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

"At a moment like this in the affairs of the world, one might reflect how much the steadiness of our democracy owes to the impeccability of our justice, and to the certainty that neither the prejudices of passion nor political turmoil could, in the words of Lord Buckmaster, 'flutter the ermine of a Judge's robe.' The world would be happier if the serene and untrammelled administration of justice could be realized in every country which pretends to civilization."

—Sir Terence O'Connor, K.C., M.P., His Majesty's Solicitor-General for England.

Vol. XV. Tuesday, February 7, 1939. No. 2.

Insurers as Defendants in Running-down Actions.

ACCORDING to English practice, as a general rule the insurance company which has issued a motorist's insurance policy of any kind is not allowed to be brought in as a defendant by third-party notice, in an action for damages by the injured party against the motorist, where the trial is with a jury: *Gowar v. Hales*, [1928] 1 K.B. 191. This rule is founded on the well-established practice at the Bar, imposed by the Judges, that, in an action against the uninsured motorist, the jury should not be informed that the defendant is insured: *Jones v. Birch Bros., Ltd.*, [1933] 2 K.B. 597, 606. An exception arises where the owner of the motor-vehicle dies insolvent or becomes bankrupt at or after the time of the accident: Motor-vehicles Insurance (Third-party Risks) Act, 1928, s. 10 (1) (3).

The question arose in England recently whether an insurance company could be added as a defendant in a running-down action; and the Court of Appeal (Greer, Slesser, and MacKinnon, L.JJ.) defeated the attempt of the plaintiffs to add the insurance company which had insured the defendant's third-party liability: *Carpenter v. Ebblewhite*, [1938] 4 All E.R. 41. Their Lordships, while in agreement as to the result, gave different reasons for their conclusions.

The plaintiffs claimed that they were gravely injured by reason of the negligence of the defendant, Ebblewhite, who was the owner of the car driven at the time of the accident by the defendant, Bellson, as his servant or agent. They obtained leave to join Ebblewhite's insurance company as a defendant. In their statement of claim, the plaintiffs claimed, *inter alia*, a declaration that the insurance company was liable to satisfy any judgment obtained against Ebblewhite or Bellson. An application was made to strike out such portions of the statement of claim as referred to the insurance company, on the grounds that such references were frivolous and vexatious.

Mr. Justice Goddard made the order applied for, and the plaintiffs appealed.

In the Court of Appeal it was contended that the insurance company could not say whether they were under any liability to Ebblewhite. If the accident occurred through the negligence of Ebblewhite or his servant or agent, they could not dispute their liability; but, on the other hand, if it should be established that Ebblewhite was not liable, either because Bellson was not his servant or because there was no negligence on the part of the driver of Ebblewhite's car, then there would be no indemnity due from the insurance company to anybody. With this proposition, Lord Justice Greer agreed. He said:

> "It has never been determined that there can be a claim for a declaration where no dispute has arisen between the plaintiff and the defendant, and it would not have made any difference if this claim had been made in a separate action. It would still have been frivolous and vexatious—at any rate, vexatious—to bring an action before the dispute has arisen. It seems to me that it is wrong and entirely premature at the present time to determine in this action, or even in a separate action, a dispute which has never arisen between the parties at all. I do not think it would make any difference whether the claim were made in an action against Ebblewhite by joining the insurance company."

His Lordship, after coming to the conclusion that the Court should not disturb the decision of the Judge below, said, with regard to the point which was made on behalf of the respondent, that the joining of the insurance company in the action was embarrassing because it would be necessarily unavoidable that the jury should know that there could not be any claim against the insurance company unless they decided the case in favour of the plaintiff, that that reasoning did not appeal to His Lordship at all, because, since the time that it had been provided by statute that every owner of a motor-car must be insured, that matter would be present to the minds of the jury just as much, though not a word was said about it, as if it were proclaimed from the house-tops.

Lord Justice Slesser came to the same conclusion that the appeal should be dismissed, but for reasons different from those stated by Greer, L.J. On the matter with which Greer, L.J., had dealt, His Lordship preferred to express no concluded opinion. He then proceeded to consider whether the jury should be informed that the defendant was indemnified by an insurance company. He said:

> "The reason I have come to the conclusion that, within the meaning of the rule to which Greer, L.J., referred, this adding of the claim against the insurance company for a declaration would tend to embarrass the fair trial of the action is this. I think that there can be no doubt that, before the passing of the Road Traffic Act, 1934, such an addition would be embarrassing. It has been already held in this Court that, where it was sought to bring in the insurance company insuring the defendant by means of a third-party procedure, that would tend to embarrass the trial of the action as between the plaintiff and the defendant, if only for the reason that it would almost with certainty necessitate telling the jury that there was in that case an insurance. In *Gowar v. Hales*, [1928] 1 K.B. 191, Scrutton, L.J., said, at p. 197:
>
> > ' . . . It has been established as a rule of practice at the bar which the Judges enforce, that in an action against a motorist the jury ought not to be told that the defendant is insured. Whether the way of enforcing it is, as has been done in one case cited to us, to discharge the jury when the fact has been told them, or whether it is, as in the case before Branson, J., to say it is an error of judgment on the part of the counsel who has mentioned it but that the Judge should endeavour to put it right by his summing-up, it is not necessary to decide here. There was this undoubted rule of practice on which the

Judges acted; and to have a rule of practice that a jury should not be informed that the defendant is insured, and for the Judge at the same time to bring in the insurance company to take part in the trial of the action as the Judge shall direct and be bound by the result of the trial, seems to me to be entirely inconsistent.'

That was the view taken by the Court in 1927, before the passing of the Road Traffic Act. Then we find that in *Jones v. Birch Bros., Ltd.*, [1933] 2 K.B. 597, Scrutton, L.J., at p. 606, recites again what he had said in *Gowar v. Hales*, [1928] 1 K.B. 191, and indicates that it has been a universal practice in dealing with this class of case, which, as I read his judgment, is not necessarily limited to cases where there is a jury.

"I ask myself, in those circumstances, that being clearly the law at that time, whether the fact that the Road Traffic Act, 1934, with certain specified exceptions, requires insurers under that Act to satisfy judgments against persons insured in respect of third-party risks makes a difference to the old rule. Looking at the facts of this particular case, I think that it would be wrong here to say that the statute has altered the rule, and for this reason: this is not a case where it is admitted that, if the plaintiff succeeds, automatically the insurers become liable. It is a case where the contention of the insurers, as expressed in the correspondence, is that, at the time of the accident, the person causing the injury was not driving as the agent of the insured person, but had purchased the car, and was himself the owner of the car, and outside the policy altogether."

In these circumstances, His Lordship thought a discussion as to the declaration must inevitably have the result that, if the jury found one way they would know they were finding on the question of whether or not the car had been purchased. They would know that they were finding for the plaintiff, in effect, against an insurance company. They would know, on the other hand, that, if they had decided that the car had been purchased, as the insurance company said, by the driver of the car, then they would be finding for a man who possibly was a man of straw, with no insurance company behind him. That would involve a consideration, as it seemed to His Lordship, of the fact that the party may be injured just as much and as cogently and as prejudicially as would have been the case before the passing of the Road Traffic Act, 1934.

His Lordship added:

"While I say nothing about circumstances which might arise when the dispute with the insurance company was not of this sort, in the present case, having regard to the issues between the parties, I do not think that it can be said on behalf of the appellants that it is so certain that the defendant was insured that the jury must be taken to have known it in any event, and the mischief which the earlier cases seek to guard against no longer exists. I think, therefore, that, in the circumstances, this case does fall within the class of case mentioned in *Gowar v. Hales*, [1928] 1 K.B. 191, and I have come to the conclusion that it would tend to embarrass the action if a declaration against the insurance company were sought in the present proceedings."

In view of the proposed adoption in New Zealand in the near future of the English third-party procedure, Lord Justice Slesser's final observation is of great interest. He said:

"I think that the rule is of general application with regard to third-party procedure, though there again, of course, another question—as to whether the insurance is an indemnity, and, therefore, within the rule—has been canvassed, but it is not germane to the matter here to be considered. I think that the old practice in these cases prevails, and that nothing in the statute has altered the position. The position seems to me to be the same whether we are considering third-party procedure or considering an application to add the insurance company as a defendant. Therefore, for those reasons, as I say, though expressing no concluded opinion upon the validity of an action for a declaration brought as a separate cause, I think that in the present case the proceedings are wrongly conceived, and the appeal fails."

Lord Justice MacKinnon agreed with the reasons given by Greer, L.J., and considered that he had very properly emphasized the aspect of the reason to which we have referred in detail—namely, that all the questions involved in determining whether or not ultimately the insurance company might be liable were pure questions of fact.

