[TUESDAY, SEPTEMBER 29, 1925.

Butterworth's Fortnightly Notes

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Butterworth's Fortnightly Notes.

"Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in Heaven and Earth do her homage, the very least as feeling her care and the greatest as not exempted from her power."
—Richard Hooker.

The Editor will be pleased to receive manuscripts of Articles for consideration and any suggestions with regard to the development of the Paper.

Address all communications:—The Editor,
Butterworth's Fortnightly Notes,
49-51 Ballance Street, Wellington.

TUESDAY, SEPTEMBER 29, 1925.

EDITORIAL.

LEGAL EDUCATION.

We publish in this issue our final contribution towards the reform of our system of Legal Education. It is from the pen of Mr. J. C. Stephens, and this with the excellent article which we published on the 9th June completes his contribution through our columns on the matter.

The profession will find this second article of great interest. The conclusions appearing in it are convincingly sound. Indeed that would be expected coming as they do from so experienced a practitioner and examiner.

The findings of the Commission justify the need for reform which we have advocated and though there may be some differences of opinion in details between the findings of the Royal Commission and the opinions expressed in these columns, yet substantially the result is the same. We are naturally pleased that we have stimulated to some extent a movement in the right direction. The profession have seized the opportunity of expressing their opinions on this as well as on other matters of interest and it is not slow to realise how necessary is such a Journal as Butterworth's Fortnightly Notes.

Matters are daily cropping up of general interest and we invite practitioners to give their brethren the benefit of their experience or seek their advice in this Journal. It is foundea for the purpose of serving the profession and it behoves members of the legal fraternity to take advantage of that fact.

TRIAL BY JURY.

Once again the Bench has expressed its opinion that the range of actions to be tried by the Jury should be curtailed.

On this occasion the Judges have revoked the rules in relation to Trial of Divorce petitions and have drawn fresh ones having the effect of limiting to trial by Jury only petitions in which Adultery is in issue.

We think this is an improvement. Desertion and agreement for Separation are issues for which the Judge is far more competent to decide. We trust, however, that these new rules are not in the nature of the "Thin edge of the wedge" and that the issue of Adultery will soon be taken from the Jury also.

The change made in civil actions is perhaps too drastic.

Many of our readers agree with the views expressed in the Article on the subject appearing in our issue of 18th September. We should not be surprised to hear, now the rules have been in action for 7 months, that the Bench too has modified its opinion.

SUPREME COURT.

Ostler, J. July 14, 1925.
Wellington.

THOMAS v. RICHARDSON.
THOMAS v. WOODWARD.

Practice—Leave to serve writs in Samoa—Samoa Act 1921—Secs. 1, 2 and 3—Court's discretion under Sec. 3.

These were two applications by motion for leave to serve two Writs in Samoa. The application was founded on the following evidence: On the 17th January 1924 plaintiff was tried and convicted by His Honour W. H. Woodward Esquire Chief Judge of the High Court of Western Samoa upon a charge of theft of the sum of £45, and was sentenced to four months' imprisonment, the sentence to be served in New Zealand. He was removed to a cell at 9.30 a.m. on the date after sentence, and remained there until 4.30 p.m. when he was again brought before the Chief Judge, who stated: "Upon looking up the statute I find I cannot sentence you to four months in New Zealand, and therefore I now sentence you to six months, but as I do not want you to be imprisoned for six months, I have recommended the Administrator, Major-General Richardson, to remit two months of your sentence, which he has been pleased to do. Therefore you will serve only four months' imprisonment." Next day Thomas was placed on board the steamship Tofua and brought to Auckland, where he served a term of 3½ months' imprisonment and was then released. He then desired to return to Samoa, where he had left his wife and children, but he was refused a ticket on the steamer going to Samoa, as he alleges by the Justice Department on the advice of the Department of External Affairs. Upon his making representations through a member of Parliament to the Hon. Minister of External Affairs, the Minister replied by telegram as follows: "Owing to representations received from Administrator Samoa, quite impossible to allow Thomas return there. Administrator is making arrangements to return wife and children New South Wales at her own request." On these facts Thomas has been advised that he has a good action for damages, for tort against the Administrator, Major-General Richardson, and also a good action against His Honour the Chief Judge, and he asks the leave of the Court to serve writs on these two gentlemen.

O'Regan in support.

OSTLER J. after considering the evidence based as it was on the affidavit of the plaintiff said: "Section 80 Sub-Section 1 of the Samoa Act 1921, provides that the civil jurisdiction of the Supreme Court of New Zealand shall extend to Samoa, and may be exercised in New Zealand in respect of the Territory in the same manner in all respects as if it was part of New Zealand. Sub-Section 2 gives the Supreme Court power to stay any action which might have been institution in the High Court of Samoa. Sub-Section 3 provides that 'No writ of summons or other originating civil process shall be served in Samoa without the leave of a Judge of that Court. . . ' Had it not been for the provisions of this section there would have been no jurisdiction in this Court to give leave to serve a writ outside New Zealand, this case not coming within the provisions of Rule 48 of our Code. No regulations or Rules have been made under this section to guide the Court as to the principle upon which it should give or refuse such leave, but this much is clear, that under the section a discretion is given to the Court in the matter, and in my opinion that discretion is a judicial discretion to be exercised on the same principles as those which guide the Court in an application for leave to serve a writ out of New Zealand under Rule 48. In such an application it has been held that the Court has a discretion which it is bound to exercise judicially and on proper grounds. In the exercise of that the nature of the case which it is intended to make against

discretion it will not try the merits, but before granting the leave asked for it must be satisfied that the plaintiff has a probable cause of action: **Societe Generale v. Dreyfus** (37 Ch. D 215). In order to enable the discretion to be exercised the affidavits should show, not only that the plaintiff is advised he has a cause of action, but they should shew the nature of the case which it is intended to make against the defendant, with sufficient particularity to enable the Court to decide whether a probable cause of action has been made out. In the case of the proposed action against the Administrator, in my opinion it has not been shewn that Thomas has a probable cause of action. Two acts only are alleged to have been done by the Administrator, viz. (1) to remit two months of the sentence imposed on Thomas by the High Court of Samoa, and (2) to make representations to the Department of External Affairs of this Dominion that it was undesirable that Thomas should be allowed to return to Samoa. In my opinion on neither of these acts could an action for damages in tort be founded. On Thomas's own shewing and assuming the facts stated by him to be true he was not prevented from returning to Samoa by the Administrator, but by an act of the Government of New Zealand. That being so, in the exercise of the discretion vested in me by Section 80 of the Samoa Act 1921, I ought to refuse leave to serve a writ on the Administrator, and leave is accordingly refused. With regard to the case of His Honour the Chief Judge, it is alleged that an action for damages lies against him because he acted in excess of his jurisdiction. Assuming the facts alleged in this case to be true, in my opinion no probable cause of action has been made out in this case either, and for this reason, that it is only Judges of an inferior Court of record who are liable in damages for an act done in excess of their jurisdiction. In my opinion a Judge of a superior Court of record is absolutely exempt from all civil liability for acts done by him in the execution of his judicial functions, even where he exceeds his jurisdiction. There is indeed not much authority for this proposition, but it was the opinion of the majority of the Judges in **Taafe v. Downes** 3 Moore P.C. 36 n., and it is the opinion expressed in the text books both in England and America.: see **Salmond on Torts** (6th Ed. 582), **American and English Encyclopaedia of Law** (2nd Ed. p. 728). Now the High Court of Samoa, as constituted by the Samoa Act 1921, is a superior Court of Record. It has conferred on it all jurisdiction, whether criminal or civil which may be necessary to administer the laws of Samoa, including jurisdiction to give declaratory judgments in civil cases: Section 73. All the rules of common law or equity relating to the jurisdiction of the Superior Courts in England are to be construed as relating to its jurisdiction: Section 349 (2). And finally this Court has no control over the High Court of Samoa by way of certiorari mandamus or prohibition, whether in respect of want of jurisdiction or otherwise. The High Court of Samoa has therefore all the indicia of a superior Court of Record and in my opinion is such a Court. It is true that the jurisdiction of this Court is extended by Section 80 to Samoa, and is concurrent with the jurisdiction of the High Court, and it is true that by Section 83 an appeal lies from the High Court to this Court, but these facts do not in my opinion take away the character of the High Court as a superior Court, any more than the fact that an appeal lies from this Court to the Court of Appeal indicates that this Court is not a superior Court. The only remedy for an injury caused by an act of a Judge of the High Court of Samoa in excess of his jurisdiction in my opinion is either appeal to this Court, or, if that remedy is not available, representations to the Government or the Parliament of New Zealand. For these reasons, in my opinion, no probable cause of action against His Honour the Chief Judge has been made out and I accordingly refuse leave to serve a writ on him. As it may be desired to appeal I shall treat these two motions as having been moved in Court.

Solicitor: **P. J. O'Regan**, Wellington.

Stout, C.J. June 18, 19, 1925.
Auckland.

BROWN v. MEIKLEJOHN.

Prohibition—Whether available under circumstances to stop Hearing of charges under Gaming Act—some charges dealt with.

