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

"*As has been well said: 'Whoever pretends to be neutral in matters where justice is concerned fails to be impartial.' Whoever in such a matter claims to be indifferent is in reality siding with him who is in the wrong and against him who is right.*"

—LORD MACMILLAN, at the International Congress of Comparative Law, at the Hague.

Vol. XIII. Tuesday, October 5, 1937. No. 18

The Status of New Zealand King's Counsel.

AT the Dominion Legal Conference held at Auckland in April, 1930, the Rt. Hon. the Chief Justice, Sir Michael Myers, in the course of his inaugural address, said:

"The profession of the barrister and of the solicitor are really distinct professions. Although we may practise them together, it does not in the least follow that the qualities required are the same in the one as they are in the other. We know they are not. Perhaps many a young man goes into Court and takes cases when he should remain in his office and instruct counsel. It is not a good thing for the Bar, the solicitor, or the public. It is your business, I suggest, to make the public and the Legislature realize that. In 1882 the first attack was made. In 1898 the back door to the Bar was opened. Any solicitor in practice for five years was entitled to come along and say he wanted to be admitted as a barrister, and he was entitled to be admitted accordingly. I want to remind you of what has happened in other professions. Every profession has had its status improved—accountants, dentists, architects—every profession; the only one which has had its status lowered is the profession of the law, and I ask you how much longer are you going to allow that to continue? Has it occurred to you that you may have in the future men being appointed as King's Counsel who have not had the ability, or who have been too indolent, to pass the necessary examination to qualify them for admission to the profession of a barrister? That certainly will not happen immediately, because so long as I am Chief Justice there will be no King's Counsel who has not come to the Bar through the front door."

To many of his hearers, and to some who have since recalled these words, this passage from His Honour's address has seemed to be a hard saying. That, on the contrary, the preservation of the present high status of King's Counsel, whose patents have been granted in New Zealand since 1915, is of the utmost importance to the members of the New Zealand Bar, it is now our purpose to record.

First, we shall consider the position of King's Counsel in Canada. In the *Fortnightly Law Journal* (Toronto) of March 15 last, there appeared the following advertisement:

> "Impecunious solicitor who finds his name amongst those created King's Counsel, and cannot afford the price of both the Patent and a silk gown and vest, would like to borrow the gown and vest necessary from some benevolent owner of the same. Also he would like some hints on proper Court procedure, having only once stood without the Bar when he was called, and never again expecting to attend Court once he has been called within it. Under the circumstances the cost of the Patent may be recouped out of the publicity value of the initials 'K.C.,' but a gown and vest would be a dead loss."

This is not a fantastic instance, for an editorial comment on what is termed in Canada, "The K.C. problem," says that more King's Counsel gowns than one would think are there born to blush unseen once their owner has had his day in Court when he is invited within the Bar, and they are then hung on some forgotten peg. The problem arises from the fact that a Bar examination is not required before a Canadian practitioner can, as at present, seek the coveted initials, as "a legalized unethical publicity stunt," as our contemporary terms it.

In Canada, barristers, who become such by effluxion of time after practice as solicitors, are eligible for the receipt of the patent of a King's Counsel. This, the *Fortnightly Law Journal* editorially has termed "a degradation of the distinction," and added that it "has proceeded so far that the wonder is that the superior Courts ever are graced by the presence of silken gowns." This view is supported by a member of the Canadian Bar, who says:

> "The height of absurdity appears to be attained by the spectacle of King's Counsel appearing to argue a case in the Small Debts Court, before a Justice of the Peace, or in summary conviction matters before a Justice or Magistrate. If *Lex de minimis not curat*, it surely seems that the most eminent exponents of '*Lex*' should hold themselves aloof from '*minima*'."

In a later comment, after referring to the fact that the patent of a King's Counsel in New Zealand is "a very jealously guarded honour," our Canadian contemporary says editorially:

> "What, we wonder, would be a New Zealand practitioner's reaction to the fact that, as news despatches creditably inform us, half the active members of the profession in Saskatchewan have now been granted silk? What a contrast between the wholesale scattering of the distinction as though it were a bushel of seed grain in the hope that some will fall on fertile soil, with 'the very jealously guarded honour' of New Zealand."

So much for recent comment in Canada.

In view of the foregoing, we have made inquiries as to the position of the granting of patents in Canada. We learn from a reliable Canadian source that a King's Counsel patent may be granted to a practitioner who is a barrister and solicitor; that the recipient of the patent need not have passed a barrister's examination, or be the holder of any equivalent academic distinction, and he may continue to act as a solicitor, without any

restriction as to the nature of his practice. Our informant proceeds:

> "In Ontario some years ago a statute was passed whereby a limit was placed on the number of King's Counsel patents to be issued each year, also the qualification of ten years' practice was required; but this statute was never proclaimed, and it has subsequently been violated frequently. One batch of 160 patents was issued in which the qualification was divided into three categories: (1) War service, only those with real War service were largely ignored; (2) Election to the provincial Parliament; and (3) General political qualification. Of course, the issue of the patent is mainly a matter of political services to the party in power, though there are exceptions. Legal qualifications have not the remotest relevance. Many King's Counsel have never been in Court, and would not know what it was all about if they got there. From a lawyer's point of view the matter is a scandal. The House of Commons in Ottawa has gone on record as opposed to titles of any kind; and it is high time that Canada abolished King's Counsel's patents if the matter cannot be put in the profession's own control."

Finally, we are informed that there is no arrangement whereby any Canadian King's Counsel may be admitted to the Inns of Court by virtue of his patent; if any Canadian King's Counsel wishes to be so admitted, he must go through the usual formalities of keeping terms and passing the Bar examination before he can be called to the English Bar.

We shall now examine the status of the King's Counsel in the other Dominions.

In South Africa, no one can be appointed a King's Counsel unless he is in good standing as a barrister or advocate (as some Provinces term him); and, to be a barrister at all, he must have passed the prescribed Bar examination, and, while practising as a barrister, he may not be an attorney, notary, or conveyancer.

In New South Wales, Ceylon, the Cape of Good Hope, and Northern Rhodesia, and, since quite recently, Natal, the professions are separate and distinct; and no one may be admitted to the Bar without passing the prescribed Bar examination. (In the Orange Free State the professions are amalgamated, but a Bar examination is a pre-requisite to admission as a barrister.)

In New Zealand, by virtue of the Law Practitioners Amendment Act, 1915 (now s. 10 of the Law Practitioners Act, 1931), no practising barrister of the rank of King's Counsel may also practise as a solicitor, either alone or in partnership with any other solicitor. This does not apply to any persons who held the patent of King's Counsel on October 12, 1915, the date of the passing of the original provision.

We now turn to the Consolidated Regulations of the several Societies of Lincoln's Inn, the Middle Temple, the Inner Temple, and Gray's Inn, as revised from May 27, 1936. The significance of what has already been detailed becomes apparent. Regulation 43 provides:

> "(i) So long as the Regulations affecting Call to the Bar in those of His Majesty's Dominions beyond the Seas or Provinces thereof as set out in the Schedule hereto remain substantially as at present *and the two branches of the Profession are therein kept distinct*, any Member of the Bar of any such Dominion or Province, having the qualification set out in the Schedule, may on presenting a Certificate of his Call to any such Bar duly authenticated and a certificate from a Judge of the Supreme Court of such Dominion or Province and from the Attorney-General or Senior Law Officer thereof that the applicant is a fit and proper person to be called to the English Bar, be admitted as a Student without having passed any of the Examinations referred to in Regulation 1, and be called to the English Bar without submitting to the Examination for Call to the Bar, and without keeping any Terms."

SCHEDULE.

Dominion or Province.	*Qualification.*
New South Wales	Barrister of 3 years' standing.
Ceylon	Barrister of 3 years' standing.
Union of South Africa—	
1. The Cape	Barrister of 3 years' standing.
2. Transvaal	Advocate of 3 years' standing.
3. Orange Free State	Advocate or Barrister of 3 years' standing not practising as Attorney under Sect. 12 of Ordinance No. 4 of 1902.
Northern Rhodesia.. ..	Barrister of 3 years' standing.

It is observable that all the Australian States other than New South Wales, Canada, and New Zealand, are omitted from the foregoing Schedule. There is no mention of Canada anywhere in the Regulations for admission as a barrister, without examination, to the English Bar; and as we have said, no Canadian King's Counsel may be admitted without keeping terms as a student and passing the prescribed Bar examination.

There is, however, a special regulation for New Zealand dealing exclusively with King's Counsel:

> "(ii) Any member of the Bar of the Dominion of New Zealand who may hold the patent of King's Counsel *dated after the passing of the New Zealand Law Practitioners Amendment Act, 1915, and who is by law for the time being debarred from practising as a Solicitor in New Zealand*, may, upon producing proof to the satisfaction of the Masters of the Bench of the Inn to which he seeks admission that he holds a patent as one of His Majesty's Counsel, and that the local law in New Zealand disentitles him to practise as a Solicitor, be admitted as a Student without having passed any of the Examinations referred to in Regulation 1, and without keeping any Terms, be called to the English Bar without submitting to the Examination for Call to the Bar."

The careful draftsmanship of this clause is to be observed. It applies to the present state of the law in New Zealand; and, if that be changed, the status of the New Zealand King's Counsel disappears. In order that New Zealand "silks" may be eligible for admission to the English Bar their status as a barrister, in the sense of the English understanding of that word, must be maintained generally. Thus, if there should be a repeal of s. 10 of the Law Practitioners Act, 1931, the Regulation will stand; but it will debar any King's Counsel from New Zealand from the status of a barrister in England, without terms and examination. Moreover, the Regulation applies only to those barristers who have taken silk since the prohibition by statute of the holders of a patent engaging in the work of a solicitor.

The examination which must be passed by New Zealand barristers below the rank of King's Counsel, and by all other practitioners in the Dominions which are not specified in Regulation 43 (i) and (ii), comprises the following compulsory subjects, which must be passed before call:

> PART I.—Roman Law; Constitutional Law (English and Colonial) and Legal History; the Elements of the Law of Contract and of the Law of Tort; the Elements of Real Property *or* the Elements of Hindu and Mohammedan Law, *or* the Elements of Roman-Dutch Law.
>
> PART II (The Final Examination).—Criminal Law and Procedure; Common Law (Special Subjects); the General Principles of Equity and Special Subjects in Equity; Company Law and *either* Practical Conveyancing *or* a Special Subject in Roman-Dutch Law; Evidence and Civil Procedure; and a General Paper in two parts, namely, (i) Common Law, and (ii) Equity.

Last year, at the Dominion Legal Conference at Dunedin, a remit was proposed: "That the present

rules preventing King's Counsel from practising as Solicitors should be abolished." After a number of reasons had been put forward against any amendment of the existing law, the remit was lost on the voices. But none of the information we have gathered, as appears above, was before the Conference, notably the Regulations for admission of New Zealand holders of the patent of King's Counsel to the Inns of Court and for their call to the English Bar.