The topic here under discussion arose incidentally in the recent case, *Bateman v. Ackroyd*, [1939] N.Z.L.R. 65; but that case is dependent on its own facts, and cannot be taken as any adequate guide as to whether or not the fact that the defendant is insured should, or should not, be mentioned to the jury. In the present state of uncertainty on the point, the remarks of Lord Justice Slesser (*supra*) will be welcomed, as they were made in relation to the existence of the English parallel statute making compulsory the insurance of third parties by the owners of motor-vehicles.

Summary of Recent Judgments.

SUPREME COURT.
Napier.
1938.
December 2, 23.
Myers, C.J.

GOODMAN v. NAPIER HARBOUR BOARD.

Contract—Construction—Contract for Erection of Wharf for Harbour Board—Clause vesting Plant and Materials in Board—Clause empowering Board to determine Contract and seize and forfeit Plant, Materials, and Deposit—Legality thereof—Whether Board exercised such Remedy in pursuance of Statute—Harbours Act, 1923, s. 248.

A clause in a contract for the construction of a wharf by the plaintiff for the defendant provided that in certain events the defendant might determine the contract by notice and

"enter upon and take possession of the works, together with all the plant and materials of the contractor employed by the contractor for the purpose of the works or brought upon the site of the said works or adjacent thereto, and the same shall become the absolute property of the Board without making any payment or compensation therefor, and all sums of money deposited as security for the due performance of the contract, or owing to the contractor, shall be forfeited and become the absolute property of the Board, and all work (exclusive of plant) done up to that time shall be paid for to the contractor at such sums as the engineer shall fix, having regard to the schedule of prices, and to all additions and deductions, and after deducting all payments made on account."

Another clause provided that all plant and material delivered or brought on to the works for the purpose of being used or employed in or about the same should be the absolute property of the defendant as though they had been legally vested in the Board by absolute assignment.

The defendant, being entitled to do so, determined the contract in the manner provided and seized and forfeited the plant, materials, and deposit.

In an action claiming damages for conversion and alleging that such seizure and forfeiture were not legal,

Willis, for the plaintiff; **J. F. B. Stevenson,** for the defendant.

Held, That, on the construction of the contract, the clause as above set out was not a machinery clause for the purpose of enabling the Board necessarily to complete the work (which alternative remedy was provided for under another clause), but a clause, the intention of which was to entitle the defendant on the determination of the contract absolutely to the plant, materials, and deposit; but there was nothing illegal in the provisions of that clause.

In re Keen and Keen, Ex parte Collins, [1902] 1 K.B. 555, and **Reeves v. Barlow,** (1884) 12 Q.B.D. 436, applied.

Ranger v. Great Western Railway Co., (1854) 5 H.L. Cas. 72, 10 E.R. 824, and **Hart v. Porthgain Harbour Co., Ltd.,** [1903] 1 Ch. 690, distinguished.

Semble, In exercising its remedy of enforcing its remedies under the contract, the defendant Board was engaged in a public duty and was doing something in pursuance of the Harbours Act, 1923, and its amendments, within the meaning of s. 248 of that Act, which provides for notice and commencement of action within the periods specified therein.

Bradford Corporation v. Myers, [1916] 1 A.C. 242, 264, and **Vincent v. Tauranga Electric-power Board,** [1933] N.Z.L.R. 902, G.L.R. 614, aff. on app. [1936] N.Z.L.R. 1016, J.C., referred to.

Solicitors: Gifford and Robinson, Napier, for the plaintiff; **Sainsbury, Logan, and Williams,** Napier, for the defendant.

Case Annotation: *In re Keen and Keen, Ex parte Collins,* E. and E. Digest, Vol. 5, p. 672, para. 5955; *Reeves v. Barlow, ibid.,* Vol. 7, p. 15, para. 63; *Ranger v. Great Western Railway Co., ibid.,* p. 361, para. 113; *Hart v. Porthgain Harbour Co., Ltd., ibid.,* p. 413, para. 321; *Bradford Corporation v. Myers, ibid.,* Vol. 38, p. 110, para. 784.

SUPREME COURT. Wellington. 1938. Dec. 9, 12, 20. *Quilliam, J.*

In re **ANNIE NISSENBAUM (DECEASED).**

Practice—Probate and Administration—Caveat—Order *nisi*—Whether the Court has discretion to Order an Action or the Hearing of an Order *nisi*—Administration Act, 1908, ss. 27, 28—Code of Civil Procedure, RR. 531L and 531Q.

The rules of the Code of Civil Procedure relating to caveats against a grant of probate or administration contemplate proceeding both by action and by the hearing of an order *nisi* as provided by s. 28 of the Administration Act, 1908. Rule 531L of the Code of Civil Procedure does not oust the inherent jurisdiction of the Court to order an action and can be reconciled only with R. 531Q if the latter be read as giving the Court a discretionary power.

Where an order *nisi* for probate had been granted under s. 28 of the Administration Act, 1908, the caveator filed an affidavit, which, though insufficient to enable the Court to determine whether or not the order *nisi* should be made absolute, disclosed sufficient to show that a full inquiry should be made, the Court made an order for the will to be proved in solemn form.

Counsel: O'Leary, K.C., and **Holdsworth,** for the executors; **O. C. Mazengarb** and **Arndt,** for the caveator; **Pope,** for Mrs. T. Allen, a daughter of the deceased.

Solicitors: Holdsworth and Gault, Wellington, for the trustees; **Ongley, O'Donovan, and Arndt,** Wellington, for the caveator; **Perry, Perry, and Pope,** Wellington, for Mrs. T. Allen.

SUPREME COURT. In Chambers. Wanganui. 1938. December 19. *Quilliam, J.*

In re **BROWN (DECEASED).**

Practice—Probate and Administration—Application for Order dispensing with Sureties—Necessity for showing No Child of Deceased predeceased him leaving Issue—Administration Act, 1908, s. 49—Code of Civil Procedure, R. 531F.

An application for an order dispensing with sureties must show that no child of the deceased predeceased him, leaving issue who would be entitled to a share in the estate under s. 49 of the Administration Act, 1908.

Counsel: F. K. Turnbull, in support.

Solicitor: F. K. Turnbull, Wanganui, for the administrator.

The Law Relating to Motor-vehicles.

Noteworthy Decisions of 1938.

By W. E. LEICESTER.

This year has been marked by the absence of the marathon type of case which tends to rear its head so continuously in the Law Reports. Another feature of the year—and from a public point of view an important one—is the success that has attended an intensive campaign on the part of the authorities to reduce personal injury and property loss due to road collisions. Here and there this campaign has resulted in the imposition of punishment upon offenders that would appear somewhat greater than the offence deserved. In *Cass v. Richards,* [1938] G.L.R. 394, the appellant who had been in the habit of driving some five hundred miles a week and had held a motor-driver's license for twenty years without having previously been charged with any motoring offence was convicted of having failed to keep his motor-vehicle as close as possible to the left of the roadway in breach of the Traffic Regulations, 1936, para. 14 (1). There was no suggestion of intoxication or excessive speed or of that kind of driving regarded by laymen as gross negligence. On an appeal to the Chief Justice, the order for suspension of the driving license was quashed and set aside.

A more important case, *The King v. Bowden,* [1938] N.Z.L.R. 247, reached the Court of Appeal. Here, as the result of the conduct of the accused, a female passenger jumped out of a moving motor-car, fracturing her arm. The accused who was driving the car left her by the road-side. It was contended on his behalf that the circumstances did not disclose an "accident" within the meaning of s. 5 (1) of the Motor-vehicles Amendment Act, 1936; but, if they did, then such an accident did not arise directly or indirectly "from the use of a motor-vehicle." It was argued that the accident consisted in the passenger jumping out of the motor-vehicle, and that her action in doing so was intentional on her part and therefore could not be regarded as an accident. In the view of the Court, at p. 254, the language of the section indicated that there was in the mind of the Legislature a wider idea or intention than merely to penalize a person proved to have been a "hit and run" motorist.

> "The underlying idea, it seems to us, on a fair construction of the section, was to ensure as far as possible the protection and safety of an injured person so that he might not be left in his injured condition to run the risk of further injury by reason of his being left on the road, or perhaps to die for lack of attention. If that is so, the actual penalizing of the 'hit and run' motorist is only one phase of the mischief which the Legislature sought to remedy, . . . We can see no reason for saying, for example, that a passenger in a motor-vehicle—whether a public or a private vehicle—who by 'accident' falls therefrom upon the road is not just as much within the purview of the protection of the section as a pedestrian who while on the road is run into by such vehicle."

So far as the motorist's duty to stop was concerned, the Court did not think that one could say more than that his duty is to stop as promptly after an accident as is reasonably possible, having regard to the state of the road, the traffic upon it at the moment, and any other relevant circumstances.

