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

"*Bear in mind that we practise a profession, not a trade; a vocation, not a business. We are indeed dedicated to a high calling, and, in the words recently used by an eminent writer, we are 'the custodians of a very sacred and precious inheritance which enshrines the long results of the perpetual warfare of the spirit of man, the spirit of love and fellowship against the enemies of the soul, the evil hosts of selfishness and brute force and tyranny and chaos.*'"

—The Rt. Hon. Lord Macmillan.

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Sir Alexander Gray, K.C.

Unanimity in matters affecting purely professional interests, or upon questions of domestic concern, is rarely characteristic of lawyers in this country. Common ground, however, has lately been found upon which perfect agreement can be recorded. We refer to the merited inclusion in the list of New Year honours of the name of the President of the New Zealand Law Society. From all parts of the Dominion has arisen an appreciative chorus acclaiming the knighthood conferred on one whom all members of the legal profession regard with genuine respect and undoubted affection. Sir Alexander Gray, K.C., is pre-eminently worthy of recognition at the hands of his Sovereign. And we all feel joy in this recognition of his leadership, of his professional eminence, and of the courtesy and helpfulness that his brethren have for so many years associated with his name and his charming personality.

With the self-effacing modesty that is not the least of his qualities, Sir Alexander would undoubtedly say that he has been chosen as the recipient of His Majesty's compliments to the profession of the law in the Dominion. We admit that we are complimented, but in a more intimate sense. For we possess as the leader of our work-a-day ranks one whose personal character and honourable service are worthy of distinguished recognition. In this respect, in our pride of possession, we have a real part in the honours recently bestowed.

We take pleasure, too, in the selection of a practising barrister as the recipient, on purely professional and personal grounds, of the honour of knighthood. From time to time, it is true, high distinctions have been conferred upon other lawyers; but these have come principally as the reward of service in other spheres of activity. Now, for the first time in this country, forensic eminence has been acknowledged as a touchstone to notable public recognition.

It is not our purpose here to enlarge on the qualities of mind and heart which have earned Sir Alexander Gray the respect and affectionate regard of his fellowmen. Nor is it necessary in a journal that is read chiefly by lawyers to enumerate the services to his profession he has rendered during many years. We all know the painstaking care with which he has applied himself in difficult times to the promotion of the best interests of those who follow the practice of the law. When, however, we recall his high sense of honour and personal fastidiousness in all that pertains to the dignity and prestige of the profession to which he belongs, we realise his value as a source of inspiration to his younger brethren. There is something particularly attractive to all right-thinking men in the spectacle of singleminded allegiance to an ideal of high-principled conduct. In this regard, the profession and the public owe much to Sir Alexander Gray. Quite unconsciously he has provided, during over half a century at the Bar, an example that could not fail to have caused a raising of the standards of those who observed it. In his person, the best traditions have been preserved: many have profited thereby, and all have recognised in him a leader whom men felt worthy to be followed.

At times, an honour may be honoured in its recipient. We feel that is so in the instance before us. Honesty of purpose, scrupulous rectitude, professional idealism, kindliness, and unselfish modesty, have been the keynotes of Sir Alexander Gray's professional years. And, in honouring him, all these qualities of high repute have been honoured. Consequently, in the wider sphere of social and public life, his knighthood is of good omen. It shows that in the turmoil of the times, these attributes are still recognised as worthy of honouring and as fruitful of emulation. We are all naturally proud and pleased that to a President of the legal profession a knighthood has come. But it is a source of greater pride and pleasure to reflect that it has been conferred on Sir Alexander Gray himself, since, in his honouring, our highest professional traditions have received merited recognition and appropriate acknowledgment.

Ave Atque Vale!

On the eve of the recent vacation, Mr. Herbert Page, Resident Director for Australia and New Zealand of Messrs. Butterworth and Co. (Aus.) Ltd., died with tragic suddenness at his Sydney home. Known as he was to many members of the legal profession and to numbers of other friends in the Dominion, the news of his passing came as a profound shock. It was barely six weeks since he had left our shores for the last time; and many were looking forward to seeing him in their midst in March next.

The late Mr. Page was born at Halifax, England, in July, 1883, and was educated at Bradford College. He went to London in 1901, and there took up journalism, among his activities being the editorship of *Page's Weekly*, an engineering magazine. He joined Messrs. Butterworth and Co. Ltd., at their head-office, and was closely connected with the publication of *Halsbury's Laws of England*. This brought him into personal relations with the Earl of Halsbury who supervised

every page of that work, and he could relate many interesting memories of the great Lord Chancellor. In 1912, Mr. Page was appointed the firm's representative in Australia, and in 1914 he established the New Zealand branch. More recently, he became Resident Director for Australia and New Zealand. He visited England on business on several occasions, the last being in 1928, when he completed the preliminary stages of the *Reprint of the Public Acts of New Zealand*, 1908-1931. In their announcement at the commencement of that work, the Publishers specially note Mr. Page's initiative in its regard; to him, they say, "we owe a special acknowledgment, for he is responsible for the origination of the scheme, and without his zeal and enterprise the work would not have been undertaken." Mr. Page took a keen interest in all forms of sport, but golf was the principal recreation of his later years.

Although another hand has written elsewhere in this issue in appreciation of the late Mr. Page, it is fitting that, in the JOURNAL in which he took such close personal interest, we who served under him should express our tribute to his memory. When, so recently, we marvelled at his fund of seemingly inexhaustible energy, we little thought that soon he would be touched by the stilling hand of death, or that the tireless voyager would next set out for the bourne whence there is no return. *Dis aliter visum.*

Writing under the shadow of his unexpected loss, we find it difficult to do justice to the many-sided qualities of our late "chief," as we remember his virile personality, his broadness of vision, his fertility of ideas. He had a great sense of duty: to his work, to his Directors, to his friends, to his staff. Endowed with ability of a high order, he was painstaking in his preparations and sound in his decisions. He strove to the utmost to do all which came to his hand in a finished manner that would stand every test. In personal and business relations, he combined integrity, shrewdness, and caution, with unaffected sincerity and unfailing good humour. He was a good fighter, and a clean one; after the battle, he was ever the first to offer his hand. But, over and above all these things, we remember his courtesy, his kindliness, and his inflexible fairness and ready encouragement to all who served him.

The late Mr. Page was more than a business man of the best type. He had interests—human interests—far beyond those of his everyday work. He was a conspicuous and disinterested friend of the legal profession to which he was attached by so many ties of friendship. He was brimming-over with ideas for promoting its well-being and for smoothing away its difficulties. He gave himself with ungrudging effort and untiring zeal to that voluntary task. And, all the while, he possessed in an uncommon degree the confidence of all those associated with him in these, his self-imposed activities.

In expressing the high regard and warm esteem in which Herbert Page was held among us, both as a man and as a friend, we know we are but voicing the feelings of everyone who came in contact with him, either in business or in the gentler pleasures of life. The greatness of his loss to his wife and daughter is a grief into which we hesitate to intrude. But, if the assurance of our deep sympathy can serve to assuage in the slightest degree the sorrow that is theirs, we offer it to them on behalf of all the New Zealand friends of him whose irreparable loss we mourn.

Summary of Recent Judgments.

COURT OF APPEAL Oct. 6, 7, 11; Dec. 9, 1932. } **LANGLEY v. DELMONTE AND PATIENCE, LTD., AND A. DELMONTE.**

Company — Private Company — Objects — Guarantee — Whether *ultra vires*—Sufficiency of execution by affixing of Seal by Managing Director, where no Substantive Article dealing therewith—Presumption of Regularity—Internal Management—Companies Act 1908, s. 150 (2), Second Schedule, Table A, RR. 95, 99, 100, 100 (o), 105.

Appeal from judgment of *Ostler, J.*, at Wellington, reported in Vol. VIII, p. 192.

Defendant Company, a private limited company, had a total capital of £6,500, £5,000 of which was held by Abraham Delmonte of London and the balance by Alexander Delmonte his son, and Harry Patience, all three of whom were Directors of the Company. Alex. Delmonte by cl. 13 of the company's articles of association was appointed Managing Director. The secretary of the Company and attorney for Abraham Delmonte was Joseph Benjamin.

Sub-Clauses 16 and 28 of the objects clause in the Company's Memorandum of Association were as follows:

"16. To enter into any arrangement for sharing profits union of interests joint adventure reciprocal concession or otherwise with any person firm or company carrying on or engaged in or about to carry on or engage in any business or transaction which this company is authorised to carry on or engage in or any business or transaction capable of being conducted so as to directly or indirectly benefit this company; and to lend money to guarantee the contracts of or otherwise assist any such person or company and to take or otherwise acquire shares and securities of any such company or to sell or re-issue with or without guarantee or otherwise deal with the same.

"28. To lend and advance money or give credit to such persons and in such terms as may be thought fit and to give guarantee or become security for the payment of moneys or the performance of contracts or obligations of any such persons."

The relevant provisions of the Articles of Association, which were registered, were as follows:

Clause 1 adopted the provisions of Table "A" in the first schedule to "The Companies Act 1908" (including Arts. 95, 99 and 100), with certain exclusions and modifications which do not affect the questions at issue herein. Cl. 11 provided that three directors should form a quorum for directors and general meetings, and no question was to be decided except on a unanimous vote. Cl. 14 provided that the directors should exercise all the powers of the company except such as were required to be exercised by the company in general meeting, and empowered them to appoint additional directors. Cl. 15 provided that it was not necessary for the directors to hold any formal meetings but a resolution in acting signed by all the directors should be as valid and effective as if it had been passed at a meeting of directors duly called and constituted.

Clause 19 provided that during Abraham Delmonte's absence from New Zealand his attorney should represent him in all capacities and should have all his powers and privileges.

At the first meeting of the Company a resolution was passed to the effect that "whenever the Common Seal of the Company is necessary to be affixed to any agreement, document, resolution, or declaration, that it be affixed by the Managing Director or the secretary in the presence of a witness." This resolution however was not a special resolution, was not registered, did not comply with s. 168 (6) of the Companies Act 1908 and had no validity as against third parties.

Plaintiff, a retired jeweller, who had some considerable business with defendant Company sold his business and stock to Jenkins a condition of the sale being that Jenkins should have a guarantee. After some discussion between plaintiff Jenkins, Alex. Delmonte, and Patience, and correspondence with Alex. Delmonte, Alex. Delmonte agreed that the Company would guarantee payment of the purchase money to a limit of £500. On October 21, 1930 the common seal of the Defendant Company was affixed to the deed of Guarantee in the presence of an office girl and "Alex. Delmonte, Managing Director p.p. Delmonte & Patience Ltd."

The secretary of the Company and attorney of Abraham Delmonte had no intimation of the agreement to give a guarantee or of its execution by Alex. Delmonte and did not learn of it until after the earthquake hereinafter mentioned.

After the receipt of the guarantee plaintiff gave possession of the business to Jenkins when defendant company dealt in the same way as they had previously dealt with plaintiff. The Napier earthquake and fire of Feb. 3, 1931 practically destroyed the premises and stock and involved Jenkins in financial ruin. By that time he had made some payments on account of the purchase money which had reduced the liability of the defendant Company to £480. Plaintiff salvaged some damaged stock, the approximate value of which was £160, and which by agreement with Jenkins became plaintiff's property. *Plaintiff's claim against Jenkins under the agreement* for the purchase of the business was extinguished by order of the Hawke's Bay Adjustment Court.