Leaving aside the "K.C. problem of Canada," which is instructive in showing the lengths to which any slackening of the present New Zealand requirements in relation to the granting of patents may lead, we emphasize the present high status of a New Zealand "silk,"

> "who may hold the patent of King's Counsel dated after the passing of the New Zealand Law Practitioners Amendment Act, 1915, and who is by law for the time being debarred from practising as a solicitor in New Zealand," and "upon producing proof . . . that the local law of New Zealand disentitles him to practise as a Solicitor."

This status, which must at all costs be jealously guarded, qualifies the holder to admission to the English Bar, a privilege not shared by His Majesty's Counsel in other British Dominions other than those we have indicated; and there is nothing to prevent a New Zealand King's Counsel, once he has become a member of one of the Inns of Court, from at once applying for silk in England, if he thinks his work and reputation would justify it.

New Zealand barristers below the rank of King's Counsel, may not be admitted to the English Bar without passing the entrance examination which contains cultural subjects unknown to our Law Practitioners' examination, though a certificate from the New Zealand University of a pass in that subject will be deemed equivalent to passing the Bar Council's examination in it. The reason for this is that, since a solicitor may be admitted to the Bar in New Zealand on proof of five years' practice as such, New Zealand barristers do not have the privileges granted to the Advocates or Barristers of New South Wales, Ceylon, and certain of the Provinces in South Africa, where the passing of a barristerial examination is a necessity pre-requisite for admission to the Bar.

It is of the utmost importance to the members of the New Zealand Bar that the privilege granted to them by Regulation 43 (ii) of the Consolidated Regulations of the Inns of Court, be not imperilled in any way, as it must be (*a*) if the qualification of a candidate for the grant of a patent as King's Counsel be less than that prescribed for admission as a barrister in England; in other words, that he must have passed an examination for admission as a barrister here, equivalent as regards required subjects to that of the Inns of Court; and (*b*) if the present statutory provision preventing the holder of a patent from practising as a solicitor be modified or repealed.

It will be seen from the foregoing that the learned Chief Justice's word of warning at the Legal Conference at Auckland in 1930, and the rejection of the remit at the Legal Conference at Dunedin last year, were timely and necessary to prevent any deterioration of the present position regarding the granting and holding of the patent of King's Counsel, or any diminution of the present high status of our King's Counsel which enables them, when in Great Britain, to be admitted to rank with their brethren of the English Bar.

Now, as we are authoritatively informed, all a New Zealand King's Counsel has to do if he wishes to become a member of the English Bar is to write to the Under-Treasurer of whichever Inn of Court he wishes to join, with proof of the qualification required by the relevant Regulation that we have already set out.

So valuable a privilege may not lightly be rejected. The very fact that a New Zealand King's Counsel is eligible as a member of an Inn of Court, by reason of the present conditions under which he may receive a patent, not only confers a status upon the King's Counsel himself; it indirectly helps to maintain in the eyes of the profession in England the prestige of the New Zealand Bar generally.

Summary of Recent Judgments

SUPREME COURT. Wellington. 1937. June 10, 11, 14, 15; Sept. 9. *Myers, C.J.*

In re **INVESTMENT EXECUTIVE TRUST OF NEW ZEALAND, LIMITED (IN LIQUIDATION).**

Company Law — Misfeasance — Estoppel — Practice — Fiduciary Position of Managing Director—Summons for Misfeasance including alternative Claim to Place him on List of Contributories—Illusory Consideration of Debentures exchanged for Shares allotted—Invalidity of Issue and Allotment of Shares—Failure in Compliance with Articles—Whether Shareholder estopped from alleging same—Companies Act, 1933, s. 269.

In a summons under s. 269 of the Companies Act, 1933, claiming relief in monetary compensation for misfeasance, there may be included, as an alternative, an application for a declaration that shares in the name of one M., credited in the books of the company as fully paid up, are contributing shares on which no part of the capital represented thereby has been paid to the company, and that M. is liable to be placed on the "A" list of contributories in respect thereof.

In re Wragg, Ltd., [1897] 1 Ch. 796, and **In re Innes and Co., Ltd.,** [1903] 2 Ch. 254, applied.

M. was the managing director of the Investment Executive Trust, Ltd., with a delegation of all the powers of the company. The company having increased its capital, M. applied for and was allotted 193,400 shares and 26,600 "A" shares at 2s. each, making a total of 220,000 shares. These were paid for by a cheque drawn on the trust account of H. for £22,000, and simultaneously a cheque of the company in favour of H. for a like amount was passed through the Bank, this latter payment being recorded in the company's books as an investment in British National Trust, Ltd., debentures, of which M. and A. handed over twenty-two of the face value of £22,000, £19,340 of such value belonging to M. and £2,660 to A. The Investment Executive Trust, Ltd.'s, minutes made no reference to the transaction and did not indicate that any authority was given by the directors for the purchase of the British National Trust, Ltd.'s, debentures or for the acceptance thereof in payment of the share capital represented by the 22,000 shares.

Hay, for the liquidator, in support; **Cooke,** K.C., and **Tripe,** for McArthur.

Held, upon the facts set out in the judgment,

1. That the consideration constituted by the debentures was valueless, or, at least, illusory and colourable.

2. That M. in the said transactions was in a fiduciary position, and that, whether they were considered as an exchange of debentures for shares or as two separate transactions, M. was guilty of misfeasance or breach of trust and liable for £19,340, the sum claimed as loss therefrom.

M. set up as a defence that the increase of capital and the allotment of any portion thereof were invalid.

Held, That, while M. was not estopped from showing that an issue or allotment of shares by the company was in contravention of the Companies Act, 1933, on the facts set out in the judgment, the issue and allotment of shares in the increase

of capital, so far as the ordinary shares were concerned, was not void. But the capital having been *de facto* increased and *de facto* new shares issued to and taken by M., even if there might have been some defect or unsubstantial failure in compliance with the articles, M. was estopped by his conduct from alleging that the allotments were invalid and from denying his liability upon the shares.

Bank of Hindustan, China, and Japan, Ltd. v. Alison, (1871) L.R. 6 C.P. 222; **British Mutual Banking Co. v. Charnwood Forest Railway Co., Ltd.,** (1887) 18 Q.B.D. 714; and **Wellington Bowling Club v. Sievwright,** [1925] G.L.R. 227, applied.

Shortland Flat Gold-mining Co., Ltd. v. Kneebone, (1912) 31 N.Z.L.R. 1039; **In re Athenaeum Life Assurance Society, Richmond's Case and Painter's Case,** (1858) 4 K. & J. 305, 70 E.R. 127; **York Tramways Co. v. Willows,** (1882) 8 Q.B.D. 685; and **In re Miller's Dale and Ashwood Dale Lime Co.,** (1885) 31 Ch.D. 211, referred to.

Solicitors: Mazengarb, Hay, and Macalister, Wellington, for the liquidator; **R. R. Tripe,** Wellington, for J. W. S. McArthur.

Case Annotation: *In re Wragg, Ltd.*, E. & E. Digest, Vol. 9, p. 310, para. 1928; *In re Innes and Co., Ltd., ibid.* para. 1926; *Bank of Hindustan, China, and Japan, Ltd. v. Alison, ibid.*, p. 145, para. 824; *In re Athenaeum Life Assurance Society, Richmond's Case and Painter's Case, ibid.*, p. 420, para. 2713; *York Tramways Co. v. Willows, ibid.*, p. 284, para. 1751; *In re Miller's Dale and Ashwood Dale Lime Co., ibid.*, p. 580, para. 3873; and *British Mutual Banking Co. v. Charnwood Forest Railway Co., ibid.*, p. 255, para. 1584.

COURT OF ARBITRATION. Christchurch. 1937. September 16. *O'Regan, J.*

In re **THE NEW ZEALAND FREEZING WORKERS' AWARD.**

Factories Acts—Wages—"Half-holiday"—Hour of Commencement—Factories Act, 1921-22, s. 35—Factories Amendment Act, 1936, s. 13 (1) (*a*).

An award providing that work done after mid-day on Saturday must be paid for at time (or rate) and a half, must be read subject to the provisions of any statute, and, in particular, the Factories Act, 1921-22, and its amendments.

Consequently, every person employed in a factory must be paid at the rate of time and a half for work done after 1 p.m. on Saturday.

SUPREME COURT. Auckland. 1937. August 27, 30. *Ostler, J.*

SMITH AND ANOTHER v. KEMP.

Practice—Particulars—Action for Probate in Solemn Form—Summons for Particulars of Mental Condition of Testatrix dismissed—New English Rules not automatically incorporated in New Zealand Rules of Court—Code of Civil Procedure, R. 604.

Rule 604 of the Code of Civil Procedure cannot be invoked to incorporate automatically every new rule of procedure made in England into the Code; it can be invoked only where no rule has been provided.

The practice in regard to testamentary actions was fixed in New Zealand in 1860 in accordance with the then practice of the Court of Probate in England. Consequently, R. 604 cannot be invoked to change that practice by reason of the fact that a new rule (now O. 19, r. 25A) in respect of particulars in such actions was made in England in 1901 and amended in 1904.

Therefore, in probate actions, the practice in New Zealand (following that of the Court of Probate) is not to require particulars to be given of specific instances of delusion where the plea is want of testamentary capacity, or how, when, where, in what way, or by whom undue influence was exerted on the testatrix where the plea is that execution of a will was obtained by undue influence.

Counsel: Mervyn Reed, for the plaintiffs; **West,** for the defendant.

Solicitors: Mervyn Reed and Foy, Auckland, for the plaintiffs; **Jackson, Russell, Tunks, and West,** Auckland, for the defendant.

SUPREME COURT. Wellington. 1937. August 12, 24. *Ostler, J.*

PRIEST v. MOWAT* (No. 2).

Practice—Trial—Estoppel—Claim on Two Causes of Action for Damages for Personal Injury and for Damages for Property Loss respectively—Separate Trials—Verdict of Jury that Plaintiff's Personal Injuries caused by Negligence of both Parties—Trial before Judge alone of Cause of Action for Property Loss and Counter-claim thereon—Defendant not estopped by Jury's Verdict from Recovery on Counter-claim.

Where a statement of claim, alleging negligence on defendant's part, contains two causes of action, one for personal injury and the other for property loss, the defendant counter-claiming for property loss, and the trial of the cause of action for personal injury before a jury results in a verdict for the defendant on the grounds that both plaintiff and defendant were negligent, the judgment on that cause of action cannot be pleaded as an estoppel in the trial before a Judge alone of the second cause of action and the counter-claim thereto.

National Insurance Co. of New Zealand, Ltd. v. Geddes, [1936] N.Z.L.R. 1004; **Priest v. Mouat,** [1937] N.Z.L.R. 431; and **Brunsden v. Humphrey,** (1884) 14 Q.B.D. 141, applied.

Counsel: A. M. Ongley, for the plaintiff; **Parry,** for the defendant.