This is an action for Prohibition. The plaintiff was arrested on 30th December, 1924, and charged with carrying on the business of a bookmaker on the 26th December, 1924. This charge was made under Section 2 of The Gaming Amendment Act, 1920, which enacts:—

"The business or occupation of a bookmaker is hereby declared to be unlawful. Every person carrying on such business or occupation commits an offence against this Act, and is liable on summary conviction to a fine of five hundred pounds, or to imprisonment for a term of two years."

No information was apparently filed, or, if filed, was not brought before the Court. The plaintiff was arrested and charged and then remanded. No hearing of the charge has been held, and no evidence regarding it has been taken.

On the 16th January, 1925, eight informations were laid against the plaintiff. They were: (a) Charge that he did on the 6th December enter into a bet on the result of a horse-race to wit the Taumarunui Cup run at Taumarunui which bet was dependent on the working of the totalisator on the said race; (b) for a similar offence as to a bet on the same day in a race called the Ranganui Handicap; (c) for a similar offence on the 11th December, 1924, on the Te Awamutu Cup run at Te Awamutu; (d) for a similar bet on 13th December on another race; (e) for a similar bet on 26th December in a race at Auckland; (f) for a similar bet on the 30th December at Auckland; (g) for a similar bet on 30th December at Auckland; (h) for a similar bet on the 20th September, 1924, at Avondale.

Meredith for the Crown.
Luxford for accused.

STOUT, C.J., said the dates of seven of the offences differ from the date of the charge made on which he was arrested. There is only one offence of betting charged on the 26th December. Two of the offences charged are on days since the charge of 26th December. One is as far back as 26th September, 1924. There is therefore no identity in date so far as seven of the charges are concerned. Further, the charges are all charges laid under Section 5 2of The Gaming Act, 1908, whilst the charge on which he was arrested was a charge under Section 2 of The Gaming Amendment Act, 1920, No. 2. There is therefore no identity in the crimes charged nor on the date of the offences save one. I fail to see any ground whatever for this Court interfering with the proceedings. The eight offences charged are all offences

that have to be tried summarily and are within the jurisdiction of the Magistrate. So maybe the charge on which the plaintiff was arrested, but he would have a right to have that case submitted to a jury. He has no right to have those eight offences to be tried by a jury. They can be tried summarily. How then does the right of the prisoner to a prohibition exist? It was argued that this case came within the class of cases of which **Joe Tong v. Cox**, 21 N.Z.L.R., 591, and **Hamilton v. Walker**, L.R., 1892, 2 Q.B. 25, are examples. Neither of these cases can be said to help the plaintiff. In **Hamilton v. Walker**, L.R., 1892, 2 Q.B., 25, the appellant was charged with two offences arising out of one transaction: (a) With delivering indecent advertisements, and (b) with aiding and abetting and procuring the same offence. The facts regarding the two offences were the same. The Justices heard the first information and then without deciding it heard the second one and they convicted him of the two offences. It was decided that this was wrong. First, that each case should have been decided on its own evidence and the Justices should have decided on the first without taking evidence of the second. Further, there were not two offences. This was charging a defendant with two offences on one statement of facts. Tong's case was similar, one statement of facts, two offences charged. The Magistrate heard one case then without giving his decision heard the second. What has happened in this case has no likeness to what happened in these cases. Here there is not even an information filed or brought to the notice of this Court in reference to the bookmaking offence. Second, seven of the offences charged are not on the same dates as the charge on which he was arrested. Third, the offences are quite distinct, not only as to dates but also as to what was done. The plaintiff may be guilty of betting, and yet not be a bookmaker; and he may be a bookmaker without having made these bets that are charged. The offences are different as well as all the dates but one, and the authorities quoted are not therefore in point. The statement as to the powers of the Supreme Court to deal with actions before it is not of value in dealing with the proceedings in another Court of competent jurisdiction and having power to deal with an offence charged. Further, I may add that in the two cases to which reference has been made the prisoner accused was prevented from pleading a plea of previous conviction or previous acquittal. Such pleas are open to him in the proceedings against him in the Magistrate's Court, and will be open in any Court in which further proceedings may be taken against him. To say that the Supreme Court can interfere with the order of business in our Magistrate's Court would be to assert an unheard of jurisdiction. Further, the plaintiff has a right of appeal both in law and fact of which he may avail himself.

Judgment must therefore be given for the defendant. No reference was filed and costs will be only for counsels' appearance. I fix them at £6/6/-.

Solicitors for plaintiff: **Fitchett, Rees, and Luxford**, Auckland.

Solicitors for defendant: **Meredith and Paterson**, Auckland.

Sim, J. August 18, 19, 28, 1925
Invercargill.

RUDDOCK v. SINCLAIR ET AL.

Restraint of trade—Coercing employer to dispense with plaintiff's services.

The eighteen defendants are slaughtermen, and members of the Otago and Southland Freezing Works and Related Trades Employees' Industrial Union of Workers, which is registered under the Industrial Conciliation and Arbitration Act 1908. In April 1925 they were all working in the works at Mataura of the Southland Frozen Meat and Produce Export Company Limited, under the provisions of an award made by the Court of Arbitration on the 28th of November 1924. On the 17th of April plaintiff was engaged to work as a slaughterman at the Mataura works, but he did not commence work that day. After he had been engaged, the defendants held a meeting, and, through Manning their delegate, informed Walker, the foreman, that they refused to work with the plaintiff. When asked by Walker for their reason Manning declined to give any reason. Notwithstanding the objection made by the defendants, the plaintiff started work at Mataura on Tuesday the 21st of April, and worked there on that and the two following days. Before the plaintiff started work the defendants were killing from 12 to 14 sheep per hour. As soon as the plaintiff started work on the Tuesday at 1 p.m. the defendants reduced their rate of killing to 8 per hour, and continued at that rate on the following day. On Thursday the rate was reduced to 6 per hour in forenoon, and to 4 per hour in the afternoon. When defendants made this reduction in the rate of killing they were acting in concert, and made the reduction for the purpose of compelling the company to get rid of the plaintiff as a slaughterman. This the Company did by giving him work as a carpenter's labourer in the Company's works at Makarewa. The plaintiff alleges that what was done by the defendants was done for the purpose of injuring him, and he made charges against the defendants of intimidation, conspiracy and illegal methods of work. He further alleged that the defendants by their acts deprived the plaintiff of his job at the Mataura works, and prevented him from obtaining work as a slaughterman. He claims, therefore, to recover £500 from them as damages.

Stout for plaintiff.
Callan for defendants.

SIM J. said: "I assume in favour of the defendants that they were not actuated by any desire to punish the plaintiff for his conduct in 1923, or by any desire to injure him, and that they objected to him merely because they regarded him as an undesirable fellow-labourer. It was contended on behalf of the defendants that, on this view of the facts, they had not been guilty of any actionable wrong, and counsel relied on the case of **White v. Riley** (1921) 1 Ch. 1 in support of this argument. It was held in that case by the Court of Appeal that the mere statement by a number of workmen that they would not work with another workman, and would strike if he were retained in the employer's service, did not of itself constitute an unlawful threat, and was not of itself actionable. The present case is not one involving any breach of contract between the Company and the plaintiff. The plaintiff was employed as a piece-worker, and the Company was entitled to dispense with his services at any time. The case, therefore, does not come within that line of cases in which **Larkin v. Long** (1915) A.C. 814 is a recent illustration. But notwithstanding this, it is clear that, if the defendants resorted to the use of illegal means for the purpose of inducing or compelling the Company to get rid of the plaintiff as a slaughterman, they have committed an actionable wrong. The authority for this statement of the law is to be found in the judgments in the Court of Appeal and House of Lords in the case of **Mogul S.S. Co. v. McGregor** 23 Q.B.D. 598 (1892) A.C. 25, and this is treated as clear law in the latest case on the subject in the House of Lords: **Sorrell v. Smith**, 41 T.L.R. 529. Now in the present case the defendants did resort to the use of illegal means to effect their purpose, because the reduction in the rate of killing, if it did not amount to a strike, was at any rate a breach of the award they were working under, for which each of them was liable to a penalty of £5 under Section 13 of the Industrial Conciliation and Arbitration Amendment Act 1908. The award declares that the provisions thereof are to be binding upon the Union and every member thereof, and orders the Union and every member thereof to do observe and perform every matter and thing thereby required to be done observed and performed, and not to do anything in contravention thereof. Clause 35 of the award, which provides for the constitution of a Disputes Committee, declares that the essence of the award is that the work of the employer shall always proceed in the customary manner and shall not on any account whatsoever be impeded. The reduction by the defendants of their rate of killing, to the serious injury of the business of the Company, constituted, I think, a violation of the duty imposed by this clause, and amounted to a breach of award. The result of their action was to force the Company to get rid of the plaintiff, who had every prospect of being employed as a slaughterman at Mataura until the end of the season. If he had remained there, he would have been able to earn nearly 38/6 per day, while as a carpenter's labourer he was paid only 14/- per day. He is entitled to recover damages for the loss he has suffered in this way. I assess the damages at £50 and give judgment for that amount with costs according to scale and disbursements and witnesses' expenses to be fixed by the Registrar.

Solicitors for plaintiff: **Stout & Lillicrap**, Invercargill.
Solicitors for defendants: **Callan & Gallaway**, Dunedin.

Mr. J. E. Stevenson has relinquished his position on the staff of Messrs. Moore, Moore & Nichol, Dunedin, to take up business on his own account. Mr. Stevenson, prior to his appointment with Messrs. Moore, Moore & Nichol, was on the staff of Messrs. Stewart & Payne.