Plaintiff sued for recovery of £480 either from defendant company under its Deed of Guarantee or alternatively from Alex. Delmonte for breach of warranty in signing the guarantee on behalf of Defendant company, thereby assuming an authority which he did not have.

The defendant company set up the defence (*a*) that the giving of the guarantee was *ultra vires* of the Company, and (*b*) that the guarantee was not executed in accordance with the Company's Articles of Association.

On appeal from judgment for defendants.

Cornish for appellant; **Wiren** for respondent Company; **Young** for respondent Delmonte.

THE COURT OF APPEAL (**Myers, C.J., and Herdman, MacGregor and Kennedy, JJ.**), allowing the appeal:

Held (1) That following **In re Efron's Tie and Knitting Mills Pty. Ltd** [1932] V.L.R. 8, that sub-cl. 28 did not authorise defendant Company to give a guarantee except for persons to whom it had already lent and advanced money or given credit, but that the Company had under sub-clause 16 power to give the guarantee in question.

(2) That there was no substantive article dealing with the affixing of the seal, Sub-para. (o) of article 100 of Table A applying only as a restriction upon the power of the Directors to make regulations if exercised and it was not exercised. Nor in the case of private companies, which frequently consist of but two shareholders and have but one director, was there anything in the mode of executing the guarantee to put the appellant upon enquiry.

In re Barned's Banking Co. Ex parte The Contract Corporation (1868) L.R. 3 Ch. App. 116; **Biggerstaff v. Rowatt's Wharf Ltd.** [1896] 2 Ch. 93, and **British Thompson-Houston Co. v. Federated European Bank Ltd.** [1932] 2 K.B. 176 applied. **South London Greyhound Racecourses Co. v. Wake** [1931] 1 Ch. 507 distinguished.

Semble that article 100 is to be construed as far as possible as containing directions from the company to the directors in matters of internal management, the breach of which directions might give a cause of action to the company against the directors if loss ensued but would not affect third parties dealing with the company. *Dicta of Denniston, Williams and Edwards, JJ.*, **Common Shelton and Co. Ltd. v. Timaru Milling Co. Ltd.** approved (1899) 18 N.Z.L.R. 329, 343, 347.

Semble. The words "without notice" in section 150 (2) of the Companies Act 1908 do not mean "without express notice." The appellant could if necessary have relied on that provision. There was no constructive notice of any irregularity because an inspection of the articles would not have disclosed any provision regarding the affixing of the seal except 100 (o) under which no regulations were made.

(3) That the doctrine of frustration did not apply.

Appeal allowed against the respondent Company and a declaration made that appellant is entitled to payment of the guarantee up to the aggregate sum of £500 on the basis of £21 13s. 4d. per month with immediate payment of arrears, with specified credits to be allowed for proportionate part of salvage, &c.

Solicitors: Webb, Richmond, Swan, and Bryan, Wellington, for appellant; **Wylie and Wiren,** Wellington, for respondent Company; **Young, White and Courtney,** Wellington, for respondent A. Delmonte.

NOTE:—As to the Companies Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 1, p. 827; for the Imperial Act of 1929, see *Halsbury's Statutes of England*, Vol. 2, p. 775; also refer to *Lindley on Companies*, 6th Ed.; *Gore Browne's Hand-book*, 37th Ed.; *Palmer's Company Law*, 8th Ed.; *Palmer's Company Precedents*, 14th Ed., Vol. I; and *Street on Ultra Vires*.

SUPREME COURT
In Banco.
Wanganui.
Nov. 8, 17, 1932.
Reed, J.

WALSH v. SMITH.

Second-hand Dealers—Purchaser of Old Gold and Coin without License—Whether within Definition of "Second-hand dealer"—Onus of Proof—Second-hand Dealers Act, 1908, ss. 2, 3.

Appeal by the Crown against dismissal of an information under s. 303 of the Justices of the Peace Act, 1927.

S., who carried on business as a buyer of gold and coins, was charged by the Crown with carrying on business as a second-hand dealer without a license as required by the Second-hand Dealers Act, 1908. The information was dismissed by the Magistrate on the grounds that the definition of "second-hand dealer" in s. 2 is restricted by the latter portion of that section, and that there was no evidence that S. was not purchasing the gold and coins "for the purposes of manufacturing other articles therefrom."

Bain for the appellant.

Held, allowing the appeal, (1) that to be excluded from the provisions of the Act a person must show that he carried on *the business of purchasing second-hand articles for the purpose* of manufacturing other articles therefrom, and the onus of proof is on the accused to show that he comes within the exclusion.

R. v. Audley [1907] 1 K.B. 383 followed.

(2) On the facts as found by the Magistrate, there was *prima facie* evidence that the accused carried on the business of a second-hand dealer without being the holder of a license, and this called upon him for an answer. In default of such answer, he should have been convicted.

Appeal allowed and case remitted to the Magistrate.

Solicitor: Crown Solicitor, Wanganui, for appellant.

NOTE:—As to the Second-hand Dealers Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 8, p. 182, title *Second-hand Dealers*; and as to the Justices of the Peace Act, 1927, see *ibid.*, Vol. 2, p. 351, title *Criminal Law*; refer also to *Archbold's Criminal Pleading*, 7th Ed.

COURT OF ARBITRATION
Dunedin.
Nov. 18, 1932.

KENNEDY v. LAWSON.

Workers Compensation—Liability for Compensation—Worker a Band-cutter on threshing mill—Whether employed by farmer or by threshing contractors—Workers' Compensation Act, 1922, s. 2.

K. was a band-cutter who followed P. and M's threshing-mill from farm to farm. Defendant, a farmer, entered into a contract with P. and M., threshing contractors, for the threshing of oats on his farm, P. and M. to supply the plant and engine-driver at a certain rate and L. to be responsible for the wages of the other men including the plaintiff, K.

The question to be answered by the Court was whether the farmer or the threshing-mill owner was responsible for the payment of compensation to threshing-mill workers who are injured.

E. J. Anderson for plaintiff; **D. A. Solomon** for defendant.

Held, in an oral judgment delivered by *Frazer, J.*, (1) That the question is in every case one of fact and the *nexus* of employer and worker must be established before any responsibility for payment of compensation can exist.

(2) That in the present circumstances, L. was the employer as he retained the power of control over the mill-workers.

Attwood v. Smith Bros., 2 N.Z. W.C.C. 27, and **Scoble v. Kean and Tait** [1920] N.Z.L.R. 435, [1920] G.L.R. 341 referred to.

Solicitors: J. T. Walter, Balclutha, for plaintiff; **Solomon, Gascoigne, Solomon, and Sinclair,** Dunedin, for defendant.

NOTE:—For the Workers' Compensation Act, 1922, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Master and Servant*, Vol. 5, p. 597.

SUPREME COURT
In Chambers.
Wellington.
Oct. 28,
Nov. 16, 1932.
Myers, C.J.
Reed, J.

O'NEILL AND OTHERS v. N.Z. NATIONAL CREDITMEN'S ASSOCIATION (WELLINGTON), LTD., AND OTHERS.

Practice—Interrogatories—Time for Resisting—Objection on ground of Incrimination—Principles to be applied in disallowing Interrogatories—Code of Civil Procedure, R. 155.

Interrogatories should be settled on the summons for leave to administer them, and not on objection being taken in the Answer.

Objection was taken to certain proposed interrogatories in an action for damages for libel, on the ground that they might tend to criminate the defendants sought to be interrogated. On the summons for leave to deliver interrogatories, it was contended that defendants' objection could not then be taken, but that an order be made giving leave; and that the defendants should be left to make objection in their answers.

James for plaintiffs; **Cleary** for defendants.

Held, by *Myers,* C.J., and *Reed,* J., in a judgment delivered by Myers, C.J.: (1) That, there being no rule of procedure in New Zealand providing for objection to be taken on the Answer, the interrogatories should be settled by the Judge on the application for leave to administer them.

Roskruge v. Ryan (1896) 15 N.Z.L.R. 246 followed:

2. That, without the information which would have to be laid before a Judge or Magistrate on an application by a person claiming to have been libelled for leave to proceed with a private prosecution for defamatory libel under s. 233 of the Crimes Act, 1908, the Court is not entitled to say if there is any reasonable probability of criminal liability on the part of the defendants or to place them in a position of peril by allowing the interrogatories to which objection had been taken on the ground of possible incrimination.

Reg. v. Labouchere (1884) 12 Q.B.D. 320; **Wood v. Cox** (1888) 4 T.L.R. 652; and **Becker v. Smith's Newspapers and Another** [1931] S.A.S.R. 1, 137, distinguished.

The distinction between the English and the New Zealand procedure is discussed in the Judgment.

Order disallowing (by consent) Interrogatories, Nos. 1 to 15; and giving leave to deliver Nos. 16 to 23.

Solicitors: Webb, Richmond, Swan and Bryan, Wellington, for plaintiffs; **M. O. Barnett,** Wellington, for defendants.

NOTE:—For Code of Civil Procedure, see *Stout and Sim's Practice of the Supreme Court*; refer also to *Odgers on Libel and Slander,* 6th Ed.; *Gatley on Libel and Slander,* 2nd Ed.; *Bray on Discovery*; 1932 *Yearly Practice.*

SUPREME COURT
In Banco.
Auckland.
Nov. 4, 7, 1932.
Smith, J.

ANTUNOVICH AND ANOR. v. COLLINS AND ORS.

Motor Vehicles Insurance (Third-party Risks)—"Owner" of Motor-vehicle bailed for period exceeding Fourteen Days—Definition "includes" bailee and excludes bailor—Motor-Vehicles Act, 1924, s. 2—Motor Vehicles Insurance (Third-party Risks) Act, 1928, ss. 2, 3.

Summons for argument of question of law before trial of action, namely, determination of the liability (if any) of H. L. White, Ltd., the third named defendant.

By s. 2 of the Motor-Vehicles Insurance (Third-party Risks) Act, 1928, "owner" in relation to a motor-vehicle has the same meaning as in the Motor-Vehicles Act, 1924, viz. "'owner' *includes a bailee to whom a motor-vehicle is bailed for any* period exceeding fourteen days and also includes a person in possession of a motor-vehicle pursuant to a bill of sale. Where there are more owners of a motor vehicle than one, every such owner is an owner for the purposes of this Act."

Defendant, A. L. White Ltd., disposed of a motor-car to defendants Collins and Irwin on May 24, 1932, by a Hire-purchase agreement, admitted to be a bailment under which the car was bailed for a period exceeding fourteen days. On the same day, notice of the sale was given and the car transferred to the names of the bailees, who were registered as owners, the car was licensed, and an insurance effected under the Motor Vehicle Insurance (Third-party Risks) Act, 1928, for the year commencing June 1, 1932, the fees for all these purposes being paid by the Bailees. On May 26, 1932, the son of plaintiffs was injured and later died as the result of a collision between his bicycle and the said car driven at the time of the accident by a son of Collins.

In an action brought by plaintiffs against both the bailees and the bailor, on an argument by consent of the question of law whether H. L. White Limited the bailor, was liable to plaintiffs, it was admitted that that company was not so liable at Common Law.

J. J. Butler for plaintiffs; **Grant** for third named defendant; **West** for defendant, Collins; **C. G. Lennard** for defendant, Irwin.

