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

TUESDAY, JUNE 8, 1926.

SUSPENSION OF SOLICITORS.

The following extract from the Law Journal of 10th April is interesting.

Abram Stross, of 20 Castle Street, Liverpool, suspended for four years for having misappropriated a cheque of £150 to his own use received for the specific purpose of paying it into a certain company's account. The Committee desire it to be understood that in this case they forbore to exercise their full disciplinary powers in view of the ill-health and youth of the respondent and his obvious lack of experience and knowledge.

Major Harry Bailey, of Cathedral Chambers, 10a Temple Row, Birmingham, suspended for one year for withholding from a client until after proceedings had been instituted the sum of £8, received from an insurance company in settlement of a claim.

Featherstone Lewis Jones, of St. John Street Chambers, Deansgate, Manchester, suspended for six months for improperly neglecting to pay the amount of a composition to a client and misappropriating it to his own use.

If those improprieties had been committed in New Zealand the members would not have found our Court of Appeal as lenient. One cannot avoid the conclusion that as soon as a wrong-doer is discovered in our midst then it is better for the profession, better for the public and even perhaps better for the man himself that he be struck off the roll of honourable practitioners for all time. Of course there may be exceptional cases where the practitioner is told he may apply for readmission in a few years but they must be very exceptional. The necessity of keeping the profession peopled by men whose integrity is undoubted needs no elaboration.

SUPREME COURT.

MacGregor, J. May 6, 1926.
Wellington.

PATERSON v. PATERSON & KEAN.

Divorce—Practice—Adjournment, application for—Procedure to be followed.

This was an application by the respondent and co-respondent to have the date of trial of the petition adjourned. The grounds of the application were several, including ill-health and intention to call a witness at present absent from New Zealand.

Treadwell for respondent in support.
O'Leary for co-respondent in support.
Mazengarb for petitioner to oppose.

MACGREGOR, J., granted the application. In the course of his reasons the learned judge made the following observations: "It is difficult to lay down any general rule as to an application of this kind, and more especially in connection with a divorce case. There does not seem to be any settled practice as to the postponement or adjournment of such a trial, and I think one must simply follow by analogy the ordinary procedure of the Supreme Court on the subject. That procedure is laid down in rule 252 of the Code, which says:—

> "The Court may before the trial, or the Judge "presiding at the trial may during the trial, if it "appears expedient in the interests of justice so to "do postpone or adjourn the trial for such time, to "such place, and upon such terms (if any) as the "Court or Judge thinks fit."

Therefore I have to try and find out as best I can what it is expedient to do in this case in the interests of justice. I have not got to consider merely the parties, the Petitioner, the Respondent, and the Co-Respondent, but to consider what should be done in the interests of justice generally. .... Both the Respondent and the Co-Respondent are charged with adultery which, of course, is a very serious thing; and in the interests of the children that ought to be considered. It is of importance in a case of this sort, that in so far as possible the truth should be carefully ascertained and a proper verdict given. I am not at all sure, if we tried to rush through the trial to finish this week or on Monday of next week, that we should do justice to some, at all events, of the grave considerations that may arise in this suit if all the affidavits are to be relied upon."

Solicitors for petitioner: **Mazengarb, Hay & Macalister,** Wellington.
Solicitors for respondent. **Treadwell & Sons,** Wellington.
Solicitors for co-respondent: **Bell, Gully, Myers & O'Leary,** Wellington.

Reed, J., Feb. 22, 23; Mar. 1; Apl. 23; May 6, 1926.
New Plymouth.

SCOBIE v. INGLEWOOD BOROUGH COUNCIL.

Negligence—Local body—Neglect in selecting engineer—What must be proved—Absolute statutory duty—Breach by defendant—Effect of.

The plaintiff successfully sued the defendant for damages for injuries he received from falling from an electric power and light line whilst engaged in cutting certain electric lines or wires from a pole. The facts are immaterial for the note we make.

Moss for plaintiff.
Wilson for defendant.

REED, J., said in regard to the plaintiff's contention that the defendant was negligent in the selection of their engineer.

It is contended, on behalf of the defendant Council, that if the plaintiff is entitled to any damages they must be limited to the sum of £1,000, the injuries being due to the negligence of a fellow servant. Sec. 67 (3) Workers Compensation Act, 1922. It is not disputed that the engineer was a fellow servant of the plaintiffs but, it is contended, there has been established against the defendant Council, first a breach of an absolute statutory duty, and secondly personal negligence of the defendant Council itself. As to personal negligence it is alleged that the defendant Council omitted to use reasonable care in choosing a competent and careful engineer. No doubt, if that were established, it would amount to personal negligence on the part of the defendant Council, but the onus is upon the plaintiff of proving that there was want of reasonable care in the ap-

pointment or in the continuance of the employment. It is not sufficient to prove that his act showed incompetence or carelessness in the present case, the proof must go further, it must be shown that either by the exercise of reasonable care, at the date of his appointment, it would have been found that he was incompetent, or that he had during his employment proved himself incompetent or careless, and the defendant had continued to employ him: **Tarrant v. Webb, 18 Ch.D. 797.**

To the further contentions of the plaintiff with regard to the personal liability of the Council the learned Judge said:

It is further contended that the defendant council was personally negligent in not providing adequate appliances for carrying on the work; and the neglect to supply an insulated platform and an up-to-date switch-board for cutting off power is instanced. It is more convenient to consider this point in conjunction with the allegation of a breach by the Council of an absolute statutory duty. Now the doctrine of common employment is that the risk of negligence on the part of a fellow workman is one of the risks accepted by a workman as an implied term of the contract of service. But the risk involved in an employer's failure to discharge a statutory duty absolutely imperative on him is not a risk which the workman must be presumed to have accepted. Thus in **Groves v. Wimbourne** (1898) 2 Q.B. 402 the employer was held liable for an injury suffered by one of his servants through the absence of sufficient fencing around dangerous machinery, although sufficient fencing had originally been erected and the fencing had been wrongfully removed by one of his other servants, for the statutory duty to maintain such fencing was absolute. In **Kaye v. Westport Harbour Board** (1916) N.Z.L.R. at 1087, Stout, C.J. delivering the judgment of the Court of Appeal said:

> "There are two kinds of negligent acts. There "may be, first, a negligent system or way in con- "ducting works; and second, there may be a casual "negligent act by a fellow employee. If the act "was of the first class, then, although one or more "employees were negligent, nevertheless the respon- "dent would be liable because the statute casts upon "it a duty and that duty is not fulfilled. If the "negligence is of the second class, the respondent "would not be liable because a single casual act of "negligence was committed about which it could have "no knowledge, and which was contrary to its order "or system in carrying on the work."

The test to be applied is suggested at p. 1088 as follows:

> "Was the omission....a mode of carrying on "the work—the system in fact—or was it an event "that happened only in this one instance?"

In the present case there was a clear breach of the regulations, first under R. 37 (a) in ordering the plaintiff to cut the electric lines when other lines upon the same pole had not been disconnected, secondly in authorising the use of an obsolete switching apparatus which enabled a live wire to be left in accidentally and which may have been the cause of the accident. The regulations are made under the provisions of Sub-sec. 2 of Sec. 2 of the Public Works Amendment Act 1911, which enacts as follows:

> "The Governor may from time to time, by Order "in Council Gazetted, make regulations (a) prescrib- "ing the form of licenses under this Act..... "(b) controlling the use and management of any "works or lines used for generating, transforming, "converting, or conveying electricity (whether so "used pursuant to a license under this Act or not) "so as to secure the safety of the consumers or em- "ployees and the public from personal injury by "reason of such use."

In pursuance of this power it is enacted by Regulation 55 that: "The licensee shall keep the whole of the work

> "authorised by the license in good order and con- "dition **so as to at all times ensure** continuity of "service and **immunity from danger.**"

The defendant Council is under a statutory duty to comply with these regulations. The duty is absolute and if mischief follows from non-compliance the defence of common employment is not open. It is claimed that owing to the defective nature of the switching apparatus that lines, other than the red lines before referred to, were not rendered dead, and there is some evidence which suggests that this may be so. It is, however, unnecessary for me to discuss that question as I have formed a definite opinion with regard to the liability of the Council in respect of the breach of Regulation 37, which requires bare low-pressure wires to be disconnected when workmen are engaged upon them. It is clear that there was a breach of that regulation by the engineer of the defendant Council in not first disconnecting the power before ordering the plaintiff to cut the lines, and to that breach must be attributed the accident to the plaintiff.

In the House of Lords case of **Butler v. Fife** 1912 A.C. 149 Lord Kinnear said: "If rules are broken and mischief

> "follows, there is prima facie evidence of failure "of duty and although the employer may have a "complete defence if he has done his best the burden "of proving it lies upon him."

Adams, J. May 11th, 1926. Christchurch.

SHAW v. ELECTRIC PRODUCTS & GRAMOPHONES LTD.

Practice—R.257 (a)—Claim for damages and accounts—Whether jury more competent to try issues than Judge.

This was a summons in Chambers for an order for trial before a jury in lieu of a Judge alone.

