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"The Profession of the Law is an emblem of the union of mankind in society." —*Lord Reading.*

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Our Policy Re-stated.

The policy of THE NEW ZEALAND LAW JOURNAL from the day of its inception, may be expressed comprehensively in five words: *Service to the Legal Profession.* This has been the essential principle that has guided its editors and contributors, and the ideal towards which all their efforts have been directed. The fostering of the traditions of the learned profession of the law; the promotion of its interests; assistance willingly given to members of both its branches by the provision of useful and up-to-date professional equipment in the form of early reports of the more important judgments of our superior Courts, and of overseas decisions of Imperial or Dominion interest, and the supply of expert commentary upon practical matters bearing directly on the daily work of advocate or conveyancer,—all these have been kept in the forefront of this journal's activities. Appreciation of its beneficial service, often expressed by members of Bench and Bar, has given valued encouragement to all who have been responsible for its production. Such testimony, too, is ample endorsement of its aims.

The policy here outlined has been faithfully promoted under the successive editorships of Mr. C. A. L. Treadwell and Mr. H. J. V. James. The latter gentleman, after three-and-a-half years' active duty, has been compelled by pressure of increasing work in the Courts to relinquish the editorial pen. His resignation, regretfully accepted by the publishers, gives to his successor the grateful opportunity of expressing, as from the ranks of the profession itself, merited appreciation of the signal ability and painstaking care with which Mr. James has served the JOURNAL, and, through its columns, his colleagues in the Law. In their name, we thank him.

The extent to which a professional periodical, such as this, can give service, is the ratio of its worth. With full realisation of what this implies, the recent editor's successor at once declares that a policy which has proved so advantageous to those whom the JOURNAL is honoured in serving, will conscientiously be maintained. That its usefulness may be even further extended, is our hope and aim.

None of us is allowed to forget that the whole tendency of our times is towards associated endeavour for the general welfare. Consequently, not on our efforts alone do we rely in furtherance of the JOURNAL ideal of useful service. We seek the associated and individual co-operation of the members of the profession. In extending the hospitality of these pages, we wish them to regard the JOURNAL as a place where they may foregather to give of their experience and their talents towards the common fund of legal knowledge. We want them to use these columns as an open forum wherein for the general benefit of their fellow-practitioners, some may express their daily problems, and others explain solutions of them.

In pursuance of our desire for such helpful pooling of New Zealand's professional resources, we shall seek contributions, not only from those "good grey heads whom all men know," but also from the younger members of the Bar whose incursions into the perplexities of daily practice can (and, we think, should) be soundly arrayed for our common information. If we are able to lead out from our ranks even a few more valuable writers and commentators, we feel we will render an important service to the profession. Consequently, from old and young practitioners alike, we will especially welcome papers on such subjects of current legal importance as cannot yet be extracted from within the covers of standard text-books: there are plenty of these topics awaiting capable expositors.

As for ourselves, we do not claim to possess the eyes of an Argus or the hands of a Briareus: we leave that assertion of ubiquity to the technicians of our daily press. Any suggestion, any advice, any item of interest, that will assist us in the attainment of our expressed ideal, will always have our ready and grateful attention. We do not promise to adopt every proposal that comes our way: to sail with the stream of passing feeling or thought often leads over unobserved shoals or precipices to which it may be flowing. But whatever will help to place matters of passing moment in their right perspective and to give them their true values, will have our willing support. The restraints of honour and the limitations of accuracy, will be the only curb to our efforts in that regard.

We once heard the Hon. T. R. Bavin, K.C., remark that the things which unite us are deeper and more lasting even than those which divide us. We agree. Whatever comes within the latter category, shall have no part or share in these columns. Matters which do not primarily interest us as lawyers, can find plenty of scope for discussion in spheres outside a journal devoted solely to legal interests.

We ask for the freest of criticism of our humble efforts. We wish our readers to become vocal, so that we shall so be directed as to improve our media of service to them and for them. In particular, we will gladly receive comments on our published articles. So long as such comments are constructive in intention and practical in character, we will give them the wide audience of our readers. So that both sides may fairly be heard, we will submit the contributor's reply alongside his critic's comment.

While asking the freest of criticism of our own efforts, we express the hope that the JOURNAL will long continue to breathe forth the real spirit of the legal profession that has long been one of its particular glories. This has been well described by a respected leader of the English Bar: "The arduous struggle, the blows given and taken, the exultation of victory, the sting of defeat, which are our daily experience, far from breeding division and ill-will, bind us more closely together by the ties of a comradeship for which you will look in vain to any other arena of the ambitions and rivalries of men." If the JOURNAL with the co-operation it seeks from every member of the profession, can assist towards a continuance of this traditional spirit among us, we will together be performing a further duty not only to our professional colleagues, but also to the wider public of the Dominion at large whom it is their duty and their privilege to serve.

Court of Appeal.

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

July 1; 17, 1931.
Wellington.

IN RE BUTCHART DECEASED.

Family Protection—Jurisdiction—Domicile—Jurisdiction of Court to Order Provision in Favour of Persons Resident in New Zealand Out of Realty in New Zealand of Testator Domiciled Abroad—Adequate Provision—Events Subsequent to Death of Testator Considered—Quaere as to Position of Claim of Personal Representative of Widow of Testator in Respect of Period Elapsing Between Death of Testator and Death of Widow—Family Protection Act, 1908, S. 33.

Application by widow and daughter of testator for further provision under The Family Protection Act, 1908, removed into the Court of Appeal. The facts, so far as material, were as follows: D. Butchart was domiciled and resident in Scotland and having married in 1872, lived with his wife and children in that country until 1898 when his wife, with her children, separated from him and ceased to have any communication with him. From that time his wife worked for the support of herself and family, being assisted by members of her family as they grew up. Eventually a son, J. Butchart, settled in New Zealand and upon his invitation his mother and sister Alice joined him in 1909 and resided with and were supported by him until his death. He died intestate in 1927 leaving estate worth about £9,000 which went wholly to his father. D. Butchart was then aged 82 and an inmate of a charity home in Scotland. On the day that he became aware of his sudden access to fortune, he made a will leaving all his estate to a niece who had been kind to him, and died before a month had elapsed. The widow and daughter in terms received nothing under the will of the testator but under Scottish law, which applied to the estate of the deceased save as to immovables situate outside of Scotland, the widow became entitled to a sum of over £1,000. She died after the commencement of the present proceedings. A. Butchart, the testator's daughter, was in delicate health and able to do light work only. During the last years of her mother's life she was compelled to look after her mother owing to the latter's age and feebleness. On the testator's death she became entitled under Scottish law to about £200 and she succeeded upon her mother's death to her estate.

Levi for applicants.
Cornish and **James** for defendant.
Kelly for Public Trustee.

KENNEDY J., delivering the judgment of the Court, said that there arose, for decision upon the present application the question whether a person resident in New Zealand might, under the Family Protection Act, 1908, be ordered further provision out of land situate in New Zealand which formed part of the estate of a testator who died domiciled abroad. The question was discussed by Skerrett, C.J., in **In re Roper,** (1927) N.Z.L.R. 731, and answered affirmatively, although that learned Judge also found that the testator had a New Zealand domicil at the time of his death. The Act in no way limited the right to relief to those domiciled in New Zealand and it had already been decided by Skerrett, C.J., in the case referred to that it was immaterial where the domicil of the applicant was. Decisions to the same effect had been given on similar enactments in South Australia in **In re Found, Found v. Semmens,** (1924) S.A.S.R. 236, and in New South Wales in **Re F. Donnelly,** 28 N.S.W.S.R. 34. Their Honours thought that the decision of Skerrett, C.J., on that point was well founded and that the language of the statute showed that it was no objection to the capacity to claim that the applicant was not domiciled within New Zealand: *Cf.* **Krzus v. Crow's Nest Pass Coal Co. Ltd.,** (1912) A.C. 590.

The authority of the Supreme Court was required by any person who desired to deal with movables or with immovables in New Zealand and that authority was obtained, where a will was left, either by grant of probate or of letters of administration with the will annexed or by the resealing under the provisions of the Administration Act, 1908, of a grant obtained elsewhere. The Court would make a grant when there were any assets within the jurisdiction and, once a grant had been made, would in general have before it a person who might be a party to proceedings under the Act or to proceedings commenced to determine any question arising with regard to the succession to the testator's assets: **Dicey,** 4th Edn., pp. 352-356. The will left by the testator in the present case was confirmed in Scotland in favour of the executrix, the defendant, and such confirmation was resealed in New Zealand. But on the other hand no application for probate or letters of administration with the will annexed could be successfully made in this country where there was not nor ever had been any asset within the Dominion: **In the Goods of Hannah Tucker,** (1864) 3 Sw. & Tr. 585. In **In re Roper** (*sup.*) at p. 743, Skerrett, C.J., said: "There can be no doubt that in cases where New Zealand Courts have jurisdiction over the wills of testators they have power in a proper case to order that provision shall be made out of the estate of the testator for the testator's wife, husband, or children." The view enunciated by their Honours accorded also, they thought, with the opinion expressed by Murray, C.J., in **In re Found, Found v. Semmens and anor.** (*sup.*) at p. 240. In New Zealand resealing of probate or letters of administration was equivalent in effect to a grant: The Administration Act, 1908, S. 43. As Skerrett, C.J., pointed out in **In re Roper** (*sup.*) the Family Protection Act, 1908, constituted a statutory restriction on the right of a testator to dispose as he pleased of his property. It might in the result prevent a testator from disinheriting certain members of his family and to that extent it might in effect invalidate testamentary provisions. The provision, which might be ordered, was out of the net balance, after payment of debts and of death duties, so that the residue otherwise distributable in terms of the will was alone affected. Their Honours thought, therefore, as Harvey, J., decided in **Pain v. Holt,** 19 N.S.W.S.R. 105, that the provisions of the Act related not to administration but rather to the succession to, or distribution of, the testator's estate. Their Honours did not think, as contended for the defendant, that claims under the Family Protection Act, 1908, were analagous to claims for damages for tort, or that claims under the Act were to be assimilated to claims for maintenance made during life by children upon their parents. The Family Protection Act, 1908 applied to any person who died leaving a will making insufficient provision therein for the maintenance of certain persons. The words of the section included a testator domiciled in New Zealand and were wide enough in terms to cover any testator dying domiciled outside New Zealand. The Act, however, would not enable relief to be granted in respect of movables where a testator was domiciled outside of New Zealand because, by virtue of the municipal law of this country, which was not abrogated by the statute, the material validity of a will of movables would be referred by New Zealand law to the law of testator's domicil at the time of his death—**Stanley v. Bernes,** (1831) 3 Hagg. Ecc. 373, and **In re Trufort,** (1887) 36 Ch. D. 600—and that would not in the case being considered include the provisions embodied in the Family Protection Act, 1908. Indeed where a testator died domiciled in a foreign country, the New Zealand personal representative might hand over the distributable surplus to the foreign personal representative in the country of the domicil for distribution by him. The validity of a will affecting an immovable such as land and the rights of succession thereto, including the testator's capacity to deal with his whole estate so far as consisting of such land was on the other hand governed by the *lex situs* and not by the law of the domicil: **Hicks v. Powell,** (1869) L.R. 4 Ch. 741; **Dicey** 4th Edn., 556. Consequently to a will so far as it affected land situate in New Zealand whether the testator were domiciled in New Zealand or elsewhere, the Family Protection Act, 1908, applied and, in respect of it, an order might be made in favour of those who were entitled, under that Act to further provision out of the testator's estate. A somewhat similar question was considered in **In re James Rea, Rea v. Rea,** (1902) 1 Ir. 451. In that case an intestate left realty in Victoria and other property in Ireland where he was domiciled. Porter, M.R., held that the widow was entitled in respect of the Victorian land to a charge of £1,000 in accordance with the law of that state. In **Re F. Donnelly,** 28 N.S.W.S.R. 34 and **In re Osborne,** (1928) St. R. Qd. 129, the Court declined to make orders in respect of immovables situate outside the state in which application was made. The question formulated at the commencement of this judgment must accordingly be affirmatively answered and the facts of the present application fell to be considered.

