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"Patience is the chiefest fruit of study. A man by much reading gains this chiefest good, that in all fortunes he hath something to entertain and comfort himself withal."

—JOHN SELDEN (1584–1654),
Table Talk, 130.

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The Urgency of Gaol-Delivery.

IN our last issue we published the statement of the learned Chief Justice, the Rt. Hon. Sir Michael Myers, concerning the reasons which prompted him, while acting as Deputy Governor-General, to preside at criminal trials during the first Criminal Sessions of the present year at Wellington. We recall that His Honour said, *inter alia*,

> "In normal conditions, while the Chief Justice is acting temporarily in another capacity, he avoids sitting in criminal cases, or in civil cases in which the Crown is directly interested. That was I believe the rule acted upon at least as far back as the time of Chief Justice Sir James Prendergast.
>
> "It is, however, as I have always understood it, a fundamental tradition of the English Judiciary—and in New Zealand we follow the English traditions—that gaol-delivery should never be postponed, unless such postponement is absolutely unavoidable, and that no man's liberty shall remain in peril for a single avoidable hour."

It is not our purpose to trace the development of the royal jurisdiction in England, when it was personally exercised by the King. But it may be of interest to indicate why the learned Chief Justice of New Zealand, except in an emergency such as recently arose, does not preside at criminal trials whenever he is acting as Deputy of the Governor-General during His Excellency's absence from the Dominion. Viner mentions two cases in which Henry III sat in person during civil trials in the Court of King's Bench, which survives to-day as the King's Bench Division of the High Court of Justice. But, very early in the development of judicial institutions, the Court of King's Bench acquired the character of a true Court of Justice, whence it followed that, whether the King were actually present or not, judgment could be given by his Judges only, for the King could not be Judge in his own cause. (Viner, *4 Inst.* 73). As Blackstone says,

> "Yet though the King himself used to sit in this Court, and is still supposed so to do, he did not, neither by law is he empowered to, determine any case or motion, but by the mouth of his Judges to whom he hath committed his whole judicial authority" (*3 Comm.*, 41).

To-day, the style of the Court of King's Bench is *coram rege ipso*, and all processes are returnable accordingly. The fiction of the King's actual presence in the Court is maintained; but, on the other hand, "the King himself cannot be judge *in propria causa*," as Lord Coke puts it. With the result, as Bracton says, in the King's Bench, those "*capitales justiciarii proprias regis causas terminant.*"

Since the passing of the Supreme Court Ordinance of January 13, 1844 (Sess. III, No. 1), the Supreme Court of New Zealand has jurisdiction in all cases as fully as, *inter alia*, the Court of Queen's Bench then had in England; and the traditions of that Court are perpetuated in our Supreme Court procedure in criminal matters, except when statute law supersedes them. The Governor-General, who is the King's personal representative, cannot sit in the King's Court, nor can he who functions as the King's representative in his stead do so in normal circumstances. The fiction of the law in his regard is maintained.

It is, however, a principle of our law that nothing may operate to work an injury. Though the proper operation of a fiction of the law is to prevent a mischief, or remedy an inconvenience that might result from any general rule of law, still *in fictione juris semper substitit aequitas*. Consequently, when an emergency arises during the Governor-General's absence, the Chief Justice, even though he may be acting then in the capacity of Deputy Governor-General and the King's personal representative, has a duty to sit, *qua* one of His Majesty's Judges, during current criminal sessions to prevent the mischief of delay in gaol-delivery; so that, in the words of the present learned Chief Justice, "no man's liberty shall remain in peril for a single avoidable hour."

The right of the subject to personal liberty is his most prized possession. And the principle of the inviolability of that liberty is inherent in our Constitution. Its preservation was the main purpose of Magna Carta, which, by its thirty-ninth and fortieth clauses, provided:

> "No free man shall be taken or imprisoned or disseissed, or outlawed, or exiled, or anyways destroyed, nor will we pass on him or condemn him, unless by the lawful judgment of his peers, or by the law of the law. To none will we sell, to none will we deny or delay, right or justice."

Hallam, in his *History of the Middle Ages*, ii, 327, has termed these the "essential clauses" of the keystone of our liberties, for, he says, they "protect the personal liberty of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation." Because these famous clauses were interpreted as safeguarding the principle that no man should be imprisoned without due process of law, as Professor Holdsworth tells us in his *History of English Law*, Magna Carta

> "has exercised a vast influence both upon the manner in which the Judges developed the writs which could be used to safeguard this liberty, and upon the manner in which the Legislature has assisted that development.
>
> "Without the inspiration of a general principle with all the prestige of Magna Carta behind it, this development could never have taken place; and, equally, without the translation of this general principle into practice, by the invention of specific writs to deal with cases of its infringement, it could never have taken practical shape" (ix, 104).

We find, in the words of Fitzjames Stephen in his *History of the Criminal Law in England*, that, according to the oldest theory, the criminal law, as well as the rest of the common law of the land, was, in unwritten tradition, in the keeping of the Judges, who, from the earliest times to the present day, have enjoyed a qualified power of legislation by virtue of this right to declare with authority what the law is. He continues:

> "That part also of the criminal law which has been expressly enacted by the supreme legislature has always been made

with express reference to the existing state of things. . . . The law of crimes and punishments has been more than once recast and composed, to a great extent by statutes of which few are fifty years old."

But, he points out, the Courts where the criminal law is administered have undergone few changes, and it is possible to trace the steps by which they were formed out of institutions which existed at the time of Henry III.

The *Mirror of Justices*, which Lord Coke spoke of as "a very ancient and learned treatise of the laws and usages of this kingdom whereby the commonwealth of our nation was governed," and which, he said, came to us from the times before the Norman Conquest (Professor Maitland disputed this), we read among the abuses against which Justices are warned:

"55. It is an abuse that gaols are not delivered of deliverable prisoners without delay after writ made against them."

Bracton, who lived at the time of Magna Carta, and who wrote in the reign of Henry III on the laws and customs of England, shows in his first chapter how and in what order the Judges ought to proceed in the eyre (*in itinere*), that is, when they are presiding over assizes, which, he indicates, were always to be held on a day fixed by the Judge. The Justices in eyre were first appointed in 1176, as we learn from *Hale's History of the Common Law*, 170, and were succeeded by justices of assize and gaol-delivery. Their authority was re-established by Magna Carta in 1215, in the year before Henry III came to the throne.

In *Staunford's Pleas of the Crown*, which was written and published during the lifetime of Shakespeare, we read of the commissions of gaol-delivery, which was the chief purpose of the assizes, over which King's Bench Judges presided while on circuit, and we there learn:

"Nec etia de cetero concedatur breue ad audiendum and terminandu appella cora justiciariis assignatis: nisi in speciali casu and certa causa cum dns Rex hoc preceperit, sed ne huiusmodi appellati vel indictati *diu detineant in prisona . . . sicut in Magna Carta and aliis statutis dictum est*" (55b).

Lord Coke, at a later date, speaking of the Court of King's Bench tells us:

"The Justices in this Court are the sovereign Justice of oyer and terminer gaol delivery, &c., and conservators of the peace within the realm." (*4 Inst.* 73).

And Blackstone says that the Court of King's Bench "protects the liberty of the subject by speedy and summary interposition." (*Comm.* iii, 42, 43).

We treat as a commonplace the principle that no Judge should sit and hear an action to which he is a party. But Chief Baron Comyns in his *Digest of the Law of England*, iv, 435, when treating of the Duty of Judges, places this third in importance. Above all, he says, Judges ought to do justice according to law; and they should do right to all the King's subjects, great and small, *without delay*. He gives as his authority the statute 20 Ed. I, c. 2, which commanded the Judges not to delay justice. Another statute, 27 Ed. I, c. 3, commanded Justices of Assize to deliver the gaols of all prisoners, within liberties or without, whenever they begin the assizes to which they are commanded.

Throughout the history of English law runs the principle of the preservation of the liberty of the subject, that no man should be punished without being brought to answer by due process of law, and that justice should not be delayed. For instance, the Petition of Right (3 Car. I, c. 1.) founded its provisions on the Magna Carta and the statute 28 Ed. III, which re-asserted the principle of liberty of the subject and declared that no free man should be imprisoned or delayed justice contrary to the laws and franchise of the land. Gardiner says that the Petition of Right must be deemed by constitutional historians as second in importance only to the Great Charter itself (*History of England*, vi, 311). And Professor Holdsworth, for the constitutional lawyers, says that it was the first of those great constitutional documents since Magna Carta, which safeguard the liberties of the people by securing the supremacy of the law (*History of English Law*, v, 449).

Although there is little historical connection between Magna Carta and the institution of gaol-delivery, which preceded it, or between the Great Charter and the writ of habeas corpus, which followed it, the principle of safeguarding personal liberty is common to all three. The writ of habeas corpus, by the end of the sixteenth century, was being used, as Professor Holdsworth tells us, to give effect to the principle contained in Magna Carta, and a substantial connection between them had in fact been created which was too obvious to be overlooked (*History of English Law*, ix, 112). Apart from the writ of habeas corpus, the Common-law Judges, though they might be willing, in the interests of national safety, to allow great freedom of action, were always jealous of their own jurisdiction in criminal matters, which was concurrent in the assizes and in their own Court of King's Bench. On the Crown side, that Court had (as the Divisional Court has to-day) cognizance of all criminal causes, from treason down to the most trivial misdemeanours or breaches of the peace. It is, and always has been, the principal Court of criminal jurisdiction in England. When a Judge of that Court goes on circuit, he sits under three commissions: the Commission of Oyer and Terminer, in virtue of which he tries those criminal cases in which a presentment is made to him, as formerly a true bill was returned by the grand jury; the Commission of Gaol Delivery, in virtue of which he clears the gaols of all persons awaiting trial or sentence, whether they be in custody or on bail; and the Commission of Assize, which is a survival of the old commission empowering the Judge to try all local cases at Nisi Prius. Since the passing of the Judicature Act, 1873, the Judge acting under these commissions is "a court of the High Court of Justice," which means that he is not limited by the terms of his commissions, as other Justices of Assize are, but he can do anything that a Judge sitting in the Royal Courts of Justice can do.

The Supreme Court of New Zealand, as we have seen, has all the powers and authorities which the Court of Queen's Bench had in 1840, when, as authority tells us, the commissions to which we have referred were held by the Judges of that Court *virtute officii*, their power, as Lord Coke says, being "original and ordinary."

The traditions of that Court, as has been pointed out, are that gaol-delivery, like the granting of a writ of habeas corpus, is never to be postponed—because no man's liberty is to be left in suspense—unless postponement is absolutely unavoidable. The principle which compels Judges, at whatever inconvenience of time and place, to issue a writ of habeas corpus, is the principle that derives from Magna Carta and which impels the urgency of gaol-delivery during assizes or criminal sessions, or, in the last resort, gives urgency of hearing to a criminal appeal in the Court of Appeal.

