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

"Amid the shifting sands and cross currents of public life, the law is like a great rock on which men may set their feet and be safe." —*Lord Justice Sankey.*

Vol. IV. Tuesday, June 26, 1928. No. 9

Disclosure of Defendant's Insurance in Running-down Cases.

Is the exclusion from the Jury in Running-down Cases of information as to whether defendant was insured or not desirable? This question is raised by a recent judgment of Mr. Justice Talbot. The Jury in Running-down Cases probably want to know if the parties were insured, and wonder why no one even mentions the subject. The answer is, of course, that the fact of insurance is not relevant to the issue involved.

In *Grinham v. Davies*, a street accident case recently tried at Shoreditch County Court, the Judge discharged the Jury and ordered the case to be tried by a fresh Jury, because counsel for the plaintiff had read to the Jury part of a letter from which they could infer that the defendant was insured. In dismissing an appeal by the plaintiffs from the Judge's order, a Divisional Court—Mr. Justice Salter and Mr. Justice Talbot held that the rule that such information must not be conveyed to a Jury was a well established rule of practice, and that if violated, the Judge had a discretion to discharge the Jury.

The same rule of practice is enforced in New Zealand, but it is doubtful whether it would have been voluntarily observed by counsel had not its violation been described in *Wright v. Hearson* (1916) W.N. 216, as most improper and irregular on part of counsel, and the practice defined as one which counsel could not disregard and trust to not being checked in time. There is no reported case in New Zealand of a Jury being discharged because of violation of the practice and prior to *Grinham and Another v. Davies* no case reported in England where for such reason the Jury has been discharged and the case ordered to be set down for trial by a fresh Jury.

It is possible that this seeming reluctance to visit violation of the rule with the full penalty available is due to a suspicion that despite the strong language used in *Wright v. Hearson* the usefulness of the rule is not altogether beyond question. If this is so it can be fairly inferred that the impropriety of a question in breach of the rule is not so obvious as the language used in *Wright v. Hearson* would lead one to believe. If in reading to the Jury correspondence passing between the parties or their solicitors which is in itself relevant counsel omits to eliminate such parts as may lead the Jury to infer insurance, such omission can hardly in most cases be fairly censured as improper, and most irregular. Such a position seems to have arisen in *Grinham and Another v. Davies*, indeed counsel for the appellants in the Divisional Court said that in his recollection he had not read the letter from which, the Judge ruled, the Jury could infer that defendant was insured, while counsel for the respondent though asserting his recollection of some portion of the letter having been read, informed the Court that he did not believe there had been any specific reference to an insurance company. The case as it came before the Divisional Court admittedly therefore rested on an unintentional violation of the rule unaccompanied by any impropriety on the part of counsel. Nevertheless the right of the County Court Judge in these circumstances to exercise his discretion by discharging the Jury and sending the case for trial by a fresh Jury was upheld. Mr. Justice Salter stated that he had examined the four cases in which the matter had been considered, and although as far as he was aware there was no reported decision in which a Judge had taken the course adopted by the County Court Judge, such Judge's use of his discretion was not subject to appeal. It seems clear that if the matter had arisen, in the first instance, before Mr. Justice Salter or Mr. Justice Talbot, they would have exercised their discretion, not by ordering trial before a fresh Jury, but if they discharged the Jury at all, by ordering trial without the Jury. The examination to which the rule was subjected by Mr. Justice Salter and Mr. Justice Talbot makes the likelihood of the County Court Judge having been led to attribute too great an importance to the rule by the language of *Wright v. Hearson* reasonably clear. Mr. Justice Salter described the rule as an obviously fair one, supported not only as a rule of practice, but also in virtue of the much wider rule that it was the duty of the Judge to see fair play between the parties, and to prevent any unfair appeal to the prejudice of the Jury. Mr. Justice Talbot said that although he had no doubt that the rule in question was a well established rule of practice and one which the Courts must enforce, he doubted very much whether it worked for justice. No Jury nowadays could avoid knowing that in the very great majority of cases of the present kind a defendant was insured, and it was better that they should have the advantage of the argument of counsel and an express direction from the Judge that they should not be influenced by that consideration. Further, where a defendant in such cases did not appear to be affluent, and where a heavy award of damages would be justified on the facts, a Jury often refrained from awarding the proper sum which they would award if they knew that the defendant were insured. If the whole matter were disclosed it would be much better, because the attention of the Jury would be then explicitly directed to the fact that, in considering damages, the only matter which they ought to take into account was what the injury to the plaintiff had been.

Counsel for the defendant can disclose the fact that his client is insured and does so if he thinks it advisable to attract to his client's testimony the weight generally attaching to the evidence of a person not pecuniarily interested in the result, and it does not on the face of it appear reasonable that the Jury should be kept in ignorance on given information on this subject, at the option of one of the parties only, especially since, as Mr. Justice Talbot points out, a Jury may give insufficient damages because of ignorance as to defendant's real ability to make good the real loss. Mr. Justice Talbot's judgment seems to challenge not only the usefulness of the rules in Jury Cases, but also the impropriety of disclosing the facts as to insurance in cases heard by Magistrates and Judges sitting without a Jury.

Supreme Court.

Sim, J. April 24; 27, 1928.
Christchurch.

PRATT v. THE COMMISSIONER OF STAMP DUTIES.

Revenue—Estate Duty—Death Duties Act 1921—Will Conferring a Power of Appointment of Share Among Donee's Children and Other Issue—Codicil Providing That Trustees If Requested May Raise Any Part or Parts Not Exceeding One Half Share Held In Trust for Donee and His Issue for Donee's Own Use and Benefit—Whether Such Provision Conferred on Donee a Right to Receive One Half Capital of Such Share—Whether "Property" Within Section 5 Death Duties Act 1921.

Case stated for opinion of the Court under Section 62 Death Duties Act 1921. The appellants were the executors of the will of Frederick Pratt, who died in April, 1925. The question in dispute was as to the interest which the deceased took under the will of William Pratt, his father, who died in October, 1905. Frederick Pratt was under that will entitled to the income of a one-eighth share in the estate, and had power by will or codicil to appoint such share among his children and other issue and in default of appointment or in so far as the appointment did not extend all the children of Frederick Pratt were entitled to such share in the proportions specified in the will.

The controversy between the parties arose on the construction of the third codicil to William Pratt's will, which contained a provision the material portions of which were as follows :—

"I DECLARE . . . that . . . my Trustees if they shall be requested so to do by any son or married daughter of mine for the benefit of whom and whose issue my Trustees may then hold any such preferred shares . . . or any interest in my estate . . . may from time to time raise any part or parts not exceeding in the aggregate one half of the share in my estate (whether represented by preferred shares . . . or otherwise) then vested in my Trustees UPON TRUST for such son or married daughter and his or her issue and pay the same for such son or married daughter's own use and benefit my intention being by this declaration to enable any son or married daughter to obtain payment to him or her for his or her own benefit of any sum or sums not exceeding in the aggregate one half of the capital value of the share in my estate directed to be held by my Trustees for the benefit of him or her and his or her issue."

Frederick Pratt did not request the trustees of William Pratt's will to raise any part of the share in question, and was not paid any part of such share. The Commissioner included one half of such share (£5,330 12s. 6d.) in the final balance of the estate and assessed duty accordingly. The question to be determined was whether the whole or any part of the sum of £5,330 12s. 6d. formed part of Frederick Pratt's dutiable estate.

Wilding and Harman for appellants.
Hamilton for respondent.

SIM, J., stated that the answer to the question in issue depended on the view taken as to the effect of the third codicil to William Pratt's will. The Commissioner, when making the assessment, acted on the view that the right of Frederick Pratt to receive one half of the capital of the eighth share was property within the meaning of Section 5 of the Death Duties Act 1921. That section enacted that for the purposes of the Act the final balance of the estate of a deceased person should be deemed to include (*inter alia*) "any property situated in New Zealand at the death of the deceased over or in respect of which the deceased had at the time of his death a general power of appointment." It was contended on behalf of the Commissioner that those words were sufficient to cover the right in question, and, in support of his argument, counsel referred to the definition of "general power of appointment" contained in section 2 of the Act. Those words were declared to include any power or authority which enabled the donee or other holder thereof to appoint or dispose of any property or to charge any sum of money upon any property as he might think fit for his own benefit, whether exercisable by instrument *inter vivos* or by will. It was contended on behalf of the appellants that the trustees of William Pratt's will had a discretion as to whether or not they would make a payment to a son or married daughter under the provisions contained in the third codicil, and that Frederick Pratt was not entitled to insist on any such payment being made to him. Counsel for the Commissioner contended that the trustees were *bound* to make the payment, if requested to do so, and relied on the declaration in the codicil that the testator's intention was to enable any son or married daughter to obtain payment to him or her, for his or her own benefit, of any sum or sums, not exceeding in the aggregate one half of the capital value of the share in the estate directed to be held by the trustees for the benefit of him or her and his or her issue. His Honour thought that, notwithstanding those words, the testator intended his trustees to have a discretion as to whether or not they would make any payment under the authority in question. The testator had used the word "may." *Prima facie* that word imported a discretion, and the words relied on by the Commissioner were not sufficient, in His Honour's opinion, to displace the primary meaning of the word, and to establish that the trustees were bound to exercise the power, if requested to do so. If the testator had intended to make the exercise of the power obligatory he would have used the word "shall" instead of "may." The assessment was held not to be correct and was set aside accordingly.

Appeal allowed.

Solicitors for appellants: **T. D. Harman and Son,** Christchurch.
Solicitors for respondent: **Crown Law Office,** Wellington.

Sim, J. April 26; 28, 1928.
Christchurch.

SAMSON v. WHITE STAR BREWERY LIMITED.