Solicitors: Gifford Moore, Ongley, and Tremaine, Palmerston North, for the plaintiff; **Buddle, Anderson, Kirkcaldie, and Parry,** Wellington, for the defendant.

* The amendment in the spelling of the defendant's name, reported as "Mouat" in the interlocutory proceedings reported p. 123, *ante*, was made at the trial of the jury action.

SUPREME COURT. Wellington. 1937. August 30; September 22. *Myers, C.J.*

TICKNER v. TICKNER (No. 2).

Divorce and Matrimonial Causes—Practice—Limitation of Judge's Discretion to grant New Trial—Divorce Suit a "Civil case"—Jury's Verdict—Three-fourths majority—Effect thereof—Juries Act, 1908, s. 152—Code of Civil Procedure, R. 276—Divorce Rules, R. 54.

Rule 54 of the rules under the Divorce and Matrimonial causes Act, 1928, does not give to the Court or a Judge a general power or discretion overriding R. 276 of the Code of Civil Procedure and the principles laid down governing the application of that rule.

A divorce suit is a "civil case" within the meaning of s. 152 of the Juries Act, 1908, which provides that if three-fourths at least of any jury impanelled on any civil case shall after the jury has retired to consider its verdict for a period of at least three hours intimate to the Judge presiding that the jury has considered its verdict, and that there is no probability of such jury being unanimous, the verdict of three-fourths shall be taken and accepted as, and shall have all the consequences of, a verdict of the whole of such jury.

Sims v. Sims and Davidson, (1878) 1 S.C.R. (N.S.W.) (N.S.) Div. 1, applied.

Mordaunt v. Moncrieffe, (1874) L.R. 2 Sc. & D. 374, and **Branford v. Branford and Shepherd,** (1879) 4 P.D. 72, followed.

The verdict of the majority of a jury must in pursuance of s. 152 of the Juries Act, 1908, which permits its being accepted in the place of unanimity, be regarded as equal in weight and value to one that is unanimous.

West India Electric Co. v. Roberts, [1920] A.C. 1025, followed.

Counsel: R. R. Scott, for the petitioner; **Rollings,** for the respondent.

Solicitors: R. R. Scott, Wellington, for the petitioner; **W. P. Rollings,** Wellington, for the respondent.

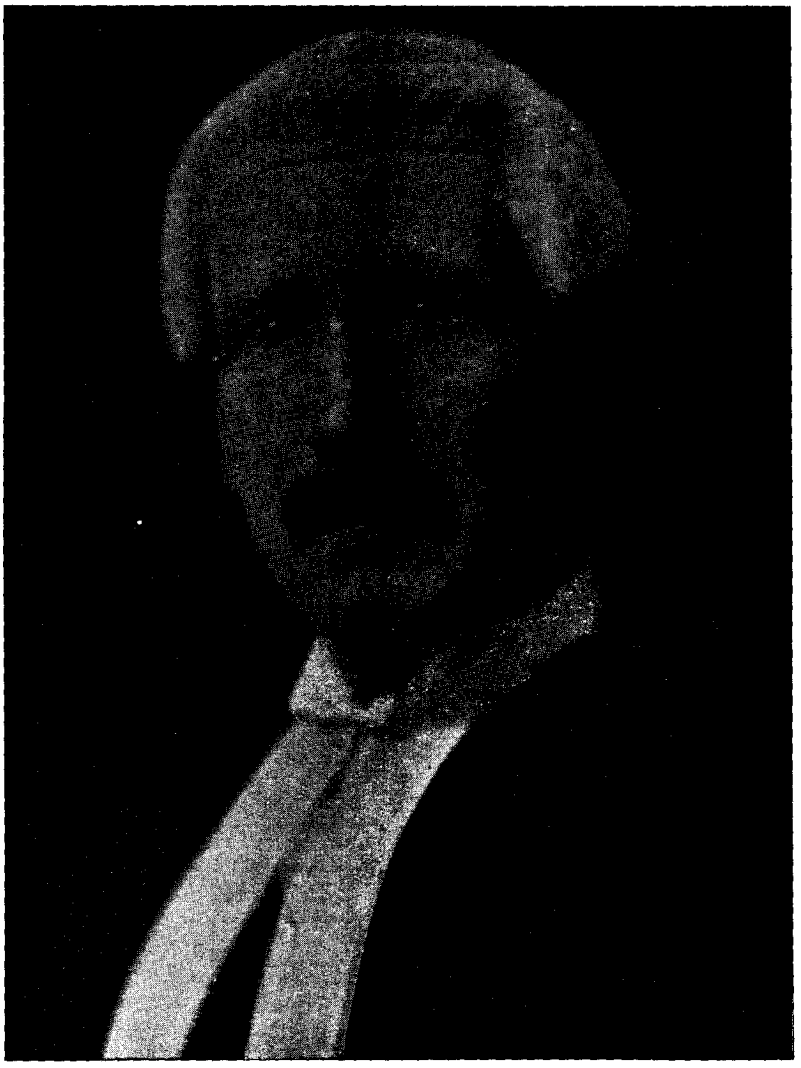
Case Annotation: *Sims v. Sims and Davidson*, E. and E. Digest, Vol. 30, p. 246, 466 (*i*); *Mordaunt v. Moncrieffe, ibid.*, Vol. 27, p. 384, para. 3770; *Branford v. Branford and Shepherd, ibid.*, Vol. 22, p. 414, para. 4237; and *West India Electric Co. v. Roberts, ibid.*, Vol. 30, p. 246, para. 463.

Death of the Hon. Mr. A. S. Adams.

DOMINION-WIDE TRIBUTES FROM BENCH AND BAR.

In the Court of Appeal, in Wellington, and in the Supreme Court in each of the other three main centres, tributes of affection and appreciation were paid by members of the Bench and Bar to the memory of the Hon. Mr. A. S. Adams, who, after twelve years' service as a Judge of the Supreme Court Bench, retired on August 3, 1933, and who died at Christchurch, on September 12, aged seventy-six years.

At the opening of the Court of Appeal sitting on September 13, a large gathering of members of the profession was present, when His Honour the Chief Justice, Rt. Hon. Sir Michael Myers, took his place on the Bench in company with Mr. Justice Ostler, Mr. Justice Smith, Mr. Justice Johnstone, and Mr. Justice Fair.



The Late Hon. Mr. A. S. Adams.

The Judiciary.

His Honour the Chief Justice addressed the members of the Bar as follows:

"The inexorable hand of death has again within the space of a few days laid itself upon us, and we are met to-day to mourn the loss of a former Judge of this Court, the Honourable Alexander Samuel Adams, and to express to his widow and family, two at least of whom are members of the Profession to which we all belong, our word of respectful sympathy.

"Mr. Adams was for many years a member of the Bar in Dunedin, where, by reason of his high moral character, his sound knowledge of legal principles, and his conscientious devotion to the interests of those whom as a member of the Profession he was called upon to serve, he attained a position of eminence and distinction. Nor was his reputation confined to Dunedin, for his engagements took him to other cities, and particularly to Wellington, where he appeared in many cases of importance in the Court of Appeal. In 1921 he was appointed a Judge of the Supreme Court; and in that office he displayed the same characteristic devotion to duty and the same high qualities as had earned for him his place of distinction at the Bar. When he retired in 1933, we of the Bench felt that we had lost a conscientious and loyal friend and colleague; and we and you know that the country lost the services of a capable, upright, and respected Judge.

"He was of an exceedingly modest and retiring disposition, and I doubt whether it would ever have occurred to his mind, though I know it has been a matter of regret to the Profession generally, that his services did not receive the full measure of recognition to which we all thought their merit entitled them. But though that recognition was not accorded him, there remain a permanent record of able and faithful service, and the memory of an honoured name.

"I trust that the sincere and respectful tribute that Bench and Bar offer to-day to the memory of our departed friend will be some indication to those he has left behind of the esteem in which we regarded him, and will afford them some measure of consolation in their great loss."

The Attorney-General.

The Solicitor-General, Mr. H. H. Cornish, K.C., said that he desired to read the following statement from the Attorney-General, Hon. H. G. R. Mason, who was unavoidably absent from Wellington:

"I very much regret that public duties elsewhere prevent my personal attendance before the Court on the occasion when Bench and Bar pay their tribute of respect to the memory of the late Mr. Justice Adams. I desire, however, very sincerely to be a party to the paying of that tribute.

"The late Mr. Justice Adams was a man of high ideals, clearly seen and firmly held. As a private citizen, he was the fearless and tireless champion of any cause of the justice of which he was persuaded. As a practising lawyer, he was a prudent and wise counsellor. For some years he represented the Crown in Otago in both criminal and civil proceedings, and he discharged the duties of his office with impartiality and distinction.

"As a Judge, he was careful and conscientious, his one aim being to promote justice according to law. His impartiality, his patience, and his industry fully rendered him worthy to be one of His Majesty's Judges."

The Attorney-General concluded by expressing sympathy with the members of the deceased gentleman's family.

The New Zealand Law Society.

The next speaker was Mr. G. G. G. Watson, who said that in the absence of the President of the New Zealand Law Society, he, on behalf of that Society, as representing the practitioners of the Dominion, desired to join in paying tribute to the memory of the late Mr. Justice Adams and in tendering sympathy to his family.

"We mourn to-day the passing of a learned lawyer and skilled advocate, a wise and humane Judge, and, above all, a man of strong character and rigid adherence to high principles," the speaker continued.

"A member of the Bar for almost forty years, Alexander Samuel Adams, by his untiring industry, his keen perception of fundamental legal principle, and his clear and logical exposition of the law, soon established his position as one of the leaders of the Bar in Dunedin. In that position he served his clients well; he merited the esteem of his fellow-practitioners; and he upheld the high traditions of the Bar. The *Law Reports* of the Dominion contain numerous records of his forensic achievements.

"The qualities and characteristics which made him a distinguished member of the Bar stood the late Mr. Justice Adams in good stead during his twelve years' tenure of office as a Judge of this Court. In that position he strove with all his power to administer justice in accordance with his wide knowledge and understanding of the law. He spared no effort, regardless of the cost to his own health or comfort, in his ever-present desire to discharge to the full his duty to those whose business brought them to the Court either as litigants or advocates.

"His quiet dignity, his love of justice, his unfailing courtesy, his devotion to duty, and his high ethical standards will be remembered by all who came in contact with him.

"We express the hope that the grief and sorrow of his family may in some measure be assuaged by the sympathy of those who knew him and his work."

The Wellington Law Society.

On behalf of the Wellington District Law Society, Mr. P. B. Cooke, K.C., asked their Honours' permission to add an expression of sorrow at the passing of one who, by his wide knowledge of the law and by his distinguished career as a Judge, had won an honoured place in the annals of the legal history of the Dominion. Mr. Cooke continued:

"Mr. Justice Adams did not sit in Wellington very much in the Supreme Court: his duties in that Court took him for the most part elsewhere; but for many years he sat here regularly in this Court.

