New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes"

VOL. XXIX TUESDAY, FEBRUARY 17, 1953 No. 3

CRIMINAL LAW: RECENT STATUTORY CHANGES.

II.

IN our last issue, we considered some of the changes, which were made to the Criminal law in 1952, and which came into force on January 1 of this year. We then gave in detail the effect of the Summary Jurisdiction Act, 1952, and the Crimes Amendment Act, 1952. We now conclude our survey with some consideration of the remaining statutes in the series.

JUSTICES OF THE PEACE AMENDMENT ACT, 1952.

Sections 2-14 of this statute amend the law relating to appeals to the Supreme Court against summary convictions by Magistrates and Justices. The opportunity is taken to redraft the relevant sections so as to include the amendments made by the Justices of the Peace Amendment Acts of 1946 and 1948. The effect of the main changes is as follows :

(*a*) An appellant who has been sentenced to imprisonment or detention will be bailable at the discretion of the Magistrates' Court. At present, he is entitled to be released from custody as soon as he gives security for the prosecution of the appeal, and does not have to enter into any recognizance for bail.

(*b*) No appellant will have to give secutiry for the prosecution of the appeal.

(*c*) The time allowed for giving notice of any appeal is altered to ten days (which is the time allowed under the Criminal Appeal Act, 1945, for an appeal to the Court of Appeal against a conviction by the Supreme Court). Formerly, the time was fourteen days for an application for a Case Stated, and seven days for notice of a general appeal.

(*d*) The procedure for stating a Case and giving notice of appeal is simplified ; and, in order to avoid any delay in hearing the appeal, provision is made for the Registrar of the Court to have the appeal set down for hearing on the first available day at the most convenient sitting of the Supreme Court, whether in the same judicial district or not.

The remaining sections make miscellaneous amendments to the Justices of the Peace Act, 1927.

Appeals.—Section 303 of the Justices of the Peace Act, 1927, is repealed. A new s. 303, enacted by s. 2 (1) of the Justices of the Peace Amendment Act, 1952, simplifies the procedure for having a Case stated for the opinion of the Supreme Court on a question of law. The appellant will file a notice of intention to appeal (in duplicate) within ten days after conviction, and the Registrar will post or deliver a copy to the respondent. The appellant must submit a statement of his case to a Justice within twenty-one days after the conviction or within such further time as may be allowed by the Court. The Justice will then settle and sign the case, after hearing the parties if necessary, and the Registrar will send it to the nearest Supreme Court Registry in the same judicial district. The Registrar of the Supreme Court is required to set the appeal down for hearing on the first practicable day at the most convenient sitting of the Supreme Court, whether or not it is in the same judicial district. Subsection 3 of s. 2 repeals the provisions requiring security to be given to prosecute the appeal.

Warrant of Commitment.—Section 3 of the new statute repeals s. 306 of the Justices of the Peace Act, 1927. The new s. 306 provides that a warrant of commitment will be issued in any case where the appellant has been sentenced to imprisonment or detention ; and that, where the appellant is bailed before the warrant is executed, the warrant is suspended until the determination of the appeal. Formerly, no warrant of commitment could be issued when the appellant had given security to prosecute the appeal, and on the giving of that security he was entitled to be released. The previous law authorizing the issue of a distress warrant where this is expressly provided for by any other enactment, or the issue of any warrant where a person has failed to obey an order to enter into a recognizance to be of good behaviour, is re-enacted ; and orders under the Destitute Persons Act, 1910, are not affected.

Bail pending Appeal.—A new s. 306A is enacted by s. 4. It provides that an appellant in custody is bailable at the discretion of the Magistrates' Court, which may allow bail in such sum, and with or without surety, as it thinks fit ; but the appellant is not to be released if he is serving any other sentence. The appellant may apply to a Judge of the Supreme Court to modify or reverse any decision as to bail. If a Justice is satisfied, on the oath of the respondent or any surety, that an appellant is about to abscond for the purpose of evading justice, he may issue a warrant for his arrest.

A new section, s. 306B, inserted by s. 5 of the Justices of the Peace Amendment Act, 1952, provides that an appellant in custody who is not admitted to bail is to be specially treated as if he were a prisoner on remand before trial, unless the appeal is only against sentence, in which case he continues to serve his sentence in the ordinary way. Any time during which a prisoner is out on bail, or during which a prisoner not released on bail is so specially treated, does not count as part of the term of his imprisonment, unless otherwise directed by

the Supreme Court on the hearing of the appeal. This section puts a prisoner in the same position as if he were an appellant to the Court of Appeal (under the Criminal Appeal Act, 1945) against a conviction in the Supreme Court.

Right of Appeal.—Section 315 of the Justices of the Peace Act, 1927, is repealed by s. 6 of the Amendment Act, 1952. A new s. 315 re-enacts s. 315(1) and (1A) of the principal Act, conferring a general right of appeal to the Supreme Court against any summary conviction, sentence, or order of a Magistrates' Court. Section 315(2) is not re-enacted, as it is replaced by later provisions as to the hearing of the appeal.

Sections 7-9 deal with the method of giving notice of a general appeal, bail, the issue of warrants, and the setting down of the appeal for hearing by the Supreme Court. Those sections repeal ss. 316, 317, and 318 of the principal Act, and replace them by new sections. Under the new s. 316, the appellant files (in duplicate) a notice of appeal in the Magistrates' Court office within ten days after the conviction, sentence, or order, and the Registrar forthwith delivers or posts a copy to the respondent. The former time-limit was seven days. A new and simplified form of notice of appeal, a new Form 52, is set out in the First Schedule.

Under the new s. 317, the appellant is in the same position as to bail, the issue of warrants, and custody pending the appeal as if the appeal were on a question of law, and the provisions of the newly re-enacted ss. 306, 306A, and 306B of the Act apply accordingly.

Under the new s. 318, the Registrar of the Magistrates' Court sends the notice of appeal and all relevant documents to the nearest Supreme Court Registry in the same judicial district. The Registrar of the Supreme Court is to set the appeal down for hearing on the first practicable day at the most convenient sitting of the Supreme Court, whether or not it is in the same judicial district. Section 332 is repealed and replaced by a new s. 332, which empowers a Judge of the Supreme Court to grant extensions of time and to review any decision of a Justice or Magistrate refusing an extension of time for the stating of a Case under Part IX of the Justices of the Peace Act, 1927, as now amended.

A new section, s. 334A, is added by s. 11 of the Justices of the Peace Amendment Act, 1952. It provides that, where, after the determination of an appeal, the appellant is liable to imprisonment or detention, or where the appeal has not been duly prosecuted, the appellant may be arrested forthwith, and any warrant previously issued is to have effect subject to any modification of the conviction, order, or sentence by the Supreme Court.

A new s. 342A, added by s. 12 of the Justices of the Peace Amendment Act, 1952, provides that, where an appellant has been sentenced to imprisonment or detention under the conviction to which his appeal relates, no Court fees are payable by him on his appeal.

Section 13 of the Justices of the Peace Amendment Act, 1952, consequentially amends the principal Act, the Justices of the Peace Amendment Act, 1946, and the Justices of the Peace Amendment Act, 1948.

Section 14 (1) provides that the foregoing amendments are to apply, as from January 1, 1953, to appeals already commenced. Subsection 2 provides that they are to apply to appeals brought against convictions or orders made before that date.

Informations.—An amendment of s. 55 of the Justices of the Peace Act, 1927, (effected by s. 17) makes it clear that any Justice may issue any necessary summons on an information, even when the case may eventually be heard only by a Magistrate.

Section 72 of the principal Act (as amended by s. 5 of the Justices of the Peace Amendment Act, 1948) is further amended by s. 18 so that, where Justices amend an information by substituting a summary offence for another summary offence, or a summary offence for an indictable one, either party may re-examine or cross-examine any witness who has already given evidence, in respect of the offence originally charged. Where, on the other hand, an indictable offence is substituted for a summary one, the case may be dealt with either in a summary way, if it is an offence triable summarily (subject to the right of the accused to claim trial by jury where the penalty exceeeds three months' imprisonment), or, if it is not an offence triable summarily, by the taking of depositions and a subsequent indictment in the usual way.

Arrest of Absconding Accused.—A new s. 89A is added to the principal Act by s. 19 (1). Its effect is that, where, on an adjournment in a summary trial, the defendant is admitted to bail, and a Justice is satisfied on the oath of the informant or any surety that the defendant is about to abscond for the purpose of evading justice, the Justice may issue a warrant for his arrest. The section is based on the similar provisions of s. 179 of the principal Act, which gives this power in indictable cases. Section 179 is amended by omitting the requirement of an information in writing where the Justice is satisfied on oath.

Right to Claim Trial by Jury.—A proviso added to s. 124 (1) of the principal Act by s. 20 makes it clear that, where, in a case triable summarily, the defendant has elected to be tried by a jury, he may, at any time before he is committed to the Supreme Court, abandon that claim and elect to be dealt with summarily.

Costs in Certain Cases of Dismissal of Information.—A new s. 157A is added to the principal Act by s. 21. It provides that, where, on a charge of an indictable offence, the Justices dismiss the charge, they may order the prosecutor to pay costs if they are of the opinion that the charge was not made in good faith, or was made without reasonable grounds. The power to award costs to a defendant already exists in summary cases, under s. 91 of the principal Act.

Witnesses' Expenses.—Section 22 repeals s. 166 and Form 39 of the First Schedule of the principal Act, which relate to the method of payment of witnesses' expenses in indictable cases. Those provisions have been superseded by Regulations.

Maori Translations.—A new section is substituted for s. 265 of the principal Act, by s. 23. The old s. 265 required every document served on a Maori to be in the Maori language or accompanied by a translation. The new section provides that the rules relating to civil proceedings in a Magistrates' Court shall apply. Under those rules, where any document is served on a Maori, he may request a translation, and thereafter every document subsequently served on him in the proceedings is to be accompanied by a translation unless the Court otherwise orders or the Maori is at the time represented by a solicitor. The Court has power in any case to order a translation where it is not asked for.

POLICE OFFENCES AMENDMENT ACT (No. 2), 1952.

This Act is consequential on the passing of the Summary Jurisdiction Act, 1952. It completes the replacement of Part V of the Justices of the Peace Act, 1927 (carried out majnly by the Summary Jurisdiction Act, 1952, and the Crimes Amendment Act, 1952), by bringing into the Police Offences Act, 1927, with minor alterations, certain provisions of that Part.

Section 2 repeals s. 6 of the Police Offences Act, 1927, and substitutes a new s. 6, dealing with the wilful destruction of property and with wilful trespass. The new s. 6 now includes all cases of mischief to property where the value of the damage does not exceed £20, and replaces ss. 215, 216, 219, and 220 of the Justices of the Peace Act, 1927. The new s. 6A (added by s. 3) is merely a re-enactment ,with minor drafting alterations, of para. (*c*) of the repealed s. 6.

Section 4 (1) replaces s. 202 of the Justices of the Peace Act, 1927, under which the maximum penalty on summary conviction for common assault was two months' imprisonment or a fine of £10. The section increases the penalty to three months' imprisonment or a fine of £50. Subsection 2 re-enacts s. 206 of the Justices of the Peace Act, 1927, under which Justices had no jurisdiction where questions of title arose.

Section 5 makes it an offence for any person to assault a child under fourteen years, or for any man to assault a woman. It replaces s. 203 of the Justices of the Peace Act, 1927, which dealt with " aggravated " assaults.

Section 6 re-enacts, with minor drafting alterations, s. 207 of the Justices of the Peace Act, 1927, under which, in a case of assault, the Court could award not more than half the fine to the person injured, as compensation.

Section 7 is consequential on s. 5. It omits the word " aggravated " from s. 74 of the Police Offences Act, 1927.

Section 8 re-enacts s. 208 of the Justices of the Peace Act, 1927, under which it was an offence for the owner, occupier, or manager of any premises to induce or knowingly permit a girl under sixteen years to be on the premises for immoral purposes. It is a good defence if the accused has reasonable cause to believe that the girl is sixteen years or older.

Section 9 re-enacts ss. 210 and 211 of the Justices of the Peace Act, 1927, under which it was an offence to detain any woman or girl on any premises for immoral purposes, or in any brothel.

Section 212 of the Justices of the Peace Act, 1927, is re-enacted by s. 10. Under that section, a Justice may issue a warrant to a constable authorizing him to enter and search premises where it is believed that a woman or girl is unlawfully detained for immoral purposes, and to arrest any person accused of the unlawful detention.