Principal and Agent—Land Agent—Section 30 Land Agents Act 1921-22—Claim for Commission—Agent Completed Work—Absence of Written Authority—Certain Directors of Company Agreed to Pay Commission—Whether Company Estopped from Relying on Absence of Written Authority——Fraud—Section 30 a Complete Defence to Claim—Principal Disallowed Costs.

This was a claim by a land agent for commission. The plaintiff, who was employed by the defendant company to find a purchaser for a sub-lease of an hotel, found a purchaser, who duly completed the purchase. The plaintiff took part in the negotiations that resulted in the purchase, and there was a definite agreement between the plaintiff and two of the directors of the defendant company that the defendant company should pay the plaintiff £125 as commission, Grierson and Davies having agreed to contribute £12 10s. towards that sum. The plaintiff was not appointed in writing, and the question to be determined was whether or not he was entitled to recover his commission, notwithstanding the provisions of Section 30 of the Land Agents Act 1921-22.

Donnelly for plaintiff.
Sargent for defendant.

SIM, J., stated that Mr. Donnelly had contended that the defendant in the circumstances was estopped from alleging the want of a written appointment, and further that to allow the statute to be pleaded in answer to the plaintiff's claim would be to make it an instrument of fraud. In the opinion of the Court the facts did not raise a case of estoppel, or bring the case within the authorities relied on by Mr. Donnelly. It was said in **25 Halsbury,** p. 293, par. 498, that a party could not rely upon non-compliance with the Statute of Frauds where it would in effect be a fraud on his part for him to do so. But a landowner was not guilty of what amounts in law to fraud by relying on a statutory defence such as that afforded by Section 30 of the Land Agents Act. His conduct might be mean and shabby, but that did not make it fraudulent, and His Honour agreed with what Mr. Justice Chapman said in **Hooper v. Edward Anderson Co., Ltd.,** (1919) N.Z.L.R. 65, when discussing the corresponding Section (13) of the Land Agents Act 1912. The decision in that case appeared to be a clear authority for holding that the defendant was entitled to rely on Section 30 of the Act as a bar to the plaintiff's claim, and His Honour held accordingly that the plaintiff was not entitled to recover his commission.

Plaintiff nonsuited. Defendant disallowed costs.

Solicitors for plaintiff: **Raymond, Stringer, Hamilton and Donnelly,** Christchurch.
Solicitors for defendant: **Slater, Sargent and Dale,** Christchurch.

Adams, J. May 3, 1928.
Timaru.

CONLON v. PARR AND UNWIN.

Practice—Jury—Peremptory Challenges—Whether Defendants Joining in One Statement of Defence but Raising Separate Defences and Represented by One Counsel Entitled Each to Six Challenges—Juries Act, 1908, Section 124.

Action by the plaintiff by his next friend claiming damages for an alleged assault. The defendants joined in one statement of defence but raised separate defences. They were represented by one counsel at the trial. Counsel for the defendants claimed for each defendant the right to challenge peremptorily up to the number of six.

Sargent and O'Connell for plaintiff.
C. A. L. Treadwell for defendants.

ADAMS, J. (orally) said that the question depended upon the construction of Section 124 of the Juries Act 1908. Counsel for the plaintiff contended that the provisions of the section relating to civil actions applied only to cases in which several defendants had filed separate statements of defence. That construction would make the right to separate challenges dependent upon form and not substance, so that defendants pleading identical defences by separate statements of defence would have the right, while defendants pleading separate defences in one statement of defence would have only six challenges between them—*Qui haeret in litera haeret in cortice.* His Honour thought that on the true construction of the section the right was to be tested by the pleading in substance and not in form, and *therefore held that each defendant was entitled to* exercise the right of peremptory challenge up to six.

Solicitors for plaintiff: **L. J. O'Connell**, Timaru.
Solicitors for defendants: **Treadwell and Sons**, Wellington.

Ostler, J. May 11; June 7th; 1928.
Palmerston North.

ERICKSEN v. HOWARTH.

Easement—Right of Way—Excessive User—Injunction—Right of Way Appurtenant to Lot A—Use of Way as Access for Motor Car to Lot A and hence to Lot B Adjoining—Erection of Garage on Lot B—Owner of Servient Tenant Raising No Objection to Such User Until Garage Completed—Whether Entitled to an Injunction Preventing Such User of Way.

Claim by the plaintiff for an injunction to restrain the defendant from continuing to trespass on his land and for £100 damages for past trespasses. The plaintiff had granted a right of way over the land to one Cradock, an adjoining owner. The grant purported to give to the proprietor of Cradock's land for the time being his tenants, servants, agents, workmen and visitors the right for all time to pass and repass with or without horses and carts and other vehicles over that portion of the plaintiff's land described in the grant. The defendant desired to obtain the benefit of this right of way, and obtained from a transferee of Cradock, a lease of a portion of his property so that as tenant he should have the use of the right of way. He did not use the right of way merely as tenant, however, but as a means of access to his own land adjoining that which had been leased to him. He built a garage on his own land and used the right of way as access to this garage. He had been advised that by procuring the lease he would obtain a legal right to use the right of way as access not only to the land leased, but also to the adjoining land owned by him, and it was in this belief that he built the garage. It was admitted during the proceedings that the advice was unsound and that the defendant had no right to use the right of way as access to his garage. The plaintiff knew what the defendant was doing, but raised no objection until the garage was completed. The defendant claimed, therefore, that the Court ought, in the exercise of its discretion, to refuse an injunction and to award to the plaintiff damages in lieu of an injunction.

Kight for the plaintiff.
Ongley for the defendant.

OSTLER, J., said that the Court had a discretion to refuse an injunction, but it was a judicial discretion, and must be exercised on well-established principles. Those principles had been clearly set out in the case of **Moore v. Dunn,** 3 B.F.N. 102 (1927) G.L.R. 361, recently decided by the Chief Justice, where the cases bearing on the subject were collected. It had been laid down that such discretion should be exercised only in very exceptional circumstances. Unless such exceptional circumstances existed a defendant was not entitled to ask the Court to force an unwilling plaintiff to barter his proprietory rights for a sum of money. The question was whether the defendant had shown that there were such exceptional circumstances as would warrant the Court in exercising the discretion that it had been asked to exercise. In His Honour's opinion there were such circumstances. The defendant *bona fide* believed that by acquiring the lease from Cradock's transferee he would obtain a legal right of way over the land in question to his own land. In that belief he expended some £400 to £500 in the erection of a garage on his land, and he blocked by more or less permanent constructions all other access to his garage. The plaintiff was continuously on his own premises and could not have failed to see what the defendant was doing. But he stood by and allowed him to go on with his expenditure, without warning him that he had no right to the use of the right of way. Only after the expenditure had all been incurred did he assert his rights, and then he was quite willing to sell those rights, but he asked the excessive sum of £100, which the defendant refused. If the defendant had been willing to pay this sum the action would not have been heard of. The plaintiff admitted that he had suffered no damage, and it was clear that the use of the right of way by the defendant would occasion him no damage and but little inconvenience in the future. His Honour considered that the plaintiff's conduct in the matter shewed clearly that he only wanted money, and he allowed the defendant to go on with the construction of his garage, so that when it was completed he would be in a better position to be squeezed. That being the case, and as the injury was small and was capable of being amply compensated for in money, and as an injunction would, in the circumstances be oppressive, His Honour refused an injunction and awarded the plaintiff the sum of £50 as damages in lieu of an injunction.

Solicitors for Plaintiff; **Robertshawe, Kight and Dunn,** Dannevirke.
Solicitors for Defendant; **P. W. Dorrington,** Dannevirke.

Ostler, J. May 11; 23; 1928.
Palmerston North.

HOOPER v. DAY.

Contract—Restraint of Trade—Dentistry Business at Palmerston North—Dentist Employed to Manage Branch Business at Pahiatua—Covenant by Employee Not to Practise Within a Radius of Fifty Miles of Palmerston North or Pahiatua—Sale of Pahiatua Business and Subsequent Purchase by Employee—Whether Restriction Imposed by Covenant Reasonable.

Action claiming £100 damages against the defendant for breach of an agreement, and an injunction to restrain further breaches. The plaintiff, who was a dentist, and had an extensive practice in Palmerston North, which practice included patients from towns at some distance from Palmerston North, *such as Pahiatua, decided, in 1924, to start a branch business at* Pahiatua. He employed the defendant, a young man just through his examinations, and with no practical experience, to carry on this business. The employment was for two years at a weekly wage of £12, but the plaintiff had the right to terminate the employment upon short notice if the defendant proved incapable or failed to attend to the work. The defendant covenanted that upon the determination of the agreement he would not without the written consent of the employer practise the profession of a dentist within a radius of 50 miles of Palmerston North or Pahiatua, not however including the boroughs of Wanganui and Masterton, for a period of five years from the termination of the agreement.

The defendant proved a capable dentist and two further agreements embodying this covenant were entered into, extending the term of the employment. The third agreement provided for a year's leave of absence for the defendant to enable him to go to America to further study his profession, but *this term of service was to be completed on his return. When* the defendant left for America the plaintiff employed another dentist to carry on the Pahiatua practice, to whom he eventually, in October, 1926, sold the goodwill of the Pahiatua business.

The defendant, on his return from America worked for the plaintiff, in Palmerston North, for some time, but in December, 1927, the plaintiff released the defendant from any further obligation to serve him. The defendant thereupon bought the goodwill of the Pahiatua practice, and commenced to practise there. The plaintiff claimed that this was a breach of covenant, and claimed damages and an injunction as above mentioned.

Cooper for the plaintiff.

O'Leary for the defendant.