"From the first we instinctively respected him for his scrupulous fairness. His kindliness of manner and his innate courtesy soon changed our respect into affection—and that affection never waned.

"We shall remember him, Your Honours, not only for his grasp of legal principle, not only for his intimate knowledge of the details of our legal system, but as a Judge who added to these and to his other great qualities a burning desire to be just."

The Court then adjourned as a mark of respect.

In Christchurch.

"It is with feelings of profound respect that we mark the passing of the Hon. Alexander Samuel Adams," Mr. Justice Northcroft said, at a gathering in the Supreme Court at Christchurch, in the presence of a large number of practitioners. "Throughout a long and honourable life he has enriched this community by his services as a member of our profession at the Bar and on the Bench, and by his faithful and disinterested services in the cause of social reform. His was of a deeply religious nature, inspired by a strong sense of duty and a firm adherence to principle."

These virtues, Mr. Justice Northcroft added, had made Mr. Justice Adams a figure in many forensic and political struggles undertaken for social causes. At the Bar he had always been a zealous student of the law. Such qualities marked him as eminently suited for the exercise of judicial functions. For the last ten years of his judicial life he had adorned the Supreme Court Bench in Christchurch. He was an earnest student, and formed his judgments from profound scholarship. He had ennobled judicial tasks by personal virtues, and his wisdom would linger in recorded judgments.

"His personal attributes, particularly of courtesy and consideration for you who were privileged to practise before him, will long continue as a happy memory—the longer indeed as his kindly help was the more generously given to those who were younger and less experienced," Mr. Justice Northcroft added. "Your Bar has lost a kindly friend; the Bench, a good Judge."

Associating himself with Mr. Justice Northcroft, and speaking for the Canterbury District Law Society, Mr. K. M. Gresson, President of the Canterbury Law Society, said:

"Those of us who in the years past have practised in this Court know as perhaps no one else knows what legal scholarship reposed in him who, for some ten years or more, was our resident Judge, to whom we bade an affectionate farewell only four years ago, and to whose worth we pay to-day a further final tribute and at the same time offer to his relatives our deepest sympathy in their bereavement. Most of his judicial life was spent here with us; at his coming, to most of us he was unknown; but in a surprisingly short time there grew up between him and the Christchurch Bar a relationship extraordinarily happy and harmonious, and one that, as the years went by, ripened into a real affection from us towards him who was invariably so courteous, so helpful, so considerate.

"To the extent and depth of his legal learning and particularly to his outstanding knowledge of equity law as well as to his kindly encouragement, many of us owe more than we properly realize.

"Only four years ago we assembled in great numbers when he entered upon his retirement, and there was expressed on our behalf the hope that he might enjoy many years of happy leisure. But it was not to be, and even these brief four years were not years of comfortable ease. It would seem that his services to the State and to us took greater toll of his health and strength than we realized—that literally he wore himself out in the conscientious discharge of the duties of his high office.

"We desire to-day to give public expression to what we all feel—admiration for and appreciation of his learning as a Judge, and regard and affection for his countless acts of consideration for us, as well as a deep sympathy towards his family in their grief, and especially towards his sons, who are professional brethren."

In Auckland.

"It is fitting that the Bench and Bar should unite in doing honour to the merits and services of the distinguished fellow-worker whom death has taken from us," said Mr. Justice Callan in the Supreme Court at Auckland, when paying a tribute to the late Mr. Adams.

"He devoted himself with great intensity to that exacting, useful, and honourable calling to which both Bench and Bar belong," said His Honour. "It was my privilege to know him and his work and worth during the fifteen years of his practice in Dunedin. He was gifted with the type of mind peculiarly suited to command success in our profession—a mind quick, penetrating, and subtle. He had an infinite capacity for taking pains, an untiring energy, and great industry. He was a learned lawyer. The best tribute we can pay to the memory of Mr. Adams and the lawyers and Judges of his generation is to see that in our hands the torch they held and have now passed on to us does not grow dim."

Mr. A. H. Johnstone, K.C., paid a tribute on behalf of the Bar. He said that few men were more entirely free of vanity and affection.

In Dunedin.

Members of the Bench and Bar met in the Supreme Court on the same morning, when Mr. Justice Kennedy paid an eloquent tribute to the late Hon. A. S. Adams. The Hon. Sir Walter Stringer occupied a seat on the Bench.

Mr. Justice Kennedy, Mr. E. J. Smith, President of the Otago Law Society, and the Hon. W. Downie Stewart referred particularly to Mr. Adams's helpfulness and kindness as a practising barrister to his younger colleagues.

Penalties for Minor Traffic Offences.—Commenting editorially on the article on this topic in the last issue of the JOURNAL, p. 246, *ante*, the *Evening Post* (Wellington) says in part:

> "There is much to be said for the proposal, with the proper safeguards specified by the LAW JOURNAL. Such fines are imposed in several other countries without serious objection. In his report on his recent visit to Australia the Wellington City Engineer (Mr. K. Luke), speaking of infringements of the traffic laws by pedestrians, says that 'in some cases the fines were collected immediately by the representative of the police or the traffic officers.' There is no reason why it should not apply to motorists for minor infringements, as it does in many States of America. . . . Most motorists or other road-users would appreciate, if they feel they are in the wrong, the opportunity of a settlement on the spot. If not, there is always the Court. The procedure proposed is explained and the safeguards suggested seem adequate. One of the most important provisions is that the fine for each class of offence should be fixed throughout the Dominion as a definite amount and that traffic authorities should have the right also to bring any case before the Court."

The Duty of the Indemnifier's Solicitor.

In Running-down Actions.

By W. E. LEICESTER.

On August 11, 1934, William Groom, an eminent official of the Bank of England, was a passenger in a motor-car driven by his brother, a Lincolnshire farmer. They were driving along a country road when a lorry came recklessly out of a side-turning, colliding with the car in which the brothers were travelling and seriously injuring the banker who sustained a fractured skull and was unable to work for a number of months. The collision was due entirely to the negligence of the driver of the lorry, and he was subsequently convicted on a charge of dangerous driving. The lorry was insured with the Motor Union Insurance Company, while the farmer's car was insured with the National Farmers' Union Mutual Insurance Society; and, as it happened that these companies were at the time negotiating a somewhat similar case between them, they decided to pool both accidents and endeavour jointly to keep the damages in both as low as possible.

The farmer's insurance company had issued a policy which covered him for such sums, including costs and expenses, as he might become legally liable to pay for injuries caused in connection with his car, and this policy included a clause which, if and so long as it so desired, gave the company absolute conduct and control of any proceedings against its insured. In view of this insurance against his brother's possible liability, the banker instituted his action against both drivers. The National Farmers' Society instructed Messrs. Crocker to act for its insured; and this firm, upon counsel's advice given informally, decided to admit that the farmer was negligent, the motive of this procedure being that the plaintiff would be likely to obtain higher damages against the driver of the lorry than he would against his own brother. Without any instructions from, or communication with, the farmer who, though nominal, was in fact their client, Messrs. Crocker entered an appearance to the writ and instructed counsel to settle a defence admitting negligence and to suggest what sum should be paid in settlement of the claim. This firm also sent to the solicitors for the banker a letter stating that their farmer client admitted negligence. When the farmer became aware that this defence had been delivered, he wrote to the company that it was so delivered without his authority or consent, whereupon the company wrote to its agent at Norwich in the following terms:—

> "You state that Mr. Groom is very cross that, without his consent, negligence should be admitted, when, in fact, no one seriously suggests that he was negligent. That may be the view of our insured, but nevertheless if we had repudiated liability we ran a very serious risk of the Court holding a different view and giving a decision against us."

It has to be said for Messrs. Crocker that they believed that the wording of the clause giving the company the control of the proceedings was sufficient to justify them in admitting negligence and liability.

A humbler person might have felt inclined to have stood the pricks with stifled anger and philosophic

calm : not so William Groom, for " in the veins of the Lincolnshire farmers runs the fighting blood of the old Vikings." He was as mad as Ajax. Even if Messrs. Crockers' scheme had been good it still would not have soothed him, but the unhappy solicitors were to be deprived even of the compensating compliment of ingenuity, said Mr. Justice Hawke, [1937] 3 All E.R. 844, 848 :—

> " I think that the letter was written in the course of carrying out a scheme in which these defendants, very likely misconceiving the position, sought to put upon one of their clients a liability which it is not suggested lay upon him, which they did not think lay upon him—in fact, they thought definitely that it lay upon someone else—but for purposes of their own, disregarding the interests of their own client, they embarked upon this scheme. I am going to use one expression of my own about it. I think it was a stupid scheme. It was thought, I suppose, by those who conceived it and by those who carried it out, to be a remarkably clever bit of tactics. I think it was absolutely stupid and worthless. But they had embarked on this scheme, and their motive in writing the letter was to keep it going. In other words, they were saying something which they knew to be false or did not believe to be true, and their motive was certainly indirectly—I do not wish to use any offensive expression—to disregard the interests of one client because it suited them better to regard the interests of another client."

The farmer considered that neither the solicitors nor the insurance company had studied his interests. He claimed damages against both of them for negligent breach of duty towards him and for libel. The action against him had come on for trial before Mr. Justice Goddard who had given judgment against him for £924 and £208 12s. 10d. costs solely by reason of the admissions in their defence ; and the recovery of these damages and costs was one of the heads of damage claimed by the farmer. He also claimed damages alleging that he had lost his " no claim " bonus ; that he had the necessity of disclosing the judgment against him on future insurances ; that he was liable to pay Messrs. Crockers' costs if recovery was not barred by their negligence ; and that his reputation was damaged by the publicity given to the action in the local press. At the trial, various questions were left to the jury who gave a verdict against both defendants on both grounds, awarding £1,000 for negligence and £1,000 for libel against the National Farmers' Society and similar sums against Messrs. Crocker.

Whether, in the circumstances, it was possible for the Court to uphold the verdict against the company for a breach of duty was not decided. In the view of the Judge, this question of duty would appropriately have arisen in the course of the arbitration which the parties had agreed should be a condition precedent to the plaintiff's having any claim against the insurance company. The case, on this point, fell within the principles of *Scott v. Avery*, (1856) 5 H.L. Cas. 811, and the company was entitled to judgment. The letter which it had written to its Norwich agent was considered by the Judge at the trial not to be capable of a defamatory meaning. The matter, however, was left to the jury merely in order to get an answer, subject to discussions which might take place after the answer was given. It appeared to Hawke, J., upon consideration after argument, that the letter expressed " nothing more than a sort of pious belief in the profession—particularly judicial persons may think it impious, if that is the right word—that cases may go wrong." No doubt the jury regarded it as a reflection on its infallibility and decided to meet such heresy with stern financial censure. In this respect, as on the other question of breach of duty, it received no encouragement from the Court.