Sim, J. July 21, 22, 25, 1925. Christchurch.

TATTLE v. GIBSON.

Sale of land—Public auction—proposed dedication of some of roads not completed—whether purchaser of section entitled to rescind—whether and when vendor can sue for balance due as debt.

On the 24th of April, 1920, the plaintiffs offered for sale by public auction certain allotments in the Borough of Akaroa in what was described as a subdivision of Narbey's Estate. The defendant became the purchaser of two of these allotments for the sum of £395 and paid a deposit of £59 os and signed the agreement at the foot of the Particulars and Conditions of Sale. Clauses 3 and 12 of these Conditions are as follows:—

"3. The balance of the purchase money of each lot shall be paid on the first day of May, 1921. All future payments shall be made and the purchase completed at the offices of Messrs. Cunningham and Taylor, 144, Hereford Street, Christchurch, the vendor's solicitors, and all unpaid purchase money shall bear interest at the rate of Five pounds ten shillings per centum per annum computed from the first day of May, 1920, and shall be paid half-yearly on the first day of May and November . . . ."

"12. Upon payment of the whole of the purchase money at the time and place before mentioned, and the observance by each purchaser of the agreements on his part herein contained the vendors shall make and execute to the purchaser of each lot a memorandum of transfer duly executed by the vendors in the prescribed form which shall be prepared by and at the expense of the purchaser and shall be left for execution at the said office of the vendors' solicitors not less than ten days before the time fixed for completion."

The defendant has not paid the balance of the purchase money agreed to be paid, and the plaintiffs have brought the present action to recover such balance with interest thereon, or, in the alternative, to obtain a judgment for the specific performance of the contract.

Gresson and Brassington for plaintiffs.

Sim and Lascelles for defendant.

SIM, J., said the general rule is that in a contract for the sale of land the mutual engagements of the parties will be considered to be dependant on each other, and each party, unless discharged by the other party, must be able and willing to perform his duties under the contract before he can enforce his rights thereunder: **Dart** (7th. Ed.) p. 1004. It is also a general rule that where the purchaser fails to complete the contract the vendor is not entitled to sue for the purchase money as a debt. His remedy is to sue for specific performance of the contract, or for damages for breach of contract. The contract may be expressed, however, in such a way as to give the vendor a right to recover the purchase money as a debt, without regard to the question of a conveyance. It was contended on behalf of the plaintiffs that the present was such a case, and counsel relied on the case of **Yates v. Gardiner,** 20 L.J. Ex. 327 as an authority for this view of the matter. It was held there that the defendant had agreed to pay the purchase money of the land on the specified date without a conveyance. But the language of the contract in the present case is different from that under consideration in **Yates v. Gardiner.** Clauses 3 and 12 of the Conditions both refer to the completion of the purchase. Clause3, after fixing the date for the payment of the balance of the purchase money, provides that the purchase is to be completed at the specified offices. Clause 12 provides that the memorandum of transfer is to be left for execution at these offices not less than ten days before the time fixed for completion. What is the date here referred to as the time fixed for completion? The only date specified in either clause is the first day of May, 1921, the date fixed for the payment of the balance of the purchase money. That must be taken to be the time fixed for completion. It is true that in **Mattock v. Kingiake,** 10 A. & E. the expression "completion of the purchase" was held to mean only the payment of the balance of the purchase money. In the present case the context in both clauses 3 and 12 makes it clear that it means something more than the payment of the balance of the purchase money. That something more is obviously the execution of the transfer, and this is sufficient, I think, to establish that what the parties contemplated was that the purchase should be completed on the first of May, 1921, by payment of the balance of the purchase money, and the execution of the memorandum of transfer. See **Williams on Vendor and Purchaser** (3rd. Ed.) p. 545. This is how the contract under consideration in **Ruddenklau v. Charlesworth** (1925) N.Z.L.R. 161, 173, was construed by the Court of Appeal. That decision is an authority for construing the contract in the present case in this way. On this construction of the contract the undertaking on the part of the purchaser to pay the balance of the purchase money and the undertaking on the part of the vendors to execute a memorandum of transfer are mutually dependant stipulations, and the vendors are not entitled to recover the balance of the purchase moneys as a debt: **Laird v. Pim,** 7 M. & W. 474.

The next question to be considered is whether or not the plaintiffs are entitled to have the contract specifically performed. The plan produced at the auction sale and referred to the Particulars as the Sale Plan, is incorporated into and forms part of the contract. It is clear that Clauses 5 and 6 of the Conditions that all the roads shewn on this plan were intended to be completed and dedicated in accordance with the provisions of Section 116 of the Public Works Act 1908. This, however, was not done. After a delay of some years the original subdivision was reduced by leaving out of it the roads marked Walnut Avenue and Olive Avenue on the original plan, and all the allotments lying east of Selwyn Avenue, so that the total number of allotments in the subdivision was reduced from 60 to about 28. There has not been any dedication of Walnut Avenue or Olive Avenue, and the plan deposited in the Lands Registry Office is of the reduced subdivision. It was contended on behalf of the defendant that in these circumstances the plaintiffs were not in a position to perform their contract, and were not entitled to a decree for specific performance. In support of this contention counsel relied on the case of **Hardley v. Hugues,** 29 N.Z.L.R. 188. In that case the defendant purchased two allotments shewn on a plan of subdivision. The plan shewed a new street or road, but the provisions of Section 2 of the Public Works Act 1903, now contained in Section 116 of the Public Works Act 1908, were not complied with. Notwithstanding this, the plaintiffs managed to get a plan deposited in the Lands Registry Office, and were in a position to give the defendant a title to the two allotments purchased by him, with, probably, a right-of-way over all the roads shewn on the plan. It was held that the defendant was not bound to accept such a transfer. The ground of this decision is thus stated by Mr. Justice Edwards at page 190: "I am satisfied that the sale of these allotments by the plan was at least a sale upon terms that, at all events, before the time came for payment of the last instalment of the purchase money, the plaintiffs should be in a position to give, and should, upon payment of that instalment, give to the defendant a good title to the allotments sold as part of a subdivided estate, through which the roads shewn upon the plan had been lawfully dedicated in accordance with the provisions of the 2nd section of the Public Works Act 1903. The plaintiffs are admittedly not in a position to perform their contract upon these terms." The learned Judge held, accordingly, that the plaintiffs were not entitled to compel the defendant to purchase and pay for something substantially different from that which they contracted to sell him. It seems to me that the principle of this decision applies in the present case. The defendant agreed to purchase two allotments in a particular subdivision containing certain roads or streets which, in terms of the contract, were to be completed and dedicated in accordance with Section 116 of the Public Works Act. The plaintiffs, therefore, are not in a position to give the defendant what he agreed to purchase, and they are endeavouring to compel him to accept something substantially different. Slight differences between the sale plan and the deposited plan would be regarded, of course, as immaterial. But the difference here cannot be treated in that way. The subdivision has been shorn of practically half its original proportions. It now contains only about 28 allotments instead of 60, and only two streets instead of four have been completed and dedicated. It is impossible to say that these alterations can be treated as other than substantial, and the defendant is entitled, I think, to succeed in his defence on this ground. It is unnecessary, therefore, to consider the other question raised as to the right of the defendant to rescind the contract, as he did, on account of the long and inexcusable delay on the part of the plaintiffs in getting the streets completed and dedicated.

The result is that the defendant is entitled to judgment on the claim with costs according to scale and disbursements and witnesses' expenses to be fixed by the Registrar. He is entitled also to judgment on the counter-claim for the amount of his deposit, viz., £59 5s.

Solicitors for plaintiffs: **Wilding and Acland,** Christchurch.

Solicitors for defendant: **Weston, Ward, and Lascelles,** Christchurch.

Ostler J. July 21, 1925.
Wellington.

HILLARD v. BEVAN.

Specific performance—Laches—Measure of damages.

The facts in this case are unimportant so far as the law points decided by the trial Judge so we omit them. The action was one for specific performance and the defendant inter alia pleaded laches against the plaintiff.

Smith for plaintiff.
Hanna for defendant.

OSTLER J. found for the plaintiff on the facts and made the decree prayed. In his reasons he made the following observations: The third defence raised is that plaintiff has disentitled himself to the remedy of specific performance by delay and laches, and acquiescence. But plaintiff's evidence shews that the delay was caused by the defendant continually promising to complete the title, down to as late as 1924, and plaintiff's reliance on those promises. The delay was therefore attributable to defendant, and it is a principle of equity that in that case he should not be allowed to avail himself of it as a defence: see **Fry on Specific Performance** (5th ed. p. 544) and cases there cited. The only delay on the part of plaintiff on which defendant can rely is that from the last occasion in 1924 on which he agreed to go to Wellington with plaintiff to arrange for the transfer of the land to him, and September 1924 when the writ was issued. Now the rule is that where the contract is substantially executed, and the plaintiff has got the equitable estate, so that the object of his action is merely to clothe himself with the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or at any rate it will be looked at less narrowly by the Court: see **Fry on Specific Performances** (5th ed. par. 1110). It is true that to save a purchaser from the consequences of delay his possession must be under the contract sought to be enforced and the vendor must have known that the purchaser claimed to be in possession under that contract. But here it is clear on the facts I have found not only that plaintiff was in possession under his contract to purchase, but also that defendant must have been aware of this, for otherwise he would not have been continually promising to complete his title. Counsel for defendant argued strenuously that the principle cited is only applicable to cases of landlord and tenant, and not to cases of vendor and purchaser. It is quite true that the cases in which it has been applied have been landlord and tenant cases. But in my opinion the principle is equally applicable to cases of vendor and purchaser, and is peculiarly applicable to the facts of this case. The case of **Mills v. Haywood** (6 Ch. D. 196) which was relied on by counsel for defendant is in my opinion distinguishable, and is really an authority against him, for there it was clear that the defendant was entitled to assume that the plaintiff was in possession not under his contract of purchase, but under his prior lease.