OSTLER, J., said that one of the defences raised was that the covenant was void as being an unreasonable restraint of trade. It was admitted by the counsel for the plaintiff that the onus rested on the plaintiff to prove that the restraint imposed was no more than reasonable for the protection of the plaintiff's business, but he contended that all the circumstances of the case should be looked at to determine the question. In His Honour's opinion, however, none of the facts and circumstances which happened after the first agreement was entered into had any bearing on the question of the reasonableness of the covenant. Contracts were made with respect to the state of circumstances existing as contemplated at the date when they were entered into, and that principle was applicable to contracts in restraint of trade. What the Court had to determine was whether, in a contract of employment of a dentist in Pahiatua for a maximum period of two years, but with the right in the employer to terminate the contract at any time on short notice if not satisfied with the employee's work, the restriction imposed was more than reasonably necessary for the protection of the employer's business. That was a question of law, and in considering it regard should be had not only to the interests of the contracting parties, but also to the public interest—**Morris v. Saxelby** (1916) 1 A.C. 688. That case pointed out clearly the distinction between contracts for the sale of the goodwill of a business and contracts of employment, in which covenants in restraint of trade were zealously scrutinised. In the latter case covenants to restrain subsequent competition by the employee were held to be unreasonable. It was only if the employer could show that the covenant was necessary for the protection of a trade secret or a business connection that it was held to be legal, and then it must not be any wider than necessary to protect that interest. If it was it was against public policy and void. No instance was cited where in a contract of employment, the restriction was so large in space as it was in the contract under consideration. In **Mallan v. May** (11 M. & W. 653) it was decided that a restriction in the case of a dentist against practising in London was reasonable, but any wider area was held to be unreasonable. The plaintiff, however, contended that in the modern days of motor cars, considering the central position of Palmerston North, and the ease and speed with which it could be reached from 50 miles round by motor or rail, 50 miles was not a larger radius than necessary to protect the plaintiff's business. The opinion of the Court, however, making an allowance for the speed and ease of modern travel, was that a radius of 50 miles was much wider than necessary for the protection of the plaintiff's business. His Honour doubted very much whether any of the plaintiff's patients lived beyond a circle of 25 or 30 miles, or came to him for treatment from beyond such a circle. Towards the south of Palmerston North, Levin was only some 30 miles away, and it no doubt had one or more dentists. At Foxton, towards the south-west, the plaintiff had a branch established. Wanganui was only some 50 miles to the north-west, and practically all persons within a radius of 25 miles of Wanganui who required dental assistance would find it more convenient to go there. Moreover there were Fielding and Marton between. Dannevirke was only 35 miles from Palmerston North, and no doubt had its own dentists. In His Honour's opinion, notwithstanding the central position of Palmerston North, and the ease with which it could be reached, it was quite unreasonable in a contract of employment to attempt to restrict the employee from practising within a radius of 50 miles of Palmerston North except in the boroughs of Wanganui and Masterton. Such a restriction prevented the employee from practising at Fielding, Marton, Foxton, Levin, Otaki, Carterton, Eketahuna, Pahiatua, Woodville, and Dannevirke. The effect of it was really to prevent competition, which rendered the covenant void. It was very significant that when the plaintiff sold the goodwill of the Pahiatua practice the restriction that he imposed on himself was only a 30 mile radius from Pahiatua. In the present case the space restricted was not only a 50 mile radius of Palmerston North, but also the same radius of Pahiatua, which was 18 miles in a straight line from Palmerston North (although 30 miles away by the best available road). That meant that there were two intersecting circles each of 100 miles in diameter, in no part of which, except in Wanganui and Masterton could the defendant practise for five years. It might well be contended, however, that when the plaintiff sold the goodwill of the Pahiatua practice he also sold the benefit of the covenant so far as regards the 50 miles radius of Pahiatua, and that all he had left of the covenant was the 50 miles radius of Palmerston North. His Honour decided the question of law on that assumption, and held that such a restriction in a contract of employment was void as being greater than required for the protection of the employer's business, and against the public interest.

Some suggestion was made that the covenant could be severed. On consulting the late authorities, and especially **Atwood and Lamont** (1920) 3 K.B. 571, His Honour thought that the covenant could not be severed so as to cut down the 50 miles radius of Palmerston North. That was a single covenant for the protection of the plaintiff's Palmerston North business. If the Court endeavoured to sever the covenant by reducing the circle to what it thought reasonable limits, it would really be reforming the contract.

Judgment for defendant.

Solicitors for Plaintiff; **Cooper, Rapley and Rutherfurd,** Palmerston North.
Solicitors for Defendant; **Page and Siddells,** Pahiatua.

Blair, J. May 28, 1928.
Auckland.

IN RE SAUNDERS: PARK v. AUSTIN.

Administration—Beneficiary Absent from New Zealand Since 1878—Not Since Heard of by Parents or Members of Family—Presumption of Death—Whether Any Presumption of Death Without Issue—Evidence Required.

Originating Summons taken out by the plaintiff Lillian Mary Park as administratrix of the estate of Minnie Saunders, for an order that Robert Charles Austin, the defendant, be presumed to have died without issue some time before the 1st January, 1886. The defendant, as one of the next of kin, was entitled to a one-eighth share of the estate. The Public Trustee represented Robert Charles Austin or his issue, if any. A previous application had been made before Stringer, J., for such an order, but the Court directed further steps to be taken by advertisement to ascertain the whereabouts or existence of the defendant. The advertisements were without result.

The facts relied on to support such a presumption were as follows:—

Robert Charles Austin was born at Wellington, in New Zealand, on 10th April, 1864, and it was believed left New Zealand when about 14 years of age, and went to Sydney, with the object of earning his living. After a few months' residence in Sydney all correspondence ceased, and from that time no further word was ever received as to his whereabouts and it had always been considered that he died in the year 1878. The plaintiff deposed to those facts in her affidavit, but as 1878 was the year of her birth, she could not have any personal recollection of the circumstances. Her parents had both been dead long since, but she deposed to having many times heard the facts related by both her parents, and stated that the circumstances were matters of family history. The plaintiff further stated that she had always been informed and believed that her father went over from New Zealand to Sydney in or about 1878, for the express purpose of finding his son, the defendant, and made all possible enquiries, through the police and otherwise, but without avail, and that he returned to New Zealand convinced of his son's death. She further stated that neither had she, nor, to the best of her knowledge or belief, had any member of her parents' family, ever received any information as to what became of Robert Charles Austin after the year 1878, nor had they received any information which would raise any suspicion in their minds that he did not die in Australia about 1878. Neither had she ever heard that her brother was ever married. Those facts were borne out in a further affidavit by Harriet Mitchell, a sister of the plaintiff, who was about 11 years of age at the time Robert Charles Austin left New Zealand

Hubble for plaintiff.

Northcroft for Public Trustee representing defendant.

BLAIR, J., said that it was clear from the facts and from the authorities that a presumption of the death of Robert Charles Austin at some time prior to the 1st January, 1886, must arise.

His Honour was, however, asked to make a declaration that Robert Charles Austin be presumed to have died before that date without issue. The law as to presuming death was clear, but a different principle applied to the question of presuming absence of issue. In **re Jackson, Jackson v. Ward** (1907) 2 Ch. 354, it was held that there was no presumption of death without issue but it was open to the Court to decide on the facts that there were no issue. Kekewich, J., at page 357, said: "You cannot get conclusive negative evidence in the large majority of cases, indeed it is very seldom forthcoming, but you can get some evidence upon which a jury properly directed can act, and therefore evidence on which a judge may properly act. . . . It is not a case of presumption but of proof, sufficient if not conclusive proof." That case supported the decision in **Greaves v. Greenwood,** L.R.2. Ex. D 289, which touched the question whether one N.W., born about 150 years before and thus conclusively presumed to be dead, had died without issue. The only evidence produced was that if alive such issue would have been entitled to a large property, that eight years before the Court proceedings advertisements for heirs had been inserted in general and local papers, that various claimants had appeared and none had established their claims. That was all the evidence and the Court refused to disturb the finding of a jury that N.W. had left no heirs.

The question His Honour had to decide was, then, one of fact, whether Robert Charles Austin died without issue. The plaintiff relied on the following: (1) Defendant left New Zealand at the age of 14 years, in 1879. (2) Defendant wrote letters to his parents, but these ceased suddenly a few months after his departure, and when he was less than 15 years of age. (3) His father less than a year later specially visited Australia to make a search, and effected widespread advertisement. (4) His parents and family treated him as dead. (5) There had been no communication since. Those facts were deposed to by Harriet Mitchell, a sister of the defendant, who was eleven years of age at the time of defendant's departure for Australia. The testimony was, therefore, of some value, and was supported by family history. In addition, advertisement had been made in a form approved by the Public Trustee as representative of the defendant, and no reply had been forthcoming. The facts were very similar in **In re Jackson** (*cit. sup.*) except that there was a letter produced in which Jackson, who had gone to Australia, professed an unaltered attachment for a lady whom he had left behind him in England. In the present case, however, the facts were strengthened by the very early age at which Robert Charles Austin went to Australia, and by the fact of the apparently fairly exhaustive search which was conducted by his father at that time. There was in the present case ample evidence upon which a jury could find that defendant died without issue, and His Honour, therefore, found likewise.

Solicitors for plaintiff: **Meredith, Paterson and Hubble,** Auckland.

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

Smith, J. May 18: 25, 1928. Wellington.

PATERSON v. PATERSON.

Divorce—Separation by Mutual Consent—Parties Ceasing Marital Intercourse but Continuing to Live in Same House—Whether Sufficient to Constitute Separation—Agreement for Separation Containing Admission That Parties Had Been Living Apart Since a Certain Date—No Such Separation in Fact—Court Entitled to Go Behind Admission—Divorce and Matrimonial Causes Amendment Act 1920, Section 4.

Petition for dissolution of marriage upon the ground that the petitioner and respondent were parties to a separation by mutual consent, and had lived apart since January, 1925. The facts appear sufficiently in the report of the judgment.

Mazengarb for the petitioner.

