New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"Whatever may be said about the externals of English Law, no country in the world has produced an administration that can compare with it for dignity and effectiveness. Where are to be found Judges as independent of political influence as ours?"

—MR. COMPTON MACKENZIE (in *West to North*).

VOL. XVII. TUESDAY, MARCH 4, 1941 No. 4.

SETTING ASIDE A JURY'S VERDICT: EXCESSIVE DAMAGES.

THE principles upon which a new trial will be granted on the ground that the damages awarded were excessive are well-settled. In a recent judgment, *Sullivan* v. *Cleary's Otago Bottle Stores, Ltd.*, His Honour Mr. Justice Kennedy has summarized the law as it stands to-day; and, while there may be nothing new in that judgment, it provides a succinct statement of the principles; and we are indebted to His Honour for much of what follows.

The principles to be applied in considering whether damages are excessive were stated in *Matheson* v. *Schneideman*, [1930] N.Z.L.R. 151, (an action claiming damages for slander), where Sir Michael Myers, C.J., and Blair, J., in a judgment with which MacGregor, J., concurred, after stating that the amount awarded was greater than would have been given by a Judge sitting without a jury, said that, however, was not sufficient to justify the Court in setting aside the verdict. The judgment continued:

> Before the verdict can be set aside, the Court must come to the conclusion that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them. If the Court is so satisfied, then it is its duty to interfere and set aside the verdict. If the Court can see that the jury in assessing damages have been guilty of misconduct, or made some gross blunder, or have been misled by the speeches of counsel, those are undoubtedly sufficient grounds for interfering with the verdict: *Praed* v. *Graham*, (1889) 24 Q.B.D. 53; *Harris* v. *Arnott*, (1889) 26 L.R. Ir. 55; and see *Watt* v. *Watt*, [1905] A.C. 115, 118. There must be some reasonable relation between the wrong done and the damages awarded: *Greenlands Ltd.* v. *Wilmshurst and London Association for the Protection of Trade*, [1913] 3 K.B. 507, 532, 533; and *Eden George* v. *Truth and Sportsman, Ltd.*, (1926) 26 N.S.W.S.R. 595.

Their Honours, in enunciating the principles by which the test should be applied, said:

> The true test seems to us to be whether the Court can see that the jury have taken a reasonable view of the case and returned a verdict such as reasonable men would find. That was the test applied in *Daley* v. *Lundin*, (1908) 8 N.S.W.S.R. 447.

The judgment in *Matheson's* case was set aside as being so excessive that no twelve men on a proper consideration of the facts and circumstances could reasonably have given them, their Honours taking the same view of this case as was taken in *Eden George* v. *Truth and Sportsman, Ltd.* (*supra*); as they said:

> Taking all the relevant factors into consideration, as in the case last cited, we think that on the facts of the case the sum awarded was so excessive, and the proportion between it and the circumstances of the case was so unreasonable as to suggest—and indeed compel us to think—that the jury must have considered the matter from a wrong point of view or without a proper understanding of their duty.

In *Shaw* v. *Hill*, [1935] N.Z.L.R. 914, Sir Michael Myers, C.J., and Reed and Fair, JJ., in a judgment with which Smith, J., concurred, said that the principles which should guide the Court in considering whether the damages awarded were excessive were well settled and might, perhaps, be best expressed in the words of Lord Atkinson in *Taff Vale Railway Co.* v. *Jenkins*, [1913] A.C. 1, 7, that the verdict "should be set aside if the Court cannot find any reasonable proportion between the amount awarded and the loss sustained." And their Honours went on to say, at p. 920:

> A verdict may be set aside and a new trial granted on the ground of excessive damages if the Court, without imputing perversity to the jury, comes to the conclusion, from the amount of damages, that the jury must have taken into consideration irrelevant matters or applied a wrong measure of damages: *Johnston* v. *Great Western Railway Co.*, [1904] 2 K.B. 250, and *Cleave* v. *McDonald*, [1925] N.Z.L.R. 311, 327.

These judgments of our Court of Appeal summarize the law and, in applying them, and the later House of Lords decision, *Mechanical and General Inventions Co., Ltd. and Lehwess* v. *Austin and Austin Motor Co., Ltd.*, [1935] A.C. 346, Mr. Justice Kennedy, in *Sullivan's* case (*supra*), a case under the Deaths by Accidents Compensation Act, 1908, concluded as follows:—

> It may be said that the damages awarded, having regard to contingencies which must be taken into account, were large . . . but they are not so large in my opinion that it can be affirmed that there is no reasonable proportion between the damages awarded and the circumstances of the case. There were in this case elements which might appeal to sympathy, but nevertheless I cannot judicially affirm or conclude from the amount of damages and the circumstances of the case that the jury did take into account any element

which they should not have taken into account or applied a wrong measure of damages or took a biased or mistaken view of the whole case.

Turning now to the English cases, from which were evolved the principles enunciated or applied in the foregoing citations from recent New Zealand judgments, we find that this development of the law commenced with *Wood* v. *Gunston*, (1655) Style 462, 466; 82 E.R. 863, 864, 867, where the defendant in a slander action moved for a new trial on the ground that the damages were excessive. Glyn, C.J., said:

> It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them.

The modern line of cases commences with *Solomon* v. *Bitton*, (1881) 8 Q.B.D. 176, an action of trover, tried before Lindley, J., as he then was, in which the evidence was conflicting, the jury believing the plaintiff. The Divisional Court, of which the trial Judge was a member, ordered a new trial on the ground that the verdict was against the weight of evidence. Mr. Justice Lindley declared that he had been dissatisfied with the jury's verdict. The Court of Appeal (Jessel, M.R. and Brett and Cotton, L.JJ.) reversed the order, and said that the test was not whether the trial Judge was satisfied or dissatisfied, or whether he would have come to the same conclusion, "but whether the verdict was such as reasonable men ought to have come to." But, in *Metropolitan Railway Co.* v. *Wright*, (1886) 11 App. Cas. 152, 156, Lord Halsbury said that the principle of *Solomon* v. *Bitton* (*supra*) was erroneous, as reported, in the use of the word "ought." He added:

> If a Court—not a Court of Appeal, in which the facts are open for original judgment, but a Court which is not a Court to review facts at all—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. If reasonable men *might* find (not "ought to" as was said in *Solomon* v. *Bitton*) the verdict which was found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to Judges.
>
> I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If the finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word "might" be substituted for "ought" in *Solomon* v. *Bitton*, I think the principle would be accurately stated.*

Lord Selborne, L.C., at p. 153, said:

> It is not enough that the Judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the Judges, in the Court where the new trial is moved for, might have come to a different conclusion, but there must be such a preponderance of evidence as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the Judge, should return such a verdict.

These observations are important, owing to the later assimilation of the like tests in cases where a new trial is sought on the ground that the damages awarded were excessive.

In *M'Grath* v. *Bourne*, (1876) I.R. 10 C.L. 160, Chief Baron Palles said that to describe an amount of damages as "scandalous," "outrageous" or as "grossly extravagant" resembled the adjective "gross" when applied to negligence. He added, at pp. 164, 165:

> A more clear, legal, and accurate definition was given by my brother Fitzgerald during the argument, when he said that the amount would be such that no reasonable proportion existed between it and the circumstances of the case. Each case must rest upon its own peculiar facts.

This view was followed in *Praed* v. *Graham* (*supra*), where Lord Esher, M.R., discussed "the rule of conduct" in applications to set aside a verdict on the ground of excessive damages. At p. 55, His Lordship said in a judgment, with which Lindley, and Lopes, L.JJ., concurred:

> I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence.

The verdict could be set aside if the jury were guilty of "misconduct" or "some gross blunder" or were "misled by the speeches of counsel." If the appellate Court think that the damages are larger than their members themselves should have given, but not so large as twelve sensible men could not reasonably have given, then they ought not to interfere with the verdict. If, on the other hand, the Court think that, having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them, then they ought not to interfere with the verdict. In accordance with that rule "of conduct," it was held by the High Court of Australia in *Miles* v. *Commercial Banking Co. of Sydney*, (1901) 1 C.L.R. 470, that a verdict could not stand when the amount awarded was entirely out of proportion to any loss which the plaintiff could possibly have suffered, and, was such as no reasonable men, understanding the subject to which they ought to apply their minds could have found.