The right to liberty must be taken away in express terms, as also the right to have access to the Courts: *Newcastle Breweries, Ltd. v. The King*, [1930] 1 K.B. 854. And the right to liberty is inherent in the question of the adjournment or postponement of criminal sessions. Unless it is in the interests of that liberty, no man may be delayed in his trial. There is more than ancient authority and long-established principle behind that proposition in this country. Our criminal law and procedure is codified, and statutory. Section 52 of the Judicature Act, 1908, gives authority to a Judge to adjourn or postpone criminal sessions. His authority to adjourn one of the trials at such sessions is circumscribed by two sections of the Crimes Act, 1908. Once a trial has begun, the power to adjourn may be exercised by a Judge only upon the application of the accused, and when the Court is of opinion that it would be conducive to the ends of justice to discharge the jury and postpone the trial (s. 425); or, in case of any emergency or casualty rendering it, in the Court's opinion, highly expedient for the ends of justice so to do, the Court in its discretion may discharge the jury without giving a verdict, and direct a new jury to be empannelled during the same sittings of the Court, or postpone the trial on such terms as justice requires (s. 431).

Consequently, apart from the traditions of the English Judiciary, which are observed and followed in New Zealand, gaol-delivery may not be delayed or postponed. The fundamental principle of the liberty of the subject governs the position, and this principle may give way only to the paramount interests of justice to the accused. In this case only, when it is highly expedient for the ends of justice or when the Court considers it would be conducive to the ends of justice, a trial of an accused person may be adjourned or postponed; except, of course, when any happening renders the commencement or continuation of the trial humanly impossible. And this is where our own statute-law perpetuates the tradition and practice of English Courts that no man shall be delayed in the King's Courts the rights, the justice, and the liberty constitutionally given to him in ancient times, and preserved to him by English and New Zealand law down to our own day.

Summary of Recent Judgments.

SUPREME COURT. Hamilton. 1937-38. Dec. 6, 7, 17; Feb. 1. *Callan, J.*

GOODWILL v. SAULBREY AND ANOTHER.

Negligence — Road Collisions — Overtaking at an Intersection — Manoeuvre commenced but not completed outside Limit of 30 ft. before Intersection—Whether Offence against Regulation —Interpretation of Regulation—Traffic Regulations 1936, Reg. 14 (10)(*a*) (Serial No. 86/1936).

A driver of a motor-vehicle, who commences an overtaking movement more than 30 ft. before an intersection but does not complete it outside that limit, offends against Reg. 14 (10) (*a*) of the Traffic Regulations 1936, made under the Motor-vehicles Act, 1924.

The overtaking is not complete until the overtaking vehicle is back on its correct side of the road and ahead of the overtaken vehicle.

The overtaking vehicle should execute that manœuvre in such a way as not to compel the overtaken vehicle to check speed.

Counsel: Tompkins and Manning, for the plaintiff; **Strang,** for the first defendant; **North,** for the second defendant.

Solicitors: L. E. Manning, Te Puke, for the plaintiff; **Strang and Taylor,** Hamilton, for the defendant, K. Saulbrey; **Armstead and Kendall,** Auckland, for the defendant, E. J. Parry.

SUPREME COURT. Wellington. 1937. Nov. 19; Dec. 21. *Myers, C.J.*

In re **NEWCOMBE (DECEASED), CRESSWELL AND ANOTHER v. NEWCOMBE AND OTHERS.**

Will—Devisees and Legatees—Annuity to Wife "so long as she shall remain unmarried"—Other References to Wife's Interest "during widowhood"—Reference in Codicil to a Direction to pay same to Wife "so long as she shall remain my widow"—Subsequent Divorce of Wife—Whether entitled to Annuity—Ademption.

A testator by his will directed his trustees to "*pay to my wife so long as she shall remain unmarried*" an annuity of £200, and the trustees were empowered to apply for maintenance, "subject to my wife's income during widowhood."

A recital in the codicil referred to the direction in the will to pay "my wife so long as she shall remain my widow"; substituted for the annuity of £200 one of £156; and in other respects referred to and confirmed his "said will."

After the date of the codicil the testator divorced his wife.

Before the execution of the codicil, an order that testator should pay his wife for life £3 a week for maintenance was made under the Destitute Persons Act, 1910. This amount was later increased to £4 5s. per week; and later, in the divorce proceedings, the Supreme Court ordered the testator to pay his wife £4 a week. Testator purchased for her an annuity of £208.

On originating summons, asking whether, on the assumption that the annuity of £156 in the codicil was substitutionary and in lieu of the annuity of £200 in the will, the annuity was payable,

Cooke, K.C., and **C.A.L. Treadwell,** for the defendant; **James,** for the second defendant; **McGrath,** for the third defendant; **R. R. Scott,** for the fourth defendant; **Hay,** for the plaintiff trustees.

Held, That the context was sufficient to displace the position which would have obtained had the gift been merely to "my wife"; that the annuity was given during widowhood; and that, as the testator's divorced wife was never his widow, she could not take the annuity.

Knox v. Wells, (1883) 48 L.T. 655, and **In re Boddington, Boddington v. Clairat,** (1884) 25 Ch.D. 685, discussed.

Quaere, Whether the annuity under the will was satisfied and adeemed by the purchase of the annuity by deceased in his lifetime.

Solicitors: Mazengarb, Hay, and Macalister, Wellington, for the plaintiffs.

SUPREME COURT. Wellington. 1937. December 16, 21. *Ostler, J.*

HOGG v. FOWLER (CONTROLLER AND AUDITOR-GENERAL).

Local Authorities—Members' Contracts—Member of Local Authority a Shareholder (as Bare Trustee only) of Company contracting with it—Whether disqualified as concerned or interested "in such contract"—Onus of Proof—Local Authorities (Members' Contracts) Act, 1934, s. 3.

A registered proprietor of shares in a company transferred such shares for value to a purchaser, but the latter omitted to register the transfer and the proprietor remained on the register as a bare trustee for the purchaser. The company was concerned or interested in contracts (exceeding the prescribed minimum) made with it by the Board of a local authority of which the registered proprietor of the shares was a member.

On originating summons to determine whether the registered proprietor of the shares was disqualified as a member of the local authority,

Harding, for the plaintiff; **Currie,** for the defendant.

Held, 1. That, not being concerned or interested in a pecuniary way, he was not disqualified under s. 3 of the Local Authorities (Members' Contracts) Act, 1934 from membership of the Board.

2. That onus of proof that a member has no concern or interest in the contracting company is on the registered shareholder.

England v. Inglis, [1920] 2 K.B. 636, applied.

Solicitors: **Meek, Kirk, Harding, and Phillips,** Wellington, for the plaintiff; **Crown Law Office,** Wellington, for the defendant.

SUPREME COURT.
Wellington.
1938.
Jan. 28; Feb. 11.
Blair, J.

PERKINS AND ANOTHER v. DECKSON.

Practice—Costs—Discontinuance—Costs of previous Discontinuance not paid—Whether Failure to pay such Costs to fresh Action a Defence—Code of Civil Procedure, R. 241.

The Court has no discretion under R. 241 of the Code of Civil Procedure in the matter of treating the rule as a defence.

It is always open to a plaintiff who has commenced an action before the costs of a previous discontinued action between the same parties have been paid, whether or not such non-payment be accidental, to cure the position by again discontinuing or electing to accept a nonsuit.

Semble, Where the plaintiff has paid the costs of the discontinued action, after a defence has been filed in the second action, such second action must fail.

Mullooly v. Finn, (1886) 7 N.Z.L.R. 259, and **Bell v. Mack,** [1927] G.L.R. 156, explained.

Emslie v. Buchanan and Buxton, (1907) 26 N.Z.L.R. 1308, 9 G.L.R. 578, referred to.

Counsel: **Shorland,** for the plaintiffs; **Neal,** for the defendant.

Solicitors: **Chapman, Tripp, Watson, James, and Co.,** Wellington, for the plaintiffs; **Levi, Yaldwyn, and Neal,** Wellington, for the defendant.

SUPREME COURT.
Christchurch.
1937.
December 14, 17.
Northcroft, J.

HARRISON-WILKIE v. VICTORIA INSURANCE COMPANY, LIMITED.

Insurance—Accident—Abrasion caused by Fall from Motor-car to Road—Infection of Tetanus occurring at Time of Fall and causing Death—Whether Death "due to a disease which is the direct or indirect result of the injuries received in the accident."

An insurance policy provided that if the insured was injured by an accident sustained in direct connection with any motor-vehicle or while riding in or dismounting from any motor-vehicle the company should pay compensation in accordance with a scale, which provided, *inter alia,* £1,000 "if the insured should . . . *die solely* as the *direct result of the actual physical* injuries *received in the accident.* . . . Provided that . . . no compensation shall be payable . . . when *the death or injury is due* to a disease which *is the direct or indirect* result of the injuries *received in the accident.*"

The insured, falling out of a motor-vehicle on to a road, sustained an abrasian, and an infection of tetanus (from which she died) occurred when she was injured,

Sargent and **McMenamin,** for the plaintiff; **Donnelly,** for defendant company.

Held, 1. That the insured died as the direct result of the actual physical injuries received in the accident.

2. That the death was not "due to a disease" which was "the direct or indirect result of the injuries received," but that the tetanus was a part of the injury itself, and not something different supervening upon or resulting from the injuries.

Solicitors: **Slater, Sargent, and Connal,** Christchurch, for the plaintiff; **C. S. Thomas,** for the defendant company.

SUPREME COURT.
Palmerston North.
1937.
Oct. 27; Dec. 8.
Smith, J.

WEBB v. BUCKLEY DRAINAGE BOARD.

Land Drainage—Right of Board to Order removal by Occupier of Obstruction in Private Drain—Land Drainage Act, 1908, ss. 62, 65—Land Drainage Amendment Act, 1913, s. 7—Finance Act, 1933 (No. 2), s. 47.

Section 62 of the Land Drainage Act, 1908, as amended by s. 7 of the Land Drainage Amendment Act, 1913, applies to *private drains* within the district of a Drainage Board, which is a local authority for the purpose of the said s. 62, or within one mile beyond the boundary of that district specified in s. 62 (1).

Moutoa Drainage Board v. Easton and Others, [1937] N.Z.L.R. 452, G.L.R. 273, considered.

Counsel: **L. G. H. Sinclair,** for the plaintiff; **E. T. Moody,** for the defendant.

Solicitors: **L. G. H. Sinclair,** Palmerston North, for the plaintiff; **E. T. Moody,** Shannon, for the defendant.

SUPREME COURT.
Christchurch.
1937.
December 17.
Northcroft, J.

HALL v. DAVY.

Law Practitioners—Costs—Taxation—Damages recovered by Guardian *ad litem* and Trust Company appointed Trustee of Funds in hand to pay Solicitor's Costs after Taxation—Appropriate Procedure—Review by Court—Jurisdiction—Law Practitioners Act, 1931, ss. 24, 25.

Where, in an action by a guardian *ad litem* on behalf of an infant, damages are recovered and ordered to be paid to a trust company in trust to pay the plaintiff's solicitor's costs as between solicitor and client after taxation in accordance with the Public Trust Office Amendment Act, 1913, and to hold and apply the balance for the benefit of the infant as specified, the appropriate procedure for taxation of costs is for the solicitor to proceed in accordance with the Law Practitioners Act, 1913—*viz.,* to deliver his bill to the guardian *ad litem* who may then apply to have the bill taxed by the Registrar under s. 24 of the Act.