Held: that in the Definition of "owner" the specifying of the Bailees as the owner in relation to a motor vehicle bailed for a period exceeding fourteen days excluded any other person claiming under a different right from the meaning of "owner" in relation to that vehicle, the Act not contemplating that under a bailment the general owner, the bailor, and the special owner, the bailee, were both to be regarded as owners for the purposes of the Acts and subject to the liabilities of ownership as imposed by the Acts.

Held, therefore, that H. L. White Ltd., the bailor, was not liable to plaintiffs.

Solicitors: J. J. Butler, Auckland, for plaintiffs; **R. M. Grant,** Auckland, for third named defendant; **R. F. W. Wood,** Otahuhu, for defendant Collins; **Lennard and Lennard,** Auckland for defendant Irwin.

NOTE:—As to the Motor-vehicles Act, 1924, and the Motor-vehicles Insurance (Third-party Risks) Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Transport,* Vol. 8, pp. 800 and 822 respectively; refer also to 3 *Halsbury's Laws of England* (Hailsham Edition) p. 25; *Pollock on Torts,* 12th Edn.; *Salmond's Jurisprudence,* 8th Edn. 281; *Beal on Bailments,* 601.

SUPREME COURT
In Banco.
Auckland.
Oct. 21, Nov. 4.
Herdman, J.

IN RE SUISTED (DECD.): SUISTED v. SUISTED AND OTHERS.

Will—Interpretation—"All properties stock and moneys together with interest"—Whether sufficient to pass various classes of assets.

Originating summons for interpretation of the will of Karl Gustav Suisted.

S. by will bequeathed to his wife "all properties, stock, and moneys together with interest" belonging to him. His estate consisted of cash at bank, furniture, farming stock and implements, leasehold interest in farm lands, life insurance policy, and shares.

The question for determination was whether the bequest in the above-quoted words was sufficient to pass to testator's wife all the enumerated classes of assets.

Finlay for plaintiffs; **Johnstone** for defendants.

Held: 1. The cash at bank, farming stock and implements, and the leasehold interest in the farm lands passed to the wife absolutely.

In re Taylor; Taylor v. Tweedie [1923] 1 Ch. 99 followed.

2. There was an intestacy as regards the furniture, the life insurance policy, and the shares, and the persons entitled under the Administration Act, 1908, take as on an intestacy.

Doe d. Wall v. Langlands (1811) 14 East 370; 104 E.R. 644 considered.

Solicitors: G. P. Finlay, Auckland, for plaintiff; **Stanton and Johnstone,** Auckland, for defendants.

NOTE:—Refer to *Jarman on Wills,* 7th Edn., p. 988; *Stroud's Judicial Dictionary,* 2nd Edn., 1215; Supplement, 589; 28 *Halsbury,* 655-6.

SUPREME COURT
In Banco.
Hamilton.
Sept. 12; Nov. 10.
Smith, J.

WALLACE v. MUIR

Motor-vehicle—" Intersection "—" Road "—" Right-hand rule " —The Motor-vehicles Act, 1924, s. 36 (1) (*o*)—Motor-vehicle Regulations, 1920, Nos. 1 and 11, Cl. 13.

Appeal on a point of law from the decision of Justices convicting appellant for a breach of " the right-hand rule " on the ground (*inter alia*) that appellant was not approaching an intersection within the meaning of that word in the undermentioned Regulation.

From the Te Kuiti-Hangatiki Main Highway a strip of land leads to a quarry, the land comprising the quarry and this entrance thereto situated in the Waitomo County being owned in fee-simple by the Te Kuiti Borough Council. This strip is formed as a private road and used as a means of entrance and exit from the quarry proper by motor-lorries and other vehicular traffic, and, at the sufferance of the Borough Council, as a private road giving access to the properties of settlers residing beyond the quarry.

Appellant driving a lorry was emerging from this private road, when a motor-car upon the main highway driven by B. was approaching appellant's right-hand side. A collision occurred between the motor-car and the lorry. Justices convicted appellant of a breach of the " right-hand rule " as expressed n Reg. 11, Cl. 13, of the Regulations made under the Motor-vehicles Act, 1924.

Mackersey for appellant; **Gillies** for respondent.

Held, allowing appeal, that the power to make regulations conferred by s. 36 (1) (*o*) and s. 36 (2) of the Motor-vehicles Act, 1924, is at least confined to roads, streets, and public places which are under the control of public authorities for the regulation of traffic in the public interest whether the fee-simple thereof is actually vested in the public authority or not, and whether the access of the public streets is of right or not.

Hence this strip of private land, though formed as a private road to the frontage of the public road, was not a " road " within the meaning of the Act or the Regulations made thereunder and consequently could not make an " intersection " as defined in the regulations.

Solicitors: Broadfoot and Mackersey, Te Kuiti, for appellant; **Crown Solicitor,** Hamilton, for respondent.

NOTE:—As to the Motor-vehicles Act, 1924, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Transport*, Vol. 8, p. 800; for the Regulations cited *supra*, see *N.Z. Gazette*, 1928, Vol. 1, p. 511.

SUPREME COURT
In Banco.
Auckland.
Oct. 4; Nov. 18.
Smith, J.

AUCKLAND CITY v. ONE TREE HILL BOROUGH.

Rating—Road along boundary of two Districts but wholly within Boundaries of one Local Authority—Control given to other local authority—Properties on or in Road: by which Authority rateable—Public Works Act, 1928, s. 120—Municipal Corporations Act, 1920, s. 77.

Originating summons for determination of question of law as to whether certain rateable properties were rateable by plaintiff or defendant corporation, each of them claiming the right.

A portion of the Great South Road, a duly dedicated public highway, lies along the boundary of the O.T.H. Borough and Auckland City, but is wholly within the boundaries of O.T.H. Borough. By Warrant, dated August 24, 1914, duly gazetted, the Governor-General, acting under s. 12 of the Public Works Amendment Act, 1909 (now s. 120 of the Public Works Act, 1928), directed that this portion of the Great South Road should, for the whole of its width, be under the control of and be maintained by the Remuera Road Board which was subsequently amalgamated with the City of Auckland. Since the amalgamation, the Auckland City Council has been subject to the obligations and entitled to the rights created by the Warrant. Various rateable properties such as tramlines, gas-pipes, and electric wires are laid in the aforesaid portion of the Great South Road.

Stanton for plaintiff; **Rogerson** for defendant.

Held: That these properties were rateable by the defendant, the Borough within whose boundaries they were wholly situated, the jurisdiction of the plaintiff being limited to the control of the road.

Solicitors: Stanton and Johnstone, Auckland, for plaintiff Corporation; **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland, for defendant Corporation.

NOTE:—As to the Public Works Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Public Works*, Vol. 7, p. 622; as to the Municipal Corporations Act, 1920, *ibid*, title, *Local Government*, Vol. 5, p. 7; and for Regulations thereunder, see *N.Z. Gazette*, 1921, Vol. 3, p. 2247.

SUPREME COURT
Wanganui.
Nov. 11, 25.
Reed, J.

WANGANUI COUNTY v. THE VALUER-GENERAL AND THE WANGANUI HOSPITAL BOARD.

Hospitals—Apportionment—Determination by Valuer-General of capital value of rateable property—Practice of Valuer-General—Hospitals and Charitable Institutions Act, 1926, s. 49 (1).

Originating summons under the Declaratory Judgments Act, 1908, for a declaration that upon the true construction of s. 49 of the Hospitals and Charitable Institutions Act, 1926, the Valuer-General must report as his determination " as approximately correct " the Capital Value of the rateable property in the Wanganui County as being that appearing by the revised roll which he had for the purposes of the Valuation of Land Act, 1925, determined to be " correct."

Section 49 (1) of the Hospitals and Charitable Institutions Act, 1926, provides for the apportionment by a Board of the net estimated expenditure among the contributory local authorities " in proportion to the capital value of the rateable property in each contributory district as determined by the Valuer-General under the Valuation of Land Act, 1925, as being approximately correct as on the first day of April in the financial year in which the apportionment is made." It is necessary for the certificate of the Valuer-General under s. 49 to be given before April 18. In s. 46 (2) and cl. 7 (2) and 8 (2) of the 4th Schedule of the Act there is no provision for a revision of such determination.

In accordance with s. 49 (1) and with the practice followed ever since the legislation came into force, the valuation supplied by the Valuer-General as being approximately correct on April 1, 1932, was the amount shown on the Valuation Roll as on April 18 of the preceding year corrected to September of that year. A revision, however, completed in August, 1932, was made by direction of the Governor-General in Council under s. 8 of the Valuation of Land Act, 1925, to be as at March 31, 1932.

Blennerhassett for plaintiff; **Bain** for the Valuer-General; **N. Izard** for the Wanganui Hospital Board; **W. J. Treadwell** for the Wanganui City.

Held: That the practice adopted by the Valuer-General was in accordance with the Act.

Semble: That the determination of the Valuer-General is an administrative act, and, in the absence of any suggestion of *mala fides*, not open to attack.

Solicitors: T. W. Blennerhassett, Wanganui, for plaintiff; **Crown Solicitor,** Wanganui, for the Valuer-General; **Marshall, Izard and Wilson,** Wanganui, for the Wanganui Hospital Board; **Treadwell, Gordon, Treadwell and Haggitt,** Wanganui, for the Wanganui City.

NOTE:—As to the Hospitals and Charitable Institutions Act, 1926, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Hospitals and Charitable Institutions*, Vol. 3, p. 725.

SUPREME COURT
In Chambers.
Auckland.
Nov. 18; Dec. 6.
Smith, J.

IN RE AN ARBITRATION: AUCKLAND CITY AND GREY BUILDINGS, LTD.

Arbitration—Lease—Effect of s. 23 of the Local Legislation Act, 1931—Whether retrospective—Appointment of Umpire—Qualifications to be considered—Arbitration Act, 1908, s. 6—Municipal Corporations Act, 1920, ss. 153, 154—Local Legislation Act, s. 23.

Summons for the appointment of an umpire.

G.B., Ltd., was holder of a lease from the A.C.C. with right of renewal at a rent to be fixed by valuation made by three independent persons under s. 154 of the Municipal Corporations Act, 1920. Each party appointed a valuer, and the valuers appointed Sir W.S. as the third. At the hearing, the three failed to agree. Subsequently, s. 23 of the Local Legislation Act, 1931, was passed and the A.C.C. notified the G.B., Ltd., that it desired an arbitration thereunder. The Company denied the Act's application to its lease; and the A.C.C. objected to the nomination of Sir W.S. as an umpire on such arbitration.

Stanton for the City Corporation; **Tuck** for the Lessee Company.

Held: That s. 23 of the Local Legislation Act, 1931, is limited to a matter of procedure and retrospective in its operation to the following extent by that the words "In every lease" at the beginning of subs. (1) include leases existing when the section was passed pursuant to which a valuation for a new lease had not then been made and that subs. (3) is not limited in its application to circumstances arising under leases granted after the section was passed, but applied to the present case.

In re Lord (1854) 1 K. & J. 90; 24 L.J. Ch. 145; 69 E.R. 382 followed.

Held further: That a person with knowledge of legal principles has in some respects expert qualifications for the duty of fixing a valuation such as is required.

Subject to his consent, an order was made appointing Sir Walter Stringer the umpire.

Solicitors: Stanton and Johnstone, Auckland, for the Auckland City; **Neumegan and Neumegan,** Auckland, for Grey Buildings, Ltd.

NOTE:—As to the Arbitration Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 1, p. 346; as to the Municipal Corporations Act, 1920, see *ibid*, Vol. 5, p. 7; see also *Craies on Statute Law*, 3rd Edn., 332.

