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"*There is no reference to this point in the argument. The Court apparently thought it out for itself, which is a most dangerous thing.*"

—LORD WRIGHT.

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Solicitors and Pauper Appeals.

NOT for a long time has there been a judgment of greater interest to the profession than that recently given by a Full Court in *Boddie v. Armstrong and Springhall, Ltd., and Sievwright*, [1934] N.Z.L.R. 917. The decision has given rise to considerable comment in legal circles, and promotes a new orientation of ideas in regard to the conduct of appeals *in forma pauperis*.

The effect of the judgment, briefly, is that if a solicitor acts in Supreme Court proceedings from which an appeal *in forma pauperis* is successful, he must take no part in the conduct of the appeal if he wishes to preserve his right to profit costs in the Supreme Court action or to any other costs against the successful appellant, however earned. If such solicitor should act in the proceedings on appeal, he is thereby debarred from recovering any profit costs for work done in respect of any matter whatsoever for the appellant prior to his being admitted as a pauper, other than such allowance as may be ordered by the Court of Appeal in the nature of disbursements or office expenses in the action.

The history of the law relating to appeals *in forma pauperis* dates from the reign of Henry VII, as is shown in the judgment of Mr. Justice Grove in *Carson v. Pickersgill and Sons*, (1885) 14 Q.B.D. 859, 862. It appears that the English practice from the year 1854 onwards was that so long as a person for whom a solicitor was acting was proceeding as a pauper, such solicitor could not receive any remuneration for his services but was entitled in a successful action, as against the other party, to costs out of pocket only; and counsel were prohibited from taking, or agreeing to take, any fee from the pauper litigant. Under the Judicature Acts, from 1883 until the year 1914, O. xvi, rr. 22 to 31D, applied. Since 1926, these rules have been considerably altered as will appear later.

Up to the year 1903, no rules for the conduct of pauper appeals existed in this country: in *Young v. Harper*, (1889) 10 N.Z.L.R. 179, it was held that the Supreme Court had no power to give leave to appeal *in forma pauperis*; and the jurisdiction of the Court of Appeal to allow a party to proceed *in forma pauperis* in the Court of Appeal was established by *Robertson v. Howden*, (1891) 10 N.Z.L.R. 471. In *Wasteneys v. Wasteneys*, [1900] A.C. 446, an order of our Court of Appeal was reversed "with such costs as are payable in New Zealand in pauper appeals." But no such rules existed; so in 1903 the present rules were drawn and modelled on O. xvi (1883) under the Judicature Acts, thus importing the English practice—though with certain striking alterations, framed, it is said, in the shadow of a personal controversy. The most drastic alteration appears in R. 43 of the Court of Appeal Rules, which alters O. xvi, r. 28, by the addition indicated by the words in italics—and substitutes "appeals" in the first line for "sues or defends."

> "Whilst a person appeals as a pauper, no person shall take or agree to take or seek to obtain from him, *or from any person on his behalf, or for his benefit, or in his interest*, any fee, profit, or reward for the conduct of his business in the Court; *and, further, no person acting as solicitor or counsel for such pauper shall take any payment, fee, or reward for any business whatever done for such person out of the Court, or for any past services rendered or alleged to have been rendered to such person in respect of any matter whatsoever*. Any person who takes or agrees to take or seeks to obtain any such fee, profit, or reward shall be guilty of a contempt of Court."

This rule, according to the judgment of the majority of the Full Court (Myers, C.J., Herdman, Blair, and Kennedy, JJ.) in *Boddie's* case,

> "forbids the taking of any payment, fee, or reward for any business done. It is clear that this does not prevent the solicitor from receiving the amount of his out-of-pocket expenses."

And Mr. Justice Fair expressed a similar view:

> "Rule 43 is much wider than the English rule considered in [*Carson v. Pickersgill and Sons*, (1885) 14 Q.B.D. 859, 862], to which the first part of it corresponds, and, read as construed by the learned Magistrate, deprives a counsel or solicitor acting for a pauper appellant of his vested right to recover, and even of his right to receive, payment of his fees for all past services rendered to the pauper appellant, other than out-of-pocket expenses."

Rule 43 deserves Mr. Justice Fair's description of it as "a drastic provision." Counsel for the solicitors concerned strongly pressed the view that it was in conflict with both RR. 30 and 31 of the Court of Appeal Rules, but the Court rejected that submission. As the circumstances of the recent appeal heard by the Full Court are of importance in estimating the effect of its judgment, we now proceed to summarize them.

In an action against one J. D. Sievwright, Boddie claimed damages for slander in respect of five causes of action. Mr. Justice Ostler gave judgment in his favour on each of three of the causes of action for the sum of one farthing. Boddie's solicitors then received instructions from him to appeal from this judgment, and, owing to his financial position, it became necessary for him to apply for leave to appeal *in forma pauperis*. The litigation had been lengthy and involved, and Boddie was naturally anxious that the solicitors who had served him so far should act for him on his appeal. The formalities required by the Court of Appeal Rules were complied with. In particular, Boddie made and filed an affidavit setting out his financial position, and also an affidavit showing the amount he had paid or promised or undertaken to pay his solicitors for their costs, charges, disbursements, and expenses, in respect of the Supreme Court proceedings. His solicitors made and filed an affidavit, which showed, in detail, in the words of R. 30 of the Court of Appeal Rules,

> "every sum which such person, and every person on his behalf, or at his request, or in his interest, or for his benefit, has paid or become liable for, or has promised or undertaken to pay, for costs, charges, disbursements, and other expenses in respect of the action, cause, or matter as to which he desires to appeal, and in respect of all advice, consultations, and professional charges whatsoever preliminary to such action, cause, or matter."

The solicitors, by this rule, were limited in any event to the costs stated in their affidavit. A case was laid before counsel, and was certified as a proper one for appeal. The Court of Appeal, after hearing argument, formally granted leave to appeal *in forma pauperis*.

The appeal (which is reported in [1934] G.L.R. 258) was heard by the Court of Appeal (Herdman, MacGregor, and Kennedy, JJ.), and the learned Judges gave separate written judgments, but all agreed with the formal judgment as proposed by Mr. Justice Kennedy, which was as follows: Damages were awarded to appellant on each of four causes of action in the sum of £40, or £160 in all:

> "with costs in the Supreme Court according to scale on that amount and with disbursements to be fixed by the Registrar less the costs hereinafter allowed to the defendant. The defendant, who has succeeded on the first cause of action and in respect of severable parts of the other allegations, should have the costs of trial in the Supreme Court as on a claim for £750. An allowance in respect of witnesses' expenses is best adjusted by leaving the parties to pay their own witnesses. Appellant should be allowed on appeal for the office expenses of his solicitor the sum of £25."

Boddie accordingly was entitled to recover £160, plus "costs according to scale in the Supreme Court on that amount" with disbursements; and, in the Court of Appeal proceedings, "for the office expenses of his solicitor the sum of £25."

Immediately after the conclusion of the appeal, Messrs. Armstrong and Springhall, Ltd., and two other firms which had obtained judgments against Boddie, took out attachment orders in the Magistrate's Court against the judgment-moneys. The respondent, Sievwright, did not dispute liability, and a claim was made by Boddie's solicitors that the whole of the judgment was subject to a lien for their costs of and incidental to the Supreme Court proceedings which had been incurred up to the time the appellant was given leave to appeal as a pauper. If this lien were established, it would absorb the whole amount of the judgment.

The learned Magistrate, Mr. W. F. Stilwell, S.M., upon the interpretation he placed upon the Court of Appeal rules, and in particular upon R. 43, held that the solicitors had no lien on the judgment-moneys for their profit costs because the rule had the effect of depriving the solicitors of their costs of the Supreme Court proceedings. The Magistrate also held that the rule did not deprive the solicitors of their out-of-pocket expenses. As the result of such judgment, the amount of the attachment orders would absorb the whole of the damages and thus deprive the solicitors of any profit costs, if any such be payable.

By arrangement, an appeal to the Supreme Court was made only in one case, the parties interested in the other cases agreeing to be bound by the result. Owing to its importance to the profession, it was arranged that the appeal be argued before a Full Court.

No question arose as to the allowance of £25, which admittedly was payable to appellant's solicitors.

The argument in the Full Court, and its subsequent judgment, ranged principally around the following words which, as we have seen, were added to the English rule existing in 1903 when the pauper appeal rules were made:

> "and, further, no person acting as solicitor or counsel for such pauper shall take any payment, fee, or reward for any business whatever done for such person out of the Court, or for any past services rendered or alleged to have been rendered to such person in respect of any matter whatever."

In upholding the learned Magistrate's order, it is clear the Full Court implied that Boddie was himself entitled —apart from his judgment creditors—to retain the costs awarded by the Court of Appeal in respect of the Supreme Court proceedings.

We do not dispute the soundness of the construction placed upon R. 43 by the Full Court: it was necessarily a narrow one since the Court considered the material words of the rule were clear and unambiguous. But we think that no time should be lost in altering the rule, in the interests of poor persons as well as in justice to practitioners. As it stands, the rule implies that the profession is not a profession of gentlemen with the instincts of gentlemen to protect the weak and the distressed. It implies, we think, that a drastic curb must be placed upon rapacious yearnings of predatory practitioners to undertake speculative actions for what they might bring to them; and, if those yearnings remain unsatisfied after the Supreme Court has adjudicated on the cause in question, then to prevent satisfaction for them being sought in a higher Court. That implication omits consideration of two salient facts: first, the Court of Appeal remains, and should remain, in complete charge; it may grant or refuse leave to appeal *in forma pauperis*, quite apart from anything in R. 43. The judgment under notice refers, in somewhat unfortunately expressed terms, to this aspect:

> "The foregoing considerations point to the necessity for the exercise of extreme care in the granting of leave to appeal *in forma pauperis*, especially in any case where the effect of such order would tend to permit a solicitor who may have embarked on a speculative action to secure an advantage thereby."

This, we think, means that the character of any intending appellant's solicitor should receive the consideration of the Court to which appellant applies for leave, as well as the appellant's own financial position and the merits of his case—a suggestion the profession would properly resent—or that R. 43 does not debar solicitors from recovering Supreme Court costs prior to the admission of appellant as a pauper to the extent, which the judgment itself states. Moreover, the judgment implies that solicitors would take actions irrespective of their merits whenever the occasion for speculation arose, which is not consistent with their common sense or with experience of the profession in this country.

Above all, the poor person is considerably penalized by R. 43 as it stands. If he has confidence in his solicitor, and that confidence is strengthened by the attention and hard work devoted to his cause in the Supreme Court, he will not be put off by reference to a rule of the Court when he desires that solicitor to see his appeal through to its conclusion. Refusal by his solicitor to carry on with the appeal may give the wrong impression that he has no confidence in its success, and injustice may thereby result; or the very rapacity which the Court implies may be attributed to him in a suggested endeavour to make secure the costs he has already earned, by refusing to take an appeal he considers would succeed. For the recent judgment makes it clear that, once the appellant is admitted as a pauper, the solicitor theretofore acting for him must retire wholly from the proceedings if he wishes to preserve his vested right to earned costs. And the appellant must accordingly face the prospect of some other solicitor appearing for him, on what to the appellant is an all-important matter, when such solicitor knows nothing of the previous aspects of the litigation.