Section 214 of the Justices of the Peace Act, 1927 (under which it was an offence for anyone to keep or manage a brothel, or for any owner, occupier, or agent knowingly to permit any premises to be used as a brothel or to let them for that purpose), is re-enacted as s. 11 of the Police Offences Amendment Act (No. 2), 1952.

Section 12 is a modification of ss. 236 and 237 of the Justices of the Peace Act, 1927 (now repealed). It makes it an offence to undertake to tell fortunes. The section makes it clear that no offence is committed where the fortune-telling is not done for reward, or where it is done solely for the purposes of entertainment.

Section 13 makes it an offence, punishable on summary conviction to a fine of up to £50, to advertise a reward for stolen or lost property, stating that no questions will be asked, or to offer, by advertisement, to refund purchase or loan moneys to a pawnbroker or other person who has received stolen or lost property, or to print or publish any such advertisement. Under s. 246 of the Justices of the Peace Act, 1927, which is replaced by this section, any person who did any of those things was liable to forfeit £50 to any person who sued him for that sum in civil proceedings : that provision is not retained in the new section.

POLICE OFFENCES.

A statute which came into force on October 22, 1952, is the Police Offences Amendment Act, 1952, which makes several amendments to the principal Act. This Act has no direct connection with the statutes which are above described, and which came into force on January 1, 1952.

Offences relating to Good Order.—Section 3 of the principal Act deals with offences relating to good order and nuisances, including disorderly behaviour and fighting in or in view of public places as defined by s. 40 of the principal Act. Section 40 defines a " public place " as including a number of specified places and buildings, but does not include public hospitals or similar institutions in the definition. A new para. (*gg*), added to s. 3, makes it an offence for any person to behave in a disorderly or offensive manner, or to strike or fight with any other person, in or in view of a public hospital or any institution under the control of the Department of Health (including a mental hospital). Under the section, no such behaviour is an offence unless it is wilful. Furthermore, the penalty under s. 3 is increased from £5 to £10.

Approved Sunday Entertainments.—A new s. 18 (1A), added to the principal Act by s. 3 (1), removes, in relation to concerts and entertainments, the existing conflict between s. 18 of the principal Act, which forbids anyone to work at his calling on Sunday, and s. 313 of the Municipal Corporations Act, 1933, which authorizes the holding of Sunday concerts and entertainments with the previous consent of the Borough Council or Town Board. The effect of the subsection is that such concerts will be lawful if so authorized by the local authority ; and County Councils are given the necessary powers for this purpose. Section 3 (2) of the Amendment Act, 1952, declares that the Sunday Observance Act, 1780, does not apply in New Zealand. Under that Act, which was apparently in force here, a place opened for public entertainment on Sunday was deemed to be a disorderly house if a charge was made for admission, and every person apparently in charge of the place was liable to forfeit £200, every manager £100, and every doorkeeper £50, to any informer who sued for it.

Sunday Sales.—Under s. 18 (1) of the principal Act, an offence is committed by any person who on Sunday, in or in view of any public place, works at his calling, transacts business, sells goods, or exposes goods for sale ; and under subs. 2 of that section it is an offence to keep any place open on Sunday for any of those purposes. Section 18 (3) contains a number of exemptions, including the sale of refreshments for consumption on the premises, the sale of milk, and the carrying on

of various essential public services; and subss. 4 and 4A authorize the carrying on, under special warrants, of business at bookstalls at railway stations, bus terminals, and aerodromes. A new subs. 3A, relating to the sale of refreshments, is added by s. 4 (1) of the Amendment Act, 1952. The effect of the new subsection is to permit the sale of refreshments on Sunday, whether they are to be consumed on or off the premises. In order to remove existing doubts as to the meaning of the term " refreshments ", that term is declared to include meals, beverages other than intoxicating liquors, ice-cream, and confectionery. A new subs. 3B authorizes growers to sell their own fruit, vegetables, or flowers on Sundays from the premises or place where they are grown.

Subsection 3 of s. 4 of the Amendment Act, 1952, exempts persons working in motor garages or in service stations from the prohibition on working or transacting business on Sunday, and also permits the retail sale of petrol and motor oils on Sunday.

SUMMARY OF RECENT LAW.

CARRIAGE BY AIR.

Carrier's liability—Limitation—International carriage—" Wilful misconduct "—Breach of safety rules—Error of judgment—Several acts of carelessness—Carriage by Air Act, 1932 (c. 36), *sched. I, art.* 25. Having regard to the grave danger to life with which carriage by air is fraught, " wilful misconduct " precluding a carrier from availing himself of the provisions of sched. I, art. 25, to the Carriage by Air Act, 1932, excluding or limiting his liability for injury to passengers and damage to goods may include even a comparatively minor breach of a safety regulation or a minor lapse from accepted standards or safety. It means misconduct to which the will is a party, and it arises when the person concerned appreciates that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference to what the results may be. The same act may constitute negligence in the absence of any intention to do something wrong, but wilful misconduct if that intention is present. In a civil action the jury is entitled to look at the whole of the facts, to draw an inference from them as to the state of mind and intentions of the person responsible for an act, and to decide on the balance of probabilities whether the act is mere negligence or wilful misconduct, wilful misconduct not being established if there are equal degrees of probability. (Opinion of LORD BIRKENHEAD, L.C., in *Lancaster* v. *Blackwell Colliery Co., Ltd.*, (1919) 89 L.J.K.B. 611, applied). The mere fact that an act was done contrary to a plan or to instructions, or even to the standards of safe flying, to the knowledge of the person doing it, does not establish wilful misconduct on his part, unless it is shown that he knew that he was doing something contrary to the best interests of the passengers and of his employers or involving them in a greater risk than if he had not done it. A grave error of judgment, particularly one apparent as such in the light of after events, is not wilful misconduct if the person responsible thought he was acting in the best interests of the passengers and of the aircraft.

In determining whether or not there has been wilful misconduct, each act must be considered independently, and, though each act may be looked at in the light of all the evidence, it is not permissible to put together several minor acts of carelessness, none of them amounting to misconduct in itself, and find that together they amount to misconduct. But the number of occasions on which acts which might be acts of carelessness are committed may be some evidence that the state of mind of the person committing them was such as to make them wilful misconduct. *Horabin* v. *British Overseas Airways Corporation*, [1952] 2 All E.R. 1016 (Q.B.D.).

CARRIAGE OF PASSENGERS.

Injury to passenger—Snow on station platform—Delay in sanding and salting—Porter responsible otherwise urgently engaged—Liability of Railway Executive. Following a snowstorm snow on the platform of a railway station occupied by the defendants was trodden down and it became congealed and slippery. The only porter available started promptly to put sand and salt on the snow, but he had to stop doing so before the work was completed in order, in accordance with standing instructions, to light emergency lamps to prevent the station from being plunged into darkness in the event of a cut in electric power such as had recently been experienced. The plaintiff, a passenger, while alighting from a train, slipped on snow which had not been treated with sand and salt, fell, and was injured. *Held*, under the contract under which the defendants carried the plaintiff they were under an obligation to provide her with safe means of egress from the train, but in the circumstances they had not failed to take reasonable care to see that the platform was reasonably safe, and, therefore, had not failed in their duty to the plaintiff. *Tomlinson* v. *Railway Executive*, [1953] 1 All E.R. 1 (C.A.).

COMPANY LAW.

Alteration of members' rights—Proposal to increase capital—Issue of preference and ordinary shares to ordinary shareholders—Whether rights of preference stockholders " affected ". The capital of a company was £3,900,000, consisting of £600,000 preference stock and £3,300,000 ordinary stock, all of which was issued and fully paid. The articles of association of the company provided, by art. 68: " . . . all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, varied, dealt with, or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class . . ." By art. 83 it was provided: " . . . preference shares or preference stock shall not confer on the holders thereof the right in respect thereof to receive notice of or to attend or vote at a general meeting unless the dividend thereon is in arrear or unless the meeting is convened to consider a resolution for winding-up or to reduce capital or to consider a resolution directly affecting their rights or privileges as a separate class . . ." The company proposed to create (by way of capitalization of undistributed profits) (*a*) 660,000 new cumulative preference shares of £1 each ranking *pari passu* with the existing preference stock, and (*b*) 2,640,000 ordinary shares of 10s. each ranking *pari passu* with the existing ordinary stock. Under the company's regulations both new issues would be distributed to existing ordinary stockholders. On the question of the rights of existing preference stockholders in relation to the proposal, no argument being advanced that their rights were modified, varied or abrogated, and no separate significance being attached to the term " dealt with ", *Held*, the proposed transaction would, or might, affect the enjoyment of their rights by the preference stockholders, but their rights as such would not be affected, and, therefore, the proposed transaction could be carried out without the summoning of a separate meeting of the preference stockholders as provided for by art. 68, and without the summoning of the preference stockholders to attend and vote at a general meeting of the company in accordance with art. 83. *Re Mackenzie and Co., Ltd.*, [1916] 2 Ch. 450), applied. Dictum of LORD GREENE, M.R., in *Greenhalgh* v. *Arderne Cinemas, Ltd.*, [1946] 1 All E.R. 517, explained. *White* v. *Bristol Aeroplane Co., Ltd.*, [1953] 1 All E.R. 40 (C.A.), see *5 Halsbury's Laws of England*, 2nd Ed. p. 156, para. 282; and for Cases, see 10 *E. and E. Digest*, pp. 1002-1009, Nos. *6961-6993*.

Charitable Objects, *96 Solicitors' Journal*, 813.

CRIMINAL LAW.

Practice—Trial—Direction—Indictment containing Three Distinct Charges—Main Issue that of Identification—Defence of Alibi on One Charge—Proper Direction—If jury satisfied with Defence of Alibi, Acquittal upon Whole Indictment Open to it—Jury to be satisfied Case of Alibi unsound before Convicting Accused. When distinct charges are tried on one indictment (the main issue being identification) the jury must be directed that if it is satisfied with the defence in respect of one or more of them, it is open to it to acquit of the whole indictment. (*R.* v. *Finch* (1916) 12 Cr. App. R. 77 and *R.* v. *Dean* [1932] N.Z.L.R. 753 followed.) The accused was charged with obtaining goods by false pretences by ordering goods from James Smith, Ltd. and Kirkcaldie and Stains, Ltd., in Wellington, and directing that the purchases should be entered to the account

of customers who had accounts with these stores, on the following counts: (*a*) Obtaining goods by false pretences from James Smith, Ltd. on November 28, 1951; (*b*) Obtaining goods by false pretences from James Smith, Ltd. on November 29, 1951; (*c*) Obtaining goods by false pretences from James Smith, Ltd. on December 4, 1951; and (*d*) Obtaining goods by false pretences from Kirkcaldie and Stains, Ltd. on February 11, 1952. The accused was convicted on counts (*a*), (*b*), and (*d*) and sentenced in respect of each of them. There was evidence that the accused was in Christchurch on December 4, 1951, and the jury acquitted on count (*c*) relating to that day. She appealed against the convictions under counts (*a*) and (*b*), but not against the conviction under count (*d*). There was also an appeal against sentence. *Held*, by the Court of Appeal, 1. That the learned trial Judge should have drawn the attention of the jury to the need of deciding whether or not it accepted the alibi in regard to December 4, 1951: if it did accept it, that would have meant that it was impossible for the appellant to have committed the offence on that day; and, if such were its finding, that was a very important consideration in assessing the weight to be given to the evidence of identity on November 28 and 29, which had reference to frauds on the same firm about the same time and by the same method down to such a detail as using without authority the name of the same customer of the firm. (*R.* v. *Finch*, (1916) 12 Cr. App. R. 77 and *R.* v. *Dean*, [1932] N.Z.L.R. 753 applied.) 2. That in the absence of such a direction, the convictions in regard to November 28 and 29 must be quashed. The convictions for offences (*a*) and (*b*) were quashed and a new trial was ordered. The appeal against sentence on offence (*d*) was dismissed. *The Queen* v. *McCorkindale* (C.A. December 16, 1952. Sir Humphrey O'Leary, C.J.; Northcroft, J.; Hutchison, J.)

Receiving stolen property—Proof of theft. Cohen v. *March*, [1951] 2 T.L.R. 402, laid down no principle of law, but the decision depended entirely on its own facts. *R.* v. *Young and Another*, [1953] 1 All E.R. 21 (C.C.A.). See *9 Halsbury's Laws of England*, 2nd Ed. pp. 550-558, paras. 935-947; and for Cases, see 15 *E. and E. Digest*, pp. 960-977. Nos. *10,733-10,927*.

