgation of the decision were abandoned or, if continued, were defeated by the stamp objection. Amendment of pleadings after payment of duty was of no avail, because the instrument was and remained a nullity until stamping, and was, therefore, void at the time of the breach if any obligation was sought to be created by it." His Honour refers to the "recognised practice" but it was in truth the course permitted and directed by the Stamp Duties Act.

Mr. Justice Pike sitting in Divorce in Sydney had to deal with a question that has two or three times been incidentally before the High Court, and on each occasion the necessity of Commonwealth legislation has been stated. In the case before His Honour the petitioner was born in Queensland and his only surviving parent lives there now. He left home and joined the Australian Navy when a minor. He afterwards married, and a little later petitioned in Sydney for divorce, asserting domicile in New South Wales, on the ground that his ship, except for annual visits to Melbourne at Cup time, has always been in New South Wales waters. Upon this point of domicile His Honour said: "To my mind it is essential that any person who seeks to obtain a domicile of choice should be free to acquire that domicile, that is to say, that he should be free to reside in the particular place chosen, and to remain there for an indefinite period, without any intention of returning to his original domicile. . . . . Immediately on joining the Navy, the petitioner was under the orders of the naval authorities, and had to go wherever he was ordered by those authorities. Under Section 33 of the Naval Defence Act he could be required to serve anywhere, either within or beyond the limits of the Commonwealth. He was in that position at the time of filing his petition. That being so, in my opinion during the whole period that he was a member of the R.A.N. he was not a free agent, and was not enabled to settle in New South Wales, and could not, therefore, acquire a domicile there."

In Mr. Justice McArthur's Court Gorman, K.C., and Irvine, on behalf of several bookmakers, have moved to strike the name of one Francis off the roll of barristers and solicitors. Mr. Francis on January 1st, 2nd, and 3rd went to the races. He seems not to have been very lucky for at the end of the third day he owed various bookmakers more than £1,700. He failed to pay and refused to make himself liable for the amount. Mr. Gorman's contention was that a man "who is not fit to go on to a racecourse is not fit to practise as a barrister and solicitor." The matter is to be determined upon affidavit. Another solicitor in New South Wales was disastrously connected with betting, for in the last three years he lost £16,000 to starting price bookmakers. £100 per week for three years and all of it his clients' money. His total defalcations are said to be £200,000. It occurs to me that as many companies and owners are their own underwriters, it would be an excellent thing if men who want to go in for betting were to be their own bookmakers, so that each man would win as a bookmaker all that he lost as a punter. This might be described as a fiduciary system of betting without the gold backing of clients' money.

Tenterfield Council v. Armstrong,, Banco Court Sydney was a matter of some general importance. Defendant formerly Mayor of Tenterfield, was surcharged by the Government inspector in respect of six items totalling £2,295. He appealed, but the magistrate found as to the first item of £120 that there had been gross negligence and confirmed the surcharge. The defendant abandoned his appeal as to the other items. The Council then sued for the full amount, and the defendant denied negligence, and that the loss resulted from his negligence. The Court upon demurrer held that the statutory appeal was the defendant's only means of contesting the charges. In the Court's opinion the relevant section "taken as a whole, did not only establish a statutory liability, but it also laid down the course which was to be the only means by which that liability could be determined; and established a tribunal which was the only tribunal before which a question that came within the section could be raised and determined."

In *Paddison v. E.S. and A. Bank*, mentioned in earlier notes the plaintiff obtained a verdict for £4,000. The case lasted 58 days, the costs are estimated at £15,000 and the jurors received £4 5s. 6d. each per day for the last six weeks of the hearing, and are naturally incredulous now when told that there has been a depression.

That strange production the N.S.W. Law Reform Bill has been delayed in its passage through the Assembly by many causes. One of these was that it suddenly was discovered by its promoters that the defamation clause intended to take from us our Liberty of Speech might be used against Communists and others when the next ministry gets in, and later that the clauses against sedition and drilling—in a Law Reform Bill!—might also be used against extremists. Mr. Lysaght said that he had fully considered the clauses and would not amend them but Caucus arose in its might and said that it would re-draft the clauses, and so the matter now stands. Counsel appearing for the Council of the Bar, and for the Incorporated Law Institute have addressed the Assembly in vigorous protest against the Bill and all its clauses, and the Supreme Court Judges to whom the Bill was referred for report have said many nasty things about it in a restrained and judicial manner. I don't think it worth while to make further mention of the measure for the Lang Ministry is obviously doomed to fall soon and suddenly. Their Communist supporters have started a faction fight that must have important and dramatic results.