In passing, it may be noticed that the anomalous position of debarring a solicitor from his costs in the Supreme Court only arises if he takes the case he there conducted to the Court of Appeal. If he had been successful in the lower Court, he would have been entitled to his costs. If, however, he succeeds in the Court of Appeal, its judgment implies that the Court below was wrong, and that he should have received his costs there without question.

Solicitors are willing to face the prospect of receiving no costs in relation to a pauper appeal in the Court of Appeal, even if successful. Since the early part of the sixteenth century this has been one of the traditions of professional conduct of which the legal profession at large is the custodian. As was said by Mr. Justice Blair in *Sellyar v. Morrison*, (1931) 7 N.Z.L.J. 297,

> " It is an unwritten law in the profession that counsel are always prepared gratuitously to advise upon all cases where an appeal is suggested by a pauper, and that is particularly the case where counsel are eminent. The Rules have these great advantages, first, that they prevent oppressive appeals, and, secondly, that they facilitate the hearing of proper appeals."

And the recent remarks of Lord Justice Greer in *Rodriques v. Bakewell and Salmon*, (1934) 151 L.T. 81, 83, are typical of many expressions of Judges in England in appreciation of the traditional generosity of the profession. He said :

> " The vigorous argument of Mr. Lindsay is a signal instance of the valiant industry and skill which is afforded by members of the Bar to poor litigants."

If further evidence be needed, we have only to point to the most recent report of the Poor Persons Procedure Committee, adopted by the Law Society at its annual meeting in March last : 77 *L.J. Newsp.* 436 ; to the extensive work done for poor persons by the Society of Our Lady of Good Counsel : 178 *L.T. Newsp.* 49 ; and to other societies of lawyers formed to give legal assistance to poor persons—such as the Bentham Society, which performs the dual functions of providing a central organization and executive committee of the London Council of Poor Men's Lawyers, and of arranging for the gratuitous conduct of civil cases in County Courts and Police Courts in London, particularly where the Poor Persons Rules do not apply. In South Australia, the Law Society has declared that its Council and its members,

> " as a voluntary effort, will see that no person shall be without legal assistance, if he is deserving of such assistance and would be unable to obtain it without the help of the Society's members."

Last year about 900 applications for assistance, which are not limited to any class of work, were received throughout the State : see 8 *Law Inst. Jo.*, 162.

Moreover, when the majority of the Full Court speak of " the necessity for the exercise of extreme care in the granting of leave to appeal *in forma pauperis*," they are unmindful of the fact that in the past five years—we think with one exception—all appeals taken *in forma pauperis* in New Zealand, including one to the Privy Council, have been successful. These figures prove the " extreme care " and sound judgment of the profession, including those counsel who have certified the cases ; and show that injustice may have remained unremedied except for the profession's gratuitous services. The Court cannot, therefore, speak with experience of the effect of any order granting leave as tending " to permit a solicitor who may have embarked upon a speculative action to secure an advantage thereby."

While the recent judgment of the Full Court has focussed attention on our present rules relating to pauper appeals, no one suggests that the procedure should be abolished : it would be entirely out of character if any member of the profession advocated such a retracing of steps on the path of benevolence. But the decision provides an opportunity for reconsidering the conduct of pauper appeals in New Zealand.

We think it is the general wish of practitioners that the rules as to pauper appeals should be amended. No one so much as hints at any alteration in the rules disallowing profit costs in the Court of Appeal to a successful appellant *in forma pauperis* or to his counsel or solicitors for work done for him since his admission as a pauper. But the rule as it stands goes too far when it prevents a solicitor from recovering costs earned in the conduct of litigation or in any other manner (such as in conveyancing work) prior to the client's admission as a pauper. As the rule stands—as the judgment in *Boddie's* own case in the Court of Appeal shows—the successful pauper appellant can be awarded and may receive costs in the Supreme Court in which his solicitor or counsel in the latter Court may not participate if he also acts in the Court of Appeal proceedings. Either that part of R. 43, which is additional to the former corresponding English rule should be deleted, or the present English rules should be substituted.

In England, since 1926, the poor person seeking relief applies to the Law Society, which, through its Poor Persons Committee, inquires into the circumstances of the applicant, and the merits of his case ; if it is satisfied, it issues a certificate. On obtaining such a certificate, the applicant is admitted to take or defend or be a party to any proceedings in the High Court of Justice or in the Court of Appeal, as the case may be, excepting bankruptcy proceedings and criminal causes or matters. The solicitor named in the certificate conducts the proceedings for the poor person so admitted, and neither he nor counsel may take, or agree to take, or seek to obtain any payment, fee, or reward for the conduct of the proceedings or for out-of-pocket or office expenses ; and no Court fees are payable unless the Court should otherwise order. The Committee may allow such payments of money to be made by the poor person to the solicitor in respect of out-of-pocket (but not office) expenses as it may consider just. The Court may order to be paid to the conducting solicitor out of any money recovered by the poor person such sum in respect of costs (not including fees of counsel) to such amount as would have been allowed to the solicitor on taxation as between solicitor and client as if he had been retained in the ordinary manner, or such other sum in respect of costs as to the Court may seem just. The amount so awarded must not exceed one-fourth of the amount or value recovered after deducting therefrom all proper disbursements made by the solicitor. These rules apply *mutatis mutandis* to all proceedings in the Court of Appeal, where the appellant has not been a party to proceedings as a poor person in the High Court or in any other Court from which an appeal lies direct to the Court of Appeal. A pauper previously admitted as such in a lower Court, must obtain a new certificate and the leave of the Court as well, if he desires to appeal. Consequently these Poor Persons' Rules do not affect the recovery of costs earned in any Court for which no certificate of admission as a pauper has been given.

If the present rules were amended as we have suggested, or new rules corresponding to the present Poor Persons' Rules in England were substituted, the anomaly disclosed in *Boddie v. Armstrong and Springhall, Ltd., and Sievwright* would be overcome. Above all, the result would be to the advantage of poor but deserving litigants in the Supreme Court as well as in the Court of Appeal and, accordingly, would promote the interests of justice generally. The matter must not be left in its present unsatisfactory state.

Summary of Recent Judgments.

SUPREME COURT
Auckland.
1934.
Oct. 16, 18.
Ostler, J.

IN RE MACKY, LOGAN, CALDWELL, LIMITED (IN LIQUIDATION).

Company — Winding-up — Voluntary Liquidation — Negotiable Instruments payable on Dates subsequent to Commencement of Winding-up—Due Date not accelerated by Liquidation—Application of Bankruptcy Rule—Companies Act, 1908, s. 246 (Companies Act, 1933, s. 257)—Bankruptcy Act, 1908, s. 106.

Voluntary liquidation of a limited company does not accelerate the due date of a negotiable instrument payable on a date subsequent to the commencement of the winding-up, s. 246 of the Companies Act, 1908, making the rules in bankruptcy applicable in the winding-up of insolvent companies.

Counsel: Stanton and **R. H. Mackay,** *in support*; **Rogerson,** to oppose.

Solicitors: J. Stanton, Auckland, for the creditor moving; **Nicholson, Gribbin, Rogerson, and Nicholson,** Auckland, for the liquidator.

NOTE:—For the Companies Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Companies*, p. 825.

SUPREME COURT
Wellington.
1934.
Sept. 10, 11;
Oct. 19.
Reed, J.

ESCOTT v. THOMAS.

Contract—Restraint of Trade—Sale of Business—Vendor covenanting not to be engaged, concerned, or interested in any Business "conflicting with or of a similar nature" to the Business sold—Reasonableness—Severability.

Plaintiff, as vendor, and defendant, as purchaser, entered into an agreement whereby the vendor agreed to sell, and the purchaser to purchase, the goodwill of the vendor, in the business known as "Moresuds Sales Services" relating to soap and powders for £1,000, of which £250 was to be paid in cash and the balance was payable in instalments. The purchaser was to carry on business in accordance with the terms of the agreement, cl. 14 of which was as follows:—

"14. Subject to the conditions hereinafter contained the vendor doth hereby covenant with the purchaser that the vendor will not at any time hereafter during the period of twenty years from the said 15th day of December 1933 either alone or in partnership or as agent clerk or servant or otherwise directly or indirectly engage or be engaged concerned or interested in any business conflicting with or of a similar nature to the business hereby agreed to be sold within the Dominion of New Zealand.

"These covenants on the part of the vendor shall enure for the benefit of the purchaser only so long as the purchaser shall continue to carry on the said business and to pay the said purchase-money in accordance with the terms of this agreement and in the event of the purchaser failing to carry on such business and to pay the purchase-money in accordance with the terms of this agreement then the covenants on the part of the vendor shall be void and of no effect."

The plaintiff, having discovered that misrepresentations had been made by defendant, declined to pay more than £250. The defendant issued a writ against plaintiff, claiming £750 damages, and plaintiff counterclaimed for damages for misrepresentation. The case was settled on, *inter alia*, the terms that plaintiff and defendant each consented to judgment against him for £750.

After the settlement of the action the defendant, in direct violation of the said covenant not to compete, issued circulars to the agents of the plaintiff soliciting orders for the principal lines of manufacture that had been sold to the plaintiff and undercutting the prices.

The plaintiff claimed an injunction against the defendant restraining him from committing a breach of the covenant and also damages for a present breach of the covenant above set out.

C. J. O'Regan, for the plaintiff; **Leicester,** for the defendant.

Held, 1. That, although the plaintiff had failed to comply with certain conditions imposed to secure to the defendant the due receipt of the balance of £750 under the settlement, the sale stood upon the original terms but at the reduced price. As that had been paid, the covenant had not ceased to enure for the benefit of the plaintiff and that it was consistent with equity that the injunction should be granted.

2. That the covenant was not wider than was reasonably necessary to protect the business purchased by the plaintiff, the words "conflicting with," which do not appear to be in any precedents, not extending the general effect and purport of the covenant restraining competition by the defendant, and the restraint imposed being limited to connection with a business competing with the actual business sold and within the narrow limits of that business.

Semble, If the words "conflicting with" are too large the covenant would be divisible, as the severance could be carried out without the addition or alteration of a word.

Solicitors: P. J. O'Regan and Son, Wellington, for the plaintiff; **Leicester, Jowett, and Rainey,** Wellington, for the defendant.

SUPREME COURT
Christchurch.
1934.
Oct. 1, 12.
Johnston, J.

WRIGHT AND OTHERS v. NEW ZEALAND FARMERS' CO-OPERATIVE ASSOCIATION OF CANTERBURY, LIMITED.