SMITH, J., said that the parties were married in 1911, and had two children. The family home was in Wellington. The husband was an indent merchant, with offices in Wellington and Sydney, and he travelled a great deal in the course of business. The evidence was that he did not reside in Wellington for more than two months in any year, and not more than from three to seven days at any one time. In 1924 differences became acute between the husband and the wife, and as from January, 1925, marital intercourse ceased between them. They did not, however, live in separate places of residence in the City of Wellington. Certain correspondence between the solicitors of the parties, in April, 1925, was produced in which the parties expressed their agreement to live apart in the future, and the husband a readiness to provide for the reasonable maintenance of his wife. Evidence was given that at this date the parties were living under the same roof, but not living together in any other sense of the words. The petitioner admitted that from January, 1925, until April, 1926, husband and wife continued to live under the same roof, subject to the husband's absences from Wellington on business. They did this notwithstanding each had charged the other with adultery. In April, 1926, the husband filed a petition for a divorce on the ground of adultery of his wife and answers denying adultery were filed; the petition, however, did not come for trial. Since then the parties had not lived together.

His Honour stated that it was clear that between January, 1925, and April, 1926, the parties maintained a common home in the City of Wellington. It was provided by the petitioner; the wife resided there, and so also did the petitioner when in Wellington. The evidence was that the parties slept in separate rooms, but met at meals. There was no evidence to show that from January, 1925, until April, 1926, the parties did not appear to the world to be living together as man and wife. In those circumstances His Honour held that from January, 1925, until April, 1926, husband and wife maintained that *consortium vitae* which constituted matrimonial cohabitation notwithstanding the non-fulfilment of the marital duties which the one owed the other. See **Barker v. Barker** (1924) N.Z.L.R. 1078, per Salmond, J., at page 1089.

In August, 1927, an agreement for separation was entered into between the husband and the wife. The agreement recited *inter alia* that unhappy differences arose between the parties in 1924, and that the parties commenced to live apart, and that it was desirable that the terms upon which the parties were living apart should be embodied in an agreement. It then provided as follows: "The parties both admit that they have been living separate and apart from each other since in or about the month of January, 1925." Mr. Mazengarb, for the petitioner, contended that the admission of the parties that they had been living separate and apart since January, 1925, was in the circumstances true in fact. He cited in support of this contention the following observation of Lord Penzance, in **Fitzgerald v. Fitzgerald,** L.R. 1 P. & D. 694, 698: "Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully against the wish of the other party and in execution of a design to cease cohabitation would constitute 'desertion'." The present position was not founded on desertion, but, as His Honour understood the argument, Counsel's admission might be formulated as meaning that any separation between husband and wife which would amount to desertion if against the will of one of the parties amounted to a separation by mutual agreement if it existed by the consent of both of the parties. While that might be true in most cases His Honour was not prepared to accept it without qualification, or to agree that the facts of the present case would constitute desertion for three years, if they existed against the will of one of the parties, or that, if they existed by consent of both parties, they amounted to a mutual separation for three years. The law as to agreements for separation had been well settled without reference to the modern law of desertion as established by Statute and Case-law. In order that such an agreement might be legally effective, separation in fact must take place from the commencement of the agreement. The parties must cease to reside together. Cessation of marital intercourse was not sufficient: **Hindley v. Westmeath,** 6 B. & C. 200; **Westmeath v. Salisbury,** 5 Bligh (N.S.) H.L. 339. His Honour was of opinion that those principles applied to an agreement for separation by mutual consent under Section 4 of the Divorce and Matrimonial Causes Amendment Act 1920. The purported admission of the parties that they had been living separate and apart since January, 1925, did not prevent the Court from ascertaining the facts of the case, and as, in His Honour's opinion, matrimonial cohabitation did not cease until at least April, 1926, it was clear that no separation by mutual consent had existed for a period of three years. His Honour was unable to accept Mr. Mazengarb's contention that the totality of the circumstances of the case—the cessation of sexual intercourse by mutual consent since January, 1925, taken in conjunction with the frequent absences of the husband from home and interpreted in the light of the feeling between the parties—amounted to an agreement for mutual separation existing for three years. The cessation

of sexual intercourse by mutual consent could not amount to a mutual separation of husband and wife while they continued to live together. The paramount fact in issue was that of matrimonial cohabitation as explained in **Barker v. Barker** (1924) N.Z.L.R. 1078, following **Jackson v. Jackson** (1924) P. 19. Where that existed, there could be no desertion and no mutual separation. If the law were otherwise, there could be little check upon parties who claimed that they had been separated in their own home for three years, and collusion in obtaining a divorce based upon a fictitious separation would have free sway. In His Honour's judgment, it was important that the principle of the actual separation of residence should be maintained. There might be cases of the type dealt with in **Powell v. Powell** (1922) P. 278, as explained in **Jackson v. Jackson,** (1924) P. 19. where the complete seclusion of one party in a separate part of a common residence might be sufficient to show that matrimonial cohabitation had not been maintained, but on the contrary had been broken, and that the parties had in fact lived separate and apart. That was not the case here, and the petition was accordingly dismissed.

Solicitors for the petitioner: **Mazengarb, Hay and Macalister,** Wellington.

Court of Arbitration.

Frazer, J. May 8; 29, 1928.
Auckland.

PUKEMIRO COLLIERIES LIMITED v. PUKEMIRO COAL MINE WORKERS INDUSTRIAL UNION OF WORKERS.

Industrial Union—Section 8 Labour Disputes Investigation Act 1915—Employer and Union Not Filed as Provided in Section 8 (1)—Stop-work Meetings Held in Breach of Agreement—Whether Filing of Agreement under Section 8 (1) a Condition Precedent to Enforceability of Agreement under Subsections 3 and 4 Section 8.

Appeal from a decision of Mr. Wyvern Wilson, S.M., at Huntly The appellant company was the owner of the Pukemiro Coal Mines within the meaning of the Coal Mines Act 1925. The defendant Union was a society of workers, within the meaning of Section 3 of the Labour Disputes Investigation Act 1913. For the purpose of winning coal the plaintiff employed some 270 workmen, all of whom were members of the respondent union. On 21st July, 1926, the appellant and respondent entered into an agreement whereby certain terms and conditions of employment were agreed to. The President and the Secretary of the union, on behalf of the union convened a stop-work meeting of miners employed by the plaintiff with a view to inducing them to stop work, and as a result of the meeting the miners refused to work on the 27th June, 1927. A similar meeting was convened on 29th June, 1927, and the miners in consequence refused to work on that day also. The appellant company sued under Section 8 of the Labour Disputes Investigation Act 1913, for penalties for breach of the agreement. It was admitted and proved in the Magistrate's Court that the respondent union had committed a breach of agreement by holding these stop-work meetings, and that as a result of such breach serious loss was sustained by the appellant. The agreement had not, however, been filed pursuant to Section 8 of the Labour Disputes Investigation Act 1913, and the question arose whether or not such filing was a condition precedent to a successful claim under that section of the Act. The Magistrate held that the filing of such an agreement was a condition precedent to the imposition of any penalty under the Act, and an appeal to the Court of Arbitration was brought from this decision.

Myers, K.C., and Terry, for appellant.
O'Regan for respondent.

FRAZER, J., delivering the judgment of the Court, said that the only question for the determination of the Court was whether an agreement that had not been filed as provided in Section 8 (1) of the Labour Disputes Investigation Act 1913, was enforceable under Section 8 Subsections (3) and (4) of that Act. Section 8 read as follows:—

"8 (1) Subject to the provisions of this section, where an agreement (other than an industrial agreement under the Industrial Conciliation and Arbitration Act 1908) relating to the terms of employment of any workers is entered into by or on behalf of those workers and by or on behalf of their employers, such agreement may be filed by any party thereto with the nearest Clerk of Awards.

"(2) Every such agreement shall specify the parties upon whom the same shall be binding, and the time during which it shall remain in force, and shall also provide for the manner in which any question incidental to or arising out of the interpretation of the agreement shall be determined.

"(3) Any person who commits a breach of such agreement shall be liable in the same manner and in the same cases as if he had committed a breach of an industrial agreement under the Industrial Conciliation and Arbitration Act, 1908, and proceedings may be taken in the Magistrate's Court in respect of its breach at the suit of an Inspector of Awards, or of any society of workers party to the agreement, or of any employer or worker who is party to such agreement.

"Provided that there shall be no appeal on any matter of fact from the judgment of the Magistrate's Court in proceedings under this section.

"(4) Where a breach of an agreement under this section is committed by a society of workers or employers, party to such agreement, the said society and the members thereof respectively shall be liable in the same manner as if the society were an industrial union registered under the Industrial Conciliation and Arbitration Act 1908, and as if the agreement were an industrial agreement under that Act."

Dealing with the construction of that section, His Honour stated that subsection (1) provided that "subject to the provisions of this section" an agreement (other than an industrial agreement) relating to the terms of employment of any workers might be filed. The introductory words "subject to the provisions of this section" obviously related to the particulars set out in Subsection (2), and it was plain that unless the requirements of that subsection were complied with, an agreement could not be filed. The real difficulty that presented itself was in determining whether the words "such agreement" in Subsections (3) and (4) had reference only to an agreement that had been filed, or generally to "an agreement" relating to the terms of employment, as set out in Subsections (1), that might or might not have been filed, and that might or might not contain the requisite particulars that would enable it to be filed. It was to be noted that the expressions "an agreement," appearing in Subsection (1), and "such agreement," appearing in Subsection (2), had not precisely the same meaning. The former referred to any agreement, not being an industrial agreement, relating to the terms of employment of any workers, that was entered into by or on behalf of those workers and by or on behalf of their employers. The latter expression, owing to the effect of the introductory words of Subsection (1), obviously connoted an agreement that might be filed. The whole purpose of Subsection (1) was to make provision for filing such an agreement. Stripped of all accessory verbiage, the Subsection declared, in effect, that an agreement made between certain parties, for certain purposes, and containing certain particulars, might be filed. Nothing turned on the use of the permissive words "may be filed by any party thereto," for there was nothing in the Act to compel any party to file such an agreement within a specified period, or at all. The Subsection merely made provision for its filing, and gave any of the parties thereto the right to file it at any time. It appeared to the Court that the words "such agreement," in Subsection (3), and the words "an agreement under this section," in Subsection (4), connoted more naturally, according to the ordinary usage of the English language, an agreement of the class upon which Subsection (1) and (2) had focussed the attention, rather than any agreement belonging to a wider group: the words quoted referred to an agreement that had been filed, not to any agreement relating to conditions of employment. That view was strengthened by the circumstances, already mentioned, that the expression "such agreement" in Subsection (2) had a different connotation from the expression "an agreement" in Subsection (1).