The case against Messrs. Crocker was considered to be in a different category. To say that a man has been guilty of negligence in driving dangerously a vehicle, or a vehicle which may be dangerous, on a public highway was held to be defamatory. Nevertheless, the occasion being privileged, the plaintiff was not entitled to succeed upon the issue of libel unless he discharged the onus of proving that the persons who wrote the letter were actuated by malice or an indirect motive. In his reference to the scheme put into operation by Messrs. Crocker, the Judge found there was plenty of ground for assuming indirect motive ; and that, accordingly, the jury having taken a similar view, he was relieved of any anxiety as to whether it existed or not, the plaintiff being entitled to his judgment on this point.

Upon the question of negligent breach of duty, Hawke, J., observed that a person insured is entitled to be treated, as is the insurance company, with some consideration. Under its policy, the company could not do exactly as it liked ; it could not throw away the assured nor let any sort of injurious imputation be put upon him. He thought that Messrs. Crocker had disregarded the interests of their client, a person to whom they owed a definite duty, and that, by doing so, it produced results which had been injurious to him and for which they had to pay. The submission was made to him that the insured had authorized the company to take any course it liked, irrespective of his interests ; but the Judge declined to accept this proposition, remarking that the company was bound to consult the farmer's interests or tell him that he must conduct the proceedings for himself, and that the solicitors were in the same position, although the burden might fall a little more heavily upon them because they ought to have known perfectly well that, when they had a client, they must keep his interests in their minds. He held that if the case had been properly conducted, the farmer would have got a clean acquittal before Goddard, J., and the insurance company would not have had to pay anything. The issue having been left to him, Hawke, J., ordered the solicitors to repay to the farmer the sum of £1,132 12s. 10d. which, when he got it, had to go back to the insurance company. Whether or not it made a present to Messrs. Crocker of the money was not his concern. He also made a declaration that the farmer was not liable to pay Messrs. Crockers' costs of defending, although there is no evidence that he was ever asked to do so and the risk of his having to do so seems to have been somewhat remote.

The case is a powerful and painful reminder of the duties that a firm of solicitors owes to its client whom they regard as nominal but who is in fact an actual one. It also calls attention to the vagaries and curious outlook of juries. Here, the jury regarded the damage to the farmer as worth £4,000 and of this damage the only serious injury he had sustained was that which was done to his reputation by the improper admission of negligent driving. It is true that he claimed that the admission of negligence made a difference to his " no claim " bonus, but this would only be for one year ; and it might affect his standing with companies and the rate of his premium at some subsequent time if he wished again to insure against personal injury or property loss. These items are capable of assessment,

but an estimate of £25 to cover both of them would not be ungenerous. In the result, therefore, the jury considered that the blow to his reputation was worth £3,975, whereas Mr. Justice Goddard assessed the blow to the banker's skull which caused him considerable pain and suffering for many months as worth, if we eliminate approximate special damages, the sum of £750. In this modern world, it thus seems that a personal reputation for good driving is infinitely more valuable than the pain and suffering of the human body.

The case points another lesson, and it is not without importance in this Dominion. The clause in the farmer's policy is to be found, in the same or in a slightly modified form, in all our motor-vehicle policies. The position under a statutory cover is dealt with in s. 12 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, which entitles an insurance company to undertake the settlement of any claim against the owner and to take over as it thinks proper the conduct and control on his behalf of any proceedings, and to defend or conduct such proceedings in his name and on his behalf. While it retains the conduct and control, the statutory indemnifier is to indemnify the owner against all costs and expenses of and incidental to the proceedings, while the owner for his part has to sign such warrants and authorities as the company may require. It has not been decided to what extent under this section the company has the right to take a course of action opposed to the wishes of the owner, although the question of costs has been considered under the section: *South British Insurance Co., Ltd. v. Feeley and Soteros*, [1932] N.Z.L.R. 1392; *National Insurance Company of New Zealand, Ltd. v. Geddes*, [1936] N.Z.L.R. 1004.

It is submitted that the statutory indemnifier is protected if, for the sake of keeping down damages, it takes a course of action involving directly or indirectly an admission of liability on the part of its insured even in face of his direct opposition. At the same time, the position of the solicitor whom it employs is by no means so clear. By accepting service of a writ, or by having a writ handed to them by the company and filing a declaration of authority to defend, the solicitor constitutes himself the solicitor for the defendant, although in fact he may never at any stage see his client or communicate with him: *Re Crocker*, [1936] 2 All E.R. 899. As a matter of courtesy and caution, he should no doubt take steps to consult the wishes of his client, but what is his own position where the client insists on defending and the statutory indemnifier regards this course as involving needless risk of increasing the damages and is firmly opposed to it? Presumably, the duty of the solicitor would lead him to break entirely with the statutory indemnifier or to inform his client to go to other solicitors who will fight the case for him.

The position of the injured third party seems to be definite enough: if he succeeds in obtaining at the trial far more than that for which the insurance company could settle, he is still entitled to his judgment and it would seem that the statutory indemnifier has to pay it. But it may well be argued that the insured remains liable to reimburse the statutory indemnifier for breach of his statutory contract to the extent of the difference between the settlement figure and the jury's award. It may also be that the insurance companies, either under the statutory or the comprehensive cover, can meet the possibility of dual control of actions by an appropriate increase in the premium rates, but the difficulties of the solicitor cannot be relieved by so easy a method and it looks as if the result of *Groom v. Crocker* will be that New Zealand solicitors, in common with injured pedestrians, will have to seek some form of gratuitous indemnity from the Government.

Estoppel in Running-down Actions.

A Consideration of Priest v. Mowat.

With great respect, it is submitted that the decision of the learned Judge, Mr. Justice Ostler, in *Priest v. Mowat*, p. 260, *ante*, [1937] N.Z.L.R. 789, was wrong, and based upon a misapprehension of the effect of *Brunsden v. Humphrey*, (1884) 14 Q.B.D. 141. His Honour came to the conclusion that where there were separate trials of two causes of action between the same plaintiff and the same defendant, the first for damages to the person, the other for damages to property, both arising out of the same collision, the main issue in both trials being the same—*viz.*, by whose negligence was the damage caused—the finding of the jury in the trial of the first cause of action that the damage was caused by the negligence of both the plaintiff and the defendant (and the entry of judgment for the defendant accordingly) does not estop the defendant in the second trial from denying that his negligence had contributed to the accident.

The learned Judge relied upon *Brunsden v. Humphrey* (*supra*), as authority to show that the judgment given in the first action is no bar and cannot be pleaded as an estoppel in the said action. An examination of that case shows that damage to goods and injury to person, although they have been occasioned by one and the same wrongful act, are *infringements of different rights*; and give rise to *distinct causes of action*; and, therefore, the recovery in an action for compensation for the damage to goods is no bar to an action subsequently commenced for the injury of the person.

Why? Because, being separate causes of action, the plaintiff is entitled to the award of separate damages for each, and the fact that he recovered damages in respect of one cause of action is no bar to his recovery of further damages in respect of a different cause of action.

The defence of "judgment recovered" does not apply, for a plaintiff is allowed to bring successive actions in respect of the very same circumstances, provided those circumstances give rise to two different causes of action.

But it is submitted that *Brunsden v. Humphrey* (*supra*) is not an authority for the proposition that where the issue in question on the two different causes of action is the same—to whose negligence was the injury due—the finding in the first case on that issue is not binding on the same parties in the second case.

The law on the question of estoppel is thus stated in *13 Halsbury's Laws of England*, 2nd. ed. 409, para. 464:

> "Provided a matter in issue is determined with certainty by the judgment, an estoppel may arise where a plea of *res judicata* could never be established; as where the same cause of action has never been put in suit. A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him. Though the objects of the first or second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties and their privies. And this principle applies, whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact, or one of law, or one of mixed law and fact."

In *Outram v. Morewood*, (1803) 3 East. 346, 102 E.R. 630, the position was clearly explained by Lord Ellenborough. This was an action of trespass; and Lord Ellenborough said, at pp. 354, 633:

> "A finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to an action from injury to the same supposed right of possession. . . . And it is not the recovery, but the matter alleged by the party and upon which the recovery proceeds, which creates the estoppel. The recovery itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been on such issue joined, solemnly found against them."

The practice of separating the trials of causes of action for damage to the person and for damages to property has arisen out of the fact that the statutory insurer is not liable to indemnify a defendant for property loss arising out of the defendant's wrongful act. This practice, if the writer's submission is correct, is likely to lead frequently to contradictory decisions of Judge and jury, with this result:

Where there is a continuance of the present practice of the Judge's hearing the claim for damages to property, while the jury has retired to consider its verdict on the claim for damages for personal injury, and the two result in a contradiction, the first decision to be given estops the person against whom it is given from any advantage that may be given to him by the latter verdict. So that if the Judge's decision is the first to be given, and he finds for the defendant, the plaintiff is barred from the recovery of such damages as may subsequently be awarded to him by the verdict of the jury. It may also occur, where there are cross-claims for damage to property and for damages for personal injury, that a judgment by a Magistrate in a small claim for damages to property may estop the party against whom it is given from bringing or continuing an action in the Supreme Court claiming large damages for personal injury.

The only way to avoid such anomalies is to reverse the present judicial policy, and to provide for the trial of all claims between the same parties arising out of the same collision—whether they be cross-actions or claims for damages to person or to property—by the same tribunal and, at the same time, to give the opportunity to all concerned, whether as indemnifiers or not, to be represented, the decision of such tribunal to bind all of them.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Memorandum of Lease of Part of a Public Domain for the Purposes of a Golf-links.

(*Continued from p.* 328.)

7. The Lessee shall at its own cost provide all necessary workmen and caretakers to maintain, supervise and control the said golf-links.

8. The Lessee and its licensees shall not nor will cause or suffer any damage or injury to any trees on the said land and the Lessee will at all times during the said term use all reasonable means to preserve and protect all trees shrubs and ferns thereon and the Lessee will not cut down any trees whatsoever upon the said land or any part thereof without the consent in writing of the Board first had and obtained and provided that the Board may at any time provide and plant any further trees for shelter or other purposes in any position that the Board thinks fit save and except that no such trees shall be planted along or across any green or fairway forming part of the said golf-links And it is hereby declared that the plantations of trees at present upon the said land have been planted by the Board and the Lessee shall have no right whatsoever to cut down or remove or in any way interfere with the said trees or any of them without the express and prior approval of the Board in writing And the Board shall have the right at all reasonable times during the term hereof to enter upon the said land for the purpose of tending and protecting the said trees or of planting more trees in terms of clause 8 hereof.

9. The Lessee shall forthwith provide and thereafter maintain properly ploughed fire-belts or fire-breaks of at least eight feet in width for the protection of the said plantation in the position set out in the diagram attached hereto marked "B" to the satisfaction of the Board Provided that in lieu of maintaining such fire-belts the Lessee may where suitable maintain up to the edge of the plantations properly mown fairways of not less than the same width the intention of this provision being to protect the said plantations and future plantations of trees against fire spreading into the plantations from grass or scrub fires.