Mortgage—Mortgagor and Mortgagee—Mortgage authorizing Mortgagee to sell on terms—Whether bound to credit Mortgagor with whole of purchase-money before payment—Land Transfer Act, 1915, Schedule IV, Cl. 7.

Where a mortgagee, selling under a general power of sale (without special power to sell on terms), agrees with the purchaser to leave part of the purchase-money on mortgage, conveys the property and takes a mortgage back, he must credit the mortgagor both with the amount received and the amount secured by mortgage, and the mortgagor's personal covenant is discharged to the extent of the amount received by the mortgagee in cash and of the amount for which the mortgagee is secured by mortgage.

Quaere, Whether the obligation is the same where the mortgagee sells under an agreement for sale on terms without special power to do so.

But, where the mortgage has introduced into it clause 7 of Schedule IV of the Land Transfer Act, 1915, giving special power to the mortgagee to sell the mortgaged property "subject to such conditions as to . . . time or mode of payment of purchase-money . . . as the mortgagee thinks fit," and the mortgagee sells by agreement on terms, he is not bound to credit the mortgagor with the whole of the purchase-money payable by the purchaser under his agreement for sale before it is paid so as to release the mortgagor's liability under his personal covenant to the amount for which credit is given as well as to the amount received in cash.

Irving v. Commercial Banking Co. of Sydney, (1898) 19 N.S.W.L.R. (Eq.) 54, followed.

McLean v. Elder, (1888) 7 N.Z.L.R. 48, and **Public Trustee v. Wallace,** [1932] N.Z.L.R. 625, referred to.

Counsel: R. L. Saunders, for the plaintiffs; **C. S. Thomas,** and **Dr. A. L. Haslam,** for the defendant.

Solicitors: Wilding and Acland, Christchurch, for the plaintiffs; **C. S. Thomas,** Christchurch, for the defendant.

Case Annotation: Irving v. Commercial Banking Co. of Sydney, E. & E. Digest, Vol. 35, p. 516, note *q*.

NOTE:—For the Land Transfer Act, 1915, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Real Property and Chattels Real*, p. 1162.

COURT OF ARBITRATION
Invercargill.
1934.
Oct. 17, 19.
Blair, J.

LINDSAY v. McLEISH BROTHERS.

Workers' Compensation—"Accident"—Blister appearing on Hand of Worker while at Work in Hot Weather—Blood-poisoning following with Amputation of Finger—Workers' Compensation Act, 1922, s. 3.

A worker engaged in hot weather on defendant's farm in forking sheaves of grain to the top of a threshing-machine for the purpose of keeping it fed noticed a blister on his right hand and at the lunch interval in the afternoon showed it to several fellow-workmen. He continued work during that day and evening and for part of the following day when he had to be relieved for a time by a fellow-workman, by which time the threshing-plant having been then removed to another farm. He continued work until midday of the next day, when he had to stop. Two days later he sought medical advice, and he was sent to hospital where amputation of two joints of a finger was necessary as the result of blood-poisoning, traceable to the blister.

On a claim for compensation,

G. J. Reed, for the plaintiff; **S. M. Macalister,** for the defendants,

Held, 1. That the blister arrived on the hand some time during the work being done for the defendants, and, followed as it was by blood-poisoning, it was an "accident."

McFarlane v. Hutton Bros. (Stevedores), Ltd., [1915] S.C. 273, 8 B.W.C.C. 222, applied.

Carr v. Burgh of Port Glasgow, [1923] S.C. 844, 16 B.W.C.C. 331, referred to.

2. That there is no distinction in principle between the case of the introduction of a foreign poison and the case of the release of one caged and nominally harmless, as in both cases the poison was enabled to reach a spot which it could never have reached but for the happening of circumstances directly traceable to the work.

Solicitors: G. J. Reed, Invercargill, for the plaintiff; **Macalister Bros.,** Invercargill, for the defendants.

Case Annotation: *McFarlane v. Hutton Bros. (Stevedores) Ltd.*, E. & E. Digest Supplement No. 9 to Vol. 34, title *Master and Servant*, para. 2317 *b*; *Carr v. Burgh of Port Glasgow*, E. & E. Digest, Vol. 34, page 267, note *i*.

NOTE:—For the Workers' Compensation Act, 1922, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Master and Servant*, p. 597.

SUPREME COURT.
Auckland.
1934.
Oct. 10, 12.
Ostler, J.

BUSHILL v. MELVILLE.

Practice—Set-off—Court's Discretion to give one or separate Judgments.

Where the Court has power to set-off a debt claimed by defendant from plaintiff against a debt claimed by plaintiff from defendant, the question as to whether the Court should set-off one amount against the other and give one judgment rather than separate judgments is one for the Court's discretion, which should be exercised in the manner which will best do justice between the parties.

Union Bank of Australia v. Waterston, (1894) 12 N.Z.L.R. 672, followed as to costs.

Counsel: V. R. Meredith, for the plaintiff; **A. M. Goulding,** for the defendant.

Solicitors: Earl, Kent, Massey, and Northcroft, Auckland, for the plaintiff; **Goulding, Rennie, Cox, and Cox,** Auckland, for the defendant.

SUPREME COURT
Auckland.
1934.
Oct. 15, 17.
Ostler, J.

IN RE AN AGREEMENT, CONNEW WITH THE WILTON COLLIERIES, LIMITED.

Workers' Compensation—Construction—Agreement by Worker that no Compensation payable by Employer in respect of Incapacity or Death due to Named Disease "Due to the said Disease"—Meaning of—Workers' Compensation Act, 1922, s. 17.

The words "due to the said disease" in subs. 1 and 2 of s. 17 of the Workers' Compensation Act, 1922, mean "materially due" or "due as a matter of substance."

Where an agreement between worker and employer provided that the employer should not be liable

> "To pay to the employee or to his representatives as the case may be any compensation in respect of the incapacity or death of the employee or such incapacity or death is due to heart disease or to any repetition recurrence or aggravation thereof,"

although the word "aggravation" went beyond the exact words of subs. 3 of s. 17 of the Workers' Compensation Act, 1922, the agreement was within the ambit of subs. 2 of that section, and was effectual in law to exempt the employer from liability according to its tenor.

Counsel: Strang, for Connew; **Richmond,** for Wilton Collieries, Ltd.

Solicitors: Strang and Taylor, Hamilton, for Connew; **Buddle, Richmond, and Buddle,** Auckland, for Wilton Collieries, Ltd.

NOTE:—For the Workers' Compensation Act, 1922, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Master and Servant*, p. 597.

SUPREME COURT
Hamilton.
1934.
Sept. 10.
Herdman, J.

METCALFE v. MAXWELL.

Transport Licensing—"Passenger-service vehicle"—Motor-lorry used for General Carrying Purposes—Used on one occasion for carrying from Twenty to Thirty Persons for Hire—Certificate of Fitness necessary—Transport Licensing Act, 1931, s. 38.

Two motor-lorries, owned and used by general carriers for transport of goods, were used on October 31, 1933, to carry for hire from twenty to thirty Maoris each from Parawera, near Te Awamutu, to Huntly where a tangi was being held. The owner was charged with operating a passenger-service vehicle without a certificate of fitness having been issued and being in force in respect of such vehicle contrary to the provisions of s. 38 of the Transport Licensing Act, 1931. The learned Magistrate dismissed the information.

On appeal from the Magistrate's determination,

F. A. Swarbrick, for the appellant; **Preston,** for the respondent,

Held, allowing the appeal, 1. That the vehicle was a "passenger-service vehicle" as defined in s. 2 of the Transport Licensing Act, 1931, for which a certificate of fitness should have been obtained.

2. That to escape conviction it is not sufficient for a lorry-owner to show that his vehicle is designed for the carriage of persons not exceeding eight in number including the driver: he must submit proof to show that in the special circumstances of his case all the conditions prescribed in paras. (*a*), (*b*), and (*c*) of s. 2 collectively protect him.

Ashby v. Buchanan, [1932] N.Z.L.R. 1457, referred to.

Solicitors: Swarbrick and Swarbrick, Te Awamutu, for the appellant; **McCarter and Preston,** Te Awamutu, for the respondent.

NOTE:—For the Transport Licensing Act, 1931, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 8, title *Transport*, p. 832.

Restraint on Alienation.

Property Law Act, 1908, Section 24.

By JAMES WILLIAMS, LL.M.(N.Z.), Ph.D. (Cantab.).

The judgment recently delivered by Herdman, J., in *In re Wilson (deceased), Wilson v. Wilson*, [1934] N.Z.L.R. s. 49, canvassing as it does the effect and operation of s. 24 of the Property Law Act, 1908, is of more than a little interest to the draftsman of wills and marriage settlements.

Section 24 of the Property Law Act is as follows:—

"(1) It shall be lawful by will, or by a settlement made on marriage, to provide that any estate or interest in any property comprised in the will or settlement devised, bequeathed, settled, or given to any beneficiary, whether male or female, shall not during the life of such beneficiary be alienated, or pass by bankruptcy, or be liable to be seized, sold, attached, or taken in execution by process of law.

"(2) 'Beneficiary' for the purposes of this section is limited to children or grandchildren of the testator, or, in the case of a settlement, of the husband and wife.

"(3) Nothing in this section shall prevent any lawful restraint on alienation of property from being imposed by will or settlement.

"(4) The Court may in any case where it appears to be for the benefit of the person subject to any restraint on alienation either wholly or partly remove such restraint."

The facts to which His Honour was called upon in *In re Wilson* to apply s. 24 of the Property Law Act, 1908, were simple. One Wilson, by his last will, directed his trustees to divide the residue of his estate into as many equal parts as he had children who should survive him and attain the age of twenty-five years, and to hold one of such equal parts for each child absolutely on his or her attaining such age of twenty-five years. This bequest was followed by certain substitutionary and other provisoes, the last of which was in the following terms:

"And provided lastly that the respective shares of my said children in the said rest or residue of my trust estate shall not during their respective lives pass by bankruptcy or be liable to be seized sold attached or taken in execution by process of law."

The testator's eight children survived him. At the date of the testator's death, however, two of the sons (who had attained twenty-five years of age) were bankrupt and did not obtain their discharges until some little time afterwards. Two questions were therefore submitted for the Court's determination:

1. Did the above-quoted proviso protect the share of these two sons from passing to the Official Assignee?

2. Could those sons and the other children claim to have their shares paid over to them forthwith or so soon as they attained twenty-five, or should the trustees, in view of the provisoes, retain the corpus and merely pay over the income from time to time?

His Honour answered the first question in the affirmative, and the second by holding that the capital of the shares given by the will might be paid to the respective beneficiaries subject in each case to the beneficiary's having attained or attaining the age of twenty-five years.