His Honour reviewed the facts and said that their Honours were of opinion that the testator in failing to make any provision in his will, additional to that to which the widow became entitled by virtue of the Scottish law, did not fail to make adequate provision for her maintenance and support. What the

widow was entitled to proved, in the event, as from her advanced age might well be expected, to be adequate for her proper maintenance and support. The question did not then arise whether the personal representative of the widow might claim under her in respect of the period elapsing between the death of the testator and the death of his widow. As to the testator's daughter, by S. 33 (13) of the Family Protection Act, 1908, the Court had power, where periodic payments had been ordered or where the Court had ordered a lump sum to be invested for the benefit of any person, to inquire whether at any subsequent date the party benefited by its order had become possessed of provisions for his proper maintenance or support and in such case to discharge, vary or suspend its order or to make such other order as was just in the circumstances. Their Honours thought, likewise, that where the applicant was possessed of resources received subsequent to the death of the testator, such improved means should be taken into account in disposing of the application. Having regard to all the circumstances their Honours thought that the sum of £1,000 additional to what the claimant took by virtue of the Scottish law should be provided for her out of the immovables situate in New Zealand. An order was accordingly made, that A. Butchart be paid, out of the land of the testator situate in New Zealand at the date of the testator's death or out of the proceeds of the sale thereof, the sum of £1,000 and that until the payment of the said sum of £1,000 the said A. Butchart be paid interest as from the date of the order at £6 per centum per annum payable quarterly upon the said sum of £1,000 or upon such part thereof as should for the time being remain unpaid and that the said sum of £1,000 and interest thereupon as hereinbefore provided, and costs should be charged upon and payable out of the said land and out of the proceeds of the sale thereof.

Solicitors for applicants: **Levi, Jackson and Yaldwin,** Wellington.

Solicitors for defendant: **Webb, Richmond and Swan,** Wellington.

Myers, C.J.
Herdman, J.
MacGregor, J.
Kennedy, J.

June 24, 25, 26, 29; July 17, 1931.
Wellington.

GENERAL MOTORS ACCEPTANCE CORPORATION v. TRADERS FINANCE CORPORATION LTD.

Chattels Transfer—Motor Vehicles—Customary Hire Purchase Agreement—Agreements Between Manufacturer and Dealer or Between Dealer and Dealer Not "Customary" Hire Purchase Agreements—Nature of Appellant's Transactions Considered—Appellant Held to be a Dealer in Finance or Credit and Not a Person Engaged in Trade or Business of Selling or Disposing of Motor Cars—Chattels Transfer Act, 1924, Ss. 18, 19, 57—Sale of Goods Act, 1908, S. 27.

Appeal from a judgment of Ostler, J., reported 6 N.Z.L.J. 379. The fundamental question which arose on the appeal was whether the operations of the appellant with respect to the sale of motor cars were within Section 57 of the Chattels Transfer Act, 1924, relating to "customary hire purchase agreements."

O'Leary and **Cleary** for appellant.
R. M. Grant for respondent.

MYERS, C.J., delivering the judgment of the Court, said that for the purpose of determining the questions raised under Section 57 of the Chattels Transfer Act, 1924, any confusion that might arise by reason of the complicated dealings as between S. Bishara Limited and Bishara Brothers might be ignored. It was sufficient for the purposes of the section to say that whether the two cars in question were sold to Young and Te Heu Heu respectively by S. Bishara Limited or Bishara Brothers was immaterial, because the vendor, whichever it was, was a dealer in motor cars. So far as the sale of the car to Young was concerned the validity of the appellant's system of dealings on both "the wholesale demonstration plan" and "the wholesale storage plan" was in question. And it was admitted by Mr. O'Leary, in answer to questions from the Bench, that the appellant must show: (1) that the agreement entered into between the appellant and the distributor (whether S. Bishara Limited or Bishara Brothers) was a "**customary** hire-purchase agreement" within the purview of the section; and (2) that the appellant was engaged "in the trade or business of selling or disposing of motor cars." As to the transaction involving the sale of the Pontiac car to Te Heu Heu, in which transaction the appellant's "retail plan" was in question, it might be conceded, without necessarily deciding, that, the appellant having purchased the car from Bishara Brothers and then entered into an agreement for sale and purchase with Hall, the agreement came within the statutory definition of "customary hire-purchase agreement," provided the appellant was "a person who is engaged in the trade or business of selling or disposing of motor cars." The agreement entered into by the appellant under its various plans was not in form (apart from S. 57) a hire-purchase agreement at all, but an agreement for sale and purchase of the type that had come to be known as an agreement for conditional sale and purchase. But an agreement of that description might be a "customary hire-purchase agreement" within the meaning of S. 57 (1) of the Chattels Transfer Act, 1924. There was, however, a very important distinction between an agreement of that kind in New Zealand, if it did not come within that section, and a similar agreement in England. Although the agreement was one for sale and purchase it provided that the property in the car should not pass until the whole of the purchase money was paid. Such an agreement was held in **McEntire v. Crossley Brothers Limited,** (1895) A.C. 457, not to be within the Bills of Sale Act in England. It would, however, apart from S. 57, come within the definition of "instrument" in the interpretation clause of the Chattels Transfer Act, 1924, (S. 2), and would require registration as provided by that Act. "Instrument," however, as defined in the interpretation clause excluded a "customary hire-purchase agreement" as defined in S. 57. Consequently the agreement came within the definition of "instrument" only if it did not come within the definition of "customary hire-purchase agreement" as defined by S. 57. By S. 18 of the Act, in certain circumstances which it was not necessary to detail, an instrument if unregistered was deemed fraudulent and void as against the Assignee in Bankruptcy of the estate of the person whose chattels or any of them were comprised in any such instrument; and also as against the assignee or trustee acting under any assignment for the benefit of the creditors of such person, and as against execution creditors. By the Chattels Transfer Amendment Act of 1922 a new provision was enacted which was contained in S. 19 of the Chattels Transfer Act, 1924, which His Honour read. That was why Mr. O'Leary admitted that if the appellant could not bring itself within S. 57 of the Act the appeal must fail.

The first question for determination then was whether the agreement into which the appellant entered in accordance with its "wholesale storage plan" and its "wholesale demonstration plan" was a "customary" hire-purchase agreement. In order to determine that question it was necessary to state what the position was prior to the enactment of S. 57. A custom or practice had grown up whereby dealers in certain classes of chattels, and manufacturers who sold not through dealers but direct to members of the public, (who for want of a better term might be referred to comprehensively as "the users"), sold the chattels in some cases under a true hire-purchase agreement, and in other cases under a form of conditional sale and purchase agreement. Sometimes those agreements were registered, and sometimes not. In cases where the agreement was not registered there frequently arose on the bankruptcy of the hirer or purchaser, as the case might be, the question as to whether the chattels the subject of the agreement were in the order and disposition of the bankrupt. And the determination of that question involved considerable expense because of the vast amount of evidence required to prove (or disprove) the existence of the custom necessary to rebut the inference of order and disposition. **Official Assignee of Wylie v. Massey Harris Co. Ltd.,** 32 N.Z.L.R. 363; **Booth McDonald and Co. Ltd. v. Official Assignee of Hallmond,** 33 N.Z.L.R. 110; **Booth McDonald and Co. Ltd. v. Official Assignee of Hallmond (No. 2),** 33 N.Z.L.R. 165; **In re Morrison Ex parte National Cash Register Co. of Australasia Ltd.,** 33 N.Z.L.R. 186, were illustrations of that class of litigation. S. 57 was enacted to meet that difficulty, and the Seventh Schedule to the Act set out the chattels in respect of which it was assumed that a custom had probably become established, and which might thereafter be the subject of "customary hire-purchase agreements." The Seventh Schedule as enacted included such articles as (*inter alia*) furniture, pianos, pianolas, gramophones, typewriters, motor vehicles of all descriptions, sewing machines, cash registers, milking machines, and reapers and binders. It was quite well known, and was admitted by Mr. O'Leary, that there had never existed in New Zealand a custom whereby agreements of the kind now in question (whether on the true hire-purchase system or on the system of conditional sale and purchase) were made as between a manufacturer or wholesaler or other trader on the one hand and on the other hand the dealer

who required chattels for his stock for the purpose of selling such chattels direct to the users. He admitted that that method was a novel, or, to use his own expression, an "unique" method established in New Zealand quite recently by the appellant itself. Their Honours gathered from the appellant's powers of attorney recorded in the office of the Registrar of the Supreme Court under the Companies Act, 1908, that the appellant probably did not commence business at all in New Zealand before at any rate some time in 1926, as its first power of attorney, executed in America, bore date only the 21st July of that year. And, so far as was known, save possibly, (Mr. O'Leary said), for one other concern of minor importance that might have followed the appellant's lead, the method was still confined to the appellant and dealers in motor vehicles manufactured or sold by General Motors (N.Z.) Ltd. If Mr. O'Leary's contention was right that that kind of agreement was a "customary hire-purchase agreement" within S. 57, startling results would follow. As the agreement would not require registration, the salutary effect of S. 19 of the Chattels Transfer Act so far as concerned any of the chattels in the Seventh Schedule including such chattels as might be added thereto under subsection (6) of S. 57 would entirely disappear. In all probability the wholesome condition of business provided for by S. 27 (2) of the Sale of Goods Act, 1908, would also disappear so far as all those classes of chattels were concerned. A person who bought a motor car from a dealer in the ordinary course of business and paid the full purchase money in cash might find his vehicle seized months afterwards by a third party upon the ground that the dealer had not title to dispose of the property in the car. In the case of a dealer stocking only say furniture, pianos, gramophones, typewriters, and sewing machines, or any of the other classes of chattels within the Schedule, no person could safely make any purchase in the ordinary course of business from that dealer's establishment, though he paid the full purchase price, because every article in the shop might be the subject of an agreement under S. 57 between the manufacturer or wholesale vendor and the dealer, and no single article would the dealer have any title to dispose of.

In their Honours' opinion the argument advanced on behalf of the appellant could not be supported. S. 57 must, their Honours thought, be interpreted as applying—as their Honours felt satisfied it was intended to apply—only to the same extent and as between the same classes of persons, as the "customary" agreement applied to prior to its enactment. Their Honours could not see how the section, which purported to affect only "customary" agreements, could be held to apply to an agreement or a method of business which not only was not and never was customary, but which indeed was admitted to be something novel or "unique" brought into existence by the appellant itself since the section was passed and thenceforward carried on (with possibly but one unimportant exception) by the appellant alone. Subsection (1) of S. 57 enacted that a "customary hire-purchase agreement" was a deed or agreement in writing made between the owner of or a dealer in certain chattels and a conditional purchaser of those chattels. And paragraph (a) required that the owner of or dealer in the chattels must be either the manufacturer thereof or a person who was engaged in the trade or business of selling or disposing of chattels of such nature or description. The word "customary" was not defined, but in their Honours' opinion it must be interpreted in the light of the trade customs that existed prior to the passing of the enactment, and not as applying to an agreement or method of business as between manufacturer and dealer or as between dealer and dealer, which was not previously adopted or did not previously exist. Their Honours thought, therefore, that as far as the agreements on the appellant's "wholesale demonstration plan" and "wholesale storage plan" were concerned, such agreements were not "customary" hire-purchase agreements within the meaning of S. 57, and that the appellant's argument on that point failed.