In *Johnston* v. *Great Western Railway Co.* (*supra*), Vaughan Williams, L.J., approved the view of Lord Esher in *Praed* v. *Graham* (*cit. sup.*), "properly understood," on the circumstances in which the Court could interfere with a verdict on the ground that the damages were excessive. The fact that the damages appeared excessive to His Lordship as being more than he would have awarded, was an insufficient reason for granting a new trial. The view of Lord Esher was "incontrovertible" when construed in the light of other decisions of the Court of Appeal—*e.g.*, *Phillips* v. *London and South Western Railway Co.*, (1879) 4 Q.B.D. 406, the effect of which is that a verdict may be set aside and a new trial granted if the Court, without imputing perversity to the jury, come to the conclusion, from the amount of the damages and other circumstances, that the jury must have taken into consideration matters which they ought not to have considered, or applied a wrong measure of damages. In that case, at p. 408, Cockburn, C.J., pointed out:

> When a jury have taken all the elements of damage into consideration and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, the Court ought not, unless under very exceptional circumstances, to disturb the verdict.

In *Tolley* v. *J. S. Fry and Sons, Ltd.*, [1930] 1 K.B. 467, on app. [1931] A.C. 333, the House of Lords, on facts which are well-known, ordered a new trial to be limited to the assessment of damages. In the Court of Appeal, at p. 476, Scrutton, L.J., cited the words

* In *Webster* v. *Friederberg*, (1886) 17 Q.B.D. 736, 737, Lord Esher, M.R., said that his brother Fry had told him that Jessel, M.R., considered that the language which he then used was not correctly reported, and the word "not" should be inserted after the word "ought," so as to read "such as reasonable men ought not to have come to."

of Hamilton, L.J., as he then was, in *Greenlands Ltd.* v. *Wilmshurst* (*supra*, at p. 522):

> Still, in my opinion, by no formula or manipulation can £1,000 be got at. For any damage really done, £100 was quite enough; double it for the sympathy; double it again for the jury's sense of the defendant's conduct, and again for their sense of Mr. F. E. Smith's. The product is only £800. . . . There must be some reasonable relation between the wrong done and the solatium applied.

In the House of Lords, Viscount Hailsham said he could not see on the facts of the case any ground for saying that the amount of damages was so excessive as to warrant the inference that the jury took a biased or mistaken view of the whole case.

The award of a verdict of £25,000 damages for libel in a film was awarded the plaintiff in *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, (1934) 50 T.L.R. 581. The verdict was not disturbed, Scrutton, L.J., remarking, at p. 585, that the Courts will interfere only if the amount of damages is such that in all the circumstances no twelve reasonable men could have given it.

In *Mechanical and General Inventions Co., Ltd. and Lehwess* v. *Austin and Austin Motor Co., Ltd.* (*supra*), the jury's verdict assessing damages at £65,000 for breach of contract was restored by the House of Lords.

On the important question as to the duty of an appellate Court when dealing with the verdict of a jury, Lord Atkin endorsed in every respect the detailed exposition contained in the opinion of Lord Wright, with which Lord Macmillan also found himself in entire agreement. This speech of Lord Wright has now become the *locus classicus* of the exposition of the principles relating to the granting of a new trial on the ground of an excessive award of damages.

For the appellate Court to set aside the verdict of a jury as being against the weight of evidence, merely because the Court does not agree with it, would, in Lord Wright's opinion, be quite wrong. Much more is necessary in order to justify the setting aside of a jury's verdict where there is some evidence to support it. No doubt the test could be roughly described as being whether the verdict of the jury was reasonable, but what is meant by "reasonable" in this connection must be carefully defined.

The phrase "miscarriage of juries" used in *Wood* v. *Gunston* (*supra*), was, in Lord Wright's view, the key to the matter. He quoted the judgments in *Metropolitan Railway Co.* v. *Wright* (*supra*), and, in particular, the speech of Lord Halsbury as containing the "most illuminating statement." These valuable observations, he said, go back to the test laid down in *Wood* v. *Gunston*, whether there was a miscarriage of the jury. Thus, His Lordship proceeds:

> The question, in truth, is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

His Lordship said, at p. 377, that the damages in the case before their Lordships' House ran into big figures, but damages cannot be treated as excessive merely because they are large. "Excess implies some standard which has been exceeded." Although His Lordship indicated that he himself might not have awarded the same amount, yet he did not find any such irreconcilability or want of proportion between those damages and the whole circumstances of the case. On the question of damages, the respondents had not satisfied him that the verdict was one which was "unreasonable" in the sense that the jury might not come to it or one which was against the overwhelming balance of the evidence; and he could not find that the jury were partial or perverse.

Before concluding, Lord Wright's general observations, at p. 377, must be quoted:

> Most of the reported cases on the question of excessive damages are naturally cases of tort: in contract the damages are generally capable of more or less precise ascertainment, though it sometimes happens—as here—that they must be matter of conjecture. But in general in contract a new trial is ordered, if at all, because of some error in law. But where there is no error in law the principles are well stated by Lord Esher in *Praed* v. *Graham*, (1889) 24 Q.B.D. 53, where he said "the rule of conduct" for the appellate Court when considering whether a verdict should be set aside on the ground that the damages are excessive, "is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence." Lord Esher adds that the Court cannot set aside the verdict merely because it is larger than they themselves would have given, but only if "having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them." He treats that statement as equivalent to the definition given by Fitzgerald, J., and approved by Palles, C.B., in *M'Grath* v. *Bourne*, (1876) I.R. 10 C.L. 160, that to justify setting aside the verdict on the ground of excessive damages "the amount should be such that no reasonable proportion existed between it and the circumstances of the case." Lord Esher's statement of principle was approved by another master of the common law, Vaughan Williams, L.J., in *Johnston* v. *Great Western Railway Co.*, [1904] 2 K.B. 250.

He proceeded later:

> I do not find in the verdict on damages any such irreconcilability or want of proportion between these damages and the whole circumstances of the case. On the question of damages the respondents have not satisfied me that the verdict was one which was "unreasonable" in the sense that the jury "might" not come to it, or one which was against the overwhelming balance of the evidence. Nor can I find that the jury were partial or perverse; and again I should desire to quote and apply here the observation which Viscount Hailsham, L.C., made in *Tolley* v. *J. S. Fry and Sons, Ltd.*, [1931] A.C. 333, in reference to that case: "I cannot see in the facts of this case any ground for saying that the amount of the damages awarded is so excessive as to warrant the inference that the jury took a biased or mistaken view of the whole case."

Lord Blanesburgh, who dissented, referred to the besetting weakness by which a jury, in venting its displeasure, seeks to punish, their only duty being to compensate properly for any legal wrong done. His Lordship said:

> I conceive it to be one of the most important functions of the Court in any case in which it finds that a jury has yielded to the besetting weakness, to correct it. If the Court were to become hesitant in the exercise of that function, a jury in civil cases would soon become the tribunal for the punishment of defendants for other than legal wrongs committed or for the denial to plaintiffs of their legal rights and all according to the length of its own foot, instead of being, as in this case it alone was, a tribunal for compensating the appellants for legal wrong suffered by them at the hands of the respondents.

The whole duty of the appellate Court was summed up by Lord Wright when he said, in words which echo Lord Halsbury in the *Metropolitan Railway Co.'s* case: "The question, in truth, is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty." Nowhere, in all the reported cases, has this definitive test been put in more precise and constitutional language.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Auckland.
November 21;
December 20.
Johnston, J.

WESLEY TRAINING COLLEGE BOARD
v.
MOUNT ROSKILL ROAD BOARD.

Rating—Rates and Rate-book—Urban Farm-land List—Preparation of Urban Farm-land Roll—Land included whether Urban Farm land—Notice to others than those Occupiers whose Names on List—Whether Omission to give such Notice Accidental—Waiver of Failure to give Notice—Jurisdiction—Proceedings to set aside Urban Farm-land Roll—Whether same should be against Council or Assessment Court—Need to prove Court's lack of Jurisdiction—Urban Farm Land Rating Act, 1932, ss. 2, 4, 5 (2), 13, 15, 27.

In preparing an urban farm-land roll under the Urban Farm Land Rating Act, 1932, a local authority should exclude from its farm-land list lands which, after inquiry and consideration of the relevant circumstances, in their opinion do not come within the terms of the definition in s. 2 of the statute, because they are fit for subdivision for building purposes, and are likely to be required for such purposes within a period of five years.

Under s. 5 (2) of the statute only those occupiers whose properties appear in the list prepared are entitled to notice of the list and its contents. Notice need not be given to occupiers of lands which have once been on a farm-land roll, but are not included in the new list. Urban farm lands of a greater area than 3 acres need not be included in a new roll.

Where notice was not given to the plaintiff whose name appeared on the farm-land list, it was held on the evidence that the omission to give such notice was accidental; and that, therefore, according to s. 5 (2) of the Act, the farm-land list was not invalidated by such omission; and, further, that even if it were not accidental the plaintiff had waived such failure to give notice by agreement (in subsequent proceedings) upon the value of the land accepted and confirmed by the Assessment Court.