The plaintiff claimed damages for wrongful dismissal and balance of statement of account. The defendant admitted the dismissal, but pleaded that it was for cause, alleging that the plaintiff had appropriated certain sums of money; altered the date of an agreement, thereby conferring an advantage upon himself; and had sold goods of his own in the defendant's shop, contrary to the terms of his employment. The defendant counter-claimed for the sum of £50 general damages for breach of the contract of service.

Hunter, in support:

The issue as to whether the dismissal was wrongful should be tried before a jury, since it involved allegations of dis-

honesty, and a jury had always been recognised as the proper tribunal to try such issues. The case differed from **Dinnie v. His Majesty the King** (1916) G.L.R. 34 since the questions involved were pure fact. It was not proposed to trouble the Court with the claim for the balance of account as that could be referred to the Registrar.

Sim, opposing:

Cited **Clare v. The Canton Insurance Office Ltd.**, (1925) G.L.R. 268 and **Hearle v. Benny** (1926) G.L.R. 33. The application must proceed upon the assumption that both Judge and jury were equally competent to try any question of fact, and the onus was upon the applicant to establish that the matter could be more conveniently tried before a jury. No real reasons could be advanced why it was more convenient.

ADAMS, J. (Orally):

The burden was upon the applicant to show grounds why it would be more convenient to try the case before a jury. The action involved both a common law claim for damages and an inquiry into the balance of an account. In the circumstances he could not see his way to order a trial before a jury.

Reed, J. Apl. 22, May 11, 1926.
Auckland.

FRANKLYN COUNTY COUNCIL v. BOARD OF WESLEY TRAINING COLLEGE.

Rating—School—Rating Act 1908, Sec. 2 (g)—"Not carried on exclusively for gain or profit."

The plaintiff claimed £136 11s. 8d. for rates from defendant in respect of their school in the district. Farming played a large part in the instruction of the boys at the school. The conditions of the school are as stated in the reasons of the learned Judge, viz.:..

In pursuance of the powers conferred, the Board, in 1918, acquired an area of about 681 acres of second class land, in the Karaka District, some 30 miles from Auckland. Upon this have been erected large and commodious school buildings. There are 110 boys at the school, all boarders, of whom about 70 per cent. are over the age of 13 years. There are about 30 free scholars, and the rest pay about half the amount of fees usually charged in secondary schools. Boys, who, upon entrance, have not passed the proficiency examination—the 6th standard—are required to sit for it. Those that have passed it must prepare and sit for the Public Service examination or Matriculation. The ordinary routine of school duties is as follows: All the boys before breakfast are engaged in minor farm duties such as pig feeding, care of fowls, etc., and from 9.30 to 12 upon school work. During this period, from three to five boys are engaged in some farm work in connection with horses, whilst at shearing and harvesting time, a much larger number of boys are working. The rest of the boys are doing the ordinary school work, as taught in the primary and secondary schools, including, however, animal husbandry and farm subjects, with soil analysis and chemistry, and the testing and treatment of manures. Every boy has an experimental plot. From 1.15 to 5 or later all the boys are engaged on farm work. The boys, under the supervision of a senior instructor, do all the testing for butter-fat.

The Principal and teachers of the school are paid salaries and provided with residential quarters and board. The Principal acts as farm manager and has under him competent men employed in four different branches of farming, who, under his direction, act as supervisors of the agricultural work of the pupils. These men are paid wages, and provided with residential quarters and board. No casual labour is employed.

The condition of the property, as at the 1st April, 1924 (the commencement of the period for which the rates are claimed) was as follows, all areas being approximate; an area of about 120 acres, all fully improved, was being farmed as a dairy farm; about 410 acres, all fully improved, were carrying sheep; about 10 acres contained the actual buildings, orchard, playground, experimental plots, etc., and there was an area of something over 140 acres of land which, having reverted, during the occupancy of the previous owner, to scrub and second growth, was being gradually brought into grass. At the date of the hearing of this case there was still an area of 40 or 50 acres in this reverted state. The reverted land was, as a whole, the worst on the farm, being described as "typical third class sheep grazing land."

Balance sheets were produced. The working account of the farm shows a net profit, for the year ending 31st December, 1924, of £289 17s 0d. This, however, is without making any allowance for interest on capital. Upon the school itself there is a net loss of £1,207 14s. 1d. The general income and expenditure account of the Board shows an excess of expenditure over income of £42 5s. 3d. The principal item of income is a sum of £3,226 from rents received from the trust properties. As an indication of the size of the operations on the farm it may be observed that the receipts were:

Sales of **Stock**	..	£697	2	2
Wool	..	475	13	2
Cream	..	720	7	4
Produce	..	50	18	2
		£1,944	0	10

and the stock in hand was valued at £2,547 3s. 0d.; and the gross profits were £2,065 8s. 11d.

His Honour on reviewing the evidence of the school's principal held that the school was a general educational institution where the special subject agriculture was taught as one of the branches of the general system of education and that the teaching of agriculture was one of the principal parts of the school curriculum and that the whole of the land was necessary to carry out that teaching efficiently.

Beckerleg for plaintiff.
Richmond for defendant.

REED, J., gave judgment for the defendant. He held that the cases Remuera Road Board v. Smith, 32 N.Z.L.R. 895 and Hawkes Bay County v. Welch, 1919, N.Z.L.R. 474, were direct authorities in favour of exemption.

Solicitors for plaintiff: **A Hanna**, Auckland.
Solicitors for defendant: **Buddle, Richmond & Buddle**, Auckland.

Herdman, J. Apl. 23, 26, 1926.
Auckland.

HANSEN ET AL v. SHIP "GUY C GOSS."

Shipping—Debt—Wages due master and crew—Arrest of ship—Freight—Prepaid—Whether lien attaches—Practice Rs. 108 & 112 Vice Admiralty Rules—Setting down.

Action by the master and crew of a vessel claiming a lien upon the vessel, the freight, and the cargo in respect of wages and disbursements.

The plaintiffs were the master and crew of an American vessel registered in the United States of America. The Articles of Service had been signed in Vancouver before the American consul and a cargo had been shipped there for delivery at various ports in New Zealand. The vessel was under charter and the whole of the freight was prepaid to the charterers. Upon their arrival at Auckland the master had made repeated efforts to secure the payment of the wages due to the crew and to himself together with the reimbursement of certain expenses necessarily incurred: these efforts proved unsuccessful and the necessary steps were taken for the arrest of the vessel and for the establishment of a lien upon the ship, her freight, and cargo. Prior to the trial of the action, an application was made by motion by the consignees to the effect that their goods be discharged altogether from the effects of the order of arrest upon the grounds that, as all freight thereon had been prepaid, no lien attached thereto. His Honour pointed out that up to that time the action had not been formally set down for trial, and the notices required by the Vice Admiralty Court Rules had not been given: he therefore doubted whether the Court had, in the circumstances juris-

diction to hear the application for release of the cargo. Counsel for plaintiffs undertook to set the case down forthwith and the other parties concerned consented to waive their rights to the formal notice prescribed by the Rules. His Honour then intimated that he would, in the meantime, hear the arguments of Counsel, and would take them into consideration in conjunction with the evidence adduced at the trial, this course being adopted in order to facilitate an early decision upon the questions involved. The arguments set out below were submitted to the Court.

McVeagh for the master of the vessel.
Holmden for the crew.
Meredith & Hubble for the Public Works Department, one of the consignees.
Finlay for all the other consignees except two who were not directly represented.

Finlay in support of the motion for the discharge of the cargo.

The action has not yet been set down, nor has the necessary notice of trial been given as required by Rules 108 and 112 of the Vice Admiralty Court Rules. N.Z. Gazette, 1884, Vol. 1, pp. 415 421. We are prepared to waive these matters in order that the trial of the action may be hastened. The Court has jurisdiction to hear the present motion.

(Holmden: There is a preliminary objection: The validity of the lien depends upon the terms of the Articles and they are now in the custody of the American Consul who refuses to produce them unless ordered so to do by the Court.)

HERDMAN, J., I think that steps should be taken to arrange with the Consul to appear and to produce the Articles.