Then came the question, which applied as well to the "retail plan" as to the "wholesale storage plan" and "wholesale demonstration plan," namely, whether the appellant was "engaged in the trade or business of selling or disposing of motor cars" within the meaning of paragraph (a) of S. 57 (1). That involved a consideration of the true nature of the appellant's transactions. The respondent contended that the appellant's transactions were all in substance loan transactions, and that the appellant was a money-lender within the Money-lenders Act, 1908. For the appellant a number of cases were cited in which there arose the question whether a transaction was a borrowing of money or a *bona fide* sale and hiring, and in which it was held that the transactions in question were precisely what they purported to be, that was to say hire-purchase transactions, and not transactions in the nature of loan or bills of sale: **Yorkshire Railway Wagon Co. v. Maclure,** 21 Ch.D. 309; **Manchester Sheffield and Lincolnshire Railway Co. v. North Central Wagon Co.,** 13 A.C. 554, 35 Ch.D. 191; **Johnson v. Rees and Anor.,** 84 L.J.K.B. 1276; **British Railway Traffic and Electric Co. v. Kahn,** (1921) W.N. 52. But it was to be observed that in all those cases the final agreement entered into by the person or company occupying in the litigation a position similar to that of the appellant in the present case, after such person or company had purchased the chattels, was a hire-purchase agreement in the true sense. That was not so in the present case, and that was at least one important distinction between the present case and the cases relied on by the appellant. Furthermore, there were many cases in England in which it had been held, even though the agreement entered into by the person or company in the position of the appellant in the present case purported to be a hire-purchase agreement in the true sense, that the document amounted to a bill of sale within the Bills of Sale Act, 1882, and was void for want of registration inasmuch as the real intention of the parties was merely to create a security for money: **In re Watson,** 25 Q.B.D. 27; **Madell v. Thomas,** (1891) 1 Q.B. 230; **Beckett v. Tower Assets Co.** (*ibid*) 638; **Maas v. Pepper,** (1905) A.C. 102, and the very recent case of **Motor Traders Finance Ltd. v. H. E. Motors Ltd.,** which went from the High Court to the Court of Appeal and thence to the House of Lords, where it was ultimately decided on the 26th day of March, 1926. The case was unreported but there were submitted to us certified copies of the transcript of the judgments of all three tribunals. The authorities established that the duty of the Court, in a case like the present one was to enquire into the true and real nature of the transaction. Regard must be had to both the form and the substance of the transaction, to the position of the parties, and to the whole of the circumstances under which the transactions came about. Before referring further to the judgment in **Motor Traders Finance Ltd. v. H. E. Motors Ltd.,** it might be stated that although, as the learned Judge in the Court below had said, General Motors (New Zealand) Limited and the appellant were two separate legal entities, the fact was (as was admitted at the Bar) that the American General Motors Corporation owned all the shares in the appellant corporation, and also (with the exception of perhaps five or six shares which were in the names of its employees and were controlled by the American Corporation) all the shares in General Motors (New Zealand) Limited. Without attempting an exhaustive statement, as disclosed by the evidence oral and documentary, of the methods adopted for the transaction of business as between General Motors (New Zealand) Limited, the appellant, and the distributors or dealers through whom General Motors products were sold in New Zealand, their Honours gave a summary of what might be regarded as the main features of those methods. Their Honours concluded that although, as already pointed out, the appellant and General Motors New Zealand Limited were separate legal entities, the fact was that for all practical purposes the appellant was but another name for General Motors New Zealand Limited and the effect of their methods of business was that precisely the same persons, namely the main American General Motor Corporation or its shareholders, reaped the profits from the two sets of dealings, first the profit derived by General Motors New Zealand Limited from the sale of the car, and secondly the profit from the financial transactions of the appellant in respect of the same car. The facts of the present case bore a close resemblance to those in **Motor Traders Finance Limited v. H.E. Motors Ltd.** cited above. The distributor or dealer was the sole concessionaire for his particular district or territory for the sale of motor cars, trucks and chassis of the various makes sold by General Motors New Zealand Limited. He was compelled by his agreement to use his best efforts to promote the sale of those cars and he had to maintain at all times a minimum stock of cars. Yet those documents of General Motors New Zealand Limited and the appellant purported to bind the distributor by terms which were onerous, restrictive, and unsuited to the free disposal of cars which was the real business of the distributor who required the cars as part of his stock for sale to customers. On the other hand the appellant was not, and never meant to be, a dealer in cars. It kept no stock. It had no show-rooms. It might occasionally have to take cars back from those with whom it entered into agreements to keep up instalments, but, if so, the circumstances was exceptional and probably inconvenient; and when it did happen it would appear that in some cases at least the appellant sold the seized car to General Motors New Zealand Limited, then purported to buy it back again and sell it to a third party on a conditional agreement for sale and purchase. On a consideration of all the circumstances their Honours could not but come to the conclusion that in their real and true nature and substance the transactions entered into by the appellant were loan transactions and that the agreements which it obtained from Distributors or dealers on either the "Wholesale

Demonstration Plan" or the "Wholesale Storage Plan" and from ultimate purchasers or users on the "Retail Plan" were in substance instruments by way of security for the amount of "finance" or "credit" supplied by the appellant. In other words their Honours thought that the real transaction under the first two plans was a sale by General Motors New Zealand Limited to the distributor or dealer and a loan by the appellant to the distributor or dealer of the portion of the purchase money which was paid by the appellant to General Motors New Zealand Limited: and, in the case of the "Retail Plan," the true transaction was a sale of the car by the dealer to the user, the appellant advancing the unpaid portion of the purchase money upon the security of the agreement and the car comprised therein. If that was correct, then the appellant was a dealer in finance or credit, and could not, their Honours thought, be regarded as "a person engaged in the trade or business of selling or disposing of motor cars" within the meaning of S. 57 (1) (a). That being so, then, apart from their Honours' conclusion that the agreements entered into under the Wholesale Storage Plan and the Wholesale Demonstration Plan were not "customary" agreements, none of the agreements under any of the appellant's "plans" came within S. 57 (1) of the Chattels Transfer Act. Consequently they required registration, and as they were not registered S. 19 of the Act applied.

As it had been admitted on behalf of the appellant that, unless the agreements came within S. 57 (1), the appellant could not succeed, it was unnecessary to consider either the grounds upon which the learned Judge in the Court below relied or any of the other questions argued before the Court of Appeal. In particular it was unnecessary, and, their Honours thought, inexpedient in the interests of the appellant itself, to deal with the submissions made by Mr. Grant as to the appellant's being a money-lender within the Money-lenders Act, 1908, and, if a money-lender, as to the effect upon its contracts of non-registration under that Act. That question was, no doubt, one of great importance to the appellant and if, consequent upon the present judgment, it was advised that there was any element of risk on that point it might be able so to alter its methods of business as to reduce or eliminate that risk. It was sufficient, without discussing this point further, to say that in their Honours' opinion the appeal failed for the reasons already indicated.

Solicitors for appellant: **M. O. Barnett,** Wellington.
Solicitors for respondent: **R. M. Grant,** Auckland.

Myers, C.J.
Herdman, J.
MacGregor, J.
Kennedy, J.

July 13; August 7, 1931.
Wellington.

R. v. JOHNSTON.

Crimes—Evidence—Corroboration of Evidence of Child—Rule of Practice—Application by Prisoner for Leave to Appeal to Court of Appeal on Ground of Wrong Direction as to Existence of Corroboration—No Question of Law Involved—Rule of Practice and Not Rule of Law for Trial Judge to Warn Jury of Danger of Convicting on Uncorroborated Evidence of Child Whether Under or Over Twelve Years of Age—Desirability in Interests of Justice of Shorthand Notes of Summing-up in Criminal Trial—Application Dismissed—Crimes Act, 1908, Ss. 442, 443, 444.

Motion on behalf of the prisoner under Section 443 of the Crimes Act, 1908, for leave to appeal to the Court of Appeal upon the ground (*inter alia*) that the learned trial judge misdirected the jury by telling them that certain matters given in evidence corroborated the evidence of a child, whereas it was claimed that such matters did not amount to corroboration.

L. K. Wilson in support.
Fair, K.C., to oppose.

MYERS, C.J., said that although it was a rule of practice to warn the jury of the danger of convicting a person accused of a crime of this kind upon the uncorroborated evidence of a child of tender years, it was not disputed that in New Zealand the omission to give the caution was not a matter that enabled the Court of Appeal to intervene—though the position was different in England by reason of the operation of the Court of Criminal Appeal: **Rex v. Baskerville,** (1916) 2 K.B. 658, at p. 663. But it was said that even in New Zealand if the Judge did warn the jury and then proceed to tell them that certain matters proved were matters of corroboration which did not really amount to corroboration that raised a question of law within Ss. 442 and 443 of the Crimes Act, 1908. As was pointed out by Cooper, J., in **Rex v. Hanlon,** 34 N.Z.L.R. 612 there was an important difference between the law of England and that of New Zealand in regard to the requirement of corroboration of the evidence of children. As he there stated where children under the age of twelve years were called to give evidence, the law in New Zealand permitted them to do so upon their promise to speak the truth, the whole truth, and nothing but the truth, but the evidence of a child so given did not necessarily require to be corroborated. In England, on the other hand, in cases brought under the English Act of 1904 for the prevention of cruelty to children—and see The Children Act, 1908, S. 30—a child of tender years was permitted to give evidence without an oath being administered to it and the Act expressly required that such evidence should be corroborated but there was no statutory provision to that effect in New Zealand. It was the recognised practice, however, on the trial of a person charged with an offence such as that with which the applicant was charged for Judges in New Zealand to give the jury the caution to which His Honour had already referred, although, as in the present case, the complainant might not be under twelve years of age. Where a statute required corroboration of the evidence of the complainant the direction became a matter of law, and there were many reported cases in which the omission to give the direction had resulted in a conviction being set aside: **Rex v. Christie,** (1914) A.C. 545, and **Eade v. The King,** 34 C.L.R. 154, were illustrations. In New Zealand, as had already been stated, there was no statutory requirement of the corroboration of a child, whether under or over the age of twelve years. Consequently the direction to the jury was a matter not of law but of practice, and in His Honour's opinion the applicant was concluded by the judgment of the Court of Appeal in **Rex v. Weston,** 32 N.Z.L.R. 56, where it was held to be a rule of practice and not a rule of law for the presiding Judge in a criminal trial to warn the jury that it is dangerous to rely upon the uncorroborated testimony of an accomplice, and that the question whether a proper direction had been given did not raise a question of law within the meaning of Ss. 442 and 443 of the Crimes Act. In that respect precisely the same principle applied to the case of corroboration of a child of tender years as to that of corroboration of an accomplice. After referring to passages from the judgment of Williams, J., at p. 61, and of Edwards, J., at p. 63, in that case, His Honour said that the other learned Judges did not deal precisely with that aspect of the matter, but the views expressed by them lead, in His Honour's view, to the same conclusion. If the present case had to be decided in England under the law as it had existed there since the enactment of the Criminal Appeal Act, 1907, the conviction would be quashed: **Rex v. Rudge,** 17 Cr.A.R. 113; **Rex. v. Smith,** 18 Cr.A.R. 19; **Rex v. Phillips,** *ibid* 115. It was true that in **Rex v. Lovell,** 17 Cr.A.R. 163: 129 L.T. 638 Lord Hewart, C.J. used language from which it might be suggested that an error by a Judge in describing as corroboration that which was really not corroboration was an error in point of law; but the learned Lord Chief Justice was after all stating only the contention made on behalf of the appellant. There was nothing in the judgment to indicate that in his view such an error was an error in point of law. However that might be, there was the judgment of the Court in **Rex v. Weston** (*sup.*) the effect of which was that the question whether there was corroborative evidence was not a question of law. That being so, the same position obtained in the present case as in that, namely that there was no question of law involved and, therefore, no question which the Court of Appeal could deal with under Ss. 442 and 443 of the Crimes Act. In the result the application must, in His Honour's opinion, be dismissed. It was however competent for the prisoner to make application to the Governor-General in Council under S. 447 of the Act.

HERDMAN, J. said that in considering the present motion for leave to appeal one question only arose for decision—whether any question of law arose upon the case stated. There was no contest about the admissibility of evidence. It was expressly stated at the Bar by prisoner's Counsel that he raised no objection to the admission of any of the evidence. Then it was to be noted that the present case was not one in which corroboration was required by any statute or by any rule of law. In **R. v. Hanlon,** (1915) 34 N.Z.L.R. 612 and in **R. v. Cocker,** 92 L.J. K.B., p. 428, whilst emphasising the necessity for cautioning juries against convicting an accused upon the uncorroborated evidence of young children, it was stated in terms that

admitted of no doubt that it was within the province of a jury to convict upon the uncorroborated evidence of a young child. In the present case the accused was found guilty of indecently assaulting a girl under 16. The substance of the present application was that there was misdirection by the learned Judge in the course of his address to the jury. In the fragmentary record of what purported to be His Honour's summing up which had been supplied to the Court by the applicant, it was obvious that the Court had not before it a complete report of his address. Much that was said had been omitted and that which was missing might have been of material assistance in deciding the present application. What formed the basis of the prisoner's present application was the direction of the learned Judge upon the facts. In his address to the jury the following passage appeared, and it was to observations contained therein that exception was taken: "Naturally enough the Crown case depends mainly upon the evidence of the girl, who is 12 years of age. In such cases as the present one, Judges frequently warn juries not to convict on the uncorroborated evidence of a child of tender years but it is a matter for the jury to determine what extent of reliance should be placed on such testimony. There is some corroboration in the present case,—the weight of which is to be determined by you. The corroboration consists of the fact of the child's distress when she saw accused, her torn garments, and the father's evidence regarding her distress on returning home on the day of the alleged offence. The little girl identifies the accused as the man who had assaulted her. The fact that the girl was immediately thrown into a state of terror when she accidentally met the accused in the street and also when she saw him at the identification parade affords some corroboration of her evidence as to his identity. Upon the question of the amount of credence you should give to her identification of the accused there is to be noted the fact that,before she attended the parade at which she identified the accused, she was brought by the police to an identification parade where the accused was not present, but another suspect was. She had no hesitation in saying that the man who had assaulted her was not in that parade."