DEATH DUTIES.

Interest Provided in Concert or by Arrangement, *102 Law Journal*, 675.

DEFAMATION.

Libel—Practice—Several Actions wherein Same Libel involved—Order for Consolidation of Actions—Effect of Such Order—Trial—Right of Challenge exercisable by Counsel for all Defendants—Right of Cross-examination of Plaintiff's Witnesses—Costs—Judgment for Plaintiff against Each Defendant in Varying Amounts—Nature of Order for Costs—Law of Libel Amendment Act, 1910, s. 6—Juries Act, 1908, s. 124. The effect of an order under s. 6 of the Law of Libel Amendment Act, 1910, for consolidation of several actions in which the same libel was involved is not to merge the actions into one, but to provide only that all the actions should be tried together. (*Stone* v. *Press Association, Ltd.*, [1897] 2 Q.B. 159 applied.) (*Bailey* v. *Wilils*, (1930) 30 N.S.W.S.R. 131, *Palmer* v. *McLear and M'Grath*, (1858) 1 Sw. & Tr. 150; 164 E.R. 670, and *Chippendale* v. *Masson*, (1815) 4 Camp. 174; 171 E.R. 56, distinguished.) The plaintiff brought an action claiming damages for libel against the New Zealand Press Association, and he also brought twelve separate actions in each of which damages were claimed against a different newspaper proprietor. The same alleged libel was involved, as it arose out of a message through Reuters to the New Zealand Press Association. Before trial an order for consolidation of the actions under s. 6 of the Law and Libel Amendment Act, 1910, was made upon the grounds that all the actions had been commenced by the same person in respect of the same, or substantially the same, defamatory statements in different newspapers published severally by the defendants. Identical statements of defence for all parties, including the Press Association, were filed by the same solicitors, and the defences showed that a retraction and apology was pleaded by all defendants. A sum of £1,000 was paid into Court by the defendants with a denial of liability in satisfaction of plaintiff's claims. Counsel for the New Zealand Press Association did not represent the other defendants, but all the latter were represented by one counsel. At the hearing there were counsel for the plaintiff, counsel for the Press Association, and one counsel for all the other defendants who were combining in their defence. Counsel for Blundell Brothers, Ltd., and the eleven defendants associated with that company informed the Court before the trial that he would submit to the jury in apportioning damages (if any), that the Press Association should be held to be the "principal libeller" and the apportionment should vary accordingly. *Held*, 1. That counsel for the Press Association was entitled to six peremptory challenges in accordance with the Juries Act, 1908; and, in view of the effect of an order for the consolidation of actions under s. 6 of the Law of Libel Amendment Act, 1910, the representation of the various newspapers (other than the Press Association, which might be described as "the principal libeller") entitled counsel representing those other newspapers to the separate challenges in accordance with the Juries Act, 1908. (*Stone* v. *Press Association Ltd.*, [1897] 2 Q.B. 159, applied). 2. That counsel for the Press Association and counsel for the other defendants were each entitled to cross-examine the plaintiff's witnesses. 3. That when the case of the plaintiff was concluded and the defendants were called on, each counsel was entitled to open and call evidence. 4. That, in the exercise of the Court's discretion, though the defences were the same and the evidence called for the Press Association supported the newspaper companies' case, as counsel for the Press Association was content with only one address and that in opening and made no request for a right to reply, counsel for the companies, in the exceptional circumstances of this case, should have the final word. 5. That the costs of preparing for trial should not be allowed in each case as there was the same case put forward by the plaintiff against each defendant who combined in putting forward the defence; and the one allowance for preparation should, with the costs of trial, be apportioned, *pro rata*, among defendants. *Hood* v. *New Zealand Press Association, Ltd.*; *Hood* v. *Blundell Brothers, Ltd. and Eleven Other Newspaper Companies*. (S.C. Wellington. December 5, 1952. Sir Humphrey O'Leary, C.J.).

The Defamation Act, 1952 Eng., *102 Law Journal 677*; *96 Solicitors' Journal* 791, 841.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Complete period—Resumption of matrimonial relations—Condonation—Subsequent desertion—Revival of condoned matrimonial offence—Marriage Act 1929 (No. 3726), sec. 75—Matrimonial Causes Act 1937 (Imp.), sec. 2. Where desertion has continued for the complete period of three years and the parties resume relationships which amount to condonation of the offence, the offence is revived by the former deserter again bringing the matrimonial relations to an end by further deserting without just cause or excuse. *Ivey* v. *Ivey*, [1953] V.L.R. 529.

Discovery in the Divorce Court, (Geoffrey Tyndale), *214 Law Times*, 288.

Evidence—Marriage celebrated in Canada—Certified extract of provincial register—Whether admissible as proof of marriage. Where the Court is dealing with a marriage said to be celebrated in another British community, and certified by a document purporting to come from a public office in that community, and of a kind which, if issued by a public office in Victoria, is a common mode of proof of the marriage, and the document tendered appears on the face of it to be regular and regularly issued out of the office from which it purports to come, and there is present no element of suspicion, the document may be admitted as proof of the marriage without calling expert evidence of the law of the place of celebration. *Fletcher* v. *Fletcher*, [1952] V.L.R. 541.

Maintenance—Agreement for Separation providing for Payment of Sum for Maintenance of Wife and Child "during the joint lives of the parties"—Application for Additional Maintenance, Not Application for Variation of Post-nuptial Settlement—Principles Applicable—Order for Additional Weekly Sums for Maintenance of Petitioner and Child—Divorce and Matrimonial Causes Act, 1928, ss. 33, 37, 38. The petitioner was entitled to receive under an agreement for separation "during the joint lives of the parties" maintenance for herself and her child at the rate of £2 per week. The separation agreement was treated and considered as if it were a provision for a weekly sum of £1 5s. for the petitioner and a separate provision for a weekly sum of 15s. for the child. On her application for maintenance for herself and the child after the making of the decree absolute, *Held*, 1. That the application came within s. 33 of the Divorce and Matrimonial Causes Act, 1928, for additional maintenance of the petitioner, and it was not an application for variation of the post-nuptial settlement constituted by the maintenance provisions of the separation agreement; and, in so far as it concerned the child, it was an application under s. 38 for additional maintenance. 2. That the principle of *Coutts* v. *Coutts*, [1948] N.Z.L.R. 591—namely, that the power to vary post-nuptial settlements conferred by s. 37 of the Divorce and Matrimonial Causes Act, 1928, should be exercised only where it is shown that the continuance unvaried of the settlement has been rendered unjust by the

divorce or the conduct which occasioned the divorce—was inapplicable to the petitioner's application insofar as it related to an additional provision for her; and it was inapplicable in so far as the application related to an additional provision for the child.

3. That the application fell to be decided on the principles enunciated in *Wood* v. *Wood*, [1891] P. 272 and *Lodder* v. *Lodder*, [1924] N.Z.L.R. 355. (*Haas* v. *Haas*, [1948] N.Z.L.R. 1114, applied.) 4. That, in applying those principles, apart from any question of inducement to obtain the separation (of which there was no evidence), the fact that the separation agreement contained a bargain for maintenance was, in the circumstances of this case, a fact to which weight must be attached. 5. That, in applying those principles, it must be borne in mind that the obligation to provide for his first wife is the primary duty of her former husband and that the obligations accruing from any second marriage into which the respondent might enter could not be allowed to interfere in any substantial sense with his obligations to provide for his first wife and for the child of his marriage with her. 6. That a fair allowance should be made to the petitioner and the child as follows: the respondent to pay to the petitioner, in addition to the amounts provided for by the separation agreement, the sum of 10s. per week for her own maintenance and the sum of 7s. 6d. per week for the maintenance of the child. *Semble*, That an application of the principles of *Wood* v. *Wood*, [1891] P. 272 and *Lodder* v. *Lodder*, [1924] N.Z.L.R. 355 to cases in which a wife applies for maintenance in addition to that provided for by a separation agreement the fact, if it be the fact, that she specifically agreed to accept a certain amount for maintenance in order to obtain the separation agreement upon which the divorce proceedings were afterwards based is of material importance. Application by wife petitioner for ancillary relief in the nature of maintenace for herself and the child of the marriage. *Newland* v. *Newland*. (S.C. Wellington. December 3, 1952. Cooke, J.)

Proof of Adultery—Association and Opportunity, *116 Justice of the Peace*, 758.

FACTORY.

Dangerous machinery — Circular saw — Riving knife — Arc of "radius not exceeding radius of largest saw used on bench"— Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10 (b) (*i*). A circular saw was bought with a twenty-four inch diameter blade, and that blade was replaced when necessary with a new twenty-four inch blade, but with use the diameter of a blade was gradually reduced by the continual sharpening of the tips and re-gulleting (cutting deeper by filing) of the indentations. Owing to market conditions a new blade, ordered in February, 1948, was not received until April, 1950, and, in consequence, in March, 1950, the diameter of the old blade was only 19½ inches, compared with a diameter of twenty-four inches of the circle of which an arc was formed by the riving knife used to fence it. The distance of the front edge of the riving knife from the teeth of the saw at table bench level was under half an inch in accordance with the requirements of reg. 10 (*b*) (ii) of the Woodworking Machinery Regulations, 1922, but, owing to the different diameters, the distance horizontally 4¾ inches above the table, where the knife met the guard covering the top of the saw, was 1⅛ to 1¼ inches. On March 13, 1950, while he was removing a piece of wood jammed in the machine, the operator's fingers were caught in the saw and he was injured. *Held*, regulation 10 (*b*) (i) of the Woodworking Machinery Regulations, 1922, contemplating as it did that the bench might be used for saws of different sizes, was complied with so long as the radius of the arc formed by the riving knife did not exceed the radius of the largest saw used on the bench; in the present case, the largest saw used was of twenty-four inch diameter, and it did not cease to be the largest saw within the meaning of the regulation merely because for a time it became of less diameter; and, therefore, there had been no breach of the regulation. Decision of PARKER, J., [1952] 1 All E.R. 1125, affirmed. *Watson* v. *British Thomson-Houston Co., Ltd.*, [1952] 2 All E.R. 851 (C.A.).

HUSBAND AND WIFE.

Disputed Ownership of Matrimonial Home, *96 Solicitors' Journal*, 796.

Necessaries, *102 Law Journal*, 704.

Title to property—Matrimonial home—Both parties contributing to purchase—Respective beneficial interests not ascertainable by reference to amounts of contributions—Married Women's Property Act, 1882 (c. 75), s. 17. In 1934 the husband and the wife, both of whom throughout their married life were wage earners, were married. In 1935 a dwelling-house was bought in the name of the husband for £460, to serve as the matrimonial home. The wife provided the deposit of £29, and the rest of the purchase money was borrowed on the security of a mortgage from a building society in the name of the husband. £151 of the principal of the mortgage money was repaid out of housekeeping money provided by the husband, and the remaining £280 was repaid by the wife out of her own money while the husband was on war service. The wife provided all the furniture for the home out of her own resources. In 1951 the husband left the wife and in 1952 the house was sold for £2,117. On a summons under the Married Women's Property Act, 1882, s. 17, to determine how the proceeds of the sale should be divided. *Held*, the question was: On all the facts, what was the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased, but also to the light which the whole conduct of the parties had thrown on their relationship together as contributors to the property which was their joint matrimonial home?; in some cases it might well be that the amounts which they respectively contributed ought to conclude the question of the shares in which they should partake in the proceeds, but on the facts of the present case it was not possible fairly to assess the separate beneficial interests of the husband and the wife by reference to the contributions which they had made towards the purchase of the house, and, in all the circumstances, the proper and equitable course was to divide the proceeds of sale between them in equal shares. (*Re Rogers' Question* [1948] 1 All E.R. 328, distinguished. Dictum of MAUGHAM, L.J., in *Re Dickens* [1935] Ch. 309, applied. *Jones* v. *Maynard*, [1951] 1 All E.R. 802, approved.) Per ROMER, L.J.: Cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of the present one, where the facts, as a whole, permit of its application. *Rimmer* v. *Rimmer*, [1952] 2 All E.R. 863 (C.A.).

Wife as Agent of Necessity, *214 Law Times*, 304.

JUDICIARY.