In considering the question of damages the learned Judge said: "With regard to damages the rule in **Flureau v. Thornhill** (2 Wm. Bl. 1078) and **Bain v. Fothergill** (L.R. 7 H.L. 158) have been held to apply to New Zealand: see **Fleming v. Munro** (27 N.Z.L.R. 796). But that rules does not apply to the circumstances of this case. In this case after contracting to sell the fee simple of the land free from encumbrances defendant deliberately executed two mortgages over the land. If he has put it out of his power to specifically perform his contract by these acts, he has done so by his own default. Therefore plaintiff is entitled to claim as damages the loss of his bargain."

Solicitors for plaintiff: **Morison, Smith & Morison**, Wellington.
Solicitors for defendant: **Duncan & Hanna**, Wellington.

Reed, J. May 28, June 9, 1925.
Auckland.

GLASS v. LAIDLAW.

Will—Misdescription of legatee—whether adopted son or his father meant—neither correctly named in will—surrounding circumstances—evidence—latent ambiguity—whether testator's declaration of intention admissible.

This was an originating summons for the determination of the question as to who was the person called "Alfred Douglas Glass" in the following paragraph of the will of John Glass, deceased:—

"As to one-fourth of my residuary estate for my son, William Campbell Glass. As to one-fourth of my residuary estate for my daughter, Marian Campbell Glass. As to one-fourth of my residuary estate for my son, Alfred Douglas Glass; and as to the remaining one-fourth of my residuary estate for all the children of my late daughter, Euphemia Lee, who shall survive me in equal shares."

The plaintiff was the adopted son and grandson of testator. The question resolved itself into whether Alfred George Douglas Glass, a grandson of the testator, and legally adopted son, or whether his father, Alfred Duncan Glass, a son of the testator, was the person meant. On the authority of **Collins v. Day**, 1925, N.Z.L.R. 280, the Court considered all the material facts and circumstances known to the testator with reference to which he was taken to have used the words in the will, and so put itself in the position of the testator.

The facts were unusual, and contained some extraordinary features.

The plaintiff's birth was registered by his mother in the name of Alfred George Douglas Glass, and his father's name was stated to be Alfred Douglas Glass, aalthough his correct name was Alfred Duncan Glass. The plaintiff when ten months old was adopted by his grandparents under the name of Douglas Glass. The consent to the adoption was correctly signed by the parents of the child, but the body of the document states the name of the father, in three places, to be Arthur Duncan Glass. It is corrected in one place to Alfred, but the witness purports to witness the signature of Arthur Duncan Glass. Attached to the papers is the certificate of birth of the plaintiff with the father's name, stated as Alfred Douglas Glass. The order of adoption is of Douglas Glass. There are two mistakes in the names of the other three children in the will; Marian Campbell Glass should be Marian Cameron Glass, and Euphemia Lee should be Euphemia Low.

The plaintiff was adopted by the testator and his wife on the 13th May, 1902, and was brought up by them.

Apart from some evidence of relatives whether or not the deceased knew that the plaintiff bore the name of Alfred, the additional facts were proved.

(1) The order of adoption, which would have been in the possession of the testator, gives the name as Douglas only; (2) the plaintiff went to school, and the instructions of the Education Board, which are printed on the school register, are that the name in full of the pupil is to be entered. At two separate schools, Stanley Bay and Devonport, the testator caused the plaintiff's name to be entered as Douglas; (3) at the age of nine the plaintiff was an inmate of the Auckland Hospital. The testator entered his name there as Douglas.

The grandparents were much attached to the plaintiff, and referred to him as their son, and he lived with them until he was about the age of 14, when he was convicted of theft. He was apparently not punished for this, but a short time later, being again convicted of the same class of crime, he was sent to an industrial school. He escaped from there, and wrote to his grandmother informing her of the fact. Upon reading the letter she fainted and died the same night. This was about the 14th April, 1917. The will now in question was made about five weeks later, that is to say on the 21st May, 1917, and the testator died on the 29th of the same month. The uncontradicted evidence of the oldest son, William Campbell Glass, who was not affected by the result of the case, was that his father, the testator, attributed to the plaintiff a large measure of the responsibility for his wife's death, and stated he would have nothing more to do with him. This communication took place when William Campbell Glass was in Auckland attending his mother's funeral. The same witness gave evidence of his father's statements, at that time, with regard to his intentions as to the disposal of his property. The latter evidence was objected to by council for the plaintiff and rejected.

The material facts and circumstances may be summarised as follows:—1. That due, either to the imperfect memory of the testator or to a misunderstanding of his instructions by the draftsman, at least two of his four children are incorrectly named in the will. 2. The plantiff was always known to the testator as "Douglass";; that the son Alfred Duncan was always referred to as Alfred. 3. That the plaintiff was treated with affection by the testator, but was wayward and difficult to control. 4. That the testator always retained his affection for his son Afred Duncan, and, in his last days, turned against his grandson, to whose misbehaviour he attributed, in a great measure, the sudden death of his wife.

Cocker for plaintiff (grandson and adopted son of testator).

Northcroft for Public Trustee.
Gregory other defendant.

REED, J., said in rejecting the evidence offered as to testator's statement of intention:—

"It is not that class of case that Lord Bacon describes as one of 'equivocation,' that is where the description of the legatee or of the thing bequeathed, is equally applicable, in all its parts, to two persons or to two things. There the evidence would be admissible; but, that is not the position here; this is a case where the surrounding circumstances point to a latent ambiguity in the will, and, in such cases, evidence of declaration of intention, by the testator, is not admissible: **Charter v. Charter**, L.R. 7 H.L. 364."

The learned Judge dealt with the case as follows after colating the evidence:—

In the light of these facts and circumstances I now turn to the will. The beneficiary is described as "my son Alfred Douglas Glass." Is this the case of an erroneous or incurrate name, and a description or demonstration sufficiently clear to correct the error or inaccuracy? "There is no presumption in favour of the name more than the demonstration," said Lord Chancellor Campbell in **Drake v. Drake**, 8 H.L.C. 172, 179, and added, "Upon referring to the numerous cases that have been cited at the Bar, it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed." Counsel for the plaintiff contends that the description or demonstration as a son is not sufficiently clear to determine the matter, and claims that the plaintiff is not incorrectly described by the testator as his son. To support this contention he refers to Section 21 of the Infants Act, 1908, which provides that:—

> "The adopted child shall for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, benefits, privileges, and consequences of the natural relation or parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parent."

He also relies on the evidence that the plaintiff was always referred to by the testator as his son, and on the fact that two of the Christian names of the plaintiff are correctly stated in the will, whilst the name Douglas is not part of the name of plaintiff's father. In view of the extraordinary mistakes in the will as to names, Campbell for Cameron, Lee for Low, I think very little weight can be attached to the use of the name Douglas when the question is whether it was intended for Duncan. Further, the name is Arthur Douglas, and, as already stated, I think that the testator was not aware that the plaintiff had any other name but Douglas, whilst he was quite familiar with his son's name, and always spoke of him as Arthur. Then, although the legal status of the plaintiff was that of a son, and the testator was in the habit of speaking of him as his son, I think that, in dictating his will the collocation shows that he was referring to the true and natural relationship of the beneficiaries to himself. Had the plaintiff been a stranger in blood his case might have been stronger for then the only connection would have been that of an adopted son, whereas he was his grandson, and I think he would have been so described had the testator intended to refer to him. I am fortified in this opinion by the fact that the children are mentioned in their order of seniority, Alfred Duncan Glass being the third child. On the whole therefore I find it impossible to resist the conclusion that the son Alfred Duncan Glass is entitled to the fourth share of the testator's residuary estate bequeathed to "my son Alfred Douglas Glass" and the question will be answered accordingly.

I find myself in some difficulty with regard to the question of costs. The will was proved on the 14th July, 1917, and the estate was distributed, with the exception of the share held in trust for the children of Euphemia Low, and the share now in question. If the estate had not been distributed it would have been a proper case to have ordered the costs to be paid out of the estate, the fault being that of the testator. **Wilson v. Squire** 13 Sim 212. The executrix, before distributing the estate, should have had the present question decided. It is her fault, therefore, that the corpus of the estate is not available to answer those costs. In these circumstances I desire to hear counsel on the matter.

Solicitors for plaintiff: **Stanton, Johnstone & Spence**, Auckland.

Solicitors for Public Trustee: **Earl, Kent, Massey & Northcroft**, Auckland.

Solicitors for the Trustee: **Gittos, Uren & Gregory**, Auckland.