In England a definite distinction was drawn between misdirection as to the law applicable to a particular case and misdirection as to the evidence. In the former case a right of appeal existed. In the latter case leave to appeal must be obtained for the reason that a misdirection as to the evidence was not a ground involving a question of law—**Archibold's Criminal Pleading,** 27th Ed., p. 341. In New Zealand S. 442 of the Crimes Act, 1908, gave a right of appeal upon questions of law only. That was assumed to be the law when the Court of Appeal decided the case **R. v. Weston,** 32 N.Z.L.R. 59. In that case the Court was invited to decide whether Denniston, J. had or had not properly directed the jury upon the subject of corroboration in a case which depended to some extent upon the evidence of accomplices. The Court decided that the question whether a proper direction had been given in that case did not raise any question of law within the meaning of sections relating to criminal appeals in the Crimes Act. In his judgment Williams J. on p. 61 said: "Where there is corroborative evidence or not is not a question of law but a question of practice." The decision in Weston's case was founded upon **The Queen v. Stubbs,** 25 L.J. M.C. 16. There accomplices figured as Crown witnesses and a question was raised about corroboration and about the direction of the Chairman of the Quarter Sessions. The report makes it plain that there had been a misdirection but the Court of Crown Cases Reserved refused to interfere. Willes, J., said that the question before the Court was one of practice. Questions of law only could be reserved for the opinion of the Court. The Chief Justice said the jury having acted on the evidence the jury could not interfere. The Legislature in limiting appeals to cases in which questions of law arose, no doubt recognised that to sanction appeals on questions of practice or upon facts would involve an invasion of the province of juries who were judges of the facts and a serious and inconvenient multiplication of appeals.

In the present case His Honour found nothing in the direction of the learned Judge or in the circumstances of the case which raised any question of law for determination. The girl in the case was over 12 years of age. It was accordingly necessary that she should give evidence on oath or after affirming. She was not an accomplice so her testimony could not have been taken exception to upon the ground of complicity. In her case corroboration though desirable was not indispensable. No objection could be taken to the summing up of the learned Judge upon the score that he had not given full warning to the jury about the immaturity of the principal witness called by the Crown. The substratum of the Crown's case was, of course, the evidence of the child, and, having that in his mind, His Honour deemed it to be his duty to point out to the jury that, before convicting the accused, they should be satisfied that the girl's story was supported by other evidence. He then said in general terms that there was corroboration the weight of which was to be determined by the jury. He then proceeded to give particulars of the corroboration referring to the facts and circumstances testified to. The admissibility of that evidence, as His Honour had pointed out, was not objected to. The appellant's complaint was that there was misdirection.

His Honour referred to the condition of the child's garments. As to that, the condition of the clothing undoubtedly corroborated the evidence given by the girl which went to prove that a crime had been committed. Then the learned Judge made reference to evidence given about the child's distress on returning home on the day of the assault, about her distress when she saw accused, about her agitation when she met the man on the street and when she took part in the identification proceedings. Those circumstances might not be corroboration in the sense in which that terms was defined by the Court of Criminal Appeal in **Rex v. Baskerville,** (1916) 2 K.B. 667, but such evidence had been described in New Zealand in language which was not unlike that used by the learned Judge in the present case. In **Rex v. Walesby,** (1919) N.Z.L.R. 289, at p. 297, Edwards, Chapman and Sim JJ. speaking about the admissibility of a complaint said that such evidence was admissible as "corroborating the credibility of the person making the charge and as evidence of the consistancy of such person's conduct." If the learned Judge, in alluding to the circumstances narrated above, used the term "corroboration" in the sense that that evidence confirmed the credibility of the child, there was little to object to in the use of that expression. It might be that the girl's nervousness and exhibition of fear was evidence from which an inference might be drawn that she had seen the man before and supported the evidence given about her identification of the prisoner. However, its admissibility was not questioned. The applicant's complaint was, in substance, reduced to the following: He declared that the learned Judge erred because he directed the jury that certain evidence was corroborative evidence, when it corroborated nothing, or did no more than confirm the veracity of the girl. His Honour understood counsel's contention to be that the jury might have understood from the direction of His Honour that the evidence to which he made reference, excepting the evidence about clothes, corroborated the girl's testimony "not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction." Assuming that such an interpretation must be placed upon His Honour's direction, assuming that he did in fact give such a direction, it did not, in His Honour's opinion, raise any question of law, nor did any other statement contained in the address to the jury raise any question of law. His Honour had been unable to discover any legitimate ground upon which the present application could be supported and stated that it must accordingly be dismissed.

MacGREGOR, J., stated that in the present case he agreed that leave to appeal should be refused, on the short ground that no question of law appeared to have arisen at the trial. His Honour agreed also with the remarks of Herdman, J., as to the fragmentary and unsatisfactory way in which the summing-up to the jury by the trial judge was brought before the Court on the hearing of the motion for leave to appeal. It appeared to His Honour essential in the interests of justice that provision should be made for having a *verbatim* report of the summing-up in every criminal trial taken by a competent and independent shorthand-writer. Most of the questions of law reserved under S. 442 of the Crimes Act, 1908, arose directly or indirectly out of the summing-up delivered by the judge who presided at the trial. It was impossible for a Court of Appeal critically to consider such a summing-up unless there was placed before it the actual words in which the jury were directed. In the present case it was obvious that a large part of the summing-up was not before the Court at all. How then could the Judges of the Court of Appeal be expected adequately to review it?

KENNEDY, J., said that the prisoner was charged with attempted carnal knowledge and alternatively with indecent assault upon a girl under the age of sixteen years. The evidence against him was that of the girl and other evidence, in respect of which it was contended that the learned Judge had misdirected the jury in law, because, in summing up, he had said that this evidence amounted to corroboration of the girl's story whereas it was urged that the evidence showed no more than that an offence had been committed without implicating the prisoner as the person committing it. The girl, being over the age of twelve years, gave evidence on oath, but as the offences charged were sexual offences upon her, the Judge properly warned the jury of the danger of acting upon her uncorroborated testimony. There was in this country no

statutory requirement that a jury, in considering such charges, was not to act upon the uncorroborated testimony of the victim. It was competent for the jury in this case, notwithstanding the warning, to have found a verdict against the prisoner upon the uncorroborated testimony of the girl alone. The warning, then, which the Judge gave, was in the nature of comment upon the value of the evidence and in observance of a rule of practice rather than in the nature of a direction or ruling upon a matter of law and, in His Honour's view, the learned Judge's observations in summing up did not become a direction upon a question of law by his statement that evidence was corroborative or amounted to corroboration although the proper view might be that the evidence referred to did not go so far as to implicate the accused. His Honour added that this point had already been considered in this Court in **Rex v. Weston,** 32 N.Z.L.R. 56, where it was decided that the question whether a proper direction had been given upon corroboration, where there was no requirement by law, did not raise a question of law within the meaning of sections 442 and 443. In that case, as in the present one, it was sought to be contended that the Judge ought to have told the jury that, unless the evidence connected the accused with the charge, it was not corroboration. The Court held, following **Regina v. Stubbs,** 25 L.J.M.C. 16, that no question of law was raised. His Honour thought that that decision applied and that, both upon principle and upon authority, the application should be dismissed.

Application dismissed.

Solicitors for Crown: **Crown Law Office,** *Wellington.*
Solicitors for prisoner: **Burnard and Bull,** Gisborne.

Supreme Court.

Reed, J. June 9; July 27, 1931.
New Plymouth.

LOADER v. NEW PLYMOUTH HARBOUR BOARD.

Negligence—Damages—Trespasser—Liability of Harbour Board to Trespasser—Duty to Abstain from Wilful Injury or Reckless Disregard of Ordinary Humanity—Mooring of Launches in Certain Area Prohibited by Harbour Board But Use of Area by Launches for Purpose of Landing Fish or Passengers Allowed—Person Proceeding in Launch to Area for Dominant Purpose of Mooring Launch a Trespasser Not Withstanding Intention also to Use Area for Lawful Purpose.

Appeal in law and fact from the decision of the Magistrate's Court at New Plymouth in an action in which the appellant sued the respondent for damages in respect of an injury received by him through a piece of timber falling off the Breakwater at New Plymouth and striking him whilst passing in a launch underneath. The appellant was a fisherman and a partner of the owner of the launch. The part of the Harbour where the accident occurred was a confined area vested in the respondent Board by virtue of a Certificate of Title, and was used for mooring the Harbour Board's small craft, launch, and diver's boat and dinghy which were moored by lines attached to the breakwater and wharf. No vessels were permitted to use that confined area for berthing alongside either the breakwater or the wharf, but the Harbour Board had granted permission to fishermen, and launches conveying passengers, to land their catch or their passengers, as the case might be, at steps at the head of the area. That was sometimes availed of, but the Board always insisted that no craft should be moored in that reserved area. Allan, the partner of the plaintiff, who owned and, at the time of the accident, was in charge of the launch, had in respect of that embargo consistently defied the Board and had moored his launch across the fairway in that area causing delay and inconvenience in getting the Harbour Board's small craft out when required. He was Secretary of the Fishermen's Association and, although repeatedly written to and warned, persisted in mooring his launch in the position objected to.

Weston for appellant.
Quilliam for respondent.

REED, J., said that the launch was a "ship" within the definition of the Harbours Act, 1923, and after referring to the relevant Harbour Board bylaws, stated that it was quite clear that the Harbour Master had authority vested in him to direct that the launch should not be moored in the position that Allen persisted in occupying, and that he did so direct him, and that, in spite of such direction the practice was continued—he was moored in that position on the day of trial in the Magistrate's Court. The Magistrate had found as a fact that "the object of Allen, and the plaintiff is inextricably bound up with Allen, was to moor his boat in his usual place near the steps; the use of the steps was only incidental to his main purpose. His evidence makes that quite clear." It was contended on behalf of the appellant that as permission had been granted to land fishing gear at the steps, and that as the accident happened whilst proceeding there to do so, that the question of the intention as to subsequent movements was irrelevant. His Honour could not accede to that contention. The Magistrate's finding of fact on that point was not attacked in the argument submitted to His Honour, therefore the position was that the dominating motive of those men was to moor the launch in the place forbidden, the movements to that end, including the landing of the gear at the steps, were all subsidiary to the main object. The respondent Harbour Board was the owner in fee of the land over which flowed the water in which it was intended to moor the launch. It was unnecessary to consider whether or not a Land Transfer Title abrogated the common law right of navigation in those tidal waters. His Honour assumed, without deciding, that it did not, and that the appellant had full rights of navigation, subject to such restrictions as the respondent might lawfully impose. The position was analagous to the rights of persons to use a highway, where the soil of the highway was vested in the adjoining owners. The public in such a case had full rights of way but the soil and every right incidental to the ownership of the soil was vested in the adjoining owners. Such would appear to be the position in the present case. His Honour referred to **Harrison v. Duke of Rutland,** (1893) 1 Q.B. 142, which was an instructive case. A strong Court consisting of Lord Esher, M.R., Lopes, L.J., and Kay, L.J., there held that a man who went on the highway for the purpose of frightening driven grouse away from butts occupied by the shoorters on an adjoining moor was a trespasser on the soil of the highway, which soil was the property of the owner of the moor. All three learned judges gave considered judgments in carefully worded language in their "anxiety to maintain the rights of the public over highways to their fullest legal extent," to quote the language of Lord Esher. The test applied in that case was: For what purpose was the plaintiff on the highway? If simply for the purpose of passing or repassing then he was not a trespasser; if for other and different purposes he was in law a trespasser. The reasoning in **Reg. v. Pratt,** 4 E. & B. 860 was referred to and approved in that case. There the Court held that "the magistrates were fully justified in drawing the conclusion that he (the defendant) went there, not as a passenger on the road, but in search of game." It was true that in both those cases there were overt acts, in the former case the plaintiff was actually frightening the grouse, and in the latter the defendant had fired at a pheasant crossing the road, but, as would be seen by an examination of the cases, those facts were only relevant as evidence of the intention with which the offenders had gone on the highway. In the present case the conclusion of the magistrate, that the intention of the plaintiff, in being where he was, was to moor his launch in a prohibited area, was not contested. The intention being ascertained then the law is, as stated in the latter case by Erle, J., as follows: "I take it to be clear law that, if in fact a man be on land where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he *is in law a trespasser*"; and by Crompton, J.: "I take it to be clear law that if a man use the land, over which there is a right of way, for any purpose lawful or unlawful other than that of passing and repassing, he is a trespasser." The position, therefore, was: (1) that the restriction on mooring a vessel in that particular area was lawfully imposed, (2) that the appellant in conjunction with Allen was, in defiance of such restriction, using the restricted area of the water way with the dominant purpose of mooring the launch there. In such circumstances they were trespassers at the time the accident happened. As trespassers the respondent owed them no duty but to abstain from injuring them wilfully or from doing a wilful act in reckless disregard of ordinary humanity towards them. **Robert Addie and Sons (Collieries) v. Dumbreck,** (1929) A.C. 359. There was no suggestion that either of such conditions obtained.