In default of such application, the solicitor should apply under s. 25 of the Act. The taxation could then be viewed by the Court.

But where the taxation proceeded by arrangement between the solicitor and the trustee company, no bill of costs having been delivered to the guardian *ad litem,* and there was no Court order referring the bill to the Registrar, the Court had no jurisdiction to review the taxation.

Counsel: **M. J. Gresson,** for the plaintiff's solicitor; **Sim,** for the Guardian Trust.

Solicitors: **Wynn-Williams, Brown, and Gresson,** Christchurch, for the plaintiff's solicitor; **Duncan, Cotterill, and Co.,** Christchurch, for the Guardian Trust.

Rules and Regulations.

Health Act, 1920. Drainage and Plumbing Regulations Extension Order, 1938, No. 1. February 2, 1938. No. 1938/16.

Health Act, 1920. Hairdressers (Health) Regulations Extension 1938, No. 1. February 2, 1938. No. 1938/17.

Health Act, 1920. Camping-ground Regulations Extension Order, 1938, No. 1. February 3, 1938. No. 1938/18.

Cook Islands Act, 1915. Cook Island Pearl-shell Fisheries Regulations Amendment 1938. February 9, 1938. No. 1938/19.

Shipping and Seamen Act, 1908. Marine Engineers' Examination Rules, 1938. February 14, 1938. No. 1938/20.

Stock Act, 1908. Sausage-casing Importation Regulations, 1938. February 23, 1938. No. 1938/21.

Agricultural Workers Act, 1936. Agricultural Workers Extension Order, 1938. February 23, 1938. No. 1938/22.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Otago and Southland) Regulations, 1938. February 23, 1938. No. 1938/23.

The Rule in Boyd v. Mayor, &c., of Wellington.

Indefeasibility of Title under the Land Transfer Act.

By E. C. ADAMS, LL.M.

It has been suggested that the rule in *Boyd v. Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, should be abrogated by legislative action. The advocates of this suggested alteration apparently consider that the decision in that case was not justified by the ruling of the Privy Council in the leading case of *Assets Co. v. Mere Roihi*, [1905] A.C. 176, for I have never heard it seriously suggested that the principle of *Mere Roihi's* case should be repealed by the Legislature. It must be admitted that many leading lawyers do consider that *Boyd's* case lays down an erroneous principle. But whether this is so or not, I think that, if there is any legislative tampering with the principle of *Boyd's* case, there is a grave risk that what the minority Judges in that case conceived was the true rule expounded in *Mere Roihi's* case will also be seriously impaired. And, if the principle in *Mere Roihi's* case is whittled down beyond the limits put to the rule by Stringer and Salmond, JJ., in *Boyd's* case and by Dixon, J., in the recent Australian case of *Clements v. Ellis*, (1934) 51 C.L.R. 217, the cardinal feature of the Torrens system, certainty of title, will be detrimentally affected.

Hutchen's Land Transfer Act, 2nd Ed., 85, states that since the case of *Boyd v. Mayor, &c., of Wellington*, it must be accepted that a person innocently registered under the Land Transfer Act by virtue of a void instrument may acquire an indefeasible title. It is the giving of efficacy by registration to a *void* instrument that disturbs the strictly logical minds, but I shall endeavour to show that the practical consequences of this are not serious, and in most cases could be guarded against. The rule of indefeasibility of title conferred by the Land Transfer system has already so many exceptions, one of which at least is causing considerable concern to New Zealand and Australian lawyers, that to increase the number of exceptions would, it is submitted, do far more harm than good. It is true, I understand, that the actual decision in *Boyd's* case did cause a serious hardship, which had to be adjusted by subsequent legislation; but the facts there were most exceptional and not likely to be repeated. It was a case of expropriation of land for a public purpose by a local body. Proclamations taking land have to pass through so many hands, that the risk of any serious irregularity in the procedure is slight. It must be remembered that it was not established in *Boyd's* case that the Proclamation was invalid; indeed two Judges, Stout, C.J., and Adams, J., thought it had been properly obtained; the other three Judges did not express an opinion. It was held by the majority that, assuming the Proclamation to be invalid, its registration under the Land Transfer Act conferred upon the Corporation an indefeasible title.

One of the principal exceptions to the rule of indefeasibility of title is fraud, which means actual dishonesty of some sort. Skerrett, K.C., in arguing for the plaintiff in *Boyd's* case, submitted, *inter alia*:

> "It is fraud for the City Corporation either (*a*) to acquire title *knowingly* under a void instrument, or (*b*) if title has been acquired by *mistake* (*its own*), to set up that mistake as against the claim of the rightful owner."

It is submitted that to acquire title *knowingly* under a void instrument would be fraud, but it is obvious that in *Boyd's* case it was not proved that the Corporation knew the Proclamation was void. It will be observed that Hutchen in stating the rule in *Boyd's* case limits it to a person *innocently* registered, and that appears to be correct. The second proposition of learned counsel that it was *fraud* for the Corporation, if title had been acquired by its own mistake, to set up that mistake as against the rightful owner, was clearly untenable.

Although *fraud* (as described by the Privy Council in *Mere Roihi's* case and *Waimiha Sawmilling Co., Ltd. v. Waione Timber Co., Ltd.*, [1926] A.C. 101) is a very necessary exception to the rule of indefeasibility of title, it sometimes causes costly litigation, as the latter case shows, for whether a given set of circumstances amounts to fraud or not is often a matter of opinion.

I think that all the ammunition that can be fired against the rule in *Boyd's* case will be found in the judgments of Salmond, J., in that case and Dixon, J., in *Clements v. Ellis* (*supra*).

Gibbs v. Messer, [1891] A.C. 248, constitutes an exception to the rule in *Mere Roihi's* case; a person *immediately* taking under a forged instrument does not acquire an indefeasible title, although he has the power to confer an indefeasible title upon a third person. Stringer, J., who delivered a dissentient judgment in *Boyd's* case, was unable to see "how any rational distinction can be drawn between transfers which are void because forged and those which are void for any other reason." But the difference appears to be that in forgery, one is not dealing with the registered proprietor. The theory of the Land Transfer system is that the register-book (with certain specified exceptions) is conclusive evidence of ownership. If you do not deal with the registered proprietor, you do not transact business on the strength of the register-book, and it must be the actual existing register-book, and not one to be constructed on the strength of instruments simultaneously presented with your own, should any of such instruments prove to be a forgery: *Clements v. Ellis* (*supra*).

Now the rule in *Gibbs v. Messer* (*supra*) sometimes creates great injustice. Take, for example, *District Land Registrar v. Thompson*, [1922] N.Z.L.R. 41, a case of impersonation of which there is a real risk in certain communities. The registered proprietor was a Native, who died in 1901. His son, who had almost a similar name, in the year 1920 signed what purported to be a genuine transfer from the deceased registered proprietor to Thompson. Neither the District Land Registrar nor the purchaser at the date of the registration of the transfer knew that they were dealing with a forged instrument. When the District Land Registrar afterwards was satisfied that the instrument was a forgery he was successful on an application to the Court in getting the certificate of title called in and the memorial of the transfer to Thompson cancelled. And so Thompson lost the land which he thought he had properly purchased and probably he was unable to recover the money he had paid for it, and he would

have no claim against the Assurance (now the Consolidated) Fund. Last year the Legal Conference at Dunedin, passed the following resolution : " *That it be a recommendation to the New Zealand Law Society that it should consider whether the provisions governing the Land Transfer Assurance Fund should be extended to satisfy claims for loss due to forgery of Land Transfer documents,* ((1936) 12 N.Z.L.J. 103). It is the writer's opinion that if the rule in *Boyd's* case or *Mere Roihi's* case is encroached upon by the Legislature, it will not be long before practising solicitors will be asking for State indemnity in all cases where an innocent purchaser is deprived of land through the cancellation of the registration of an invalid or void instrument. Will any Government New Zealand is likely to have so extend it ? If not, then, it is respectfully submitted, leave the rule in *Boyd's* case alone.

And the Australian practising solicitors have also reason to view with alarm the latest application or extension of the rule in *Gibbs v. Messer (supra).* I refer to an article on *Clements v. Ellis (supra)* in *9 Australian Law Journal,* 355. A. held under certificate of title subject to a mortgage in favour of M. B. paid the full purchase price on a free of encumbrance basis ; a transfer from A. to B. (in order) was duly executed, and also what purported to be a valid discharge of mortgage from M. The discharge of mortgage and the transfer were registered simultaneously in the Office of Titles, and B. got a clear certificate. It was afterwards proved that the discharge of mortgage was a forgery, and B. was obliged by the Court to have the mortgage to M. reinstated on the register-book, because he had not contracted on the strength of the register-book. When his transfer was accepted for registration, the register-book still showed the mortgage to M. The contemporaneous presentation for registration of a discharge of mortgage and of a following transfer purporting to be free of the mortgage is extremely common in New Zealand.

As pointed out by Evatt, J., in *Clements v. Ellis (supra)* at p. 265, Salmond, J., gave the broadest interpretation to *Gibbs v. Messer (supra)* :

> " He could see no difference between an instrument which was void because of forgery, and one which was void because of infancy, absence of agent's authority, mistake, or *ultra vires.*"

Now with regard to mortgages, the principle of indefeasibility of title laid down in *Boyd's* case does create logical difficulties. This is because a mortgage usually has a two-fold operation ; there is an obligation to pay a debt founded on contract and there is a *charge* on land. The debt is the principal thing, and the charge is accessory to it : *Re O'Neill, (Deceased) Humphries v. O'Neill,* [1922] N.Z.L.R. 468. It is interesting to note, however, that long before *Boyd's* case, Edwards, J., in *Jury v. United Farmers' Co-op. Association, Ltd.,* (1909) 29 N.Z.L.R. 126, refused to set aside a mortgage which had not been confirmed pursuant to the Native Land Acts, because it had been registered without fraud under the Land Transfer Act. Apart from the Land Transfer Act, a mortgagee under a void or *ultra vires* mortgage cannot sue *ex contractu* ; nor can he sue for money had and received to his use, for such an action is founded on the *fiction* of a contract. It would be most logical perhaps to treat such a mortgage, although registered under the Land Transfer Act, as not conferring on the mortgagee any right to sue on the contract, leaving him to his remedy against the land, and to his equitable rights of following the mortgage moneys, if he could, in accordance with the principles laid down by the House of Lords in *Sinclair v. Brougham,* [1914] A.C. 398.

With regard to instruments executed by infants there is but little *practical* difficulty in applying the doctrine of *Boyd's* case. Section 62 of the Land Transfer Act, 1915, instructs the District Land Registrar to note against a certificate of title any legal disability such as infancy, so far as he has notice or knowledge thereof. It is surely the duty of a solicitor to note the disability in the instrument under which the infant becomes registered. If this is done, no unauthorized dealing by an infant or other person under legal disability will be registered ; if such an instrument were registered inadvertently by the District Land Registrar, the Consolidated Fund would be liable.