Finlay: As to the question of jurisdiction, see the Colonial Courts of Admiralty Act (Imp.) 1890 (53 & 54 Vict. C 27) s. 2. The Court sitting as an Admiralty Court in New Zealand has the same jurisdiction as the Admiralty Court in England. English Courts have repeatedly exercised a jurisdiction over foreign ships: the **Herzogin Marie 5 L.T. (N.S.) 88.** There is no material difference between the English and the American law upon the question now before the Court: **American and English Encyclopaedia Vol. 25, p. 114.** The lex fori applies because the question before the Court is one of remedy and we are construing an English statute (applicable to New Zealand) with reference to property which is within the jurisdiction of this Court. This view is strengthened by the decision in the case of the **Minna Craig Steamship Co. v. The Chartered Bank of India, London and China (1897) 1 Q.B., 460:** see also the **American and English Encyclopaedia Vol. 25, p. 117.** English law may be said to consist in part of Common Law and in part of Statute Law. No English statute gives in express terms a right of lien to a crew for their wages. The only statutory provision bearing on the matter is s. 167 of the Merchant Shipping Act, 1894 (Eng.). The duty of the Court, therefore, is to ascertain the Common Law on the point. No authoritative writer says that the captain and crew have a lien on the cargo where the freight has been paid: **the Lady Durham 3 Hagg. Admiralty Rep. 196, 200.** By implication, the same view appears in **Roscoe's Admiralty Practice, 4th Ed. 253:** see also **Temperley's Merchant Shipping Acts 3rd Ed. 98, Note (b) How v. Kirchner 11 Moore's Priv. Council Cases 21: Halsbury, Laws of England, Vol. 26, p. 620, par. 980.** A sale of cargo by the master of a ship is a matter requiring the utmost caution on his part, for the cargo has been delivered to him for the express purpose of its being forwarded to its destination: **Halsbury, Laws of England (11).** The master must act so as to protect the interests of the owners of the cargo. But the ship has now arrived at the port to which the bulk of the cargo was consigned and the remaining consignees are willing to take delivery here. There is no interest of the cargo owners which the master needs to protect. He has now no authority to hypothecate the cargo to raise funds: Halsbury, **Laws of England, Vol. 26, p. 242, par. 336.** As to evidence of American Law see our **Evidence Act 1908, ss. 40, 41.**

Meredith: I adopt the argument of my learned friend, Mr. Finlay. The Court should look at **Rule 141 of the Vice Admiralty Court Rules, N.Z. Gazette 1884, Vol. I, p. 415, 422.** This rule enables the Court to order that the cargo be discharged from the ship and placed on shore in the custody of the Marshall and it will remain in his custody pending the conclusion of the present litigation. See Order 46 made in pursuance of this Rule: **N.Z. Gaz. 1884, Vol. I, p. 435.**

Rule 141 does not enable the Court to discharge the cargo from the effects of the lien.

McVeagh, for the master:

Rule 141 (supra) applies only to an unloading and not to a "release" of the cargo.

Holmden, for the crew:

The crew have a lien upon the freight: even if the freight upon the cargo has been paid, the claim of the crew must stand.

HERDMAN, J. (After reviewing the facts, His Honour proceeded:) The immediate question is whether any part of the freight remains unpaid. The onus of proving this matter rests upon the plaintiffs. That onus has not been discharged. In fact it is admitted, as against the master, that the freight has been paid: and there is other evidence before me to the same effect. The plaintiffs clearly have in respect of their unpaid wages a lien upon the ship and upon the freight, as freight. They are entitled to sell the ship in satisfaction of their claim. But the cargo upon which all freight has been paid is the property of the consignees. A mariner has no lien upon the cargo as cargo: this is clear from the decision in the case of the **Lady Durham, 3 Hagg. Admiralty Rep. pp. 196, 200.** So far as the cargo is subject to freight he may attach it as a security for the freight that may be due. In the present case, there is no freight due and therefore no lien upon the cargo. The plaintiffs having seized the ship, they will be entitled to adopt the proper procedure to sell the ship they have thus arrested. I accordingly give judgment for the full amount claimed by the plaintiffs for wages and for disbursements: but I hold that the plaintiffs are entitled to no rights as against the cargo, and I give leave to withdraw the writ of arrest as against the cargo and I direct that it be released from the effects of the process of arrest in order that it may be discharged from the ship. Judgment for plaintiffs for amount claimed and leave granted to withdraw writ of arrest as against cargo.

Solicitors for the master of the vessel: **Russell, Campbell & McVeagh,** Auckland.
Solicitors for the crew of the vessel: **Wynyard, Wilson, Vallance & Holmden,** Auckland.
Solicitors for the Public Works Department: **Meredith & Paterson,** Auckland.
Solicitors for the remaining consignees: **G. P. Finlay,** Auckland.

MacGregor, J. May 6, 12, 1926.
Wellington.

IN RE USHER DECEASED: DIX v. PUBLIC TRUSTEE.

Will—"Personal effects"—Whether passes residue—Surrounding clauses — Whether effect different had clause been at end of will.

This was an originating summons to have determined the meaning of the following sub-clause of the will of Sarah Usher deceased.

That sub-clause reads as follows:—

> "To my two said sisters **Amelia Dix** and **Emma "Webley** the residue of my jewellery and personal "effects in equal shares should they both survive me "and should only one of my said sisters survive "me then wholly to that one."

The question put to the Court was whether the testatrix bequeathed to her two sisters, Amelia Dix and Emma Webley, the whole of the residuary personal estate by virtue of the above sub-clause.

H. F. Johnston for plaintiffs.
Gray, K.C. and **Clere** for residuary legatees.
Kelly for Public Trustee.

MACGREGOR, J., answered the question in the negative. He said:

The precise words to be construed are—"the residue of my jewellery and personal effects." The plaintiffs assert,

and the residuary beneficiaries deny, that these words as used in sub-clause 3 (g) are wide enough to pass to the plaintiffs the whole of the residuary personal estate of the testatrix—amounting in value to some thousands of pounds. The plaintiffs further contend that in construing these words the Court is in the present case not at liberty to apply the rule of **eiusdem generis**. Apart from the **eiusdem generis** rule, however, it appears to me that in this case there are distinct grounds which can be collected from the context of the will for considering the words in question as used in a special and restricted sense. It may, indeed, be admitted that had sub-clause 3 (g) been the last clause in the will the wider construction of the words contended for by the plaintiffs probably would have prevailed. The law on the subject is thus broadly stated in "**Halsbury on Wills** (vol. 28, pages 700/1):—

> "A gift of the testator's 'effects' without a context sufficient to control it, may include the whole "of the testator's personal estate where that property is not otherwise disposed of by the will, ... "and the expression is frequently used in a restricted sense, meaning goods and moveables, a sense "specially applicable where other parts of the personal estate are otherwise disposed of, or where "there is a subsequent residuary gift of personal "estate."

In applying the law so stated to the present case it is of course necessary to bear in mind what may be termed the testamentary circumstances. The estate of the testatrix consists of real property valued at over £700 and personal property valued at over £7,000. The will itself is divided into seven distinct clauses. The general scheme of the will is, after bequeathing numerous legacies to relatives and friends of the testatrix, to divide the real and personal residue between a Methodist Orphanage and a Methodist Sunday School in which the testatrix appears to have been deeply interested. The general residuary gift is contained in Clause No. 6, which is followed only by a machinery clause giving to the trustees various powers and authorities as to the sale or lease of any part of the trust estate. Clause 3 is a long clause, consisting of twenty-one sub-clauses (a) to (u).

It commences as follows:—"I give and bequeath the following legacies in each case free from all duties and "deductions."

Clause 3 then proceeds by its various sub-clauses to give pecuniary and other legacies to various relatives, friends, and institutions. To one of the plaintiffs she gives a pecuniary legacy and also a specified gold watch, and to the other a pecuniary legacy and a marked gold ring. Then comes sub-clause 3 (g) already set out, followed immediately by the remaining sub-clauses (h) to (u) bequeathing further gifts to various named legatees.

It is obvious, I think, from its position and contents that clause 3 (g) was not intended by the testatrix to operate as a residuary gift in any real sense, but rather as a specific bequest to her two sisters equally of her jewellery and trinkets—apart from the designated gold watch and ring already given to them respectively.

From the stamp duty accounts it appears that these articles of jewellery et cetera do not exceed in value the sum of £8 in all. Then follow clauses 4 and 5 of the will, which I need not set out here, but which appear to me from their terms to be on the whole inconsistent with the idea that clause 3 (g) did or could operate (as suggested by the plaintiffs) to pass to the plaintiffs the whole of the residuary personal estate of the testatrix. The residuary gift itself is contained in clause 6, the material portion of which is as follows:—

> "**I give devise and bequeath** the whole of my "estate both real and personal of whatsoever nature "and wheresoever situate not hereinbefore otherwise "disposed of **upon trust** to pay my just debts funeral "and testamentary expenses and the legacies be"queathed by this my will or any codicil thereto and "to stand possessed of the residue hereinbefore re"ferred to as 'my residuary estate' upon trust to "divide the same into four parts so that the **South** "**Island Methodist Orphanage**, Papanui, Christchurch, "shall take three of such parts and the **Nelson** "**Methodist Sunday School** (I being both a scholar "and Sunday school teacher in this school) shall take "one of such parts."

Clause 6 in its context was subjected by Mr. Johnston to a minute and critical examination, from which he deduced in the result that the clause was not really a residuary gift of the personalty at all, inasmuch as that personalty had already been disposed of by the terms of clause 3 (g), and had therefore been "hereinbefore otherwise disposed of." This argument appears to me rather to beg the present question. It was supported by the citation of numerous cases, most of them referred to in **Jarman on Wills**, illustrating the rule that the word "effects" used in a will may comprise the entire residuary personal estate of a testator. But this general rule is capable of being restrained and limited in various ways, as appears from **Jarman** (pp. 1022 et. seq.). It may be restrained by the context of the whole will within narrower limits. It may further be limited in appropriate cases by the operation of the rule of construction known as **eiusdem generis.** It has been frequently applied as a last resort and only to prevent an intestacy as to any part of the estate. And finally, as Mr. Jarman himself says (p. 1032.): "It is to be observed, "however, that in all the preceding cases, there was "no other bequest capable of operating on the general "residue of the testator's personal estate, if the "clause in question did not. Where there is such a "bequest it supplies an argument of no inconsider"able weight in favour of the restricted construc"tion, which is then recommended by the anxiety "always felt to give to a will such a construction as "will render every part of it sensible, consistent, and "operative."