Appeal dismissed.

Solicitors for appellant: **Weston, Hall and Grayling,** New Plymouth.
Solicitors for respondent: **Govett and Quilliam,** New Plymouth

Actio Personalis.

Two Bills to Amend Deaths by Accident Compensation Act.

By T. P. CLEARY, LL.B.

Lord Campbell mentions in his *Lives of the Chancellors* that in passing the Act now known as the Fatal Accidents Act, 1846 ("the most popular of all my efforts at legislation"), he and Lord Lyndhurst engaged in speculation as to the mode of assessing damages in the case of the death by accident of an actual or expectant Chancellor, and the bearing on the matter of a possible change of Government. The principle that the damages are to be awarded strictly by way of compensation to the family of the deceased for the pecuniary loss suffered by them has since been carefully followed both under the English Fatal Accidents Act, 1846, and our Deaths by Accident Compensation Act, 1908. The application of this principle necessarily involves the taking into account of any benefits accruing to the family by reason of the death. Indeed, it fell to Lord Campbell himself first to explain to a jury that they ought to deduct in full from the damages they would otherwise award any sum payable in respect of accident insurance effected by the deceased, and that they ought also to make a further but less complete deduction in respect of ordinary life policies payable independently of accident.

The deduction of the proceeds of insurance policies, although quite in conformity with principle, appears to have been regarded as anomalous, and American Courts in dealing with statutes similar to the Fatal Accidents Act declined to follow Lord Campbell's ruling. In 1908, the Fatal Accidents (Damages) Act was passed in England, having been promoted, it is believed, by the insurance companies, who alleged that the rule prejudiced new business. This Act provided that any sum payable on the death of the deceased under any contract of insurance should no longer be take into account in assessing damages.

Two Private Bills have been introduced during the present Session by Messrs. H. G. R. Mason and Downie Stewart respectively to amend the Deaths by Accident Compensation Act, 1908. Clause 4 of Mr. Mason's Bill and clause 2 of Mr. Stewart's Bill make the same provision as the English Act of 1908, with the addition in the Hon. Mr. Stewart's measure that no deduction is to be made on account of any pensions to which the persons for whose benefit the action is taken may be entitled. Probably, Mr. Stewart has in view *Baker v. Dalgleish Steam Shipping Company*, (1922) 1 K.B. 361, where it was decided by the Court of Appeal that pensions must be taken into account. There can be no doubt that an Act following the English statute would command wide approval; although on principle it would appear that to differentiate between insurance moneys, or, for that matter, pensions, and other benefits acquired through the death of the deceased, would be to create rather than to cure an anomaly.

Mr. Mason's Bill is much wider in its scope than Mr. Stewart's, and makes provision for other important amendments to the principal Act. It was held by the Court of Appeal in *Clark v. London General Omnibus Co. Ltd.*, (1906) 2 K.B. 648 that funeral expenses were not recoverable either in an action under Lord Campbell's Act, or at Common Law, thus settling the "controversy of very learned men, including Sir Frederick Pollock and Mr. Beven." Clause 3 of Mr. Mason's Bill permits the recovery of medical and funeral expenses.

The most important proposal in Mr. Mason's Bill is contained in Clause 2. Lord Campbell's Act constituted an exception to the maxim: *Actio Personalis Moritur cum Persona*, by permitting an action notwithstanding the death of the wronged one: but it did not affect the operation of the maxim in the case of the death of the wrong-doer. Since the passing of the Motor Vehicles Insurance (Third Party Risks) Act, 1928, the anomalous operation of the maxim has been accentuated, as was pointed out by the Chief Justice in *Findlater v. Public Trustee and Others*, 7 N.Z.L.J. 129, 1931 G.L.R. 403, which has already been referred to in these columns (p. 125, *ante*). Clause 2 (2) of Mr. Mason's Bill provides that the right of action under the principal Act shall not be lost by reason of the death of the wrong-doer. Clause 2 (3) makes provision for the bringing of an action against the insurer in the event of the wrong-doer becoming bankrupt or "dying insolvent," which is the phrase that Myers, C.J. found it unnecessary to construe in *Findlater's* case when considering Sec. 10 of the Motor Vehicles Insurance (Third Party Risks) Act, 1928. Clause 2 (1) of Mr. Mason's measure does not appear to be altogether clear, and it is suggested that he might well give its wording further consideration.

Judges and Salary Reductions.

It is refreshing to read in the daily Press an intelligent appreciation of the sound reasons why no variation should be made in the salaries of the Judiciary. In its leading columns, the *Auckland Star* on August 21, said in part as follows:

> "We must remember that the security which our judges now enjoy from political tyranny or undue influence is quite a modern development in our constitutional history. Before the Revolution of 1688, judges were removable at the Royal pleasure, and thus the door was opened wide for terrorism and corruption. One of the most memorable clauses in the Bill of Rights provided in effect for that tenure of office 'for life or good conduct' which is still to-day the chief safeguard for the dignity and integrity of our judicial Bench and the just and fearless enforcement of our laws. Now it should be obvious that if the salaries of our judges are reduced by legislative enactment, a precedent may be set up which may supply pretexts for threatening in various ways the security of the judicial position and thus menacing the prestige and authority of our Courts. Any judges who have objected to the reduction of their salaries on constitutional grounds have thus strong arguments in their favour. No doubt the refusal of judges to consent to a reduction of salaries places them in an invidious position and may be attributed to selfishness or lack of public spirit. But this is a short-sighted view of the case, and it should be recognised that to lower the salaries of judges, no matter what the reason or excuse, might set in motion forces that would tend inevitably in the long run to undermine the integrity of the Bench and ultimately to destroy the power and the beneficent influence of those judicial tribunals which are still the chief safeguard of the people against tyranny or crime."

"I do not suppose anybody but a lunatic keeps a copy of his love letters."

—Mr. Justice Avory.

Rescission and Damages.

By T. Cyprian Williams.

I.

It is surely well settled that, when one party to a contract commits a breach of one of his main duties thereunder—one that "goes to the root of the whole consideration"—the other party (if he do not claim specific performance of the contract, where that remedy is available) has his choice of two common law remedies: he may either rescind the contract and sue for complete restitution to his former position (*restitutio in integrum*), or he may affirm the contract and sue thereunder for damages for breach of the agreement. These remedies are alternative and mutually exclusive, and not cumulative. He may, indeed, *claim* both of them in the alternative by his writ and in the prayer for relief in his pleadings; but he must elect at the hearing which of them he will pursue, and when he has once so elected, his election is irrevocable, and precludes his pursuing the alternative remedy. And if he elect to rescind the contract, he must return to the other party any property which has been transferred to him in pursuance of some part performance of the contract; except only a deposit paid to him on the condition, express or implied, that it should be forfeited on the depositor's breach of the agreement. For the numerous cases, which support these propositions, the writer (to save space) asks leave to refer to those cited in *Williams' Vendor and Purchaser* 792, n. (*s*), 810, n. (*c*), 815, nn. (*r*, *s*), 983, n. (*g*), 1001, nn. (*x*, *a*), 1012, 1013, nn. (*l*, *o*, *p*, *q*), 1015, nn. (*d*, *e*), 1016, m. (*f*), and 1017, n. (*g*), 3rd Edn., and in his *Contract of Sale of Land*, pp. 119, nn. (*a*, *c*), 121, nn. (*k*, *l*, *m*), 122, nn. (*o*, *p*, *q*), and 123, n. (*s*).

Furthermore, if one aggrieved by the other's breach of one of his main duties under the agreement elect to rescind the contract, the entire contract is avoided, and neither of the party, whose breach is the cause of the rescission, nor the party who rescinds the contract for that breach, can sue upon or take advantage of any clause or stipulation therein contained. And in this respect the consequences of rescission of a contract are the same, whether the contract be rescinded for a breach of an obligation going to the root of the whole consideration, or for fraudulent or innocent misrepresentation, including that kind of misrepresentation which seems really to be failure to produce and deliver a property exactly corresponding with that described in the contract. Thus a vendor of land producing a property substantially different from what he contracted to sell cannot, if the purchaser elect to rescind the contract, take advantage of a stipulation in the contract that it shall not be avoided by errors of description, but compensation shall be allowed therefor (*Flight v. Booth*, 1 Bing. N.C. 370, 377), or of a stipulation that no compensation shall be allowed for errors of description, nor shall the same annul the sale (*Lee v. Rayson*, [1917] 1 Ch. 613). And an insurer of property against loss by fire, who claims to repudiate and to rescind the contract for fraud or on some ground going to the root of the whole consideration cannot set up an arbitration clause contained in the contract as a bar to an action by the insured to recover the amount of his loss (*Jureidini v. National British, etc. Insurance Co., Ltd.*, [1915] A.C. 499, 503, 505). And where, after a sale of property with an express power of resale on the purchaser's default, the vendor exercises the power of resale, that operates as a rescission of the original contract of sale, and the vendor is not entitled to sue *under that contract* to recover the amount of any loss on the resale, but he must sue upon a special stipulation, either expressed or to be implied, in the power of resale that the original purchaser shall be liable to pay the amount of any deficiency in the price on, and the expenses of, the resale (*Lamond v. Davall*, 10 Q.B. 1030, 1032; *Ockenden v. Henly*, E. B. and E. 485; Sug. V. & P. 39). Where, moreover, the contract contains such an express power of resale, the vendor cannot resell *under that power* (though he may do so as owner restored to his former position) after he has elected to rescind the contract for the purchaser's breach of an obligation going to the root of the whole consideration (Fry, L.J., *Howe v. Smith*, 27 Ch. D. 891, 105).

That the remedies for breach of a contract of sale by rescission or affirmation of the contract are alternative, and mutually exclusive, and not cumulative, is further shown by the fact that where a deposit is paid on the express or implied condition that it is to be taken in part payment of the purchase money, but is to be forfeited on the purchaser's breach of the agreement, and the vendor elects to affirm the contract and sue for damages thereunder for the purchaser's breach, he cannot then retain the deposit *as forfeited*, and claim *in addition* the full amount of the damages awarded to him for the breach; but he must give credit for the amount of the deposit as part payment of the price, and can only recover the amount of the damage, which he has sustained, after giving credit for such payment (see *Ockenden v. Henly*, E. B. & E. 485; *Howe v. Smith*, 27 Ch. D. 89, 104, 105; *Shuttleworth v. Clews*, [1910] 1 Ch. 176; 2 *Williams' Vendor and Purchaser* 1020 and n. (*f*), 1024 and n. (*m*), 3rd Edn.). In fine, the common-law rule as to the affirmation or rescission of a contract, in case of a breach going to the root of the whole consideration, accords with the principle of Scots law that a man shall not approbate and reprobate.

Now it is thought that in every case in which a contract contains a clause stipulating for payment of a fixed sum in the event of a breach of the agreement, and a party aggrieved by the other's breach of the contract sues under that clause, then, whether he claims that sum as liquidated damages or as a penalty (and, therefore, security for his actual damage) he is affirming and not rescinding the contract. There can surely be no doubt about this. A party suing under such a clause is not pursuing any of the general remedies afforded by law for a breach of contract; but he is seeking to enforce a special and peculiar remedy, his title to which is derived solely from the provisions to that effect contained in the contract. And in every such case it is a question to be decided by the Court upon consideration of all the terms of the agreement, whether the parties' true intention was that the sum fixed should be liquidated damages, or that it should be a penalty only (see *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage, etc. Co., Ltd.*, [1915] A.C. 79, 86-88). So that whenever a party sues upon such a clause, he necessarily submits the construction of the whole agreement to the Court, and claims whatever the Court may award him upon the true construction of that particular stipulation.

In the recent case of *Lock v. Bell*, [1931] 1 Ch. 35. however, it appears to have been decided by Mr. Justice Maugham that a contract for the sale of the vendor's interest in a licensed house was rescinded, and the de-

posit forfeited upon a breach of contract by the purchaser, which went to the root of the whole consideration, and that the party rescinding (the vendor) was entitled *in addition* to recover damages under a penalty clause for the purchaser's breach of the agreement. The writer will venture, with great respect for the learned Judge, to offer some criticism of this decision in the concluding portion of this article.