LEGAL EDUCATION.

by

J. C. Stephens, Esq.

In my former article (B.F.N. Vol. 1 No. 8) I reserved for future discussion the subjects of Conveyancing and Civil Procedure. It has since occurred to me that it would be better to deal with the general subject of Practice and with Conveyancing and Court Practice as part thereof.

While the subject of Practice is of direct and immediate interest to the profession and the law student, we ought not to overlook the interests of the public.

It makes for the dignity and standing of the legal profession that it should be composed of educated men trusted by the public whom it serves. And confidence and, indeed, happiness, in professional work is acquired in direct proportion to the extent to which the student has obtained a knowledge of the practical work of the profession, in addition to general theoretical knowledge of the subject matters thereof.

The public are entitled by law to assume, and do assume, that professional men are skilled in the practice of their profession. How far is that assumption justified in the case of the young man (or woman) just admitted to "the practice (!) of the law"?

The medical student acquires a knowledge of the practice of his profession from clinical lectures, etc., the dental student receives instruction in mechanical and operative dentistry, and the engineering student must, before obtaining his degree, present certificates shewing that he has spent a defined period in engineering work of a practical nature.

What is to be said of the law student?

Since the abolition of articles, no attempt has been made to ensure a knowledge of Practice until a few years ago. A man might receive a license to practise the profession of the law without knowing how to draw the commonest of deeds or to conduct the simplest of cases. That was certainly not fair to the public. It was not even fair to the man himself. During the war I had an assistant who had been a Civil Servant, had studied law and passed his examinations. He spent six months in a practitioner's office and then launched himself on the troubled sea of practice. And it **was** a troubled sea. He practised in several country towns and he told me that it was a constant nightmare. I have been informed that a certain country practitioner (not in Otago!) never attempts to prepare documents relating to land under the Property Law Act, but sends them to the metropolitan town. Each of these men had a saving knowledge of his ignorance. What of those who have not? Is such a state of things for the benefit of the public or creditable to the profession?

Some four or five years ago an attempt was made by the Senate of the New Zealand University to remedy this state of things. A new subject of Conveyancing was added to the prescription. This action was probably taken as a result of a report by a Committee (consisting of Mr. C. P. Skerrett, Sir J. G. Findlay and Mr. Von Haast) of the Council of the New Zealand Law Society made in 1919 and adopted by that Council. In their report the Committee say "Members of the Council will agree

that practical training should be required both of barristers and solicitors." They recommended a paper on Conveyancing "covering the practical work in both divisions of property, the student being required to have a competent knowledge of the simple forms in every day use and possibly being allowed to take into the examination room certain specified books." They also said "it should be made plain that the same knowledge will be required on the law of procedure, both civil and criminal."

In my opinion, it is more necessary that a candidate for admission as a Solicitor, or, indeed as a barrister (for his work will combine both branches) should shew a knowledge of Conveyancing than a knowledge of the Practice and Procedure of the Courts, and that necessity will not be removed by last year's Land Transfer Act. His mistakes in the Courts will immediately discover themselves, whereas his mistakes in Conveyancing may be imbedded in documents and remain undiscovered until it is impossible to correct them.

The Senate did not, however, make it compulsory to pass the examination. An alternative option was given to the student to present a Certificate from a teacher in an Affiliated Institution that he has **done work,** to the satisfaction of the teacher, in the preparation of certain specified instruments. The prescription even for the paper is, in my opinion, considerably short of what is required, but the option, from the point of view of ensuring knowledge of Conveyancing Practice, and judging it as actually exercised, is hopelessly bad.

So far as the general principles of Conveyancing are concerned, the knowledge of the student may, and I think should, be tested by examination in the same manner as the general principles of any other subject of the Course. In my opinion also no one can be said to have an adequate knowledge of Conveyancing, if that knowledge is confined to preparing from memory a number of forms. Mere knowledge of forms could, perhaps, be better tested in the class room than in the examination room, if the test is adequate. To give to a student the matter required to be dealt with in a deed, and allow him to use the precedent books, would at least save him from so much cram. And I am inclined to agree with those who urge that that is a better and more adequate test than the ordinary method of examination. At the end of his final year, the Engineering Student has to design a machine. Fifteen days are allowed for this and the whole of it is done in the examination room. But the student is at liberty to bring into the room and use, notes, text books and works of reference.

The option is certainly not a test of the knowledge of Conveyancing principles, and as actually exercised, at least in Otago, is not even a test of the knowledge of the specified forms.

The system adopted in Dunedin in connection with the certificates is as follows: Each lecturer prepares certain forms, gives his students a copy, and explains generally the provisions contained in them. In view, however, of the demands of his subject, only a very limited time can be devoted by any teacher to such explanation. There is no examination, term or final. It will be seen, therefore, that the lecturer has little, if any, opportunity of judging whether a Certificate ought to be granted. It is too much to expect him to conduct an oral examination when each student applies for a certificate. As a fact, he does not do so, and yet the Senate has required that the certificate is to be that the student "has done **work** to the satisfaction of the teacher" etc. I am not criticising the teachers at Otago University. Far from it. I say the system is impossible under existing conditions.

It is on record that one conscientious teacher refused a certificate. Apart from that instance, there have been one hundred per centum of passes. That has not been the experience of the Examiner in Conveyancing. It was understood in Dunedin (rightly or wrongly) when the system of certificates was introduced that it was only a temporary expedient, and that an examination would supersede it, but the two systems still go on.

When the South Island Board of Examiners met in December, 1923, this question was discussed. Grave doubts were expressed by some as to whether the examination system was wholly adequate for testing a student's knowledge of Conveyancing Practice. It was felt, however, that that was only one aspect of a larger question which required further consideration. But the Board came to the unanimous conclusion that, under existing conditions, the provision for obtaining a certificate should be abolished and that every candidate should pass an examination. This resolution was forwarded to the Senate who submitted it to the teachers of the Affiliated Colleges. I understand the teachers failed to agree and there the matter stands.

At its annual meeting in 1924, the Otago Law Society unanimously approved of the proposal to abolish the certificate, the resolution being supported by the teachers at Otago University all of whom are members of that Society.

It may be noted that the result of abolishing the certificate would be, so far as concerns examination, to place Conveyancing in the same position as the Practice and Procedure of the Courts, and that the town student would not have an advantage over the country student.

There is another subject which finds no place in the prescription and knowledge of which, I think, urgently requires attention. I refer to the Principles of Advocacy. I presume that no one will deny that the present system of allowing a student to pick up his knowledge of this subject where he can, and as he cares, is very undesirable in the interests alike of the student and the public. Many cases are won which should be lost and many are lost which should be won, owing to the blunders of the counsel engaged therein. It may be said that Advocacy is nothing but a combination of common sense and experience. That is true of the successful and experienced advocate. The student may have some degree of common sense, but he has no experience, and he will surely be vastly benefited by having his attention directed to rules which are based on the practice of those who have been leaders at the Bar. Many of those same leaders would probably admit many bitter defeats, many secret heart-burnings, and much self-reproach in their early days on account of blunders realised too late, but avoidable, if some instruction had been given to them **before** they commenced their work at the Bar. In other countries a barrister obtains some knowledge of Advocacy by acting as Junior Counsel. In New

Zealand very few have that advantage. King's Counsel are the only seniors who can afford the luxury.

Opposition to the inclusion of Advocacy in the course will probably be based on the difficulty of giving instruction. This difficulty is more apparent than real. One of the lecturers at Otago University has prepared a set of lectures on this subject and he proposes to deliver them gratis next year to such of the Otago Students as care to attend to hear them. The syllabus takes the student through preparing for trial, and the whole course of the trial from start to finish, including such details as cross-examination in general and with reference to various special classes of witnesses and evidence, contradicting one's own witness, impeaching credit of witnesses and choice of jurymen.

The simple truth is that, at the present time, the average student knows nothing of this important subject. He does not know how to prepare his evidence, or how to open a case for Plaintiff or Defendant in the proper manner. The majority do not know what is a leading question. This state of affairs, in the interests of the profession and the public generally, should not be allowed to continue.

But, are these reforms sufficient? I am quite satisfied that they are not. They ought to be adopted, but, in addition, there should be the same provision for practical work as in the other professions. Much benefit may be obtained from lectures on Practice, especially on general principles, but the best and, indeed, the only completely effective, way to learn how to do any kind of work is to do it. The student may, for instance, be taught the general structure of a deed and the reasons for the form of the clauses contained therein, but he will never really assimilate this knowledge until he has passed some time preparing such deeds under supervision. There are, moreover, innumerable details of the every day life of a lawyer which can only be learnt in an office.

I believe that the great majority of the members of our profession will agree with me when I say that adequate practical training can only be received in the office and cannot be gained in the University. Medical and Dental students do not receive their practical training in the University class rooms. In the case of the medical student, the clinical instruction is given in the hospital and with reference to concrete cases. So in the case of the dental student, he receives both practical and theoretical training in the same building, but, as to the practical training, only because the building is itself used as a dental hospital. And here again the work is with reference to concrete cases. The Engineering Student does his practical work outside the University College altogether. Mr. Von Haast says in his article (B.F.N. p. 62) "one of the chief evils of the present system . . . is the abolition of articles and the failure to provide for compulsory training for the profession." Articles, of course, are served in the office. It is safe to say, also, that, when the Committee of the New Zealand Law Society referred to practical training, they meant training in an office. In this democratic country something may be said for the abolition of articles, in any case it is hopeless to expect them to be restored. It is essential, however, in the interests, alike of the profession and the public, that legal education should be placed in the same position as in the other professions by providing for compulsory practical training.