Applying these considerations to the present case it is, I think, fairly clear that the words in question must be construed in a somewhat restricted sense, in order to render every part of the will of the testatrix at once "sensible, consistent and operative." The expression used is not "effects" standing alone, but "personal effects" associated with the term "jewellery." In the result it appears to me that the wide rule relied on by the plaintiffs does not apply here

(1) because it is restrained by the context of the will itself within narrower limits;
(2) because of the probable operation of the rule of construction known as **eiusdem generis;**
(3) because here there can arise no question of creating an intestacy, inasmuch as
(4) there exists in a later part of the will clause 6, which in my opinion is a valid and effectual residuary clause operating on the residuary personal estate of the testatrix claimed by the plaintiffs as passing to them under 3 (g).

For these reasons I think that the answer to the question put by the summons must be as follows:—That under subsection (g) of clause 3, of the said will the whole of the residuary personal estate does not pass to the said Amelia Dix and Emma Webley, the above-named plaintiffs.

On the question raised during the argument by Mr. Johnston as to whether the words were wide enough to include household furniture the learned Judge, without deciding the matter, referred to the recent decision of Eve, J., in **Re Taylor, Barker v. Smith,** 147 L.T. Journal 253.

Solicitors for plaintiffs: **Johnston & O. & R. Beere,** Wellington.

Solicitors for residuary legatees: **Gray & Sladden,** Wellington.

Solicitors for Public Trust Office: **G. G. Rose,** Wellington.

Ostler, J., April 29, May 14, 1926. Wellington.

IN RE JOYCE DECEASED: PUBLIC TRUSTEE v. SMITH.

Will—Three contingencies mentioned in will—Two only provided for—Whether cross limitation ought to be implied.

This was an originating summons to clear up an ambiguity of the will of James Brown Joyce deceased. We take the facts from the reasons of the learned Judge.

The will is dated the 25th May, 1895, and the testator died on the 7th September, 1897. The testator was married in Melbourne in 1853, but separated from his wife shortly after the marriage, and apparently there was no issue of the marriage. In 1861 the testator married again. There is no information before the Court as to whether the first wife was living when the second marriage took place. In the absence of evidence to the contrary it must, I think, be presumed that at the time of the second marriage the first

wife was dead. By the second marriage the testator had two daughters, Ann and Mary. Mary was never married. She died on the 13th April, 1925, leaving no issue. Ann was married on the 24th September, 1887, to John Magnus Magnussen Hagland, and by him she had thirteen children, two of whom died in infancy , and the other eleven of whom are still living. Ann died on the 4th December, 1921, more than three years earlier than Mary.

By his will the testator, after certain bequests to his second wife, directed his executor to convert the balance of his estate into money, to invest the proceeds in the Common Fund of the Public Trust Office, to pay his wife £100 per annum for her life and to divide the balance of the income equally between Ann and Mary, and after the death of his wife to divide the whole of the income equally between the two daughters for their lives. The will then directed that "after the death of either of them should they leave any children" the trustee might apply the share of such income theretofore coming to such deceased parent for the benefit and maintenance of such one or more of the children who in the discretion of the trustee should require the same .... and that all accrued accumulations of income not used should be added to the capital, with power to resort thereto if required, "and on the youngest child of either stock attaining the age of 21 years I direct that the share of the money in the hands of my trustee appropriated to such stock both the capital sum and the accumulated income if any shall be divided among such children in equal shares, etc."

Then follow the words of the will that have created the difficulty, and I quote them in full:

> "Should one daughter predecease the other leaving no children or leaving children should they all "die before attaining the age of twenty one years "I DIRECT that the share of the income of such "deceased daughter or her issue shall be paid to the "surviving daughter for her life and after death or "if she be dead I DIRECT that the whole of the "capital and accumulated income be divided equally "among the children of such survivor on their attaining the age of twenty one years as hereinbefore "recited. In the event of there being no children "living to become entitled to payment the residue of "my estate shall be distributed as if I had died intestate in respect thereof."

Kelly for Public Trustee.
Archer for next-of-kin.
von Haast for grandchildren.

OSTLER, J., in deciding that the moiety of the testator's residue must go as on an intestacy said inter alia:

It is argued by Mr. von Haast, who represented these eleven children that the Court ought to imply a cross-limitation in the will to fill up this gap and provide for this contingency which the testator omitted. The argument is that the intention of the will to be gathered from reading it as a whole was to benefit the stock of both his daughters, and that it was only on the failure of grandchildren by either daughter attaining 21 years that there was to be a gift over. Reliance was placed on the principle expounded in the cases of **re Hudson (20 Ch.D. 406); re Ridges Trusts (L.R. 7 Ch. 665); re Clark's Trusts (32 L. 325); Vanderplank v. King (3 Hare 1).** In re Hudson Kay, J., reviewed the cases and deduced from them the following rules:—

(1) Cross executory limitations are only implied to fill up a hiatus in the limitation which seems from the context to have been unintentional.

(2) They cannot be implied to divest an interest given by the will.

(3) The existence of other cross-limitations between different persons does not prevent the implication.

(4) But where such cross limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention.

The intention of the testator can, of course, only be gathered from the terms of the will. In this case, reading the will as a whole, I find it impossible to determine that the clear intention of the testator was that the gift over was to be only in default of children of either daughter attaining 21 years of age. One might conjecture that this was the intention; but it would be mere conjecture. The Court is not entitled to assume, because to benefit first the children of both daughters seems reasonable that that must have been the testator's intention. Nor should the Court give effect to a presumption against the caprice of the testator if to do so would involve doing violence to the clear words he has used: see **In re Hamlet (39 Ch.D. at 436).** Even if there were clear evidence of intention the cross-limitation contended for could not be implied without ignoring the clear terms of the will. It has been laid down by the highest authority that this should not be done by the Court: see **Scale v. Rawlins (1892) A.C. 342.** Moreover the cases show that cross-limitations are implied to avoid an intestacy. In this case if the cross-limitation contended for is not implied there will still be no intestacy. The testator has clearly provided how the property is to be disposed of in the event of neither of the two contingencies he provided for happening. In that case he directed that the residue should be distributed as though he died intestate, and so he has completely disposed of his estate. In my opinion the Court is not justified in altering the clear terms of this will and, by implying a cross-limitation, doing violence to its language. It must be presumed that the testator meant what he said, and omitted the third possible contingency intentionally, as was found to be the case in **In re Mears (1914) 1 Ch. 694).**

COURT OF ARBITRATION

Frazer, J. September 16, 1925.
New Plymouth.

GOULDEN v. BURKE.

Worker's Compensation—Accident causing death—Contract of Service—Worker.

The facts appear sufficiently from the argument.
O'Dea for plaintiff.
Weir and **Sheat** for defendant.
O'Dea.

This is an unusual case. The Deceased, who was the husband of the plaintiff, and defendant, with two other farmers, owned a haymaking plant in common. They agreed to get in hay on each other's farms working in turn about. At first no arrangement was made as to payment, but as some worked more than others it was agreed in June, 1924, that for the future a record of time worked was to be kept and anyone who worked more than his share was to be paid 2s. per hour.

(FRAZER, J.: We had a similar case in Christchurch some time ago but we decided it on another point. A similar practice appears to prevail among sheep-farmers with regard to shearing.)

It is submitted that each farmer controlled the labour of the others while on his farm. (1) He marked out the size of the haystack and its position. (2) He directed what work should be done by each man, though after they had worked for some time it was recognised that each man was best fitted for a certain job and usually took that job. (3) The farmer on whose farm the work was being done would direct when work would cease for meal times or for the day. (4) If one of the men wished to leave early he would ask leave of this farmer. The defendant was owing deceased £4 10s. for work done while haymaking at the date of the accident, when he was killed by a pole falling on him in the hayfield, on the 12th March, 1925. This amount the defendant has paid to the plaintiff, deceased's widow.

My submission is that there were several contracts of service, each reducible to this form: Each farmer in effect said to the others: "You work for me at 2s. per hour, but you must set off against all the work you do for me all the work I have done for you also at 2s. per hour. While you are working for me you are my employee. While I am working for you I am your employee." The main test as to a contract of service is the question of control: 20 Halsbury 67 para. 134. It is not suggested that the farmers were independent contractors, and the relationship cannot be partnership although the haymaking plant was held in common. There were no profits or losses, and each farmer owned the stack that was built on his farm. If this is not a contract of service what is it? The Defendant will

refer to the case of **Kemp v. Lewis** (7 B.W.C.C. 422). In that case a quarryman was injured while engaged in haymaking. It was the custom for the quarrymen to do work haymaking for farmers after their ordinary day's work was over. No payment of money was agreed upon but it was the custom for the farmer to provide beer or supper. It was held that this was gratuitous and that there was no contract of service. That is not the case here. As to the question of control in contracts of service: **Corrie v. Pithie** (1920 G.L.R. 254); **O'Donnell v. Clare County Council** (6 B.W.C.C. 457); **Jones v. Penwyllt Dinas Silica Brick Co.** (6 B.W.C.C. 491); **Underwood v. Perry & Son, Ltd.** (15 B.W.C.C. 131; also at page 257). This is not a joint adventure: **Jamieson v. Clark** (2 B.W.C.C. 228 at page 233).