(*To be concluded*).

Bench and Bar.

Mr. W. H. Cocker, B.A., LL.B., of Messrs. Hesketh, Richmond, Cocker, and Adams, Auckland, has been honoured with the appointment of New Zealand correspondent of *The British Year Book of International Law.*

On August 14, at Auckland, Mr. Lloyd Manning, of Te Puke was admitted as a Barrister by Mr. Justice Herdman on the motion of Mr. A. C. A. Sexton.

Mr. G. L. O'Halloran, formerly of the staff of Messrs. Jackson, Russell, Tunks and West, has commenced practice in the National Bank Buildings, Auckland.

Messrs. Greville and Bramwell have dissolved partnership. Mr. Greville will continue in the late firm's Auckland office, and the Dargaville practice will be conducted by Mr. Bramwell.

Mr. H. F. von Haast has been appointed by the New Zealand Branch of the Institute of Pacific Relations as one of the New Zealand delegates to the Biennial Conference of the Institute at Hang-chow, and leaves on September 4. He expects to be back in Wellington before the New Year. We understand that during his absence a reserve nominated member will be appointed to perform his duties as a nominated member of the Hawke's Bay Adjustment Court.

Mr. J. N. Baxter, of the office of Mr. P. H. Watts, Hamilton, died on August 18.

Mr. W. A. Carruth died suddenly at Whangarei on August 17; he had been at his office in seemingly good health on the previous day. Born seventy-one years ago at Papatoetoe, Auckland, the deceased was educated at Colonel Grant's school there, completing his education at the Auckland Grammar School. He was then articled to the late Mr. William Thorne, with whom he afterwards commenced practice in partnership in charge of a branch office at Whangarei over forty years ago. Later, he continued on his own account. During the pioneering days, Mr. Carruth attended to most of the townspeoples' legal affairs, and he was Borough and County Solicitor and adviser to several other local bodies. Some years ago he took his son, Mr. H. G. Carruth, into partnership. The deceased gentleman took a keen interest in local sports and athletic societies, besides being president and an active member of the original Philharmonic Society for a long period. He was one of the High School Governors for thirty-seven years, during eleven of which he was chairman of the Board. His widow, two sons and a daughter, survive him.

Receivers Under Debentures.

Position on Voluntary Winding Up.

By S. D. E. Weir, LL.M.

At a time when voluntary liquidations of companies are unfortunately common, it is of interest to consider the position of a receiver under a debenture who has been appointed and has entered into possession prior to the passing of an effective resolution to go into voluntary liquidation. For present purposes, it is not proposed to examine the case of a receiver who, on the authority of such decisions as *Robinson Printing Co. v. Chic*, (1905) 2 Ch. 123 and *re Vimbos*, (1900) 1 Ch. 470, is deemed to be the agent of the debenture holders prior to liquidation, but to confine the subject to the position of a receiver who is, by the terms of the debenture, empowered (*inter alia*) to get in and realise the assets of the company and to carry on its business but who, according to the express conditions of the debenture, is for such purposes to be deemed the agent of the company.

Until the company goes into liquidation, it appears that effect will be given to such a provision and no liability will in the ordinary way be incurred by the receiver or by the debenture holder unless the Court concludes that, on a consideration of the debenture as a whole, a different construction should, in the circumstances, be placed upon the clause in question: *Cully v. Parsons*, (1923) 2 Ch. 512

When, however, an effective resolution has been passed that the company should be wound up voluntarily, the position of such a receiver becomes somewhat uncertain. It may be stated upon the authority of *Gosling v. Gaskell*, (1897) A.C. 575 that on a compulsory winding up, the power of such a receiver at least to pledge the company's credit and to make new contracts on the company's behalf involving the carrying on of its business as a going concern is determined, and that if he purports to do so, the company is not bound because its power so to contract is at an end, nor, in the absence of evidence of authorisation, will the debenture holder incur personal liability for his action.

In *Thomas v. Todd*, (1926) 2 K.B. 511, Wright, J. held that the same rule should be applied in the event of a voluntary liquidation and held that, in the circumstances of the case before him, the receiver incurred a personal liability on the contract which he made. The learned judge suggested (at page 518), really following Lord Herschell's dictum in *Gosling v. Gaskell* (*cit. sup.* at page 592) that where the receiver purports to act as an agent only, then, though not liable as a principal, he may be held liable for damages for breach of warranty of authority.

The authority of these cases does not seem to have been questioned on the points necessary to the decision in each instance. But it is submitted that a considerable doubt arises as to their applicability where the receiver is not making new contracts for the purpose of carrying on the business and is not pledging the company's credit, but is merely selling the assets for the purpose of paying the amount secured by the debenture.

Thus Lord Davey in *Gosling v. Gaskell* (*supra* at page 595) says (the italics in the following and other passages quoted are mine):

> "I assume that the power *to carry on the business so as to pledge the credit of the company and make the company liable to be sued on contracts made by him* came to an end . . . ."

and in the Court of Appeal, Rigby, L.J., in the course of his dissenting judgment said,—(1896) 1 Q.B., at page 700,

> ". . . he could no longer pledge the credit of the company. But it seems *that he could realise the trade assets* and employ them in further trading so long as he was not stopped by the trustees for any of the debenture holders."

One must also bear in mind the provisions of Section 222 of our Companies Act, 1908:

> "Where a company is wound up voluntarily it shall from the date of the commencement of such winding up cease to carry on its business *except in so far as is required for the beneficial winding up thereof* . . . but its corporate state and all its corporate powers shall notwithstanding its requisitions provide otherwise continue until the affairs of the company are wound up."

There are, it must be admitted, wide statements in both *Gosling v. Gaskell* and *Thomas v. Todd* which create a difficulty. Thus in the former case Lord Watson (at page 588) refers to the "incapacity of the company to act by or incur any obligation through an agent"; Lord Herschell (at page 591) to the company becoming "incapable of entering into contracts without the sanction of the Court," but the winding up in that case was a compulsory winding up and the statements made were, it is contended, wider than was necessary for the decision. Again, in the later case referred to, Wright, J. (at page 516) said: "I have come to the conclusion . . . that *the right of the receiver to bind the company terminated on the commencement of the voluntary liquidation*," but the learned judge may have had the facts of that particular case only in mind when he made such a broad statement.

Language similarly wide appears in the text books, e.g. *Steibel*, 3rd. Edition Volume I, page 409; *Buckley*, 11th. Edition, pages 199-200 on the authority of the cases above-mentioned, but it is still suggested that, in view of the nature of a voluntary liquidation and having regard to the provisions of our Companies Act on the point and provided that the debenture is appropriately worded, the receiver should still, after the commencement of a voluntary winding up, be able on principle to realise the company's assets as the agent of the company (or its liquidator), although he is no longer such an agent for the purposes of pledging its credit in order to carry on the business. To hold otherwise might deprive the debenture holder of the very protection which he contracts to obtain. Until, however, the point is definitely decided, receivers will no doubt wisely require satisfactory indemnities before taking any steps whatsoever once liquidation has supervened.

"There is only one question to which a woman will give in answer the unqualified and brief affirmative."

—The Lord Chief Justice of Northern Ireland.

Personal Accident Policies.

"Violent Accidental External and Visible Means."

By J. B. Callan, B.A., LL.B.

A common form of personal accident policy makes the insurer liable to pay "if the assured meets with bodily injury by violent accidental external and visible means." Cozens Hardy, M.R., once said of these words that it seemed to him seriously open to doubt whether they did not exempt the insurer on every occasion that is likely to occur—*In re Brown's claim*, (1915) 2 Ch. at p. 170. In *Hamlyn v. Crown Accidental Insurance Co.*, (1893) 1 Q.B. 750 C.A., the plaintiff was insured under a policy containing the words quoted above. He was a grocer. A customer came into his shop with a child. The child dropped a marble, which began to roll down the sloping floor of the shop. The grocer tried to catch the marble, opened his knees and, stooping forward, bent them. This, he appears to have done awkwardly, for in so doing he wrenched his knee. He claimed under his policy, but his claim was resisted; and Bompas, Q.C., and Blake Odgers argued for the insurance company: (1) that the stooping was not violent, (2) that it was intentional and, therefore, not accidental, and that the injury, which was entirely within the knee, was, therefore, neither (3) external nor (4) visible. The insurance company thus resisted independently on each of the four of the adjectives by which their contractual liability was defined and qualified. But all four of these contentions were unanimously rejected by the Court of Appeal, and judgment was given for the grocer. One cannot resist the feeling that their Lordships strained to the utmost the doctrine of "contra proferentes" in arriving at this result. But most persons who were neither lawyers nor insurers would probably agree with the grocer that what had happened to him was just the sort of thing against which he had insured, and would feel gratification that the law found itself able to agree with him. In *Colonial Mutual Life Assurance Society Ltd. v. Long* (7 N.Z.L.J. p. 4) the plaintiff who was a man in his prime, and was used to playing games, was watching some school children playing tennis, when a tennis ball was driven out of the court. The plaintiff picked up the ball and threw it back to the court. It was a fairly long throw, and he sprained his shoulder. This probably surprised him considerably, but possibly rather less than the ultimate result of the ensuing litigation. Blair, J. (1931, Gaz.L.R. p. 99) confessed himself unable to distinguish the case from that of Hamlyn the grocer, and gave judgment for the plaintiff. But on appeal, 7 N.Z.L.J. 4, the Court of Appeal unanimously reversed Blair, J., and apparently distinguished the case of Hamlyn the grocer by finding that whereas what happened to Hamlyn's knee was a very unlikely consequence of an attempt to pick up a marble, the spraining of Long's shoulder was, on the evidence, not shown to be a very unlikely result of throwing a light object like a tennis ball from the distance from which the plaintiff threw it, and with the force with which he must have thrown it. Medical evidence to this effect was given on both sides in *Long's case*. The decision of the Court of Appeal thus rests on its inability to draw from the evidence, the inference that what happened to Long was an unlikely result

of his act. This should operate as a warning to persons who propose to effect personal accident insurance. Having regard to the thousands of errant tennis balls that are thrown back to tennis courts throughout New Zealand every year, and the small proportion of strained shoulders that result therefrom, the simple layman might imagine that a strained shoulder is judicially as unlikely a consequence of throwing back a tennis ball, as a dislocated knee is of picking up a marble. But this is a rash generalisation. One must be prepared to consider the throw with more detail—the length of it and the strength of it. Of course, if one *knows all* the factors, it will be seen that the resultant straining was not merely not unlikely, but inevitable. The decision also affords a useful hint for the conduct of the defence of such cases. In the grocer's case, had the grocer or some onlooker been persuaded to detail exactly *how* the grocer attempted to pick up the marble, and had medical evidence been tendered that the dislocation of his knee was an exceedingly likely result of the particular movement the grocer made, then it seems the grocer would have lost his case.

The most useful moral to draw from a consideration of the decisions, would appear to be that drawn by Lord Esher in *Coles v. Accident Insurance Co.* (1889) 5 Times L.R. 736, from a consideration of the policy then under discussion. His Lordship said: "I hold that this is a policy not to be praised, and people ought to be warned against insuring under policies in that form."

Misdirection of a Jury.

Lord Darling at Nisi Prius.

When a member of the Judicial Committee of the Privy Council, in the goodness of his heart, goes back to the King's Bench in the day of adversity and carries on for many weeks, it is hard luck that a re-trial of one of his long cases should be ordered by the Court of Appeal on the ground of non-direction and misdirection of the jury on material issues. Yet this was the fate of Lord Darling in the case of *Clifton v. Weil and Others*, wherein, according to the "melancholy" view of Scrutton, L.J., it was regrettable that the case should have gone on for nine or ten days and that the Court of Appeal should be obliged to say that no satisfactory direction had been given to the jury.

But Lord Darling need not be unduly dismayed. His long record is remarkably free from over-rulings and re-trial orders, and the same fate has befallen many a young Judge of great reputation. And it must be remembered that he had been a long time away in the higher regions of pure law where juries are unknown. It would be unwise and unfair to attribute this re-trial to his eighty-one years.

As Lord Merrivale observed, in dealing with the case of the Captain of the *Highland Hope*: "We have known men whose years have gone beyond seventy-five who have held such positions as that of Prime Minister, Primate of England, and the head of great commercial undertakings, and they have rendered service which it is a man's business to render in his circumstances of life so long as he can." And he might have added to his list, with justice, Law Lord; and President of the Probate, Divorce and Admiralty Division, one might say, for Lord Merrivale is 75 himself.