A comparison of Section 8 of the Labour Disputes Investigation Act 1913, with Sections 28 (5) and 30 of the Industrial Conciliation and Arbitration Act 1925, did not, His Honour continued, alter the opinion formed by the Court as to the proper construction to be placed on Section 8. It was true that Section 28 (5) of the latter Act used the words "shall be filed," but the word "shall" was used because a time limit of 30 days from the date of making an industrial agreement was by the same Subsection fixed for filing that agreement. But for the necessity of using the mandatory word "shall" in connection

with the time limit, the words of Section 8 (1) of the Labour Disputes Investigation Act—"may be filed by any party thereto"—might have been used, because the enforceability of an industrial agreement depended upon Section 30, which provided that every industrial agreement duly made, executed "and filed" should be binding on the parties thereto. The sections of the two statutes were *in pari materia*. The provisions of the Labour Disputes Investigation Act were intended to afford to societies, that did not desire to avail themselves of the provisions of the Industrial Conciliation and Arbitration Act, the right to enter into enforceable agreements with employers on conditions somewhat similar to those under which industrial agreements were made; and it was reasonable to conclude that the legislature intended that filing should be a condition precedent to enforceability in both cases.

His Honour then considered Section 9 of the Labour Disputes Investigation Act 1913. Subsections (3) and (4) of Section 8 dealt with breaches of agreements under that Section, and Section 9 dealt with strikes, and provided for the imposition of a penalty if a strike occurred during the currency of an agreement made "and filed" in accordance with Section 8. There could be no reason for supposing that the legislature intended to make a distinction between filed agreements and agreements that had not been filed, according to whether a breach in any particular case amounted or did not amount to a strike. Such a distinction would be quite illogical, more especially as heavy penalties were provided for breaches that did not amount to strikes.

If Section 19 of the Labour Disputes Investigation Act 1913 were considered, it would be found that the Registrar or an Inspector of Awards was empowered to inspect the register of members of a society that was a party to an agreement entered into "and filed" under Section 8. The object, of course, was to enable the names of the members of such a society to be ascertained, in order that proceedings might be taken against them for any breach of an agreement or of the Act. If agreements that had not been filed were intended to be enforceable under Subsections (3) and (4) of Section 8, one would expect to find the words "whether filed or not" in Section 19, instead of words limiting the power to inspect the membership register to cases in which an agreement had been filed; for in order to enforce an agreement, it would be necessary, whether the agreement had or had not been filed, to know the names of the persons against whom proceedings could be instituted in their capacity as members of a society that had entered into the agreement.

A further consideration that confirmed the Court in the opinion that an agreement purporting to be made under the Labour Disputes Investigation Act, but not filed, was unenforceable under Section 8, was the rule of interpretation applying to the construction of statutes that invaded the common law. At common law an agreement entered into by a trade union relating to conditions of employment was unenforceable. The Labour Disputes Investigation Act made such an agreement enforceable in certain cases and under certain conditions. The rule of construction to be applied when the wording of a statute of that nature was ambiguous was stated thus by Byles, J., in **R. v. Morris,** L.R. 1 C.C.R. 90, 95: "It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law." In **R. v. Scott,** 25 L.J.M.C. 128, 133, Coleridge, J., said that, where there was a seeming conflict between the common law and the provisions of a statute, one ought to proceed by carefully examining whether the two might not be reconciled and full effect given to both. In the present case, it was clear that the statute invaded the common law to the extent of rendering enforceable an agreement entered into under the Labour Disputes Investigation Act, that had been filed; but the Court was not justified in assuming, on the construction of Section 8, that it went any further than that. The sounder interpretation was that which relegated to its common law status an agreement that had not been entered into and filed in compliance with the requirements of the Act. Further, the provisions of Subsections (3) and (4) of Section 8 were quasi-criminal in their nature, and the Court had to be satisfied, before it could hold that a breach of an agreement that had not been filed was actionable, that the language of the section clearly indicated that such an agreement was enforceable under the provisions of the Act. The Court was not satisfied on this point.

Appeal dismissed.

Solicitors for appellant: **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.

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

The Husband's Dominion over his Wife in English Law

Recently, in England, a defendant, when charged before a magistrate with assaulting his wife, claimed that as she was his wife, he had a right to chastise her, and the learned magistrate is reported to have said: "A wife has ceased to be a chattel to be dealt with as a man thinks fit. She now stands as an independent person with her own rights. Don't think that because you have married a woman that entitles you to knock her about. It doesn't." It is not surprising, in view of the traditional superiority which a husband has always enjoyed in English law over his wife, that such a view as that of the defendant in the police court should be held; and it is interesting to consider that part of the marriage relationship which concerns the husband's rights against the person and liberty of his wife. And it is to some extent remarkable how solicitous the Courts have been in protecting the person and liberty of the wife against the husband, when one considers the complete subjection in property rights which the Common Law enforced upon the wife, and the powers over the person and liberty of minors and apprentices which the Common Law gave, and to some extent still gives, to the parent and the master.

The origin of the view that the husband has a right to chastise his wife and to restrain her liberty is to be found in Bacon's Abridgment. Under the heading Baron and Feme, paragraph B, we find the following: "The husband hath, by law, power and dominion over his wife, and may keep her by force within bounds of duty and may beat her, but not in a violent or cruel manner"; and in the margin (in the 7th Edition) one or two references are given to support the proposition, *e.g.*, to *Fitz. Nat. Brev.*, and one or two very old reports which, it must be confessed, are difficult to understand. But the important thing is the statement itself in the Abridgment. The Abridgment was (and to a lesser extent still is) an important work; indeed, Maine (in "Early Law and Custom" at p. 371) called it "our classical English Digest," and a quotation from it is still entitled to high respect, although not to the respect to which it was entitled in the days of its fame in the 18th century; and had the law as enacted in the Courts, as far as we can follow it in the cases, followed the lines of the passage from the Abridgment, it would not have been possible to say, as we have done, that the law has been solicitous in protecting the person and liberty of the wife against the husband. But the law as enacted in the Courts fell far short of the law as stated in the Abridgment. Let us look at some of the cases.

One of the earliest was **Attwood v. Attwood**, Precedents in Chancery, 492, decided in 1718. Here in the report we find "*per cur.* A wife cannot bring a *Homine Replegiando* against her husband for he has by law a right to the custody of her, and may if he think fit confine her; but he must not imprison her. . . .". From Comyns' Digest, Imprisonment, L. 4, we find that a *Homine Replegiando* was an original writ which formed a remedy for false imprisonment. Three years later, in **Rex v. Lister,** 1 Stra. 478, the Court held "that where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company, it is lawful for the husband, in order to preserve his honour and estate, to lay such a

wife under a restraint. But where nothing of that appears, he cannot justify the depriving her of her liberty; . . . ". In the report of **Rex v. Newton** in 1728, 1 Barn. K.B. 64, we see: "The Court admitted that a man might confine his wife in his own house for proper reasons." We now come down to 1840, and in that year **In re Cochrane,** 8 Dowl. 630, was decided. Coleridge, J., in giving judgment, in that case said: "There can be no doubt of the general dominion which the law of England attributes to the husband over the wife," and went on to cite the passage from the Abridgment. In 1852 **Reg. v. Leggatt,** 18 Q.B. 781, was decided. The Court here refused to grant a *habeas corpus* to a husband for the purpose of restoring to him his wife, who was living apart from him, and Lord Campbell, C.J., in delivering his judgment, said: "This case is quite different from that of an infant. There the parent has a right to the custody of the child. . . . But a husband has no such right at Common Law to the custody of his wife." In 1859 in the case of **In re Price,** 2 F. & F. 263, we find that "if he (*i.e.*, the husband) believes that she (*i.e.*, the wife) intends to leave him to reside in an improper place, he has a right to restrain her." Finally we have **Reg. v. Jackson** (1891) 1 Q.B. 671, which is the leading case on the subject. It was a judgment of a strong Court of Appeal, composed of Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J., and the Court held that a husband was not entitled to keep his wife in confinement. The various authorities, including the passage from the Abridgment and **In re Cochrane** (*cit. sup.*) were fully discussed, and the Court scouted the opinion expressed in Bacon and adopted by Coleridge, J. The judgments should be read by those who are interested; it is not worth while taking excerpts from them; but it may be said that both the Lord Chancellor and the Master of the Rolls were of opinion that the husband could have power to restrain (not to imprison) his wife only if the wife was committing some "act of proximate approach to some misconduct," as if she were on the staircase about to join some person with whom she intended to elope.

A perusal of these cases leads us to the following conclusions: (1) that the Courts never held that a husband had a right to chastise his wife; (2) as far as the liberty of the wife was concerned, as early as 1718 they made a distinction between confinement and imprisonment—a somewhat refined distinction, as Lord Esher, M.R., pointed out in **Jackson's Case** (*cit. sup*). as early as 1721 they expressed the opinion that even confinement was only permitted in exceptional cases—see **Lister, Newton,** and **Price** (*cit. sup.*); in 1852, through Lord Campbell they went as far as to say that the husband has no right of custody at all; and in 1891 that the husband's rights were merely those of restraint in very exceptional circumstances. It is true that in 1840 Coleridge, J., went so far as to adopt the language of the Abridgment; but the decision of **In re Cochrane** was not an advanced one, for, as Fry, L.J., pointed out in **Jackson** (*cit. sup.*) the proposition put forward by Coleridge, J., was directly at variance with **Lister** (*cit. sup.*), and **Leggatt's Case** greatly weakened it, and by **Jackson's Case** it was in effect overruled.