When should such training commence? Here there is room for much difference of opinion. Mr. Von Haast, for instance, states as the ideal, that the law student should give his whole time to his legal training devoting himself solely to University work in term time and working in an office during vacation. He admits, however, that this is not practical politics. Others suggest that the student should finish his arts subjects before entering an office.

It must be admitted that students who spend their whole time at the University, mixing with students of other faculties, gain an education, a broadening of their mental outlook, altogether apart from the specific subjects of their studies. Students who spend their days in offices cannot gain that benefit from University life to the same extent.

Notwithstanding the loss sustained by their partial isolation, it is my opinion, based on observation extending over a long period of years, of students during their student days and their after life, that it is desirable that the office training should be commenced at as early an age as possible. Theory and practice should be studied together, but, in addition, I am convinced that in his office life, a student besides acquiring a knowledge of the innumerable details which make up the daily life of the lawyer (at least the general practitioner) also acquires, almost unconscientiously, a mental bent which is of immense value in learning the principles of law and also in solving the problems which will be brought before him in after life. He lives in a legal atmosphere.

The system adopted in other countries may be quoted against me. I can only say that my opinion has been formed, not from theoretical reasoning but from practical observation. And, before citing those other countries, one must have regard to the conditions there prevailing and the evolution of legal education in those countries. Articles exist in them all for solicitors and that presupposes office training. But they connote, further, a limited class. In addition to the articled clerks there are a large number of paid clerks. In New Zealand all clerks are on the same plane. In the case of the barrister, any comparison must have reference to historical development.

I conclude by directing attention to the estimation of our system held in Victoria. In that State, any barrister or solicitor of the Supreme Court of England, Scotland or Ireland, or any of the other States of the Commonwealth may be admitted to practice without examination or service under articles. A Barrister or Solicitor of the Supreme Court of New Zealand **who has been in the employment of a practising barrister and solicitor of the Supreme Court of Victoria for five years immediately preceding his application** may upon passing in five legal subjects be admitted to practice as a barrister and solicitor in Victoria. For this bit of information I am indebted to Mr. J. B. Callan. It requires no comment.

Mr. H. Brasch who has been practising in Dunedin for a number of years on his own account has admitted to partnership Mr. J. N. Thompson, late Managing Clerk to Messrs. Mondy, Stephens, Monro & Stephens. The firm will be known as "Brasch & Thompson."

LONDON LETTER.

The Temple, London,
22nd July, 1925.

My Dear N.Z.,

At the moment of writing the Tasmanian apple case, of which I have promised you a full note has just been decided in favour of the Shipowners. It has been long in the hearing and numerous experts have been called. No doubt the substance depending on the issue is large, in proportion to the length and cost of the hearing. At any rate I hope so, for there is a growing feeling in this country that there are no bounds, but should be, to the proportions which litigation achieves these days. In truth, I think the complaint is less justified at the moment than it might have been a short while ago. When, however, business is booming, we are apt not to hear the complaints; it is when the slump comes that we hear the candid truth and are made to realise, or led to believe, that it is our own fault in the past if there is no work in the present. A client put it to me thus, recently; of an honourable and honest profession, the junior barrister is the least expensive and the most deserving worker and the solicitor is little, if anything, behind him. But the Big Leaders are altogether inexcusable, as to the fees they ask and the fleeting minutes they devote to the case. There is undoubtedly much to be said for this popular contention; and though, as I say, it is truer of our prosperous past than of our lean present, there is foundation for the suggestion that litigous business has to a great extent been killed by the demands made upon it by our "stars". In which context I may appropriately call your attention to the still further, but presumably far from final, proceedings in the arbitration between the Government of Kelantan, in Malaya, and the Duff Development Syndicate. They are reported in Tuesday morning's "Times," July 21st, and you will, if you read the report, note the gentle sarcasm of Russell J.'s reference to Mr. Upjohn's 25 hours' argument and its alleged superficial and prefatory nature! Be it very far from me to charge such of our great men, as Upjohn K.C. and Simon K.C., with the fault of protraction. It is the fact, however, that the complaint, to which I have referred and which is now very prevalent and likely to become more so in the near future, attaches itself most to the cases in which these luminaries shine. I will note the Tasmanian Apple case for you in my next letter: I have not had the opportunity of seeing my friend, engaged in it, since the judgment.

I have dealt with the foregoing issues in earlier letters, and the further matter I have to discuss is also in contexts already dealt with. It is within ten days of the Long Vacation, essentially a period when new matters do not originate but outstanding matters recrudesce, for completion or at least for adjournment. The purifying of press reports, of unpleasant proceedings in the Courts, achieves its first crisis in Lord Darling's "Act to regulate the publication of reports in judicial proceedings in such manner as to prevent injury to public morals"; it is, of course, only a Bill as yet; the "Daily Mirror" regards it with despair and the "Westminster Gazette" refers to it as Lord Darling's latest joke. In parenthesis we may remark that Lord Darling's reputation oscillates between that of a thoroughly successful and distinguished Judge and that of an inconsequent and even inconsiderable humourist; certainly he has always varied and still varies in the quality of his work, but the ups and downs of his reputation are attributable rather to the varying popularity of his enterprises; and no one can deny his undiminishing vitality throughout. Apart from the above-mentioned journals, and some others who take the like view, we observe an orientation of opinion in favour of stern measures, on the part of a large section of the press which has hitherto not been enthusiastic in the cause of its own reform. The motive seems to be a pride in our newspapers, as compared with those of foreign countries; the result is likely to be a greater chance of success for Sir Evelyn Cecil's campaign than was anticipated a few months back. As to all other subjects, long contemplated for discussion and now being critically discussed, I may best refer you to the very full report of the Annual Meeting of our Solicitors' Incorporated Law Society, which took place on Friday, 10th July, and is fully reported in this week's "Law Journal" (July 18) at page 664. You will there see a full account inter alia, of the new developments of our Poor Persons' Procedure and of the difficulties which it involves and of the advantages which it promises.

An incident of last week was the arrest of a perfectly respectable and unoffending officer, in circumstances very similar to the first stages of the Back scandal of years ago. But, except for the curious coincidence of a mistaken identity on the part of a woman complaining of being robbed by a casual, male acquaintance, there is little of real similarity between the Adolph Beck Case and last week's Major Sheppard Case. There was no occasion for the press, still less for a learned City Recorder, to go into hysterics in the matter. True, upon the gallant officer's arrest, the police officials were so convinced that he was the low miscreant they were after that no trouble was taken immediately to examine their victim's proofs of identity. Their conduct is going to be enquired into; and the enquiry has (if it be required) my approval, upon the simple grounds that, if you do not have an occasional brush round with executive officers in general and police officers in particular, they are apt to break away from a moderate and careful exercise of their powers. But Adolph Beck, you will remember, served one long sentence and was well on his way with another, before the tragic mistake was discovered. His years of suppressed infuriation and mental anguish at his imprisoned innocence hardly bear thinking of; they were reluctantly compensated, you will recall, by a beggarly thousand pounds or two, as if a year alone of any man's liberty was not worth ten times that sum! I consider it something of an insult added to injury, to this victim of our country's unspeakable carelessness, to proclaim the momentary, if intense, discomfort of Major Sheppard (who was discharged before he even got into the dock) a disaster of comparable magnitude. With all sympathy for the latter's misfortune, it may be said, from the point of view of public interest, that his case only goes to show how the sufferings of Adolph Beck and their effect upon the popular imagination have secured for all of us, Major Sheppard included, ultimate security and liberty preserved if we happen to be innocent men.

(To be concluded in our next issue.)

THE MOUAT CASE.

The Christchurch criminal case of **Rex v. Mouat** has now apparently passed through all its stages and Mouat has been sentenced by Mr. Justice Reed to a term of seventeen years' imprisonment with hard labour upon the jury's finding of Manslaughter. The prisoner was charged with the murder of his wife about the 19th day of February, 1925—and the case raises many interesting questions both from the general and the legal point of view.

The short facts were that Mouat and his wife lived on terms of friendship and the Crown was quite unable to disclose any motive for the crime. On the evening of the 19th February they were both present at a friend's place, taking part in a social evening, and returned home across the road approximately at half-past nine, there being no indication during the evening that the parties were anything but the best of friends. When Mrs. Mouat left that neighbour's house, it was the last time that she was seen alive by any person other than Mouat.

The latter's story, as related in his unsworn statements to the Police, was that upon arriving home and going to bed, some argument ensued concerning money troubles, but that they both went to sleep peaceably for the night. That next morning she left the house intending to meet another woman in Cathedral Square, to then go on to her father's home in Christchurch, possibly spend the night there, and in any event to go on next day by train to Purakanui in Otago, where Mouat's mother lived. That when she passed out of his gate about half-past nine on the morning of the 19th February it was the last time he had seen her.