In England, where a learner was charged with driving a private motor-vehicle without due care and

attention, it was set up by way of defence that the driver had exercised such care and attention as could be expected from a person who had had as little experience of driving as the defendant. The Justices dismissed the charge upon this ground. The King's Bench Division, however, declined to apply one standard of care to experienced and another to inexperienced drivers and, holding that due care and attention was something governed by the essential needs of the public on the highway, ordered that the driver be convicted: *McCrone v. Riding*, [1938] 1 All E.R. 157. Where, in motoring offences, penal sections are made very wide in their terms with a view to lessening a serious public evil, there is a growing view that Courts should resist any inclination to whittle away the remedial effect of such sections: *Bond v. Holloway*, [1938] S.A.L.R. 41.

The reported decisions of the year on questions of negligence serve rather to illustrate the rules of motor-driving than to lay down any new principles. In *Goodwill v. Saulbury*, [1938] N.Z.L.R. 114, three cars were involved in a collision precipitated by one driver who commenced to overtake another vehicle at a distance of more than 30 ft. before an intersection but who was unable to complete the overtaking movement within the limit prescribed by the regulations. On a motion for a new trial, Callan, J., considered that it was open to the jury to conclude that the driver had embarked upon an overtaking movement which, even if there had been no collision, he could not have completed without offending against the regulation. In his view, although the driver was entitled to assume that the car in front would not commence a turn out of a main road without any warning signal, it was imprudent for him to travel unnecessarily close behind it as both the mechanical and the human element in the leading vehicle were liable to sudden involuntary failure. What was a prudent distance to maintain depended on the circumstances, including the speeds of the respective vehicles, the driver of the overtaking one being bound to keep sufficiently far away to be able to stop short of the leading vehicle if that should suddenly stop.

Further light on the "off-side" rule is furnished by *Vaughan v. Page*, [1938] N.Z.L.R. 461, and by *Ashton v. Whittaker*, [1938] N.Z.L.R. 508. In the first of these cases, a motorist who had entered upon an intersection that required his attention to be directed to several points failed to look to his left in sufficient time to avoid a collision. It was contended that he should not have entered upon the intersection without having looked to his left, but this contention was not accepted by Callan, J., who thought that to say that a man who enters upon an intersection without having looked at all to his left was necessarily guilty of negligence was to enunciate a proposition which may sometimes state less and sometimes state more than the duty of a motorist. It seemed to him that there might be situations in which the attention of the motorist was necessarily so absorbed by traffic on his right and to his front that, even when driving at a reasonable speed when he entered and crossed the intersection, his protection on the left must consist largely in trusting that any traffic on his left would perform the duty it owed to him.

A similar view was reached by the English Court of Appeal in *Joseph Eva, Ltd. v. Reeves*, [1938] 2 All E.R. 115, where the driver of a motor-car at a crossing controlled by traffic lights was held to owe no duty to traffic crossing in disobedience of the lights beyond the duty that, if he in fact saw such traffic, he ought to take all reasonable steps to avoid a collision; but he was entitled to assume that there was in fact no traffic entering the crossing against the lights.

In Victoria, in *McAsey v. Lobban*, [1938] V.L.R. 140, the Full Court, in considering the facts of an intersection collision, declined to hold guilty of contributory negligence a driver who had assumed that the regulations would be obeyed, and acting on that assumption failed to look for traffic on his left. Whether, however, failure at an intersection to avoid a driver on one's right is a negligent breach of the right-hand rule is a question of fact for the jury: *Ashton v. Whittaker* (*supra*). It might be held to be a mere error of judgment without negligence since the bare fact of one motor-car colliding with another which might suddenly dash out from an intersecting street on its right does not in itself amount to negligence: *Algie v. D. H. Brown and Sons, Ltd.*, [1932] N.Z.L.R. 779.

The proverbial donkey makes its reappearance in *Larking v. Wilson*, [1938] G.L.R. 81, in which a motor-cyclist coming round a corner on his wrong side of the road collided with the buffer of a motor-car parked on its wrong side of the road with the result that his leg was fractured. It was put forward on his behalf that, at the speed at which he was travelling, loose metal on the road prevented his pulling up in time to avoid the motor-car. However, Reed, J. (applying *Davies v. Mann*, (1842) 10 M. & W. 546, 152 E.R. 588), held that by the exercise of reasonable care the plaintiff could have avoided the consequences of any negligence on the part of the defendant; and, moreover, that if loose metal was a serious matter in negotiating a road it imposed a greater care upon a person traversing it. Here, the motor-car did not amount to a "trap," and can thus be distinguished from the telegraph pole in *Ogier v. Christchurch City Corporation*, [1938] N.Z.L.R. 760, which by reason of its proximity to the outer edges of the footpaths of two intersecting streets resulted in injuries being suffered by the plaintiff in a motor collision and in damages being awarded against the Corporation.

A useful review of the various authorities in "skidding" cases is given in *Hunter v. Wright*, [1938] 2 All E.R. 621. The defendant had practically stopped at a pedestrian-crossing and, on accelerating to a speed of sixteen to twenty miles per hour, skidded some 13 ft. to 20 ft., mounting the pavement, and injuring the plaintiff who was walking thereon. It was found that the skid was not due to any negligence on the part of the defendant although it was contended that she had been negligent in steering the wrong way to correct the skid and in accelerating after it. The main interest in the case lies in the fact that it occupies a midway position between that class of case in which skidding in itself is no evidence of negligence and the other class of case in which the mounting of a motor-car upon the pavement has been held to be *prima facie* evidence of negligence on the part of the driver. Upon the facts of this case, the Court of Appeal was of the opinion that the defendant, once she had proved that the skid was not due to any fault of hers, had discharged the onus of showing how her car came to be on the pavement and could not be said in any way to be blameworthy for the accident.

So far, the 1936 Traffic Regulations in New Zealand have not given rise to any important decisions upon the respective duties of drivers and pedestrians in relation to pedestrian-crossings. In *Bailey v. Geddes*,

[1938] 1 K.B. 156, the Court of Appeal has laid it down that, once a pedestrian is upon a crossing to which the regulations apply, and the vehicle is an approaching one within the meaning of the regulations, any want of care on the part of the pedestrian which might have prevented him from recovering at common law is irrelevant because the duty put upon the driver by the regulations is such that, had he obeyed it, he must have avoided any negligence there might be on the part of a pedestrian. This case is followed in *Chisholm v. London Passenger Transport Board*, [1938] 2 All E.R. 579, in which it was held that the driver of an omnibus is liable where he has not seen a pedestrian upon such a crossing since it is his duty to stop if in fact there is a pedestrian on the crossing before the driver arrives on it. On the other hand, the rigidity of this rule is to some extent loosened by *Knight v. Samson*, [1938] 3 All E.R. 309, where the pedestrian gave no indication of his intention to cross the crossing until the car was a foot or two off it. The vehicle was proceeding at a proper speed, but the driver had no opportunity of pulling up in time. It was held that, there being no negligence and no breach of the regulations, the plaintiff could not recover.

The question of excessive damages was before the Court in *Shelton v. Viles*, [1938] G.L.R. 574, a claim for £3,000 general damages and agreed special. After the jury had been empanelled, the defence withdrew the denial of liability and the case was considered solely on the question of quantum. The jury found the sum of £2,750 for general together with the agreed special damages. On a motion for a new trial, the argument presented was that the amount awarded bore no reasonable relation to the wrong done and must have been reached on the assumption that the plaintiff, a salaried man, fifty-seven years of age, had lost the complete use of his legs, whereas on the medical evidence he had lost the use of his knees only. Johnston, J., took the view expressed in *Hip Foong Hong v. H. Neotia and Co.*, [1938] A.C. 888, that the verdict of the jury should not be disturbed unless a Judge is convinced that their finding is so unreasonable as to amount to a miscarriage of justice. Even if he wished to support the opinion he might hold that the sum awarded was excessive, after granting a reasonable sum for pain, suffering, and loss of enjoyment, Johnston, J., could find no calculation or basis in the evidence which enabled him to say that the lesser sum was the only reasonable inference from the material before the jury.