It would not be proper to conclude without referring to two authorities which seem at first sight to suggest that the Courts have acted otherwise than we have stated. In **Phillips v. Barnet,** 1 Q.B.D. 436, decided in 1876, it was held that a wife cannot bring an action for damages for assault against her husband. But

(*Continued in next column.*)

The Honourable Mr. Justice Reed.

The Honourable Mr. Justice Reed, C.B.E., eldest son of the late Rev. George McCullagh Reed, was born in Ipswich, Queensland, in 1864. He was educated at the Auckland Grammar School, Otago High School, Victoria University College, and at the University of Cambridge, and served his articles with the firm of Devore & Cooper, Auckland. He was admitted to the Bar in 1887, practised at the Bay of Islands until 1896, and then went to Auckland. In 1913 he was made a King's Counsel. On 3rd March, 1921,—Mr. Reed was then senior partner in the firm of Reed, Towle, Hellaby & Cooper, of Auckland—he was appointed to the Supreme Court Bench.

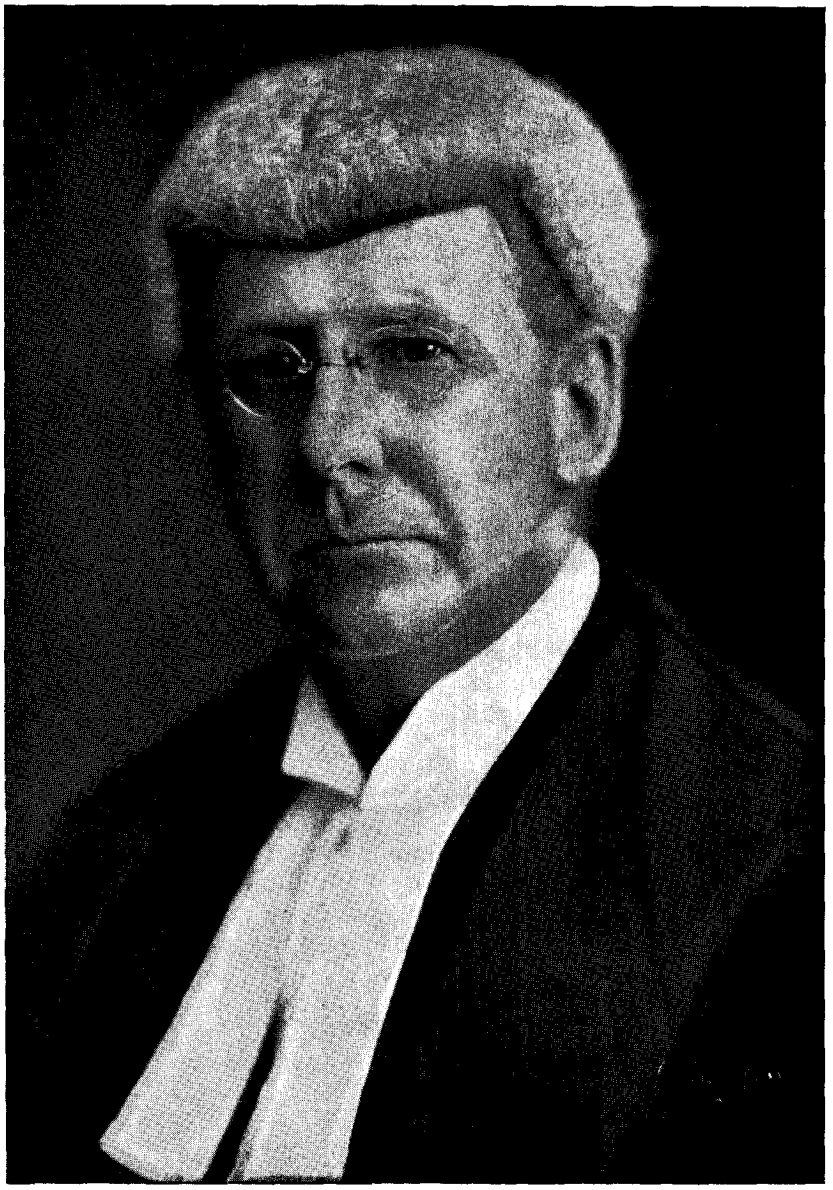
His Honour Mr. Justice Reed takes a keen interest in military matters. For some time he was Lieutenant-Colonel in command of the 3rd (Auckland) Infantry Regiment, retiring in 1911 with the rank of Colonel. In that year he was appointed Judge Advocate-General for New Zealand, a position which he has held ever since; for his services in that capacity the honour of C.B.E. was conferred upon him in 1919.

Other public positions which Mr. Justice Reed has held include those of the Chairmanship of the Kawakawa School Committee, and a seat on the Auckland Education Board. He has also been President of the Auckland District Law Society.

(*Continued from preceding column.*)

this was not decided upon the ground, nor can it be cited as an authority in favour of the proposition, that the husband has rights against the person and liberty of his wife. It was expressly decided on the ground that in law husband and wife are one; and it therefore follows if a wife should assault a husband, he too would on the same grounds be prevented from maintaining his action. The other authority is the *dictum* of Hale (1 P.C. 629) that a husband cannot be guilty of rape upon his wife. This *dictum* has not met with complete judicial approval (see *e.g. per* Wills, J. and Field J., in **Reg. v. Clarence,** 22 Q.B.D. 23,) but if it be a correct statement of the law, the ground is, as was pointed out by Hale himself, and by Hawkins, J., in **Clarence** (*cit. sup.*) that the consent of the wife is present in law.

The fact that Parliament will soon be sitting again and that new legislation will be added to the Statute book with unexpected clauses in unsuspected places recalls the story that is told of a paragraph introduced into an unopposed local Bill by a Town Clerk weary of matrimony. In the Bill, which was one for the better bestowal of the sewage of the borough, he deftly introduced a sub-clause whereby it was enacted that "from and after January 1st next ensuing the marriage of the Town Clerk shall be annulled," a curious provision which escaped the observation of both Houses.



The Honourable John Ranken Reed, C.B.E.,
Judge of the Supreme Court of New Zealand

Statements of Accused Persons.

(By W. E. LEICESTER).

"And I ask: For the depths
Of what use is language?
A beast of the field moans a few times
When death takes its young.
And we are voiceless in the presence of realities—
We cannot speak."

—EDGAR LEE MASTERS.

Those members of the public who relish the dramatic phases of crime must find the statements of accused persons a perplexing problem. Scarcely is there a defended trial but some confession is bitterly criticised by either prosecuting or defending counsel—the one suggesting that if men are honourable they relate the same story to the police as to the jury, the other explaining that it is a psychological possibility for an innocent man, under certain circumstances, to say the first thing that comes into his head. I use the terms "confession" and "statement" synonymously as meaning, not necessarily a complete admission of guilt, but any connected disclosure which, being relevant to the issue, the prosecution offers as incriminating and puts in evidence against the person making it. Such confessions are either judicial or extra-judicial, but with the former I have no concern; and indeed, since H. M. Bateman's cynical drawing of the "spoil-sport" or the culprit who told everything, it is at least doubtful whether they receive much encouragement from Bench or Bar. The latter form of confession can be taken broadly to cover any statement made by an accused person to any official in authority save a Judge, or Magistrate seized of the charge against him.

In the case of statements made in the presence of an accused person, the trend of judicial opinion is not to favour, in its entirety, the rule laid down in **R. v. Norton** (1910) 2 K.B. 496, that the particulars of such statements become admissable only when given on an occasion when the accused might reasonably have been expected to have explained or denied the allegations against him. Where the prejudicial influence of such confessions outweighs their evidential value, the view of the House of Lords in **R. v. Christie** (1914) A.C. 545, may well be taken to support the proposition that the growing, and approved, practice is for the prosecution not to press for their admission. The numerous motives and considerations that lead a person to maintain a silence under accusation or even an evasive responsion may apply with an even greater force to a suspect who makes a confession that is false *ab initio* or one that he sees fit, at some period of the trial, materially to alter or change. Yet, one is constantly meeting the fallacious argument raised by counsel for the Crown that an accused, by reason of the fact that he has departed from the statement made at the time of his arrest or has refused point-blank to make a statement at all, has thereby displayed a lack of honesty amounting to the clearest evidence of guilt. This method of procedure, in my opinion, is as unfair as it is illogical, for many confessions, when properly appraised, are valueless as evidence although they may seem to lend great weight to the case for the Crown. Some mental attitude in the person to whom the statement is made or in the suspect making it or some defect attaching to the statement itself may, upon investigation, render it unworthy of credence. Very often the Court is too ready to admit these extra-judicial statements and to brush aside the grave objections that can be taken to them—objections that are founded both on commonsense and on a knowledge of human nature.

To illustrate my meaning, I take the case of G. who was charged under Section 156 of The Crimes Act 1908, and Section 41 of the Police Offences Act 1908, with wilful exposure. The accused was a type infrequently met in these days save in the pages of Hardy and Powys—a rustic, slovenly, slow-minded and illiterate. His defence was a qualified admission of the exposure which had taken place in a railway-station urinal and had been seen by some ladies in a passing train, but an emphatic denial that the act was a wilful one; and on this point, the main evidence against him was his own signed statement which read, in part, as follows:—

> "I did not do this with the object of insulting any particular person. There were people about at the time as it was just before the Wellington train left. The abovementioned two occasions are the only ones on which I have committed this offence at the Railway Station or elsewhere. I do not make a practice of this sort of thing. I am not able to offer any reason for doing it and I am well aware that it is an offence to expose my person in a public place. I regret being so foolish and if given a chance on this occasion will undertake not to commit this offence in the future. I have read the foregoing statement through, and say that it is true and correct in detail. I make the same voluntarily and of my own free will, as I do not wish to put anyone to any trouble in connection with the matter."