Deceased Persons' Declarations.

As to Symptoms.

That the declarations of deceased persons as to their bodily or mental condition are admissible in evidence where the state of their health is material, is a well-established doctrine in the law of evidence. Such declarations are not direct proof of the truth of the facts asserted (and so exceptions to the hearsay rule), but are to be adduced "merely as conduct manifesting the existence of the given condition" (*Phipson on Evidence*, 7th Edn., p. 60). Thus, on a charge of murdering a child by deliberate neglect, Channell, B., allowed a witness for the prosecution to mention a complaint of hunger by the child not as a proof that the child had in fact been hungry, but as "an act" expressing the child's feelings: see *Reg. v. Conde* (1867, 10 Cox 547) at p. 548.

At one time the Courts seem to have been prepared to allow not only statements describing the symptoms, but remarks implicating a particular person as being in the opinion of the speaker responsible for those symptoms: *cf. Rex v. Blandy* (1752, 18 S.T.) at pp. 1135-1138. But it is clear now that

> "the statements must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them, or how they were caused."—*per* Charles, J., in *Reg. v. Gloster*, (1888, 16 Cox at 473).

To hold otherwise would be to render unnecessary the stringent rules relating to dying declarations.

If it is desired to put in evidence statements of the deceased as to past symptoms, such statements must have been made in the presence of the accused, who had an opportunity of commenting on them. Thus in *Rex v. Black* (1922, 16 C.A.R. 118), a husband was charged with having poisoned his wife. Evidence was given of what she said to the doctor as to the effect of some medicine which her husband had given to her some time previously. The Court of Criminal Appeal held that this evidence was admissible, Avory, J., stating (at p. 120):

> "If it had appeared that there were statements made behind the back of the appellant, it would have required grave consideration whether they could have been admitted, but the Court is satisfied that they were made in his presence in such circumstances as to require some answer or comment from him, and the absence of any such comment was evidence from which the jury might draw inferences."

When instead of giving evidence of this nature through a witness to whom the words were spoken, it is sought to put forward written statements showing the condition of the mind of the deceased, the law is not altogether clear. In *Witt v. Witt and Klindworth* (1862, 32 L.J., P. & M. 179) which was a husband's divorce suit, Sir C. Cresswell (the Judge Ordinary) refused to allow letters written by the wife to her medical adviser to be put in evidence, the letters being said to contain statements by the wife of her being in ill-health, and showing, therefore, that she went to the place from which they were written in order to obtain a cure. The correctness of this decision is doubted by Taylor (*Law of Evidence*, 11th Edn., p. 400n). It seems certainly to be inconsistent with the view taken of the law by the House of Lords in the *Aylesford's Peerage Case* (1885, 11 A.C. 1). There letters written by a mother (then deceased) bastardising her issue were ruled to be admissible. Lord Selborne clearly regarded the letters as equivalent to statements to a witness.

London Letter.

Temple, London,
1st July, 1931.

My Dear N.Z.,

By your leave I am postponing the article on the subject of the New South Wales Appeal to the Privy Council; the Vacation will be upon us, shortly, when there is a dearth of legal matter, however domestic, to write about but, on the other hand, an adequacy of time in which to frame an article carefully; and, as the leave to appeal was granted, there will be available to me, shortly, as there is not at the moment of writing, a transcript of the proceedings before their Lordships to obtain it. I had prophesied that it was a toss-up which way the decision, on application for Special Leave might go. On the one hand, their Lordships notorious or notable reluctance, to interfere to any possible excess with the Dominions' housekeeping, might have seized upon the excellent reason for refusing, that in the Federal High Court the Appellant expressly intimated that the option to appeal to that Court had been deliberately adopted because "Australians would of course prefer to have their affairs settled by Australians."

(May I, daringly, digress at that point to suggest that such reasoning could hardly ever have been used in New Zealand, it being our view, yours and mine, that there is no more such a thing as a New Zealander, in this sort of context, than there is an Englander: we are surely one people? I hope I am right as to this; at least I know that if any cause of mine was, assuming the technical and physical possibility, carried to an Appellate Tribunal in New Zealand, I should attach no importance to the matter, from my Client's point of view, and from my own I should rejoice that a Court of Appeal had been chosen which afforded me the opportunity of making the one journey I have always wanted to make. But the idea that one's cause was being carried among strange men, of peculiar colour, with a sense of justice and propriety and honour different from my own: or to put it shortly, that I was being referred to anything in the nature of a "foreigner"—such an idea would not, I must confess, occur to me .... However, Australia is Australia, and we are not; so let us return to our discussion.)

On the other hand, I thought or was reminded, their Lordships might well say that a question of this magnitude was one upon which every available form of adjudication should be available to the disputants: and that was the view, as I understand, their Lordships took. I will tell you, in the article, what it is all about, and what most fascinatingly subtle, even metaphysical, point governs the issue. The foregoing is enough for the moment, if we add their Lordships' expression of view that our A.G. and all Dominions A.G.'s and, *nominatim* and especially, those principally concerned in the other States of Australia as to their constitution, should be made cognisant of what is afoot and upon the Table of Discussion, with a view to their participating, should they see fit to intervene.

O New Zealand! See fit.

Bench and Bar in Garden Party Array.—The Masters of the Bench of the Inner Temple, those autocratically self-elected governors of the affairs of the Inn (and their autocracy, and the complete absence of representative election from their constitution, belie, it always seems to us, half the vaunted merits of Democracy and of the maxim *Vox Populi Vox Dei*, by the very smoothness and excellence of their government) those Masters of our Bench gave a garden party yesterday, to which we were all invited but from which we were, in my Chambers, prevented from going by the double fact that we happened to be busy and that our windows overlook the lawn so that we could watch without waiting. The gates were narrowly guarded and but half open, it being the plan that each and all should be welcomed personally by the Treasurer of the Inner Temple, one Sir John Simon, K.C., M.P., of whom you may have heard mention. It was a very nice idea, but it meant an unconscionable amount of waiting; so that beneath our windows, as we discussed this and that Advice (as to whether we should give it) and that or this Allegation (as to whether we should plead it), passed, in a very slow moving queue, all the Notables and Unnotables of our Profession, in their motor cars at first, and then on foot, with their ladies, when the cars were parked and they had to line up for the presentation.

Some say that this reception was a practice in the minor functions of Vice Regality; but that is a naughty saying, and I must not develop it.

The cars were, in four cases out of five, of one famous mass-production make. Only an occasional Rolls-Royce made its appearance; and only one in every five was a "Greyhound" or a "Meteor" or an "Eagle" or any other fancily-named model, of the smart rather than reliable type. Four out of every five were, I repeat, of that Make and Manufacture which suggests safe and solid reliability .... And much the same may be said, in other words, of the ladies. .... Both which things go to establish what we have long suspected, that ours is a race of men, at the Bar or on the Rolls, which prefers inward and spiritual grace to outward and visible allure.

At one moment, when we paused from Bullen or Leake, we looked out upon a long queue with Lord Hewart, L.C.J. at the tail of it. It was good to see that most remarkable and so much discussed man apparently in good health and better form. Why he is remarkable, I have endeavoured frequently to impress upon you; what is discussed, in his regard, and with some degree of criticism, I have also ventured to mention or hint; but, be whoever right as to his merits as a Lord Chief Justice, there is no lack of unanimity as to the admiration and affection which his seductive genius with words begets. Lord Russell, suggesting anything but the Supreme Court of Appeal of this our Empire, ambled quietly along, in his appointed turn; Farwell J. looked very pleasing in grey morning suit and tophat (ditto); and Sir Henry Dickens, the Common Sergeant and son (as you know) of the incomparable Charles and also father of a practising barrister of no mean attainment or age, gallantly stood at the place of reception for an endless time, acquitting himself most marvellously for a man of his years. A pleasing colour effect was W. O. Willis, K.C., of the Divorce Bar, whose morning suit was noticeably light in hue, whose top hat was almost white, and whose countenance lacked none of its familiar crimson and cheerful polish.

Sir Francis Newbolt, that gaunt and bearded cynic who is King's Counsel, Official Referee and Chancellor of Ecclestical Jurisdiction, and also recently had his pockets picked by a common larcener, strode angrily up; the homely and darkly philosophical Lord Justice Slesser dropped domestically in: and in short, all one's friends and all one's enemies and all the men one tries to do down but by whom one is done down (if we may regard litigation, professionally, in that manner) sooner or later passed through the Gate and, their minds occupied far away by some forensic point or event, drifted, as soon as they decently might, to the Refreshment Tents.

Some People in the News.—If it was not becoming so frequent with me, as almost to be a habit, I would inform you at length and in detail of the personal merits of yet another figure in the Law which has passed: His Honour Judge Gurdon. But it is better, perhaps, not to encourage this tendency to the obituary; and you will have read much of him in the current Press, since he was a man for whom the affection of his professional brethren was but typical of the affection of a very wide world, and he had all the merits which deserved it. A cheerful friendliness, an admirable humanity and a difficult limp were the impression, visual, which he left behind, this distinguished athlete. And in his day, if I remember right, he was regarded as a practising Junior of very distinct promise, so that his taking a County Court Judgeship was subject of much surprised comment.

Again, I do not intend to dilate upon the observations of Sir Cecil Hurst, K.C., "formerly Legal Adviser to the Foreign Office and now British Judge on the Hague Court of International Justice," upon the occasion of his Reading in the Middle Temple Hall and the subject of the World Court of the Hague. I am of that school which contends, not without a certain violence of expression, that what he was Formerly had a notable distinction and was a laudable achievement but should never have been allowed to enable him to become what he is Now; and for this reason I do not intend to include him among those privileged to be mentioned and maligned in these Letters. The appointment, as the *Law Journal* (yours, as well as ours, I seem to remember) commented at the time, was an unfortunate one; and I'm blowed, if one may be blowed in print, if I see why we should forgive it.

Cost of Litigation Under Fire.—The cost of litigation is again being much canvassed, the reformers or would-be reformers now becoming so intent that they are being a little acrimonious in their addresses to each other. This does not much matter; they will never achieve anything by their piecemeal reformations and suggestions though certain recommendations of the Bar Council have this merit about them, that they are barefaced plagiarisms of existing practice in Scotland and there they have achieved much success. The point is quite a short one: there is needed a complete re-orientation on the subject of fixing days and paying fees and, indeed as to most of that which goes to the methods of our carrying on our business. Given a willingness to face this, we do not much mind how far Authority goes in pirating Scottish ideas, provided it is careful not to plague us with Scottish phraseology. Indeed, the more like Scotsmen we become, especially as to our ideas of the extent to which we should be remunerated and to which the Litigant should be made to pay for his sport, the better I for one shall be pleased. The Scottish example is an example we should do well to follow, first and essentially and foremost as to the price, to the public, we put upon litigation. Our charges are outrageous; the system of remunerating the Junior is as extravagant, at the end, as it is miserly at the beginning; and the whole result is that our profession trembles upon the verge of permanent unemployment for the reason that a man would sooner keep away from Justice than entertain her upon the English rate of exorbitant expense.

A Recent Murder Trial.—The Hearn murder case has given rise to no more important remark than this, that it is a disappointment for those who had a Rouse-Hearn "double"; I suppose these newspaper sensations mean little to the good lawyer as his lay friends suppose they mean all; and there was none of the technical importance about the Hearn trial which attached to the Rouse. Norman Birkett, K.C., was it is true in both; but then, it may well be asked, why should he not be? There is no more reason why he should not be, than there is reason why he should be. He is a very pleasant and a very able man; but to attribute to him any of the great qualities of advocacy, which may cause a murder case to become a matter of history by reason of the counsel engaged in it, is nonsensical. He has no better average of wins nor worse average of losses than any of his contemporary "Stars": and really, when you get down to it, that word "Star" is almost sinister in the accuracy of its connotation, as you may see if you consider the various, human objects to which it is applied!

Yours ever,
INNER TEMPLAR.

Correspondence.

BRANDING OF STOCK.

Sir,

I read with interest the letter by "Taurua" in your issue of August 4. All practitioners will, I think, agree that it is preferable for the grantor to covenant to brand with his registered brand. The difficulty is, however, very frequently met that a grantor, requiring accommodation for (say) £100, advises the Solicitor concerned that he has not a brand and would not use it if he had. A registered brand costs 30/- or more, and, if the Solicitor compels the grantor to incur this expense, it is begrudged even more than the legal costs of the transaction. Personally, I consider that the fact that few dairy farmers brand should receive further recognition, and the peculiarity of certain unbranded stock being included in a security (merely because the grantor has covenanted to brand them) while the same stock would not be included except for that unfulfilled covenant, should be removed.