The testator in *In re Wilson* did not purport to exercise to the full the powers conferred by s. 24. He did not forbid alienation by the beneficiary, but merely sought to protect his bequest from passing by bankruptcy or being seized, sold, attached, or taken in execution by process of law. His Honour had therefore first to consider whether this partial exercise of the power conferred by the section was valid, and he had no difficulty in deciding that it was.

"I think that it is undoubted that a testator, if he wishes to take advantage of s. 24 of the Property Law Act, 1908, is not obliged to exercise to the full all the powers conferred upon him by that section. He may forbid alienation, or he may provide that the share shall not pass by bankruptcy, or he may select any one or more means for protecting a gift provided for by that section and incorporate it or them in the testamentary document."

Sim, J., in *Kidd v. Davies*, [1920] N.Z.L.R. 486, had already decided that a testator might forbid only some forms of alienation by the beneficiary, and Herdman, J., accepted the principle of this decision. On this point, indeed, *In re Wilson* and *Kidd v. Davies* are but applications of the wider principle that in general one entitled to exercise a power need not exercise that power to its greatest extent but may, if he so desires, exercise it in a lesser measure. *Omne majus continet in se minus*: Broom, *Legal Maxims*, 9th Ed. 120, 121.

But it is His Honour's decision that the protection of s. 24 can follow a bequest into the hands of a beneficiary that is of chief interest. If His Honour's decision on this point is correct, then it follows that the effect of s. 24 is to enable testators in certain cases to attach to property the novel incident of inalienability. The policy of the law is strongly opposed to any attempt to add to or alter the ordinary incidents of ownership (*Co. Litt. Book* 2, c. 5, s. 360; *Taddy v. Sterious*, [1904] 1 Ch. 354; *Pollock on Principles of Contract*, 9th Ed. 257), and it would seem reasonable to suppose, therefore, that if the Legislature intended in any particular case to break in upon this principle its intention would be expressed in unequivocal language. In this connection it must be remembered that s. 24 is not in itself a separate and complete code, but is an amendment of and engrafted upon a code of common equity, and statute law, and should therefore be construed so as to make an harmonious whole with the body of law upon which it has been engrafted.

Moreover, if His Honour's decision is correct, s. 24 must often operate to produce great inconvenience and injustice. What, for example, would be the position of a *bona fide* purchaser for value of chattels from one to whom they had been bequeathed subject to a condition forbidding alienation and protecting them from passing by bankruptcy, or being seized, sold, attached, or taken in execution by process of law? Accepting His Honour's view of the section, it would seem that no title would be acquired by the purchaser, but that the chattels would continue to be the property of the beneficiary. Section 24 in such a case may be compared with the elaborate provisions of the Chattels Transfer Act, 1924, designed to give the widest publicity to dealings with chattels. In the absence of the clearest language it seems scarcely reasonable to suppose that the Legislature, which has provided in the Chattels Transfer Act for the amplest notice in all ordinary cases of dealings with chattels, should yet in s. 24 leave so large an opening for secrecy and non-disclosure to produce fraud and injustice.

Again, what would be the position of one taking a legacy of money or a share in a fund subject to a condition in terms of s. 24? The conclusion seems inescapable that the money would be frozen in the legatee's hands. He could not invest it; that would involve alienation; for the same reason he could not even bank it. A more unfortunate result could not be imagined.

(*To be concluded.*) P. 294

"In or About" Premises.

A recent "Mortgagee Indemnity" Case.

By E. S. SMITH, M.A., LL.B.

The judgment in *Public Trustee v. Gill and Others*, [1934] N.Z.L.R. 832, granting leave to enforce, by the sale of freehold premises, a charge acquired under s. 47 of the Workers' Compensation Act, 1922, marks the first recorded occasion upon which the provisions of the Mortgagees' Indemnity (Workers' Charges) Act, 1927, have been successfully invoked, and is of particular interest as illustrating the very complete nature of the statutory provisions for the enforcement of rights to compensation. In this case compensation will be paid to the dependants of a worker killed by accident notwithstanding that the employer was killed in the same accident and left an insolvent estate; that the employer's insurer repudiated liability; that the employer's interest in the leasehold premises on which the accident happened was of no value; that there existed some doubt as to whether the accident happened "about" adjoining freehold premises belonging to the employer; and that in any event the freehold premises were mortgaged beyond their value.

The claim arose out of the death in the Napier earthquake of the lady bookkeeper of a Hastings land agent and auctioneer. The bookkeeper was employed in offices on leasehold premises occupied by her employer as an auction market; adjoining were freehold premises, the property of the employer, upon which the land-agency business was conducted and the private office of the employer located. It was necessary for the bookkeeper to visit these freehold premises frequently each day on her employer's business. On February 3, 1931, both the bookkeeper and the employer were killed by the collapse of the building on the leasehold property. The bookkeeper left a relative totally dependent on her earnings; the employer an insolvent estate, an order to administer which in terms of Part IV of the Administration Act, 1908, was granted to his widow. The employer had at one time obtained workers' compensation insurance cover—indeed he was the local agent for an insurance company; but the insurer, after some negotiations with the representatives of the bookkeeper's estate and the grant of an extension of time for bringing an action until the result of the earthquake test cases should become known, advised that the insurance policy had lapsed in January, 1931, through non-payment of the premium. The plaintiff was accordingly forced to look solely to his remedies under s. 47 above mentioned.

The right of a worker to compensation continues notwithstanding the death of the employer (s. 55, Workers' Compensation Act, 1922); but, while special provision is made in the Workers' Compensation Act for the bringing of actions against an insurer where an employer dies insolvent and against a bankrupt employer notwithstanding bankruptcy (ss. 48 and 53), neither the Act nor the rules make provision as to the form of action where the estate of a deceased employer is bankrupt. Such an action is, however, solely for the purpose of determining the existence and extent of rights to compensation, and it is thought that neither an action against an administrator under grant of administration (execution to be levied against assets *quando acciderint*) nor against an administrator under Part IV of the Administration Act would be stayed on the application of the defendant: see *Daniell's Chancery Practice*, 8th Ed., 1643; *O'Connell v. Mc Kellar*, (1891) 10 N.Z.L.R. 233. The plaintiff commenced his action citing the widow as defendant in her capacity as administratrix and also as administratrix under Part IV. No objection to this form of action was taken at the Arbitration Court hearing, though technical as well as substantive defences were raised.

On removal of judgment into the Supreme Court, proceedings were taken by way of summons for the enforcement of the charge which, it was claimed, had attached under s. 47 to the freehold premises, citing as defendants the administratrix, the mortgagee of the freehold premises, and the Registrar-General of Land as nominal defendant under the Mortgagees' Indemnity (Workers' Charges) Act, 1927. The joining of these parties as defendants simplified the proceedings, for the Court was able to hear the true protagonists—the plaintiff and the mortgagee's indemnifier—argue the real question at issue between them—namely, whether or not the accident occurred "in or about" the freehold premises. The evidence was all upon affidavit, and there was a conflict as to the necessary frequency of the bookkeeper's attendances in the freehold building during the course of her duties. Reed, J., accepted the positive evidence of her predecessor in office, and upon this evidence and without reference to authority found that, whether regarded from the point of view of the character of the bookkeeper's duties, or the proximity of the scene of her death to the freehold building, the injury which resulted in her death arose out of and in the course of her employment in or about the freehold building.

His Honour then proceeded to discuss the various authorities cited during argument which, with the exception of *Westport Coal Co. v. Champion*, (1906) 26 N.Z.L.R. 590, deal with the meaning of the words "in or about" as these occur in s. 7 (1) of the Workmen's Compensation Act, 1897 (Imp.). While he found no case the facts of which approximated to those before him, he could find nothing in the authorities cited for the defendants to cause him to change the conclusion formed; His Honour pointed out, moreover, that, in *Fenn v. Miller*, [1900] 1 Q.B. 788, Collins, L.J., presented a supposititious case which covered the facts of the present case and served to confirm the opinion already reached by him without the aid of authority. The decision in *Westport Coal Co. v. Champion* (*supra*), cited by the defendants, discussed the meaning of "in or about any mine" in s. 3 of the Coal-mines Amendment Act, 1903; in that case the majority of the Court of Appeal, upon an analytical examination of what constituted a "mine" within the meaning of the section, held that "a person engaged in or about the screening-house . . . is not employed in or about a mine"; the screening-house in that case was situated some two miles from the nearest of the coal-mines proper. His Honour accordingly held that the plaintiff was entitled to an order under s. 47 of the Workers' Compensation Act, 1922, as prayed—that the freehold premises be sold by the Sheriff and out of the proceeds of the sale the amount of the charge and costs be paid to the plaintiff.

As already observed, there is no other reported case in which the provisions of the Mortgagees' Indemnity (Workers' Charges) Act, 1927, were invoked by a plaintiff, though it is understood that in 1931 a claim under that

Act was settled by compromise. As since the passing of the 1927 Act over 200,000 mortgages have been registered, representing in mortgagees' indemnity fees a sum in excess of £10,000, even the mortgagees' indemnity "premium" at the considerably reduced rate of 1s. per mortgage would seem to leave to the Consolidated Fund a fair margin to provide for overhead expenses in connection with the indemnity scheme now in operation.

Obituary.

Mr. E. W. McCarter, Te Awamutu.

The late Mr. E. W. McCarter, who died at Te Awamutu recently, spent his early years in Timaru and Dunedin, where, after studying accountancy, he took up the profession of the law. He served in legal offices in Dunedin, Wellington, Hawera, and Auckland, before joining Mr. W. Tudhope in partnership in Hamilton, afterwards entering the firm of Messrs. Cox, Luxford, and McCarter, of Hamilton and Te Awamutu, where his subsequent years were passed. After a year's practice there on his own account, after his former partnership had been dissolved, Mr. McCarter was joined in 1922 by Mr. S. S. Preston, the partnership continuing until Mr. McCarter's death.

The deceased gentleman took an active part in the public and sporting life of Te Awamutu, being at different times President of the local Chamber of Commerce, on the council of which he sat for several years; President of the Golf and Bowling Clubs, as well as of the Orphans' Club. He was also a member of the local Masonic Lodge. He will be greatly missed by a large circle of friends.

Before routine business was proceeded with at the sitting of the Magistrates' Court at Te Awamutu, following the death of Mr. McCarter, Mr. H. Y. Collins, rose and addressed the presiding Magistrate, Mr. S. L. Paterson, S.M., on behalf of the local practitioners, saying he was asked to mention that one of their associates, Mr. Ernest W. McCarter, had during that week been called to his last rest, after a residence in the community of over 12 years, during the whole of which period he had experienced bad health; but in spite of his physical disabilities he had been a highly successful practitioner. His affable manner had commended him to all, and it was a pleasure to do business with him. He was a keen advocate, but always fair, and he was clearly imbued with the highest ideals and endeavoured to live up to them. In his profession he had made progress, and won the confidence and esteem of all with whom he came in contact. Mr. McCarter was an exceedingly popular man, and took his part worthily in public affairs, and he was a very useful member of the community. Mr. Collins said he would like the relatives and friends of deceased to know the high regard in which he was held by his fellow-members of the Bar.