SUPREME COURT
Christchurch.
Nov. 1, 4.
Ostler, J.

RE COOK, EX PARTE COTTERILL AND OTHERS.

Bankruptcy—Practice—Application to set aside Bankruptcy Notice—Cross-demand by Debtor—Writ issued by him but Prosecution of Claim delayed—Whether Debtor should be allowed Opportunity of having same litigated—Bankruptcy Amendment Act, 1927, s. 2 (1): Bankruptcy Rules, RR. 86, 87.

Application to set aside a bankruptcy notice.

On May 16, 1932, judgment for £140 0s. 9d. was obtained against C. by the judgment creditors, who, on October 10, 1932, filed a request for the issue of a bankruptcy notice for non-payment of the amount of such judgment. A bankruptcy notice was issued on that day. On October 14, C. filed an affidavit under RR. 86 and 87 of the Bankruptcy Rules, in which he stated that he had issued a writ on January 21, 1932, against the judgment creditors claiming £165 16s. 7d. as damages for breach of duty as solicitors, and a defence had been filed. C. had not obtained a fixture for the hearing of his action at the February or May sittings, and, according to his affidavit, when fixtures were being made for the August sittings the judgment creditors had stated that they did not require a date to be fixed. The case had now been set down for hearing on November 17.

The judgment creditors submitted that C. could have put forward the claim for damages against them as a set-off or counterclaim to the judgment which was the basis of the bankruptcy notice.

M. J. Gresson for judgment creditors; **Stacey** for debtor.

Held (refusing application to set aside the bankruptcy notice): That the judgment debtor should be given an opportunity of having his claim litigated. His consenting to judgment on the claim against him did not amount to a waiver or abandonment of his own claim against the judgment creditors.

The Court extended the time mentioned in the bankruptcy notice until three days after the action by C. should result in a judgment or be struck out. An imperative fixture was made for the hearing of that action, and, if the debtor were not prepared to go on with the hearing on that date, the action would be struck out for non-prosecution.

Order in terms of judgment.

Solicitors: Duncan, Cotterill, and Co., Christchurch, for the judgment creditors.

SUPREME COURT
Christchurch.
Nov. 21.
Ostler, J.

SCOLLARD v. HUMPHRIES.

National Expenditure Adjustment—Contract to sell Goodwill of Hotel and Sub-lease—Transfer of Sub-lease and Mortgage back to vendor—Whether Act applies to Original Contract or subsequent Mortgage—Premium or Bonus—Whether to be deemed Interest or Rent—National Expenditure Adjustment Act, 1932, Part III, ss. 29 (3) and 31.

Originating summons for the interpretation of s. 29 (3) of the National Expenditure Adjustment Act, 1932.

S. agreed to sell to H. the goodwill of an hotel premises and sublease of the hotel for £3,500; £2,000, on acceptance, £1,500 to remain on mortgage for three years. S. duly transferred the sub-lease to H., but on completion the terms of the contract were altered, only £1,500 being paid in cash and the balance of £2,000 secured by mortgage. All these transactions took place in 1930.

Donnelly for plaintiff; **Burns** for defendant.

Held: That no part of the sum secured by the mortgage was to be deemed to be rent; that the contract to which s. 31 applied was the contract created by the mortgage and not the prior agreement; and that s. 31 did not operate so as to reduce the principal but only the interest.

Quaere, whether money paid for the goodwill of a business comes within the purview of s. 29 (3).

Solicitors: Raymond, Stringer, Hamilton and Donnelly, Christchurch, for plaintiff; **Livingstone and Burns,** Christchurch, for defendant.

NOTE:—For the National Expenditure Adjustment Act, 1932, Part III, see *Kavanagh and Ball's New Rent and Interest Reductions*, p. 42.

Rules and Regulations.

Customs Act, 1913. Customs Amendment Act, 1921. Prohibition of importation of certain goods from the Commonwealth of Australia.—*Gazette* No. 77, December 15, 1932.

Tobacco Act, 1908. Customs Acts Amendment Act, 1932. Excise duty on Tobacco.—*Gazette* No. 77, December 15, 1932.

Customs Act, 1913. Customs Amendment Act, 1921. Additional Customs (Tariff Reference and General) Regulations, 1932, *re* Tobacco.—*Gazette* No. 77, December 15, 1932.

Master and Apprentice Act, 1908. Regulations prescribing form of indenture of apprenticeship relating to an apprentice under the control of the Soldiers' Flock House Committee.—*Gazette* No. 78, December 22, 1932.

N.Z. Law Society's President Knighted.

New Year Honours for Sir Alexander Gray, K.C.

The JOURNAL *is glad to publish two appreciations of the new Knight—one representative of legal opinion in Wellington where he has practised so long, and the other voicing the feelings of practitioners in other parts of the Dominion.*

A Tribute of Appreciation.

By the RT. HON. SIR FRANCIS BELL, K.C.

Nearly sixty years have passed since I was admitted to the New Zealand Roll. Many events of that long period were of special interest to the profession and were the subject of comment and discussion at our gatherings. I can recall none in regard to which there was more complete and unanimous satisfaction than

Sir Alexander Gray, K.C.
S. P. Andrew, Photo

the grant by the Sovereign of the distinction of Knighthood to our President. I write " our President " for the President of the Council of the New Zealand Law Society holds his office by free election of the profession and whoever may by political accident or seniority be leader the President is the head of our domestic tribunal—*arbiter morum*—the trusted guardian of our traditions.

When in 1926 Sir Charles Skerrett became Chief Justice, and it became necessary to elect a successor to him in the Presidency of the Society, there was general and cordial agreement in the choice of Alexander Gray, K.C., since emphasised each year by renewal of that expression of confidence. We owe to his initiative and guidance the proud determination of the profession to accept responsibility for those few of its members who disgrace it by defrauding clients of moneys entrusted to their care, and to his energetic advocacy is largely due the power conferred on us by Parliament to levy a heavy annual tax upon all of the profession to establish a fund sufficient for the promised indemnity.

Since the creation by the Act of 1896 of a Council representative of the profession, there have been only four Presidents. The precedent created by his Knighthood may be followed in future, as is now the practice in regard to Presidents of the Incorporated Law Society of England, but he is the first, and the grant to him is of an honour he has himself won by his own merit and by his public service.

I have known Sir Alexander Gray since he began his apprenticeship to the law, have been associated with him in many ways, and have been always happy in our long and unbroken friendship. He has been, and will yet be, the recipient of many congratulations, of none more sincere than mine.

"A Thing Pleasing to Men."

By R. MCVEAGH.

It is a source of singular satisfaction to the members of the legal profession in the Dominion that His Majesty has been graciously pleased to confer upon Sir Alexander Gray, K.C., the honour of a knighthood. In Sir Alexander's case the honour is the reward of a life of industry and of unquestioned professional merit. The community at large has perhaps an inadequate idea of the advantage to it of an eminent lawyer in their midst. A great part of his work is unseen and unknown. Not all his labours are in the Courts. The difficulties that are overcome and the disputes that are avoided are " caviare to the general."

Cicero in his oration, " *Pro Muraena,*" refers to this in the course of a eulogy upon the professional merits of Servius Sulpicius, the leading counsel for the prosecution. Cicero says :

> " *He learned the civil law ; he worked early and late ; he toiled ; he was visible to every one ; he endured the folly of crowds ; he tolerated their arrogance ; he bore all sorts of difficulties ; he lived at the will of others, not at his own. It is a great credit, a thing pleasing to men, for one man to labour hard in that science which will profit many.*"

Such has been the life of Sir Alexander Gray. With reason he will feel cheered that it has brought a deserved recompense. Throughout a long professional career he has applied himself with assiduity to the causes of his clients, and he never faltered in the performance of this duty. In a singular manner he won the respect and esteem of the Judges of the Courts in which he practised. They, no less than his professional brethren, will feel that the honour bestowed upon him is a recognition of those high qualities which he so successfully strove to attain. And the profession will rejoice that a long and meritorious service in the practice of the law has been marked by the bestowal by the Sovereign of a knighthood.

Commercial Case Law and Arbitration.*

The Doctrine of "Stare Decisis."

By J. Walter Robson,
President of the Manchester Law Society.

There is, in the mind of the litigant, especially in commercial matters, a feeling that, however well he may be served by his legal adviser, both as to opinion and also as to conduct of his case, the result of his proceedings is very uncertain, and he attributes this uncertainty to the state of the law. He realises that his professional adviser cannot possibly predict what view of the evidence a jury will take; but when he has been told that the law is in his favour, and judgment has nevertheless been given against him, he may be excused if he calls the law hard names.

Daily contact with the affairs of clients and the necessity for dealing with these in a practical manner, does not allow to the solicitors' branch of the legal Profession time or opportunity to examine the springs of judicial conduct from which the judgments of the courts flow. These provincial meetings are not conferences of jurists, but gatherings of professional men (and women) interested mainly in what affects their daily work. It is, however, well within the province of the meeting to consider and discuss subjects which may not be of immediate practical utility, but which form important parts of the great system of law which solicitors assist to administer.

With this in mind, it will probably be interesting to refer to some of the difficulties presented to the minds of the Bench in reconciling decisions, and the attitude of the judges towards these difficulties.

Textbooks furnish statements of the effect of decisions on any particular point of law; few of them trace the development of a principle. The judges of the High Court are constantly striving to "reach a result which, while consistent with legal principle, shall harmonise with the conditions of the age." It is supposed that they merely declare the existing law; in truth, they are subject to the restrictions of precedent and statute, and often to the necessity of collaboration with a jury, and in many instances the task of applying old principles to new circumstances is extremely difficult. The business man can hardly be expected to appreciate these difficulties to their full extent.

In his preface to the *Book of English Law*, Professor Edward Jenks describes his subject as "a living picture or reflection, formless and difficult to describe, of the unconscious working of the English mind as expressed in tradition, statute and judicial decision," and he dedicates his book as a tribute to the "creation of the one great system of indigenous national law which the world has produced." This is eulogy, but it is not exaggeration; every lawyer will confirm the aptness of this description of English law.

In what direction, then, is its development progressing in these modern days? Professor Fifoot considers that it is the social background upon which the main doctrines of English law have developed. Professor Laski, on the other hand, does not know how an adequate theory of judicial decisions can be constructed except in terms of the economic interpretation of history—an opinion which suggests that mere expediency has been the main factor, even in quite recent times.

The accusation is made that the Anglo-Saxon character is a curious mixture of the rankest sentimentality crossed by a streak of grimmest criticism. If this be true, and if it is also true that the social background is the moulder of our law, some anomalies and anachronisms must be expected.

There is consequently still a "time-lag" between legislation and modern conditions, of which many instances might be given. A great number of legal decisions which to-day are accepted as binding are out of touch with common sense. The law does not work with that precision and accuracy which the public has a right to attribute to it. Whilst Lord Coke declared that common law was nothing more than common sense, occasions arise on which even the judges cannot assent to the truth of this saying.

In the case of *Ward v. Van Loeff* (131 L.T. Rep. 292; [1924] A.C. 678) Lord Blanesburgh confessed that his decision was manifestly absurd, but he was powerless to do aught but follow precedent. That is the doctrine of "*stare decisis*," a principle which affects the minds of some judges more than others, and which, if it is carried too far, will seriously hinder the development and beneficial use of a great legal system. Whilst this principle tends to preserve stability and renders the task of the lawyer in advising his client less difficult, it is to be observed that English judges to-day are showing a tendency to "satisfy reasonable demands" not by "conscious invention," but by taking into consideration the social background for each decision as well as the state of the law.