10. Except for the purpose of burning off rough grass and scrub which in all cases must be done under the supervision of a member of the ground staff the Lessee will not permit fires to be lighted save and except in a properly appointed fireplace within a building upon the said land and will use its best efforts that the members of the Lessee and those persons playing at golf upon the said land will use their best endeavours to avoid the risk of fire and to prevent grass and other fires upon the said land.

11. The Lessee "will fence" within the meaning ascribed to those words in the Sixth Schedule to the Land Transfer Act 1915 and will repair and maintain all fences on and near the boundaries of the said land throughout the said term and provided that neither the Lessor nor the Board shall be liable nor be called on to erect or repair or contribute towards the cost of erection or maintenance of any fence between the land hereby leased and any land adjoining thereto.

(*To be concluded.*)

Court of Review.

Summary of Decisions.*

By arrangement, the JOURNAL is able to publish reports of cases decided by the Court of Review. As decisions in this Court are ultimately determined by the varying facts of each case, it is not possible to give more than a note of the actual order and an outline of the factual position presented. Consequently, though cases are published as a guide and assistance to members of the profession, they must not be taken to be precedents.

CASE No. 75.† Case stated by an Adjustment Commission.

The applicant was a poultry-farmer occupying 10 acres, of which he had been in possession since October, 1933. He was registered as unemployed for the purposes of the Unemployment Act, 1930, and placed on the property pursuant to the scheme set forth in the Small Farms (Relief of Unemployment) Act, 1932. In consideration of being let into possession, he signed a document undertaking to execute any agreement, lease, or other document which might be required of him by the Small Farms Board, which Board thereupon advanced money to him to an ultimate amount of £575 4s. for working-expenses and for the establishment of a poultry farm on the said land; and, as security for such advances, the applicant executed in favour of His Majesty the King four instruments by way of security over the stock and chattels. There was not sufficient evidence to show that applicant was called upon to execute, or had executed, any document in accordance with his undertaking.

The Commission asked: (*a*) Is the applicant a "lessee" within the meaning of the word as defined in s. 4 of the Mortgagors and Lessees Rehabilitation Act, 1936, and entitled to have his liability in respect of his tenancy adjusted? and (*b*) Is the applicant a "mortgagor" within the meaning of the Act and consequently entitled to have his liabilities adjusted irrespective of the answer to the first question?

Held, 1. That the applicant was, at the most, a tenant at will in respect of the Crown land occupied by him and, as such, was liable to have his tenancy determined by one month's notice pursuant to the provisions of the Property Law Act, 1908. The essential ingredient of a lease being that a definite term be created, no such term was expressed or implied in the document signed by the applicant, which document had not been executed by the Crown. While a lease can be created verbally, though not for a period greater than one year, there was no evidence of any such verbal agreement.

2. That the applicant was a "mortgagor" within the meaning of the Act. He was admittedly a "farmer" within s. 4, and consequently was entitled to have his liabilities adjusted. The fact that his tenure of the farm lands occupied by him was for an indefinite period, terminable at short notice, did not destroy his status as a farmer. As a "farmer applicant" the whole of his unsecured debts or liabilities form part of his "adjustable debts": s. 4 (1); and they may be adjusted by the Commission. The arrears of rent may also be adjusted in pursuance of s. 44 (2).

CASE No. 84. Motion to determine whether applicant was a "farmer applicant."

Applicant personally occupied and farmed properties owned by him till the year 1930. He then let them to tenants who had occupied and farmed them to the date of judgment. The present tenancies will expire in June, 1938, but contain rights of renewal—for three years and four years respectively. Since leasing the farms, applicant had implemented his income by carrying on business at intervals as a dealer in stock remedies and farm implements. Applicant's income from his farms at the date of hearing and for the preceding three years has been £540 per annum, while his average income from his business activities had been £150 per annum. Applicant intended to resume occupation and farming of the properties, which he had occupied and farmed on his own account till 1930, when the existing leases expired. The property was subject to mortgage and one of the tenants had applied for adjustment of his liabilities.

Held, That the Court had power to make an order in terms of the motion.

In the course of its judgment, the Court said:

We have been referred to ss. 38, 29, 35, 36, 26, 27, and 21, but the point has not been contested and it is clear this Court has *jurisdiction* to make the order despite the fact that in the first place under the usual procedure the question is determined by an Adjustment Commission. Under s. 21 the Court may not only issue directions to Adjustment Commissions in the exercise of their powers and functions, but may at any time exercise any power or function of an Adjustment Commission.

A farmer is defined as a person whose normal income is derived wholly or principally from the use of lands for agricultural purposes. The question then is a matter of fact and given the income derived in this case by applicant from his farms and his business activities we find as a fact that applicant is a "farmer applicant."

He has not, in our opinion, if his income comes from the use of the land, to be also the person who actually does the work on the farm. This conclusion is assisted by the fact that *trustees* and personal *representatives* are included as farmers. In the definition of "farm mortgage," again, a mortgage is defined as one granted over any land that at the passing of the Act is used by or on account of the mortgagor, being a farmer, exclusively or principally for agricultural purposes. In s. 4 (2), again, the wording is "where the use of any land by or on account of any mortgagor or lessee . . . has ceased . . . "

It is true that in s. 2, which sets out the general purposes of the Act, the purpose is stated to be to retain them in the use and occupation of their farms as efficient producers and in regard to home applicants to retain them in the occupation of their homes.

However, these general statements do not in our opinion mean that at all times applicants must be in personal occupation and themselves using the land.

The definitions really control the determination of this question. The test is, whether the use is the principal source of the income in the case of a farmer applicant. In the case of a home applicant, again the question is one of fact as to whether it is required for a home or wanted for a home despite the fact that circumstances may have, as is frequently the case where people have been unemployed, been temporarily deprived, by reason of having to seek employment elsewhere, of personal use of the home as a home.

* *Continued from p. 248.*
† *To follow Case No. 74 on p. 236.*

London Letter.

By Air Mail. Strand, London, W.C. 2,
September 10, 1937.

My dear EnZ-ers,—

Time was when I (and no doubt you) learnt the lesson about doing with all one's might the task in hand. Pursuant to the implications of that injunction, the effect of which seems to have prevailed throughout an otherwise misspent life, I have been devoting myself with all my might to the Long Vacation, which began on August 1; and so you went without a letter, last month! The prickings of an unruly conscience have become somewhat troublesome of late; so, although we do not "go back" until October 11, a stray week-end in Town (with everybody else away) has had the effect of a stay order on my resolutions; and, here we are together again. (And, may be, the more we are together . . . Anyhow, here's hoping!)

Evidence on Commission.—Since we are speaking of the legal holidays, you might be interested to know that once upon a time the Long Vacation over here was extensively used and profitably enjoyed by legal practitioners in visiting not only foreign countries, but various parts of the British Empire for the purpose of taking evidence or commission: a lucrative way of "going places" in the off-season at Home. In a book written by Judge Lailey not long ago, *Jottings from a Fee Book*, he tells of the days when such commissions "were not uncommon and did not meet with the regrettable discouragement in the Courts, on grounds of expense, which they afterwards encountered."

Bilbao, so helpful to the Empire during the Great War and so sadly in the news of late, was visited by Judge Lailey (when a barrister) during the Long Vacation exactly forty years ago. He said:

> "It was a mining case. My clients, a firm of merchant princes in the City, had contracted for a supply of iron ore from Spanish mines, in the neighbourhood of Bilbao. They complained not only of low quality, but of breach of an express or implied term of the contract; the term being that the ore supplied should be up to the standard of the average output of the particular mines, worked fairly and in the ordinary course; whereas 'low grade ore—in some instances mere sweepings of the mine—had been selected for their shipments.'"

A mass of local evidence was required, and it was taken before the British Consul at Bilbao, but local influence was too strong for Mr. Lailey's clients.

> "The man in control of the defendants' mines lived in the locality. He was a man of rank and, as we soon found out, a star of magnitude and a power in the land.
>
> "Industriously but unobtrusively the plaintiff's local agent had collected statements from numerous workmen and others. If substantiated, they abundantly proved our case; but some of these gentry faded from the picture (with, I think, their 'conduct money'), and others who did face the music wilted in the dominating shadow of the Grandee, who honoured every day of the proceedings with his presence. Two or three of the witnesses, from whom we had hoped most, refused point-blank at the last moment to go into the chair. And we had no means of compelling them. We were told, incidentally, that no insurance company would quote terms for a policy on the life of any man who could remember and give in evidence anything useful to the plaintiffs. The commission sat and perspired through several sultry weeks . . .
>
> "At the trial, before Bigham, J., Edward Clarke, who led me against Joseph Walton on the other side, failed to satisfy the Court and establish what was in substance a charge of dishonest dealing."

Domestic Courts.—At the beginning of next month the Summary Procedure (Domestic Proceedings) Act, which received the Royal Assent at the end of last session, comes into effective operation. In anticipation the Home Office have sent out an instructive circular, the second of its kind, telling Justices throughout the country what they can do. The general scheme of the measure is to set apart in a special class proceedings under the Guardianship of Infants Acts and under Summary Jurisdiction (Separation and Maintenance) Acts, and to provide not only an atmosphere of conciliation, but a Court well balanced to promote and help condonation and forgiveness. The drab surroundings of the ordinary Courts are not favourable to the prevalence of such an atmosphere. Accordingly, the Home Secretary suggests (what the Act did not do) that if it is possible the Justices should sit in some room other than the ordinary courtroom. We are all sensible of the effect of Courts and rooms upon the mind and spirit, and what the Home Secretary indicates seems to be an excellent suggestion.

The Shooting of an Ambassador.—The shooting by Japanese airmen of Sir H. Knatchbull-Hugessen, the British Ambassador in China, is an example of the lawlessness of air-warfare, which has reduced warfare to the indiscriminate slaughter of civilians, a "lawlessness in warfare of which even barbarous nations would be ashamed" as Grotius wrote in 1625, when there used to be distinction between civilized and savage peoples. The British Government in their Note to Japan might have based their protest on the universal principle of Public International Law that the person of a diplomatic agent—amongst whom Ambassadors occupy the first rank—is inviolable. An offence committed against the person of an Ambassador is an offence of peculiar gravity, and is a crime against the State by which he is accredited. But the British Note recognizes that the real issue does not relate to the attack on an Ambassador as such, but to attacks on non-combatants. "The foreign, even the diplomatic, status of the occupants [of the cars] is also irrelevant. The real issue is that they were non-combatants." This gives the incident its true significance. An intentional attack on the British Ambassador is not suggested; but the attack in which he was injured was a breach—to quote from the Note—of "one of the oldest and best established rules of international law that direct or deliberate attacks on non-combatants are absolutely prohibited, whether inside or outside the area in which hostilities are taking place." The Note is in effect a protest against the modern military tendency to ignore the distinction in warfare between combatants and non-combatants, and to employ the methods of uncontrolled savagedom.