Mr. S. L. Paterson, S.M., said he would like to join with the Te Awamutu Bar in mourning the passing of a very fine man. He had known the late Mr. McCarter well by repute, as always a capable and gentlemanly advocate and an ornament to the profession. He agreed that their friend would be sadly missed.

Sir Henry Newbolt Remembers.

A Well-known Wellington Counsel at Oxford.

In his Memoirs, *My World as in My Time* (Faber & Faber, Ltd.), Sir Henry Newbolt, who forsook the law —he was called by Lincoln's Inn—for a literary career, has some interesting recollections of Mr. A. R. Atkinson, who has practised for a number of years in Wellington. Sir Henry says of him in Oxford days:

"The College Debating Society was the scene of one or two displays of humour worth remembering. Arthur Atkinson, a New Zealander who had been with me in the Sixth at Clifton, had come on to Corpus as a scholar of the year after me. He was an excellent classic and the most expert bibliophile I have ever known. But his most unusual talent was for irony, parody, and subtle argumentative traps. He astonished us, in a debate on the proposed abolition of the House of Lords, by pronouncing himself a convinced supporter of the Peers: and after eulogising their lordships for their modest attendance at debates, the deliberateness of their deliberations, the restraint of their enthusiasms, the individuality of their outlook, and the decorum of their early-closing habits, he put forward a scheme of his own for preserving these valuable characteristics and securing their prevalence among us. The proposal was that all peerages, with all the functions and privileges belonging to them, should be made hereditary not only in the male line, and in single representatives, but in every line of descent and in every descendant. The effect of this would be, within a reasonable time, to make the House of Lords coextensive with the nation: the Commons would all be peers and would govern as a Demo-aristocracy or an Aristo-democracy, each man using the name towards which he felt a leaning. At the moment the surprise was what pleased us in this extravaganza: on a later review I seem to perceive a number of ironical but significant truths beneath the paradox which we applauded so boisterously.

"Another evening Atkinson showed a still finer art. He rose to speak—no matter upon what subject—and his tone struck his hearers at once by its grave and measured dignity. This was a quality which we had not yet learned to associate with our vivacious Oversea orator: he was speaking with a new utterance, as one lifted above himself by some uncommon mood. Surprise, admiration, bewilderment grew as he went on: till suddenly a ripple of recognition moved the whole audience at once—they were listening to the voice of the man who wrote the speeches in Thucydides!

"But his greatest feat was his impersonation of Plato in a dialogue published in the summer of 1886 and reprinted some years later in the volume of *Echoes from the Oxford Magazine*. This dialogue is entitled *Agymnasticus or the Art of Bowling*. The scene is no doubt reminiscent of a cricket-match which took place in May of that year, when Oxford was disastrously beaten by the Australians, thanks to the bowling of Spofforth, the 'Demon Bowler.' I was not present at the match—I had gone down a year before—but I happened to be up for the week-end immediately after it, and I called upon Atkinson, whom I found established in the Fellows' Buildings. He was in the act of finishing a manuscript, which he handed to me, asking how I should advise him to sign it. I advised his own name:

but he wrote ' C.T.' at the foot of the last page, and in answer to my astonished inquiry ' Why C.T. ? ' he said, ' Why not ? They'll think it means T.C.—Tommy Case. I owe him something.'

" I read the MS. and was spellbound. Here I found Socrates, with his two young friends Athletes the sportsman and Agymnasticus the reading man, looking on while 'the Dæmon Bowler ' is knocking down the Oxford wickets. Socrates slyly praises him as ' a great batsman ' and is sharply corrected by Athletes. Socrates then modestly asks him to assist his ignorance by replying to a few questions. ' You would admit, I suppose, that there is an art of bowling ? ' But Athletes sees the trap, and refuses, for a reason which all Platonists will appreciate. ' I know nothing about art,' he says, ' but I know exactly what you are after, Socrates, and I shall not answer you.'

" He turns away to watch the game, and Socrates, in his hearing, then applies to Agymnasticus. From him he extorts a series of admissions, which he weaves into a chain of logical fallacies of the true Socratic kind : and it is not long before he has conclusively proved that the bowler, being best at ' taking wickets ' must be best able to guard or protect them—is in fact the best batsman. And further, since he who is best at keeping the wickets is the best wicket-keeper, the best bowler must be not only the best batsman but the best wicket-keeper too.

" But this is only the first round : it is followed by another. ' Every art considers not its own interest, but the interest of its subject, and the subject of the bowler's art is clearly the batsman.' It follows that the good bowler, as such, will consider the interests of the batsman, will bowl him only half-volleys, or full pitches to leg, and will never hit his wicket, for that would be making the subject of his art worse than he was before, instead of better ; a thing which no true artist would ever do.

" Here at last Athletes gets his opportunity, and delivers a telling blow as he departs. ' I hope, Socrates, I may be allowed to play against your eleven of honest bowlers when you have made it up : it would be great fun. But I rather think, to use one of your own phrases, that though the model of such an eleven may be laid up in heaven, we are not likely to see a copy of it on earth.'

" My instinct about the false initials appended to this piece was fully justified. When the *Echoes* were published—only four years later—in book form, the signature ' C.T.' was not one of those which the Editor was able to interpret, and Arthur Atkinson has never been recognised by the public as the author of one of the most fascinating *jeux d'esprit* of our generation. My account of it is necessarily a scant one, a mere description of a miniature comedy. What keeps it so fresh in memory is the charm, which I cannot convey. It is agreed that a true parody is not a mere imitation, nor even a mere criticism : it is the most perfect kind of appreciation. This particular example brings back to the reader the fine flavour of Plato's style and humour, and at the same time revives for a moment the old power of enjoyment which has perhaps been somnolent for years. It is not, I think, extravagant to say, as Mark Pattison might have said, that to recognise the bouquet of the old Greek wine in a choice vintage of to-day is one of the rewards of a classical education.

" Atkinson afterwards came to London and was called to the Bar, but to our regret he soon returned to New Zealand, where his letters and articles have adorned and enlivened the Press for many years. His public speaking has also made him conspicuous. In the General Election of 1893, which was fought on the Temperance issue, he stood against a prominent member of the outgoing Government and defeated him, thereby becoming member for Wellington. The question has often been asked at Corpus gatherings why he had not made a reputation at the Union. The reason was perhaps that he did not care to sacrifice to ambition evenings which could be spent in College among his inmates : the debates at the Union, though only a shadow of Parliament, were too much like the real world of politics, and he preferred to accumulate memories of a College life which could not be so easily paralleled in the islands to which he was returning."

New Zealand Law Society.

Council Meeting.

(*Concluded from page 269.*)

Duties of a District Law Society in regard to Granting of Certificate in support of admission as Barrister under Section 4 (e).—A District Law Society wrote as follows :—

" A Solicitor Clerk is intending to apply for admission as a Barrister on the above qualification and has applied to my Council for a certificate of character.

" The rule provides that the Council has to be satisfied that the applicant is a person of good character, and *that the Council does not know of any objection to the application for admission being granted.*

" Both members of the firm for whom the applicant works are strongly of opinion that the applicant is eligible for admission under the provisions of the Act, but my Council is inclined to take a different view.

" I am directed to ask if your Council would be so good as to define the duties of a District Law Society in regard to the granting of a certificate in support of an application for admission as a Barrister on a five years' qualification as a managing clerk.

" And more particularly are the words italicised above intended to refer only to character or do they cover everything."

Mr. R. H. Webb pointed out that the granting of a certificate was a vital matter, and that an application for admission should be treated with great care and the most searching inquiries should be made. The New Zealand Law Society should make plain to the District Societies what inquiries were necessary.

It was decided that the question was purely one for decision by the District Law Society concerned.

Council of Legal Education—Report.—The University of New Zealand forwarded the Report of the Council of Legal Education set up on October 27, 1932, to consider and make recommendations with reference to—

(*a*) Examinations for admission as Barristers and Solicitors, the subjects thereof and the prescriptions therefor, as well as those of the LL.B., LL.M., and LL.D. Degrees :

(*b*) The system of teaching and examining :

(*c*) The relation of practical work to college work.

After some discussion, an Auckland Committee consisting of Messrs. G. P. Finlay, J. B. Johnston, and L. K. Munro was appointed to consider the Report,

to receive any recommendations from the various District Societies, and to forward its findings when completed to the University.

Section 45, Public Works Act, 1928.—The Wellington District Law Society drew attention to a letter written by a firm of practitioners to the Minister of Justice, in which it was pointed out that s. 45 of the Public Works Act provided that compensation could not be claimed for damage suffered from one year after the completion of the work out of which the claim arose. The letter stated that in many cases, particularly in drainage cases, no damage ensued until twelve months after completion of the work which ultimately caused damage, hence great hardship had been inflicted on innocent persons by local authorities exercising statutory powers without compensating persons injured by the exercise of these powers.

An amendment of s. 45 was, therefore, sought, the practitioners suggesting that the following proviso might be added: "Provided always that nothing in this section shall be deemed to deprive any person suffering injury by the drainage works after the completion thereof from claiming compensation for such injury under this Act."

It was decided that the attention of the appropriate Minister should be drawn to the section and that he be asked to take remedial measures.

Duty of Solicitor where requested to take Proceedings "in forma pauperis."—The Taranaki District Law Society forwarded a letter from a practitioner who desired a ruling as to his duties in connection with a request by a married woman, living apart from her husband, that he should launch proceedings for her divorce *in forma pauperis*. She had been informed that it was the duty of a solicitor to undertake such proceedings if he were asked to do so. The practitioner thought that in the particular case cited the woman was able to pay the usual costs by instalments. The following ruling was adopted :—

"That where a practitioner is requested to take proceedings *in forma pauperis* and he is satisfied that the case is a proper one, it is the opinion of the Society that it is his duty to launch such proceedings."

Section 2, Trustee Act, 1925 (England).—The Attorney-General requested the opinion of the Society concerning the amendment suggested in the following letter, received by him from a firm of solicitors :—

"We beg to bring under your notice the difficulties which are at present confronting Trustees of trust estates in reference to the investment of trust funds owing to the high premiums at which Government and local body stocks are selling.

"We would draw your attention to s. 2 of the English Trustee Act, 1925, which provides that a trustee may under the powers of that Act invest in any of the securities mentioned or referred to in s. 1 of the Act notwithstanding *that the same may be redeemable and the price exceeds the redemption value*, except in specified cases which would not apply to investments in New Zealand other than investments which come under the subheadings of (*m*) and (*o*). This section reproduces s. 2 of the English Trustee Act of 1893 which again replaces s. 4 of the Trustee Investment Act of 1889, but we have no provision in our Trustee Act or its amendments of a similar character, and it has always been considered in England that a trustee is not at liberty to invest trust moneys in redeemable Stock at a premium owing to the loss which would fall on the remainderman.