Semble, That the duties of the Council in preparing a farm-land list are ministerial rather than judicial, and that while proceedings should have been taken to set aside the urban farm-land roll against the Assessment Court rather than the Council, in view of s. 27 of the said Act, such proceedings could not succeed unless a manifold lack of jurisdiction in that Court were shown, which had not been the case.

R. v. *Woodhouse*, [1906] 2 K.B. 501; *R.* v. *Electricity Commissioners, Ex parte London Electricity Joint Committee Co) (1920), Ltd.*, [1924] 1 K.B.171; *Ex parte Bradlaugh*, (1878-3 Q.B.D. 509; and *Colonial Bank of Australasia* v. *Willan*, [1924] 1 K.B. 171, referred to.

Counsel: *Stanton*, for the plaintiff, in support; *Towle*, with him *Milliken*, for the defendant, to oppose.

Solicitors: *Joseph Stanton*, Auckland, for the plaintiff; *Baxter, Shrewsbury and Milliken*, Auckland, for the defendant.

Case Annotation: *R.* v. *Woodhouse*, E. and E. Digest, Vol. 16, p. 99, para. 10; *R.* v. *Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920), Ltd., ibid.*, Supp. Vol. 16, para. 2303; *Ex parte Bradlaugh, ibid.*, Vol. 16, p. 441, para. 3070; *Colonial Bank of Australasia* v. *Willan, ibid.*, p. 440, para. 3060.

SUPREME COURT.
(Compensation COURT.)
Napier.
1940.
December 10, 13.
Myers, C.J.

NAPIER HARBOUR BOARD
v.
MINISTER OF PUBLIC WORKS.

Public Works Acts—Compensation—Assessment—Land Suitable for Building Purposes—"Amount which the land if sold in the open market by a willing seller might be expected to realize"—Matters for Court's consideration—Finance Act (No. 2), 1936, s. 28.

In determining the amount of compensation under the Public Works Act, 1908 where the land is suitable and intended by the claimant for building purposes the Court, in applying the rule laid down in s. 28 of the Finance Act (No. 2), 1936, must consider the sum which the land as freehold might be expected to realize in the open market if the claimant had been willing to sell to a person or company desirous of acquiring the land for subdivision and sale as building sites.

Counsel: *J. F. B. Stevenson*, and *M. R. Grant*, for the claimant; *L. W. Willis* and *H. W. Dowling*, for the respondent.

Solicitors: *Sainsbury, Logan, and Williams*, Napier, for the claimant; *Kennedy, Lusk, Morling, and Willis*, Napier, for the respondent.

PUBLICATION OF STATUTES.

A New Feature, and the Influence of War.

In the Annual Volume of Statutes for 1940, copies of which are now coming to hand from the Government Printer, the Attorney-General, the Hon. H. G. R. Mason, has introduced a new feature. This is an index which shows where to find all the principal Acts at present in force in the Dominion. In the index these Acts are arranged in alphabetical order and for those Acts reprinted in 1931 reference is given to the volume and page in which the Act may be found in the reprint. For any other Act reference is given to the annual volume of Statutes and the page thereof at which the Act may be found. As the index relates to all unrepealed Statutes irrespective of date and not merely to those of the current year, the index is placed at the back of the volume to preclude any confusion with tables relating only to the current volume itself, which are placed at the beginning. It is proposed to include a similar index in each annual volume. By reference to the index in the latest volume one will therefore always readily ascertain the volume and page at which any desired Act may be found irrespective of its date. It is confidently expected that this new feature will be found a decided convenience.

The new volume betrays the influence of war conditions. It is thinner than any volume since 1930, having only 398 pages, including the new index. As the 1930 volume was of quarto size as against the octavo size that is now used, it is probable that there is distinctly less matter in the 398 pages of the new volume than in the 338 pages of the 1930 volume, and we have to go back to the last war to find a volume that would compete with the present one for brevity of contents. It took several years for the last war to show its full influence upon the size of our annual volume of Statutes. The 1914 and 1915 volumes were full sized. The 1916, 1917, and 1918 volumes were much smaller, and the volume of contents comparable with those of the present year. They contained respectively 274, 319, and 287 quarto pages. By reason of the change from quarto to octavo an exact comparison in the volume of contents of the present volume with the earlier war-time volumes cannot readily be made, but the 1916 volume would appear to be the only one of which it can be said definitely that it is less voluminous than the present one, although it is probable that both the 1917 and 1918 volumes are also slightly less in content.

THE LAW RELATING TO MOTOR-VEHICLES IN NEW ZEALAND.

Noteworthy Decisions of 1940.

By W. E. LEICESTER.

Acting on the recommendation of the Law Revision Committee, Cabinet set up in this year a special Committee to examine the basis of liability for personal injuries arising from the use of motor-vehicles, to investigate the practicability of adopting in such cases the principle of absolute liability, without regard to negligence, and to consider what limitations would be necessary if such a rule were adopted.

"Under the present law," says the Minister of Justice, "a person injured in a motor accident cannot recover damages unless he can prove that the accident was caused by the wrongdoing (generally negligent) of some other person, and no less than a third of the Supreme Court's time is now taken up with attempts to determine liability. To do so a number of very complicated rules and principles have been evolved, and it is common knowledge, not only among lawyers, that juries to-day, knowing that every motor-vehicle in New Zealand is covered by a third-party insurance policy, are prone to give judgment for a plaintiff in a running-down case on very slender evidence. That is, juries themselves, in finding negligence so readily, are tending to the elimination of this factor as a test of liability. The Committee will consider the financial, legal, social, and other consequences that would result from importing into our law the principle of absolute liability."

The more pressing and urgent considerations of the war have led to the postponement of the Committee's deliberations and the calling of evidence before it; but the introduction of the principle of absolute liability into the common law of this country is a matter that will demand a maximum of caution if the most curious anomalies are to be avoided. However, the presence on the committee of the President of the New Zealand Law Society, as Chairman, and another member of our profession should constitute a sufficient safeguard against legislative exuberance.

NEGLIGENCE GENERALLY.

The most important negligence case of the year is the decision in *Stewart* v. *Hancock*, [1940] N.Z.L.R. 424, an appeal allowed by the Privy Council consisting of Viscount Caldecote, L.C., Viscount Sankey, Lord Thankerton, Lord Russell of Killowen and Lord Roche. The appellant was riding his motor-cycle along the main road leading from Hamilton to Auckland when he came into collision with an unlighted stationary motor-car owned by the respondent. This car was standing on the side of the road facing in the same direction as that in which the appellant was travelling, while on the opposite side and some thirty yards nearer the appellant, there was another stationary car facing in the opposite direction and showing lights. This one had stopped as the result of a request from the respondent who was having trouble in getting his car to re-start by means of the starting handle and who had switched off his lights in order to spare the battery. The appellant in approaching the stationary lighted car reduced his speed from about thirty-five miles per hour to about twenty-five miles per hour, and on passing out of the beam of its headlights saw the respondent's car when it was only some 20 to 30 ft. away but not in sufficient time to avoid it. The jury found for the appellant for a substantial amount after being directed by the trial Judge, Mr. Justice Fair, that, if they thought that the plaintiff had the last opportunity of avoiding the accident and negligently failed to avail himself of it, or that he was negligent in any of the respects alleged and such negligence was a proximate cause of the accident, there should be a verdict for the defendant. On the subsequent argument on a motion for nonsuit, the Judge held that, on the facts, it was impossible to say that, as a matter of law, the appellant was guilty of contributory negligence. This view was rejected by the majority in the Court of Appeal, Ostler and Johnston, JJ., upon the ground that it was conclusively proved that the proximate cause of the accident was the appellant's own negligence and that the verdict of the jury was so unreasonable as to be perverse. Smith, J. dissented from this opinion.

The Privy Council, however, drove another nail into the coffin of the dilemma theory (either that he was not keeping a proper look out, or, if he was keeping a proper look out, he was driving too fast to avoid the accident); and provided further expressions of approval of the judgment of Macnaghten, J., in *Tidy* v. *Battman*, [1934] 1 K.B. 319, wherein he observes that at night time the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must necessarily depend on a variety of facts, such as the colour of the obstruction, the background against which it stands, and the light coming from other sources. The Privy Council seemed to regard as perfectly reasonable the suggestion put forward in favour of the motor-cyclist that he had to contend with the difficulties of the headlights of the lighted parked car and also was justified in keeping an eye on that car to see whether people might step out from behind it, by which time he had covered a considerable amount of the space between the two parked cars. It can thus safely be said that there is no rule of law that in every case disqualifies a motorist from recovering damages where he has run into a stationary unlighted object. In an editorial note upon this case, it is said, in commenting upon the dilemma theory, that, in reported cases at least, the driver has succeeded as often as not in escaping from that dilemma and has been successful in his action: [1940] 2 All E.R. 427, 428.