With regard to the *ultra vires* difficulty, it was laid down in *Re Kaihu Valley Railway Co. and Owen,* (1890) 8 N.Z.L.R. 522, that, if an instrument executed by a company incorporated under the Companies Act is in proper form and the seal appears to have been properly fixed, the Registrar should accept the document. This rule has been found most convenient in practice, and I do not think any New Zealand practitioner would seek to alter it. With regard to corporations created by *statute,* it is submitted that the Registrar has power to reject the instrument, if it appears to be *ultra vires.* This seems to follow from the Australian case *The King v. Registrar of Titles,* (1915) 20 C.L.R. 379. And in *Finlayson v. Auckland District Land Registrar,* (1904) 24 N.Z.L.R. 341, *Edwards,* J., said :

> " It is the duty of the Registrar to refuse to register instruments which his own records show to be in contravention of the statute law."

It is to be noted that in the *Kaihu Railway Company's* and *Boyd's* cases there was nothing *ex facie* irregular or improper. On the other hand, a Corporation such as a local body has its powers limited by statute which the Registrar is expected to know. *Public* reserves are amply protected from any irregular alienation by Appendix I to the Land Transfer Act, 1915, and s. 13 (2) of the Public Reserves, Domains, and National Parks Act, 1928.

With regard to instruments executed by an attorney without authority, there are ample safeguards. Section 163 of the Land Transfer Act, 1915, provides that, subject to certain specific provisions, the provisions of the Property Law Act, 1908, relating to powers of attorney shall apply to powers of attorney made or used under the Act. In practice a District Land Registrar will not register an instrument executed by an attorney, unless it is clear that the attorney has the necessary authority ; if the District Land Registrar misconstrued the authority and wrongly registered a dealing in pursuance thereof, the Consolidated Fund would be liable to recoup the dispossessed registered proprietor.

Dixon, J., in *Clements v. Ellis (supra),* quotes with approval the following illustration by Salmond, J., in *Boyd's* case :

> " The registered title of A. cannot pass to B. except by the registration against A.'s title of a valid and operative instrument of transfer. It cannot pass by registration alone without a valid instrument, any more than it can pass by a valid instrument alone without registration."

Presumably the advocates of altering the rule in *Boyd's* case would alter it so that the title could not pass so far as immediate parties are concerned unless there was " a valid and operative instrument." That sounds all right in theory, but why should the validity of a registered instrument be left in abeyance perhaps for years, as may happen at present, in the case of a forgery ? And whether an instrument is valid or operative is often a matter of opinion. In clear cases of *mistakes* the Registrar has power to alter the register under s. 74 of the Land Transfer Act, 1915. For example, the instrument to be registered must be registrable under the Land Transfer Act, 1915. If the District Land Registrar inadvertently registered a transfer from A. to B., which was not properly executed by A., he could cancel the registration, unless a fresh interest had arisen on the register. The interest sought to be registered must be one authorized by statute: *Waimiha Sawmilling Co. v. Waione Timber Co.*, [1926] A.C. 101, 106. The person claiming under the instrument must see that he deals with the real registered proprietor. If an instrument intended to be held as an *escrow* is inadvertently registered, its registration can also be cancelled by the Registrar: *Ex parte Delatour*, (1904) 6 G.L.R. 433.

Finally, *Tataurangi Tairuakena v. Mua Carr*, [1927] N.Z.L.R. 688, shows how substantial injustice is often avoided in the application of the rule of indefeasbility of title. The Native tenants in common of a block of Native land were duly incorporated under the provisions of the Native Land Act, 1909, and a Committee of management of three persons appointed. A lease for ten years was granted by the committee to one of their number. The Court of Appeal held, that although the lease had been duly confirmed and registered under the Land Transfer Act, the lessee had not acquired an indefeasible title by registration under the Land Transfer Act, 1915, because he held in a *fidiciary* capacity. The Court included Sim, J., who had been one of the majority Judges in *Boyd's* case. In delivering the judgment Skerrett, C.J., thus succinctly stated some of the limits of the doctrine of indefeasibility of title under the Land Transfer Act: of indefeasibility of title under the Land Transfer Act:—

> " It was further contended that the registration of the lease under the provisions of the Land Transfer Act confers an indefeasible title upon the respondent Carr. I think that this contention is wholly untenable. The provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him, or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest."

The principle of indefeasibility of title under the Land Transfer Act does not in any way destroy " the fundamental doctrines by which Courts of equity have enforced, as against registered proprietors, conscientious obligations entered into by them:" *Barry v. Heider*, (1914) 19 C.L.R., 197, 216.

To mind, the only valid and substantial objection to the doctrine of *Boyd's* case is that sometimes by the operation of the rule of indefeasibility of title the intention of the Legislature as expressed in another statute is frustrated. An example of this is *B. v. M.*, [1934] N.Z.L.R. s. 105, where a mortgagee exercised his power of sale in contravention of the Mortgagors' Relief Act, 1931: Reed, J., said:

> " Admittedly the title was obtained by the plaintiffs without fraud, and therefore, the fact that in acquiring the title the plaintiffs failed to comply with the provisions of the Mortgagors Relief Act, 1931, is irrelevant; the plaintiffs have an indefeasible title."

This difficulty could be surmounted in practice, if the Legislature expressly directed that the District Land Registrar should not register any instrument in contravention of the particular statute; this would be preferable to any express attempt to alter the rule in *Boyd's* case. It is by these means that the policy of the Legislature is mainly carried out with regard to the preventing of " slumming " in the subdividing of the land, and of aggregation of land under the Land and Native Land Acts; the District Land Registrar so to speak is created the watch-dog for the Legislature.

The First All India Court.

Its First Sitting.

A Great day for India was Monday, December 6, 1937, when the Federal Court of India, the first central Judiciary that India has ever known, sat at Delhi for the first time.

In robes of black and gold, Sir Maurice Gwyer, C.J., Jayakar and Shah Sulaiman, JJ., took their judicial seats in the Chambers of Princes. Behind them, in a semi-circle, were the Chief Justices of Bengal, Bihar, Punjab, and the United Provinces, with the Judicial Commissioners of Sind and the N.W. Frontier Province, robed in crimson and black, while " prominent barristers from all parts of India in wig and gown filled the auditorium." The Court was welcomed by the two most eminent members of the Bar in India, Sir Brojendra Mitter, Advocate-General of India, and Sir Tej Bahadur Sapru, who is regarded as the leader of the Bar in India. The Advocates-General of the various Provinces, too, gave their welcome, while from the Lord Chancellor of England and from the Chief Justices of the Dominions messages of good will were read.

The Chief Justice, in reply, made a speech worthy of the great occasion, and dwelt on the importance of the Federal Court in the development and future well-being of India as " a nation on the march." He spoke, also, of its complete independence of Government and parties, and of the " nice poise and balance of political forces, legislative and executive, which made manifest the need of a Federal Court." This Court would look at the Constitution, however, its form might change, " not with the cold eye of the anatomist, but as a living and breathing organism which contained within itself the seeds of future growth and development."

He said also that in its tasks the Court could not succeed without the assistance of a strong, free and independent Bar, and they had endeavoured in the newly made Court Rules to facilitate the carrying out of this high mission. He ended his speech in good and noble words, saying that this All-India Court might " play a great part in building up the nation by cherishing those things which lay at the root of civilization—the eternal verities which have their origin in the bosom of God."

The Law Relating to Motor-vehicles.

Noteworthy Decisions of 1937.

By W. E. Leicester.

Concluded from p. 42.

It was contended in *Petherick v. Waters and N.I.M.U. Insurance Co. (No. 2)*, [1937] N.Z.L.R. 309, that the pleadings should set out as separate issues the various heads under which general damages are claimed in respect of injury to the person. To require this to be done, in the view of Reed, J., would be to introduce a fresh technique of pleading into these cases and to be likely seriously to embarrass the plaintiff, particularly before a jury. Moreover, the effect would be that damages would probably be assessed twice for the same constituent part; and he held that the plaintiff in a personal-injury action is entitled to have the case tried without being hampered by any discussions as to the rights of the defendant to indemnity, the indemnifier not being permitted representation unless joined as a third party. In *Priest v. Mowat*, [1937] N.Z.L.R. 431, where the defendant applied for separate trials of the personal-injury and property causes of action on the ground that the insurer against the claim in respect of property, not being a party to the action, would be prejudiced if the two cases were heard together, Ostler, J., held that the word "conveniently" in the rule should be interpreted as "justly" and separate trials should be ordered. These cases are not in conflict with *National Insurance Co. of New Zealand v. Geddes*, [1936] N.Z.L.R. 1004, the point being that separate causes of action can be pleaded, but the several heads under which general damages are claimed in respect of bodily injury should not be set out as separate issues in the pleadings. In *Priest v. Mowat (No. 2)*, [1937] N.Z.L.R. 789, it was suggested that as a jury had found negligence on the personal-injury cause of action against the defendant, he was estopped from denying negligence upon the property cause of action. This contention was not upheld, Ostler, J., finding it quite clear from the authorities that the plea of estoppel or *res judicata* could not be raised.

Shortly put, then, where separate trials of the causes of action are permitted under R. 100 of the Code of Civil Procedure, the cause of action relating to property loss may, if the parties so agree, be taken before the Judge before whom the claim for damages for bodily injury has been heard, and after the retirement of the jury to consider the personal injury claim. As was held in the *Geddes* case, judgment must be entered separately on each cause of action and the costs follow the separate judgments.

Several accident cases during the year may become useful authorities on practice and procedure. The Court of Appeal held in *Birt v. Robinson*, [1937] N.Z.L.R. 572, that where an appeal is taken from a non-suit, the time commences to run from the date of the pronouncement of judgment of non-suit and not from the later date when written reasons are given. The appellant in this case, being out of time, applied for special leave to appeal: *Birt v. Robinson (No. 2)*, [1937] N.Z.L.R. 893. The Court of Appeal would not entertain as sufficient grounds for special leave the fact that the trial Judge had not given written reasons for the non-suit until after the expiration of twenty-eight days from the judgment, and that an intention to appeal was expressed in a letter written by the appellant's solicitors within the period. However, it held that the only vested right that a defendant has upon a non-suit is to costs; and that, upon the special circumstances of the case, he should be granted special leave, but not unconditionally, the grant being subject to the condition that the appellant, if he succeeded on the appeal (which he did), should on a re-trial, whatever the result, pay to the respondent the costs to which he would have been entitled on the non-suit. In *Hurlstone v. Steadman*, [1937] N.Z.L.R. 708, the Court of Appeal declined to hold the owner of a motor-vehicle liable in respect of an alleged fraud committed by the statutory agent after the owner's liability to pay damages had become complete. In the opinion of Myers, C.J., the statutory agency was one limited "for the purposes of this Act and of every contract of insurance thereunder"; it could not have the effect of making the agent anything more than an agent for the purpose of creating in favour of an injured person or the representative of a person killed a cause of action for damages against the owner of a car by reason of the statutory agent's negligence. Kennedy, J., considered that the statute extended liability to pay damages on account of death or bodily injury resulting from the use of the car but not liability for damage on any other account.