Mrs. Mouat has never been seen since, but some thirty-one bones were found in the back garden of Mouat's residence, and three acknowledged experts testified that these bones were human, that they all apparently belonged to the one body, and that body would be a small woman approximately of Mrs. Mouat's stature. This must admittedly have been opinion evidence only, but was not contradicted and no serious cross-examination was directed towards disturbing its fundamental hypotheses.

There were also signs of blood upon a blanket, a pillow, a sheet, and in the bath pipe. Further experts swore to this substance being blood, but in one instance only was it sworn to as human blood, and that by one expert only. On the other hand, it was admitted that the sure test for human blood (the precipitin test) had failed. And it further appeared from expert evidence that all ashes found upon the premises exhibited, upon analysis, no signs of fatty substance.

The other available evidence consisted in facts as to Mouat's evasive and otherwise erratic conduct subsequent to the night of the alleged murder, but there was nothing in the way of direct confession of guilt or statement that Mrs. Mouat was dead.

Upon the first trial, after four days, the jury disagreed, the direction given by His Honour Mr. Justice Adams being that it was open to them to find a guilty of murder upon these facts. Neither the learned Judge nor the Crown Prosecutor opened the question of Manslaughter to the jury. The second trial lasted three days, and on this occasion both the Crown Prosecutor and the learned Judge directed the jury that it could find manslaughter if it so pleased. His Honour's grounds for such direction were shortly as follows:—

(a) That the total amount of blood (deposed to by one expert as about one teaspoonful) entitled the jury to infer that no deadly weapon had been used but that death was caused by the use of brute strength.
(b) That no motive appeared.
(c) That all the evidence showed affection between the parties.
(d) That on the evening of the 19th February, both were friendly and happy together.

And from all these, and the admission that an argument about money had taken place, the jury might infer that further recrimination ensued, resulting in the deceased provoking Mouat so that he lost his self control.

These facts, and the subsequent direction by the learned Judge, raise two interesting legal questions, namely:

(a) There being no certain production of Mrs. Mouat, was there a case to go to the jury at all, and
(b) Whether the verdict of manslaughter was justified in the circumstances?

We understand on good authority that it is not proposed to take the matter further, and so feel at liberty to discuss the same with certain freedom.

It is clear from various cases, one of the most recent of which is **The King v. Brown** (14 G.L.R. 255) that production of the dead body or some portion of it is not a sine qua non to a successful prosecution. The starting point in the line of argument is the early statement in **Hale-Pleas of the Crown** (Vol II p. 290):

> "I would never convict of murder or manslaughter unless the fact were proved to be done, or at least the body found."

This has been for some time and is now accepted as only a prudential maxim, and where satisfactory circumstantial evidence is avilable both that the body is dead that the accused did the killing, a jury may convict. The interest in the present case arises from the quality of the circumstantial evidence corroborating the disappearance, and identifying the accused as the wrong-doer. It is to be observed that in cases such as **The King v. Brown** (above), **Regina v. Woodgate** (2 N.Z. Jur. N.Z.C.A. 5) **and Reg. v. Waines** (A.R. 7th July 1860) the two latter of which are cited in the first mentioned case, there was an actual confession by the accused to some third party that he had done the act. In **R. v. Mouat** there was no such confession, but the conduct of the accused may or may not have amounted to an indirect confession that he did the act. The remainder of the case becomes merely expert opinion as to the identity of the bones and the nature of the blood. In the nature of the case no unequivocal fact identifying the body was forthcoming, and no direct acknowledgment that the body had been disposed of. In these circumstances, it might seem problematical whether the case really reached that point when a jury may be permitted to speculate and found a verdict upon whatever theory they care to fashion.

It is, however, upon the question of misdirection that the verdict seems more open to question. The killing being established, the law presumes murder, and it is for the accused, either from the Crown's evidence or from his own, to establish the necessity or provocation which takes the act out of the category of murder. See Russell on Crimes (8th Edition pp. 615, 781). And if there is evidence of manslaughter it is the Judge's duty to put the case to the jury in that light, as equally it is his duty not to permit the issue of manslaughter if there are no facts to justify it. A recent case on this point is **R. v. Thorpe** (1925) T.L.R. 468, wherein it was held that the proper issue was murder or acquittal. It is also noteworthy that there must be facts as to matters which it is alleged justified the provocation (See Russell at p. 784); and in England the practice has been followed or the jury finding the facts for the Court and the latter then deciding whether these facts or events could in law justify the emotion that led to the killing. For an instance of this see **R. v. Dudley** 14 Q.B.D. 273. As to the sufficiency of the alleged provoking event, Mr. Justice Chapman stated in **R. v. Jackson** (1918) G.L.R. 11 at p. 12:

> "Was there here a wrongful act or insult amounting to provocation excusing to a sufficient degree the sudden use or a knife in the manner described? An irritating circumstance is not sufficient. You must look for a wrongful act or insult. . . . It is for you to say whether there was a threat or an insult of such a character as to amount in your opinion to provocation for the deadly blow that was struck."

Now apparently the only fact in any way provoking the alleged passion was the quarrel over money matters with his wife. This, according to the only statement on the matter, ended peaceably. The absence of motive, and the friendship between the parties were in themselves states of mind and in no sense provocative facts. This seems to mean that any domestic difference may be urged in mitigation of murder, if a husband kills his wife, provided the killing is sufficiently proximate in point of time to such difference of opinion. In the circumstances, it is a matter for regret from a legal point of view that the Court of Appeal has not been asked to pronounce upon the question. On the other hand, it is easy to understand that Mouat would not care to risk another trial, with only the simple issue of murder before the jury, and that counsel for the prisoner would have to accept a very grave responsibility in advising an application for the Court of Appeal to review the summing up.

Mr. K. A. Williams recently practising at Ohura has removed to Marton.

Report of University Commission on Legal Education.

The report of the University Commission which was laid on the table of the House of Representatives on 9th September is a valuable document. The legal profession will naturally be most interested in that section of it which deals with legal education which the Commissioners say is at present upon an unsatisfactory footing. The Commissioners say:—

"Members of a 'profession' should be distinguished by three main qualifications: (1) They have undergone a sound and liberal course of general education; (2) they have received an intensive training of high quality in the principles and in the practice of their special work; and (3) they have accepted a body of ethical standards as a guide to professional conduct. It is essential, therefore, that the scheme of education for entrants to a profession of the first rank should be generously planned and administered, and that a more or less empirical knowledge of the technique of practice in the various branches of the profession, superimposed upon a slender equipment of general knowledge and of principles should not be accepted as satisfactory. . . . . .

Legal practitioners have always been regarded as members of a learned profession, as, indeed, is shown by the customary courtesy of allusion to "my learned friend." It appears to us that, unless a marked change is effected in the legal education provided in the Dominion, this term runs the risk of being regarded as a delicate sarcasm.

That the community should be vitally interested in seeing that lawyers are trained who are in the full sense of the term "professional men" follows from a consideration of the position which lawyers occupy in the State. "Practising lawyers do not merely render to the community a social service which the community is interested in having them render well. They are part of the governing mechanism of the State. Their functions are in a broad sense political. This is not due primarily to the circumstance that a large proportion of our legislative and administrative officials, and virtually all our Judges are chosen from among this practically ruling class. Nor is it due entirely to the further circumstance that the growth of our law in the form of judicial decisions, that interpret and declare its actual content, is necessarily greatly influenced by arguments of counsel. It springs even more fundamentally from the fact, early discovered, that private individuals cannot secure justice without the aid of a special professional order to represent and to advise them. To this end lawyers were instituted, as a body of public servants, essential for the maintenance of private rights. From their earliest origins the law has accorded to these "officers of the Court" certain special and exclusive privileges which set them apart from the mass of the people as truly as if they were in a strict sense, public officials." (The Carnegie Foundation for the Advancement of Teaching Training for the Public Profession of Law Bulletin 15 p. 3.)

The Commission considers that, apart from any disability arising from the provisions of the Legal Practitioners Act which affect prejudicially the education and standing of the profession, the remedy for the present condition of legal education is in the hands of the Judges, who however have in effect delegated the matter to the University and who have been slow to move in the matter of legal education. The Commission recommends that the practice followed in Victoria of creating a Council of Legal Education representative of the Judges, the leaders among practising barristers and solicitors, and the University teachers of law is the most satisfactory method for providing and for watching over a course of legal education which shall comply with the requirements of a good professional education and at the same time satisfy the demand for a training which is strong enough on the practical side. To this body should be entrusted the powers now vested in the Judges alone.

"The root cause of the deficiency of practical training appears to us," say the Commissioners, "to lie in the legislation governing admission to the legal profession. Apparently this legislation was passed at a time when what was regarded as the advanced democratic view demanded that no obstacles should be placed in the way of any citizen who wished to become a lawyer. "Articles" were regarded as an obstacle of this nature, and were in such disfavour that they were incontinently swept away, but no provision was made for the practical training which 'articles' supplied. Further, what is now styled by the legal profession 'the back-door entrance' was opened and any solicitor after five years' practice as a solicitor or a managing clerk can claim to be admitted as a barrister.

In our judgment, the true democratic view is that the community should be able to command the services of well-educated specialists as its lawyers; that their training should be calculated to produce broadly and thoroughly trained experts; and that the facilities for education provided by the State should be such that this professional training is within the reach of all, without respect of class or financial position. New Zealand provides so liberally for education beyond the primary stage that any young man or young woman of ability who is prepared to make a reasonable sacrifice can, with the help of 'free places' and scholarships obtain entrance to any calling which demands as a qualification a course of higher education.