The question as to the right of a passenger to recover from a negligent driver who collides with a vehicle in which the passenger is travelling was considered by the Court of Appeal in *Biggs* v. *Woodhead*, [1940] N.Z.L.R. 108. The proper test, as formulated by Lord Justice (then Mr. Justice) Goddard in *23 Halsbury's Laws of England*, 2nd Ed. 687, is whether the negligence of the driver of the vehicle which collided with that in which the plaintiff was travelling wholly

or in part caused the accident: if so, the plaintiff can recover, and the fact that there is negligence on the part of the driver of the vehicle in which the plaintiff was travelling makes no difference. Thus, where the plaintiff is an innocent party and is injured by the joint negligence of two drivers, the negligence of the defendant need not be a substantial part of the cause. The passenger against whom contributory negligence is not pleaded simply has to prove that the conduct of the defendant was part of the operative cause of the collision; and he is entitled to a direction that the jury has to determine "the cause" of the collision by considering whether the acts of the defendant driver contributed directly to the collision and whether in large or small degree and not by considering whether one negligent driver (who may have so contributed) could have avoided the consequences of the acts of the other negligent driver (who may also have contributed). Per Smith, J., at p. 131. The case also shows that negligence which may be the cause or part of the cause of a collision need not be, in law, the latest in point of time. Of course, it is open to a jury to find on the whole of the evidence that the passenger's own driver is the sole cause of the injury, but this is a matter of fact for the jury to decide upon the whole case. Per Myers, C.J., at p. 122. *McKenna* v. *Stevens and Hull and Co.*, (1923) 2 I.R. 112: *Smith* v. *Harris*, [1939] 3 All E.R. 960. An attempt was subsequently made by the respondent to appeal to the Privy Council, but the Court of Appeal did not consider that the question involved was one of "great general or public importance." *Biggs* v. *Woodhead (No. 2)*, [1940] N.Z.L.R. 276.

Reference was made to *Biggs's* case by Smith, J., in *Allen* v. *Watkins*, [1940] G.L.R. 91, in which it was held that in an action for negligence, when the innocent bailor of a motor-car, damaged in a collision, is the plaintiff, the Court must look at the facts as though he were an innocent passenger; and if each driver claims that the other was negligent, the bailor is entitled to recover if he can show that the damage to his vehicle was caused either wholly or in part by the negligence of the defendant he has selected. Where there is permanent injury done to his vehicle, the owner is entitled to maintain his action in tort against the wrongdoer even though he may also maintain an action in contract against the hirer; but the owner may not, of course, recover twice for the same damage.

Traffic Regulations.

In *Dempsey* v. *Speirs*, a decision of the Chief Justice delivered on December 18 last, the right-hand rule is considered. The Court stresses the importance of the rule and holds that the right which it confers should not be allowed to be whittled away. *Prima facie*, where the rule operates, the person in whose favour it runs is entitled to its benefit although he may in fact lose that benefit by reason of negligence on his part; but it does not follow, says the Chief Justice, that every act of negligence on his part will result in his losing the benefit of the rule. The decision might well be considered as giving a graceful *coup de grace* to *Pearce* v. *Hardiman*, [1935] G.L.R. 57, which has been used too often to create a doubtful principle.

The contention that where the defendant has admitted a breach of the traffic regulations, there is conclusive evidence that he was guilty of negligence which was either the cause or partly the cause of an accident is not upheld by Ostler, J., in *Duncan* v. *Wakeford*, [1941] N.Z.L.R. 25; [1940] G.L.R. 589. There is no legal principle that such negligence must amount at least to a contributing cause of an accident; and thus a jury which rejects it as part of the operative cause of an accident does not give a verdict that is against the weight of evidence. This view is upheld by a long stream of authority, examples being *Algie* v. *D. H. Brown and Son*, [1932] N.Z.L.R. 779; *Dominion Airlines Ltd. (in Liquidation)* v. *Strand*, [1933] N.Z.L.R. 1; *Goodwill* v. *Saulbrey*, [1938] N.Z.L.R. 114. Here, the widow of a passenger in W.'s car which collided with a car driven by M. sued M. for damages under the Deaths by Accidents Compensation Act, 1908. The evidence showed that W. had sought to turn, at a short distance round a bend, across the track of M.'s car and M., who had dipped his lights temporarily while meeting an oncoming vehicle, failed to see the obstruction in time to avoid it. The jury placed the blame for the collision upon W. The Court considered the question whether M., who admitted a breach of driving regulations as to speed, was guilty of negligence was a question of fact for the jury; it was also a question of fact whether that negligence was the cause or a cause of the accident. "Considering the time of night, the extreme darkness, the bad visibility, the fact that Morris had dipped his lights temporarily while meeting an on-coming vehicle, and that he might well assume that no driver would be so foolish as to stop his car across the road in those conditions at such a time and place, and in such a manner as to make its lights invisible, the jury may well have thought that the acts and omissions of Wakeford constituted something in the nature of a trap, and that under the circumstances Morris was excused from not seeing Wakeford's car sooner and for driving at such a speed as to be unable to pull up before colliding with it."

The obligation of a bus company to keep its vehicles in repair was also considered by Ostler, J., in *Northern Publishing Co., Ltd.* v. *White*, [1940] G.L.R. 101. Although this was a dissenting opinion, the majority of the Court of Appeal holding that the jury could properly find that the unsafe condition of the bus was not due to negligence on the part of the deceased, there is a most useful survey in this judgment of the duty of an owner in respect of the brakes of his vehicle. Reference may be made to the distinction that is clearly emphasized in the judgment between the duty of a company to have its vehicles safe to be driven by any of its employees and the duty imposed upon the employee of seeing that the vehicle which he himself drives is in a safe condition, such duty being delegated to him by his employers. His failure in such circumstances to perform this duty would amount to contributory negligence and afford a complete answer to an action by himself or his representatives (*ibid.*, 123, 125).

Insurance.

The fields of insurance law have not proved so fruitful as in previous years; but *Marsh* v. *Absolum*, [1940] N.Z.L.R. 448, contains several points of interest. The plaintiff brought an action on behalf of himself and his infant daughters claiming extensive general and special damages under the Deaths by Accidents Compensation Act, 1908, for the death of his wife who was killed while driving his motor-car in a collision with one Paki. The latter had unlawfully converted the defendant's motor-car and was driving it at an excessive and reckless speed with the desire to terrify his wife into acceding to his demand that she return to live with him. His *modus operandi* to effect this return to

cohabitation was to drive the car at a speed of at least sixty miles per hour passing and re-passing the house in which she was working. The jury returned a negative answer to the question as to whether he wilfully and intentionally drove into the plaintiff's car; and, the Court of Appeal holding that there was evidence to justify this finding, the case had to be regarded merely as an ordinary case of death sustained by a third party through the negligent use of the motor-vehicle. The decision is, however, given on the question as to the liability of an owner under the Motor-vehicles Insurance (Third Party Risks) Act, 1928, where death or injury is caused by the negligence of a person who has stolen a vehicle and is driving it without the owner's authority. The Chief Justice, after hearing full argument, expressed himself as satisfied that the section does cover the case of an injury caused by negligent user of a stolen vehicle. The third feature of this unusual case was the contention that the trial Judge had misdirected the jury by directing them that damages could be given to the infant children of the plaintiff for the value of the training and practical assistance that their mother would have afforded over and above the amount awarded for the provision of a competent housekeeper until the youngest child was twenty-one years of age. Although these children had admittedly suffered a very serious loss for which no pecuniary payment could properly compensate them, such loss was held to be not the kind for which, according to judicial decisions, the statute gives compensation. It would seem there is no difference in principle between the moral and practical training of a mother and of a father: if there is no pecuniary loss in the one case, it cannot be said that there is in the other (p. 463).

(To be concluded.)

PRACTICE NOTES.

Payment into Court.

By W. J. Sim, K.C.

Recent rulings on the subject of mentioning to the jury the amount of damages paid into Court by the defendant (as to which see (1940) 16 N.Z.L.J. 299) prompt an examination of the present position in New Zealand of payment into Court and its consequences.