Desertion.—The senior Courts being at present inoperative, you will, I hope, pardon me for trying to seek some law for your delectation in the lower realms. When does a husband desert his wife? The question was raised last week in a Metropolitan Police Court when a wife applied for a separation order against her husband on the ground of desertion. The husband appeared by a solicitor who pleaded that his client was in prison, and therefore not capable of deserting. The learned Magistrate adjourned the case in order that the wife might obtain professional assistance to answer this plea. As the matter is thus *sub judice*, it would not be proper to express an opinion; but one may refer to *Townsend v. Townsend*, (1873) L.R.

3 P. & D. 129, which, on the facts, appears to be the nearest to the present case.

Summary Justice.—It must be rare for Magistrates to be confronted with a case where a prosecutor, having failed to make good his charge before them, forthwith assaults one of the acquitted defendants and strikes him with such violence as to draw blood. Have you any precedent for such an episode? It is the more astonishing when we read that the person who committed this unheard-of assault was himself an ex-sergeant of the Metropolitan Police. He had charged two men with stealing motor-cars, one of which was his own. A defence was put forward which the Magistrates believed—as well they might do—and dismissed the charges. Thereupon the complainant took the law—if one may so call it—into his own hands with the result described. In the circumstances, many people may think that the sentence of six weeks' imprisonment with hard labour erred, if anything, on the side of brevity. Not only was the assault an offence against the person injured, but it was a grave contempt of Court which the Magistrates would have been entitled to consider in assessing the penalty.

Mr. Justice Blair.—His Honour, you will be pleased to know, is thoroughly enjoying his year's leave; and that he shows every appearance of doing so, I was happy to observe near New Zealand House the other day. He has not been overlooked by the legal journalists, and his presence at the Lord Mayor's annual banquet to His Majesty's Judges was the inspiration for a nice little par. about him in the *Law Journal* (London) recently.

Toleration in World Affairs.—Lord Macmillan is known to Empire lawyers as a Law Lord whose judgments in the Privy Council and elsewhere are models of clear exposition, good law, and good sense. His address, delivered at the International Congress of Comparative Law at the Hague on August 4 has been widely read and approved.

The keynote of his speech was toleration, the need and the goodness of it in international law and international relations. He did not expect or desire the fusion of all laws and the removal of diversity; but in the commercial sphere he said that much good might be gained by uniformity, where diversity is now merely irritating and serves no useful purpose.

"International commerce," he said:—

> "is constantly hampered by legal difficulties. Many of the most exasperating of these difficulties are due to differences which are merely arbitrary and accidental, and which, with good will, could easily be removed. The wheels of commerce could be made to revolve more smoothly by the elimination of legal differences which merely cause unnecessary friction. There is, for example, no reason in the nature of things why the laws relating to commercial documents should not be the same throughout the world. There are large spheres of human activity in which uniformity of practice is desirable and can be attained without any sacrifice of national *amour propre*, to the immense advantage of all concerned."

He continued:

> "This Congress has a practical aim. The day of isolated communities, content to be a law unto themselves, is past and gone in a world all parts of which are daily being brought into physically closer contact by rapidly improving means of transport. To meet these new conditions the law must develop a new technique. Within each State the social object of the law is to enable its citizens to live together and pursue their avocations in peace and security. But the citizen of each State is also a citizen of the world, and his interests and his relationships tend more and mor to transcend the physical boundaries of his own country."

Another Lawrence for Arabia.—The new and first Chief Justice of our newest Colony has been appointed by King George VI, and Mr. James Taylor Lawrence is Chief Justice of Aden. Thus has the enhanced importance of the Colony received judicial recognition, and the place, which as a mere Possession could boast no more than a good "District and Sessions Judge," has now a Lawrence, C.J. Like so many other able Judges of the Empire, he acquired his judicial qualifications by way of the Indian Civil Service, which he joined after the open competitive examination of 1911. Not long afterwards he became Assistant Collector, Magistrate, and Assistant Judge in Bombay. He served for a long while with distinction in the financial department, and later became Sessions Judge in the Deccan in 1926. He returns to the place he left on his retirement in 1932; for in 1927 he went to Aden as additional Sessions Judge, and there became Judge and Sessions Judge later in the same year. During the period he acted as Judicial Assistant in the Residency. He is not yet fifty years of age, the date of his birth being January 28, 1888. He was educated first at King Edward's Grammar School, Birmingham, and later at Aberdeen University, at Trinity College, Cambridge, and at University College, London. He returns to Aden, as Chief Justice, after five years in retirement.

Music hath Charms.—A Highland piper is an inspiriting sight in his native haunts or at the head of marching men, but is a little pathetic as a solitary figure in a West End street when his national instrument is used to attract largesse. He is liable to be fined too, it seems, for at Bow Street the other week one Alastair MacDonald had to pay eight shillings "for using a noisy instrument, to wit, bagpipes, for the purpose of obtaining money or alms at Jermyn Street, Piccadilly."

Let not our Dunedin friends be annoyed. The pipes have their uses, no doubt. There is a quaint ceremony of piping in the haggis, in which the strains of the bagpipes serve to distract the attention of the guests from what they are about to eat. And there is nothing offensive in the word "noise." No one minds a joyful noise or a merry noise. It is volume, not quality, of which the authorities complain. If pipers are to be allowed in Lambton Quay they may drown the mellifluous motor-horn or the machine-gun rattle of the super-charged sports car. We must stick to the right noises.

In the aforementioned case, the police constable stated, and policemen are always right, that it is impossible to play the bagpipes softly. Sassenachs would perhaps complain that it was impossible to play a tune, asking, in the words of the poet,

> "*If you really must play on that cursed affair,*
> *My goodness! play something resembling an air.*"

It can be done, for the same poet tells of his hero's answer to the challenge:

> "*It was wild—it was fitful—as wild as the breeze—*
> *It wandered about in several keys;*
> *It was jerky, spasmodic, and harsh, I'm aware,*
> *But still it distinctly suggested an air.*"

I quote the poet confidently to you, my friends, because he was a Magistrate, even if there are some who will deny that he was a poet.

Yours as ever,

APTERYX.

Legal Literature.

The Trial of Buck Ruxton. Edited by R. H. Blundell, Barrister-at-Law and G. Haswell Wilson, M.D., Professor of Pathology in the University of Birmingham, pp. lxxxvii+457, illustrated. London: Butterworth and Co. (Pub.), Ltd.

This, the sixty-sixth of the Notable British Trials, is one of the most interesting. The case possesses, it is true, but little legal interest, the objection taken to the admission, upon the trial of the indictment of murder of the wife, of the evidence as to the identification of the servant's body and clothing, having nothing in law to sustain it, and being made, it is to be supposed, because it is the sort of point counsel for the defence must safeguard himself by taking, in case it may afterwards in some way turn out to be useful upon an appeal. The interest of the case is medical, in the masterly reconstruction of the bodies from much dissected and mutilated remains of two bodies whose parts were mixed up together; and psychological, in the warped and contradictory character and capacity of the accused.

It is impossible to do justice to the medical matters in a review. The reader will find them exhaustively and lucidly dealt with in the evidence of the expert witnesses, and will have the assistance of an excellent summary by careful hands, in the introduction.

The psychological study revolves itself into two parts, that of the husband of the living woman, first her potential and then her actual murderer, and then that of the concealer of a crime.

The first of these two, no doubt, linked aspects of the man is lit by his own observation, "We were the kind of people who could not live with each other and could not live without each other." He was a wildly jealous man, she, apparently, a tantalizing woman. There is nothing surprising that this conjunction produced disaster. The second aspect of Ruxton's psychology is a little more out of the ordinary. Here was a man, prepared to commit a second murder in order to eliminate a witness, ready and able to do an elaborate dissection of two bodies and to dispose of them not unskilfully, yet splashing, literally splashing, clues all over his house, giving away blood-soaked carpets and garments enough to convict a regiment of murderers, putting his head in the lion's jaws by going and talking to the police.

Not that he could ever have hoped to escape detection, especially once he had allowed himself to be forced into killing the maid, Mary Rogerson. Sooner or later the hue and cry after her was bound to be up, and, as he had killed without reflection, the clues to her murder were too numerous for destruction. But he had marvellous luck with his charwomen, who seem to have been singularly unimaginative or timid people. Blood, and more blood. Carpets and clothing refusing to give up their gore. But everyone trying to clean up the mess to the best of their ability. It is an amazing exhibition of innocent participation. Even the odour itself of death did not send them running to the police.

Of course, returning to Ruxton, all this cutting up and carting miles away of the dreadful *disjecta membra* of his crime was action forced upon a frantic man, because, however homicidally inclined, it is certain that at the last he killed suddenly and impulsively. The nightmare horrors of the disposal of murdered people always shock decent folk. But they do not, necessarily, connote outrageous wickedness. A Landru, with his stove and fuel ready to incinerate the corpses of his victims, is a ghoul. A Ruxton, slaying one woman in crazy jealousy and another in unreasoning panic, and then doing bloody butcher's work for hours in the vain hope of snatching safety, is indeed a horrifying person, but, looked at calmly, a poor human creature in anguish too. It is a case for the Pharisee's prayer, uttered humbly, in another sense. The readers of trials for murder may well thank God that they are not as these men.

Practice Precedents.

Petition by Administrator to have Estate administered under Part IV of the Administration Act, 1908.

Where an administrator has ascertained that the assets of the deceased available or reasonably liable to be available for payment of the debts of the deceased are not sufficient, or cannot be conveniently converted into money for the purpose of meeting the several claims thereon, he may petition the Court to have the estate of the deceased administered under Part IV of the Act: Administration Act, 1908, s. 54. In *In re Areta Kerei (dec'd).*, [1922] N.Z.L.R. 174, it was held that Part IV of the Act applies to the estate of a deceased Native.

As to the effect of an order under Part IV on a mortgage of after-acquired stock, see *Silk v. Dalgety and Co., Ltd.*, [1923] N.Z.L.R. 1065.

On the application of an administrator who has filed such petition, or in the event of his failing to make an application at the next available sitting of the Court, then on the application of any creditor or claimant of or upon the estate of the deceased, or any person beneficially interested therein, the Court may, if it thinks fit, make an order to administer the estate under Part IV of the Act: s. 56. A creditor may petition the Court, in the circumstances as set forth in s. 57; and, as to the jurisdiction of the Court in such cases, see s. 58, and as to when an order may not be made, see s. 59. The Court may order the estate to be administered by the Official Assignee or the Public Trustee: s. 60.

Rule 531v of the Code of Civil Procedure provides that before any order for the administration of the estate of a deceased person under Part IV of the Administration Act, 1908, can be made, due notice of the application for such order must be given to the Official Assignee in Bankruptcy or to the Public Trustee, as the case may require, or the consent in writing of such Official Assignee or Public Trustee, as the case may be, or his solicitor or counsel, to the making of such order must be filed in the Court.