One would not think on hearing the statement read, as it was on the opening of the Crown's case, that the accused had impressed upon the detective that whatever wrong he had committed was neither deliberate nor intentional. G. maintained that the detective had written the statement, saying, "You don't want to drag any women into this, do you? Read it over and sign it, and things will be alright." Relying on these words, G. had written his signature. On the other hand, the detective asserted that the statement had been taken down at the dictation of the accused who had completely understood what was in it. Which hypothesis was correct, I leave to the reader to choose for himself. The jury, apparently, considered the matter beyond doubt, even in face of a summing-up which concluded by stating that a verdict of acquittal meant that two ladies had gone into Court to commit perjury and a police officer should be dismissed from his employment.

The mental processes of this detective are not hard to follow. He fell readily into the fallacy of assuming what he set out to prove. Complaints had been received at the Detective Office, and he had no reason to disbelieve the truth of them. Accordingly, when the accused admitted the acts complained of, the police officer without further investigation imagined that this amounted to a plea of guilty to the offence, although *mens rea* was the essential ingredient of it. Failing to distinguish this important difference, the detective obviously thought he would palliate the guilt of G. by the contrite avowals that appear in the extracts I have quoted. The wording of the statement and the suggestion that the women should be kept out of it are both consistent with this view. The fact that the ex-

pression of the theory brought forth the wrath of the Bench and the ridicule of the Crown merely goes to show that the way of counsel is sometimes as hard as that of the transgressor himself.

"That all men are guilty until they are proved to be innocent," says Taylor, in his Treatise on Evidence, "is naturally the creed of the police, whose professional zeal, fed as it is by an habitual intercourse with the vicious, and by the frequent contemplation of human nature in its most revolting form, almost necessarily leads them to ascribe actions to the worst motives and to give a colouring of guilt to facts and conversations which are, perhaps, in themselves, consistent with perfect rectitude." Police officials are not concerned with any abstract theories of justice; they desire, like most of us, to finish their tasks and, with that end in view, have a tendency to frame their testimony in a way that will close most avenues of escape. Hence it follows that it is distinctly in their interests if the suspect steps unwarily into the realms of self-incrimination, for while they may avoid what, legally, is an "inducement," their series of questions to the person in their control, although he may not be under arrest, is designed to carry a definite implication that he has nothing to hope from pursuing a policy of silence and, indeed, a great deal to fear. The matter then simply develops into an extra-judicial examination recorded by officials untrained in the taking of evidence and whose accuracy, very often, is measurable by their own views of the case. "It frequently happens," says Baron Parke in **Earle v. Pickin,** 5 C. & P. 542, "not only that the witness has misunderstood what was said, but by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what was really said."

It is absurd, in my opinion, for anyone to urge that a detective has not a direct personal interest in the conviction of his prisoner, that it is possible for him in the exercise of his duties to manifest the quintessence of impartiality. In making this assertion, I do not wish to disparage a fine and zealous body of men, but I do think that the average policeman, being concerned in an arrest, feels that it is his duty to support the charge, and that any indulgence or undue squeamishness on his part is unlikely to call forth from his superiors a loving mead of praise. A short time ago, I heard the following evidence given in an undefended speeding prosecution:

THE SENIOR SERGEANT: "What was his speed, Constable?"

THE CONSTABLE: "Thirty miles per hour, Sir."

THE SENIOR SERGEANT: "Thirty miles per hour, or forty miles per hour, Constable?"

THE CONSTABLE: "Oh, forty miles per hour, Sir. I thought you said thirty miles per hour when you told the Magistrate the facts just now."

In these enlightened days, when such thinkers as Bertrand Russell, Schiller and Vernon Lee stress the importance of environment on character, it may be charitable but it is certainly unsafe to grant an immunity to stations and other places where the police are trained to "get their man." However congratulatory a police officer may be to the advocate whose skill has freed an accused person he feels in his heart that an acquittal reflects upon his discrimination and that his quarry has, for the time being, eluded him.

The argument, so constantly advanced by the Crown, that an innocent man must of necessity make a truthful statement is at best a superficial one. No man can explain ALL the circumstances that may weigh against him; and trivial, simple coincidences may under the lash of criticism appear significant and incredible. What are the thoughts and feelings of a man, happy and contented with the esteem of the community and the love of his adult family, wrongly confronted with charges of a sexual nature? The alleged offences as such are of small concern in comparison with the realisation that his peace and happiness are shattered and social ostracism stares him in the face. To the innocent, publicity is a greater punishment than it is to the guilty, who have at any rate the solace that it was caused by their own misdeeds. The mere fact of acquittal does not wash out the stigma of having been charged, for the platitude that there is never smoke without fire has long been popular with a public that reveres a half-truth far more than it does the whole one. Mr. Justice Coleridge has stated that the maxim "*nemo tenetur seipsum accusare*" is as important and as wise as almost any other in our law; but, should the accused refuse to make a statement, no one but a confirmed optimist can expect the prosecution to take a favourable view of the fact. If, therefore, the refusal is accepted by the Court as evidence of guilt, then the maxim occupies, like the sayings of Waldo Trine, the unusual position of being both weighty and meaningless.

The instincts of terror and self-preservation must be present in every man charged with a crime, their strength varying with the nature of the individual, of the offence and of his complicity in it; and, in the suspect, torn mentally by conflicting interests, the desire for self-preservation (to use that term in its widest sense) is invariably the stronger factor of the two. In consequence, an accused person may readily adopt the expedient of a false statement when its immediate advantages outweigh its future disadvantages. For instance, a married man may have to rely upon his mistress to establish an *alibi*—a course that invites scandal as well as other and costlier inconveniences. At the time of his arrest, he says what is untrue, not to conceal guilt, but to stifle inquiry. Then, again, suggestion may act upon the mind of a weak individual. A young school-teacher, childishly playing with a fuse and some gunpowder, left the former smouldering when he quitted the school at a late hour in the afternoon. He was suddenly confronted next morning by a detective who stated he was being charged with attempted arson and requested an explanation. The school-teacher expressed fear and amazement at the idea. "Come," said the detective, "why put us to any bother? Suppose we write down that you've been overstudying and didn't know what you were doing."

These are but a few of the reasons that may be given for statements untrue wholly or in part. There is no accounting for some human actions, and to study them all would be to embark upon a Freudian essay of the mind of man. Vanity, misunderstanding, ignorance, confusion or the lesser of two evils, this last so well illustrated by the Boorn case—all may lead to a confession upon which no reliance can be placed. And, as Mr. Justice Maule has so cynically observed, whenever there is no evidence against a prisoner, he is at once seized with a desire to confess everything to the police. Silence may be golden, but confession is apparently good for the Crown.

London Letter.

Temple, London,

25th April, 1928.

My dear N.Z.,

Nearly two years ago—on 22nd June, 1926, to be accurate—I called your attention to a reported case, **Rex v. Denyer,** in which an officer of an association of traders was convicted in respect of the association's "stop-list" expedients, adopted to keep retailers up to the mark in keeping prices also up to the mark. The case came, later, before the Court of Criminal Appeal and the conviction was upheld. Meanwhile on the civil side a different view of the lawfulness of "stop-list" expedients has been adopted: and, on this also being appealed, Lord Justice Scrutton ventured the observation (if one may thus mildly describe Scrutton, L.J.'s attitude) that **Rex v. Denyer** was wrongly decided. Then up and spake the L.C.J., as monarch of all he surveys on the criminal side: let the public beware, he uttered, that only the House of Lords can upset the Court of Criminal Appeal, and further that, as to this matter unless and until the House of Lords rules otherwise, the decision in **Rex v. Denyer** is to be regarded in criminal matters as paramount and will be enforced as such. A very entertaining battle between two lions, or, shall we say, tigers! And now to the schedule of the principal of recent decisions promised in my letter:—

Two interesting decisions in Revenue matters were among those which came under the review of the Court of Appeal and the House of Lords at the end of last sittings. Both were appeals from decisions of Rowlatt, J., and in both cases the decisions of the learned judge were upheld. In the first, **Inland Revenue Commissioners v. Parsons,** the defendant, owner of large estates which he had turned into a private company, wherein he was the principal shareholder, devised a scheme from which his employees were to derive considerable benefits. From the shares which he held he set aside two large blocks, of the nominal value of £100 each, for the benefit of certain servants employed on his estates. The terms were, shortly, that the Company was to open and keep accounts in which the shares of each employee were to be credited with all the dividends on the shares; these, during his employment by the Company, were to be received by the defendant. The employees, it was provided, might also help to pay for the shares by instalments of not less than £10 at one time. As soon as the account reached the par value of a share that share was to be transferred to the employee. Among the terms of the scheme was a clause providing that, until the actual transfer to the employee, the shares were to continue in the name and under the control of the defendant. The dividends so set aside for the year ending 5th April, 1919, amounted to £1,622 10s. 0d. Our Mr. Latter, K.C. (with whom you are acquainted) contended for the defendant that these monies were the subject of a binding trust in favour of the employees. The Attorney-General (now Lord Chancellor), contended for the Crown that they formed part of the defendant's taxable income. Rowlatt, J., decided for the Crown, and his decision has been upheld in the Court of Appeal.

In the second case, **Inland Revenue Commissioners v. Longford (Countess)** the Guardian of the Sixth Earl of Longford, a minor, received an allowance for maintenance from the Trustees of two settlements of which the Earl was the *cestui que trust.* The income from the two settlements, when added together, amounted to a sum which, if received by one person, would have been liable to super-tax. The Crown contended that the guardian of the infant, or the trustees of either settlement, could be called upon to make a return of the total income and could be assessed in respect of it. Rowlatt, J., decided against this contention, and held that the income from both settlements was income receivable by the Earl so as to be liable to tax. Both the Court of Appeal and the House of Lords confirmed this decision.