Tender before action brought is a good defence to an action to recover a debt: see *Griffiths* v. *Ystradyfodwg School Board*, (1890) 62 L.T. 151, and the judgment in *The Mona*, [1894] P. 265, 268. The principle of the plea appears to be that the promisor has always been ready to perform the contract, and has in fact performed it as far as he was able, but has been prevented from completely performing it by the refusal of the promisee to accept performance. But tender cannot be pleaded as a defence to a claim for unliquidated damages: *Davys* v. *Richardson*, (1888) 21 Q.B.D. 202, 205. See generally *1940 Yearly Practice*, 373, and, as to the form of defence, *Bullen and Leake's Pleading Precedents*, 9th Ed., 825. A recent illustration of an effective tender occurred in *Farquharson* v. *Pearl Assurance Co., Ltd.*, [1937] 3 All E.R. 124. In that case the mortgagee of a life insurance policy, having the right to pay premiums if necessary, offered to pay the same, the offer being declined. The assured died unexpectedly when the premium was still unpaid. It was held that the company could not in the circumstances be heard to say that the premium had not been tendered.

The tender must be unconditional, but it may be under protest or with a reservation of all rights: *Scott* v. *Uxbridge Rickmansworth Railway Co.*, (1866) L.R. 1 C.P. 596; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1. It may be noted, however, that if a creditor has to employ a solicitor to collect his debt, an effective tender can take place without tendering the costs of the solicitor's letter: *Kirton* v. *Braithwaite*, (1836) 1 M. & W. 310; *Caine* v. *Coulton*, (1863) 1 H. & C. 764. The form of defence in *Bullen and Leake* pleads that the sum tendered is now brought into Court. The *1940 Yearly Practice*, 373, in its discussion of the present O. XXII affirms that if the defendant desires to rely on a plea of tender before action, he must (*a*) pay the money into Court with his defence; (*b*) give notice to the plaintiff; (*c*) state the fact of payment in and the amount in his defence. There is no New Zealand Rule on the subject, requiring a payment in to accompany the plea of tender.

In New Zealand payment into Court after action brought in any action for a sum of money is governed by two separate rules, which have become known familiarly as describing (*a*) payment in in satisfaction of the cause of action, and (*b*) payment in with a denial of liability, with different consequences according to the procedure adopted. These are RR. 213 and 223. Rule 213 affirms that a sum of money may be paid into Court by way of satisfaction or amends:

> If the claim in any action is for a sum of money, the defendant may, before the trial of the action pay into Court a sum of money by way of satisfaction or amends.

Notice must be served upon the plaintiff of the payment in (R. 214) and the money may be paid out to the plaintiff or duly authorized agent. Logically since the tender was made in satisfaction, it might have been expected that acceptance of the sum would involve an acceptance of the conditions of its payment in, but there is authority that the plaintiff may under these conditions take the money out of Court and still continue his action: *Smith* v. *Ogden*, (1890) 8 N.Z.L.R. 546, and *Nolan* v. *Mutual Life Association* (1904) 6 G.L.R. 477. When these cases were decided the notice to be served upon the defendant was to the effect that the plaintiff accepted the sum paid in in satisfaction of the claim in respect of which it was paid in. See Form 15 which was part of the original code as framed in 1882. The decision of Denniston, J., in *Smith* v. *Ogden* appears to have been based upon the principle that at the time of payment into Court no procedure existed for the payment in accompanied by a denial of liability as is now permissible under R. 223, although this procedure, enacted in 1896, was in existence when Edwards, J. decided *Nolan's* case (*supra*). It appears anomalous that the plaintiff purporting to take the money out of Court expressly in satisfaction of his cause of action may continue his action.

Form 15 runs as follows :

> Take notice that the plaintiff accepts the sum of £ paid by you into Court in satisfaction of the claim in respect of which it is paid in.

The English practice at the moment is summarized in the *1940 Yearly Practice*, 375, as follows :—

> It is no longer competent for a plaintiff to take the money out of Court when paid in, without a denial of liability, and still go on with his action as under the revoked r. 5.

The previous English practice had been to recognize that the money was the plaintiff's from the moment it was paid into Court, and the right to take it out did not depend upon a consideration of whether or not it was accepted in satisfaction of the claim. It may be noted, however, that in England the uplifting of the money was not accompanied by a form that it was accepted in satisfaction of the claim. The view is held, with respect, that the foregoing authorities in so far as they recognize that acceptance of money paid in in satisfaction and formally accepted as such may be followed by a continuance of the action, may call for re-examination in modern practice. That they have not come under review is probably due to the fact that the practice is seldom, if ever followed. The payment in is usually accompanied by a statement of defence denying liability on the main issue or on damages or on both. The almost invariable practice appears to be to follow R. 223, which is as follows :—

> A defendant may pay money into Court under R. 213, and file a statement of defence in respect of the cause of action in satisfaction of which such payment into Court is made.

Rule 224 then defines explicitly the consequences of uplifting the money. Under para. (*a*) the plaintiff may accept the money paid into Court in satisfaction of his claim notwithstanding the defendant's denial of his liability, and the plaintiff is entitled to the costs of the action up to the date of payment, and may sign judgment for such costs. The exercise of a judicial discretion may sometimes arise according to the facts—*e.g.*, a late payment in and a partial hearing as occurred in *Miller* v. *Union Steam Ship Co., Ltd.* (*No. 2*), [1918] G.L.R. 217. If the plaintiff decides not to accept the sum paid into Court but proceeds to trial, he runs the risk of incurring heavy costs although succeeding to the extent of the amount paid in or less. The sum in Court is available for satisfaction, so far as it goes, of the plaintiff's judgment and such costs as he is entitled to for the action up to the moment of payment in ; but the defendant is entitled to the general costs of the action, after the time of payment. For a typical adjustment of the situation which arises when the plaintiff fails to recover more than the amount paid into Court, see *McLeod* v. *Kay*, (1911) 14 G.L.R. 402. At the trial of the action the jury assessed the damages at less than the amount paid in. The Court ordered judgment to be entered for the defendant, that the costs of the action up to the time of payment into Court should be added to the damages assessed, and that the costs subsequent to the payment into Court should be set off against the amount ascertained to be due by the defendant to the plaintiff, the moneys in Court to be applied in payment of the sum due by the defendant to the plaintiff, and the residue paid to the defendant. In that case, a slander action, £20 had been paid into Court, and the jury assessed the damages at £15. The trial costs were fixed on the difference between the amount paid into Court (£20) and the amount claimed (£481). In *Purdy* v. *Durno*, [1939] G.L.R. 583, the difference between the amount claimed and the amount awarded was £900, and it was on this figure that the Court allowed costs of trial to the defendant. In *Weir* v. *Harwood*, [1918] G.L.R. 632, the defendant succeeded in keeping damages within the amount paid into Court, but had paid in so late that the plaintiff was not allowed any time to consider whether or not he would accept it. In the circumstances the Court gave judgment for the defendant, but left each party to pay his own costs.

The subject of payment into and out of Court and tender has in recent years in England been given careful attention under O. XXII, and the New Zealand code in this respect seems due for amendment. Attention is called in this article to the apparently unsatisfactory position whereby a plaintiff purporting to accept in satisfaction a sum paid in in satisfaction, may nevertheless proceed with his action. In England satisfactory provision has been made by rule in the case of several defendants, and in cases of libel or slander a plaintiff who takes money out of Court may apply by summons in Chambers to make in open Court a statement in terms approved by a Judge. Order XXII, r. 6 in England makes express provision for the non-disclosure during the course of the trial of the fact of payment into Court, a matter now satisfactorily disposed of in New Zealand by the authority of *Wallace* v. *Gough, Gough and Hamer, Ltd.*, [1940] 814.

The subject of a plea of tender, and the accompanying payment into Court seem, however, also to deserve further attention as in England. The subject of payment into Court is one in which practitioners move not without a certain sense of insecurity, and the matter is respectfully raised for consideration at the right moment.

Death of Sir Harry Eve.—Sir Harry Eve died on December 10, having survived for three years his retirement from the Bench. For thirty years he had been a Judge of the Chancery Division, and he frequently sat in the Court of Appeal to assist in the disposal of business there. He was so good—one may say, so great—a Judge that his promotion to a permanent seat in the Appellate Tribunal would have been a fitting recognition of his services, and would have been generally welcomed. Perhaps the best reason why the promotion did not come is that his proper home was in the Chancery Division, and he was too valuable there to be taken from it. For, indeed, he had established as a Chancery Judge a position which was unique. Some years ago, in a sketch of his career, it was said that no one ever left his Court without feeling that he had found a friend in the Judge, and it was his overflowing good nature—not unmixed, when occasion required, with tones of pungent rebuke—that made him to the Bar and solicitors the well-beloved Judge. The genial air of a Devon constituency in the years that preceded Eve's appointment in 1906 as a Judge, and the caravanning life which years ago occupied his holidays, helped no doubt his cheery good nature, and with it he had the learning and judicial insight which filled his long tenure of office with many valuable judgments. As long as there is personal recollection of him, the memory will be one of affection and esteem.—Apteryx.