Mr. Justice Pritchard of the Queen's Bench Division of the High Court of Justice since 1947 has resigned because of ill health.

Mr. Albert Denis Gerrard has been appointed a Judge of the High Court of Justice. He was Recorder of Salford and a Judge of Appeal, Isle of Man. He succeeds Mr. Justice Pritchard in the Queen's Bench Division.

LANDLORD AND TENANT.

Unauthorized User: Trustees in Trouble, *96 Solicitors' Journal*, 829.

MASTER AND SERVANT.

Liability of master—Liability to third person for acts of servant—Act within course of employment—Injury to servant's wife due to servant's negligence. Where a servant, while acting in the scope of his employment, negligently harms another, the fact that he is in such a relation to the injured person that suit cannot be brought against him does not relieve the master from liability. The plaintiff and her husband were employed by the defendant to manage a beer and wine house. The plaintiff was injured through the negligence of her husband in the course of his employment. In an action by her against the defendant for damages in respect of the injury, *Held*, an employer was liable to a person injured by the negligence of his servant notwithstanding any legal immunity of the servant vis-a-vis the injured party, and, therefore, the defendant was liable to the plaintiff although the plaintiff could not have sued her husband for the injury. *Broom* v. *Morgan*, [1952] 2 All E.R. 1007 (Q.B.D.) See *22 Halsbury's Laws of England*, 2nd Ed. pp. 221-229, paras. 397-408; and for Cases, see 34 *E. and E. Digest*, pp. 125, 126, Nos. *964-972*.

Safe System of Working—Duty of master—Provision of safe system of working—Window cleaner—Defective window sash—No safety appliances provided. The respondent, a window cleaner, was employed by the appellants, a firm of contractors, to clean the windows of a club. While, following the practice usually adopted by employees of the appellants, he was standing on the sill of one of the windows to clean the outside of the window and was holding one sash of the window for support, the other sash came down on his fingers, causing him to let go

and fall to the ground, suffering injury. On a claim by him against the appellants for damages, *Held* (LORD TUCKER, *dubitante*): even assuming that other systems of carrying out the work, *e.g.*, by the use of safety belts or ladders, were impracticable, the appellants were still under an obligation to ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the appellants had not discharged their duty in this respect towards the respondent; and, therefore, they were liable to him in respect of his injury. Per LORD REID: Where a practice of ignoring an obvious danger has grown up it is not reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required. Dictum of VISCOUNT SIMON, L.C., in *Colfar* v. *Coggins and Griffith (Liverpool), Ltd.*, [1945] 1 All E.R. 328, explained by LORD OAKSEY and referred to by LORD TUCKER. Decision of COURT OF APPEAL ([1952] 1 All E.R. 39), affirmed. *General Cleaning Contractors, Ltd.* v. *Christmas*, [1952] 2 All E.R. 1110 (H.L.). See *22 Halsbury's Laws of England*, 2nd Ed. pp. 187-190, paras. 313-317; and for Cases, see 34 *E. and E. Digest*, pp. 194-198, Nos. *1583-1623.*

NEGLIGENCE.

Fire—Fireman injured by explosion—Liability of occupiers—Invitee—Exceptional and unnecessary dangers of fire and explosion created by occupiers—Volenti non fit injuria. The defendants were the occupiers of a factory in which they carried on the business of extracting the aluminium in aluminium foil. As a result of the processes carried on at the factory large quantities of fine dust containing aluminium and carbon particles were created. This dust lay in thick deposits in numerous places all over the factory, and the defendants took no steps to prevent or lessen its creation or to remove it. While fighting a fire at the factory in the course of his duties as a part-time fireman, the plaintiff was injured by a dust explosion caused by the exceptional and unnecessary dangers of fire and explosion which the defendants had created and maintained on the premises. In an action by the plaintiff claiming damages for negligence, the defendants denied liability and pleaded, *inter alia*, that the plaintiff attended the fire with knowledge of the attendant risk of injury to himself and voluntarily incurred that risk. *Held*, (i) the maxim *volenti non fit injuria* applied only if the plaintiff was both (*a*) *sciens*, *i.e.*, he fully appreciated the dangerous character of the physical condition brought about by the negligence of the defendants, and (*b*) *volens*, *i.e.*, he had consented to assume the risk without compensation; a man could not be said to be *volens* unless he was in a position to choose freely, and if he was acting under the compulsion of a duty his consent should rarely, if ever, be inferred, *Bowater* v. *Rowley Regis Corpn.* [1944] 1 All E.R. 465, applied); on the facts, the plaintiff was neither *sciens* nor *volens*, and he had not impliedly agreed to give up any rights which he would have had but for such agreement. (ii) the fire brigade having been summoned by the defendants' servant who was in charge of the factory at the time, the plaintiff was an invitee, but he could not succeed on the basis of a breach by the defendants of their duty to an invitee as it was not shown that he would have avoided the danger if he had been informed of it, and the probabilities were that he would not have done so. (iii) the rights of a fireman who properly attends a fire cannot depend on how he comes to be there, for the fire brigade can attend the fire in the exercise of the powers conferred on them by the Fire Services Act, 1947, s. 30 (1), or they can be summoned, for example, by a policeman or a passer-by. (iv) there was a duty on the defendants not to have their factory in the dangerous condition in which it was, and they knew or ought to have known (*a*) that by lack of reasonable care they were creating and maintaining exceptional and serious risks of fire and explosion in the factory, (*b*) that by reason of such risks a fire was likely to occur, (*c*) that, if a fire did occur, members of the fire service were likely to enter the premises to deal with it in the course of their duty, and (*d*) that, if firemen entered the premises to deal with the fire, they would be exposed to an exceptional and serious risk of being injured by explosion, and, therefore, their duty not to have their factory in that dangerous condition was a duty which the defendants owed towards the firemen and they were liable to the plaintiff in damages. Dictum of LORD ATKIN in *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 580, applied. *Merrington* v. *Ironbridge Metal Works, Ltd., and Others*, [1952] 2 All E.R. 1101. See *23 Halsbury's Laws of England*, 2nd Ed. pp. 571-576, paras. 825-827; and for Cases, see 36 *E. and E. Digest*, pp. 12-17, Nos. *37-76.*

Invitee—Railway station—Passenger slipping on patch of oil—Duty owed by Railway Executive. Part of a railway station occupied by the defendants was used for the loading and unloading of mail vans, for mail bags and trolleys, and for standing barrows used to convey mail bags to platforms, but there was nothing to show that passengers should not go on that part. On the removal of certain of the barrows the foreman on duty noticed a patch of oil which had dripped on the ground and had previously been hidden by the barrows. He at once tried to stop people passing that way and directed a trolly driver to get sawdust and put it on the oil. The plaintiff, while crossing the part of the station in question and not hearing the foreman who did not see her, slipped on the oil, fell, and was injured. *Held*, the plaintiff was an invitee of the defendants: *Bloomstein* v. *Railway Executive*, [1952] 2 All E.R. 418, applied; the defendants had not failed to exercise reasonable care to keep the part of the station in question reasonably safe for passengers; and, therefore, they were not liable to the plaintiff for negligence. *Tomlinson* v. *Railway Executive*, [1953] 1 All E.R. 1 (*supra*) applied. *Blackman* v. *Railway Executive*, [1953] 1 All E.R. 4 (Q.B.D.).

See 23 *Halsbury's Laws of England*, 2nd Ed. pp. 600-609, paras. 851-858; and for Cases, see 36 *E. and E. Digest*, pp. 35-45, Nos. *208-281.*

SALE OF GOODS.

Contract—Distinction from contract for work and labour done and materials supplied—Contract to make fur jacket to order—Colour of skins and style selected by purchaser—Enforcement of contract—Need for note or memorandum signed by purchaser—Sale of Goods Act, 1893 (c. 71), s. 4 (1). The defendant ordered from the plaintiffs, retail furriers who made up furs and fur garments for women customers, a mink jacket for his wife. After inspecting several skins he chose a colour and selected a style for a jacket. The price was £950, but there was no written note or memorandum of the contract signed by the defendant. *Held*, the contract was one, not for work and labour to be done and materials to be supplied, but for the sale of goods to a special order, and, in the absence of a memorandum in writing signed by the defendant, it was unenforceable by virtue of the Sale of Goods Act, 1893, s. 4 (1). *Lee* v. *Griffin* (1861) (1 B. & S. 272), applied. *Marcel (J.) (Furriers), Ltd.* v. *Tapper*, [1953] 1 All E.R. 15 (Q.B.D.).

See 29 *Halsbury's Laws of England*, 2nd Ed. p. 14, para. 11; and for Cases, see 39 *E. and E. Digest*, pp. 359, 360, Nos. *3-10.*

SHIPPING AND SEAMEN.

Winch—Duty to fence—"So far as is practicable without impeding the safe working of the ship"—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 26. While a vessel was discharging a cargo of coal at a port, a seaman employed in the ship was asked to raise the derrick to enable the stevedores to shift the coal. As he was re-winding the wire rope on to the drum of the winch, he was caught by the rope, was pulled over the guard towards the drum, and suffered injuries. The guard at the side of the drum was of the usual kind and height, and evidence was given that it would have been impossible to have put more fencing above the drum without impeding the use of the winch, while a further guard at the side of the winch would not have been practicable as it would have prevented access to that part of the ship. In an action for damages against the shipowners the seaman alleged, *inter alia*, a breach of the Docks Regulations, 1934, reg. 26. *Held*, the working of the winch was part of the working of the ship; as further fencing would have made it impossible to work the winch properly, it was not practicable to fence the drum more securely "without impeding the safe working of the ship", within the meaning of reg. 26 of the regulations of 1934; and, therefore, the shipowners were not in breach of the regulation. *Ritchie* v. *T. G. Irving and Co., Ltd.*, [1953] 1 All E.R. 37 (C.A.).

STATUTE.

The meaning of "Determinable", *214 Law Times*, 291.

VENDOR AND PURCHASER.

Repudiation or Rescission? *96 Solicitors' Journal*, 775.

Res Ipsa Loquitur—*Surgical Operation performed by Team of Workers—Forceps left in Patient—Action against Surgeon only—Doctrine of* Res Ipsa Loquitur *not applicable in Circumstances of Complicated Surgical Operation performed by Team of Workers. Practice—Costs—Action by Patient against Surgeon claiming*