Professor Aron, of the United States Bar, has noted this in his recently published book on evidence. "Bold and progressive minds," he says, "have questioned the sanctity of the doctrine of '*stare decisis*' and are refusing to accept many of our principles of jurisprudence and legal procedure as the supreme work of all-wise creators."

There is nothing wrong with the law; the old reproach which was justified before the Common Law Procedure Act no longer can be levelled at the judicial system. It was Lord Macmillan who considered that the fundamental difference between the common law of Scotland and the common law of England lay in the fact that in England you have to find the remedy in order to discover the right; whereas in Scotland you have to find the right in order to discover the remedy. That is not true of the English legal system to-day. The Courts will entertain and deal with every kind of claim, and justice is denied to none. Since the Judicature Act of 1873, it is assumed that a fusion of law and equity has taken place. But many a litigant with unclean hands comes into the courts of common law, and succeeds, if he is protected by a suitable previous decision of the courts.

Reference has been made to the difficulties created by the doctrine of "*stare decisis*" and the effect of what are called binding decisions on the minds of the judges. It may be of interest to refer to one or two recent commercial cases which have passed through various stages of appeal, and which have elicited from the judges comments on this subject. They are instances of divergence of opinions which are somewhat disconcerting to the litigant, as well as to the lawyer.

* A paper read at the recent meeting of the English Law Society at Bristol.

The first instance is that of the case of *W. Hillas and Co., Ltd. v. Arcos, Ltd.* (Comm. Cas. 36, p. 353). This case related to a contract for the sale of specified timber entered into by the Russian trading company named Arcos, Ltd. There was a clause in the contract providing that the buyers, the plaintiffs, should have the option of entering into a further contract with the sellers for supplies of timber during the following year. The quantity of timber to which the option was to apply was specified, and a method of arriving at a price was also stated, but the stipulations as to certain other conditions were somewhat ambiguous; *e.g.*, the precise kinds, sizes and quantities were not specified. The case was heard in the first instance before Mackinnon, J., and a jury. The jury found that there was a valid contract. Mackinnon, J., gave judgment for the plaintiffs, and awarded 30,000*l.* as damages for breach of the contract. The defendants appealed on the construction of the option clause, and the plaintiffs with regard to the amount of damages, which they claimed should be 132,000*l.* The defendants' appeal was allowed, and the cross-appeal dismissed. A further appeal to the House of Lords (not yet reported) appears to have resulted in the reversal of the decision of the Court of Appeal, and a restoration of the original judgment of Mackinnon, J. In the course of his judgment in the Court of Appeal, Scrutton, L.J., stated that in his view the option was not an agreement, but only "an agreement to make an agreement" which was not enforceable. This would have been his opinion apart from authority, but he was bound by a decision of the House of Lords in *May and Butcher v. The King.* Curiously enough, this apparently important case, decided in 1929, was never reported, and the Lords' record and judgment had to be referred to. No reference to this decision was made on the original hearing before Mackinnon, J.

Scrutton, L.J., was one of three judges who heard the case of *May and Butcher v. The King* in the Court of Appeal, and he took the view, in that case, that there was a contract. His brothers, Sargant and Eve, JJ., were of the contrary opinion, and held that the arbitration clause which might have been resorted to for the purpose of fixing a price for the goods was of no effect, as there was no agreement. In *Hillas v. Arcos*, Scrutton, L.J., confirmed his opinion expressed in *May and Butcher v. The King* that there was a contract, and added that he thought nine out of ten business men would agree with him; but he was bound as a judge to follow the principles laid down by the House of Lords. Then followed this passage in his judgment: "But I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart, with the result that commercial business is leaving the courts and being decided by commercial arbitrators with infrequent reference to the courts."

Greer, L.J., in the course of his judgment in the same case, said:

> "The difficulty" (that is, of enforcing a vague contract) "does not arise out of any imperfection in the rules of law administered in our courts; it arises out of the difficulties inherent in the conception of contractual obligations—difficulties that can only be surmounted by a statutory provision that where the parties have not entered into a concluded contract the court shall have power to make for them the contract which in its view they would have made if there had been further negotiation to deal with matters not already decided."

He added:

> "I think that, although the defendants' conduct is wholly indefensible from the point of view of commercial morality, the point of law raised on their behalf is a good one, and this appeal is entitled to succeed."

These are judicial utterances expressed in restrained and considered language. The profound knowledge of commercial law and usage which Scrutton, L.J., possesses, and his wide experience, clothe the opinion expressed by him with almost the importance of an axiom. Greer, L.J., would approve of judges being invested by statute with the powers of an arbitrator, coupled with a species of purely equitable jurisdiction in certain cases, with power to supplement incomplete contracts and to enforce them if the intention of the parties can be ascertained. There is a tremendous field of both statute and common law of universal application and unquestioned authority. But the vicissitudes in the *Arcos Case* show that on occasions new circumstances arise for decision by the judges which render consistency and co-ordination extremely difficult to maintain.

The Bank of Portugal Case. Consider some of the recent commercial cases of note; for example, the *Bank of Portugal Case* (100 L.J., K.B. 465). The great skill and learning with which this case was argued by counsel engaged, and the careful consideration of the facts and the law in the judgments of each succeeding tribunal, had their final issue in the House of Lords, when, by a majority of three to two, the court directed judgment to be entered against Messrs. Waterlow for 610,392*l.* The decision of the Court of Appeal, consisting of Scrutton, Greer and Slesser, L.JJ., was rejected. In the three tribunals a number of varying judgments were delivered. In the court of first instance. Wright, J., directed judgment for the bank for 569,421*l.* In the Court of Appeal (47 T.L.R. 465), Greer an Slesser, L.JJ., assessed the damages at 300,000*l.*; Scrutton, L.J., considered that the plaintiffs were only entitled to 8,922*l.* In the House of Lords (48 T.L.R. 404), the Lord Chancellor and Lords Atkin and Macmillan held that the bank were entitled to judgment for 610,392*l.* whilst Lords Warrington and Russell agreed with Scrutton, L.J., as to the measure of damage.

The principle of *Hadley v. Baxendale* was discussed in this case, and the method of its application was the subject of much diversity of opinion. Lord Atkin said: "For my part I cannot see the way to decide this case for Messrs. Waterlow without reversing a number of authorities which have governed our commercial law as I understand it from earliest times." Lord Russell commented on this. He said: "Personally I am unconscious of any such assault upon authority. . . . I confess, however, that I derive consolation from the knowledge that, in this alleged act of violence, I am abetted by one whose pre-eminence as a commercial lawyer is both well established and long established"—presumably a tribute to Scrutton, L.J. Nine judges were occupied in the hearing of the various stages of the case. Of these, one gave judgment for 569,421*l.*; three considered the bank was entitled to not more than 8,922*l.*; two assessed the damages at 300,000*l.*; whilst three of the five judges in the House of Lords held that the bank was entitled to recover 610,392*l.* It is true that this divergence of opinion on the part of the judges was on the amount of damages suffered by the bank, but the result can hardly be considered as conclusive.

"THE BOLD AND PROGRESSIVE MIND." Scrutton, L.J., in the case of *Toogood and Sons, Ltd. v. Green* (1932, 1 K.B. 204), delivered a dissenting judgment in the Court of Appeal. The majority of the Court had followed a House of Lords decision which they considered binding. Scrutton, L.J., said that, as a "question of judicial comity," he was not prepared to treat this decision as overruling an express decision of the Court of Appeal in an earlier case on facts similar to those he was dealing with. The case of *Toogood v. Green* went to the House of Lords (1932, W.N. 132), with the result that the decision of the Court of Appeal was reversed, and Scrutton, L.J., was vindicated. He has indeed on many occasions shown the "bold and progressive mind," and has questioned the sanctity of the doctrine of "*stare decisis*."

ARBITRATION. It was originally intended in this paper to discuss the merits and demerits of arbitration by submission in commercial cases. Neither time nor space will permit of this. In terms quite consistent with those used in the *Arcos Case*, Scrutton, L.J., has expressed the view that there is little advantage to be gained by referring cases to arbitration, except in questions where knowledge of a particular trade was desirable. Generally speaking, he added, there could be no better qualified arbitrator than a judge of the High Court. Arbitration has its uses, and also its place in the settlement of disputes; but the conduct of a modern commercial arbitration on the lines of a court of law, with counsel, solicitors and witnesses, has become almost as expensive as a trial by a judge. If, in addition, the subject-matter is of a complicated nature, the right of appeal to the court on questions arising out of the arbitration may have the effect of delaying the final decision of the arbitrator for an unreasonable period.

In the case of *Produce Brokers Co., Ltd. v. Olympic Oil and Cake Co., Ltd.* (114 L.T.R. 94), the House of Lords dealt with a point arising out of the award of an arbitrator. There were seven distinct stages of argument for decision, four of them in courts of law and three before the arbitration tribunal. The eighth stage was reached in the House of Lords, and it was there held that an arbitrator had power to determine the existence of a custom as part of a commercial contract. The case went back to the arbitrator, but another argument in court was necessary before his final award was accepted. In the course of his judgment, Lord Loreburn accepted the right of parties to prefer "what some may consider the imperfect though expeditious wisdom of arbitrators to the slower and more costly justice of His Majesty's Courts," but regretted that in the case being dealt with the parties had to encounter the inconveniences of both methods, with the advantages of neither. The case may, perhaps, be exceptional, but it illustrates some of the disadvantages of arbitration.

One must, however, recognise the great benefit to the commercial community of arbitration tribunals of the type which functions in connection with the Manchester Chamber of Commerce. During the existence of this tribunal, with its panel of merchants and trade experts, more than two thousand arbitrations have been carried through, with undoubted benefit to the local business men. The great majority of these arbitrations do not involve the consideration of points of law.

The energies of the legal profession should, therefore, be directed towards the accomplishment of reforms in legal procedure and practice. The judges are pursuing their difficult task with learning and skill, and in spite of difficulties such as those indicated in this paper, they still retain the full confidence of the commercial community. What remains is the duty of simplifying procedure, of reducing cost, of limiting appeals, and of expediting the hearing of cases. This accomplished, there will be no grounds for the apprehension felt by Scrutton, L.J.

THE EDIFICE OF ENGLISH LAW. It is truly said of the law of England that it is a living system which is in a constant state of development and growth. To the present generation of lawyers this statement is very clearly illustrated in the issue of the second edition of *Halsbury's Laws of England*. Within a period of twenty-five years such remarkable changes and developments have taken place as to render obsolete much of the original edition, and to necessitate the complete revision and re-issue of this great work. Its compilers have not attempted to reduce the huge mass of legal lore into a code, or a set of principles; they have recognised this to be an impossibility. But they have in a striking form given us a plan of the colossal edifice of English law with its maze of approaches, corridors and rooms, and have furnished a guide to the intricacies of its structure and arrangements. They have emphasised what was already known to lawyers, the hugeness, the antiquity, the inconsistency and the majesty of the structure. Its architecture is of many periods. Unlike a great cathedral, it has no harmony of design; yet, in spite of all its faults, it is an embodiment of the genius of successive generations in the life of a great nation.

Motorist v. Pedestrian?