PRACTICE PRECEDENTS.

Compromises with Creditors under s. 159 of the Companies Act, 1933.

By H. E. Anderson.

(*Concluded from p. 35.*)

EXHIBIT "F."

COPY OF RESOLUTIONS PASSED AT MEETING OF CREDITORS OF A. LTD.

Mr. moved, Mr. seconded :

That the scheme of arrangement submitted to this meeting be and the same is hereby approved and agreed to.

Motion carried unanimously.

Mr. moved, Mr. seconded :

That the company immediately apply to the Supreme Court to call separate meetings of the unsecured and hire-purchase creditors for the purpose of considering and, if thought fit, approving the scheme and upon such approval the company shall petition the Supreme Court for its sanction thereto.

Motion carried unanimously.

Mr. moved, Mr. seconded :

That it shall be suggested to the Court that Mr. and, failing him, Mr. shall be chairman of the meeting.

On the motion of Mr. seconded by Mr. it was unanimously resolved :

That Mr. be asked to represent the creditors in any legal proceedings.

This is the copy of resolutions marked "F." referred to in the annexed affidavit of sworn at Wellington this day of 1940, before me—

A solicitor of the Supreme Court of New Zealand.

ORDER SUMMONING SEPARATE MEETINGS OF COMPANY.

(*Same heading.*)

Before the Right Honourable the Chief Justice, on Monday the day of 19 .

UPON THE APPLICATION of the above-named company by summons dated the day of 19 AND UPON HEARING Mr. of counsel for the applicant and Mr. of counsel for creditors of the said company AND UPON READING the affidavit of and the exhibits therein referred to THE COURT DOTH ORDER that the applicant doth convene separate meetings of

(1) Unsecured creditors.

(2) Hire-purchase creditors ;

such meetings to be held at for the purpose of considering and if thought fit of approving with or without modification a scheme of arrangement proposed to be made between the unsecured creditors and hire-purchase creditors and the said company AND THIS COURT DOTH FURTHER ORDER that at least seven (7) days before the day appointed for such meetings a prepaid circular letter (with a proper proxy form attached) be sent by post to each of the unsecured and hire-purchase creditors of the company stating the time and place of meeting and the object for which the meetings are to be held and containing a precis of the scheme of arrangement and stating that a copy of the full scheme of arrangement can be seen during ordinary business hours at the offices of AND THIS COURT DOTH FURTHER ORDER that of , or failing him of be and he is hereby appointed chairman of the said meetings AND that the said chairman do report the result of the said meetings to this Court.

By the Court,
REGISTRAR.

PETITION FOR SANCTION BY THE COURT OF SCHEME OF ARRANGEMENT UNDER S. 159 OF THE COMPANIES ACT, 1933.

(*Same heading.*)

To the Honourable the Supreme Court of New Zealand.

THE HUMBLE PETITION of A. Ltd. whose registered office is situate in in the city of showeth as follows :—

1. The object of this petition is to obtain the sanction of the Court to a scheme of arrangement between the unsecured creditors and hire-purchase creditors of the company and the company whereby the assets of the company are to be transferred to a new company to be incorporated under the name of A. Co., Ltd.

2. The A. Ltd. was incorporated as a private company on the day of 19 with a nominal capital of £1,000.

3. The main objects for which the company was established as set out in the memorandum of association were as follows :—

1. To enter into and carry into effect with or without modification the agreement therein referred to.

2. To establish and carry on the business of restaurant and cabaret proprietors and any other business which might usefully be carried on in connection with such business and to acquire and undertake the whole or any part of the business property and liabilities of any person or company carrying on business as such restaurant and cabaret proprietors or any other business which may be usefully carried on in connection therewith.

And other objects set forth in the company's memorandum of association.

4. Shortly after the company's incorporation it duly entered into the said agreement and subsequently became interested in the present business carried on at .

5. For divers reasons and causes the company has carried on at a loss and has become financially embarrassed and there are now unsecured creditors to the value of £3,402 and hire-purchase creditors to the value of £3,543 and the company is owing the sum of £800 for rent and £200 for alterations to the premises occupied by it and certain other sums to shareholders in the company for loans and other advances claims for which have since been abandoned by the shareholders as part of the scheme formulated. Accordingly a scheme of arrangement under s. 159 of the Companies Act, 1933, between the various parties interested was formulated and executed by A. Ltd. the shareholders the landlord the lessee and C. M. T. trustee for a company to be formed and submitted and explained to a meeting of creditors on the day of 19 .

6. A copy of such scheme is annexed to the affidavit of filed herein on the day of and marked as exhibit "E."

7. By an order made in the above matter on the day of 19 it was ordered that your petitioner should convene separate meetings of the unsecured creditors and hire-purchase creditors to be held at for the purpose of considering and if thought fit of approving with or without modification the said scheme of arrangement proposed to be made between the unsecured creditors and hire-purchase creditors and the company and it was further ordered that seven (7) days notice be given by prepaid circular letter (with a proper proxy form attached) and containing a precis of the scheme of arrangement and stating where a full copy thereof might be seen and the said order directed that or failing him be chairman of the said meetings and that such chairman report the result thereof to the Court.

8. On the day of 19 separate meetings of the unsecured and hire-purchase creditors duly convened in accordance with the said order (a proxy form and a precis of the said scheme of arrangement having been enclosed with the notices convening such meetings) were held at in the city of and the said took the chair at each such meeting.

9. The said meeting of unsecured creditors was attended either personally or by proxy by fourteen (14) unsecured creditors to whom accounts are owing to the amount of £1,073.

10. The said meeting of hire-purchase creditors was attended either personally or by proxy by seven (7) hire-purchase creditors to whom accounts are owing to the amount of £3,496.

11. The said scheme of arrangement was taken as read by each meeting and the unsecured creditors unanimously passed the following resolution :

(*a*) That this meeting of unsecured creditors of A. Ltd. approve and agree to the scheme of arrangement submitted to the meeting in so far as the same affects them and agrees thereto with such modification (if any) in the said scheme as the Court may think fit to approve or impose.

and the hire-purchase creditors unanimously passed the following resolution :

(*b*) That this meeting of hire-purchase creditors of A. Ltd. approve and agree to the scheme of arrangement submitted to the meeting in so far as the same affects them and agree thereto with such modification (if any) in the said schedule as the Court may think fit to approve or impose.

12. No objection has been made to carrying out the said scheme of arrangement.

13. It will be for the benefit of the creditors that the said scheme of arrangement should be sanctioned by the Court, YOUR petitioner therefore humbly prays as follows :—

(1) That the said scheme of arrangement may be sanctioned by the Court so as to be binding on all the creditors of the company and on the company.

(2) Or that such other order may be made in the premises as to the Court shall seem meet.

AND your petitioner will ever pray.

DATED this day of 19 .

THE COMMON SEAL of A. Ltd. &c. was hereunto affixed by
..... Director.
..... Secretary.

I, of restauranteur and managing director of A. Ltd. MAKE OATH AND SAY :

1. That I am the managing director of A. Ltd. and am aware of the matters set forth in the foregoing petition.

2. That so much of the allegations set forth in the foregoing petition as relate to my own acts and deeds or the acts and deeds of the petitioner company are true and such of the same as relate to the acts of others, I believe to be true.

SWORN &c.

AFFIDAVIT IN SUPPORT OF PETITION UNDER S. 159 OF THE COMPANIES ACT, 1933.

(*Same heading.*)

I, of MAKE OATH AND SAY as follows :—

1. That I am [*state occupation or profession*].

2. That I was appointed by a Committee of the creditors of A. Ltd. on the day of 19 to look after the accounts and supervise the running of the business of a restaurant carried on by A. Ltd. at and have acted in that capacity since the said day of 19 and I have a full knowledge of all matters pertaining to the affairs of the company from that date.

3. That the object of the petition is to obtain the sanction of the Court to a scheme of arrangement between the unsecured creditors and hire-purchase creditors of the company and the company whereby the assets of the company are to be transferred to a new company to be incorporated under the name of A. Co., Ltd.

4. That A. Ltd. was incorporated as a private company on the day of 1938 with a nominal capital of £1,000.

5. That the main objects for which the company was established as set out in the memorandum of association were as follows :—

1. To enter into and carry into effect with or without modification the agreement therein referred to.

2. To establish and carry on the business of restaurant and cabaret proprietors and any other business which might usefully be carried on in connection with such business and to acquire and undertake the whole or any part of the business property and liabilities of any person or company carrying on business as such restaurant and cabaret proprietors or any other business which may be usefully carried on in connection therewith.

AND other objects set forth in the company's memorandum of association.