damages for Alleged Negligence—Statement of Claim alleging Negligence during Operation and Post-operative Negligence—One Sum of Damages claimed—Two Separate Causes of Action—Jury finding for Defendant in respect of Alleged Negligence during Operation and for Plaintiff on Claim relating to Post-operative Treatment—Causes of Action closely related and really Alternative Claims—Nature of Order for Costs—Code of Civil Procedure, RR. 115, 555, 565. The plaintiff was a regular patient of the defendant, who had attended him over a period of years. On March 31, 1946, he developed severe pains in his stomach, and was seen by the defendant, who formed the opinion, after examination, that the plaintiff was suffering from an acute abdominal condition which made an immediate operation necessary. He accordingly arranged for the plaintiff to enter a private hospital, and the operation was carried out at about 11 p.m. the same night. The operation, in accordance with usual and established practice, had been performed by a team, consisting of the defendant, an assistant surgeon, an anaesthetist, and a theatre sister. The plaintiff, in his pleadings, put his case on two grounds. First, he alleged that the defendant was guilty of negligence in leaving the forceps in his body at the conclusion of an operation; and, secondly, he alleged that the defendant was negligent in the treatment and attention he gave to him during a period of some three and a half years subsequent to the operation, occasioning the plaintiff unnecessary pain and suffering and general ill health. Issues were submitted to the jury, which found that the defendant was not negligent on the first ground, but that he was negligent on the second ground in failing to ascertain that a pair of forceps was present in the plaintiff's abdominal cavity during the period between March 31, 1946, and November 15, 1949. The jury awarded £2,000 general damages. The plaintiff's counsel moved for judgment for the plaintiff, and asked that the findings of the jury in respect of the first issue should be set aside and a new trial ordered on such issue on the ground that the learned trial Judge misdirected the jury by directing it that the onus of proving negligence was on the plaintiff, and by not directing the jury that the doctrine of *res ipsa loquitur* applied. Counsel for the defendant moved on the answers of the jury for judgment for the defendant on the first issue. In respect of the second issue he moved (*i*) for judgment of nonsuit, or, alternatively, for judgment for the defendant on the ground that there was no evidence of negligence on the part of the defendant to go to the jury, and (*ii*) for an order that the findings and verdict of the jury be set aside and a new trial granted on the grounds that the verdict was against the weight of evidence and that the damages were excessive. Alternatively, he asked that judgment be entered for the defendant. *Held*, 1. That the question of legal responsibility for the plaintiff's mishap lay between the defendant, the assistant surgeon, and the theatre sister; and, as the learned Judge had directed the jury, the defendant was not vicariously responsible for the negligence of the assistant surgeon and the theatre sister, but was responsible for his own negligence only. 2. That the doctrine of *res ipsa loquitur* did not apply in the circumstances of a complicated surgical operation, performed by a team of workers, though proof that a pair of forceps was found in a patient's body after an operation of itself raised an inference of negligence against someone; but this may not be free from doubt, since so little is known by laymen of the conduct of a complicated operation that it may be difficult to apply the doctrine in the case of such an operation. (*Easson* v. *London and North Eastern Railway Co.*, [1944] K.B. 421; [1944] 2 All E.R. 425, and *Mahon* v. *Osborne* [1939] 2 K.B. 14; [1939] 1 All E.R. 535 applied.) (Dicta of Fair, J., and Gresson, J., in *Union Steamship Co. of New Zealand, Ltd.* v. *Voice*, [1951] G.L.R. 315 referred to.) 3. That, assuming in the plaintiff's favour that the doctrine of *res ipsa loquitur* applied in a general way in the course of a surgical operation, the plaintiff, having elected to sue only the surgeon, who was one of a team of workers, had to undertake the responsibility of establishing that the defendant himself was negligent. (*Hillyer* v. *St. Bartholomew's Hospital Governors*, [1909] 2 K.B. 820 followed.) (*Gold* v. *Essex County Council*, [1942] 2 K.B. 29; [1942] 2 All E.R. 237; *Cassidy* v. *Ministry of Health*, [1951] 2 K.B. 343, 345; [1952] 1 All E.R. 574; and *Ingram* v. *Fitzgerald*, [1936] N.Z.L.R. 905 applied.) (*Mahon* v. *Osborne*, [1939] 2 K.B. 14; [1939] 1 All E.R. 535, and *Woods* v. *Duncan*, [1946] A.C. 401; [1946] 1 All E.R. 420n referred to.) 4. That all the known facts were before the jury; the question of the defendant's responsibility depended upon whether the jury was prepared to draw the inference that the defendant himself had been guilty of negligence in one or other of the ways raised in the issues; and it had not been prepared to draw that inference, or, if it had, it was not satisfied that there had been negligence on the defendant's part. (Dicta of *Lord Radcliffe* in *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392 applied.) 5. That the verdict was not against the weight of evidence; and, consequently, the defendant's motion for judgment, or, alternatively, for a new trial, failed. *Nuttall* v. *The King*, [1952] G.L.R. 66 and *Pointon* v. *Andresens, Ltd.* [1951] N.Z.L.R. 569 applied.) 6. That, in relation to the post-operative condition of the plaintiff, there was a considerable body of evidence, both lay and expert, from which it was open to the jury to infer that, in all the circumstances, the defendant had failed to exercise reasonable care in the attention he gave to the plaintiff; and the defendant's motion for nonsuit was accordingly dismissed. (*R.* v. *Bateman*, (1925) 94 L.J.K.B. 791 followed.) (*Chapman* v. *Walton*, (1833) 10 Bing. 57; 131 E.R. 826, and *Rich* v. *Pierpont*, (1862) 3 F. and F. 35; 176 E.R. 16, applied.) 7. That the damages awarded were not so excessive that the jury's verdict should be set aside as they were not such an amount as no twelve men could reasonably have awarded, and it could not be said that they had acted upon a wrong principle or had taken into account matters which they ought to have disregarded. (*Nance* v. *British Columbia Electric Railway Co., Ltd.*, [1951] A.C. 601, and *Petrie* v. *Winstone (Merchants), Ltd.*, [1949] N.Z.L.R. 886, followed.) (*Sarcich* v. *Wellington Harbour Board*, [1945] G.L.R. 68, referred to.,) 8. That, although two separate allegations of neglect were made raising separate and distinct causes of action, only one sum of damages was claimed, contrary to R. 115 of the Code of Civil Procedure; and the defendant was entitled, on the answers of the jury, to judgment in respect of the first cause of action, and the plaintiff was entitled to judgment in respect of the second cause of action for the amount of damages awarded (£2,000). (*McCracken* v. *Weston*, (1904) 24 N.Z.L.R. 248, *Munro* v. *Mowbray*, (1915) 34 N.Z.L.R. 750, and *Foley's Creek Extended Co.* v. *Cutten and Faithful*, (1903) 22 N.Z.L.R. 759, followed.) 9. That, in the circumstances of this case, it would be unjust to allow the defendant a separate set of costs in respect of the first cause of action, as, though there were separate and distinct causes of action, they were closely related and were really alternative claims; and, in the Court's discretion, the plaintiff was awarded costs as on an action for £2,000, but allowing for one day of trial only, with witnesses' expenses and jury fees, in respect of which the plaintiff was allowed one half. (*Jamieson* v. *Burgess*, (1912) 15 G.L.R. 393, applied.) *MacDonald* v. *Pottinger*. (S.C. Invercargill. October 6, 1952. North, J.)

WILL.

Dispositions in Favour of Relatives. *102 Law Journal*, 564.

Execution—Holograph Will—Testator's Name written by Him in Attestation Clause—No Other Signature—Submission of Document for Attestation Sufficient Acknowledgment as Signature—Valid Execution—Wills Act Amendment Act, 1852 (15 & 16 Vict., c. 24), s. 1. Whether the name of the testator appears in a holograph clause or fills a blank in a printed clause, the validity of the document as a will does not depend on inferences drawn by the attesting witnesses, and it is not necessary that there should be proof that attention was directed at the time of execution to the name in the attestation clause. In the absence of sufficiently strong evidence to the contrary, the necessary inference as to the testator's intention will be drawn in cases where (*a*) the testator has shown by words or conduct that he intended the execution of his will, and (*b*) there was, at the time, no other signature to the will to which such intention can be referred. (*In the Goods of Mann*, (1858) 28 L.J.P. 19, applied.) (*Patterson* v. *Benbow*, (1889) 7 N.Z.L.R. 673, distinguished.) (*In the Will of Campbell*, (1895) 13 N.Z.L.R. 340, referred to.) Everything in the will of the testator, except the signatures, addresses, and occupations of the attesting witnesses, was proved to be in the testator's handwriting. There was no signature of the testator, unless his name, written by him as part of the attestation clause, could be so regarded. The testator wrote nothing in the presence of the witnesses, but asked them to witness his signature to a document and, upon being asked its nature, replied that it was his will. Both witnesses were familiar with his handwriting; and the surviving witness swore that he recognized it, and that it would be equally clear to the deceased witness that the whole document was in the testator's handwriting. On application for probate of the testator's will, *Held*, 1. That the will was duly executed, as, from the signature in the attestation clause thereof, it was "apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will" within the meaning of s. 1 of the Wills Act Amendment Act, 1852. 2. That it was immaterial that the attestation clause said that the will was "signed" in the presence of the witnesses, and the submission of the document for attestation as a will was sufficient acknowledgment of the signature. *In re Gibson (deceased)*. (S.C. Auckland. November 17, 1952. F. B. Adams, J.)

THE NEW PROPERTY LAW AND LAND TRANSFER ACTS.

Correlation between the two Statutes.

By E. C. ADAMS, LL.M.

II.

As stated previously in this series of articles, the Property Law Amendment Act, 1951, which was introduced into, and safely steered through Parliament by the Hon. H. G. R. Mason, Q.C., M.P., never became law, but all its provisions are included in the Property Law Amendment Act, 1952, which came into operation on January 1, 1953. In his valued article, (1952) 28 NEW ZEALAND LAW JOURNAL 24, on the Property Law Amendment Act, 1951, the Hon. Mr. Mason said :—

> Three leading ideas determine the scope and framework of this Act—to correlate the contents of the Property Law Act, 1908, and the Land Transfer Act, 1915, better than is done by the present sections of those Acts, to rewrite parts of the Property Law Act in closer conformity with more modern counterparts as appearing in the English Law of Property Act, 1925, and to make some few but quite important changes in the law. The Act is therefore most easily discussed under these three headings. Interest attaches to all three, and the last naturally calls for the close attention of all conveyancers. *But it was the first-mentioned element—correlation—that was the primary purpose of the Act.*

In this article, therefore, I shall endeavour to show how this primary purpose of the new legislation—correlation between the Land Transfer and the Property Law Acts—has been achieved.

As to the history of the matter, s. 98 of the Property Law Consolidation Act, 1885, provided that nothing in that statute should limit or otherwise affect any of the provisions of the Administration Act, 1879, or the Land Transfer Act, 1870, and any Acts amending the same.

In the Property Law Act, 1905, s. 122 reads as follows :—

> This Act shall be read and construed so as not to conflict with the provisions of the Land Transfer Act, 1885, as regards land under that statute.

There was a similar section in the Property Law Act, 1908 ; see s. 1 (4).

The late Mr. T. F. Martin in his *The Property Law Act, 1905*, at p. 108 *et seq*, discussed in a masterly manner the effect of s. 122 of the Property Law Act, 1905. He pointed out that s. 122 meant, apparently, that the provisions of the Property Law Act, 1905, were to apply to land under the Land Transfer system, where such provisions were capable of so applying, and where such application could take effect without doing violence to any provision of the Land Transfer Acts.

In this matter of correlation between the Property Law Act and the Land Transfer Act, it appears to me that this is the formula which has been followed by the draftsman of the Property Law Act, 1952, and it expresses the principles which have been applied by the Supreme Court and the Court of Appeal in the meantime. Whatever s. 122 of the Property Law Act, 1905, and the corresponding section of the 1908 Act meant, they certainly did not mean that the Property Law Act did not affect Land Transfer land in any way whatever : *Daveney* v. *Carey*, (1914) 33 N.Z.L.R. 598. In that case it was held that s. 70 (2) of the Property Law Act, 1908, applied to mortgages of land under the Land Transfer Act. That subsection which is now s. 81 (2) of the Property Law Act, 1952, reads as follows :—

> A mortgagor is entitled to redeem the mortgaged land although the time for redemption appointed in the mortgage deed has not arrived ; but in that case he shall pay to the mortgagee, in addition to any other moneys then due and owing under the mortgage, interest on the principal sum secured thereby for the unexpired portion of the term of the mortgage.

One can readily see why *Daveney* v. *Carey*, (*supra*) went to Court, for, under the Land Transfer system a mortgage is a charge and not a transfer of the land to the mortgagee ; and therefore, as *Martin* pointed out, in a *strict* use of language there can be no redemption of a Land Transfer mortgage, yet in a looser sense (which the Courts have adopted obviously for convenience sake) redemption and equity of redemption are spoken of as regards land comprised in such mortgages.

Martin thought that provisions of the Property Law Act relating to land and establishing some rule of law or practice irrespective of any particular mode or assurance, applied to land under the Land Transfer Act. The Courts have undoubtedly so construed the two Acts, and this principle appears to have been followed in the Property Law Act, 1952.

Martin also thought that provisions of the Property Law Act relating, or that could relate to *equitable interests* in land, applied to land under the Land Transfer system, *but only as regards dealings outside the provisions of the Land Transfer Act.* This also appears to be a sound principle, and appears to have been carried out by those who drafted the Property Law Amendment Act, 1951, and the Property Law Act, 1952. But, although *Martin* could lay down these sound principles, it required a decision of the Supreme Court before one could be definite whether or not any particular provision of the Property Law Act applied to land under the Torrens system. One will find these decisions scattered throughout the third edition of *Garrow's Real Property Law in New Zealand*, and I suppose that the student sitting his property paper, in order to be sure of a pass, has had to learn these cases by heart.