Weir for Defendant:—

It is contended that the deceased Goulden was not a "worker" within the meaning of the Worker's Compensation Act, 1922, inasmuch as there did not exist between the deceased and the Defendant a contract for service as is contemplated by the act. A contract of service must be such a contract between the parties as to contain an obligation to render service which if not fulfilled by either party would give rise to an action ex contractu, i.e., sounding in damages for a breach thereof (Macdonald's Workers' Compensation Act, page 181).

Whether a contract of service exists or not is to be determined by applying the rules of Common Law to the facts of each case, the chief test being the existence or non-existence of control (Macdonald page 181). In the present case there had been constituted between the deceased and the defendant Burke no contract of service whereby Burke was the employer and the deceased was the employee, and whereby Burke or the deceased could have sued each other for any breach thereof. In fact, the arrangement or agreement entered into was one entered into by four parties of whom deceased Goulden and the defendant were but two, and it was—

(a) An agreement of co-operation, or
(b) An agreement to contribute personal labour and assistance to a common object, or
(c) An agreement whereby the four parties concerned became partners to assist one another to carry out a common object.

In such an agreement there is no such contract of service as is essential to constitute one or more of them workers within the meaning of the Act and there is nothing to show who of the four, when working as a gang, was the master or masters, and who the servant or servants. Which of them had the right to prescribe to the other the end of his work or retained the power of controlling the work? If the defendant was the master and the deceased Goulden the servant on the particular day of the accident on Burke's farm then the arrangements made by the gang must be altered and broken into a series of separate and distinct contracts whereby each day the gang worked on any particular farm the member of the gang whose farm that day was being worked was the master and the other members the servants. The arrangement between the parties was obviously not this. It is clear that in a contract of service there must be two distinct parties, an employer and an employee. For the purposes of the Workers' Compensation Act the status of master and servant must be a continuing one for a certain period of time, **Ellis v. Ellis & Co., Ltd.**, 7 W.C.C. cases p. 97 C.A. If there was a contract of any description between the parties is was an agreement of co-operation or assistance towards a common object. Such a contract or arrangement does not come within the Act.

FRAZER, J. (Orally):—

There is no dispute as to the facts. The question is one of law as to whether the deceased, Goulden, was a worker within the meaning of the Act so as to render the defendant liable to pay compensation for his death. Apparently the four men concerned had come to an arrangement for "pooling" their labour for the purposes of haymaking. I think the matter of control has been overstated, and I am of opinion that the man in charge of the operations at the respective farms was more in the nature of a leader of the gang than a master of servants. He could not have dismissed any one of them without a kind of general conference of all and the formulating of a new arrangement after an adjustment of matters between them. A contract of service has not been established. Judgment is accordingly given for the defendant, and leave reserved to apply for costs.

Solicitors for plaintiff: **O'Dea & Bayley**, Hawera.
Solicitors for defendant: **Syme & Weir**, Eltham.

(Contributed by P. O'Dea.)

OF PLEADERS AND THEIR ANSWERS.

There be pleaders that think their whole duty is to make to the Judge a discourse that they have prepared. Such are commonly impatient if the Judge seem not minded to listen to that which they have carefully conned over, but would draw them into other matters that the pleader maybe has but ill considered. But the fault is often with the pleader and not with the Judge. The duty of the pleader is to persuade the Judge to choose one judgment, if it may rightfully be chosen. To that end, the pleader must so speak as the occasion shows to be needful. But it is waste of breath to tell a Judge with many words that which he well knows or clearly perceives. Therefore, all such things should be omitted, if the pleader can come by the knowledge that they are not needful. Other matters, however, may not be clear, upon which the pleader had counted beforehand for a ready hearing, the fault whereof may be in his bad pleading, and not in the bad understanding of the Judge. And where the fault lies concerns not the pleader. It would be an ill excuse to a suitor to say: "You lost your cause because the Judge was a fool. I could have cured him of his folly, but I would not." He that comes not to make a discourse, but after digesting all the matter, to persuade by speech, will rejoice to be questioned. By questions he learns both the parts he should omit and the parts he should repeat and strive earnestly to make clear. It is tedious labour to dispute with a dumb man, but he at least by signs, may show his mind. To argue before a Judge who would make neither speech nor sign until he delivered judgment would be after the manner of the ancients when they consulted an oracle. But we know a Judge for a man though a wise one, and should expect to speak to him as to a man and not as to a dumb idol. Therefore, all questions that a pleader may answer readily, he will answer gladly, as he that would sell a sound beast rejoiceth to give trial. But if questions come upon the pleader unawares, he should take heed, for herein is much mischief. Some are so jealous of their own fame that they will be bold to answer what they have scarce heard asked, much less weighed or considered. Whereby in the end they make shipwreck of their own fame, which is a small matter, and of the suitor's cause, which is a great matter. Others will answer courteously that if the Judge do but attend, he will hear his question answered in that which is to come. And this is a good answer if it be true, and a very evil answer if it be false. When two play at foils and one hath an open place in his armour, he will not lose, so he guard it till the end of the bout. But it is not thus in the play betwixt a Judge and a pleader. When the argument hath ended, the pleader hath dropped his weapon. But till the Judge be delivered of his judgment, he holdeth still his foil with which he may pierce the weak spot when it is all unguarded. Others rather than discourteously give no answer or shamefacedly admit that they have no answer, will make pretence to answer, but will answer what was never asked. This also is very evil. For the Judge, being as he is, but human, may perplex himself thereafter

(when he should rather attend to the argument) whether that bad answer was caused by defect of understanding or defect of honesty in the pleader. Whereby the pleader and his argument suffer, however the Judge resolve that perplexity. Others will discourteously hint to the Judge that this question is naught to the matter in hand. And if this were done to an equal in station in private disputation, maybe he would presently satisfy you that the error was in you, and that the question was one fit to be considered. And then considering it, and answering it, you would answer also the difficulty that beset his understanding. But if you speak thus to a Judge, he may consider only what is due to the dignity of his office and refuse further parley. Thereafter you may speak without questions, and with great pleasure in the ornaments of your own discourse, but as you are presently to discover, without persuading, where maybe you could have persuaded had you been willing at the first to be humble. When, therefore, aught is asked that the pleader cannot readily answer, it were prudent first to have the Judge to state his question clearly. Thus shall some time be gained for thought, and maybe, the answer will appear where before was only darkness and confusion. If this will not do, it were better to say: "I cannot answer, but I have here matters that seem to me fit to be unfolded. I pray thee let me unfold them. Then perchance thy questions will seem needless. But if I stand here grappling with many questions that I do not understand, I shall fail to unfold even such poor matters, as I have prepared. And that way neither thou, nor I, nor the suit can prosper." Such an answer showeth forth courtesy, courage and honesty in the pleader. And the Judge, who is a man, though a wise one withal, will remember the early beginnings of his own wisdom and learning, and will pray the honest pleader to make his discourse. And to that discourse he will give an earnest ear, and if perchance at the end he ask more questions, he will ask them with all gentleness.

LONDON LETTER.

Temple, London,
17th March, 1926.

My Dear N.Z.,—

The event of the week is the death of the Treasury Solicitor and King's Proctor, a very great loss to the whole profession. Clive Lawrence was the very remarkable son of a very remarkable father; indeed, he inherited all his great humanity, as was obvious to all who knew them both, and also his tremendous vitality, as was less obvious owing to the very different call put upon that vitality in the case of the father and the case of the son. Lord Trevethin can only be referred to, in this context, by the name under which he was so well known at the Bar and as a Puisne Judge: A. T. Lawrence. In his prime "A.T." was little short of marvellous, by reason of his tremendous capacity of grasp. He had achieved greatness at the Bar long before he had developed even a modicum of eloquence; oratory was little to his taste and he delayed taking silk for a long time, owing to his dislike of speaking. But he had a tremendous vigour, and such force that he could surmount any accumulation of work and even indulge, to some extent, his own love of leisurely living. I have been told that even at his present age, which is not small, he has often to be searched for at the hour of dinner, when he has gone out fishing! There, of course, is perennial youth.

By the blow of misfortune after misfortune, Clive Lawrence's physique had been put, from his school days, to such severe tests of endurance as you would think no man could survive. He has described his body as a veritable battle-field of surgeons; but the wound is the least trial of a surgical operation. It would seem as if every resource, from which he might derive the strength to live, had been exhausted; and his diet, for the last thirty years has been such that you would think there was not an ounce of nourishment in it. It can only be said of him that he remained more than alive, the jolliest and best and least melancholy of good fellows, the sturdiest and kindest of friends. As well as morale, he derived from his father that astounding instinct for the right course and that infallible judgment as to where the truth lay. He is a very, very great loss.