6. That I believe that shortly after the company's incorporation it duly entered into the said agreement and subsequently became interested in the present business carried on at .

7. That for divers reasons and causes the company has carried on at a loss and has become financially embarrassed and there are now unsecured creditors to the value of £3,402 and hire-purchase creditors to the value of £3,543 and the company is owing the sum of £800 for rent and £200 for alterations to the premises occupied by it and certain other sums to the shareholders for loans and other advances claims for which have since been abandoned (as part of the scheme formulated). Accordingly a scheme of arrangement under s. 159 of the Companies Act, 1933 between the various parties interested was formulated executed by A. Ltd. the shareholders the lessee C. and the landlord and C. M. T. as trustee for the new company to be formed and submitted and explained to a meeting of creditors on the day of 19 .

8. That a true copy of such scheme is annexed to my affidavit filed herein on the day of 19 and marked as exhibit " E."

9. That by an order made in the above matter on the day of 19 it was ordered that your petitioner should convene separate meetings of the unsecured creditors and hire-purchase creditors to be held at for the purpose of considering and if thought fit of approving with or without modification the said scheme of arrangement proposed to be made between the unsecured creditors and hire-purchase creditors and the company and it was further ordered that seven (7) days notice be given by prepaid circular letter (with a proper proxy form attached) and containing a precis of the scheme of arrangement and stating where a full copy thereof might be seen and the said order directed that or failing him be chairman of the said meetings and that such chairman should report the result thereof to the Court.

10. That on the day of 19 a prepaid circular letter together with a proper proxy form and a precis of the scheme of arrangement was posted to each unsecured and hire-purchase creditor notifying each creditor that separate meetings would be held at on the day of 19 as regards the unsecured creditors at 11 o'clock in the forenoon and as regards the hire-purchase creditors at 11.45 o'clock in the forenoon such notice stated the place where a copy of the full scheme of arrangement could be seen. True copies of such notice, precis of scheme of arrangement and proxy form are attached hereto marked " A." " B." and " C."

11. On the day of 19 separate meetings of the unsecured and hire-purchase creditors duly convened in accordance with the said order were held at and the said took the chair at each such meetings.

12. That the said meeting of unsecured creditors was attended either personally or by proxy by fourteen (14) unsecured creditors to whom accounts are owing to the amount of £1073.

13. That the said meeting of hire-purchase creditors was attended either personally or by proxy by seven (7) hire-purchase creditors to whom accounts are owing to the amount of £3496.

14. That the scheme of arrangement was referred to each meeting and each meeting unanimously passed a resolution in the following terms :

That the scheme of arrangement referred to in the notice convening the meeting be taken as read.

15. That the unsecured creditors unanimously passed the following resolution :

(*a*) That this meeting of unsecured creditors of A. Ltd. approve and agree to the scheme of arrangement submitted to the meeting in so far as the same affects them and agrees thereto with such modification (if any) in the said scheme as the Court may think fit to approve or impose.

and the hire-purchase creditors unanimously passed the following resolution :

(*a*) That this meeting of hire-purchase creditors of A. Ltd. approve and agree to the scheme of arrangement submitted to the meeting in so far as the same affects them and agree thereto with such modification (if any) in the said schedule as the Court may think fit to approve or impose.

16. No objection has been made to carrying out the said scheme of arrangement.

17. That the report of the said chairman is hereunto annexed marked " D." I know the signature to the said report is the signature of the said .

18. That the only assets of the company outside the assets subject to hire-purchase contracts have been valued by Mr. at the sum of £790. A true copy of his valuation dated the day of 19 is attached hereto and marked " E."

19. That at a meeting of the creditors held at it was unanimously resolved " that Mr. be asked to represent the creditors in any legal proceedings."

Sworn &c.

NOTICE CONVENING MEETINGS.

(*Same heading.*)

NOTICE is hereby given that by an order dated the day of 19 the Court has directed separate meetings of

(1) The unsecured creditors

(2) The hire-purchase creditors of the above-named company

for the purpose of considering and if thought fit approving with or without modification a scheme of arrangement (a precis of which is attached hereto) to be made between the above-mentioned creditors and the company and a new company to be formed. The said meetings will be held on the day of 19 at as regards the meeting of unsecured creditors at 11 o'clock in the forenoon and as regards the hire-purchase creditors at 11.45 o'clock in the forenoon at which place and respective times all the aforesaid unsecured creditors and hire-purchase creditors are requested to attend. A full copy of the said scheme of arrangement may be seen at the offices of .

The said unsecured and hire-purchase creditors may attend such separate meetings as aforesaid and vote in person or by proxy provided that the proxy must be deposited or sent to Mr. not later than the day before the meeting at which it is to be used.

The Court has appointed Mr. or failing him Mr. as chairman of the said meetings and has directed such chairman to report the result of the said meetings to the Court.

The above-mentioned scheme will be subject to the subsequent approval of the Court.

Dated this day of 19 .

NOTE.—A copy of the precis of the scheme is not given with these precedents.

PROXY FORM FOR UNSECURED CREDITOR.

(Same heading.)

I, the undersigned, an unsecured creditor of the above-named company hereby appoint [*If any other proxy is preferred strike out names here and insert and add name of proxy and initial alteration*] or failing him as my proxy to act for me at the meeting of unsecured creditors to be held at the on the day of 19 at 11 o'clock in the forenoon for the purpose of considering if thought fit approving with or without modification a scheme of arrangement proposed to be made between the said company and its unsecured creditors and hire-purchase creditors and a new company to be formed and at such meeting and any adjournment thereof to vote for me and in my name [*If for insert "for" if against "against" and strike out the words after the word scheme and initial such alteration*] the said scheme either with or without such modification as my proxy may approve.

Signature .
Address .

Amount of debt in figures £ : s. d.

1. This proxy must be lodged with Mr. not later than the day before the meeting at which it is to be used.

2. Any alterations made on the form of proxy should be initialled.

3. If the appointor is a corporation, then the form of proxy must be under its common seal or under the hand of some officer duly authorized in that behalf and the fact that he is so authorized must be so stated.

Proxy form for hire-purchase creditor will be in nearly the same form.

REPORT OF CHAIRMAN.

(Same heading.)

I, the person appointed by this Court to act as chairman of the separate meetings of unsecured and hire-purchase creditors of the above-named company summoned by a prepaid circular letter (with a proxy form attached) dated the day of 19 posted to each unsecured and hire-purchase creditor on the day of 19 and held on the day of 19 at the respective times of 11 a.m. and 11.45 a.m. at DO HEREBY REPORT to the said Court the result of the said respective meetings as follows :

1. The said meeting of the unsecured creditors was attended either personally or by proxy by fourteen (14) unsecured creditors to whom accounts are owing to the amount of £1,073.

2. The said meeting of hire-purchase creditors was attended either personally or by proxy by seven (7) hire-purchase creditors to whom accounts are owing to the amount of £3,496.

3. The scheme of arrangement a true copy of which is annexed to the affidavit of filed herein on the day of 19 was referred to each meeting and it was resolved by each meeting that the scheme having been fully explained at a meeting held on the day of 19 and a precis thereof having been sent to each creditor should be taken as read.

4. (*a*) The resolution submitted to the unsecured creditors was as follows :

That this meeting of unsecured creditors of A. Ltd. approve and agree to the scheme of arrangement submitted to the meeting in so far as the same affects them and agrees thereto with such modification (if any) in the said scheme as the Court may think fit to approve or impose.

(*b*) The said meeting was unanimously of opinion that the scheme of arrangement should be approved and agreed to.

5. (*a*) The resolution submitted to the hire-purchase creditors is as follows :

That this meeting of hire-purchase creditors of A. Ltd. approve and agree to the scheme of arrangement submitted to the meeting in so far as the same affects them and agree thereto with such modification (if any) in the said schedule as the Court may think fit to approve or impose.

(*b*) The said meeting was unanimously of opinion that the scheme of arrangement should be approved and agreed to.

Dated this day of 19 .

N.B.—If the scheme is not unanimously agreed to then it is submitted that the chairman should state the numbers present and voting for and against the resolutions.

MOTION ON PETITION.

(Same heading.)

MR. of counsel for the petitioner TO MOVE before the Right Honourable Sir Michael Myers, G.C.M.G., Chief Justice of New Zealand at his Chambers, Supreme Courthouse on the day of 19 at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order in terms of the prayer of the petitioner that the scheme of arrangement mentioned in such petition be sanctioned by the Court so as to be binding on all creditors of the company and the company or that such other order may be made in the premises as to the Court shall seem meet UPON THE GROUNDS that it is in the interest of the creditors and the company that such order be made AND UPON THE FURTHER GROUNDS set out in the petition of the above-named company and the affidavit of filed herein on the day of 19 .