Yours, etc.,
"NORTH TARANAKI."

"With few exceptions, the lawyer of the stage is either a knave or a mountebank. The literature of the green room can be searched almost in vain for lawyers who can prove a good moral character. Instead, we have a veritable rogues' gallery."

—Mr. James M. Beck, Solicitor-General for the United States, 1921-1925.

Legal Literature.

The Law of Running-down Cases.

By EDWARD TERRELL, Barrister-at-Law.
(Butterworth & Co. (Publishers), Ltd.)
pp. xxx, 254, with 12-page Index.

The number of actions arising out of motor collisions has increased everywhere of late years, and shows little sign of diminishing. Mr. Terrell has consequently done us a distinct service by his comprehensive treatment of all phases of the application of Common Law principles to the practical issues involved in this class of action. Motor accidents are his principal theme, but he illustrates with shipping and other relevant cases. His treatment of his subject is extremely practical, even to a concluding chapter on the most effective manner of preparing a road-accident case for trial. Various extracts from different Judges' ways of putting issues to the jury are another helpful feature throughout his pages.

His handy arrangement of his subject-matter, is not the least valuable service rendered by the author. Commencing with a chapter dealing exhaustively with the case for the Plaintiff, he discusses such problems as the proof of negligence, and the limits within which the principles of *Res ipsa loquitur* may be applied, with special reference to "skidding" cases, as, for example, his critical examination of *Wing v. London General Omnibus Company*, (1909) 2 K.B. 652. He also outlines the circumstances in which defective vehicles render their owners liable for damages through accidents, *Britannia Hygienic Laundry Co. v. Thornycroft and Co.*, (1926) 95 L.J.K.B. 237 being one of the decisions upon which comment is given.

In dealing with the defendant's case, the author subdivides his chapter into a discussion of actions respectively wherein a submission that there is no case to answer, may profitably be made; a defence of contributory negligence may be set up, or a defence of inevitable accident may be usefully maintained. The recent judgment of the House of Lords in *Swadling v. Cooper*, (1930), 46 T.L.R. 597, provides the author with material for demonstrating the effect of the latest dicta on the meaning of contributory negligence. The relative functions of judge and jury on this issue are carefully explained, and, after fully discussing the old principle as applied to modern facts, an excellent outline of a summing-up is given.

We find the chapter on Lord Campbell's Act to be the most concise commentary we have seen on it. It is valuable to New Zealand practitioners, since our Deaths by Accident Compensation Act, 1908, only slightly varies from Lord Campbell's Act in the list of persons to whom compensation is payable, and by the fact that the Crown is bound in so far as it relates to common employment. The chapter is thus most useful when considering the effect of our own legislation.

In a very searching chapter on Damages, the author reviews in a highly commendable manner the leading cases on damages awarded by way of compensation, and he comments usefully on the now-leading case, *In re Polemis and Furness, Withy and Co.*, (1921) 3 K.B. 560, as to remoteness of damage. Another valuable section is that in which he treats exhaustively with claims in respect of mental shock, and the development of the law in regard to them, in the light of modern medical knowledge. Mention of the author's dealing with the admissibility of servants' testimony, and his remarks concerning the unsatisfactory state of the law regarding the liability of owners of vehicles not within their own physical control when an accident occurs, by no means exhausts a list of the many practical questions discussed in other chapters of this valuable treatise. A good general index is supplied.

The work is thoroughly up-to-date, comprehensive in treatment, valuable in its detail, and altogether an indispensible adjunct to the equipment of adviser and advocate alike.

The Fortnightly Law Journal, Canada.

(Fortnightly Law Journal Ltd., Toronto, Canada).

We extend a cordial greeting to our new Canadian contemporary *The Fortnightly Law Journal*, the first two numbers of which have just reached us. The new publication has received the benediction of the Minister of Justice and Attorney-General of Canada (the Hon. Hugh Guthrie, K.C.) who writes a foreword, and the aim of its publishers is to provide "an all-Canada Journal providing material of interest and utility from the East to the West." If the standard of these early numbers is maintained this aim will undoubtedly be achieved. Each number contains twelve pages of reading matter, all attractively presented. There are notes and articles on matters of general legal interest and more localised notes from the Capital and the Provinces, as well as sound articles of high standard on points of law. Each number contains notes of the current Canadian decisions, both in the Supreme Court of Canada and in the Provincial Courts, and there are notes also of "Empire Cases of Importance and Interest." One number contains the first of what is to be a regular series of London Letters by a barrister of the Middle Temple, and the ever-popular "Forensic Fables" are being reprinted. Finally, one notices the "Practical Points" column, where answers are given to the legal conundrums of the subscribers.

Mr. R. M. Willes Chitty, apparently of the illustrious line of Chittys, is the editor.

New Books and Publications.

Practical Forms, Vol. I, Fourth Edition. By Charles Jones, revised and enlarged by J. Rhys Williams. (Effingham Wilson). Price 16/-.

Scrutton's Charter Parties. Thirteenth Edition. By S. L. Porter, K.C., and W. L. McNair. (Sweet & Maxwell Ltd.). Price 40/-.

Chalmer's Sale of Goods, including The Factors Acts, 1889 and 1890. Eleventh Edition, 1931. By Ralph Sutton, M.A. and N. P. Shannon. (Butterworth & Co. (Pub.) Ltd.). Price 19/-.

The New Land Tax, 1931. By Rt. Hon. G. H. Sargent. (Longmans Green). Price 2/-.

Commercial Code of Japan. Annotated. Vol. 1. Price 38/-.

Bills Before Parliament.

Transport Licensing. (Hon. Mr. Veitch). "Commissioner" means the Commissioner of Transport; "Goods-service" means any service by motor-vehicle for the carriage or haulage of goods for hire or reward unless the service is such that it is carried on entirely within the boundaries of a single borough or town district; "Owner" in relation to a vehicle which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of that vehicle under that agreement; "Passenger-service vehicle" means any motor-vehicle used for hire or reward for the conveyance of passengers, with or without goods (not being a motor-vehicle which is available for hire to any of the public on undefined routes for the conveyance of passengers not exceeding eight in number including the driver, and in respect of which separate fares for each passenger are not charged or received), and includes a trackless trolly-omnibus.—Cl. 3. Constitution of transport districts.—Cl. 4. Alteration and abolition of districts.—Cls. 5 and 6. Central Licensing Authority and District Licensing Authorities established.—Cl. 7. Qualification and term of office and removal from office.—Cl. 8. Person acting when disqualified liable to fine—Cl. 9. Vacancies may be filled.—Cl. 10. Deputies may be appointed by Minister of Transport.—Cl. 11. Allowances and expenses of members provided.—Cl. 12. Officers to be officers of the Public Service.—Cl. 13. Meetings of Licensing Authorities.—Cl. 14. Procedure of Licensing Authorities.—Cl. 15. Annual Report of Licensing Authority to be furnished to Minister in April of each year.—Cl. 16. Constitution of Board.—Cl. 17. Application of certain of foregoing provisions of this Act to Appeal Board and members thereof.—Cl. 18. Functions of Appeal Board.—Cl. 19. Passenger-services to be carried on only pursuant to passenger-service license granted under this Act.—Cl. 20. Exemptions from passenger-service license.—Cl. 21. By whom passenger-service licenses granted.—Cl. 22. Application for license to be made to Commissioner of Transport.—Cl. 23. Licensing Authority to advertise receipt of application and hold public sitting.—Cl. 24. Matters to be considered before determining applications for licenses.—Cl. 25. Preference for applications by Government and local authorities and other public bodies in certain cases.—Cl. 26. Granting or refusal of license.—Cl. 27. Classification of licenses.—Cl. 28. Licensing Authority to fix routes, fares, time-tables, &c.—Cl. 29. The license and its effect.—Cl. 30. Registers of licenses to be kept.—Cl. 31. Duration of license: one year from quarter day of issue or from quarter day immediately preceding.—Cl. 32. Amendment or revocation of terms and conditions of license.—Cl. 33. Renewal of licenses in manner specified.—Cl. 34. Revocation of and suspension of licenses.—Cl. 35. Accounts to be kept and returns to be made by licensees.—Cl. 36. Applicants for licenses and licensees to supply particulars of arrangements with other persons as to provision of passenger-transport facilities.—Cl. 37. Passenger-service vehicles, with certain exceptions, to be used only in connection with licensed service.—Cl. 38. Terms of issue of certificates of fitness.—Cl. 39. Duration of certificates.—Cl. 40. Revocation of certificate of fitness. if passenger-service vehicle does not comply with prescribed conditions as to fitness.—Cl. 41. Powers of Inspectors.—Cl. 42. Right of appeal from decisions of Licensing Authorities to Transport Appeal Board.—Cl. 43. Governor-General may declare controlled areas for purposes of this Part or apply this Part to all transport districts.—Cl. 44. Inquiries by Central Authority and any District Authority for purpose of ascertaining desirability of declaring controlled area.—Cl. 45. Application of provisions of Cls. 19 to 41 (inclusive) to controlled area or to certain goods-services carried on therein.—Cl. 46. Requirements of Licensing Authority as to granting of goods-service licenses.—Cl. 47. Licensing Authority may require owner to show cause why service should not be licensed as goods-service.—Cl. 48. Combined passenger and goods-service not to be carried on without goods-service license and certificate of fitness.—Cl. 49. Commercial aircraft services to be carried on pursuant to aircraft-service license granted under this Act.—Cl. 50. Exemptions from aircraft-service license.—Cl. 51. Licenses to be granted only by Central Authority.—Cl. 52. Application of certain provisions of this Act with respect to applications for aircraft-service licenses.—Cl. 53. Matters to be considered before determining application for license.—Cl. 54. Conditions which may be prescribed in granting of licenses.—Cl. 55. Special conditions (as to insurance, &c.) precedent to grant of license.—Cl. 56. Duration of license.—Cl. 57. Aircraft must have certificate of fitness under the Aviation Act, 1918.—Cl. 58. Clause 42 to apply to Appeals.—Cl. 59. Excludes in respect of commercial aircraft-services, operation of section 18 of Police Offences Act, 1927 (relating to Sunday trading).—Cl. 60. Notice of accidents to be given to Commissioner.—Cl. 61. Inquiries into accidents.—Cl. 62. Report of inquiry not to be used in legal proceedings.—Cl. 63. Provision as to service of notices.—Cl. 64. Offences to be tried summarily.—Cl. 65. Evidence and proof required, onus on defendant.—Cl. 67. Application of fees and fines to Consolidated Fund, and expenses of administration to be paid out of moneys appropriated by Parliament.—Cl. 68. Certain provisions of other Acts, &c. to be read subject to this Act.—Cl. 69. Power of Minister to modify restrictions on user of roads or streets by vehicles used in connection with passenger or goods services.—Cl. 70. Save as specially provided, this Act not to derogate from provisions of other Acts.—Cl. 71. Regulations for specified purposes.—Cl. 72. Provisions as to regulations.—Cl. 73. Auckland Transport Board Act, 1928, to be subject to provisions of this Act; no further licenses, &c., to be granted by such Board.—Cl. 74. Section 6 of Christchurch Tramway District Amendment Act, 1927, repealed.—Cl. 75. Motor-omnibus Traffic Act, 1926, repealed.—Cl. 76. Act to bind the Crown.

Distress and Replevin Amendment. (Mr. Fraser). S. 5 of principal Distress and Replevin Act amended by deleting proviso therein.—Cl. 2 S. 181 (3) of the Magistrates' Court Act, 1928, amended by adding after word "name" in line 7, "or may make such order as he deems just and equitable under the circumstances of the case, having regard to the relative positions (financial and otherwise) of the landlord and tenant, and any other relevant considerations."

Rating Amendment. (Mr. Mason). Cl. 2.—Repeals Ss. 47 and 69 of the Rating Act, 1925.

Licensing Poll Postponment. (Rt. Hon. Mr. Forbes). Cl. 2 (1) and (2). No licensing poll to be taken simultaneously with any general election before December 31, 1931. Result of last licensing poll to continue in force, until licensing poll taken simultaneously with first general election after December 31, 1931, notwithstanding preceding Parliament dissolved before it had been two years in existence.

Marriage Amendment. (Mr. Mason). Cl. 2.—Woman may be officiating minister.

Local Bill.

Petone Borough Council Empowering. (Mr. W. Nash).

South Wairarapa River Board Empowering. (Colonel McDonald).