I don't know that I can usefully add to my note, as to the new Silks; what I have said anticipates anything I could now say. I fancy I did not mention C. B. Marriott, among the intending? I don't know that I knew that he was intending. I can say of him, quite shortly, that he is much more the older type of recruit to the Front Bench: a man of age and experience, long known of and gradually developed. I mark him down as the man of whom, in a year or two, we shall see the name most often among recent King's Counsel. But that is merely my own guess. He is a great man in athletics, and I believe that the Pegasus Races would not race without him. He is, I mean, one of the main points of the Bar Point-to-point.

As to the week's cases, the Revenue Paper has, I suppose, remained the most interesting feature, though I find nothing very moving in any of the decisions. A number of cases as to agents in this country of principals abroad concentrated themselves into two judgments of Rowlatt, J., on March 9th and 10th, respectively. The first are assembled under the heading of **Gavazzi v. Mace** and turn upon section 31 (6) of the Finance (No. 2) Act, 1915: "an agent not being an authorized person carrying on the non-resident's regular agency." You may be able to understand the section; I am afraid I cannot, and I am comforted by the impression that Rowlatt, J. could not either. The system of charging a non-resident, as to profits made in this country, is not to render the non-resident chargeable in the name of any general "agent" (apart from a particular agency, that is) nor to render him chargeable in the name of such an agent as is within our inverted commas above. One gathers the clear idea of what the Legislature intended, and the cases under review are very clear and logical applications of the intention. But how the words used were ever relied upon to express that intention and to what end they lead, it is difficult to conceive. This is a judgment, and report, not to be epitomised, since (as so often happens in the Revenue Paper) every detail of the facts is essential and, indeed, the decision is almost as much one of fact as of law. It is none the less an important precedent and a clear illustration of the line to be drawn between a non-resident's *alter ego*, in whose name he may become chargeable, and a non-resident's business contact, in whose name he may not become chargeable.

The other agency matter turns on section 41 of the Income Tax Act, 1842, and the position of forwarding agents in this country assessed in respect of the shipping companies abroad, whose agents they are, and in respect of those shipping companies' profits in this country. Here, again, the facts have to be most carefully regarded in order that the application of the principle of **Grainger v. Gough** may be accurately appreciated.

The cases are **Nielsen Anderson & Co. v. Collins (Inspector of Taxes)** : **Tarn v. Scanlon (Surveyor of Taxes)** and there are very full notes in the **Times** of March 11. The point has been thus summarised elsewhere :—" the fact that the agents, though undertaking all the preliminary business as to shipments, did not make the contracts nor sign the bills of lading could not avail to take them out of the section, as to the application of which the determining factor is the receipt by the agent of the profits assessed."

Turning to less heavy stuff, we had more of our friends the cats last week. **Buckle v. Holmes** standardises the position of your domestic pet, even when among your neighbour's pigeons and as far as you are concerned as their master, until the House of Lords intervenes. Cats are not capable of being permanently classified as *ferae naturae* : the classification is not capable of being varied, in different circumstances but as to the same animal. I think this was always the commonsense of it, and the whole excitement over the matter always seemed to me to be worked up. The wireless case, **British Broadcasting Co., Ltd. v. Wireless League Gazette Publishing Co.,** concerned itself only with matters of copyright, and not very new matters at that, though it may be of interest as to various activities in which the Crown these days engages, such as issuing of books of stamps accompanied by display pages of advertisement. The subject-matter, I should mention, was the programmes printed by the plaintiff of current broadcasting, as to which the defendant (to a claim on infringement of copyright) retorted, but retorted unsuccessfully, that the plaintiffs were merely the licencees in respect of a Government monopoly and that the property in the programme and its copyright lay in the Crown. Seeing the title of the case, many of us expected a first discussion of the many novel problems to which broadcasting must eventually give rise.

The Workmen's Compensation appeals in the House of Lords : (**Wilsons & Clyde Coal Company, Ltd. v. McFerrin** ; **Kerr and Others v. Dunlop & Co.** : 14 March) are something of an event, in that they represent the first handling of the new section by the House. By Section 7 of the 1923 Act came the extension of " arising out of and in the course of " an employment to instances where the workman was disobeying positive instructions or contravening statutory regulations, provided he was acting for the purposes of or in connection with the employer's business. Lord Dunedin's reasons for judgment in the first place show clearly that the new section does not wipe out all the requirements of the old (Section 1 of the 1906 Act) to the effect that the accident must arise out of and in the course of the employment ; in the second place it shows, by discussing two cases which fall on the two sides of the line, exactly where the line is to be drawn between what remains of the old section and what is gone. Both appeals arise from blasting operations in a mine and as to accidents which, if orders had been obeyed, would not have occurred. Lord Dunedin quotes himself and we may do the same : " If the thing he " (the workman) " does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accident did not arise out of his employment." (**Barnes v. Nunnery Colliery Company** (1912) A.C. 44.) Another event was almost achieved yesterday, when Lords Justices Bankes and Warrington came within reach of but did not ultimately tackle the much-discussed point, arising under the Rent Restriction Acts, as to subletting by a statutory tenant.

The **Rex v. Ah Tam** murder appeal, to which I referred last week, achieved no purpose except to elicit from the Court of Criminal Appeal a reminder that an indictment for murder should be confined to one murder, without the addition of any other offence. The Insurance case of a week ago (March 9) was, to me, very interesting, at least from the theoretical point of view. In a proposal form, the assured had answered the question : " Do you keep books of account ? " or whatever its exact form may be, in the affirmative, and his answer was a true one. Thereafter, however, and during the continuance of the risk, he ceased to keep books, so that if his statement amounted to any sort of a warranty for the future, there was a breach of it. Of course, it is not a breach of warranty case, strictly so-called, but that seems to me to be a convenient way of putting the point. The case was **Weber v. Employers' Liability Assurance Co.** and MacKinnon, J. decided that the answer to the question imported no statement as to future conduct. One might fairly hope that there will be an appeal, even though the decision would presumably be affirmed. It seems to me a matter which admits of a very full discussion and that, from such a full discussion, an interesting analysis of general principles might result.

Less point seems to me to attach to the contentions in the shipping case of **Rio Tinto Co. v. Seed Shipping Co.** of the same date, though the argument strikes one as being at least ingenious. The facts are interesting and are briefly as follows :—

Given a charterparty with the usual exceptions in the ship-owners' favour as to non-liability for stranding, and so on, we have a vessel putting to sea with a master well over fifty years of age, given to acute attacks of indigestion and presently overtired with particularly exacting labours of loading, etc. As his ship is still negotiating the Clyde, under the charge of a pilot, the master is seized with a violent attack of his malady, so that, at the mouth of the river, he steers south-south-east instead of south-south-west setting a course very different from that which the pilot has directed. The ship is stranded, the charterer suffers and the exception in the shipowners' favour manifestly applies. The charterers are meanwhile left with any claim they may have on any other score, and they assert a claim based alternatively on deviation and on unseaworthiness. The deviation point is most easily dismissed ; essential to any deviation, said Roche, J., is the intention to abandon the route contracted for, and that requirement could not be satisfied by the mere departure, as in the above circumstances, from the course usually adopted in negotiating the particular passage. The point of unseaworthiness is more substantial. Undoubtedly to send a ship to sea with a totally incapable master would be to provide an unseaworthy ship. But the medical evidence in this case was to the effect that the malady was such as would have been treated not by a prohibition to undertake the patient's normal task but by the prescription of a medicine. If physical unfitness of a master is to be relied upon, it was held, there must be proved such unfitness as to render him incapable of assuming command.

With that my note of current cases of interest end. As to the general atmosphere of things legal, I am informed that there is a flicker of business in the commercial list but that my friends on the Chancery side are, on the whole, as little occupied as are people on this side. How far the tendency among Solicitors to take alarm at the effects of the new Law of Property Acts alleviates the position, as far as the pure conveyancers are concerned, does not transpire. I am told that the

rush of new work from this source is slow to mature. Circuit work draws to a conclusion: the Licensing season is nearly over and it looks like being a quiet spring. Perhaps, as in the hardware trades, orders are being held over to see how the coal crisis ends? There seems to be a strong feeling in industrial centres that matters will be settled without anything in the nature of a general strike, but it may well be that the wish is father to the thought.

Yours ever,
INNER TEMPLAR.

THE CONVEYANCER

GUARANTEE CLAUSE IN MORTGAGE.