The effect of an order being made for the administration of an estate under Part IV of the Act is that the whole of the estate, at the date of the presentation of the petition upon which such order is made, vests in the administrator or the Official Assignee in Bankruptcy or the Public Trustee or such other person as aforesaid as the Court by such order or any subsequent

order directs; and the person in whose favour the order is made must forthwith proceed to realize, administer, and distribute the same in accordance with the law and practice for the time being in force with respect to the realization, administration, and distribution of the property of a bankrupt debtor, subject, however, to the modifications made therein by the Administration Act, 1908, or any rules thereunder: s. 61; and see the Administration Rules, 1889 *New Zealand Gazette*, p. 438, and Schedule thereto.

During the pendency of a petition for administration and with respect to every estate ordered to be administered without any limit, the Supreme Court has the same jurisdiction, authority, powers, and functions as for the time being belong to the Court in its bankruptcy jurisdiction and are necessary for the purposes of this Act: s. 63; for the provisions as to the administration of estates, see s. 64.

An appeal lies from any order of the Court made under Part IV of the Act in like manner as the same would lie from a decree or order of the Court in its bankruptcy jurisdiction: s. 66.

The rules above referred to, and in particular RR. 18 and 19, deal with the manner in which any surplus remaining in the hands of an appointee after payment in full of all debts due from the debtor, together with the costs of administration and any other moneys that would be payable in case of bankruptcy are to be dealt with.

As to what are testamentary expenses, see *Sharp v. Lush*, (1879) 10 Ch.D. 468, and *In re King, Travers v. Kelly*, [1904] 1 Ch. 363.

A motion is necessary in support of the petition: see R. 414A of the Code of Civil Procedure, which provides that, except where express provision is made to the contrary, relief sought by petition is to be obtained by moving upon the petition for an order in terms of the prayer of the petition or for such other order as the Court may consider proper. Such motion must be set down and moved in the manner and time provided in the Code of Civil Procedure, and notice thereof, if necessary, is to be served in accordance with the provisions of the Administration Act, 1908. The *grounds* upon which a motion is made must be expressly set out. It is not sufficient to refer to an affidavit on the file or to move for an order in terms appearing in the petition, or "upon the grounds appearing in the affidavit filed herein."

The following forms are appropriate to an application to administer under Part IV of the Act, as made by a duly appointed administrator.

PETITION OF ADMINISTRATOR TO HAVE ESTATE ADMINISTERED BY THE COURT UNDER PART IV OF THE ADMINISTRATION ACT, 1908.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER OF the Estate of A. B. &c. deceased

AND

IN THE MATTER OF the Administration Act, 1908, Part IV.

I C. D. of &c. the Administrator of the said deceased do hereby petition the Court as follows:—

1. That the said deceased died on or about the day of 19 and on the day of 19 Letters of Administration were granted to me by this Court and I was appointed and am now the administrator of the estate of the said deceased.

2. I have ascertained that the assets of the said deceased available or that are reasonably likely to be available for payment of the debts of the said deceased are not sufficient and as to part cannot be conveniently converted into money as appears by the account hereunto annexed.

3. I hereby petition the Court to have the estate of the said deceased administered under the provisions of the said Act by the Official Assignee in Bankruptcy.

Dated &c.

Signature:

Witness:.....

AFFIDAVIT IN SUPPORT.

(*Same heading.*)

I C.D. &c. make oath and say as follows:—

1. I am the petitioner named in the petition hereunto annexed.

2. The accounts hereunto annexed marked "A" show the assets debts and liabilities of the said deceased so far as they are known to me.

3. The several statements set forth in the said petition are within my own knowledge true.

Sworn &c.

EXHIBIT NOTE "A."

Statement of Assets, Debts, and Liabilities.

Assets.

Stock-in-trade at	[*place*] estimated at ..	£
Book debts, estimated to produce	.. ..	£
Cash in hand	.. ..	£
Furniture and other chattel property	.. ..	£
Real property [*state full particulars*]	.. ..	£
Surplus from securities in hands of secured creditors	.. ..	£
Total assets	..	£

Debts and Liabilities.

Unsecured creditors, according to list attached hereto, marked "B"	.. .. ..	£
Secured creditors, according to list hereto attached, marked "C"	.. .. ..	£
Less estimated value of securities	.. ..	£
Surplus	.. .. ..	£
Other liabilities, according to list hereto attached marked "D"	.. .. ..	£
Total debts	..	£

According to the above list there appears to be a deficiency in the said estate amounting to £ [*state any other particulars necessary to explain the account*].

Signature:

Witness to signature:

MOTION IN SUPPORT OF PETITION.

(*Same heading.*)

TAKE NOTICE that Mr. of Counsel for the above-named C. D. the petitioner herein will move this Honourable Court (in Chambers) before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court House at on day the day of 19 at the hour of 10.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard for an order that the estate of the said deceased be administered under the provisions of Part IV of the said Act by the Official Assignee in Bankruptcy at upon the grounds that the assets [*set out in para. 2 of petition, down to "money"*].

Dated at this day of 19 .

Solicitor for petitioner.

To the Registrar and to the Official Assignee at .

This notice of motion is filed by &c.

NOTE.—If the Official Assignee consents a consent may be filed signed by him; if not, an affidavit of service must be filed.

ORDER FOR ADMINISTRATION UNDER PART IV OF ADMINISTRATION ACT.

(*Same heading.*)

Before the Honourable Mr. Justice
day the day of 19 .

UPON READING the petition of C. D. &c. the administrator of A. B. &c. deceased and the motion in support of such petition for an order on the said petition under Part IV of the Administration Act 1908 IT IS ORDERED that the estate of the said A. B. deceased be administered under Part IV of the Administration Act 1908 and that the said C. D. shall cease to administer the said estate and that the same shall be administered by the Official Assignee in Bankruptcy at .

By the Court.

Registrar.

Recent English Cases.

Noter-up Service.

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

ARBITRATION.

Reference to Court—*Extra Cursum Curiæ*—Order for Account—Master Dealing with Questions Outside Order at Request of Counsel on Both Sides.

Where the Master, at the request of counsel on both sides, deals with questions outside the scope of the matter referred to him, the Master's certificate may be enforced as an arbitrator's award.

WYNDAM *v.* JACKSON, **[1937] 3 All E.R. 677. K.B.D.**

As to proceedings *extra cursum curiæ*: see HALSBURY Hailsham, edn., 1, par. 1072; DIGEST 2, pp. 317, 318.

CHARITIES.

Charitable Gift—Gift for Purchase of Site and Erection on it of Public Hall to be Presented to Local Authority for Public Purposes.

A gift of money for the purchase of a site and the erection on it of a public hall to be presented to a local authority for such public purposes as the local authority from time to time considers desirable is a good charitable gift.

Re SPENCE'S ESTATE, BARCLAYS BANK, LTD. *v.* STOCKTON-ON-TEES CORPORATION, **[1937] 3 All E.R. 684. C.D.**

As to gifts for public purposes: see HALSBURY, Hailsham edn., 4, pars. 161–168, 177–179; DIGEST 8, pp. 255–260.

EVIDENCE.

Return to Potato Marketing Board—Refusal to Produce.

A farmer's return to the Potato Marketing Board cannot be disclosed in legal proceedings other than proceedings under the Agricultural Marketing Act, 1931.

ROWELL *v.* PRATT, **[1937] 3 All E.R. 660. H.L.**

As to privilege from production: see HASLBURY, Hailsham edn., 13, par, 801; DIGEST 22, pp. 392–395.

LANDLORD AND TENANT.

Rent Restriction—Rates—Compounding by Landlord—Calculation of Net Rent—Deduction of Rates "Chargeable on the Occupier."

In order to ascertain the "net rent" of controlled premises, the landlord must deduct from the standard rent the amount of the rates with which the occupier would have been charged, and not merely the amount payable by the landlord.

STROOD ESTATES CO. LTD., *v.* GREGORY, **[1937] 3 All E.R. 656. H.L.**

As to increases under the Rent Acts: see HALSBURY, Hailsham edn., 20, pars. 383–386; DIGEST 31, pp. 567–568.

REVENUE.

Entertainments Duty—Restaurant in Converted Theatre—Elaborate Revue During Meals—Minimum Charge.

A minimum charge made in a restaurant, where a revue is performed during meals, may be liable to entertainments duty.

A.-G. *v.* LONDON CASINO, LTD., **[1937] 3 All E.R. 858. K.B.D.**

As to entertainments duty: see HALSBURY, Hailsham edn., Supp., Revenue par. 1216; DIGEST 39, pp. 300, 301.

SOLICITORS.

Negligence—Action on Motor Insurance Policy—Solicitor Giving Effect to Pooling Arrangement Among Insurance Companies.

Although an insurance company may be entitled, under the terms of a policy, to have absolute conduct and control of all or any proceedings against the assured, the solicitors retained by the insurance company to defend such proceedings must not act without considering the interests of the assured.

GROOM *v.* CROCKER AND OTHERS, **[1937] 3 All E.R. 844. K.B.D.**

As to duty of solicitors: see HALSBURY, 1st edn., 26, par. 1253; DIGEST 42, pp. 91–100.

STREET TRAFFIC.

Pedestrian Crossing—Accident—Failure of Motorist to Stop Before Reaching Crossing—Contributory Negligence of Pedestrian.

Although in some cases a defendant can plead contributory negligence as a defence to a claim based on a breach of statutory duty, yet the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, *regs.* 3, 4, *are so framed as to make it impossible for this defence to be raised in cases to which these regulations apply.*

BAILEY *v.* GEDDES, **[1937] 3 All E.R. 671. C.A.**

As to pedestrian crossings: see HALSBURY, Hailsham edn., 16, par. 724; DIGEST Supp. Street and Aerial Traffic, Nos. 31a, 31b.

Bills Before Parliament

LOCAL BILLS.

Dunedin District Drainage and Sewerage Amendment.
Hurunui Licensing Committee Enabling.
Motueka Borough Council Empowering.

PRIVATE BILL.

Wellington Diocesan Board of Trustees (Church of England) Empowering.

PRIVATE ESTATE BILL.

Nelson Diocesan Trust Board Empowering.

ACTS PASSED.

1. Imprest Supply.
2. Industrial Conciliation and Arbitration Amendment.
3. Fair Rents Amendment.—Section 2 extends the principal Act until September 30, 1938. Section 3 repeals s. 2 (*c*) of the principal Act and extends it to apply to any premises forming part of a building originally designed and constructed for the purpose of being let as more than two separate flats or apartments, the basic rent of each of which is to be determined in accordance with the provisions of s. 5 of the principal Act; this is not retrospective. Section 4 repeals s. 13 (*a*) of the principal Act, and substitutes the following paragraph: "(*a*) That the tenant has failed to pay the rent lawfully payable in respect of the premises or has failed to perform any other conditions of the tenancy."

Rules and Regulations.

Education Act, 1914. Grading of Schools Regulations, 1937. September 15, 1937. No. 235/1937.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (North Canterbury) Regulations 1936, Amendment No. 2. September 22, 1937. No. 236/1937.

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