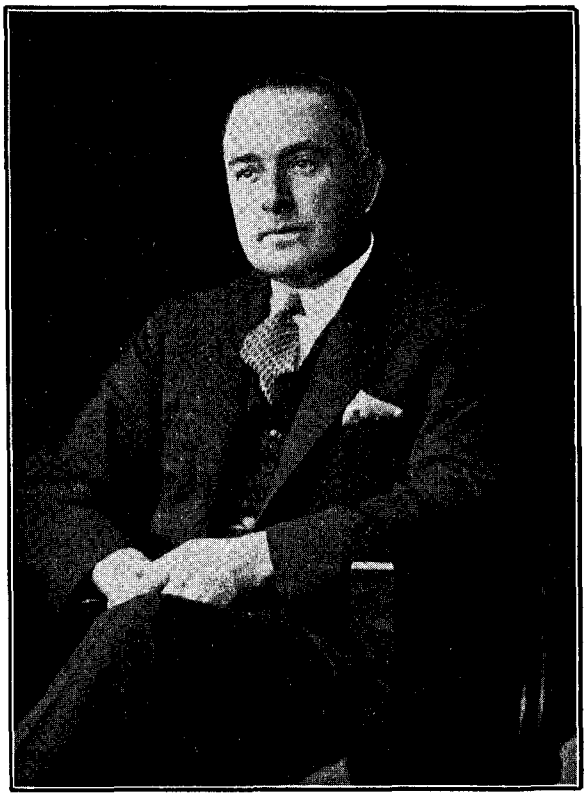
Few, if any, are the cases in which a motorist has sued a pedestrian for damages due to the pedestrian's negligence; yet many have been the cases in which a motorist and his car were seriously injured in a frantic endeavour to avoid a pedestrian who, without any warning, suddenly rushed across a road. In such a case it is the pedestrian who clearly ought to be made to pay; but there is a general impression, usually right, but quite frequently wrong, that it must be the motorist who is to blame; juries and many Judges share this belief, and so we rarely have the chance of seeing the trial of an action in *Motorist v. Pedestrian*.

Legislation is being introduced in England, which will give full legal effect to this general belief. The motorist is to be placed in the same category as the owner of a lion or a tiger, and will be liable in damages to any pedestrian whom he may kill or injure, without proof of negligence. The objection to this is that it may frighten a vast number of careful owner-drivers from the roads: they will take the view that they cannot afford to take the risk or incur the cost of insuring against it. For the reckless driver it is only the increased premium which may deter him from driving at all. Once on the road, and insured, he will drive as furiously and as carelessly as before.

Herbert Page.

An Appreciation.

The writer, who is a prominent member of the Legal Profession, and was to our knowledge an intimate friend of the late Mr. Page, desired to remain anonymous as he thought he was merely recording the sentiments of all who were privileged to enjoy Mr. Page's close friendship. They will, we know, fully endorse the appreciation.—ED.



The Late Mr. Herbert Page.

S. P. Andrew, Photo.

It is difficult to refer to the character of the late Herbert Page and yet avoid the charge of hyperbole. Yet the highest praise in his case will come from those who were best acquainted with him.

If we were to attempt to find a word going nearest to describing his outstanding characteristic, it would be selected from one of these three words "ability," "tact" or "thoughtfulness."

Herbert Page was an enthusiastic Englishman and his inclinations were English rather than colonial. Yet he came to the Colonies holding a high position in a company which operates in most of the units that form the British Empire. Both in Australia, with his headquarters in Sydney, and in New Zealand he rapidly adjusted his English ways to Colonial requirements. His was an outstanding example of an Englishman succeeding amongst colonials. His success was due to the great tact and charm with which he applied his consummate skill in business.

His scholastic education was more practical than academic. He could converse intelligently with the great and he was wise enough to know how to converse with the lowly. He probably suffered fools more gladly than do most of his friends and he must indeed have suffered acutely at times.

In New Zealand, it was his business to know all kinds of people, mostly of the legal profession and the civil service. His business connexion made him regard the Government, the legal profession and some branches of the civil service as bodies of men, who, in the interest of his employer, had to agree in certain important matters, all the time remembering that it was in their own interest to do so also.

To bring to a new point of view Ministers of the Crown, who are inclined to suspect any change not originating in themselves, civil servants who proceed along a well-trod path where imagination and ambition hardly matter, and the legal profession who have struggled hard with the other two bodies for their very existence, was work for a giant. How well Herbert Page fitted that role is for ever to be seen in the great *Reprint* of our statutes.

In the long and difficult negotiations behind the whole movement was Herbert Page, the practical dreamer.

To those who belong to the legal profession, Herbert Page will be remembered as the guiding spirit who brought to an end an old, bitter and wasteful quarrel. That he realised that the cause was a good one was clear from the part he later played in fighting tooth and nail the Press boycott, and then, later, as a mediator in bringing harmony again while upholding in the highest degree the honour of the profession.

These matters are mentioned because they are big matters calling for great qualities in the man. First, confidence in his integrity was essential. He was and always has been trusted by anyone who came in close contact with him. Secondly, capacity to evolve a practical plan. Thirdly, tact and determination. All these qualities were to be found in abundance in Herbert Page, and every business transaction he took part in was, at any rate, on his side clean and wholesome.

At times, his bargains may have appeared hard, but he was a servant working for a master, and, compatible with the business principles of that great firm he advised, he was expected to drive the best bargain he could.

No man, however, could ever say that Herbert Page secured an unconscionable bargain.

Where he succeeded beyond others was in always seeing that one bargain could be used to lead to another. He was always looking ahead for the firm.

To those of us who enjoyed his intimate friendship the qualities in him that endeared him to all were his untiring efforts to help. He was always doing acts of kindness, and innumerable are the occasions he has gone out of his way, far out of his way, to do some good turn, and often the recipients of his favours were persons who could not and never would be able to reciprocate his kindness.

By inclination he hated travelling, and to his friends he would rather talk of his home and family in Sydney. He was difficult to draw with regard to himself, while ever seeking to reveal the good in others.

A cheery good fellow out of his office, on the golf links, among his friends; away from his office he was indeed hail-fellow-well-met.

Now suddenly he has been taken, long before his time and in the very flush of life. It will be very difficult to become accustomed to the gap his going makes in the ranks of his friends.

Farewell old friend, big hearted, good hearted, capable Herbert Page!

Australian Notes.

By Wilfred Blacket, K.C.

Not Negotiable. Cheques payable to Income Tax Commissioners have been the *fons et origo* of most of the cases decided under section 88 of the Federal Bills of Exchange Act, 1909, during many years past. The latest of these cases is the *Commercial Bank of Australia v. Flanagan* in the High Court of Australia. One Coffey acting for the defendant Flanagan received from him a cheque for £435 19s. 9d. in payment of an assessment. The cheque was drawn in favour of "State tax or bearer" and was crossed "Not Negotiable." Coffey tendered the cheque as part of a deposit to credit of his account with the appellant bank, and the receiving teller asked why he was paying it in to his own account instead of paying it to the department. He said he had to do so because a part of the amount was for fees payable to him. The teller said that Coffey had made a similar explanation with regard to a cheque paid to his credit once before, and that no complaint had come from the drawer. In this case, however, Coffey had no grounds for his statement, and as he failed to pay the amount for the tax the respondent Flanagan was obliged to pay it again. He sued the Bank for the amount, and section 88 was pleaded in defence, but the plaintiff on trial obtained a verdict which under the judgment of the High Court he will retain, Sir Frank Gavan Duffy, C.J., and Starke and Dixon, JJ., unanimously holding that the Bank failed to exercise due care inasmuch as it did not make the further enquiries that were clearly necessary to safeguard the drawer of the cheque.

Re Incerta. *King v. Cornell*, N.S.W., is a case which your diligent practitioners may margin on their reports of *Valentine v. O'Donnell*, 25 N.Z.L.R., 779, for it accepts that case as containing an accurate exposition of the law on its facts; but by reason of a difference of essential facts reaches a different conclusion. King and Cornell by their letters agreed upon all the terms of a three years' agreement of share farming, except as to its commencement. As to this term Mr. Maxwell, K.C., for the plaintiff, endeavouring to retain in Banco a verdict for £400 damages for breach of the agreement, relied upon the concluding words of a letter by the defendant as follows: "Kindly consider all the above and we can fix things next week." He endeavoured to bring this statement within the rule of *Valentine's* case, but the Chief Justice delivering the unanimous opinion of the Court refused to accept the contention that the next week end was thereby indicated as the date of commencement. He thought that the meaning of the words was "give your consideration to the terms of agreement that I have suggested in outline, and then when we meet next week we can discuss them together and thrash the whole matter out." Your readers will probably think that the words in the letter as quoted instead of fixing anything had the effect of leaving every term open for discussion.

Pastry or Not. Many questions there are that now agitate Australia, but one of the most irritating of these is "what is pastry?" Pastry and bread are free of sales tax, but to get the benefit of the exemption business men have to decide the question quoted. It is a frequent visitor in all jurisdictions. Recently Sir Leo Cussen, Actg. Chief Justice of Victoria, had to deal with it on a claim against a baker for £304 sales tax. His Honour had to consider the quality and composition of some dozens of articles that no one except bakers and little boys know anything whatever about. Finally he found that fern tartlets, Wee Macgregor's, monkey faces, and about forty other articles bought and sold by and to the persons aforesaid were pastry, but that meringues, birds' nests, alberts, and cream kisses, snowballs, and other similar luxuries too numerous to mention were not. He also found that certain other articles might or might not be pastry according to circumstances, and having done so told the parties to the dispute to go away and calculate the amount of tax payable. It must have been an irritating inquiry for the judge, but he had only to deal with the matter once, while the unfortunate baker has to consider the problem every time a little boy spends twopence.

Christian Science in a Bottle. T. B. Williams, of Melbourne, was charged with having sold a "drug" without any label on the bottle stating its components. If the label was deficient in this respect it was eloquent in praise of the virtues of the medicine which was stated to be a certain cure for camel itch, meningitis, chilblains, appendicitis, bruises, pneumonia, deafness, curvature of the spine, trench feet, and various other assorted diseases. Housemaid's knee and clergyman's sore throat were not mentioned, but the omission was probably due to the fact that it was not a very large label. The medicine certainly was a very powerful compound for it contained 60 per cent. alcohol besides some methylated spirit, so that even if it did not cure all these diseases it would tend to prevent a man from worrying about them.

A Breech Presentation. D. E. Dargan, of Victoria, is now an appellant to the High Court. His grievance is that the Commissioner of Patents refused to grant letters patent for an improved method of skinning rabbits. Instead of incising the skin of the animal all along its front elevation, his plan is to begin the incision at the rear of the carcase and to end it at the third button, so to speak, and then pull out the carcase. The Commissioner thought that this was no more than a working direction, and a mere limitation of a known method, so Mr. Dargan went to the High Court for a direction that the letters should be issued. The Court reserved its decision, but I shall not think it necessary to cable its determination. In imagination I see some rabbit trappers trying to peg out skins incised in accordance with Mr. Dargan's method.

A Punter and his Money.—Thomas Rees Jones had no luck in his appeal to the High Court in support of his claim to deduct his losses as a punter from his taxable income. The matter was of some moment for he was not quite sure whether he had lost £40,000 or £60,000—probably by backing Australian horses against those with "N.Z." in brackets after their names—but knew it was more than the £12,000 which he wanted to set-off. Evatt, J., who heard the appeal refused the deduction on the ground that the appellant was not "carrying on a business" of betting. His Honour thought that it "was a practice and something akin to a mania," but that "the gratification of his bad habit" of losing money on racecourses was not "a business" within the meaning of the Act, but did not go so far as to find that it was a pleasure.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

The Rating Assurance.