AND I A. B. of in consideration of the premises do hereby for myself my executors and administrators..covenant with the mortgagee his executors administrators and assigns that if and whenever the mortgagor shall make default in any moneys payable hereunder or in the observance or performance of any covenant on the part of the mortgagor or condition herein contained or implied then and in any such case I the said A. B. my executors or administrators will on demand by the mortgagee make good each and every such default from time to time and will on demand pay to the mortgagee any sum of sums of money which the mortgagor shall be in default to payment AND IT IS HEREBY DECLARED AND AGREED that the mortgagee shall be at liberty to grant to the mortgagor time or indulgence in respect of any of the covenants on the mortgagor's part contained or implied herein and may also grant to the mortgagor any extension or extensions of this mortgage and the granting of any such time indulgence extension or extensions shall not be construed as releasing me my executors or administrators from liability hereunder PROVIDED THAT the covenant herein on my part shall be without prejudice to any other remedies of the mortgagee hereunder in the event of any such default as aforesaid.

PROVISO RE SURETIES IN MORTGAGE.

AND it is hereby expressly agreed and declared by and between the parties hereto that although as between the said AB and CD the said CD may be a surety only yet as between the said CD and the mortgagee the said CD shall for all purposes of these presents be deemed to be a principal debtor to the mortgagee and shall not accordingly be released or discharged from his liability hereunder by reason of time being given to the said AB his executors administrators or assigns or by any variation being made in the terms of this security or by an act or omission on the part of the mortgagee by which the said CD his executors or administrators would or might be released if the said CD were surety only and the liability of the said CD his executors administrators or assigns shall not be put an end to by the death of the said AB but remain and continue so long as any moneys shall remain unpaid under this security AND the mortgagee may if the mortgagee thinks fit without discharging the said CD his executors administrators or assigns grant any time or other indulgence to the said AB his executors administrators or assigns and also may upon such terms and conditions as the mortgagee thinks fit compound with the said AB his executors administrators or assigns or release him or them or this security or other security held by the mortgagee either wholly or in part and may receive dividends out of the estate of the said AB his executors administrators or assigns and all composition dividends and payments which at any time may be received by the mortgagee shall as against the said CD his executors administrators or assigns go or be taken to reduce the indebtedness of the said AB his executors administrators or assigns only by the amount actually received by the mortgagee and the said CD his executors administrators or assigns shall remain liable for the balance which shall remain unpaid and owing to the mortgagee and that the said CD his executors administrators or assigns shall not prove in or against the estate in Bankruptcy insolvency or administration of the said AB in or against any assignments for the benefit of his creditors in competition with the mortgagee and shall not seek in any way to deprive the mortgagee of or to hold the mortgagee accountable for any dividends the mortgagee may receive or be entitled to receive in any such Bankruptcy insolvency administration assignment or composition.

CLAUSE IN MORTGAGE TO ALLOW PRIOR MORTGAGE TO BE POSTPONED.

AND WHEREAS AB has applied to the said CD to advance to him the sum of £..... which the said CD has agreed to do upon having the repayment thereof with interest thereon secured as in manner hereinafter mentioned and upon EF (the prior mortgagee) joining in these presents for the purpose of postponing all principal moneys secured by the said hereinbefore in part recited deed of mortgage registered number ..... and all interest due and to accrue due for the same all other moneys thereby secured and the security respectively to the principal sum of £..... and interest thereon secured by these presents NOW THIS DEED WITNESSETH that in pursuance of the said Agreement and in consideration of £..... paid to the mortgagor with the privity of the said EF the prior mortgagee (the receipt whereof is hereby acknowledged) the said EF doth at the request of the said AB hereby testify convey and assure and the said AB doth hereby convey assure and confirm unto the said CD his executors administrators and assigns ALL that piece or parcel of land etc.....TO HOLD unto the said CD his executors administrators or assigns freed and discharged from the principal moneys secured by the said in part recited Deed of Mortgage registered number..... AND all interest due and to accrue due for the same AND all claims and demands under the same but subject to the Equity of Redemption hereinafter mentioned PROVIDED ALWAYS that if the mortgagor shall pay to the said CD the said principal sum of £..... and all interest and other moneys secured and shall perform and observe all the Covenants conditions and agreements then the said CD will at any time thereafter at the request and cost of the mortgagor convey and assure unto the said EF the said lands hereditaments and premises herein expressed to be hereby conveyed and assured to the said CD as security for the payment etc. SUBJECT to the right of equity of redemption on payment by the mortgagor to the said EF of etc..... to which the said lands and premises would have been subject if these presents had not been executed AND to the same power or sale and other powers and authorities contained in the said in part recited Deed of Mortgage registered number ..... as would have been subsisting if these presents had not been executed. PROVIDED LASTLY that the powers vested in the said EF by the said in part recited deed of mortgage registered number ..... shall not be in any ways altered qualified or abridged except as in so far as may be necessary for postponing the said principal etc. secured by the said in part recited deed of mortgage registered number ..... with the principal etc. secured by the execution of these presents.

BENCH AND BAR.

Mr. John Trevor Burton and Mr. T. E. Henry have commenced the practice of their profession in Dunedin in partnership. Mr. Burton is the son of the late E. W. Burton, Stipendiary Magistrate. He was educated at the Otago High School and received his training in the law at the offices of Mr. R. R. Aspinall, of Dunedin, Mr. G. P. Finlay, of Auckland, and Messrs. Hampson Davys, & Ford, of Rotorua. Mr. Henry's experience at the law was gained at the office of Messrs. Urquhart & Roe of Rotorua. He graduated as Master of Laws with Honours in Contracts, Torts, Roman Law and Company Law.

"The rapidly increasing divorce rate," remarked the new comer, "proves that America is fast becoming the land of the free."

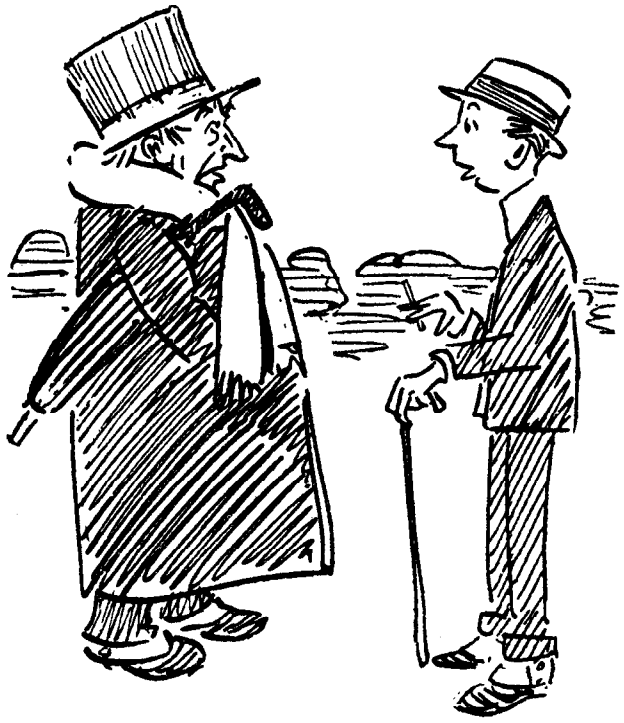
"Yes," said his friend, "but the continuance of the marriage rates shows that it is still the land of the brave."

FORENSIC FABLES

No. 20.

ADOLPHUS BROWN, MR. JUSTICE GRUMP, AND THE INTERESTING CASE.

Adolphus Brown was an Amiable Youth of Gentle Manners and Undistinguished Appearance. Rather to the Surprise of his Oxford Tutor, who had Anticipated that he would Fail to Satisfy the Examiners, Adolphus Secured a Third Class in the Honours School of Jurisprudence Heartened by his Success, old Mr. Brown insisted that Adolphus should become a Member of the Honourable Society of the Outer Temple, with a View to being called to the Bar. Thereafter Adolphus Devoted his Time to the Reading of "Shirley's Leading Cases" and the Sampling of such Musical Entertainments as Seemed to Deserve his Support. To tell the Truth, Adolphus Disliked the Law Exceedingly. When Adolphus was Beginning to Feel that he Couldn't Stick It Much Longer, Mr. Justice Grump (who was an Old Friend of the Family) Proposed that he should Accompany him as Marshal on his Next Circuit. Adolphus Gladly Accepted the Invitation, as it



Sounded like a Soft Job. Whilst Travelling in State to the first Assize Town, he Realised that Things were going to be Pretty Dull. His Prognostications were Well-Founded. Mr. Justice Grump, though a Jurist of the First Water, was not a Good Conversationalist. Every Evening after the Court had Risen, Mr. Justice Grump Took Adolphus for a Long Walk in the Country. The One Bright Spot about these Expeditions was that he did not Expect Adolphus to Converse. But there came an Awful Day when Grump, J. Let himself Go. He became very Chatty about a Beastly Case he was going to Try next Week, and Told Adolphus All about it. As Mr. Justice Grump's Well-Ordered Narrative Proceeded, Adolphus became More and More Confused. The Story Concerned a County Council, a Foreshore, Prescriptive Rights, a Lunatic Not so Found by Inquisition, and a Marriage between a Roman Catholic Spaniard and an Irish Protestant in Amsterdam. When Adolphus' Attention was Beginning to Wander, Mr. Justice Grump Suddenly Stopped and Asked him how he Thought the Case should be Decided. Adolphus, who had been Thinking how Charming Miss Popsie Dalrymple looked in the Second Act, nearly Died of Horror. His Brain Stopped Working and his Mouth became Dry. He tried Unsuccessfully to Remember What had been Held in **Lickbarrow v. Mason**. He goggled. Then Adolphus had a brilliant Inspiration. He cleared his Throat and Said in a Confident Voice that he would Leave the Whole Thing to the Jury. To the Amazement of Adolphus, Mr. Justice Grump Replied that on the whole he Agreed that it was Largely a Question of Fact. Adolphus Breathed Again. But the Affair had Given him a Nasty Jar, and he Felt Quite Shaken. So Much So that Adolphus had to have Two Stiff Whiskies and Sodas before Dinner, Two more during that Repast, and Several after Mr. Justice Grump had Retired to Rest.