In *Walsh v. Fairweather*, [1937] N.Z.L.R. 855, the Court had to interpret the effect of the Law Reform Act, 1936, in relation to a personal-injury claim. Section 17 of that Act makes it a condition precedent to the right of a tortfeasor to recover contribution that the other tortfeasor would, if sued, have been liable in respect of the same damage. In *Walsh's* case, the wife was a passenger in the car driven by her husband; and Kennedy, J., held that the effect of the Law Reform Act was not to alter a long-established rule that a husband is not liable to be sued in tort by his wife. It followed as a necessary consequence that contribution could not be recovered from the husband in respect of damages for injury to the wife, and an application for the issue of a third-party notice claiming such contribution was refused. While it was suggested by McCardie, J., in *Gottliffe v. Edelston*, [1930] 2 K.B. 378, that to overthrow the rule would be to encourage litigation between spouses which tends to become "unseemly, distressing, and embittering," nevertheless such a reason appears to have much less force in New Zealand and the application of the doctrine does substantial injustice where the husband of an injured woman passenger is responsible for the accident to an equal or greater extent than the third party who is successfully sued.

It will be seen that 1937 has produced a variety of motor-vehicle litigation. From the point of view of public safety, it may be that the most impressive statement is to be found in *Hancock v. Stewart (supra)* to the effect that it is necessary in the interests of justice that the Court should jealously guard its controlling power over the verdicts of juries, and that juries should not have a free hand to whittle away the standard of care fixed by the law. "If that controlling power is relaxed or weakened," thinks Ostler, J., "there is a real danger that liability for motor accidents will come to depend entirely on the whim or prejudice of juries."

London Letter.

BY AIR MAIL. Strand, London, W.C. 2,
February 6, 1938.

My dear EnZ-ers,

Well, here we are again, but what I am going to say to you on this occasion is not at the moment particularly patent to me. Could we but find it, there may be some lesson to be learnt from the figures published by the Law Society in their Twelfth Annual Report on Poor Persons Procedure. Certain truths to which the eyes of many of the baser sort are still blinded are therein once more exemplified; one of them being that lawyers are not wholly unsocial, or anti-social, rapacious, or free from benevolence; and that they cheerfully give their professional services without reward or hope of reward—other than in the Next World—or of advertisement. The number of Poor Persons' Proceedings begun in the year 1936 amounted to 2,490—a goodly proportion of the total of High Court cases—for the Poor Persons Procedure does not run to the lower Courts.

No less than ninety-two committees deal with the business thoroughly and efficiently. "So uniformly satisfactory," says one commentator, "are the reports that it might almost have been assumed that the committees have made a special effort to get themselves thoroughly abreast of their work in order to meet the additional burden which inevitably will fall on them as a result of the passing of the Matrimonial Causes Act, 1937." Mr. Herbert's statute has, in fact, already caused a large influx of "additional" applications under the Poor Persons Rules.

The total number of applications in London and the provinces was 6,915; the total number of poor persons' proceedings begun was 2,490. The poor persons were successful in 2,065 cases. Of these, the Society observes, 1,994 were matrimonial causes; but ten were successful in the Chancery Division, sixty-one in the K.B.D., and one in the Probate Court. Of all the cases actually heard in all Divisions of the Court, only eighty-seven were unsuccessful.

It seems to follow that an application accepted by the Poor Persons Committees is as good as won, and opposition is almost vain. This may well be because the Committee accept only cases which appear to be pretty good; and the Judges are well aware of the fact, and that acceptance by the Committee is preceded by proper inquiry and investigation. So, taken all in all, we have reason to be pleased with ourselves in our incursions into the relief of our less fortunate fellow-beings.

Canadian King's Counsel.—Since I had the honour of devilling for your Editor the material concerning our Inns of Court which he used recently in his article in your JOURNAL on the Status of King's Counsel in New Zealand, I have to supplement what he said by telling you this: In Ontario there have been a further addition to the already swollen list of King's Counsel. During last month, as a sort of mass-produced Christmas gifting, no less than 117 were created at one fell swoop. Included in the list is the learned Editor of the Canadian *Fortnightly Law Journal.* In hailing Mr. R. M. Willes Chitty, K.C., the doughty critic of miscellaneous patents, as one of the new appointees, I must quote his justification. He says, editorially,

> "To a few I feel I owe an apology for even accepting the appointment. To them I would say, do you remember the incident in *A Dog's Day* when the pup was hit on the nose by a bread pellet. 'An insult,' he says, 'I swallow the insult.'"

Mr. Chitty, K.C., however, hastens to assure his readers that his appointment will in no way militate against his disapproval of the broadcasting of the quondam honour so that it has became distinctly cheap. He suggests that those who hold the appointment should all surrender it, and the distinction be abolished or a fresh start made, rigorous qualifications being prescribed by statute for the granting of the appointment and a committee of the Benchers having the final say among those qualified. Either that, or some super-honour should be created, he thinks, such as "K.C. and bar" to be meted out in the same way, as a learned friend had suggested. The learned editor concluded by saying that, for himself, he is glad to have been appointed "lest I should have become conspicuous by being left in a stuff gown—and such a stuff gown!"

The friend who sent me the cutting says that out of about 2,600 practitioners in Ontario, there are numbered over 1,000 King's Counsel, while in Saskatchewan there are 263 wearers of silk out of 500 practitioners. Mr. Aberhart should give some social credit to his learned neighbours, who have reserved to themselves the less crowded benches without the Bar.

Workmen's Compensation.—Some people may think when they search with gratitude through the indispensable *Willis*, that every possible point under the Workmen's Compensation Act has been raised and decided. We wish they were right; but only last week, [1938] 1 All E.R. 361, a new point came to the Court of Appeal and the judgment below was reversed. The Postmaster-General was the successful appellant. He claimed, under s. 30 of the Act, indemnity against the defendants to recoup him for the sums he had paid in compensation to an injured postman. The injury, he said, was due to the defendants' motor-car driver who ran down the postman. In reply to a first claim for indemnity the defendants, with a denial of liability, paid into Court the sum demanded by the Postmaster for his payments up to the end of 1936. The Postmaster took the money out and so concluded that action. The postman, however, did not immediately get well. His employer, having to continue payment, sought in a second action for further recoupment. The defence was that only one action could be brought and that the first judgment gave the appellant his last chance. Happily, that contention found no favour with the Court of Appeal. But the case has to go back to the County Court for decision as to whether the respondents' driver was really responsible for the accident at all. That point has never been decided.

News Flash.—Solicitors, as a tribe, are unpopular among ignorant people (*The Times*).

Belligerent Rights.—The Grotius Society had an interesting meeting recently, and heard a most suggestive critical paper on belligerent rights and their recognition. This subject convulsed Europe and the United States in 1861. The British Government recognised the belligerent rights of the Confederate States and, by declaring neutrality, virtually recognised the Southern Government as at least a

de facto State. Lincoln protested strongly, and though he had himself declared a blockade of the Southern ports, claimed that no war existed, and, in effect, that we could not recognize the belligerency of the South until and unless we recognized its independence. The absurdity of such a contention is clearly demonstrated in a convincing passage in the opening chapter of Hall's *International Law*. But nothing in the way of precedent or authority can be quoted to support the present attitude of the British Government and other governments as to Spain. While they do some things which involve an admission of belligerency, and even of war, they do others which are based on a denial of those rights and of that status. The learned author of the paper was able to point a critical finger to the inconsistencies of foreign action in regard to this conflict. The only answer which the statesman can give him is that they are doing their best, inconsistently or not, to avoid a widespread war. It is a good answer.

Lawyers and Fertility.—It would perhaps, be an unfriendly act to inquire too closely as to the data upon which Mr. Griffith made the "abstruse calculation" which amused the House of Commons and revealed some of the absurdities of the Population Bill as drafted. The figures showed, he said, that women who married barristers as their first husbands were more likely to have children by their second husbands than women whose first choice was from the lower branch of the profession. Such was the kind of information which officials were authorised by the Bill to elicit, but to what end? You could not compel women to take barristers for their first husbands, or keep them away from solicitors. Very good and to the point. But what our overcrowded profession chiefly needs is not increased fertility, but means whereby the living may survive. Mr. Griffith would earn the undying gratitude of the very junior members of both branches if he could devise and secure the passing of a Bill whereby rich and likely young women would not, indeed, be compelled, but induced to marry young solicitors; and whereby the likely daughters of solicitors with plenty of briefs might be made willing and anxious to espouse struggling, deserving, junior members of the Bar.

White Gloves.—It must be rare for a Judge on circuit to get three pairs of white gloves on a single circuit. This has been the happy experience of Mr. Justice Singleton, now going the Home Circuit, and we only hope that he will return with even a larger collection. Nobody seems clear about the origin of the custom of presenting white gloves to the Judge on Circuit when there are no prisoners for trial. There is an appetising old note in *Notes and Queries* for 1849. An antiquary asks us to look for its origin in the fact that the hand was "in early Germanic law the symbol of power," and that this "symbolism" was "somehow transferred" to the glove. At a maiden Assize, we read, no criminal has been called upon to plead or, as Blackstone has it, "called upon by name to hold up his hand." As no guilty hand has been held up the Judge receives from the Sheriff this reminder of the fact. It is credibly reported that in 1699 a person pleading the King's pardon after conviction for manslaughter presented the Court "according to custom" with white gloves. Is there any connection between the two customs?

The Burden of Proof.—Last week Mr. Justice Bucknill drew attention to one of the minor, but still important, changes which Herbert's Act has made *Poulden* v. *Poulden*, *Times*, January 28). The case before the learned Judge was not a pleasant one. It appeared that a female detective, employed to watch the wife (the respondent) at the seaside, came up with her to London. The detective denied that she suggested the trip to London, and we must accept her word. Even so, however, the learned Judge found that she had so conducted herself, when acting as a supposed friend of the respondent, as to promote misconduct between her and a strange man. This was enough to put the husband out of Court even if he did not know of or authorize a highly improper proceeding. Lord Penzance in *Gower* v. *Gower*, (1872) L.R. 2 P. & D. 428, is good enough authority for that. The point of general interest, and it is a new one, is in connection with the burden of proof. Before 1938 the burden of proof, if such an issue were raised, lay on either spouse who alleged connivance. Now, by reason of the wording of s. 4 of Herbert's Act, the respondent has only to raise the plea of connivance and the burden of disproving it at once passes to the petitioner.

"F. E.'s" Method.—The favoured few who were invited to hear Sir Chartres Biron at the house of Lord and Lady Luke in Portman Square were fortunate; for the ex-Chief Magistrate's reminiscences were bound to be interesting having regard to his experiences, his learning, his mastery of English, and his powers of speech. His listeners were not disappointed. The stories reported include one of the murderer whom he unsuccessfully (but ably) defended, and who in gratitude left Mr. Biron his "first legacy" all the money standing to the murderer's credit at the bank; and another illustrating the well-known truth that women are of a very practical turn of mind. One asked for a week to pay a fine, saying that she was expecting some of her husband's money. "I asked her," said Sir Chartres, "if her husband was dead." "No," she replied, "but he is going to be hanged on Wednesday." Her husband had not, apparently, left all his money to defending counsel.