We are of opinion that legal education in New Zealand should be brought into line with legal education in other countries, and that the prescriptions for general scholarship, legal knowledge and training in legal practice should be added to and made much more satisfactory.

While the student taking the LL.B. course must, in addition to his Matriculation Examination, pass in Latin and English or philosophy at the pass degree stage, and also in his law professional subjects, it is possible for a barrister to be admitted who has not passed in Latin and in English or Philosophy as prescribed for LL.B. As for solicitors, their present culture test is that of the Matriculation Examination (including Latin) or a special examination in general knowledge for which the matriculation test is regarded as an equivalent. It cannot be stressed too strongly that such requirements are inadequate for both barristers and solicitors. A good general education is invaluable to the young lawyer. It not only gives him the mental discipline acquired from and perfected by the liberal studies, but it is a corrective to "the dehumanising effect of technical efficiency pursued as a single aim."

It is, accordingly, not enough to demand an entrance qualification passed at the age of sixteen or seventeen years: some liberal studies should be kept up during the university course. Otherwise, the student is deprived of something which is not only of as much value to him in his professional work as his technical training, but which if once dropped is not likely to be resumed, for, unlike technical training, is not added to day by day by his daily experience as a practitioner. The custom of some universities of requiring the B.A. degree as a preliminary for the study of the professional subjects of the LL.B. degree has much to recommend it, for the mental habits engendered by liberal studies are an appropriate foundation for the more vocational studies. The New Zealand practice of allowing an immature student to take his law professional examination and later to take his general knowledge test is surely absurd and shows little belief in the need for general culture as a basis for professional study.

It is to be noted that the New Zealand LL.B. is granted after a three years' course, and there is no stipulation as to a further course to be served as articled clerk. In other words, a student may become a practising barrister in three years. In Melbourne the course extends over four years, with a further year of Articles; in Sydney it takes four years or, in the case of students taking a B.A. as preliminary (a very usual course) five or six years followed by a period of articles. Mr. J. B. Callan, Jun., the representative of the Otago District Law Society, after advocating the establishment of a Council of Legal Education on the model of that entrusted with the organisation of legal education in Victoria stated: "Victoria has pointedly indicated that, in its opinion, our New Zealand requirements are inadequate. It will admit practitioners from England, Ireland, Scotland, or the other States of the Commonwealth of Australia without examination and without practical work. It will not admit a New Zealand practitioner unless he serves for five years as a clerk and is re-examined in law." New Zealand graduates suffer no such disability in respect of medical or engineering qualification, and the disability under which lawyers rest should be removed by the institution of a more satisfactory course.

As regards barristers and solicitors who have not graduated LL.B. the Victorian practice is to require (1) Matriculation (including Latin); (2) a pass in nine law professional subjects; (3) four years' service as a pupil under articles to a person practising as a barrister or solicitor, or as a barrister and solicitor.

Another great handicap under which legal education suffers in New Zealand is the almost invariable practice of taking legal studies as evening courses after office work

either in a law office or an office engaged in some other business. Over 90 per cent. of New Zealand law students are evening students only. Of the 212 evening law students who constitute the largest single group of students at Victoria College, Wellington, 92 per cent. only are employed fully or for part time in law offices. The remainder are mostly public servants studying law subjects either to gain advancement in the service or to enable them later to start in legal practice. The amount of legal practice such students can obtain is probably very little indeed.

We are of opinion that part time education properly conditioned is in no way undesirable. But while it is certain that earnest students engaged in law offices during the day can do excellent work at an evening school, it surely cannot be argued that the result is so good as can be secured by the same students attending full time courses or that the pace of the class should be that of the class for full time students. The difficulty should be met by insisting on such a limitation of the number of subjects taken as will allow sufficient time for both teacher and student to do justice to the work. Further, it must be remembered that in most countries where law students attend late afternoon and evening courses they are in a genuine law office under strict articles of clerkship. This cannot be said of New Zealand, where the only legal education which is under control is the work of the classroom. Some students may be receiving an excellent practical training, but of this there is no guarantee.

The Commission points out that practical training is essential and that the class room cannot supersede the practitioner's office, and that failure to provide adequate practical training constitutes a serious defect in legal education. Given such practical training the abolition of examination in practical details is recommended. The Commission, comparing New Zealand with New South Wales and Victoria comes to the conclusion that we have an abnormal number of law students and asks: "Can the Dominion properly absorb such a body of lawyers?" and "Is there something wrong with the objective of the secondary education of New Zealand, in that it encourages so many to enter professions for which presumably many of them are not specially fitted and in which they are not needed?"

The Commission is of opinion that the standards of the legal course should be raised in regard to each of the three elements of professional training—general culture, professional knowledge, practical training—recommends that the standard of entrance to the course for both barristers and solicitors should be the examination prescribed for the Junior University Scholarship, that the law professional subjects should be brought into line with the requirements for the Australian universities, and that for the LL.B. degree a greater number of culture subjects of general education should be included, lengthening the course to one of four years' duration. Part time students should have their subjects each year severely limited in number in order that approved methods of teaching and of study may be the rule. As regards practical training, the Legislature should be asked to amend The Legal Practitioners Act and to provide for this essential portion of a lawyer's education. A special fully equipped and staffed Law School with a strong staff of specialist teachers and a complete law library should be established in the most suitable centre.

If effect is to be given to the recommendations of the profession, legislation will be required for the following purposes:

(a) To close the back door to the profession.
(b) To provide for practical training for the candidates who seek admission to the legal profession.
(c) To establish the Council of Legal Education recommended by the Commission and to vest in it the powers now vested in the judges under The Law Practitioners Act.

CANTERBURY LEGAL GOLF CHAMPIONSHIP.

The Canterbury Bar have a fixed idea that it is worth while making a definite effort to preserve the time-honoured harmony of the Bar. For this reason, one day is set aside in summer when all offices close their doors and the profession adjourns en masse to the playing fields. In close proximity to one another, cricket matches between employers and staffs, legal tennis and bowling tournaments are held, and everything is rounded off with lunch, followed later by afternoon tea, when the ladies attend.

The idea has now been carried further and on 3rd September last the first match for the Legal Golf Championship was held, the trophy being a cup presented for annual competition by this year's President of the Law Society, Mr. W. J. Hunter. The cup will be known as "The W. J. Hunter Challenge Cup." The day was fortunately fine and furnished a splendid outing. After the match, Mrs. W. J. Hunter very kindly supplied afternoon tea, at which other guests, including many ladies, were present at the invitation of the President and Mrs. Hunter.

The first eight to be placed in the match were as follows:

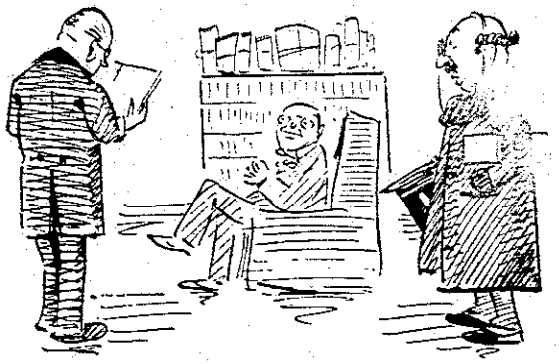
	Gross	Hcp.	Net
E. J. Corcoran (Kaiapoi Club)	85	8	77
A. T. Donnelly (Shirley Club)	96	18	78
J. Dolph (Shirley Club)	86	7	79
J. D. Hutchison (Shirley Club)	92	13	79
L. A. Dougall (Shirley Club)	86	5	81
M. H. Godby (Shirley Club)	89	5	84
H. K. Kippenberger (Rangiora Club)	93	9	84
H. O. D. Meares (Shirley Club)	97	13	84

FORENSIC FABLES.

No. 8.

THE ZEALOUS CLERK WHO OVERDID IT.

A Silk, whose Professional Activities were not as Extensive as they had been, was Sitting in his Chambers Contemplating Some Elderly Papers which Represented Struggles of the Past. He was Immensely Cheered when his Zealous Clerk Informed him that an Old Client had Turned up with a Brief. The Zealous Clerk Confided to the Silk that he thought he could get it Marked up to Twenty-Five. The Silk Directed that the Old Client should be shown in At Once. The Old Client said he was Afraid it was a Small Affair, but he would be Greatly Obliged if the Silk would give it his Personal Attention. It was a Common Jury, fixed for Next Monday. The Silk, Winking Slightly at his Zealous Clerk, asked him to Look at the Book and See what his Engagements were for that Day. The Zealous Clerk produced a Large Diary, Scanned it with Attention, and Found that Monday was Free, except for the Privy Council case, which would probably not be Reached, a Special Jury, which he was sure Sir John Would Agree to Adjourn, and the Part-Heard before the War Compensation Court, in which they had a Capable Junior: These Causes and Matters Existed Only in the Imagination of the Zealous Clerk; but he Hoped they would Create a Favourable Impression on the Mind of the Old Client. Unfortunately the Old Client was so Startled by these Many Calls upon the Time of the Silk that he Took the Brief Away and Delivered it to Somebody Else. O.



Moral: Draw It Mild.

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