"We would respectfully refer you to the judgment of Lord Romilly, M.R., in the case *Waite v. Littlewood*, 41 L.J. Ch. 636, and to the judgment in the case of *Cockburn v. Peel*, 3 DeG. F. & J. 172, and to the observations on pages 55 and 137 of *Vaizey on the Investment of Trust Funds*.

"It would be a great relief to trustees if some similar provision to s. 2 of the Trustee Act of 1925 could be added to the amendments of the New Zealand Trustee Act during the present Session."

The Council decided to approve of the proposed amendment.

Domestic Cases—Proposal to Close Courts.—The Honorary Secretary of the Women's Service Guild wrote inquiring as to the Society's attitude towards closing Courts to the public during the hearing of domestic cases, as a speaker at a meeting had stated that the Law Society had been approached on the matter and had expressed its sympathy with the effort to close these Courts.

The New Zealand Society for the Protection of Women and Children also wrote, asking that the general public be excluded from the Magistrates' Court during the hearing of separation, maintenance, and affiliation cases.

The Secretary referred the Council to the Minutes of the Council meeting of November, 1928, in which reference was made to a deputation from the Society for the Protection of Women and Children, which asked that the Council should assist in trying to obtain more privacy in the hearing of cases in the Magistrates' Courts under the Destitute Persons Act. The Council had resolved to support the efforts to obtain such privacy.

The Council resolved to re-affirm its resolution of November, 1928.

Abolition of "Actio Personalis" Rule.—Power of Courts to Award Interest on Debts and Damages.—The Solicitor-General forwarded an English Bill intituled "An Act to amend the law as to the effect of death in relation to causes of action and as to the awarding of interest in civil proceedings," and asked that the Society should consider, and, if desired, express an opinion on the Bill, as it was probable that similar legislation would come before the New Zealand Parliament this session.

The first part of the Bill would effect the abolition of the *actio personalis* rule, while the second part empowered Courts of Record to award interest on debts and damages.

The Bill was referred to the Standing Committee to consider and make such representations to the Statutes Revision Committee as they thought fit.

Receipts for Sealing Fees.—Probates and Letters of Administration.—The following letter was received from the Under-Secretary of Justice :—

"I have to inform you that representations were recently made by the Hamilton District Law Society that receipts should be issued by Registrars of the Supreme Court for sealing fees on probates and letters of administration whenever required by the party paying the fee.

"It has been decided to give effect to the representations of the above-mentioned Society, and instructions have been issued accordingly to Registrars of the Supreme Court.

"Form S.C. 62 will be used for this purpose."

Transport Law Amendment Act, 1933.—The Otago District Law Society forwarded a letter from the Nelson Town Clerk, in which attention was drawn to a resolution of the Nelson City Council protesting emphatically against the provisions contained in s. 17, subss. 2 and 3, of the above Act. The Council asked for support in an endeavour to repeal these subsections, which are as follows :—

Subsection 2. "All appeals duly lodged but not determined before the passing of this Act shall be determined by the Transport Co-ordination Board and shall be heard and determined notwithstanding that any member of the Board may have been a member of any Licensing Authority against whose decision the appeal was lodged."

Subsection 3. "The Board in determining any appeal shall not be bound to hear any person or take any evidence or to receive any representations from any person."

The Council decided to approve the principle involved in the protest of the Nelson City Council and to bring the matter to the attention of the Attorney-General with a request for the repeal of the specified subsections.

Magistrates' Courts Act—Costs where Defence Withdrawn.—The Otago District Law Society forwarded a letter from a practitioner, who drew attention to what appeared to be a definite omission in the Magistrates' Courts Act, 1928. By s. 115, a plaintiff discontinuing his action is obliged to pay the costs of the defendant incurred by him in defending the action up to the time he is served with the memorandum of discontinuance; but no provision exists for the allowance to the plaintiff of the costs incurred by him in preparing for trial in cases where the defendant, after giving notice of his intention to defend, decides to withdraw his defence and to pay the amount of the claim, or consents to or confesses judgment without making it necessary for the plaintiff to proceed to trial and judgment.

The practitioner, therefore, suggested that some such provision should be made.

The Council decided not to support the suggestion.

Chattels Transfer Act, 1924.—Sections 31 and 32.—The Hawke's Bay District Law Society forwarded the following letter which had been sent to them by a practitioner:—

"We are writing to bring before the Society, with a view to their making representations to the proper quarter and having the error rectified, a mistake which has apparently been made in the 'Chattels Transfer Act, 1924,' with special reference to Book Debts.

"Under the 'Chattels Transfer Act, 1908,' the definition of Chattels specifically includes 'book and other debts,' and specifically excludes under sub-para. (*a*) choses in action (not being book or other debts).

"Section 27 of the 1908 Act is a machinery section applicable to assignments of or securities over book or other debts.

"Under the 'Chattels Transfer Act, 1924,' book and other debts are not included in the definition of Chattels, and under sub-para. (*a*) choses in action, without limitation, are excluded.

"The obvious intention in the 1924 Act is that book debts are not to be deemed 'chattels' within the meaning of the Act. Notwithstanding this, s. 27 of the 1908 Act has been repeated as s. 31 of the 1924 Act. This section commences—'Book or other debts shall be deemed to be chattels situate in the place where the Grantor of the Instrument comprising them longest resided or carried on business during the period of six months next before the execution of the Instrument.' This section also contains other provisions dealing with book debts as 'chattels.'

"The definition in the 1924 Act, therefore, excludes all choses in action, presumably including book debts, from the definition of 'chattels,' and s. 31 is a direct contradiction dealing with book debts as 'chattels.'

"It appears to us that ss. 31 and 32 should be repealed as at present one does not feel safe in not registering under the 'Chattels Transfer Act' assignments of or mortgages of book and other debts.

"We think this is a case where the Society should make representations with a view to having the position cleared up."

It was decided to send a copy of the letter to the Attorney-General with a request that action should be taken to remedy the anomaly.

Admission Fees.—A request by the Wanganui District Law Society for the Council to adjudicate upon a claim that the Canterbury District Law Society should pay to it certain admission fees was withdrawn, the matter being arranged between the delegates for the respective Societies.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Agreement for Grant of Right to Lay and Maintain Water-pipes and take Water from Land of Grantors (in gross and not appurtenant to Land of Grantee.)

AGREEMENT made the day of 19 BETWEEN A.B. and C.D. both of etc. (hereinafter called "the Grantors") of the one part AND Y.Z. LIMITED a Company duly incorporated etc. and having its registered office at (hereinafter called "the Company") of the other part.

WHEREAS the Grantors are the registered proprietors of an estate in fee-simple in ALL THAT piece of land situated etc. and containing etc. being etc. as etc. red.

AND WHEREAS the Company is desirous of obtaining the right to lay and maintain water-pipes across the said land for the purposes of taking water from the stream thereon and conveying such water through or over the said land.

NOW THEREFORE it is agreed by and between the parties hereto as follows:—

1. THE Grantors agree to grant to the Company for a period commencing from and inclusive of the day of 19 and continuing from year to year thereafter (unless and until determined at the expiration of any such year by notice in writing by either party hereto to the other of them to be given not less than days prior to the expiration of the then current year) at the royalty of £ by the year payable annually in advance on the day of in each and every year during the term or currency of the grant the full right to take and convey water from the dam in the Stream now in the course of construction by the Company upon the said land and shown green in the said plan endorsed hereon AND for such purposes to complete the construction of the said dam according to the plans and specifications already submitted to and approved by the Grantors AND to lay place and maintain in and under the said land a line of water-pipes of an internal diameter of not more than inches from the said dam in the direction and upon the bearing of degrees minutes indicated on the said plan endorsed hereon approximately by the line coloured yellow and marked "pipe line" leading to the Road the said pipes to be laid placed and maintained where the same pass through or over arable land at a depth of not less than two feet six inches and not more than four feet below the surface of the said land.

2. THE Company shall have the rights incidental to the grant hereby agreed to be given by its surveyors engineers servants agents and workmen from time to time to enter upon the said land for the purposes of laying placing maintaining repairing and replacing the said pipe line and opening up the soil of the said land in so far as shall be reasonably necessary or incidental thereto BUT in and about the exercise of all or any of its rights hereunder the Company and its surveyors engineers agents and workmen will cause as little damage as possible to the surface of the said land and will at the cost of the Company restore the said surface as nearly as possible to its then former condition or state and as may be necessary will replace the soil thereof with the surface and turf thereof adjusted and consolidated to

the appropriate level and if necessary re-sow the same in English grasses with proper fertilisers not only immediately above the pipe line but also on either side thereof to the full extent that the soil shall have been disturbed in the course of the work AND also the Company shall pay and compensate the Grantors for all damage caused by any such work to any cereal root or other crop for the time being sown or growing upon the said land.

3. THE Grantors and their tenants and other persons lawfully in occupation of the said land shall be entitled to take and use in priority to the Company so much of the water impounded by the said dam or from the said stream which supplies the same as the Grantors or such other persons as aforesaid may need for their own domestic and farm requirements BUT the Grantors shall not do or suffer any other act or omission whereby the free and uninterrupted flow of water through the said pipes may in any way be obstructed or impeded.

4. THE Company shall and will throughout the term of this agreement and any grant executed in pursuance hereof pay the said royalty at the times and in the manner aforesaid and if the Company shall make default in payment of the said royalty or any part thereof on any of the days hereinbefore appointed for payment thereof and such default shall continue for the space of days or if the Company shall make default in performance or observance by it of any of the other terms or provisions herein expressed or implied and on the part of the Company to be performed or observed the Grantors shall be at liberty thereupon or at any time thereafter to cease to supply the Company with water and to disconnect the said line of pipes from the said dam and this agreement and any grant pursuant hereto and the rights of the Company thereunder shall forthwith cease and determine but without releasing the Company from liability for payment of royalty theretofore accrued due or damages for any antecedent breach or default hereof or hereunder.

5. THE Company will at the end or sooner determination by any means of the term hereby agreed to be created leave the said dam and pipe line in good and substantial repair order and condition and the same shall be and become the absolute and exclusive property of the Grantors.

6. THE rights hereby agreed to be granted to the Company are expressly declared to be in the nature of an easement in gross but the Company shall not assign or dispose thereof without the consent in writing of the Grantors first had and obtained.

7. A FORMAL grant of easement by way of grant of water rights inclusive of any necessary survey plans and incorporating the terms and provisions hereof shall be prepared stamped and registered by and at the expense of the Company and the Company shall also procure at its own cost the consent thereto of all riparian owners (if any) whose rights may be injuriously affected by the Company's taking water from the said stream in pursuance hereof and shall indemnify the Grantors against all costs claims actions and proceedings in respect of any such injury to the riparian rights of such owners.