The rating assurance (or rather the transfer, conveyance or lease of rateable property by the Registrar of the Supreme Court upon non-payment of rates due to a local authority) after sporadic outbreaks over the past few years, now threatens, in some parts at least, to develop into an epidemic. In the recent past a conveyancer's acquaintance with such an instrument has often been limited to an occasional perusal of the record of a rating conveyance in the course of search of a " deeds " title, but now he may be privileged to prepare a transfer of land acquired by his client upon a sale under the Rating Act.

On the subject of requisitions and enquiries connected with a rating sale or lease no generally approved line of thought or action seems to exist. The procedure to be followed by the local authority, and later the Registrar, is set out in ss. 60-84 of the Rating Act, 1925, under the heading of " Recovery of Rates." A cursory perusal of the rubric of the statute shows that the purchaser's solicitor must be satisfied on the following at least :

1. A written demand for rates must have been duly delivered and rates must have been at the time of the sale due in respect of the land purported to be sold. Section 61. (And see *Mackechnie and Another v. Waitemata County Council and Another* (1889) 7 N.Z.L.R. 332).

2. Judgment for the amount of rates must have been properly recovered and must have lain fallow for six calendar months. Sections 65, 70 and 79 (1).

3. The Registrar on receipt of the necessary certificate from the local authority must have given the prescribed notice to all persons believed to have an interest in the property, whereupon proceedings must again have lain fallow for six calendar months. Section 79 (2)–(4).

4. A sale or letting at auction complying with the particular provisions of Section 80 must have ensued.

The general scheme of the remedy is clear, but in detail the Act is defective ; it is even carelessly worded, when it tells us that rates may be sued for in the name of the " local authority " which is earlier defined (s. 2) to mean the " council, board . . . or persons empowered to make and levy rates," whereas the appropriate plaintiff is the body corporate whose powers and functions are exercised by the council or other mere collection of individuals. The Act is also inadequately worded when it does not on the face of it show that a separate judgment should be obtained for the amount of rates due in respect of each rateable property which it is sought to sell, or whether the Court has jurisdiction (as it probably has) to enter or sign a separate judgment in respect of each cause of action joined in one plaint and summons or one writ of summons. (See *Mitchell v. Hayes and Others* ; *Hayes v. Mitchell and Others* [1926] N.Z.L.R. 262).

The Act seems further defective when by s. 80 (i) it affords protection to a purchaser or lessee in respect of any impropriety or irregularity in connection with the sale or letting but does not extend to cover defects, say, in the judgment. In *Mackechnie's Case* (1889) 7 N.Z.L.R. 332, the Council and the Registrar purported to sell A's land for recovery of rates really due on B's land, and Gillies, J., in holding the conveyance to be ineffectual to pass the former parcel, said the object of the section (s. 44 of the Rating Act, 1882, since repealed and now reproduced by s. 80 (i) of the Act of 1925) was to prevent quibbles, or frivolous objections being made to upset the title of the purchaser.

So much is clear ; but does the sub-section under review entitle the purchaser's solicitor to assume the validity of the judgment, and of other matters leading up to the sale ? Apparently not. What if the defendant owner, sued in his personal name, be dead before judgment is entered ? What if the judgment include an amount of rates first due more than three years prior to the time when judgment was signed ? Can one abstain from enquiry and rely in that regard upon the maxim *omnia rite esse acta praesumuntur* ? It is more than doubtful.

It would have been better if the saving sub-section, while preserving the principle of *Mackechnie's* case (*supra*), had been expressed in wider terms parallel, say, to those of s. 81 of the Property Law Act, 1908, or s. 113 of the Land Transfer Act, 1915, (protecting the *bona fide* purchaser under a mortgagee's sale through the Registrar) and making the Registrar's assurance conclusive proof that the provisions of the Rating Act relating to the sale had been complied with, and that all things had happened and all times elapsed to authorise such assurance to be made.

In the absence of such wider provision in the Rating Act it is difficult to say just where the purchaser's enquiries should stop, and it were better surely that a defaulting ratepayer or his representatives be left to his personal remedies against the rating authority in those respects, than that the title of the *bono fide* purchaser for value should be questioned.

In practice, the conveyancer employs the usual statutory declaration made by the collector of rates to the local authority, or the town clerk, in verification of the recitals in the assurance of the facts that a demand was duly delivered, and that rates were due and continued at the time of the sale to be due in respect of the land disposed of. That is the best evidence available on those points, although the truth of such recitals in a transfer executed by a Registrar of the Supreme Court under the Rating Act is accepted by some District Land Registrars without further proof.

The judgment, although a matter of record, is not in itself notice to all and sundry ; neither is the record conclusive of all facts precedent to its validity ; and those facts seem properly to be the subject of enquiry by the purchaser's solicitor prior to completion. The principle of the saving sub-section, as was pointed out in *Mackechnie's* case (*supra*), is to protect the purchaser solely against any impropriety or irregularity connected with the sale, and not against all things which may avoid the assurance.

It remains to point out that production of the duplicate certificate of title is not imperative for the purposes of registration of an instrument executed by the Registrar of the Court under these statutory provisions, and the District Land Registrar may issue a new certificate of title in the name of the purchaser without getting in and cancelling the outstanding duplicate certificate. To this end a statement by the Registrar of the Court that he is unable to produce the existing certificate of title may conveniently be endorsed on the instrument of transfer or lease.

Juries and Running-Down Cases.

An Echo of our recent Symposium.

In the issue of the *Law Journal* (London) of November 26 last, "Outlaw" comments at length on the jury system in relation to motor collision cases. Under the title: "How Myers, C.J., Lit a Fire," he says in part:

"In New Zealand, as in Great Britain, they believe in juries. Sir Michael Myers, Chief Justice of that Dominion, some time ago expressed his opinion on the use of juries in running-down cases. THE LAW JOURNAL of New Zealand published the views of the Chief Justice and invited some forty prominent members of the Bar in different parts of the country to contribute their views. No less than thirty-eight responded; and the whole Press of New Zealand took up the matter and the subject forthwith became one of national interest and importance.

"In brief, the Chief Justice, in his address to the Grand Jury at Christchurch, called attention to the large number of criminal charges and of civil actions on his list arising out of road "accidents." Contrasting the law in England with that in New Zealand, he pointed out that in the Dominion there was only one kind of negligence necessary, in civil and criminal cases alike, to "found responsibility." Yet, on a criminal charge the jury often found the accused not guilty, while on the same or similar facts in a civil action for damages the jury would find the same person guilty of negligence. 'Clearly, both verdicts cannot be right. One or other of them must be wrong and therefore unjust.'

"He then referred to an aspect of the case which provides a very present problem in the Royal Courts of Justice in the Strand. 'May it be that the jury is influenced—subconsciously, if you like, by its knowledge of the compulsory insurance provisions of our statute of 1928? But whatever the reason, it is indisputable that there is an injustice somewhere. If the driver of the motor vehicle was not negligent, and is therefore not liable, why should some third party be required to pay damages on his behalf? If, on the other hand, he was negligent, why should he escape responsibility for the consequences of the negligence? As matters now stand, he may and often does escape criminal responsibility; and is immune as well from personal pecuniary loss."

"He suggested, therefore, the abolition of juries in civil actions in 'running-down' cases, and that the Judge might sit with two assessors, one appointed by each party, as 'a more satisfactory tribunal.' Upon the proposal thirty-eight practising barristers of New Zealand expressed their opinion; and upon those the lay Press of the Dominion expressed further views, so that the matter in a brief time became a lively and burning topic throughout the land. Generally speaking, while both legal and lay opinion was for the preservation of juries with full powers in civil as well as criminal cases, opinion generally was in favour of the supersession of juries in this class of case; but that the assessors should not be appointed by the parties. Such assessors would prove to be advocates rather than assessors.

"On the whole, the discussion seemed to indicate that an acceptable way might be found in the use of assessors to be chosen from a fairly numerous panel by lot or in rotation; the panel to be appointed by the State from men of standing and reputation, irrespective of social grade or class.

"Here, as there, it would appear to be the fact that juries are not always satisfactory or just in their assessment and award of damages. Knowing that every motorist is insured against third-party risks, they do not hesitate to award damages on a generous and sometimes lavish scale; and it is notorious that the damages awarded by juries for personal injuries in running-down cases have increased enormously since compulsory insurance was introduced. That the knowledge by a jury that a defendant was insured militated against justice was fully recognised by the Judges when the strict rule was introduced that counsel must not disclose the fact. It might be that the two thousand pounds, now so often awarded for an injured limb, is a more just estimate of damage than the small sum which in former times corresponded with the jury's estimate of what the plaintiff could afford to pay. But the probability is that both were unjust and that the jury then, as now, was influenced by considerations which were largely irrelevant.

"Moreover, juries are always addled and perplexed by the Judge's exposition of the doctrine of contributory negligence. There are few judges who really comprehend the doctrine themselves, and those who can expound it are fewer still. Why, if reform must be, should we not have a simple doctrine simply stated in a simple Act for simple folk, wherein there might also be a section providing that liability should be assessed as it is in the Admiralty Court?

"Is not the doctrine of 'last opportunity' and 'proximate cause' too old or too ill for modern application? With the increasing speed of motor-cars, the second, third, and last opportunity of avoiding an accident may occur within a second of time. The onus shifts too quickly for the reasonable man. One ought to go further back for the real negligence which caused the accident: it has probably been manifesting itself for some time.

"But there are difficulties. Perhaps the Editor will offer a prize for the best solution."

A Misdirection from the Bench.

Lord Ellenborough was once about to go on circuit when Lady Ellenborough said that she would like to accompany him. He replied that he had no objection provided she did not encumber the carriage with band-boxes, which were his utter abhorrence. During the first day's journey Lord Ellenborough, happening to stretch his legs, struck his foot against something below the seat; he discovered it was a band-box. Up went the window, and out went the band-box. The coachman stopped, and the footman, thinking that the band-box had tumbled out of the window by some extraordinary chance, was going to pick it up, when Lord Ellenborough furiously called out: "Drive on!" The band-box accordingly was left by the ditch-side. Having reached the country-town where he was to officiate as judge, Lord Ellenborough proceeded to array himself for his appearance in Court.

"Now," said he, "where's my wig? Where is my wig?"

"My Lord," replied his attendant, "it was thrown out of the carriage window."

Practice Precedents.

General.

At this stage, it is desired to point out that, as a practitioner should not appear as witness and counsel, solicitors should take care in making affidavits in support of various applications that they do not thereby preclude themselves from subsequently appearing as counsel.

Matters of a simple and non-contentious nature do not come within this ruling.

Commission to Take Evidence.

Reference should be made to R. 177 of the Code of Civil Procedure: see Stout and Sim's *Supreme Court Practice*, 7th Edn., p. 154; and note, as to evidence generally, R. 172, *ibid.*, p.152.

The application for the issue of a Writ of Commission should be by Summons, supported by Affidavit.

The Form of Return to a Commission at the end hereof is appropriate; but see also Form of Return in *Bolton v. Bolton* (1876) 2 Ch. D. 217, at p. 218; 34 L.T. 123.