In 1939, the Legislature made an effort at correlation between the two statutes. I refer to the Property Law Amendment Act, 1939, and the Land Transfer Amendment Act, 1939. The first named Act contained new provisions of substantive and procedural law (restriction on exercise by mortgagee of his rights on default by mortgagor, power to authorize land and minerals to be dealt with separately by a mortgagee exercising power of sale, and conferring on a mortgagee certain other incidental powers, and providing that a mortgagee in possession might cut and sell certain trees, and setting out the requisites as to service of

notices by mortgagees) and s. 2 thereof expressly provided that the provisions of that Act should apply with respect to mortgages of land subject to the Land Transfer Act, 1915, as well as to mortgages of other land. And s. 8 of the Land Transfer Amendment Act, 1939, expressly declared that, without limiting the application of any other provisions of the Property Law Act, 1908, the provisions of ss. 68, 70, 71, 72, 73, and 74 of that Act should *with the necessary modifications* apply with respect to mortgages under the Land Transfer Act, 1915. All these sections dealt with substantive rights as between mortgagor and mortgagee, and the corresponding sections of the Property Law Act, 1952 (being respectively ss. 90, 81, 82, 83, 84, 85) undoubtedly apply to mortgages of land under the Land Transfer Act.

This rather unsatisfactory position as to correlation between the two Acts, which prevailed up to January 1, 1953, was aptly summed up in the Explanatory Note to the 1952 Bill :—

> The application of the provisions of the Property Law Act, 1908, to Land Transfer land has hitherto been a matter of some uncertainty, except when settled by judicial decision or by express declaration or necessary inference in an amending Act.

Also, as pointed out by the Hon. Mr. Mason in his article in this Journal (1952) 28 NEW ZEALAND LAW JOURNAL 24, there was a certain amount of duplication between the Land Transfer Act, 1915, and the Property Law Act, 1908. Accordingly, where there was duplication, certain sections of the Land Transfer Act have been repealed, but in some cases this entailed the necessity of making some adjustment of terminology to enable the section of the Property Law Act to be understood in relation to the forms or procedure of the Land Transfer Act. This adjustment of terminology is particularly noticeable in Part VII of the Property Law Act, 1952, dealing with mortgages, most of which part applies to mortgages of land subject to the Land Transfer Act. Examples of unnecessary duplication having been cut out are : sales by a mortgagee through the Registrar of the Supreme Court ; implied covenants in mortgages of land, and implied covenants in leases of land. Provisions dealing with these matters are now to be found only in the Property Law Act, 1952 : it will take some time for conveyancers to become accustomed to these changes.

How has this correlation been achieved in the recent legislation ? First, s. 244 of the Land Transfer Act, 1952, provides that the Property Law Act, 1952, shall, as regards land under that Act, (*i.e.*, Land Transfer Act, 1952) be read and construed so as not to conflict with the provisions of that Act. That merely expresses a general principle and does not get us very far. The Property Law Act, 1952, contains more precise and detailed correlating provisions.

Section 3 (1) of the Property Law Act, 1952, provides that that Act shall be read and construed so as not to conflict with the provision of the Land Transfer Act, 1952, as regards land under that Act. That, in itself, is the provision which was in force when *Martin* wrote his most useful treatise on the Property Law Act, 1905. Subsection 2, however, goes somewhat further, providing that, except as otherwise expressly provided, all the provisions of the Property Law Act, 1952, shall, *as far as they are applicable*, apply to land and instruments under the Land Transfer Act, 1952, as well as to other land and instruments. The words I have put in italics suggest that the draftsman of the two Acts thinks that there may still be scope for judicial interpretation on the question of correlation. However, I think that there will be very little fresh case law on this question in the future.

The most precise provision is s. 3 (3) which reads as follows :—

> The provisions of this Act which are specified in the First Schedule to this Act do not apply to land or instruments under the Land Transfer Act, 1952.

It does not, of course, necessarily follow that a section which does not appear in the First Schedule to the Property Law Act, 1952, does apply to the Land Transfer Act, 1952. A section in this category, I think, is s. 79 (1), except para. (*a*) thereof. Variations of mortgages and assignments of mortgages are also dealt with in the Land Transfer Act, and, therefore, I do not think that the provisions of s. 79 of the Property Law Act, 1952, dealing therewith, apply to land under the Land Transfer Act : yet no part of s. 79 appears in the First Schedule to the Property Law Act, 1952.

Section 8 of the new Property Law Act does not apply to Land Transfer land. That section provides that a deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of endorsement on the previous deed, or contained a full recital thereof. One may wonder whether the Legislature has not gone too far in declaring that this very useful section shall not apply to land under the Land Transfer Act, for instruments affecting equitable estates and interests in Land Transfer land are often in practice drawn in the form of deeds.

Another section which does not apply to the Land Transfer Act is s. 10, which provides that no partition, exchange, lease, assignment (otherwise than by operation of law) of any land shall be valid *at law* unless the same is made by deed, except a lease for a term not exceeding a tenancy for one year, which lease may be made either by writing or by parol. This section, be it noted, is referring to certain classes of instruments affecting the *legal* estate : it does not embrace equitable estates or interests. Therefore, there is no harm done in stating that it does not apply to the Land Transfer Act, for under that Act registered estates and interests are created and dealt with in accordance with that statute or some other statute dealing with the matter. For example, under the Land Transfer Act, a partition at law may be effected only by a duly registered memorandum of transfer under that Act.

Section 43 of the Property Law Act, 1952, expresses an elementary principle which every student of real property in New Zealand soon learns, that, where land is conveyed to any person without words of limitation, the conveyance shall be construed to pass the fee simple or other whole estate that the party conveying had power to dispose of. This section, it is expressly provided, does not apply to Land Transfer land. Under the Land Transfer Act a memorandum of transfer is prescribed and when registered that obviously passes the estate or interest of the transferor.

Another section which expressly does not apply to Land Transfer land is s. 48, which provides that any two or more persons in whom any property is beneficially vested as tenants in common may by deed

Continued from cover i.

LEGAL ANNOUNCEMENTS.

ANNOUNCEMENT.

DAVID T. GRACE, SOLICITOR, desires to announce that he has commenced practice at the following address:—311 ELLISON CHAMBERS, QUEEN STREET, AUCKLAND. Phone 44-171.

FOR SALE.

ESTABLISHED LEGAL PRACTICE in progressive country town within sixty miles of Auckland. Excellent opportunity to buy on favourable terms. Apply—
"OPPORTUNITY,"
C/o C.P.O. Box 472, WELLINGTON.

LAW CLERK.

CAPABLE JUNIOR OR INTERMEDIATE LAW CLERK with some experience is required. Excellent experience and advancement offered in both conveyancing and common law work. Please furnish details of experience, age, salary, etc., to:—
DR. R. C. CONNELL,
C/o C.P.O. Box 2740, AUCKLAND.

BARRISTER AND SOLICITOR who is, for good reasons, disposing of his sound general practice in a small country town in APRIL, wishes to acquire partnership in practice in PROVINCIAL CITY OR LARGE TOWN. He has had excellent all-round experience, but special knowledge of conveyancing and wills and administration. Reply in confidence to—
"EXPERIENCE," C/- C.P.O. Box 472, WELLINGTON.

BERTRAM EGLEY, Solicitor, of Wellington, desires to announce that he has re-entered practice, and is carrying out Agency matters for the Legal Profession at the following addresses:
153 FEATHERSTON ST., P.O. Box 1988, WELLINGTON.
Office Telephone 41-999; (Residence) 53-611

NOTICE IS HEREBY GIVEN that ALEXANDER TOLHURST YOUNG, JACK ROBINSON EFFINGHAM BENNETT, DAVID WILSON VIRTUE, JOHN CHARLES WHITE and PETER THOMAS YOUNG who have been carrying on the practice in Customhouse Quay, Wellington, as Barristers, Solicitors and Notary Public, have admitted into partnership GORDON STEWART ORR, Ll. M., Barrister and Solicitor. The practice will be carried on from the 1st day of January, 1953, under the name of "YOUNG COURTNEY BENNETT & VIRTUE" at the same premises.

declare that they will be joint tenants thereof, and thereupon the property shall vest in them as joint tenants. Again, under the Land Transfer Act this would have to be effected by a duly registered memorandum of transfer. Registered proprietors as tenants in common would transfer to themselves as joint tenants after reciting their intention to transform their existing tenancy in common into a joint tenancy.

Section 52 of the Property Law Act, 1952, deals with applications of stated conditions of sale, and this section does not apply to Land Transfer land, with the exception of rule (*v*) in para. (*b*). What does this excepted provision cover ? Rule (v) in para. (*b*) reads as follows :—

> Where the land sold is held by lease (including underlease), the purchaser shall, on production of the receipt for the last payment due for rent under the lease before the actual completion of the purchase, assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion, and also, if the land is held by underlease, that all rent due and all the covenants and provisions of every superior lease have been duly paid, performed, and observed up to that date :
>
> Provided that this rule applies only to titles and purchasers on sales properly so called.

It would be manifestly inconvenient if these cited provisions did not apply to land under the Land Transfer Act.

Part VII of the Property Law Act, 1952, deals with mortgages and forms a pretty complete code. It is expressly provided that s. 76 (prescribing a form of mortgage) does not apply to Land Transfer land. The Land Transfer Act, of course, provides for three forms of mortgages for land under that Act. I have already expressed the opinion that s. 79 (1) (except para. (*a*) thereof) does not apply to the Land Transfer Act. But I think that, with these two exceptions, all the provisions of Part VII apply to mortgages of land under the Land Transfer Act.

Part XVI of the Property Law Act, 1952, deals with Rentcharges and Other Annual Sums, and consists of only two sections, ss. 150 and 151. It is expressly provided in the First Schedule that s. 150 does not apply to land or instruments under the Land Transfer Act, but s. 151 is not mentioned in that Schedule. There is thus the clear implication that s. 151 of the Act *does* apply to land and instruments under the Land Transfer Act.

Section 151 appears a very necessary machinery provision, and logically there is no reason why it should not apply to memoranda of encumbrances registered under the Land Transfer Act. Sir Michael Myers, C.J., in the course of a very interesting judgment in *Walker* v. *Walker*, [1932] N.Z.L.R. 1441, expressed the opinion that its predecessor—s. 111 of the Property Law Act, 1908—probably did apply to the Land Transfer Act, although such opinion was *obiter* merely. This section enables the Supreme Court on an encumbrancee exercising his power of sale, to direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, etc.

INNKEEPERS' GUESTS.

Their Personal Safety.

By G. H. L. Fridman.

The large number of cases dealing with innkeepers' liability for the goods of their guests can be contrasted with the comparative rarity of a case involving the question of an innkeeper's responsibility for ensuring his guests' personal safety. The leading books on bailment, *Sir William Jones* (1823 edition), *Story* (1878), and *Paton* (1952), all discuss at great length the relationship of innkeeper and guest from the point of view of care of goods ; but there is no mention in them of any duty owed by an innkeeper in respect of safeguarding his guests from personal injury.

In *Sandys* v. *Florence*, (1878) 47 L.J.(Q.B.) 598, the plaintiff, who was staying at the defendant's hotel as a " guest for reward ", was injured when the ceiling of a room in which he was fell upon him. Lindley, J., held that the statement of claim revealed a good cause of action, for negligence was alleged and : " it was the duty of the defendant, who was an hotelkeeper, to take reasonable care of the persons of his guests so that they should not be injured by anything happening to them through his negligence while they are his guests " (*Ibid.*, 600). It seems clear from the judgment that the liability that Lindley, J., had in mind as appertaining to an innkeeper was the liability of an invitor to an invitee, *i.e.*, to take reasonable care that the premises are reasonably safe. This view of an innkeeper's liability seems to have been confirmed by the House of Lords in *Walker* v. *Midland Railway Co.*, (1886) 55 L.T. 489. There, the plaintiff's husband while a guest at the defendants' hotel in the middle of the night looked for a water closet. He opened the wrong door in error, fell down an unguarded lift shaft and was killed. It was held that in the absence of evidence of negligence on the part of the defendant company's servants, there was no liability ; and it appears to have been an important part of the *ratio decidendi* of the case that the guest at the time of his accident was in a portion of the hotel which he had neither permission nor invitation nor reasonable cause to visit (see *per* Lord Selborne, *Ibid.*, 490). The duty to take care of a guest does not, therefore, extend to places where the guest is not expressly or impliedly authorized to go. Elsewhere a guest will be entitled to claim damages if injury results from the innkeeper's neglect of his premises, but negligence, according to these cases, must be shown. An innkeeper is under no absolute liability in respect of the persons of his guests although he is as regards their property ; he does not insure their

persons and is only liable for negligence. Swift, J., in *Winkworth* v. *Raven*, [1931] 1 K.B. 652, 657, *obiter*, as the case concerned goods.