Sir W. A. Jowitt, the Labour Attorney-General of England, has received in salary and fees from 10th June, 1929, to 31st March, 1931, £39,218; of this amount £12,654 is salary, and £26,564 fees. The two holders of the Solicitor-Generalship during this period have not, in the aggregate, done so well, the sum total of their emoluments and fees for the period being £18,526. Sir J. B. Melville from 10th June, 1929, to 12th October, 1930, drew £8,042 salary and received £4,720 in fees; Sr R. Stafford Cripps, from 27th October, 1930, to 31st March, 1931, drew £2,576 salary and received £3,188 in fees.

"A nervous witness generally means to speak truly and seldom does so."

—Lord Darling.

New Zealand Law Society.

Decisions, Rulings, etc.

A consolidation of the decisions, rulings and interpretations of the Council of the New Zealand Law Society has recently been compiled by authority of the Council of the New Zealand Law Society by Mr. Nelson Matthews, Barrister and Solicitor, Wellington.

Copies may be obtained by practitioners from the Secretary of each District Law Society on payment of 1/- per copy.

Branch Offices.

Views of Law Society of South Australia.

The Law Society of South Australia has made recently the following rules as to branch offices of solicitors :

1. (a) Every solicitor or firm of solicitors shall, either personally or by some other solicitor entitled to practise in South Australia, attend at his or her office regularly upon each day during the hours on which his or their office is open, except in case of temporary absences of short duration.

(b) Any solicitor or firm of solicitors may, in addition to his or their principal office, have a branch office or offices, provided that he or some other solicitor entitled to practise in South Australia is in charge of each such branch office and attends there regularly upon each day during the hours on which such office is open, except in case of temporary absence of short duration.

2. It is improper for any solicitor or firm of solicitors to share, occupy, or use, or hold himself or themselves out as sharing, occupying, or using an office or offices jointly with any company, or person, or persons not being practitioners of the Supreme Court.

3. Subject to due compliance with Rule 2 hereof the following rules shall apply to solicitors' branch offices :—

(1) In the case of branch offices, it is not improper to maintain an office not used by any other person not being a practitioner, and which bears a reasonable notice, by plate or otherwise, stating the name of the solicitor or firm, and the days and hours when such office is open.

(2) (a) In the case of branch offices it is not improper for a solicitor or firm to occupy or use a room or office in an institute, hotel, bank, or other public building provided that during the hours when such solicitor or firm is in attendance thereat such room or office is in the sole occupation of the solicitor.

(b) In the last mentioned case, it is not improper for a reasonable notice, by plate or otherwise, to be affixed to such building stating the name of the solicitor or firm, and the days and hours during which such solicitor or firm is in attendance.

4. The Council may dispense with strict compliance with the above rules in cases of special circumstances.

Rules and Regulations.

Scientific and Industrial Research Act, 1926. Amended regulations relating to National Research Scholarships.—Gazette No. 40, 21st May, 1931.

Shipping and Seamen Act, 1908. Amendment to Rules for examination of engineers.—Gazette No. 35, 7th May, 1931.

Land and Income Tax Act, 1923. Notice to make returns of income derived during year ended 31st March, 1931.—Gazette No. 37, 14th May, 1931.

New Books and Publications.

Redgrave's Factory, Truck and Shops Acts. Fourteenth Edition. By Joseph Owner. (Butterworth & Co. (Pub.)). Price 25/-.

Police Law. Second Edition. By Cecil C. H. Moriarty, O.B.E., B.A., LL.B. (Butterworth & Co. (Pub.)). Price 6/-.

On Rent Charges. By J. M. Easton. Second Edition. By H. Copinger Easton. (Sweet & Maxwell Ltd.). Price 19/-.

Lawrence's Deeds of Arrangement. 10th Edition. By S. E. Williams. (Stevens & Sons Ltd.). Price 12/6.

Cripps on Compensation. Seventh Edition. By R. A. Gordon, M.A., LL.M., K.C. (Stevens & Sons Ltd.). Price 49/-.

Restrictive Covenants Affecting Land. By W. A. Jolly, M.A. (Stevens & Sons Ltd.). Price 12/6.

Smith's Mercantile Law. Thirteenth Edition. By H. C. Gutteridge, K.C. (Stevens & Sons Ltd.). Price 49/-.

Digest of the Law Relating to Bankruptcy and Deeds of Arrangement. Fourth Edition. Revised by Neville Hobson and R. Withen Payne. (Solicitors' Law Stationery Society). Price 5/-.

The Law of Income Tax. Fifth Edition. By E. H. Konstam, K.C. (Stevens & Sons Ltd.). Price 49/-.

Law Relating to Real Property and Conveyancing in a Nutshell. By M. Garsia, B.A. Fourth Edition. (Sweet & Maxwell Ltd.). Price 7/-.

Documents of Title to Goods. By H. G. Purchase, LL.D. (Lond.). (Sweet & Maxwell Ltd.). Price 19/-.