During the year, for the most part, awards in personal-injury cases have been on a smaller scale than usual, and in several instances verdicts of judgment for the defendant perhaps indicate a greater sense of responsibility on the part of juries than was manifest in the early workings of the Motor-vehicles Insurance (Third-party Risks) Act, 1928. In *S.I.M.U. Mutual Insurance Association v. Minson's Ltd.*, [1938] N.Z.L.R. 255, the facts disclosed that one Minson while driving his car had run down a Mrs. Rule who was crossing the road. The driver proceeded to make a lengthy statement in which he said: "Mrs. Rule has been extremely nice to me and I am most anxious to do everything I can, quite apart from the conviction that the accident was my fault." The lady's subsequent action was compromised by Minson's third-party insurers for the sum of £1,225, and they, not being as nice as Mrs. Rule, brought action to recover it, relying on the section of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, which precluded the owner without the consent of the insurance company from making any admission of liability. Northcroft, J., who found in favour of the defendant, considered that the restraint which the company placed upon a motorist would require him to refrain from the impulses of courtesy, chivalry, honesty, or even of self-defence, lest he thereby prejudice his insurers; and he thought that although Minson's statement was an acknowledgment of fault it did not amount to an "admission of liability" within the contemplation of the section. In the Court of Appeal the majority reached the same view. The opinion of the Chief Justice was that the admission relied on by the insurance company was not an "admission of liability to pay damages": it was an admission of fault, but a person might be at fault without necessarily being legally responsible, and therefore liable to pay damages in respect of an accident. Consequently, he said, an admission of fault was by no means necessarily an admission of liability to pay damages. In an action brought for damages as the result of a motor accident, "the object of the inquiry is to fix upon some wrongdoer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent": *British Columbia Electric Railway Co. v. Loach*, [1916] 1 A.C. 719, 727. The statement by the respondent, Arthur William Minson, in this case, left it quite open as a ground of defence in an action for damages to set up contributory negligence or any other defence that might be available. It is open to contemplation, respectfully philosophic, that if a man writes gratuitously admitting that he is at fault the search is ended and the responsible agent has produced himself. However, although Blair, J., reached a conclusion along these lines in a dissenting judgment, Callan, J., upon a consideration of the whole document, did not think that the passage at its end, "quite apart from the conviction that the accident was my fault," necessarily imported an acknowledgment that it was entirely due to Minson.

The interpretation of a comprehensive motor policy was involved in *In re An Arbitration, O'Brien and The South British Insurance Co., Ltd.*, [1938] N.Z.L.R. 582. Here, the insured were Grundy Ltd. as owners and Mrs. O'Brien as hirer, but for the purposes of the benefits of the medical expenses and personal-accident clauses a typewritten slip attached to the policy stated that Mrs. O'Brien was to be deemed the insured. On a claim by Mrs. O'Brien in respect of her husband's death and her own hospital expenses arising out of an accident, the company relied on the general exception to liability that the car was being driven with the consent of the insured by a person who to the insured's knowledge was unlicensed. The claimant sought to rely on the fact that Grundy Ltd. as owners had also to have knowledge of the unlicensed driving before the exception could apply. However, the view of the Chief Justice (concurred in by Blair, J.) was that the typewritten slip made it plain that Mrs. O'Brien was the sole insured for the purposes of the indemnities which she sought; and Fair, J., also in agreement with this view, said that an unusual method of draftsmanship was not a sufficient, or indeed any, reason for disregarding the typewritten slip which was inserted for a specific purpose. It would seem that unless there is some actual restriction of the cover to the conditional owner driver or hirer driver, the decision in *Linekar v. Hartford Fire Insurance Co., Ltd.*, [1936] N.Z.L.R. 776, has application and the

knowledge of the insured must include the knowledge of the real owner where he is a party to the insurance.

A case illustrating the necessity for the insured to give adequate notice of the fact of an accident is provided by *Herbert v. Railway Passengers Insurance Co.*, [1938] 1 All E.R. 650, in which it was held that notice to an insurance company of proceedings against the insured must be more formal than a casual mention of proceedings during the course of a conversation. Section 11 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, makes it necessary for the insured to notify the statutory indemnifier, but the form of the notice is not expressly stated. It would seem wise in every instance for the insured to give it in writing. In *Windsor v. Chalcraft*, [1938] 2 All E.R. 751, an insurance company, which had received no notice by its insured that a writ had been served and the case set down for trial, was successful in a running-down action in having the judgment set aside upon the ground that being under a statutory liability to pay the plaintiff and being injuriously affected by the judgment the company was entitled to be heard. Possibly, in New Zealand, the view expressed by Slesser, L.J., in a dissenting judgment would be adopted, as our Act provides a more extensive code than the English Road Traffic Act. Nevertheless, it may be a prudent measure for the plaintiff's solicitors in personal-injury cases to see that the indemnifiers are given every opportunity to defend, and it may also be prudent for the defendant's solicitors, when acting for such indemnifiers, not to admit liability for their nominal clients without the express knowledge and permission of the defendant. The disastrous consequences which befell the incautious solicitors in *Groom v. Crocker*, [1938] 2 All E.R. 394, provides a salutary lesson. The case is discussed at some length in an article in *13 New Zealand Law Journal*, 263.

Despite the warning of Scrutton, L.J., phrased in fishing terms, about striking too soon in non-suit cases, this form of application still exercises a fatal attraction. In *Carr v. Scott*, [1938] N.Z.L.R. 323, a motor-cyclist injured in a collision alleged that a motorist had commenced to turn in front of him suddenly and without giving sufficient notice of his intention. On an appeal from a non-suit granted in favour of the defendant, it was said: "In such a case a non-suit could only properly be granted if it was clear that the plaintiff had adduced no evidence proper to be submitted to the jury, but what it was necessary for the plaintiff to do was to give a *prima facie* proof of such negligence as might reasonably be inferred to have been the cause of the accident." In this instance, if the cyclist was within the rule enunciated in *The Bywell Castle*, (1879) 4 P.D. 219, as *prima facie* on his evidence he was, then "the question of whether or not he acted reasonably and any question as to whether or not he had the last reasonable opportunity of avoiding the accident were questions to be decided by the jury": per Myers, C.J., at p. 326.

In *McMillan v. Greenfield*, [1938] G.L.R. 473, another case in which an appeal against a non-suit was allowed, the injured plaintiff driving at night had run into an unlighted motor-car that was not parked in the manner required by the regulations. It was considered that in all the circumstances it was impossible to say that the evidence showed the plaintiff was necessarily guilty of contributory negligence: that view was not compelling nor did the evidence leave contributory negligence as the only reasonable inference. The real danger in non-suit applications lies in the fact that what might be overwhelmingly compelling and the only reasonable inference in the mind of the trial Judge may to an appellate tribunal be but one of a number of inferences. The non-suit, like the hand-grenade, is a good thing if left alone.

In *Payne v. Burney*, [1938] G.L.R. 491, a pedestrian was killed at night while crossing a wide bitumen road which was partly in shadow. The evidence for the defence was that the deceased stepped into the lights of a small car when it was only some 6 ft. or 7 ft. away, the car being then well on its correct side of the road. For the defence, it was contended that the tests showed that the pedestrian could have been seen some considerable distance away, and that the lights of the car were not up to the standard prescribed by the regulations. There were no eye-witnesses called for the plaintiff. The jury had submitted to them only the two issues of contributory negligence, finding that the motor-driver had been negligent and the pedestrian negligent to a lesser degree. An issue of last opportunity was refused upon the ground that there was no room for it. The judgments in the Court of Appeal were equally divided and show a complete conflict of opinion: indeed, the task of reconciling the varying viewpoints might, it is respectfully suggested, be one of the punishments inflicted on a negligent motorist during his week-end in gaol. The present position of the case is that leave to appeal *in forma pauperis* is being sought from the Privy Council.

A further action of the successful plaintiff in *Carr v. Scott* (*supra*) gave rise to another practice decision. On the second trial, he obtained a substantial decision in his favour, and the questions to be considered were whether for the purposes of the second trial he remained a pauper (his application in the Court of Appeal was *in forma pauperis*) and whether he was entitled to costs at the second hearing. It was held that there was a duty on Registrars to require the payment of the appropriate jury fees whether or not the plaintiff was a pauper and whether or not there had been a remission of Court fees under R. 582. On the second question, the view taken was that at the conclusion of the proceedings in the Court of Appeal the plaintiff reverted to the position he was in prior to the setting down of the action. His right to costs excluded the cost of issue and service of the writ and statement of claim and the costs of and incidental to the first trial. He was entitled to such costs as were allowed in the Court of Appeal (these usually cover the cost of printing and/or typing) and to two-thirds of the scale costs on the amount awarded in the second trial together with extra days, disbursements, and witnesses' expenses to be fixed by the Registrar: *Carr v. Scott* (*No. 2*), [1938] N.Z.L.R. 1058.