That a guest is an invitee was accepted by McCardie, J., in *Maclenan* v. *Segar*, [1917] 2 K.B. 325, 329. But the learned Judge adopted (perhaps additionally) a different criterion of duty, and, it is submitted, a higher one. There the plaintiff was injured in trying to escape from her hotel room when the hotel caught fire. She alleged negligence on the part of the defendant who was proprietor of the hotel and breach of an implied warranty that the premises were as safe as reasonable care and skill could make them. Judgment was given in her favour on this ground (although there was evidence to substantiate the other charge also); and McCardie, J., stated fully the principle that an innkeeper who allowed people to make use of his premises for reward impliedly warranted the safety of those premises. In this he followed the decision in *Francis* v. *Cockrell*, (1870) L.R. 5 Q.B. 501, but limited that case to instances where the contractor (in this instance the hotelier) even by the exercise of reasonable care and skill could not have discovered the defects.

This contractual duty, it is respectfully submitted, imposes a greater obligation on the innkeeper than that which the earlier cases suggest is applicable. For to perform his duty it is not sufficient for an innkeeper to delegate to some independent contractor his tasks of making premises safe or even, it is submitted, to give notice of possible danger. Whereas, if an innkeeper were only liable for negligence, it ought to be a good defence for him to say either that the guest had knowledge of the danger; *cf. London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1 or that he (the innkeeper) had entrusted the building or repair of the premises to one whom he reasonably thought was capable of doing the job properly and skilfully. Such pleas, however, will not excuse him where a breach of implied warranty is alleged. As most—if not all—cases of innkeepers' liability arise (so it is submitted), where there is a contract of some kind between the parties (*i.e.*, the guest will be a staying and paying one) the importance of this different expression of the duty cannot be minimised. *Halsbury* (vol. 18, p. 149) defines a guest in terms of invitation without mentioning reward: if this is correct then the earlier cases which give expression to the concept of a less onerous duty still appear to be valid. But it is submitted that this definition is not entirely satisfactory and that the judgment of McCardie, J., contains the correct enunciation of innkeepers' responsibility. Perhaps it would be more advisable to invoke the invitor-invitee relationship in those cases where an intending guest was injured before the contractual relationship was created; but all the authorities seem to deal solely with cases involving a contractual element and not with those of pure tort.

Thus far the discussion has turned on cases in which the premises themselves were dangerous or had negligently been left in, or allowed to get into, a state that resulted in injury. What is the extent of an innkeeper's liability if the injury is caused by the conduct of his servants or agents? There does not seem to be any authority on this point. *Foster* v. *Bush House, Ltd.* (*The Times*, October 22, 1952) was a case in which a participant at a reunion dinner was hurt when soup was spilled over her. No question of innkeeper's liability seems to have been raised. Indeed to do so would have been difficult for the restaurant at which the dinner took place was not an inn: *cf. R.* v. *Rymer*, [1877] 2 Q.B.D. 136; *Ultzen* v. *Nicols*, [1894] 1 Q.B. 92; *Orchard* v. *Bush and Co.*, [1898] 2 Q.B. 284, nor could the plaintiff easily or properly be described as a traveller or guest, though on the state of the authorities this might be argued. The issue in *Foster's* case (*supra*) was whether there had been a breach of the duty of skill and care owed to the plaintiff. The County Court Judge had held that the accident was a piece of bad luck so that the defendants were not liable; and the Court of Appeal, though they would have reached a different conclusion of fact, would not interfere with that finding.

The case is not really helpful on innkeepers' liability, for, even if the plaintiff could be held to be a "traveller" or "guest", the restaurant does not appear to be an inn. If the cases on the state of the premises are taken as a guide (see especially the statement of Lindley, J., quoted above), the innkeeper is responsible for the negligence of his servants or agents and cannot evade liability by pleading that he was not negligent in his choice of his servants or agents. Though there is no absolute liability in the case of personal injury to a guest, there is a duty to take reasonable care, which must include the employment of people reasonably skilled in the work which they are hired to do. Such being the case an innkeeper would be liable for injuries caused by the negligence of a cook in his employ: see *Brett* v. *Holborn Restaurant Co.*, (1887) 3 T.L.R. 309, where negligence was rejected by the jury on the evidence, but where liability would have accrued for injury caused to the plaintiff by his swallowing a needle and thread if the evidence had shown that this was due to the negligence in the kitchen. And presumably an innkeeper would be liable for spilt soup scalding a guest, if this were due to the negligence of a waiter or waitress.

Would a plaintiff's knowledge that the service at a particular inn was bad or negligently rendered exculpate the innkeeper from liability for damages caused through that negligence? If liability for a servant's act were similar to liability for the state of the premises, and if it could be argued (though such an argument is criticised above), that a guest was an invitee, then notice of the dangers might be sufficient to exclude liability, but the duty of an innkeeper in respect of services provided seems to be different from that owed in respect of the premises in which they are provided, and once negligence is shown knowledge of danger on the part of the guest only operates to prove either consent to the injury or contributory negligence, both of which must be valid defences.

The liability in respect of negligently rendered services seems to be tortious and not to be contractual, as is generally the case with regard to the premises. The language of the Court of Appeal in *Foster's* case (*supra*), in speaking of breach of duty of skill and care, seems applicable to liability in tort as easily as to liability in contract. But the position of innkeepers is so peculiar that it may be that their liability is as much based upon the principles of contract as upon those of tort. McCardie, J., in *Maclenan* v. *Segar* (*supra*) discussed both when dealing with damage caused through faulty premises; and though it is respectfully submitted that the contractual aspect of the matter is usually more in evidence than the tortious, the latter, as has been seen, cannot altogether be forgotten.

HANDWRITING EVIDENCE.

By HERBERT P. MOURANT.

I am glad of the opportunity kindly granted me by your Editor to address this article to members of the legal profession through the medium of the NEW ZEALAND LAW JOURNAL.

Incidentally, it was through the late Sir Alexander Gray, an eminent member of your profession in Wellington, that I became interested in the subject now before us.

My reasons for writing this article are two-fold—first, to pass on something of the information and ideas that I have gathered during some thirty years of experience as a handwriting specialist; secondly, because I cherish the hope that the reading of this article will arouse sufficient interest to cause lawyers to realize the potential value of handwriting evidence and to use it, particularly as an aid in the detection of crime.

It will be readily admitted that handwriting will, unfortunately, continue to play a part in the perpetration of crime—and not only for the purpose of forgery and false pretences. Steps must therefore be taken to cope with it, and with this task the legal profession is closely concerned, as also are the Police.

LEGAL AUTHORITY.

It was not until 1905 (by s. 19 of the Evidence Act, 1905) that the Court in New Zealand gave recognition to the evidence of handwriting experts. The above section appears as s. 19 in the Evidence Act, 1908, and reads as follows:

> Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine may be made by witnesses, and such writings and the testimony of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.

Thus was authority given to expert evidence on handwriting to take its rightful place alongside other branches of evidence, among them now being pathology, psychology, psychiatry, chemistry, mechanics, electricity, ballistics, finger-prints, photography, and typewriting.

HANDWRITING EVIDENCE LITTLE USED.

Yet, although almost half a century has passed since legal recognition was first given, it is undeniable that little effective use has been made of evidence concerning handwriting. Moreover, the subject has been largely neglected. Why is this?

Is not one reason the lack of knowledge of the subject? With all respect, I beg to state that this ignorance is pretty general, and among those included are the Police and the law. As an illustration of this statement, I may say that, when I was recently in the South Island giving evidence on handwriting in two criminal cases, I was informed that these cases could not have been proceeded with if a witness had not been available from Auckland, over 600 miles distant. Furthermore, I learned that proceedings had been dropped in other instances because no one on the spot knew how to deal with handwriting, so that it could be used in evidence. Maybe throughout the Dominion examples such as these could be multiplied considerably.

Unfortunately, there is another quarter in which lack of knowledge, and consequent incompetence, is found. I refer, and with some hesitation, to those persons who are usually called upon to express their opinion as to the identity of suspect handwriting, and to the unconvincing quality of their evidence given from the witness-box. The reason for this unsatisfactory circumstance is that too often those who have been engaged to act as handwriting experts are not qualified for the task, mainly from absence of opportunity for study and experience.

Yet another reason can be stated for the diffidence shown, especially in the Courts, towards handwriting experts and their evidence. It is the recollection of grave miscarriages of justice that have been aided by this class of witness. Notable instances are the notorious cases of Alfred Dreyfus and Adolf Beck. By way of brief comment, let it be said that both the principal handwriting witnesses (Bertillon in the Dreyfus case, and Gurrin in the Beck cases) were proved to be unqualified. Furthermore, Bertillon who was actually a finger-print expert) was without doubt prejudiced against the unfortunate Dreyfus; and, worse still, he was influenced by the military persecutors of the accused.

TEXT-BOOKS.

It is not creditable that ignorance of the subject under consideration should be allowed to continue. There is no excuse for it, for authoritative information—the result of careful investigation of the subject—is readily available. The pre-eminent and generally acknowledged authority is *Questioned Documents*, 2nd Ed., by A. S. Osborn, New York. Another useful work is *Forged, Anonymous, and Suspect Documents*, by A. J. Quirke, Dublin, who states that he wrote the book especially for the benefit of the legal profession and the Police. Among other helpful contributions to the subject is *Documents and Their Scientific Examination*, by C. A. Mitchell.

IS ANYTHING TO BE DONE?

The practical question now arises: Is anything to be done to remedy the present unsatisfactory condition, and to take steps that will place handwriting evidence on a sound basis (as has been done with finger-print evidence), so that it may prove its worth and gain the respect it deserves?

I confess that I feel concerned about the matter, and believe that no time should be lost in arousing interest, and action, in the appropriate quarters. For this reason, I may say that I have recently made representations to certain authorities, and I trust that the reading of this article will enlist the practical interest of the legal profession.

Of pressing concern is the serious shortage at the present time of competent handwriting experts. So far as my knowledge serves, there are only two of them in the Dominion, and both of them are retired men. Steps must be taken to replace them, and to increase the number.

The Police and The Law.

In my opinion, the responsibility for dealing with this matter rests primarily with the Police and the legal profession.

It gives me pleasure to say that there are indications of awakening interest here and there among the members of the Police force. As an instance of this, allow me to mention that within the past four months I have, by request, addressed meetings of Police in Wellington, Dunedin, and Auckland.

Turning to your profession, it is encouraging to note that some attention is being given to the subject. This I have gathered from discussions with Crown Prosecutors, who are particularly concerned with the qualifications of handwriting witnesses in Court proceedings.

The fact that this article has been asked for is another encouraging sign.

Where The Expert is Needed.

It should not be overlooked that the scope of the expert in handwriting is not limited to the requirements of the Courts of Justice. There are useful opportunities for his services in the interests of, among others, solicitors, Government departments, banks, business houses, and members of the public. It is surprising the many occasions on which his aid is sought. Anonymous letters are frequently brought to him, in the hope that he will be able to name the writer of the offending documents.

Procedure.

It may give a practical turn to my remarks if I ask my readers to give attention to some brief particulars of the procedure adopted in the examination of questioned handwriting and the preparation and subsequent presentation of the expert's evidence in the Court—say, in a criminal case.

In passing, it is appropriate to state here that handwriting evidence given in Court is more often corroborative than direct. Of course, in a case of alleged forgery, the evidence of the handwriting expert is, or should be, of prime importance.

The documents containing the alleged incriminating handwriting are handed to the expert by the Police, together with specimens of the actual writing of the suspected person.

The writings are classified as "questioned" and "known", and are denoted as exhibits A, B, C, D, &c. For easy reference, each line of writing on each document is numbered in red.

If, following his examination and comparison of the various writings, the expert forms the opinion that the writer of the questioned and known writings is identical, he is instructed by the Police to prepare a detailed report, stating his opinion and giving reasons in support of it. This report is addressed to the Superintendent of Police, and becomes the basis of the expert's evidence at the preliminary hearing in the Magistrates' Court, and subsequently, if the accused is committed for trial, in the Supreme Court.

In the course of the examination (in which the magnifying-glass and dividers, for measurements, play a useful part), careful attention is devoted to many features, such as general appearance of the writings; capital letters; small letters; words or portions of words; formation, size, height, slope, and spacing of the letters; line quality; pen pressure; flourishes; pen-lifts (or breaks between letters); spacing between words; relationship of writing to the base-line; measurements; errors in writing and spelling; disguised writing; traced writing; punctuation; numerals; kinds of writing instruments used—*e.g.*, steel pen, fountain pen, ball-pointed pen, lead pencil; particulars of paper or other substance containing the writing; erasures; inks or other mediums. (Not all the above-mentioned items necessarily apply to every examination.)