8. THIS agreement and the grant to be executed in pursuance hereof shall bind the Grantors and their respective executors or administrators and assigns and the Company and its successors and permitted assigns.

AS WITNESS etc.

SIGNED etc.

THE COMMON SEAL etc.

The Government and Conveyancing Charges.

Prime Minister Denies Rumours.

Following a statement in the *New Zealand Herald* of October 6, which was later repeated in a number of metropolitan and provincial newspapers, the Editor of the NEW ZEALAND LAW JOURNAL wrote on October 10 to the Prime Minister (Rt. Hon. G. W. Forbes) drawing his attention to the allegation that it was the intention of the Government to bring pressure to bear on the profession to reduce its scale of conveyancing charges.

As this issue goes to press, the following reply has been received :

Prime Minister's Office,
Wellington,
31st October, 1934.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Dear Sir,

With reference to your letter of 10th instant concerning a statement which appeared in the *New Zealand Herald* with respect to the suggested action on the part of the Government to bring pressure to bear on the legal profession to reduce its scale of conveyancing costs : I desire to say in reply that there is no intention on the part of the Government to bring pressure to bear on the legal profession to reduce its scale of conveyancing charges, nor is it known where the suggestion mentioned in the *New Zealand Herald* of the 6th idem. originated.

Yours faithfully,
GEO. W. FORBES.

Australian Notes.

By WILFRED BLACKET, K.C.

Hogan v. Australian Labour Party.—Once upon a time John Hogan was Premier of Victoria, and, as such Premier, agreed with the other Premiers of the States of the Commonwealth that certain economies in public expenditure should be effected in order that the Depression which threatened to become a permanent boarder in Australia should be compelled to depart hence. For this action he became unpopular with a section of the Australian Labour Party of which he was a member ; and the Committee thereof rejected his nomination as a candidate for the electorate which he had represented, and performed the bell, book, and candle ceremony of expelling him from the party. He appealed to Equity against these proceedings, and Mr. Justice Gavan Duffy, upon close consideration of the confused and conflicting rules under which the Committee had purported to act, found in favour of the plaintiff, Hogan, and awarded him nominal damages. On appeal by the Committee to the High Court, it was unanimously held that His Honour's decision was erroneous. In the opinion of the Court, the A.L.P. being a voluntary association did not by its rules effect any contract with its members a breach of which could be the subject of a claim for damages at law, nor did it confer upon them any civil right, or proprietary interest suitable for protection by injunction. For grievances such as those complained of by the plaintiff, the only remedy was by way of appeal to the annual conference, or to the Federal conference,

as provided by the rules themselves. This, however, is a remedy that may seem to be of no real value to Mr. Hogan. His only consolation is that the present appellants have to pay the costs of this appeal, as they undertook to do as a condition under which the leave to appeal was granted.

A Point in Garnishee.—Under the Victorian Closer Settlement Acts the Commission acting for the Crown may allow to a holder of a selection-purchase lease who has been "ejected" from the land by order of the Commission any sum up to £100 for improvements effected by him. T. P. Ryan, a holder, had been so ejected, and £70 had been allowed him for improvements, but the money was not payable to him until he should give up possession of the holding. While he was still in possession, Mr. I. Jamieson, a storekeeper, obtained a judgment against him for £69, and took out a garnishee order *nisi* against the Commission. Upon an application to discharge that order Judge Moule, sitting in the County Court, Melbourne, after having, during the hearing, made some strong comment on the "outrageous" and supposititious way in which the Commission conducted its business, held that the Commission could not be garnisheed, and discharged the order *nisi* accordingly, but quite properly refused to give a judicial opinion on the question whether the £70 was a debt. He also omitted to say whether there really was anything "outrageous" in the proceedings of the Commission when all the facts had been disclosed in the course of the case.

Involuntary Contempt.—*Australian Investment and Discount Co., Ltd. and Cohen*: *Cor.* Long Innes, J., in the Equity Court, Sydney, was an application by the plaintiff company for permission to issue a writ of attachment against the defendant for his failure to pay to the plaintiff moneys ordered to be paid by a decree of the Court. In the suit defendant had been sued for moneys received by him as a trustee, and with his consent he had been declared to be a trustee and ordered to pay £441 to the plaintiff within twenty-one days. Two years had elapsed and no payment had been made. For the respondent it was contended that attachment would only be ordered under a decree ordering payment into Court, and/or the applicant that in the case of a trustee it was not material whether the decree ordered payment into Court or to the plaintiff, but His Honour held that it was not necessary to decide these questions because, in his opinion, the remedy by way of attachment should not be resorted to in cases where the contempt had been involuntary. In this case the defendant had no property and no means other than a weekly salary of £4 16s. on which he was entirely dependent. Therefore, His Honour could not regard the failure to pay as being contumacious or voluntary and he therefore dismissed the application. It really does not seem to have mattered much either way, for if attachment had been ordered the defendant could have obtained his release by sequestrating his estate, and the plaintiff can now issue a bankruptcy notice based on the decree and so get an order for sequestration.

Upon the trial of R. H. Lane and W. I. Moran at Melbourne upon a charge of defrauding members of the Dominion Tobacco Corporation of Australia Proprietary, Ltd., of the £16,000 subscribed by them to the company, the jury failed to agree because one of their number held the firm opinion that no man ought to be sent to prison for any crime except murder. He did not explain his reasons for thinking that a murderer was deserving of punishment.

The Late Mr. Justice McCardie.

An Interesting Biography.

Only eighteen months have elapsed—it was April 26, 1933—since the news of the death of Mr. Justice McCardie came as a tragic shock. The time is short to have appraised a life so full of interest, a judicial career so unique, but Mr. George Pollock has performed the task in a volume which will take its place in the records of the Bench.*

Henry Alfred McCardie was born in Birmingham in 1869. He was Irish by descent, though his father had been settled in the capital of the Midlands for a number of years; and it was in Birmingham that McCardie received his education—at King Edward's School—and entered on his career at the Bar. But the law was not at first his obvious choice. Some years he spent in the office of Thomas & Betteridge, learning to be an auctioneer. Then a solicitor-friend suggested a partnership if he would become a solicitor, saying, however, that the Bar should be his career. So his final decision was for the Bar, and when he was twenty-five in 1894, he was called at the Middle Temple.

His native city was not slow in giving him the chance that was to lead to success, and when he had become the leading junior counsel of his day, nearly every solicitor in Birmingham claimed to have sent him his first brief. But even when success lay before him, McCardie still had doubts as to the future. "I think," he said to a friend, "after all, I shall give up the Bar." And after a pause, he added, "I feel inclined to go into the Church. I might be better fitted for that." "If," says Mr. Pollock, "McCardie had carried his intentions into effect, he might have been a power in the church, but he would have been a power for rebellion." His course as a Judge was not exactly easy; as a Bishop, if it can be imagined that the powers that govern promotion would have let him get so far, his position would certainly have been impossible.

But if his work at Birmingham left time for such imaginings, these could only have been at the beginning, for he was the busiest junior there when his thoughts turned to London. "If" he wrote to a friend, "you can find good chambers in the Temple, take them and we will join forces." Chambers were taken at No. 2, The Cloisters, and McCardie went to London. "For a time he travelled to and fro, for his clients in Birmingham were still anxious to secure his services for their more important cases at the Assizes." But the rapid growth of his work in London soon put an end to this diversion of his energies. "The 'local' from Birmingham saw his income leap from £1,000 a year to £5,000, to £10,000, to £15,000, to £20,000, and higher still. In his last ten years at the Bar, his average earnings were in excess of £20,000 a year." And what this meant in actual work, any practising barrister can realise.

In such circumstances relief may be obtained by taking silk, and in 1910 McCardie did apply for this promotion. But it was delayed. Since it became known through the Temple and among his clients that the application had been made, the delay was prejudicial to his practice and he withdrew it. Later, without any renewed application, his name—Lord Loreburn was Lord Chancellor

**Mr. Justice McCardie. A Biography.* By GEORGE POLLOCK, with 12 illustrations. London: JOHN LANE, THE BODLEY HEAD, LTD.; 1934.

at the time—was added to the list of new K.C.s. But McCardie declined to receive the honour in this way, and when he was made a Judge he was still at the Junior Bar. And he declined advancement in another direction as well, a direction which was the natural way to high judicial preferment. He had the chance of entering Parliament. While he was in the middle of a heavy commercial case in the High Court, he received a telegram offering him a constituency in the Midlands: "We offer you this seat, which you will find a seat for life with a majority of at least four thousand, and we think you ought to accept it, but you must let us know within half an hour." The direction he gave after a short reflection was to wire back simply saying that half an hour was not sufficient time in which to make such a momentous decision. And Mr. Joseph Chamberlain, through whom the offer had come, asked: "Who can this young man be who refuses a safe seat in Parliament? No matter who he may be, take this message to him from Joseph Chamberlain: 'When the ball rolls to his feet, let him kick it; it will never roll again.'"

Politics, had he decided on this course, would have given a different turn to McCardie's career. Instead of leading to higher judicial office, it might have diverted him from the seat on the Bench for which his character, learning, and ability obviously fitted him. In October, 1916, he was appointed a Judge of the King's Bench Division—it was Lord Buckmaster's appointment—and in the succeeding years he made his mark at once as the great exponent of Case Law and the critic of social life, as well as of the law in its social aspects. His efforts in the latter direction did not always meet with judicial sympathy. "The less sociological knowledge that is brought into the discussion of these questions the better," so it was said in the Court of Appeal when his direction to the jury in *Searle v. Place* was under consideration. There might have been an unhappy judicial quarrel, but this was avoided by the tact of the Master of the Rolls and Mr. Justice McCardie's loyalty to the cause of public justice; though he did not then—and probably never did—abandon the hope that he might secure justice for himself.

In other directions, too, his desire for a changed outlook on social matters did not meet with universal approval; but there was never anything but warm appreciation of the unique knowledge of Case Law which made his judgments for lawyers a liberal education. "I am astonished," he quoted once from Lord Bowen's address in 1884 to the Birmingham Law Students' Society, "when I hear at times the suggestion that our profession must be dull. The truer view would be that our work is inordinately engrossing. Time runs by the lawyer far too like the race in a mill stream."

And this interest Mr. Justice McCardie found in the judicial precedents which we call Case Law, though here too his admiration was tempered with criticism. "I have no respect," he said, "for a rule of law whose sole claim to esteem is based on antiquity and the remoteness from everyday life," And Mr. Pollock's comment is (p. 49): "McCardie, while he greatly admired our Case Law as a storehouse of judicial wisdom and common sense, was strongly opposed to the rigid application to present needs of views expressed under widely different conditions." And later, in Chapter 32, entitled "Wisdom of the Ages," Mr. Pollock refers at length to the lecture on the subject which Mr. Justice McCardie delivered at University College, London, in December, 1927, a lecture which was printed last year in the pages of this JOURNAL, and which he concluded with a reference to Lord Coleridge's words in *Reg. v. Ramsey* (1 Cab. & E., p. 135): "The law grows, and though the principles of law remain unchanged, yet (and it is one of the advantages of the Common Law) their application is to be changed with the changing circumstances of the times."