His references to F. E. Smith (Lord Birkenhead), under the title "Criminals I Have Known," was not irrelevant, for F. E. was appearing as counsel for Goudie at Bow Street in the Liverpool Bank robbery case. "When the case began at Bow Street," said he, "I noticed a nice-looking young man who was defending Goudie. He was no other than F. E. Smith, who made a short speech so impressive that one could not fail to recognize that he had a great future before him. It was Lord Birkenhead's first start in London. The great charm of the speech was that it was delivered deliberately and apparently spontaneously. Later, however, I found among my papers a small note-book which contained F. E. Smith's speech in writing. No speech had ever been more carefully prepared."

I have heard other stories of the carefully prepared spontaneity of F. E.'s best speeches in the Courts and in Parliament. And this one, so well authenticated, suggests that the great Chancellor and statesman, who gave clients and others the impression that he divined the contents of a brief before he looked at it, was a secret worker from his youth.

Yours, as ever,

APTERYX.

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. 102. Appeal by a mortgagee against the determination of a Commission that the applicant was a "farmer mortgagor." The evidence disclosed that the applicant owned 74 acres of land which she had leased to her husband, who was using the lands for agricultural purposes. The applicant did not have any source of income other than that received as rent from the leased lands, and did not own any stock.

Held, dismissing the appeal, That the applicant was a "farmer applicant" within the meaning of s. 4.

CASE NO. 103. Motion for an order dismissing an application for adjustment upon the ground that applicant, after notice in that behalf, had failed to file particulars as required by s. 29 (3).

The application for adjustment was dismissed upon proof of service of the motion, and applicant's failure to comply with subs. 3 by the date the order was asked for.

NOTE:—In another matter the applicant was given fourteen days within which to file particulars otherwise the application for adjustment would be dismissed.

CASE NO. 104. Motion that a supplementary order be made ordering the sale of property to the mortgagee, and vesting the property in the mortgagee in pursuance of the powers contained in s. 1 (6).

Order accordingly.

CASE NO. 105. Appeal by a home mortgagor against the determination of a Commission that the applicant be not entitled to retain. The evidence disclosed that applicant had been occupying another property rented by him, and had leased the property in question. The lease of the property owned by applicant had now expired, and he wished to re-enter and give up occupation of the house he was occupying. The Commission, in its determination, did not fix the basic value. The matter having been referred back to the Commission and the value fixed by it,

Held, That the applicant was entitled to retain, and the necessary reduction of the mortgages should be made in accordance with s. 42.

It was contended on behalf of the second mortgagee, who was the vendor to the applicant, that the applicant did not require the home, as he was occupying another, but the Court did not consider that the applicant should be deprived of his rights upon the grounds advanced.

CASE NO. 106. Appeal by a Commissioner of Crown Lands against the order of a Commission. The applicant had vacated the leased property and the Commission determined that applicant was not entitled to retain, but discharged applicant from all adjustable debts.

Held, allowing the appeal, That the following proviso be added: "with the exception of the arrears of rent owing to the Crown which shall remain due to the Crown but no action shall be taken to recover any such arrears from the applicant personally, the purpose of this amendment being solely to preserve the Crown's right under s. 82 of the Land Act, 1924."

CASE NO. 107. Appeal by the Official Assignee of the applicant against an order of a Commission.

Held, dismissing the application for adjustment, That the Act was passed for the benefit of the applicant personally or his personal representatives, and it could not be used for the purpose of preferring unsecured creditors as against secured creditors, or for the purpose of altering in any way the priorities and preferences under the Bankruptcy Act.

NOTE:—In another case, it was also held that the administrator under Part IV of the Administration Act, 1908, could not take advantage of the Mortgagors and Tenants Rehabilitation Act, 1936.

* Continued from p. 8.

Obituary.

Mr. M. J. Knubley, Timaru.

The oldest practitioner in Timaru, Mr. M. J. Knubley, died on February 9, aged eighty-six years. He had practised at Timaru for over sixty years, and was a regular attendant at his office until recently.

Mr. Knubley was born at Plumland, Cumberland, and was educated at Marlborough College. He served his articles to Messrs. W. and S. Rix, at Beccles, Suffolk, and was admitted as a solicitor in England in 1875. After acting as a managing clerk for a short period, he sailed for New Zealand a few months after his marriage. He landed at Lyttelton on December 16, 1876. In the following year he sat for and passed his law examinations, and was admitted as a solicitor by Mr. Justice Johnson. He then went to Timaru, where, in June, 1877, he joined Mr. A. G. Hammersley. On the dissolution of this partnership, Mr. Knubley purchased Mr. A. Ormsby's practice. From 1883, until Mr. L. G. Reid was appointed Assistant Crown Officer at Wellington, Mr. Knubley and he practised together. Since then, Mr. Knubley had practised on his own account.

In his early days, Mr. Knubley was a keen participant in athletics, football, cricket, and golf. He was president of the old South Canterbury Amateur Athletic Club, and an active member of the Timaru Cricket and Golf Clubs. In later years he took up bowling, and was a member of the Timaru Bowling Club for upwards of twenty years. He was an original member of the South Canterbury War Relief Society, president of the South Canterbury Acclimatization Society, and, in the course of his activities on behalf of the Anglican community, was a member of the original committee responsible for the building of St. Mary's Church, Timaru.

The "father" of the South Canterbury Law Society and its oldest member, he was secretary for a number of years, and served terms as its president. He was a real "land-mark" of the law in South Canterbury and he will be greatly missed by his fellow-practitioners.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

(*Concluded from p. 44.*)

2. DEED OF ASSIGNMENT OF HIRE-PURCHASE SECURITIES FROM THE COMPANY TO THE CORPORATION ADAPTED TO A GENERAL FORM WITH SCHEDULES OF SECURITIES, ADVANCES AND INTEREST, AND TABLE OF PERIODICAL REPAYMENTS—*continued.*

(7) If default shall be made by the Mortgagor in payment of any of the principal interest or other moneys hereby covenanted to be paid on the day on which the same ought to have been paid according to the terms hereof and such default shall continue to and beyond the last day of the then current calendar month or if default shall be made by the Mortgagor in the observance or performance of any of the covenants conditions or agreements herein expressed or implied and on the Mortgagor's part to be observed or performed or if an order of court of competent jurisdiction shall be made or an effective resolution be passed for liquidation or winding-up of the Mortgagor or if at any time a judgment of any court against the Mortgagor remains unsatisfied for one day then and in any such case the Corporation by itself or by its agents or servants may immediately thereupon or at any time thereafter and without any further consent by the Mortgagor and without giving to the Mortgagor any notice or waiting any time and notwithstanding any subsequent acceptance of any payment of any money due on this security enter upon any lands or premises whereon the said chattels or any of them may be and take possession thereof and ask demand sue for recover and receive all or any of the said sums of hire rent interest or otherwise accrued accruing or to accrue due under the said hire-purchase agreements and any of them and may sell and dispose of the same chattels or moneys or any part thereof by private sale or public auction separately or together in such lots and generally in such manner in every respect as the Corporation deems expedient with power to allow time for payment of the purchase-money or to buy in the said chattels or moneys or any part thereof at such auction and to rescind or vary the terms of any contract of sale or any of the said hire-purchase agreements and to resell and or rehire without being responsible for any loss or expense occasioned thereby and to execute all such assurances and do all such things for giving effect to any such sale as may be necessary or proper and the receipt of the Corporation or its agent shall be a sufficient discharge to any purchaser or hirer at such sale or hiring for any of the purchase-money hire rent or other moneys and upon any sale or hiring purporting to be made in exercise of the powers herein expressed and implied no purchaser or hirer shall be bound to inquire as to the propriety or regularity of any such sale or be affected by notice express or constructive that any such sale or hiring is improper or irregular.

(8) The Corporation shall stand possessed of the proceeds of any such sale and hiring upon trust after payment thereout of costs charges and expenses of and incidental to such taking of possession sale and hiring and the preparation of any instrument to apply the same in reduction of the moneys then owing on the security of this instrument including all moneys herein covenanted to be paid notwithstanding that the same may not then have become due or that any promissory notes or bills of exchange may then be current for the same and to pay the balance if any to the Mortgagor and in accounts between them the Corporation shall be chargeable only with such net sums as it shall actually have received and shall not be compelled to credit the Mortgagor with any sums outstanding with or on the part of any purchaser or hirer to whom the Corporation shall have sold or let upon terms time payment or otherwise then for cash.

(9) The provisions of the Deed of Lien bearing date the day of 193 and made between the Mortgagor of the one part and the Corporation of the other part and registered with the Assistant Registrar of Companies at on the day of 193 shall be read into and be deemed to form part of this security.

IN WITNESS, ETC.

FIRST SCHEDULE.

List of Hire-purchase Securities.

Date of Agreement.	Name of Bailee.	Nature of Chattels.	Amount of outstanding Hire.

Total of outstanding hire .. £

(*To agree with Second Schedule.*)

SECOND SCHEDULE.

Particulars of Advances Charges and Interest.

No.	Item.	Words.	Figures.
1	Present advances.. ..		
2	Discount charges ..		
3	Interest		
4	Outstanding hire (total of items 1, 2, and 3)		£

(*To agree with First Schedule.*)

THIRD SCHEDULE.

Table of Payments.

Date.	Amount.		
193....	£	s.	d.

THE COMMON SEAL ETC.

Legal Literature.

Law Reform Act, 1936, by R. G. McElroy, LL.D. (N.Z.), Ph.D. (Cantab.), and T. A. Gresson, B.A. (Cantab.), with a Foreword by The Hon. H. G. R. Mason, M.A., LL.B., His Majesty's Attorney-General for New Zealand. Pp. xxxi — 248 (incl. Index). Wellington. Butterworth & Co. (Aus.) Ltd.

A Review by A. T. Donnelly.

The Law Reform Act, 1936, is the most recent statutory example of a great and permanent faculty or accomplishment of the British legal system—namely, a capacity and competence to change, amend and adjust itself easily and without friction in accordance with the felt necessities of the time and prevailing moral and political theories. The Act has changed important legal principles which have been part of the stock-in-trade of living practising lawyers since their student days.

The work under review, like many an older English text-book, is a product of youth. It is written by two young men, lawyers who have returned only a little while from the Law School at Cambridge.

The book is dedicated to Professor Gutteridge and Professor McNair, under whom as the authors say it has been their privilege to study.

There is not in England the same prejudice against ordered theoretical knowledge as in New Zealand, and so both Professor Gutteridge and Professor McNair were members of the English Law Revision Committee, whose researches and recommendations resulted in the enactment of the English Law Reform statutes.

The association of the authors with these great lawyers and teachers was, no doubt, the inspiration of this book.

The book successfully combines the theoretical and the practical, and is written throughout in a clear and scholarly fashion. There is a contrast in the style of the authors as is shown in the portions for which each is primarily responsible. The reference to theory and scholarship will, it is hoped, not deter practitioners from buying the book, because it is certain to be valuable to all of us in everyday office use.

To say of a book that it is theoretical or scholarly may incline some lawyers to dismiss it from consideration and refuse to buy or read it. A weakness in our profession in New Zealand is a tendency to regard books or the reading of them as useless unless there is some immediate cash return to be shown. A lawyer in a good practice once said, when invited to read a philosophical book upon the law, that he had little time for reading, but, in any event, his preference leaned towards a fat transfer and a mortgage.