The remaining case on the question of practice, and one of the most interesting of the year, is *Stevens v. Collinson*, [1938] N.Z.L.R. 64. A collision having occurred between the cars driven respectively by Collinson and Stevens, the passengers in the former's car sued the latter. Smith, J., "took a view unfavourable to Collinson, but directed the jury that they were entitled if they thought fit to find that Stevens might have pulled up earlier." After deliberations of more than four hours, the jury by a three-fourths majority found in favour of the plaintiffs. Collinson, who was joined, was bound simply as to the amount of damages, the finding that Stevens was negligent being *res inter*

alios acta and working no estoppal. Had the English practice prevailed of a third party being in the position of a defendant as between himself and the defendant who brings him in, the differences between Collinson and Stevens could have been decided on the first action. However, apparently emboldened at the success of his passengers, Collinson sued Stevens for damages for personal injuries, the jury in this instance finding that Stevens was not negligent; and he then proceeded against Collinson for contribution, the case being set down by Collinson in the jury list but removed by Reed, J., from that list in order to be tried before a Judge alone on the ground that the relief claimed was not "payment of a debt or pecuniary damages for the recovery of chattels" within the meaning of the Judicature Amendment Act, 1936. In his judgment, Reed, J., points out that the Law Reform Act, 1936, has not specifically provided that the Admiralty practice shall be followed and that there is no report of any case in which the question of apportionment has been debated, nor any priniple laid down upon which it is to be made, the matter being left to the discretion of the Court. Its duty is to assess the amount of contribution that, in the circumstances, is just and reasonable with the added power to exempt any person from liability to make contribution. Following the literal wording of the section, Reed, J., exempted Stevens (and his employer) from any liability to make contribution and gave judgment in their favour as against Collinson for the amount that had to be paid to the passengers on the first claim. The case is an illustration of the circuitous route that had to be taken to procure a result which, had the case been tried in England, it would appear would readily have prevailed upon the initial action.

The Christmas Spirit.—Having made reference to the case of Mr. Frank Harrison and told how he was sent to prison for six weeks on December 2 for throwing ill-directed tomatoes at Lords Justices in the Court of Appeal, I ought also to have told how, three weeks later, the Lords Justices treated him with great leniency. There was the case in which a lady in contempt had been sent to prison for an indefinite period and had continued unrepentant in gaol for a very long period.

I apologise; and herewith tell how at 10.30 a.m. on the morning of the day on which the Courts rose for the Christmas Vacation the said Frank Harrison's name was called in the Court of Appeal (Clauson and Goddard, L.JJ.) and Clauson, L.J., spake to him as follows:

"The Court has received your written apology and are glad that you have recognized the seriousness of your conduct in this Court three weeks ago. We have considered very carefully whether we should give you the benefit of a remission of your sentence. Having regard to the nearness of Christmas we propose to give directions that you be released to-day at such hour as the governor of the prison considers convenient. You will therefore be taken back to the prison and then released."

The famous incident still crops up. Recently, at a dinner, Lord Macmillan prefaced his speech with the remark that he had scanned the menu with interest to see whether any missiles had been provided, lest he failed to do justice to the toast that he had to propose.

—Apteryx.

London Letter.

By Air Mail. Strand, London, W.C. 2,
January 15, 1939.

My dear EnZ-ers,—

I find there is a mail out to-day. It has caught me napping, I fear; so, here's hoping that you will get something more up to date next week.

Comparative Law and the Text-books.—A stimulating article upon the inadequate attention paid by legal text-writers to foreign law is found in the current issue of *The Journal of Comparative Legislation* (November, 1938). Dr. Ernst J. Cohn, formerly Professor of Laws at the University of Breslau, shows by citations from several prominent text-books that the references to foreign law which are in fact given are often so out of date or meagre as to be misleading. "The very eminent English advocate who strenuously refused to believe that there existed a system of law which did not recognize either the doctrine of consideration, or something similar to it, is an example of this one-sidedness of our legal education." Decisions of the Supreme Court of the United States are increasingly quoted by the Superior Courts in this country; and, even on general grounds, some knowledge by lawyers of the fundamental principles of jurisprudence held in other countries is one of the many paths which converge towards a better understanding between nations. But insularity is not the preserve of one country; what mistake could be more profound than "that of a continental Judge" who held that the rules as to vindictive damages did not form part of English law, and were merely the expression of a more or less irresponsible whim, which seemed to befall some English Courts for inexplicable reasons in a number of cases!

Poor Persons' Cases.—The Judge at the last Leeds Assizes found no less than 246 divorce petitions awaiting trial at that important centre, and of these over 130 were "poor persons'" cases. These unfortunate facts elicited from the learned Judge an observation (*Times*, December 8) that he thought it would "be better" if there were more poor persons' cases in other litigation and less in matrimonial affairs. Of course, any statement from so important an authority must be received with respect. We think it can now be said with confidence that poor people who have a good cause for action in civil matters are not now denied justice for want of means. As for workmen's compensation, they are well looked after by their trade-unions, while in actions of tort they can generally find friends who will help them with funds. It was only to be expected that when the poor persons' procedure was started a number of unhappy wives and husbands who are of small means would avail themselves of it; and there was never any doubt but that Herbert's Act would make a great addition to the lists, especially since divorce petitions can now be heard on circuit. All that can be said is that it is on the whole better to dissolve these unhappy unions than to leave them formally in existence when they have lost all domestic and social reality.

Old Ireland.—Eire is not now, as you know, part of the United Kingdom, but a separate Dominion, of such independence that neither Mr. de Valera nor any one else can see any real differences between it and any other sovereign and independent State.

Perhaps the most notable distinction between that (as well as certain other Dominions of the Commonwealth) is the fact that it does not have to expend much on armies, navies, and air forces for defence purposes, a deprivation which many United Kingdom taxpayers would gladly endure.

There was a time when the whole of Ireland had a Lord Chief Justice, a title which belonged to no other Judge of the Empire other than the English L.C.J., and it is now applied only to the head of the Judiciary in England and in Northern Ireland. But the last of the L.C.J.s of Ireland is still with us, alive and well; Sir Thomas Molony, who was called to the Irish Bar by the King's Inns fifty-one years ago. The home of his retirement is in Wimbledon, and he is a member of the National Liberal Club.

At the Devonshire Club a few days ago he praised Irish legal education and extolled it above the English. "I believe," he said, "that the course of education at the Irish Bar is far superior to anything in England." Lectures were compulsory; he had the opportunity of continued study at Dublin University, and the Courts were within walking distance. But the fees appear to have been much inferior to the English. "Although politically opposed," said he, "Carson was always my good friend and helped me in every way. In those days Carson often took a brief for three guineas and I for two guineas."

And it is known that when Carson came to the English Bar he was pleasurably surprised by the comparative magnitude of the English fees.

Mr. Maurice Healy, K.C., nephew of the famous "Tim," and himself a lawyer and a radio speaker of high repute, was present at the same dinner, and what he said regarding the cost of litigation in England and Ireland was briefly, accurately, but (without intention) misleadingly reported in the *Times*. According to the report he said "he used to work for guinea fees in Ireland, but on the other hand business was expedited and a man could earn twenty guineas a day, without the rake-off that had to be paid in England."

That the necessary condensation of a speech may innocently do injustice to a speaker Mr. Healy revealed in an explanatory letter: and it is worth quoting, for have not all members of the Bar, at Home and overseas, suffered greater injustices even in the best of the Home and Colonial newspapers?

"Even in this boisterous weather," he wrote (a hurricane was blowing over England at the time), "I should hate to raise a storm in a tea-cup: but the necessary condensation of what I said on the above subject at the Devonshire Club on Thursday has unintentionally done me an injustice. You make me say that a man could earn twenty guineas a day without the rake-offs that had to be paid in England. I did say both things; but not in juxtaposition. I was referring to the Irish County Court system, wherein counsel could deal with a dozen or more civil bills or civil bill appeals in a day at fees of a guinea or two, while the shopkeeper who chose to act for himself in the recovery of a £20 debt would have paid when he stood up to open his case 1s. for the civil bill and 6d. for a copy. The 'rake-offs' I referred to, humorously, as I had hoped, were such fees as the hearing-fee and such like which make the English County Court so expensive in comparison with the former Irish County Court."

Yours as ever,
APTERYX.

Adjustment Commission Entertained.

A Pleasing Function at Pukekohe.

In response to an application by the Franklin Practitioners, the Auckland Rural Adjustment Commission appeared before the Bar at the Pukekohe Hotel on December 9, 1938, when the Commission was entertained at dinner to say farewell to the members on the Commission's going into recess. The application for adjustment read as follows:—

The Mortgagors and Lessees Rehabilitation Act, 1936.

IN THE PUKEKOHE HOTEL
HOLDEN AT PUKEKOHE.

IN THE MATTER of an application for adjustment of the liabilities of COLONEL M. ALDRED and MESSIEURS J. S. MONTGOMERIE and H. M. FRASER, an unusual set of applicants within the meaning of the Act.