1. Summons for Commission.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.
BETWEEN A.B. & Coy., Ltd., *Plaintiff*
AND C.D. & Coy., Ltd., *Defendant.*

LET the Defendant Company its Solicitor or Agent appear before the Right Honourable the Chief Justice of New Zealand at his Chambers, Supreme Court House, , on day the day of 19 , at 10 o'clock in the forenoon or so soon thereafter as Counsel may be heard TO SHOW CAUSE why an Order should not be made for the issue of a Commission for the examination on oath before of or if the said shall be incapacitated by illness or other sufficient cause from acting then before of of (witness) and of other witnesses on behalf of the Plaintiff Company in this action AND for the depositions so taken to be filed in this Court at and why an Order should not be made fixing the time within which the said depositions shall be so filed AND empowering the Plaintiff Company to give such depositions in evidence at the trial of this action AND WHY the trial of this Action should not be stayed until the return of such Commission UPON THE GROUNDS that it is just that such Commission should issue AND UPON THE FURTHER GROUNDS appearing from the affidavit of filed herein AND WHY the costs of and incidental to this application should not be reserved.

DATED at this day of 19 .

Registrar.

This Summons is issued by Solicitors for the Plaintiff Company whose address for service is at the Offices of Messrs. Solicitors, .

2. Affidavit in Support.

(*Heading as above*).

I, , of the City of , Solicitor, make oath and say as follows:—

1. That I am a Solicitor in the employ of the firm of Messrs. of , Solicitors on the record for the Plaintiff Company in this Action.
2. That the facts deposed to herein are within my knowledge as such Solicitor aforesaid.
3. That the Plaintiff Company has a good cause of action on the merits and that the application for a Commission is not made for the purposes of delay.
4. That the claim in this Action is for the recovery of the price of goods sold by the Plaintiff Company to Defendant Company and delivered by them to Defendant Company through the agency of who acted as agent in England of Defendant Company in respect of the goods supplied.
5. That Defendant Company acknowledges the receipt of the said goods but pleads payment of the sum claimed to the said in answer to Plaintiff Company's claim.
6. That it is material to the determination of the questions in issue in this action to adduce evidence to show whether the said acted as agent for Defendant Company or whether the Plaintiff Company looked to as the debtor for the goods ordered which were consigned by to Defendant Company.
7. That it will be necessary to adduce evidence as to the course of dealing between and the Plaintiff Company.
8. That who resides in London is a material and necessary witness for Plaintiff Company in this Action by virtue of his dealing with the Plaintiff Company, , and the Defendant Company.
9. That Plaintiff Company cannot adequately proceed to trial without the evidence of the said .
10. That is unable to attend in person to give evidence in New Zealand at the trial of this Action owing to his business interests in England requiring his continued presence there.
11. That even if Plaintiff Company should be able to induce to proceed to New Zealand to give evidence it would be unjust and inequitable that Plaintiff Company should be compelled to do so and thereby incur the greater expenses of bringing such witness to New Zealand as compared with the expenses in taking evidence on Commission in England.
12. That Defendant Company will not be prejudiced by the taking of such evidence in England by reason of its right to cross-examine the said before the Commission in England.
13. That the Solicitors in England for Plaintiff Company are , of .
14. That I am informed by the said Solicitors in England for Plaintiff Company and verily believe that the proposed Commissioners , and , are of excellent professional standing and ability and are personally unknown to the said Solicitors in England of the Plaintiff Company.

SWORN, etc.

3. Affidavit in Opposition to Summons.

(*Heading as above*).

I, of the City of , in New Zealand make oath and say as follows:—

1. That I am Managing Director of the above-named Defendant Company and have perused the affidavit of filed in support of the application for a Commission herein.
2. That the amount that Defendant Company is sued for in this Action has been paid to of London on the day of 19 .
3. That by reason of payment aforesaid there are no merits in this action.
4. That great delay therefore has taken place in launching the present action.
5. That Defendant Company will be put to heavy expense if the order as prayed is granted for a Commission in England.
6. That the Defendant Company desires to cross-examine the said in New Zealand before the Judge that is to preside at the trial of this action.
7. That discovery of documents having been granted by Defendant Company to Plaintiff Company it is clear the goods, the price of which is now being claimed from Defendant Company, were invoiced by Plaintiff Company to and not to Defendant Company.

SWORN, etc.

4. Order for Commission.

(*Heading as above*).

day the day of 19 .

UPON READING the Summons sealed herein and dated the day of 19 , and the affidavit of filed herein in support of the said Summons and the Affidavit of filed in opposition thereto AND UPON HEARING Mr. of Counsel for the Plaintiff Company and Mr. of Counsel for the Defendant Company I DO ORDER that a Commission do issue out of this Court at directed to of (include occupation) for the examination on oath before the said or if the said shall be incapacitated by illness or other sufficient cause from acting, then before the said of of (witness) a witness on behalf of the Plaintiff Company in this Action and any other witnesses on behalf of the Plaintiff Company or of the Defendant Company that may be produced before the said or the said AND THAT the return of the said Commission to this Court at be made on or before the day of 19 , or such further day as may be ordered by this Court AND THAT the depositions so taken be filed in this Court at AND THAT any party to this action be empowered to give such depositions in evidence

in this action AND THAT the trial of this Action be and the same is hereby stayed until the return of such Commission AND THAT the costs of and incidental to this Order and the said Commission be and the same are hereby reserved.

Judge.

5. Writ of Commission.

(*Heading as above*).

GEORGE THE FIFTH, etc.

TO , , of , .

AND in case the said shall be incapacitated by illness or other sufficient cause from acting then

TO , , of , .

GREETING:

KNOW YE that we in confidence of your prudence and fidelity have appointed you and by these presents give you power and authority to examine *viva voce* as hereinafter mentioned such witnesses as the parties hereto may produce, and to hold such examination at before you.

WE COMMAND YOU as follows:—

1. The parties shall be at liberty to examine *viva voce* on the subject-matter hereof or arising out of the answers thereto a witness on behalf of the Plaintiff Company in this Action, and any other witnesses on behalf of the Plaintiff Company or of the Defendant Company that may be produced, with liberty to the other parties to cross-examine the said witnesses *viva voce*, the party producing any witness for examination being at liberty to re-examine the said witness *viva voce*: and all such *viva voce* questions, whether on examination, cross-examination, or re-examination shall be reduced into writing, and with the answers thereto shall be returned with the said Commission.

2. Notice in writing, signed by you and stating the time and place of the intended examination and the names of the witnesses intended to be examined shall be given to the Agents of the respective parties by delivering such notice to such respective Agents at their places of business three clear days before the day appointed for the examination of such witnesses, and the address for service of the Plaintiff Company shall be at the offices of Messrs. of , OR such other place as such Agents shall from time to time nominate in writing to you, and the address for service of the Defendant Company shall be at the office of Messrs. , of , or such other place as such Agents shall from time to time nominate in writing to you, and if any of the said parties on whom such notice has been served shall neglect to attend pursuant to the notice then you shall be at liberty, on proof on Oath of such service as aforesaid, to proceed with and take the examination of the said witnesses in the absence of the party or parties so failing or neglecting to attend, and adjourn any meeting or meetings or continue the same from day to day without giving any further or other notice of the subsequent meeting or meetings.

3. In the event of any of the said witnesses on this examination, cross-examination, or re-examination producing any book, documents, letter, paper or writing, and refusing for good cause to be stated in his depositions to part with the original thereof, then a copy thereof or extract therefrom, certified by you the Commissioner to be a true and correct copy or extract, shall be annexed to the deposition of the said witness.

4. Each witness to be examined under this Commission shall be examined on oath affirmation or otherwise in accordance with his religion by or before you the Commissioner at the examination.

5. The Depositions to be taken under this Commission shall be subscribed by the said witnesses and by you the Commissioner.

6. The Depositions, together with any documents referred to therein, or certified copies thereof or extracts therefrom shall be despatched by registered post addressed to the Registrar of the Supreme Court of New Zealand at so as to reach him on or before the day of 19 , or on or before such further or other day as may be ordered by the Supreme Court of New Zealand enclosed in a cover under Seal of you the Commissioner.

7. Before you the said Commissioner in any manner act in execution hereof, you shall take the oath hereon endorsed on the (Bible) or otherwise in such manner as sanctioned by the form of your religion as considered by you to be binding on your conscience and we give you authority to administer such Oath to yourself.

WITNESS the Right Honourable Chief Justice of New Zealand at this day of 19 .

Registrar.

This Writ is issued by whose address for service, etc.

WITNESSES' OATH.

You are true answer to make to all such questions as shall be asked you, without favour or affection to either party and therein you shall speak the whole truth and nothing but the truth so help you God.

COMMISSIONER'S OATH.

I shall according to the best of my skill and knowledge truly and faithfully and without partiality to any or either of the parties in this cause, take the examinations and depositions of the within-named witnesses to be produced and examined by virtue of the Commission within written, so help me God.

CLERK'S OATH.

You shall truly faithfully and without partiality to any or either of the parties in this cause take write down transcribe and engross all and every the questions which shall be exhibited or put to the respective witnesses and also the depositions of each of such witnesses produced before and examined by the said Commissioner named in the Commission within written as far as you are directed and employed by such Commissioner to take write down transcribe or engross the said questions and depositions, so help you God.

6. Form of Return to Commission.

(*To be written at end of Deposition*).

The evidence contained in this and the preceding sheets of paper is the Deposition of the witness taken under the Commission dated the day of 19 , hereunto annexed and herewith are Exhibits duly marked and signed by me referred to in the said Deposition.

Commissioner.

New Books and Publications.

Butterworth's Rating Appeals, 1926-1931. Two Volumes. (Butterworth & Co. (Pub.) Ltd.) Price 57/6d.

Wolstenholme's Landlord and Tennant. Second Edition, 1932. (Butterworth & Co. (Pub.) Ltd.) Price 6/6d.

Hughes and Dixon's Landlord and Tenant Act, 1931. (Irish Free State Act). (Butterworth & Co. (Pub.) Ltd.) Price 25/-.

The Carriers Liability. By E. G. M. Fletcher, 1932. (Stevens & Sons Ltd.) Price 16/-.

The Solicitors' Act, 1932, An Act to Consolidate the Solicitors' Act, 1839-1928. Index by H. A. C. Sturgess. (Eyre & Spottiswoode Ltd.) Price 4/6d.

Poley' Law and Practice of the Stock Exchange. By R. H. Code Holland, B.A., and John N. Werry. Fifth Edition, 1932. (Pitman & Son Ltd.) Price 19/-.

Williams' Law and Practice of Bankruptcy. By W. D. Stable and J. B. Blagden. Fourteenth Edition. (Stevens & Sons and Sweet & Maxwell.) 57/6.

A Digest of the Law of Agency. By Wm. Bowstead. Eighth Edition. (Sweet & Maxwell Ltd.) Price 33/6.

The Statute of Frauds, Section Four. In the light of its Judicial Interpretation. By James Williams, LL.M. (N.Z.), D.Ph. (Cantab.). (Cambridge Press.) Price 19/-.

Constitutional Law and Legal History in a Nutshell. (Including Statute of Westminster.) By Marston Garsia. Third Edition. (Sweet & Maxwell Ltd.) Price 6/6d.

Continental Studies in English Legal History. A Hundred Years of Quarter Sessions. The Government of Middlesex from 1660-1760. By E. G. Dowdell. With an Introduction by Sir Wm. Holdsworth. (Cambridge Press.) Price 17/-.

Monro Digest XIX 2 Locati Conducti. Reprinted 1932. (Cambridge Press.) Price 7/6d.