Moral: Fortune Favours the Brave. O.

CORRESPONDENCE.

25th May, 1926.

To the Editor. Auckland.

Dear Sir,

The extract from the New Zealand Gazette dealing with the examination in Law has just been circulated amongst the members of the profession, and while it is thus fresh in our minds, there are one or two suggestions that might be made. The first suggestion is that following the Cambridge custom, a candidate be required to pass in the whole of the subjects in any one part at the one examination, and that a maximum period of two years be fixed for the passing of any one part. This may seem at first sight a little harsh, but we are supposed to be a learned profession, and moreover, our standard should not be allowed to lag behind that of the English Universities.

The second suggestion is that International Law be moved from the fourth to the first division, and jurisprudence from the first to the fourth. The reason of this is well stated in the Cambridge Law Journal (1924) at page 194: "The fact has become clear that it is undesirable to examine a student upon such matter as is contained, for instance, in Salmond's Jurisprudence when he has no acquaintance with English case law." Jurisprudence is not a primary subject. It consists in the analysis of legal conceptions, and the inter-relations of the various parts of the legal system, and this is not by any means a matter for study on entering on the study of law. I found this in the course of study in New Zealand where it was taken as a primary subject and promptly forgotten after examination, and in the course of study at Cambridge where it was taken as a late subject, and was not only found a most fascinating subject to study, but was of the utmost practical use. Without a knowledge of the substantiative law, it is not only impossible fully to appreciate this subject, but it is quite impossible to test the theory in the only way, the application to facts. This is a matter so elementary logically that one is really surprised to see this most valuable subject wasted at the beginning of a course. To test the theories of jurisprudence at present, the student has to take the word of the lecturer for every practical point, and it thus stifles that eagerness for original research that it should be the aim of a course to foster and encourage to the utmost. International Law has very little to do with the Conflict of Laws, yet a blind conservatism, originating in these branches of the law having been called respectively Public and Private International Law, always couples them together. It is suggested that International Law should be in the first division with Constitutional Law.

The third and final suggestion is this: Criminal Law which, perhaps like all "wicked" things, fascinates the majority, should be placed in the second division to liven up that division. In its place in division three, should be placed the subject Legal History, which, though it is perhaps of all subjects the most indispensable to an accurate and appreciative knowledge of the law, is wholly omitted. What is there more bracing to the intellect than the study of the History of the law of Real Property, bound up as it is with the study of the ingenuity of the greatest lawyers that England has ever produced, or what more inspiring to the lawyer than the history of the Common law, its struggles with Civil Law, and its ultimate triumph as probably the most just and practical system that has been known to this world.

There is one point in conclusion; the gazetting of regulations should not induce anyone to entertain for a moment the idea that the question of legal education is settled. Indeed it is only in its infancy, but with careful and unceasing attention of the profession, it will attain the freshness, the vigour and the promise of youth, and justify the work of those who have laboured for its prosperity..

Yours faithfully,

W. A. BEATTIE.

LEGAL LITERATURE.

REAL PROPERTY.

(R. F. Baird; Whitcombe and Tombs.)

This is an interesting and useful book. Mr. Baird, who is a solicitor as well as District Land Registrar in one of the Land Registration Districts in New Zealand, has made himself well acquainted with the early history of land tenure in England, with its development and with the entire history of land tenure in New Zealand.

Recollecting the words of Richmond, J. that "the assumption must be that substantive rights of property are not interfered with by an Act passed to regulate the transfer of land, further or otherwise than is expressly provided by the statute; and that such rights as subsisted before the Act, will generally speaking, be protected by the Court. If the Act did not provide machinery, the Court will use its ordinary powers," the author has investigated those "ordinary powers." In an interesting and logical manner he has traced the history of real property in New Zealand. The Native tenure is elaborately explained.

It is well that not only the student but also the practitioner should remember the basis of the land tenure. Too often the practitioner knows little more than appears in the Land Transfer and Deeds Registration Acts. Probably the simplicity of our method of conveying land is largely responsible for this. No practitioner, however, should dare to take the responsibility of advising clients on their rights and obligations in respect of realty without understanding the foundation from which our conveyancing legislation was built. Mr. Baird's book will put the inquirer on the track of ascertaining the position. In most matters the book will answer the queries: in all cases the inquirer will find the book a most useful guide.

The arrangement of the book is simple and the chapters are self-contained. The first chapter on Property in Land is well written and quite shortly places the origin of tenure clearly before the reader. It might not be difficult to point out parts of the book that one would wish amplified but that would rather be a matter of opinion than an attack on the true value of the book. On the whole we are decidedly impressed with the book. The student will find it invaluable. He will get an accurate knowledge of the subject and the practitioner himself will find the book most useful. The indices are carefully prepared. There is an index to chapters at the beginning of the book which might more usefully have been incorporated in the general index. The index to each chapter is headed with the name of the chapter, except the first which has been missed. The index to the cases cited is well prepared. The other divisions of the book deal with the Administration of Lands, Powers of Attorney, Crown Estates, Execution and Attestation and Registration of Titles.

"THE NEW ZEALAND LAND AGENT."

(The Ward Publishing Co., Wanganui. 30/-.)

The author of this book is Mr J. S. Barton, S.M., the well-known Stipendiary Magistrate of Wanganui and district, and author of the "New Zealand Company Secretary." The author can be complimented on his choice of subject, there being no other book in New Zealand that deals with the same theme. His experience as a practitioner and magistrate in a district where land agency cases so frequently occupied the time of the Courts in the heyday of the land agents' prosperity, has brought him into contact with the personal side of the land agent and gives him an insight into the intricacies of the law of agency possessed by very few.

The book very modestly sets out in the preface that it is intended for the guidance of the land agents of the Dominion, who "now form a fairly numerous class." Perhaps they are not so numerous a class at the present time as they were in the two or three immediate post-war years. The writer of this review remembers that in the town of Taranaki in which he is writing, the land agents in those prosperous times numbered close on fifty. This was in the boom years, when farm land in Taranaki soared in places over £200 per acre. The number of land agents slumped with the "slump" that followed, till there were scarcely half-a-dozen in the town. The number now is again on the increase. The land agents have now formed a Dominion Association with several district branches, and there is even talk of the Association instituting examinations for its members. The author thinks that statutory recognition of the result of these activities will follow, and we shall have another "close corporation" in the business of land agency. This, however, may well be doubted.

I have said that the author is very modest in his claims as to the merits of the book. It is certainly a book that should be in the hands of every legal practitioner. Almost every important case bearing on Principal and Agent that has been decided in our New Zealand Courts is quoted and discussed, together with the leading English cases, such as Salomons v. Pender, Andrews v. Ramsay, Rosenbaum v. Belson, etc. The cases are discussed in a simple, easy style suitable to the understanding of the average intelligent lay reader. I venture to say that this simple style and easy illustration will make the book just as acceptable to the average legal practitioner, who in this book, by means of a splendid index, will find any topic on land agency that he requires. Opening the book at random, we find the following topics aptly dealt with: Appointment of agent, Dangerous position of agent for both parties, Custom fixing rate of commission, Deposit—nature of; Right to retain commission from; handed back by agent; Exchange or Sale?, Commission on "Gross price," Options to purchase, Quantum meruit, Solicitor and Land Agent. There is hardly a topic on this important question of Land Agency that is not touched on in this book.

I may mention what appears to me an omission. In dealing with the dangerous position of an agent who acts for both parties, the author omits all reference to the case of McPhail v. Brown (1925 B.F.N., at page 171, and 1925 G.L.R. 390), where Reed J. treats rather fully on this subject, and the case of Allen v. Fama (1922 N.Z.L.R. 1156), a decision of Chapman J. on the same point. The concluding chapters deal with the law of property and of land registration, conditions of sale and agreement, sale and purchase, the law of Landlord and Tenant, valuation and arbitration, the Secret Commissions Act, etc., and the author distinctly "warns off" the legal profession from this part, though he hopes "the collection and classification of cases in chapters 4, 5 and 6, and the Annotated Land Agents Act, may be of assistance to them."

P.O'D.

"May God strike me dead, my Lord, if I did it," excitedly exclaimed a prisoner who had been tried before Mr. Justice Maule and found guilty. The Judge looked grave, and paused an unusually long time before saying a word. At last, amidst breathless silence, he began: "As Providence has not seen fit to interpose in your case, it now becomes my duty to pronounce upon you the sentence of the law, etc."