There is much of great interest in Mr. Pollock's book, of which only brief mention may be made. The leading criminal cases which Mr. Justice McCardie tried are stated in detail—in such detail, indeed, that the part of the Judge is overshadowed by the advocacy of counsel; for instance, the successful speech of Sir John Simon for the defence in the trial in 1917 of Lieutenant Malcolm on the charge of murdering Count De Borch: "Sir John Simon was there to defend and to make one of the greatest speeches, in the classical style, ever delivered in a British Criminal Court." And in the spring of 1922, McCardie had at the Old Bailey the two cases which caused keen excitement at the time—of Jacoby, a boy of 18, who was hanged, and Ronald True, who was saved by his lunacy. Of more permanent interest are the matrimonial cases in which Mr. Justice McCardie assessed "the value of a wife" who had proved herself to be valueless, and discussed the excesses of feminine extravagance in dress. These latter cases seemed by some inexorable rule to be attracted to the "Bachelor Judge." "Amritsar" supplies a chapter, and Mr. Pollock says that when the attack was made on McCardie for his summing up, he, with characteristic zest, prepared his defence. "But, in the end, he abided faithfully by the tradition that the Bench of England will submit to criticism without rejoinder." Mr. Pollock does not further refer to the Judge's statement: "I am satisfied that my summing-up was in strict accordance with my legal duty. *I adhere to it.*"

One interesting chapter deals with "The New Despotism," and tells how Mr. Justice McCardie was away on vacation when the ill-conceived "cut" in judicial salaries was made. He returned post haste. "In the space of little more than a week he sent two stinging letters to the Lord Chancellor. . . . To a friend he announced his intention of making a public protest, then resigning." It appears that Mr. Justice McCardie's contention that the reduction should be opposed, had the approval of the entire bench of Judges, with the exception of one appeal Judge, though they unanimously disapproved of making a public pronouncement. The memorandum they then prepared was released by the Lord Chancellor last year and its text appears in [1933] N.Z.L.J. 247.

A humane and courageous Judge, it may be as well that the restraint of the Bench did not accord with all that he desired to promote in social reform, but the biography will preserve a worthy record of his many qualities for future generations.

The Bailiff knew best.—A bailiff's report, which is on record, deals with his attempt to serve a writ on a West of Ireland landlord. The process-server reported as follows: "The defendant came to a window with a loaded shotgun in his hand. He pointed it at me, and said if I did not eat the writ there and then he would blow my soul to hell and damnation. As I believed him capable of carrying out his threat, I did as I was told."

Practice Precedents.

Charging Orders.

Rule 314 of the Code of Civil Procedure (*Stout and Sim's Supreme Court Practice*, 7th Ed. 233) provides that any party to an action may at any time after the commencement of the action *and by leave* of the Court, on proof that the opposite party is making away with his property, or is absent from New Zealand or about to quit New Zealand, with intent to defeat his creditors, *and*, after judgment, *without such leave* as against any opposite party against whom judgment has been obtained, as of course without motion issue out of the Court an order charging, etc.

Before judgment the order is an order *nisi*: see R. 321, which provides that such order shall be in the form No. 26 in the First Schedule (see Code of Civil Procedure: *Stout and Sim's Supreme Court Practice*, 7th Ed. 400). Such order *nisi* shall be served upon the person it is intended to affect thereby, *or* in the case of moneys due by the General Government or any public body, or standing to the credit of an opposite party in any cause or matter on such person as the Court directs, and, in case it is intended to affect an estate or interest in land under or by virtue of any trust, may also be registered against such land or a caveat may be entered in respect thereof.

The order *nisi* does not create a charge until it is served on the garnishee: *In re Stanhope Silkstone Collieries Co.*, (1879) 11 Ch. D. 160. Rule 322 states the *effect* of the order *nisi*.

A charging order *nisi* can be issued *before* judgment *only* when it is proved that the defendant is acting with intent to defeat his creditors: *Butler v. Green*, (1908) 11 G.L.R. 100; *Snow v. Loft*, (1914) 16 G.L.R. 683; *Easton v. Hannan*, [1924] G.L.R. 401.

The forms hereunder provide for: 1. An order *nisi* before judgment. 2. Directions for service on a Government Department.

Rule 324 provides that any person served with an order *nisi* under R. 321 may forthwith pay into Court any moneys affected by the order, to abide the result of the action or the order of the Court.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

BETWEEN A.B. &c. Plaintiff and C.D. Defendant.

MOTION FOR LEAVE TO ISSUE CHARGING ORDER NISI BEFORE JUDGMENT.

Mr. of counsel for the above-named plaintiff TO MOVE before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Courthouse at on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER giving leave to issue out of this Honourable Court an order charging the estate and interest of the defendant in the purchase-moneys payable to him by one X. of the City of for the sale of the premises situate at No. in the City of AND FOR A FURTHER ORDER that the defendant be ordered to pay the costs of and incidental to this application UPON THE GROUNDS that the defendant is making away with his property and is about to quit New Zealand with intent to defeat his creditors AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein.

Dated at this day of 19 .

Counsel for plaintiff.

Certified correct pursuant to rules of Court.

Counsel moving.

Reference: His Honour is respectfully referred to R. 314 of the Code of Civil Procedure.

Counsel moving.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I E.F. of the City of solicitor make oath and say as follows:—

1. That I am the solicitor for the above-named plaintiff in this action.

2. That the defendant has entered into an arrangement to sell and dispose of his interest in the premises situate at No. in the City of to one X.

3. That the sale of the said interest in the said premises of the defendant has been fixed for completion at on the day of 19 .

4. That the defendant has informed me on two occasions that immediately the said sale is completed he intends to leave for England with intent to defeat his creditors and that he will use every endeavour to avoid payment of all moneys claimed by the plaintiff in this action.

Sworn etc.

ORDER FOR LEAVE TO ISSUE CHARGING ORDER NISI BEFORE JUDGMENT.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion for leave to issue a charging order and the affidavit of filed herein AND UPON HEARING Mr. of counsel for the above-named plaintiff IT IS ORDERED that until sufficient cause is shown to the contrary the estate and interest of the above-named defendant in the purchase-money payable to him by one X. of for the sale of the premises situate at No. in the City of DO STAND CHARGED with the payment of the amount for which the above-named plaintiff may obtain judgment in this action together with the sum of £ the costs of and incidental to this order.

By the Court.

Registrar.

MOTION FOR DIRECTIONS AS TO SERVICE OF CHARGING ORDER NISI.

(*Same heading.*)

Mr. of counsel for the plaintiff TO MOVE before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Courthouse at on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER giving directions as to service of the charging order *nisi* issued herein by the above-named plaintiff against the moneys due and accruing due to the above-named defendant by the New Zealand Government UPON THE GROUNDS that the moneys sought to be charged are due by the General Government of New Zealand AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein.

Dated at this day of 19 .

Solicitor for plaintiff.

Certified correct pursuant to Rules of Court.

Counsel for plaintiff.

Reference: His Honour is respectfully referred to R. 321 of the Code of Civil Procedure.

Memorandum: It is respectfully suggested that the charging order be served upon [the Under-Secretary] Department, , the Department having control and direction of all moneys due to defendant.

Counsel for plaintiff.

AFFIDAVIT IN SUPPORT OF MOTION FOR DIRECTIONS.

(*Same heading.*)

I E.F. of the City of solicitor make oath and say as follows:—

1. That I am the solicitor for the above-named plaintiff.

2. That the moneys which are sought to be attached by the plaintiff are due by the General Government of New Zealand to the defendant in accordance with a contract by the defendant for the erection of a building on behalf of the Department at No. in the City of .

3. That the erection of the said building is being carried out under the control and direction of the Department and the moneys due to the defendant for the said work are paid upon the certificate of the Clerk of Works for the said Department.

4. That the Permanent Head of the Department controlling the said work and payment of the said moneys is the Under-Secretary of the said Department.

Sworn etc.

ORDER FOR DIRECTION AS TO SERVICE OF CHARGING ORDER NISI.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion for direction and the affidavit of filed herein and UPON HEARING Mr. of counsel for the plaintiff IT IS ORDERED that the charging order issued herein on the day of 19 by the above-named plaintiff against moneys due and accruing due to the above-named defendant by the General Government of New Zealand be served on the Under-Secretary Department at and upon C.D. the above-named defendant AND IT IS FURTHER ORDERED that the defendant do pay to the plaintiff the sum of £ for costs of and incidental to this order.

By the Court.

Registrar.

(*To be continued.*)

Legal Literature.

The Trial of Guy Fawkes and Others (The Gunpowder Plot), edited by Donald Carswell, of the Middle Temple, Barrister-at-Law. Notable British Trials Series; pp. vi+196. Illustrated.

From early childhood the "blood and thunder" narrative popularly termed "the Gunpowder Plot" has stirred the imagination of the people, just as it has excited the imagination faculties of historians for the past four centuries. The material available to them has been scanty, and, as one of the episodes of history that have been so coloured by partisan predilections, the story of Guy Fawkes has been told with varying success. That the whole story is not yet fully authenticated, Mr. Carswell admits; but, with impartial vision, he considers the evidence so far available, and lets it tell its own story.

Recent events in Germany suggest that the passing advantage of political "stunts" created against actual or possible political rivals is sought to-day as well as in centuries that have passed into history. Analogies will be drawn between Von der Lubbe, whose more humane proposal succeeded, and Guy Fawkes whose attempt failed; but even within the short period that has elapsed between the burning of the Reichstag building and the present moment, it is difficult to attain certitude as to the nature of the origin of the fire. How much more difficult is it to evaluate the part taken by the principal ministers of James I in the "plot," of which they took full advantage to further their particular ends.

Later, we hope to revert to the story of Guy Fawkes from a legal viewpoint, based on the evidence produced by Mr. Carswell. Meanwhile we recommend his book to all students of serious history, for he has stripped his story of all the accessories to a melodramatic scenario that has been created by successive writers whose imaginations were fanned by flames that rose higher than any Fifth of November bonfire. The book is a welcome addition, therefore, to the literature on the subject, though, as Mr. Carswell himself states, the whole story cannot be told with historical certainty until the Cecils' records are available for investigation and analysis. With commendable impartiality, he has not, however, overlooked any of the presently available records.

Rules and Regulations.

Fisheries Act, 1908. Whitebait Regulations amended.—*Gazette* No. 78, October 18, 1934.

Fisheries Act, 1908. Amending Regulations in respect of the Tonnage Measurement of Fishing-boats.—*Gazette* No. 78, October 18, 1934.

Public Revenues Act, 1926. New Zealand Government Stores Control Board Regulations amended.—*Gazette* No. 78, October 18, 1934.

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