PLEASE TAKE NOTICE that the above application will be heard before the Franklin Law Practitioners and certain others in the Dining-room of the Pukekohe Hotel on Monday next the 19th day of December 1938 at 6 p.m. when the Practitioners and others aforesaid will proceed to adjust the liabilities of the applicants for their numerous acts of assistance and forbearance towards the Practitioners and others during the two years last past.

YOU are invited to appear personally without counsel solicitor or agent but with your secretary and to make such representations as you may think fit relating to the health welfare and past performances of the Practitioners and others who have been privileged to appear before you in this district during the two years last past.

Dated this 16th day of December 1938.

A. P. KING,
Secretary.

There was a full attendance of the country Bar, with the exception of Messrs. McGahan (Tuakau) and McDonald (Papakura), who sent letters of apology. The District Valuers were represented by Messrs. C. E. Walters and Hosking; the State Advances Corporation by Messrs. Chappell and Pirrit; and the trustees under the previous Act by Mr. Reid.

Mr. A. P. King was the Chairman for the evening. Following the loyal toast, the toast list was as follows: "The Commission," proposed by Mr. M. R. Grierson, who welcomed the guests, with reply by the Chairman of the Adjustment Commission, Colonel Aldred; "The Practitioners," by Mr. H. M. Fraser, with reply by Mr. S. D. Rice, who gave a very interesting review of the Act, and insisted that there should be a new Act to allow of an application by all solicitors for relief from everything including any restricted scale of costs. Mr. Chappell, the advocate for the State Advances Corporation, also replied and gave a resumé of his experiences under the Act as it related to his Department. Mr. Blanchard proposed the health of the Valuers in the Franklin District, and Messrs. Pirrit, Hosking, Walters, and Reid responded.

Promptly at 10 p.m. the application was disposed of, and the Commission discharged from all their liabilities by the singing of "Auld Lang Syne."

There were many stories told at the gathering, but perhaps the best of them was as follows: An applicant in a certain country district under examination was asked if he had any other assets apart from his farm

and fishing lodge: "Oh yes! I did have some £50,000 in England you know. In the Midland Bank, but things seemed so uncertain at Home that I withdrew that sum and invested it in Mexican Bonds." "Anything else?" "Oh yes! I may have about £20,000 or so, but my trustee hands me out a draft now and again—that's what a trustee is for don't you know." Asked if he ever had a statement of account: "Oh dear no! You've got to trust your trustee; he does his best." "What employees have you got?"—by the way the applicant was or is a bachelor. "I have a man, and a housemaid, you know, and one must have a cook. I think that is all on the pay roll." Pressed as to any other employees, he replied: "Oh well, there is a housekeeper, but her job is purely honorary!" Needless to say there was not much relief forthcoming.

The police have been handy on several occasions, at hearings, on rumours of trouble pending, and the Commission on one inspection was met with pitchforks placed at intervals from the front gate to the cowshed, but fortunately the owner calmed down sufficiently to leave them untouched. Unfortunately there were cases in inspection where the Commission found houses or apologies for dwellings with not a stick of furniture, boxes for beds, boxes for chairs, boxes for tables, and the utilities of the meanest. Needless to say, these matters were attended to. On the whole, according to the members, the Auckland Rural Adjustment Commission met with a very fair reception from both applicant and mortgagee.

Correspondence.

The Journal at Harvard.

December 14, 1938.

The Editor,
N.Z. Law Journal.

Dear Sir,—

I would like, if I may presume to do so, to congratulate you on your issue of August 23 last, containing the Students' Supplement, which I thought an excellent innovation. I have been in London for the last two years and have not seen the New Zealand Law Journal during that time. When I found it was in the Harvard Law School library I went through all the back numbers I had missed, and was so impressed with this one that I showed it to some of the Professors here, who all expressed surprise that a little country of which they had barely heard should produce such a high grade of legal literature. Particularly well received was the modestly anonymous article on "The Use of Dangerous Things," which I too thought a much better account of the *Rylands v. Fletcher* offspring, legitimate and illegitimate, than any of the many others I have read.

I hope you will pardon this garrulousness, but I thought you might like to know that you have increased New Zealand's reputation in America's greatest Law School.

Yours sincerely,
A. Martyn Finlay.
(Formerly of Otago University).

51 Oxford Street,
Cambridge, Massachusetts.

New Zealand Law Society.

Council Meeting.

(*Concluded from p. 11.*)

Legal Aid for Poor Persons.—Mr. Gresson reported to the Council that the Law Revision Committee had had under consideration the question of establishing in New Zealand some system of legal aid and advice for the poor, and that a report had been prepared by Messrs. Spratt, Rollings, and the Secretary.

The draft Bill and regulations were at present being considered, and would be circulated in the near future. He hoped that the Council would do all in its power to support the scheme when it came under their notice.

Documents of Historical Value.—The President stated that he had received the following letter from Mr. J. W. Heenan, Under-Secretary of Internal Affairs:—

> "I have to thank you, if somewhat belatedly, for arranging for members of my staff to inspect early legal records in the keeping of Messrs. Brandon, Ward, Hislop, and Powles. The report of this inspection is now in my hands, and I am impressed by the interest and historical value of certain of the documents which the firm were good enough to place at our disposal.
>
> "It now occurs to me that some arrangement might be made between the older legal firms and the Government whereby records of actual or potential historical value might be transferred to a public institution for safe-keeping. In that event it would, of course, be necessary to agree to adopt adequate safeguards and on occasions to withhold certain classes of documents from public inspection for an agreed period.
>
> "Once the principle were adopted, however, details of that kind could be arranged, and I am now invoking your good offices again to place this proposal before the members of your Society on some appropriate occasion. Possibly the suggestion might be first circulated to your various branches and brought up for fuller discussion at your next Easter Conference.
>
> "In the meantime, I shall only be too happy to discuss the matter with you or to put you in touch with the Librarian of the Alexander Turnbull Library and the Secretary of the National Historical Committee, the two officers most directly concerned in the proposal."

The suggestion was thought to be an excellent one, as from time to time valuable old documents were destroyed.

It was decided to circulate the letter among the District Societies, and ask them to take steps to inquire from practitioners in their district for documents of historical value with a view to having these properly indexed and preserved.

Application for Admission as Barrister under Five Years' Rule.—The Secretary reported that at the last Court of Appeal an application under s. 45 of the Law Practitioners Amendment Act, 1935, had been heard. The applicant was a District Solicitor of the Public Trust Office who applied at Hamilton, but the application was referred to the Full Court for hearing.

The President had appeared at the hearing with the Secretary as his junior, and after a lengthy hearing the application had been refused.

Mr. A. C. Hanlon, K.C.—Attention was drawn to the fact that Mr. A. C. Hanlon, K.C., of Dunedin had

recently completed fifty years' service at the Bar, and suggested that a letter of congratulation should be sent to him from the Society.

It was accordingly decided that a letter should be sent from the Council congratulating him on his having practised with such eminence for a full period of fifty years.

Agreements to Lease, affecting Houses and Residential Flats.—The following letter and report was received from the Wellington Society :—

" Please find herewith a copy of a report adopted at the last meeting of my Council, which it is desired to have considered by the New Zealand Society with a view to adoption.

" Would you kindly place the matter on the order-paper for the first available meeting."

Enclosure :

Lessors' and Lessees' Costs.

" The following is the position in relation to ordinary leases or agreements to lease :—

" 1. *In England* :

" The law is laid down in *Cordery on Solicitors*, 4th Ed. 87, as follows :—

" ' In preparing leases, in the absence of any express contract the practice is for the lessor's solicitor to prepare the lease, and for the lessee to pay his own expenses, and those of the lessor. The retainer, however, is given by the lessor to his solicitors, who cannot recover the cost of a draft lease from the intended lessee unless there is privity of a contract between them, though such privity may be inferred from slight evidence. The general custom has received adverse criticism from the profession.'

" With reference to the ' adverse criticism ' mentioned by *Cordery*, a Mr. Garrett in 1933 raised, at several meetings of the Law Society, the question of the abolition of the custom of the lessee paying the lessor's costs (see *175 Law Times Journal*, at p. 94, and *77 Solicitors' Journal*, at p. 506). At a meeting on July 7, 1933, a modified motion to the following effect was carried—

" ' That it is desirable that instead of both the lessor's and lessee's costs of a lease having to be paid by the lessee as at present, the costs should be pooled and divided between the parties equally and that the Council be requested to consider the desirability of taking such steps as may be possible to effect to this alteration in the present practice.'