Dated at on this day of 19 .

Counsel for petitioner.

Certified pursuant to rules of the Court to be correct.

Counsel moving.

MEMORANDUM FOR HIS HONOUR.

Reference is respectfully drawn to *Buckley*, 11th Ed. p. 317 and to *Re Bessemer Steel and Ordnance Co.* (1875) 1 Ch.D. 251.

Counsel for petitioner.

ORDER SANCTIONING SCHEME OF ARRANGEMENT UNDER S. 159 OF THE COMPANIES ACT, 1933.

(Same heading.)

Before the Right Honourable the Chief Justice.

day day of 19 .

UPON READING the petition of A. Ltd. the motion in support thereof and the order dated the day of 19 whereby the said company was ordered to convene separate meetings of the unsecured and hire-purchase creditors of the said company for the purpose of considering and if thought fit of approving with or without modification a scheme of arrangement proposed to be entered into between the said company and its creditors which scheme was attached to the affidavit of filed herein on the day of 19 and referred to in the sixth paragraph of the said petition AND UPON READING THE REPORT of the chairman made to the Court dated the day of 19 of the result of the said meeting AND THE FURTHER affidavit of as to service of notices convening the said meetings and the several exhibits on the said affidavit respectively referred to AND UPON HEARING Mr. of counsel for the petitioner and Mr. of counsel for the creditors THIS COURT DOTH ORDER that the scheme of arrangement set out in exhibit "E." to the affidavit of filed herein on the day of 19 and mentioned in para. 6 of the petition be and is hereby sanctioned by the Court AND THIS COURT doth declare the same to be binding on all the creditors of the company and the company.

By the Court,
Registrar.

MOTION FOR AN ORDER FOR DIRECTIONS AS TO PROCEEDINGS FOR DISSOLUTION WITHOUT WINDING UP.

(Same heading except that the section to the Companies Act, 1933, to be referred to in all subsequent precedents to s. 160.)

MR. of counsel for A. Ltd. TO MOVE in Chambers at Wellington on the day of 19 at

o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER for directions as to proceedings to be taken on the summons sealed herein for dissolution without winding up of the above-named company UPON THE GROUNDS disclosed in the summons and the affidavit of of filed herein.
Dated at this day of 19 .
Certified pursuant to rules of Court to be correct.
Counsel moving.

MEMORANDUM FOR HIS HONOUR THE JUDGE.

This application is made to the Court under Rule II (1) of the Supreme Court (Companies) Rules, 1934, for directions as to proceedings to be taken on the summons filed in the matter pursuant to Rule Number 10 (*k*) Supreme Court (Companies) Rules 1934.

The summons is for the dissolution of the company without liquidation under s. 160 (*d*) of the Companies Act, 1933.

Mr. was at a meeting of the creditors of the company held on the day of 19 asked to represent the creditors in all legal proceedings and counsel craves leave to refer to the affidavit of of the day of 19 and exhibit "F." attached thereto (resolution appointing counsel to represent creditors).

The members of the company have no interest in the proceedings and no other person has any interest in the proceedings.

It is submitted that the summons and affidavit of of the day of 19 filed in support be served upon Mr. and that service upon any other person be dispensed with.

Counsel moving.

ORDER GIVING DIRECTION AS TO PROCEEDINGS.
(*Same heading.*)

Before the Honourable Mr. Justice , the day of 19 .
UPON READING the motion filed herein and the affidavit of filed herein AND UPON HEARING Mr. of counsel for the company IT IS ORDERED that the summons and affidavit of filed in support be served upon Mr. who at a meeting of creditors on the day of 19 was appointed to represent them in all legal proceedings and that service upon any other person be dispensed with.

By the Court,
Deputy Registrar.

SUMMONS FOR LEAVE TO DISSOLVE COMPANY WITHOUT WINDING-UP.
(*Same heading.*)

LET all parties concerned their solicitors or agents appear before the Right Honourable Sir Michael Myers G.C.M.G. Chief Justice of New Zealand at his Chambers Supreme Courthouse on the day of 19 at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard TO SHOW CAUSE WHY an order should not be made that the above-named company be dissolved without winding-up UPON THE GROUNDS that under the scheme of arrangement submitted to and sanctioned by this Honourable Court the whole of the undertaking and property of the company has been transferred to A. Co., Ltd. AND UPON THE FURTHER GROUNDS set out in the affidavit of .
Dated at this day of 19 .
Registrar.

TO :
Mr. , ,
Solicitor for the creditors.

This summons is issued by for the above-named company whose address for service is at .

AFFIDAVIT IN SUPPORT OF SUMMONS FOR LEAVE TO DISSOLVE COMPANY WITHOUT WINDING UP.
(*Same heading.*)

I, of the city of MAKE OATH AND SAY as follows :—

1. That I am &c.

2. That I was appointed by a Committee of the creditors of A. Ltd. on the day of 19 to look after the accounts and supervise the running of the business of a restaurant carried on by A. Ltd. at and have acted in that capacity since the said day of and I have a full knowledge of all matters pertaining to the affairs of the company from that date.

3. That on presentation of a petition to sanction a scheme of arrangement dated the day of 19 between the authorized representatives for the creditors of the company and the company an order was made on the day of 19 by this Honourable Court sanctioning the said scheme of arrangement.

4. That in pursuance of such scheme of arrangement the company on or about the day of 19 transferred the whole of its undertaking and property to a new company A. Co., Ltd. and the purchase money therefor was paid to me on behalf of the creditors of A. Ltd. in accordance with the said scheme of arrangement of the day of 19 .

5. That upon the receipt by me from A. Co., Ltd. of the purchase money for the transfer of the undertaking and property of A. Ltd. I did distribute (after deducting the charges provided to be paid by the said scheme of arrangement) amongst the creditors of the company the total amount of money available for the creditors of the company and I paid them a dividend of four shillings and sevenpence (4/7d.) in the £ and received from each creditor a receipt in full settlement of his claim against the company.

6. That there are now no further assets in the company and I consider the company can be dissolved without winding up.

Sworn &c.

ORDER DISSOLVING COMPANY WITHOUT WINDING UP.
(*Same heading.*)

Before the Honourable Mr. Justice , the day of 19 .
UPON reading the summons dated the 19 sealed herein and the affidavit of filed in support thereof AND UPON HEARING of Mr, of counsel for the said company and Mr. of counsel for the creditors THIS COURT DOTH ORDER that A. Ltd. be and is hereby dissolved without winding up.

By the Court,
Deputy Registrar.

RULES AND REGULATIONS.

Health Act, 1920. Sanitary Works Regulations, 1941. No. 1941/16.

Animals Protection and Game Act, 1921-22. Animals Protection and Warrant, 1941. No. 1941/17.

Emergency Regulations Act, 1939. Lighting Restrictions Emergency Regulations, 1941. No. 1941/18.

Labour Legislation Emergency Regulations, 1940. Woollen-mills Labour Legislation Suspension Order, 1940. Amendment No. 1. No. 1941/19.

Cook Islands Act, 1915. Cook Islands Pearl-shell Fisheries Regulations Amendment, 1941. No. 1941/20.

Industrial Efficiency Act, 1936. Industrial Efficiency (Motor-spirits Retailers) Regulations, 1941. No. 1941/21.

Industrial Efficiency Act, 1936. Industrial Efficiency (Motor-spirits Wholesalers) Regulations, 1941. No. 1941/22.

Emergency Regulations Act, 1939. Auxiliary Workers Training Emergency Regulations, 1941. No. 1941/23.

Social Security Act, 1938 (as amended by Part II of the Finance Act (No. 4), 1940) Social Security (Medical Benefits) Regulations, 1941. No. 1941/24.

Marketing Amendment Act, 1939. Marketing Department (Extension of Powers) Order, 1939. Amendment No. 2. No. 1941/25.

Statutes Amendment Act, 1939. Compensation Court Regulations, 1940. Amendment No. 1. No. 1941/26.

Emergency Regulations Act, 1939. Shipping Radio Emergency Regulations, 1941. No. 1941/27.

Emergency Regulations Act, 1939. Medical Supplies Emergency Regulations, 1939. Amendment No. 1. No. 1941/28.

National Service Emergency Regulations, 1940. General Reserve Classification Order, 1940. Amendment No. 3. No. 1941/29.

Control of Prices Emergency Regulations, 1939. Price Order No. 21 (American fencing-wire). No. 1941/30.

Control of Prices Emergency Regulations, 1939. Price Order No. 22 (Australian wire netting). No. 1941/31.

Control of Prices Emergency Regulations, 1939. Price Order No. 23 (Masonite Presdwood and Cane-ite Insulating Board). No. 1941/32.