Lawyers are supposed to be bookish men, and, to some extent, both as draftsmen and advocates, we are artificers in words, and our language is both the raw material and the most important tool of our trade. Of too many of us can it be said: "Sir, he hath never fed of the dainties that are bred in a book; he hath not eat paper as it were; he hath not drunk ink."

The book under review is a practical work, and is a safe and reliable guide to the important changes made by the Act. The working-out of the problems raised by the legislation requires the best efforts of all practitioners who may be concerned with its operation. For example, one of the authors was counsel in a recent case: *Wilson* v. *Holmes* (unreported), where an administrator-father recovered £1,500 damages for the shortened expectation of life of his child aged three. The jury may have been generous, but this case illustrates the class of problem which will come up for consideration unless some further amendment is made in the law. Juries in New Zealand have been criticized by high judicial authority for giving extravagant verdicts. The jury in *Wilson* v. *Holmes* seems to have been of the same mind as Greaves-Lord, J., in *Trubyfield* v. *Great Western Railway Co.*, [1937] 4 All E.R. 614, where the same amount (£1,500) was awarded by a Judge in respect of the loss of expectation of life of a girl of eight years of age.

The authors are to be congratulated upon beginning their enterprise with an orderly plan in mind and closely following the plan until the end of the book. They have summarized accurately and fully enough for all ordinary purposes the law as it existed prior to the passing of the Act, and have told us of the hardships and necessities which caused the authorities and the Legislature to make the changes which have been made. This preliminary historical statement supplies a background for the work and the discussion of the Act itself. Having thus provided the background, the authors have stated clearly the provisions of the Act, and have made valuable suggestions as to its probable construction and working, although, as is said by the Attorney-General in his Foreword, they cannot expect complete agreement with all the opinions they have expressed.

The book, therefore, does undoubtedly achieve the object of the authors in providing a starting-point for the discussion of general principles. It is not easy for present-day lawyers to accommodate themselves all at once to the changes made by the Act. The authors have successfully avoided the danger pointed out by Lord Wright in *Rose* v. *Ford* where he says in criticizing the judgment of the Court of Appeal:

> "I venture respectfully to think that the view of the Court of Appeal illustrates a tendency common in construing an Act which changes the law, that is, to minimize or neutralize its operation by introducing notions taken from, or inspired by, the old law which the words of the Act were intended to abrogate, and did abrogate."

Great difficulties must arise in the working-out of the principles of the Act, and violent judicial disagreement is to be expected. The difficulties which must arise are illustrated in the recent case of *Croston* v. *Vaughan*, [1937] 4 All E.R. 249, where the Court of Appeal was divided as to the apportionment of the blame between two persons who were jointly responsible for injuries sustained by another person in a motor accident where the facts were most unusual.

The book as a whole is a great credit to the authors, and credit is due to the publishers for having given the authors their opportunity. The book is of practical value to every lawyer, and is written pleasantly, modestly, and forcibly. The late Sir John Salmond once said that he was induced to set about the writing of his classic work on Torts by the fact that this was a changing and incompletely developed department of the law. There are still land and territories of the law which are uncultivated or unsettled, and frontiers there still must be and controversies as to where the lines of demarcation should be put. It is to be hoped that the example of the authors may encourage other young lawyers before they become too heavily involved in everyday practice to explore other remaining unmapped and undefined territories of the law.

The publication of works of this kind is well known not to be a profitable business; and the get-up, binding, and general appearance of the book are not completely satisfactory. It opens badly, and will only lie flat if its back is more or less broken. This is rather irritating to the reader, and is an outrage to the book. There are some misprints which have been overlooked, the rounding and joining of the back are roughly done, and the case is made of a cloth, which it is to be feared, will become dowdy in a short space of time. The almost compulsory use of electros in New Zealand instead of dies for the blocking and lettering has caused the finish of the book to suffer. However, with printing costs as they are to-day and a restricted market, too much cannot be expected, and the publishers are to be congratulated for having given the authors the opportunity to write, and the profession an opportunity to read, the work.

Practice Precedents.

Bankruptcy: Motion for Leave to Issue Summons for Possession.

Section 90 of the Bankruptcy Act, 1908, provides that if a bankrupt or any member of his family refuses, when required by the Assignee, to quit and deliver up possession of any tenement forming part of the property vested in the Assignee under the bankruptcy, the Assignee may apply to the Supreme Court for a summons calling upon such person to show cause why he should not forthwith quit and deliver up possession of the premises. On the hearing of any such summons, the Court may make such order as the case may require, and such order is enforceable in the same manner as any other order of the Court.

MOTION FOR LEAVE TO ISSUE SUMMONS.

IN THE SUPREME COURT OF NEW ZEALAND.

........District.

........Registry. No.

In Bankruptcy.

IN THE MATTER of the Bankruptcy Act 1908

AND

IN THE MATTER of A. B. &c. a bankrupt *ex parte* The Official Assignee in Bankruptcy of the property of the said A. B. &c.

Mr. of Counsel for the Official in Bankruptcy of the estate of A. B. &c. to move before the Right Honourable Sir Chief Justice of at his Chambers Supreme Court House on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER that a summons be issued calling upon A. B. &c. and C. B. of the same place wife of the said A. B. TO SHOW CAUSE why they and each of them should not forthwith quit and deliver up possession of the premises known as number , Street in the City of being all that piece of land containing one rood (more or less) and being part Lot on Deposited Plan Number Section , District and being all the land comprised in Certificate of Title Volume folio , Registry upon the grounds that the above-named bankrupt A. B. &c. is an undischarged bankrupt whose estate is being administered by the Official Assignee and that the said A. B. and his wife C. B. have refused to quit and deliver up possession of the said property as required.

Dated at this day of 19 .

Solicitor for applicant.

Certified pursuant to the rules of Court to be correct.

Counsel for applicant.

REFERENCE.—His Honour is respectfully referred to s. 90 of the Bankruptcy Act, 1908.

Counsel for applicant.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

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

1. That I am the Official Assignee in Bankruptcy of A. B. &c.
2. That the said A. B. was adjudicated a bankrupt on his own petition on the day of 19 .
3. That the said A. B. has not received his discharge in bankruptcy.
4. That the chief asset in the estate of the said bankrupt is a tenement or dwellinghouse known as Number , Street in the City of being all that piece of land containing one rood (more or less) and being part Lot on Deposited Plan Number Section , District and being all the land comprised in Certificate of Title Volume Folio , Registry SUBJECT TO MORTGAGE number to one G. H. &c., securing the principal sum of £ . The said property is vested in me under the bankruptcy of the said A. B.
5. That there is now remaining due under the said mortgage the sum of £ .
6. That the Government valuation of the property referred to in para. 4 of this my affidavit is £ as appears by the Certificate of Valuation attached hereto and marked "A."
7. That the equity in the said property amounts to approximately £ .
8. That I desire to offer the said property for sale conditional on vacant possession being given to the purchaser.
9. That the said bankrupt and/or his wife C. B. are in possession of the said tenement or dwellinghouse.
9. That on the day of 19 I gave notice in writing (copy of which is annexed hereto and marked "B") to the said bankrupt and his wife the said C. B. to quit and deliver up possession of the said tenement on or before the day of 19 .
10. That the said A. B. and the said C. B. have refused and continue to refuse to quit and deliver up possession of the said tenement or dwellinghouse to me.

Sworn &c.

ORDER FOR LEAVE TO ISSUE SUMMONS.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion for order for leave to issue a summons herein pursuant to s. 90 of the Bankruptcy Act 1908 and the affidavit of E. F. the Official Assignee filed in support thereof AND UPON HEARING Mr. of Counsel for the said Official Assignee IT IS ORDERED THAT A SUMMONS BE ISSUED calling upon A. B. &c. and C. B. &c. to show cause why they and each of them should not forthwith quit and deliver up possession to the said E. F. of the premises known as Number , Street in the City of being all that piece of land containing one rood (more or less) and being part Lot on Deposited Plan Section , District and being all the land comprised in Certificate of Title Volume Folio , Registry.

By the Court.

Registrar.

Solicitors' Right of Audience.—Mr. Justice Humphreys made some observations the other day upon solicitors and the right of audience in the High Court. In *Warner Press, Ltd.* v. *Skylinsky, Louizo* v. *Kennell*, (*Times*, January 27), counsel for the plaintiffs informed his Lordship that the first two defendants consented by their solicitors to judgment for the full amount claimed and costs. Solicitors have no right of audience in the High Court, said the learned Judge; he was loth to dispense with the necessity for the presence and the assistance of counsel. If, however, a solicitor for a party, or his managing clerk, went into the witness-box and stated, not as advocate but as witness, that his instructions were to consent to judgment, that would, in the circum-

stances, be accepted as adequate. This was duly done. A letter from that party's solicitor, similarly consenting to judgment, would also (added Humphreys, J.) have sufficed. The third defendant in the present case was to be dismissed, it was agreed, from the action; since he was neither present nor represented by counsel, no order as to costs was made in his case.

Recent English Cases.

Noter-up Service
FOR
Halsbury's "Laws of England"
AND
The English and Empire Digest.

ALIENS.

Charge of Being in Possession of Altered Passport—Whether *Mens rea* Must be Proved—Aliens Order, 1920, Art. 18 (4) (*d*).

Mens rea *is not necessary for the offence of having in one's possession, without lawful authority, a forged passport.*

CHAJUTIN *v.* WHITEHEAD, **[1938] 1 All E.R. 159. K.B.D.**

As to *mens rea*: see HALSBURY, Hailsham edn., vol. 9, pp. 10–12, par. 3; DIGEST, vol. 14, pp. 31–38.

BANKING.

Bankers—Advances—Secured by Trust Receipts—Whether Equitable Charge or Declaration of Trust.

When a bank advances money secured by trust receipts by which the borrower agrees that goods purchased with the money advanced should be held by him as agents for and in trust for the bank, the trust receipts create an equitable charge only.

MERCANTILE BANK OF INDIA, LTD. *v.* CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA AND STRAUSS AND CO., LTD. (IN LIQUIDATION), **[1937] 4 All E.R. 651. K.B.D.**

As to equitable charge and declaration of trust: see HALSBURY, Hailsham edn., vol. 23, pp. 231, 232, pars. 339, 340.

BANKRUPTCY.

Fraudulent Preference—Bank Overdrafts Secured by Mere Deposit of Documents of Third Party Without Agreement to Repay—Bankruptcy Act, 1914 (c. 59), s. 44.

A mere deposit of documents as collateral security with no covenant or agreement on the part of the alleged surety to pay part or the whole of the debt, does not make such a person a "surety or guarantor" within the Bankruptcy Act, 1914, s. 44.

Re CONLEY (TRADING AS CAPLAN & CONLEY) *ex parte* THE TRUSTEE *v.* BARCLAYS BANK, LTD, **[1937] 4 All E.R. 438. C.D.**

As to guarantors and fraudulent preference: see HALSBURY, Hailsham edn., vol. 2, pp. 368, 369, par. 498; DIGEST, vol. 5, pp. 855–857.