" At a further meeting held in August, 1933, the discussion showed that opinion was very divided on the question, but the following motion was finally adopted—

" ' That it is worth considering whether instead of both lessors' and lessees' costs having to be paid by the lessee as at present, the cost should be pooled and divided between parties equally, and that the Council be requested to consider the desirability of taking such steps as may be possible to give effect to this alteration in the present practice.'

" So far as is known, nothing further seems to have been done in this direction.

" In the handbook issued by the English Law Society, *Law Practice and Usage in the Solicitor's Profession*, Ruling 901 of the 1923 edition is as follows :—

" ' *Preparation of Lease and Counterpart—Costs.*

" ' The general usage of the profession on the granting of a lease is that the solicitor of the lessor is entitled to prepare the lease and the counterpart at the expense of the lessee, unless there is an agreement, or a custom, universally prevalent in a particular locality to the contrary ; and the Council are not aware of any general usage varying from the above in the case of a purchase of a lease to be granted ; but, in expressing this opinion, they wish to be understood that it is open to either party to depart from this rule by contract.'

" *Grisell v. Robertson*, (1836) 3 Bing. (N.C.) 10, seems to be the standard case on this subject, in which it was held that ' the evidence shows that it is the custom for the landlord's attorney to draw the lease and that it is paid for by the lessee.'

" In *20 Halsbury's Laws of England*, 2nd Ed. 79, it is stated :

" ' It is the custom for the lessor's solicitor to prepare the lease and for the lessee to pay the lessor's costs as well as his own. The lessee by virtue of this custom is liable to pay the lessor's costs unless the liability has been excluded by agreement : and the lessor who has paid his own solicitor can recover the money from the lessee as money paid by the lessor to the use of the lessee. But if, as is usual, the lessor requires a counterpart he pays the cost of this himself unless the lessee has agreed to pay the costs of both the lease and the counterpart.'

" *Woodfall on Landlord and Tenant*, 23rd Ed. 245, states :

" ' The lease and counterpart are usually prepared by the lessor's solicitor on behalf of both parties ; but frequently the draft lease is settled and approved of by the lessee's own solicitor who sometimes claims the right to engross the counterpart, which, however, seems unusual and improper. In the absence of any expressed stipulation to the contrary, the expense of the lease falls upon the lessee and of the counterpart upon the lessor, but the lessee frequently agrees to pay all the expense of both lease and counterpart.'

" As far as can be gathered, the position in England is still the same and appears to be—

" (*a*) With ordinary leases or agreements to lease, the rule is that the lessee pays both his own expenses and those of the lessor, and the costs are regulated by a statutory order : see *Thomas's Bills of Costs*, 562.

" (*b*) There is no custom binding the tenant to pay the landlord's costs of an agreement for tenancy : *Law Society's Digest*, 1937, 144, No. 328.

" It has not been possible to decide what is the difference between an agreement to lease and an agreement for a tenancy ; but, as no such distinction appears to exist in New Zealand, it is not proposed to suggest what that difference might be.

" 2. *As to the Position in New Zealand* :

" There does not appear to be anything in the New Zealand text-books concerning the liability of the lessor or lessee for the costs of the preparation of a lease. The only New Zealand case is that of *Metcalfe v. Venables*, [1921] N.Z.L.R. 576, which states ' the liability of the lessee for the costs of the lessor's solicitor in the preparation of a lease depends upon an agreement or custom, and is by way of indemnity only, and the lessors cannot recover the costs, until they themselves are liable to the solicitor for them.' This case followed *Grisell v. Robertson*, quoted above.

" As far as the legal profession in New Zealand is concerned, the position appears to be governed by the ' Scale of Conveyancing Charges in the Dominion ' issued by the New Zealand Law Society. On page 14 of the Scale, there is set out under the heading ' Lessor and Lessee ' the following subheading : ' Lessor's Solicitor's Costs '—underneath which occurs in brackets ' to be paid by the lessee.'

" It is clear, therefore, that the New Zealand Society is of opinion that the lessor's charges must be met by the lessee and the scale governs both ordinary leases and agreements to lease. (See, also, No. 17 of the rulings of the New Zealand Law Society issued since March 31, 1931, in particular the provision as to charges involving two-thirds of the usual fees for a term not exceeding twelve months.) There is no mention of agreements for a tenancy in the New Zealand Scale, and it is thought that the scale for agreement to lease meets all cases of tenancies by agreement.

" The present scale, however, presents distinct difficulties in regard to (1) agreements to lease for offices ; and (2) agreements to lease for dwellings used only for residential purposes and flats.

" It is a fact that the owners of large buildings obtain a standard lease, and either make no charge or arrange with their solicitor for a set charge of £1 1s. or thereabouts to see the document properly executed and stamped, the owner obtaining the necessary signature. It is not suggested that any alteration should be made in respect to agreements to lease of offices—the matter we think should be left for the individuals under the particular circumstances of each case to arrange. There are many cases where agreements to lease are drawn and paid for under the scale.

" The practice of owners of large buildings has greatly contributed to it being popularly supposed that an agreement to lease should only cost £1 1s.—whether a standard printed lease or a specially drawn document—and it is not difficult to appreciate that the difference is not understood.

"As to (2), the objection is a not unnatural antipathy to paying for an agreement which in most cases is more for protection of the landlord than the tenant.

"We consider that a separate scale of charges should be provided to meet the cases of tenancy agreements affecting dwellings for residential purposes and residential flats. To this end we recommend that the following scale be considered: Where the rent does not exceed £110 per annum, £1 1s.; and for every extra £50 or fraction of £50, 10s. 6d. Such scale is not to include the taking and typing of an inventory."

As the District Societies had not had the opportunity of considering the matter, it was held over until the next meeting.

Practice Precedents.

Consolidation of Actions.

Rule 210 of the Code of Civil Procedure states that where several actions are brought by the same plaintiff against several defendants upon the same instrument—*e.g.*, upon the same policy of insurance—the Court may, upon the application of the defendants, grant a rule or order to stay the proceedings in all the actions but one (whichever the plaintiff elects) until such one is determined, the defendants undertaking to be bound by the verdict in such action and that judgment be entered up against them accordingly; subject also to such other terms as the Court thinks proper.

As to the wider nature of the rule in England and cases cited, see *1938 Yearly Practice*, 894 *et seq.* Usually the procedure in New Zealand is by way of summons, though in England it is made by motion or summons: see *1938 Yearly Practice*, 895. Before the commencement of the Judicature Act, 1873 (Gt. Brit.), an order for consolidation could only be made on the application of a defendant; see *Martin v. Martin and Co.*, [1897] 1 Q.B. 429. The question of consolidation is in the Court's discretion: see *Bailey v. Marchioness Curzon of Kedleston, Bailey v. Duggan*, [1932] 2 K.B. 392.

Rule 211 of the Code of Civil Procedure expressy states that the consolidation rule is for the benefit of the defendants, and binds them in case of a verdict being finally found for the plaintiff; but in case of a verdict found for the defendant, the plaintiff is not restrained from proceeding in the other actions included in the rule. Where several defendants have entered into the common consolidation rule the plaintiff, upon obtaining a verdict and judgment in the first action, cannot sue out execution at once against the other defendants, but must obtain a Judge's order for leave to sign judgment in the several other actions which were consolidated and to sue out execution thereon. The summons should be intituled in all the actions: see *Chitty's King Bench Forms*, 17th Ed. 265.

SUMMONS FOR CONSOLIDATION OF ACTIONS.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

BETWEEN plaintiff (parties to all the actions)

AND

defendants.

Let the plaintiff in each of the above-mentioned actions his solicitor &c. appear before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Court House on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel may be heard to show cause why an order should not be made consolidating the above-mentioned actions so that the same shall be tried together before this Honourable Court at its ensuing sittings at and why the costs of this summons and incidental thereto should not be reserved for the purpose of being dealt with upon the trial of the said actions when consolidated upon the grounds that the said actions have been brought in this Honourable Court against the above-named defendants in respect of same or substantially the same allegedly defamatory matter and upon the grounds that it will be more convenient to the Court and more expeditious and less expensive to all parties for the said actions to be consolidated and upon the further grounds disclosed in the affidavit of filed in support hereof.

Dated at this day of 19 .

Registrar.

This summons was issued by &c.

AFFIDAVIT IN SUPPORT.

(*Same heading.*)

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

1. That I am a solicitor employed by solicitors in the above actions for above-named defendants and as such I have knowledge of the matters hereinafter mentioned.

2. That plaintiff has brought actions against defendants [*show cause of action*].

3. That each of the above-named defendants is desirous that the action against him should be consolidated with the actions against the others of the said defendants so that the three actions above mentioned may be tried together by this Honourable Court at the ensuing sittings thereof.

4. That it will be more convenient to the Court and more expeditious and less expensive to all parties for the said actions to be consolidated.