In particular, unusual characteristics (known as "tricks") are looked for in the known writing; if they are also found in the questioned writing, they are strong indications of the fact that one person is the author of both sets of writing.

While, naturally, the main concern of the examiner is to discover in the known and the questioned writings as many similarities as possible, he should not disregard the points of dissimilarity, and, moreover, should refer to them in his evidence; otherwise he may be suspected of not being impartial. It will be readily understood that, if the writer of the questioned writing has attempted to disguise his hand, numerous differences from his ordinary style will probably be found. On the other hand, if the quantity of the disguised writing is not small, it is practically impossible for the writer to keep from making lapses, unconsciously, into his natural style. This is his undoing.

Photography.

Photography is of the greatest assistance to the handwriting expert. In fact, it is indispensable. I speak from experience, and I take this opportunity of paying a warm tribute to the helpful co-operation of the Police photographer at Auckland. His work has been outstanding.

The original documents, both known and questioned, are photographed (actual size) and suitably mounted on large cards. Four of these are required for the preliminary hearing and ten in the Supreme Court (of these, six are for the use of the jury). Where considered helpful, selected portions of the writings are "enlarged", and are also mounted on the cards.

Needless to say, these photographs are of great importance in interpreting to the Court, and particularly to the jury, the evidence of the handwriting witness. On occasions, the use of a large slate is also effective. The jury thus absorbs the evidence by the medium of two senses—hearing and sight.

Chemistry.

Another useful ally of the handwriting expert is the analytical chemist, whose help can be sought when it is desired to decide the composition and age of inks and particulars concerning the paper or other substance upon which the writing appears.

Handwriting Witness in Court.

As to the function of the handwriting witness when in Court, Quirke (in *Forged, Anonymous, and Suspect Documents*) sets it out briefly and well:

> In his direct evidence the witness has two duties:—
> (*a*) To give his opinion.
> (*b*) To justify his opinion.
> His role ends there. He is not called to Court to plead or argue for the prosecution. But the justification of his opinion is a duty which he owes not merely to himself, but to the Court, which accepts him as a person competent to form such opinions.

(*Concluded on p. 48*).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Uses of Latin.—A Motuekan practitioner (whose Mayoral activities are well-known in the North Island) writes to Scriblex that he recently informed a lay executor-client that one more process would complete his administration and he would then be *functus officio*. The client replied: "The honours befalling me are overwhelming. In a year when I have already had renal colic which almost rendered me *corpus delicti*, I am now in danger of becoming *functus officio*: it is too much, *incredulus odi*. Another practitioner, having failed in an action after a hard struggle, received a telegram from the managing-director of his client company. This contained a Latin phrase which he recognized as coming from Horace and he promptly replied with another quotation from the same poet. "That's a waste of time and money," said the branch manager when he heard of the reply. "My chief doesn't know the first thing about Latin or any other foreign language. What he sent you was his school motto."

Rats.—It seems that recently, when Hilbery, J., was presiding at the Old Bailey in an assault case, a large rat suddenly appeared, took a comfortable seat on the ledge of the Bench and proceeded to follow the trial with more than customary rodent interest. The incident (which shows that Her Majesty's Courts of Justice are open to all) has led "Richard Roe" in the *Solicitors' Journal* to mention one that occurred in the Magistrate's Court at Bishop Auckland a few years ago. The heating apparatus (not used for some time) was turned on on a cold winter's day and hordes of rats with their relatives and retainers swarmed all over the Court-room. Business was suspended and the hunt was on, everyone participating save the massive superintendent of police, who, solid as a rock amid tempestuous seas, sat on in his place. But his trousers were wide to match his frame and one large old rat, spying, as it thought, a refuge, bolted up the leg, scrambling higher and higher with tooth and claw, while, not without pandemonium, the superintendent retired for privacy into the Justices' room.

Emergency Juryman.—Claiming that in all his experience of Court work he had never known such a thing happen before, Mr. G. R. Hinchcliffe, Q.C., Recorder at Leeds Quarter Sessions, declared a trial there to be a nullity when, on the jury retirement, a thirteenth man went along with them. The foreman, either as the result of superstitition or inability to do simple arithmetic, failed to detect the excess of worldly wisdom present. For his own part, the judicial volunteer explained that he was slightly deaf, had not heard anything that was said and had not taken part in the jury deliberations. The Recorder, however, was unimpressed by this explanation, and even went to the length of suggesting that there should be an investigation into the conduct of the police officers who let the interloper into the room. It is, perhaps, fortunate that he did not decide that the baker's dozen rule has any application to juries. Brain-power is too precious a commodity to permit of a discount.

Note on Title Deeds.—The Lord Advocate has recently pointed out to the Council of the English Law Society that the doctrine of the creation of an equitable charge by the deposit of title deeds forms no part of the law of Scotland and would, moreover, be inconsistent with the Scottish system of the finality of the Register of Seisines in regulating the rights and obligations of parties in land situated in Scotland. In this land of braw and honest men, it is considered by solicitors safe to part with the possession of deeds to other solicitors. Moneys are not wasted on the payment of production fees. The rights of the mortgagee of the land covered by the deeds are not affected nor prejudiced by the lending which, in accordance with general practice, is acknowledged by an ordinary borrowing receipt.

> "*Neither a borrower nor a lender be;*
> *For loan oft loses both itself and friend,*
> *And borrowing dulls the edge of husbandry.*"

Whoever else he was, it would seem that William Shakespeare could not have been a Scotsman.

Contract Note.—First Chief Justice of the Indian Federal Court, Vice-Chancellor of the Delhi University and legal adviser at various times to the Ministry of Health, the Ministry of Shipping and the Treasury, Sir Maurice Gwyer, G.C.I.E., K.C.B., K.C.S.I. has now died. He will be remembered by a large number of students as the author of the twelfth to sixteenth editions of *Anson's Law of Contract*—a text-book that continues to exercise, particularly for beginners in the law, a peculiar charm and fascination. Ask the established practitioner to recall something of his early delvings into the field of contract and he will almost be bound to mention *Armory* v. *Delamirie*, (1722) 1 Stra. 505; 93 E.R. 664, even though he may not have found time to read such more recent and important cases as *Monarch Steamship Co., Ltd.* v. *A/B Karlshamns Oljefabriker* [1949] 1 All E.R. 1 and *Mehmet Dogan Bey* v. *G. G. Abdeni and Co., Ltd.*, [195 1]2All E.R. 162.

A Legal Curiosity.—In *R.* v. *Fussell*, [1951] 2 All E.R. 761, the appellant pleaded guilty before a court of summary jurisdiction to a charge of attempting to take and drive away a motor-vehicle without the consent of the owner, contrary to s. 28 (1) of the Road Traffic Act, 1930 (U.K.). He was committed to Quarter Sessions for sentence and there argued that the justices had no power to deal with the case summarily as the completed offence was not an indictable offence triable summarily within Schedule II of the Criminal Justice Act, 1925; and, therefore, an attempt was not so triable. The Court of Appeal followed a 1948 authority in that Court and held that, if an offence is one which by statute can be tried either summarily or on indictment, it is for all purposes an indictable offence. In the result, therefore, it was found that certain indictable offences could be punished more severely if the offender attempted to commit them than if he actually did commit them. This created a remarkable anomaly which has now been removed by s. 19 of the Magistrates' Court Act, 1952 (U.K.).

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Trusts and Trustees.—*Property owned by Two Adults and Infant jointly—Adult Owners and Trustee of Infant desirous of expending Profits on Further Development of Property—Trustee's Position—Trustee Amendment Act, 1946, s. 4 (2).*

QUESTION: There are three joint owners of an income-producing property. One owner is an infant, in respect of whom there is a trustee. The two adult owners and the trustee wish to reinvest annual profits in further development of the property. Can the trustee do this with the infant's share of profits, or must the trustee invest in authorized investments pursuant to the Trustee Amendment Act, 1946, s. 4 (2)?

ANSWER: The answer to this question seems to lie in the realm of opinion. If the infant's share of the income is likely to amount to a substantial sum before he or she is twenty-one years of age, then the safer course would be to ask the Court to authorize the proposed expenditure, either under s. 81 of the Statutes Amendment Act, 1936, or by virtue of its general jurisdiction in respect of the estates of infants under s. 17 of the Judicature Act, 1908.

The trustee may, however, be satisfied that the proposals are clearly beneficial to the infant, and may be prepared to take such risk as is involved. According to *Simpson on Infants*, 4th Ed. 239, 240: "Ornamental improvements will not be allowed to the trustees . . . but if the improvements be beneficial, considerable latitude is allowed." Another possible justification for the proposed expenditure would be s. 4 (1) (*a*) of the Trustee Amendment Act, 1946, under which the trustee has power to apply the infant's share of the income for his or her maintenance, education, advancement, *or benefit*. It may be argued that the proposed use of the infant's share of the income would be an application of it for his or her benefit, particularly as it seems that the other joint tenants might otherwise be entitled, if they bear the expense of development of the property, to a lien on it for the expenditure: *Lewin on Trusts*, 15th Ed. 146. "Benefit" is a wide word, and it is not thought that the Court would be readily disposed to hold a trustee liable if he honestly concluded that the proposed course of action was in the best interests of the infant and would amount to an application of income for the infant's benefit. No authority has, however, been found to show that the statutory power goes as far as that; and the point seems arguable.

V.2.

2. Land Subdivision in Counties.—*Agreement to sell "5 acres more or less" of Farm Land—Provisions of Land Subdivision in Counties Act, 1946, not complied with—Right of Vendor to rescind.*

QUESTION: A. is the owner of a farm property of 300 acres, and, in 1950, he signed an agreement for the sale to B. of "5 acres more or less" to be carved thereout as shown more particularly on a plan drawn on the Agreement for Sale. A copy of that plan was forwarded to a surveyor with a request to apply for consent to the subdivision under the Land Subdivision in Counties Act, 1946. The surveyor's field-work showed the area of the land on the sale plan as 9½ acres, and the vendor refused to proceed on the ground of the large difference in area. B. now intends suing for specific performance. Can A. establish that the contract is of no effect on the ground of illegality, as no consent had been obtained under the Land Subdivision in Counties Act, 1946, before the sale agreement?

ANSWER: It is assumed that the land is situated outside a City, Borough or Town Board District.

The effect of non-compliance with the provisions of the Land Subdivision in The Counties Act, 1946, is set out in ss. 15 and 21. Presumably a purchaser could compel a vendor to seek approval of the subdivision under the Land Subdivision in Counties Act, 1946, or have it exempted under that Act, in which event the only provisions to be complied with would be ss. 125 and 128 of the Public Works Act, 1928, if applicable. The result would be that the vendor could not take advantage of his own wrong.

But it is considered that a vendor agreeing to sell "5 acres more or less" could not be compelled to sell 9½ acres: *cf. Moore* v. *Dentice*, (1901) 20 N.Z.L.R. 128.

X.2.

HANDWRITING EVIDENCE.

(*Concluded from p. 46.*)

WITNESS AND COUNSEL.

A most important element making for the successful use of handwriting evidence is co-operation between counsel and witness. From my own experience, I can testify to the value of this co-operation. It was exemplified in an excellent manner in the recent Horry murder trial in Auckland.

CONCLUSION.

Assuming that the thoughts expressed in this article—incomplete as they are—have kindled the desired interest in the minds of my readers, what action can be taken to give to handwriting evidence the status, usefulness, and recognition it deserves? May I offer the following points for consideration:

(i) Demand that the preparation and delivery of evidence regarding handwriting shall be entrusted to competent and trustworthy men.

(ii) Consult with the Police Department, and urge that, without delay, it undertake the training of suitable men *within its ranks*. Maybe the scope of the Criminal Investigation Branch could be widened to include this duty. The Criminal Investigation Branch already has photography within its jurisdiction.

(iii) Realize the need of a number of qualified men *outside the Police force* who will be available, in at least the four main cities, to serve the public, and especially the Courts, where the identity of suspected handwriting is in question. This should assist to provide such men.

(v) Other helpful means will doubtless suggest themselves.

Finally, allow me to leave this question with my readers: Is the legal profession to deny itself the indispensable aid that handwriting evidence, in the hands of efficient specialists, can supply to its members, and in particular to those whose duty is closely concerned with the administration of the criminal law?