COMPANIES.

Receiver and Manager—Appointed by the Court—Liability for Rent.

Though a receiver appointed by the Court is not the agent of anyone, but is personally liable for all contracts entered into by him, he is not liable for the rent of the business premises, since he is not a party to, nor assignee of, that contract.

CONSOLIDATED ENTERTAINMENTS, LTD., *v.* TAYLOR, **[1937] 4 All E.R. 432. K.B.D.**

As to liability of receiver appointed by the Court: see HALSBURY, Hailsham edn., vol. 5, pp. 524, 525, par. 852; DIGEST, vol. 10, pp. 797, 798.

Shares Allotted to a Minister of the Crown—No Interest During the "Establishment Period"—Whether Net Amount Received by Shareholders or Gross Amount Without Deduction of Income Tax.

If a provision is made that in the event of the winding-up of a company, some of whose shares are held by a Minister, the surplus assets shall be applied in payments to the Minister of a sum equivalent to the amount of dividend received on a share of the company originally issued to the public, then the amount payable to the Minister is the actual amount received by any other shareholder.

Re HOME GROWN SUGAR LTD., **[1938] 1 All E.R. 85. C.D.**

As to payment of dividends on a winding-up: see HALSBURY, Hailsham edn., vol. 5, pp. 700, 701, par. 1168.

CONTRACT.

Illegality—Aircraft—Unairworthiness—Agreement to Deliver and to take Delivery of an Unairworthy Aeroplane to be Flown to Destination.

A contract which provides for the flying of an aircraft without a certificate of airworthiness is unenforceable as being illegal.

COMMERCIAL AIR HIRE, LTD. *v.* WRIGHTWAYS, LTD., **[1938] 1 All E.R. 89. K.B.D.**

As to aircraft: see HALSBURY, Supp. Street and Aerial Traffic, par. 712; DIGEST, Supp. Street and Aerial Traffic, Nos. 260 (*a*)–260 (*f*).

FACTORIES AND SHOPS.

Dangerous Machinery—Fencing—Unfenced Gearwheels of Reeling Machine—Factory and Workshop Act, 1901 (c. 22), s. 10 (1) (c).

It is no defence to an allegation of negligence in not fencing dangerous machinery (i) *that there had been user for a long period without an accident;* or (ii) *that the inspector has never objected to the fencing as inadequate.*

SUTHERLAND *v.* EXECUTORS OF JAMES MILLS, LTD., **[1938] 1 All E.R. 283. K.B.D.**

As to fencing of dangerous machinery: see HALSBURY, Hailsham edn., vol. 14, pp. 594, 595, par. 1130; DIGEST, vol. 24, pp. 908–911.

FOOD AND DRUGS.

Marks of Origin—Mark Not Visible to Purchaser—Merchandise Marks (Imported Goods) No. 7 Order, 1934 (S.R. & O., 1934, No. 727), Arts. 2, 3, 4.

It is not sufficient compliance with the order in question that the meat be branded with a proper mark of origin. It is also necessary that the mark be so exhibited as to be seen by the purchaser.

ROBINSON *v.* R. C. HAMMETT, LTD., **[1938] 1 All E.R. 191. K.B.D.**

As to marks of origin: see HALSBURY, Hailsham edn., vol. 15, pp. 190–193, pars. 330–339.

HIRE-PURCHASE.

Implied Condition—Title of Owners—Date of Delivery.

When an agreement is made between the hire-purchase and the finance company it is immaterial that the finance company should not be the owners of the article in question at the time of the agreement.

MERCANTILE UNION GUARANTEE CORPORATION, LTD. *v.* WHEATLEY, **[1937] 4 All E.R. 713. K.B.D.**

As to implied conditions of ownership: see HALSBURY, Hailsham edn., vol. 16, p. 515, par. 758.

MARKETS AND FAIRS.

Street Trading—Receptacle Occupying Stationary Position Thereon—Receptacle Ordinarily Moved from Place to Place in Pursuit of Trade—London County Council (General Powers) Act, 1927 (c. xxii), s. 30.

Street traders must be licensed, with the exception of those who ordinarily move from place to place, the fact that persons trading from barrows or moving receptacles being prima facie *evidence that they are such persons.*

TAYLOR *v.* TOWNEND; SAUNDERS *v.* TOWNEND, **[1938] 1 All E.R. 336. K.B.D.**

As to street traders: see HALSBURY, 1st. edn., vol. 27, Street and Aerial Traffic, p. 288, par. 594; DIGEST, vol. 33. pp. 564–568.

MONEY-LENDERS.

Memorandum of Loan Agreement—Loan Secured by Bill of Sale—Reference to Power of Seizure and Sale—Unconscionable Contract—Money-lenders Act, 1927 (c. 21), s. 6.

In spite of the fact that a bill of sale must be in statutory form, the memorandum of a money-lending contract in cases where the loan is secured by a bill of sale must state the terms of the power of seizure and sale.

MITCHENER v. EQUITABLE INVESTMENT CO., LTD., [1938] **1 All E.R. 303. K.B.D.**

As to sufficiency of memorandum: see HALSBURY, Hailsham edn., vol. 23, pp. 190, 191, par. 280; and for cases: see DIGEST, Supp., Money and Money-lending, Nos. 353*a*–353*y*.

POWERS.

Fraudulent Exercise—Power in Favour of One Object Only—Necessity for Proof of Antecedent Agreement with Appointee to Benefit Stranger.

In the case of appointments in favour of one object only, it is necessary to show an antecedent agreement with the appointee if the exercise is to be impeached; but in the case of appointments that can be made by a selection from a class of persons, it is enough to prove an improper motive.

Re NICHOLSON'S SETTLEMENT; MOLONY v. NICHOLSON **[1938] 1 All E.R. 109. C.D.**

As to fraudulent appointments: see HALSBURY, Hailsham edn., vol. 25, pp. 581–586.

PRACTICE.

Action for Damages for Negligence—Judgment for Plaintiff—Money Taken out of Court—Whether Plaintiff can Appeal on Quantum of Damages.

A person who has obtained a judgment for damages and has taken the award out of a larger sum paid into Court, can afterwards appeal against the quantum of damages.

MILLS v. DUCKWORTH, [1938] **1 All E.R. 318. C.A.**

As to appeal on quantum of damages: see HALSBURY, Hailsham edn., vol. 10, pp. 153–155, pars. 195–198; DIGEST, vol. 17, pp. 164–179.

Action for Fraudulent Misrepresentation—Leave to Serve Notice of Writ Out of the Jurisdiction—Defendant Domiciled in Scotland—R.S.C., Ord. XI, r. 1 (*e*).

No leave for service of notice of writ out of the jurisdiction is granted where a person domiciled in Scotland sues upon a breach of contract within the jurisdiction, and a claim in contract cannot be added by a plaintiff who has obtained leave to serve out of the jurisdiction notice of a writ claiming in tort.

WATERHOUSE v. REID, [1938] **1 All E.R. 238. C.A.**

As to service out of the jurisdiction: see HALSBURY, Hailsham edn., vol. 26, pp. 31–33, par. 44.

Application for Transcript of Shorthand Notes—Notes on Discussion in Judge's Private Room.

No publication, however restricted, of a transcript of shorthand notes of proceedings in chambers may be made without the consent of the Judge.

VERNAZZA v. BARBURRIZA AND CO., LTD., [1937] **4 All E.R. 364. C.A.**

As to the privacy of proceedings in chambers: see HALSBURY, Hailsham edn., vol. 26, p. 42, par. 64; DIGEST, p. 704.

SETTLEMENTS.

Tenant for Life and Remainderman—Sale of Larch Trees.

A tenant for life is entitled to the purchase money upon the sale of trees if they are sold in the course of proper management.

Re HARKER'S WILL TRUST; HARKER v. BAYLISS, [1938] **1 All E.R. 145. C.D.**

As to trees: see HALSBURY, Hailsham edn., vol. 1, pp. 431–433, pars. 737, 738.

STREET TRAFFIC.

Driving a Private Car Without Due Care and Attention—Inexperience of Driver No Answer to Charge—Road Traffic Act, 1930 (c. 43), s. 12.

The requirement of s. 12 of the Road Traffic Act, 1930, is that the driver shall drive with due "care and attention," so that his inexperience is no answer to a charge under the section.

MCCRONE v. RIDING, [1938] **1 All E.R. 157. K.B.D.**

As to careless driving: see HALSBURY, Supp., Street and Aerial Traffic, par. 683.

WILLS.

Testamentary Capacity—Testator a Paranoid Psychopath—Insane Delusion Affecting One Clause of Last Codicil.

The Court may declare for a testamentary disposition subject to the deletion of one clause therefrom.

Re BOHRMANN, CAESAR AND WATMOUGH v. BOHRMANN, **[1938] 1 All E.R. 271. P.D.A.D.**

As to testamentary capacity and delusional insanity: see HALSBURY, 1st edn., vol. 28, Wills, p. 534, par. 1052.

New Books and Publications.

Law of Names, Public, Private, Corporate, 1938. By A. Linell. (Butterworth and Co. (Pub.) Ltd.) Price 21/-.

Wills's Principles of Circumstantial Evidence. Seventh Edition, 1937. (Butterworth and Co. (Pub.) Ltd.) Price 23/6.

More's Saving of Income Tax, Surtax, and Death Duties. Second Edition. By Jasper More, B.A. (Butterworth and Co. (Pub.) Ltd.) Price 21/-.

Swift's Sanitary Administration. By Stewart Swift, Chief Sanitary Inspector, City of Oxford. (Butterworth and Co. (Pub.) Ltd.) Price 34/-.

English Law from the Foreign Standpoint, 1937. By Hans W. Goldschmidt. (Isaac Pitman and Sons.) Price 28/-.

Winfield's Textbook of the Law of Torts, 1937. (Sweet and Maxwell.) Price 42/-.

Modern Law Review. Vol. 1, No. 1, June, 1937. (Isaac Pitman and Sons.) Price 5/- per part.

Renvoi in Modern English Law. Edited by G. C. Cheshire, 1937. (Oxford University Press.) Price 7/-.

Fay's Leading Cases in a Nutshell. Second Edition. By E. Stewart Fay, M.A. (Sweet and Maxwell.) Price 6/-.

Hanbury's Modern Equity. By H. C. Hanbury. Second Edition, 1937. (Stevens and Sons.) Price 42/-.

Latin for Lawyers. Second Edition. (Sweet and Maxwell.) Price 10/6.

Cases on Commercial Contracts. By A. C. Caporn, B.A., LL.B. (Stevens and Sons.) Price 17/6.

Lumley's Public Health. Eleventh Edition, Vol. 1. Edited by Sir Joshua Scholefield, Erstine Simes, M.A., Charles E. Scholefield, and A. N. Shelly, M.A., B.C.L. (Butterworth and Co. (Pub.) Ltd.) Price 98/-.

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A.B.C. Guide to Practice, 1938. By P. T. Bowie. (Sweet and Maxwell.) Price 10/6.

Notes on "Pollock's Contracts." By V. C. Briggs, 1937. (Stevens and Sons.) Price 7/-.