5. That all the said actions involve a determination of the same questions of law and fact.

Sworn &c.

ORDER CONSOLIDATION ACTIONS.

(*Same heading.*)

day the day of 19 .

UPON READING the summons sealed herein and the affidavit of filed in support of the said summons and upon hearing Mr. of Counsel for defendants in the above-mentioned actions and Mr. of Counsel for the plaintiff in the said actions respectively IT IS ORDERED by the Honourable Mr. Justice that the said actions be and they are hereby consolidated and that the same be tried together before this Honourable Court at its ensuing sittings at the City of and it is further ordered that the costs of and incidental to the said summons be and the same are hereby reserved for the purpose of being dealt with upon the trial of the said actions.

Registrar.

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England"

AND

The English and Empire Digest.

AGENCY.

Professional Agent—Duty to Use Care and Skill—Valuation of Property—Advance by Way of Mortgage on Fooling of Valuation—Negligence—Knowledge of Locality—Reliance Upon Valuation—Measure of Damages.

In assessing damages against a valuer for overvaluation of premises for mortgage, all expenses and loss which the mortgagee has suffered are to be included.

BAXTER *v.* F. & W. GAPP & CO., LTD., **[1938] 4 All E.R. 457. K.B.D.**

As to agent's duty to use care and skill: see HALSBURY, Hailsham edn., vol. 1, pp. 244–246, pars. 416, 417; and for cases: see DIGEST, vol. 1, pp. 433–435, Nos. 1239–1266.

BANKRUPTCY.

Proof—Agreement not to Prove in Consideration of Promise to Pay After Bankruptcy—Right of Creditor to Sue for Debt—Estoppel.

A debtor against whom a receiving order has been made cannot enter into an agreement to pay the whole amount of a debt upon condition that no proof is lodged.

JOHN *v.* MENDOZA, **[1938] 4 All E.R. 472. K.B.D.**

As to effect of bankruptcy on creditors' rights: see HALSBURY, Hailsham edn., vol. 2, p. 262, par. 337; and for cases: see DIGEST, vol. 4, p. 195, Nos. 1792–1795.

CONFLICT OF LAWS.

Divorce—Decree of Divorce by Massachusetts Court not the Court of the Domicil—Order for Maintenance Added to Decree—Whether Order for Maintenance Enforceable in England.

An order for maintenance consequent upon a divorce cannot be valid if the Court had no jurisdiction to grant the decree.

SIMONS *v.* SIMONS, **[1938] 4 All E.R. 436. K.B.D.**

As to enforcing foreign orders for maintenance: see HALSBURY, Hailsham edn., vol. 6, p. 329, par. 384; and for cases: see DIGEST, vol. 11, pp. 444–446, Nos. 1034–1044.

COPYRIGHT.

Infringement—Damages—Damages for Infringement and Conversion—Whether Cumulative or Alternative—Copyright Act, 1911 (c. 46), ss. 6, 7.

Infringement—Conversion—Limitation of Action—Assessment of Damages for Conversion—Copyright Act, 1911 (c. 46), *ss. 6, 7, 10, 14, 35.*

Remedies for infringement and conversion under ss. 6 and 7 of the Copyright Act, 1911, are not exclusive, but a three-year limitation applies to both.

CAXTON PUBLISHING CO., LTD. *v.* SUTHERLAND PUBLISHING CO., LTD., **[1938] 4 All E.R. 389. H.L.**

As to damages for infringement of copyright: see HALSBURY, Hailsham edn., vol. 7, pp. 591–593, pars. 917–919; and for cases: see DIGEST, vol. 13, pp. 219, 220, Nos. 565–573.

CRIMINAL LAW.

Habitual Criminal—Prisoner Not Informed that he Might Call Witnesses—Prisoner Not Represented by Counsel—Legal Aid for Prisoner.

When a prisoner is charged with being an habitual criminal it is most desirable that he should be represented by counsel.

R. *v.* ANDREWS, **[1938] 4 All E.R. 869, C.C.A.**

As to legal aid: see HALSBURY, Hailsham edn., vol. 9, p. 148, par. 202; and for cases: see DIGEST, vol. 14, pp. 247, 248, Nos. 2398–2413.

DIVORCE.

Desertion—Previous Proceedings for Judicial Separation Abandoned—Whether Period of Desertion Continues to Run—Matrimonial Causes Act, 1937 (c. 57), s. 6.

The presentation of a petition for judicial separation prevents desertion from running during the time that the suit is being maintained.

MARTHEWS *v.* MARTHEWS, **[1938] 4 All E.R. 377. P.D.A.D.**

As to effect of petition or justices' order in desertion: see HALSBURY, Hailsham edn., vol. 10, pp. 658, 659, pars. 968, 969; and for cases: see DIGEST, vol. 27, pp. 319–321, Nos. 2978–2999.

Insanity — "Persons Under Care and Treatment" — Respondent at Large "on Trial" During 346 Days — Reception Order in Abeyance—Detention in Fact Must be Proved—Lunacy Act, 1890 (c. 5), s. 55—Matrimonial Causes Act, 1937 (c. 57), ss. 2 (*d*), 3—Divorce (Scotland) Act, 1938 (c. 50).

When a patient is absent on trial from a mental home, there is no detention within s. 3 (a) *of the Matrimonial Causes Act, 1937.*

SHIPMAN *v.* SHIPMAN, **[1938] 4 All E.R. 732, P.D.A.D.**

As to divorce on the ground of insanity: see HALSBURY, Supp. Divorce, par. 981.

MASTER AND SERVANT.

Contract of Service—Yearly Hiring—Indefinite Hiring Subject to Reasonable Notice—Reasonable Notice—Salesman—Grade of Salesman.

There is no custom that a traveller in the oil trade is entitled to more than three months' notice.

FISHER *v.* W. B. DICK & CO., LTD., **[1938] 4 All E.R. 467. K.B.D.**

As to reasonable notice: see HALSBURY, Hailsham edn., vol. 22, pp. 149, 150, pars. 247–249; and for cases: see DIGEST, vol. 34, pp. 63–67, Nos. 384–444.

STREET TRAFFIC.

Pedestrian-crossing — Controlled Crossing — Applicability of Regulations—Pedestrian-crossing Places (Traffic) Provisional Regulations, 1935, Regs. 3, 4, 5.

The decision in Bailey v. Geddes ([1937] 3 All E.R. 671) *has no reference to a case where a pedestrian is not already upon the crossing, which is governed by common-law principles.*

CHISHOLM *v.* LONDON PASSENGER TRANSPORT BOARD, **[1938] 4 All E.R. 850. C.A.**

As to pedestrian-crossings: see HALSBURY, Hailsham edn. vol. 16, p. 492, par. 724; and for cases: see DIGEST, Supp., Street and Aerial Traffic, Nos. 31*a*, 31*b*.

Rules and Regulations.

Royal New Zealand Air Force Regulations, 1938. Amendment No. 1. January 10, 1939. No. 1939/1.

Orchard and Garden Diseases Extension Order, 1939. January 18, 1939. No. 1939/2.

Primary Products Marketing Amendment Act, 1937. Primary Products (Hops) Order, 1939. January 12, 1939. No. 1939/3.

Shipping and Seamen Act, 1908. Masters and Mates Examination Rules, 1930. Amendment No. 10. January 11, 1939. No. 1939/4.

Shipping and Seamen Act, 1908. Coastal Pilot Licensing Regulations, 1939. January 18, 1939. No. 1939/5.

Customs Act, 1913. Customs Export Prohibition Order, 1939, No. 1. January 12, 1939. No. 1939/6.

New Books and Publications.

Fender's Stamp Law for Bankers. Second Edition, 1938. (Butterworth and Co. (Pub.) Ltd.). Price 8/6.

Yearly Supreme Court Practice, 1939. (Butterworth and Co. (Pub.) Ltd.). Price 60/-.

Halsbury's Laws of England, Replacement Edition, Vol. 30. (Butterworth and Co. (Pub.) Ltd.).

British Encyclopædia of Medical Practice, Vol. 9. (Butterworth and Co. (Pub.) Ltd.). Price 52/6.

Hindu Code, Fourth Edition. By Sir Hari Singh Gour. (Central Book Co., Nagpur). (Stevens and Sons). Price 53/-.

Bowstead's Digest of the Law of Agency, Ninth Edition. By A. H. Forbes. (Sweet and Maxwell, Ltd.). Price 42/-.

Hire Purchase Act, 1938. Meaning and Effect. By A. C. Crane. (Iliffe and Co.). Price 5/-.

Radcliffe's Real Property Law, Second Edition, 1938. By G. R. Y. Radcliffe. (Oxford University Press). Price 21/-.