Two other important decisions were made in the Court of Appeal at the end of last term. In the first (**Stott and Another v. Shaw and Lee Ltd.**) the Court of Appeal presided over by Lord Justice Scrutton, supported the finding of a Divisional Court to the effect that a bill of exchange is not void simply on the ground that the consideration is not accurately stated, the amount stated as consideration not having actually passed from grantee to grantor. The grantee had paid debts of the grantor, who then gave the grantee a bill of exchange, for the monies so paid to his creditor. An incidental objection was made to the bill of exchange founded on the reason that a mortgage, given by the grantor on certain property securing the same sum of money to the grantee, amounted to a defeasance or condition within Section 10 (3) of the Bills of Sale Act 1878; but this also was held not to be tenable.

In the other of the two cases, **English Hopgrowers Ltd. v. Dening,** a decision of Rowlatt, J., was overruled. The plaintiffs sued on a contract made by the defendant on 12th April, 1925, to the intent that, so far as the hop crops grown by him on a certain 63 acres of land for the years 1925 to 1929 inclusive were concerned, he would deliver to the plaintiffs all such crops grown by him so that the same should be sold by the plaintiffs. Further, he agreed that, if he disposed of the hops to any other person, he would pay the plaintiff, "as for liquidated damages," the sum of £100 per acre or proportionately. This action concerned only the 1926 crop. On 23rd July, 1926, the defendant leased the 63 acres in question to a Company for a term of 5 years and the Company disposed of the 1926 crop to persons other than the plaintiffs. Pritt, K.C., and Wilfred Lewis, for the defendant, contended that what the defendant had done was to lease land with hops growing on it; that this was not disposing of hops produced; and that in 1926 the defendant had not grown or produced any hops at all. The defendant further said that the contract was an agreement in restraint of trade and that the attempt to fore-estimate the damages should be set aside and the provision be deemed to be a penalty. Jowitt, K.C., and Harold Murphy, for the plaintiffs, said that the hops existed apart from the land so soon as they were ready for picking, as in fact they were at the time of the lease granted to the company; and that the contract was not an agreement in restraint of trade. Rowlatt, J., decided for the defendant, on the ground that though the hops were pickable at the date of the

lease, no " hops " in fact existed until they had been picked. The Court of Appeal overruled this, holding that the hops were in existence as soon as they had so far grown as to be pickable; that, on the facts, the agreement was not in restraint of trade; and that the attempt to pre-estimate the liquidated damages could not be treated as representing a penalty.

In the Chancery Division, Eve, J., has decided that a covenant not to use premises " *except as a private dwelling house wherein no business of any kind be carried on* " is broken by a subletting of part of the premises—**Dulwich College Estate Governors v. Keeble**; and in the King's Bench Division, Rowlatt, J., has decided, in **Attorney-General v. Luncheon and Sport Club,** that betting at a club by means of a totalisator is subject to taxation under the Finance Act 1926.

Among this term's cases the most important decisions have been those made in: **re W. J. Villar, deceased, Public Trustee v. Villar**; **Cannon Brewery Company Limited v. Signal Press Limited and Others**; **and The London Holeproof Company v. Padmore.**

In **re W. J. Villar, deceased**: **Public Trustee v. Villar,** an originating summons put a question to Astbury, J., as to whether a provision depending upon the period of 20 years from the day of the death of the last survivor of all the lineal descendants of Queen Victoria living at the time of the testator, is in the circumstances valid, or void from uncertainty and impracticability. The will was dated 14th June, 1921, and the testator died on 6th April, 1926. There were 120 descendants of the Queen alive in 1920, and apart from the difficulty of ascertaining the dates of births and deaths of these descendants, it was manifest that the period might run for 100 years from the death of the testator. Astbury, J., in his judgment, followed the case of **Thellusson v. Woodward,** 11 Ves. 112, and held that the provision is valid.

Cannon Brewery Company Ltd. v. Signal Press Limited and Others was a case concerned with the law of Property Act 1925. Our new Mr. Justice Travers Humphreys holds that the service of a notice of dilapidations under Section 196 (3) of our Law of Property Act 1925, is properly made if left with some person on the premises, provided there are reasonable grounds for supposing that the person will pass it on to the lessee if possible. Lastly, in **The London Holeproof Hosiery Co., Ltd. v. Padmore,** the Court of Appeal has reversed a decision of Tomlin, J. The appellants (the plaintiffs) were in occupation of a factory with an option to purchase; a fire broke out and they exercised the option before the factory was repaired; they then brought an action, contending that they were entitled to damages for breach of contract, and alternatively, asking for a declaration that the plaintiffs were not bound to proceed with the purchase and an order for repayment of £160, paid by them by way of deposit. The defendants counterclaimed for specific performance of the contract to purchase the factory. Tomlin, J., held that the defendant, on his counterclaim, was entitled to a decree of specific performance, but the Court of Appeal reversed this decision, holding that the plaintiffs were entitled to a return of their deposit.

And that, gentlemen, concludes the business of this meeting.

Yours ever,

INNER TEMPLAR.

The Office of Lord High Chancellor.

The untimely death of Lord Cave, who lived only a few days to enjoy the earldom conferred upon him on his retirement, and the appointment as his successor of the Attorney-General, Sir Douglas Hogg, whom we must now call Lord Hailsham, attracts attention to the nature of the office of Lord High Chancellor.

The Lord Chancellor, is of course, the highest judicial functionary in England, and is, if a baron, in official rank, the highest civil subject in the land, outside the royal family, and takes precedence immediately after the Archbishop of Canterbury. He is by office a privy councillor, and it has long been the practice to make him a peer and also a cabinet minister; he is by prescription Speaker of the House of Lords. Unlike the Speaker of the House of Commons, the Lord Chancellor takes part in debates; but when he wishes to address the House he must advance to his place as a peer, for the Woolsack on which he sits is technically outside the precincts of the House. He votes, however, from the Woolsack and does not go into the division lobby. Practically the only function which he discharges as Speaker is putting the question; if two members of their Lordships' House rise together he has no power to call upon one, nor can he rule upon points of order. Not he, but the whole House, as " My Lords," is addressed by any member rising to speak.

The executive functions of the Lord Chancellor are not now so heavy as they have been in the past, and, while extensive duties still remain, their burden is now in practice considerably lightened by the efficient management of the Lord Chancellor's Department under his Secretary. Lord Thurlow was once asked how he got through his business as Lord Chancellor. " Oh! " he replied, " just as a pickpocket gets through a horse-pond—he must get through." But to many another Lord Chancellor the burden of the office has been particularly heavy—to Lord Herschell, perhaps an exceptionally conscientious Chancellor, there were not, to use his own words, three days in the year in which he was not hard at work, and on many days working ten, eleven, twelve, and thirteen hours. And we know that Lord Longdale, offered the Great Seal in 1850, drew up a list of the " pros " and " cons," the latter ultimately prevailing, on which side appeared the words: " Persuasion that no one can perform all the duties that are annexed to the office of Chancellor. Certainly that I cannot. Unwilling to seem to undertake duties, some of which must (as I think) be necessarily neglected." Happily the burdens of the office have since been lightened.

The Lord Chancellor possesses an extensive judicial patronage, but it is wrong to suppose that he is the one fount of honour in the profession of the law. Judges of the High Court and County Court Judges are selected by the Lord Chancellor, as are also Official Referees, Masters in Lunacy, and a certain proportion of the Masters of the Supreme Court. But, technically at any rate, the Lord Chief Justice, the Master of the Rolls, and the Lords Justices are appointed by the Prime Minister. The Lord Chancellor also has the appointment of Justices of the Peace, but the number of these dignitaries renders it well-nigh impossible for any Chancellor to satisfy himself of the personal merits of

each individual applicant or appointee. Lord Herschell, however, insisted on personally examining the case of each candidate to satisfy himself that he was a fit person to administer justice, saying that he would rather renounce his office than prostitute his power of appointment to Party purposes, and by this conscientiousness aroused, incidentally, considerable disfavour amongst his fellow Liberals.

The Lord Chancellor always belongs to a political party and resigns office with the party to which he is attached; the form in which his tenure of the office is terminated is by the resumption of the Great Seal by the Sovereign. The political nature of the office has frequently been denounced as contrary to the best interests of justice in that it is destructive of independence. But England has been fortunate in its Lord Chancellors and their personal conduct of the office has gone far to meet the objection. It has been said, in support of the existing system, that while the other judges should be permanent, the head of the Law should stand or fall with the Ministry as the best means of securing his effective responsibility to Parliament for the proper exercise of his extensive powers.

At the beginning of a new reign the Great Seal is "damasked," or struck with a hammer by the King at his first Council, in order slightly to deface it. The old Seal is then presented to the Lord Chancellor as a perquisite. On the accession of William IV there was a dispute between Lord Brougham, the new Lord Chancellor, and Lord Lyndhurst, who was retiring, as to the rightful possession of the old Seal, a question which the King himself decided by giving half of the Seal to each. Seals which have become worn out are also presented to the Lord Chancellor for the time being. The late Lord Halsbury is reputed to have acquired two such relics in this way. But the practice now is for a wafer Seal to be affixed to most documents of State, and the Great Seal itself, being used for only a few purposes, has thus a much longer period of efficiency than formerly.

It may perhaps be mentioned that there is no binding obligation on a Lord Chancellor to become a peer. Though a commoner he may still sit on the Woolsack, and put the question and commit resolutions; but one thing he cannot do, and that is address their Lordships' House. For a Lord Chancellor to remain a commoner there are advantages. For instance, if his party were ousted from power he could return to the House of Commons and have within his reach both the office of Leader of the Opposition and the glittering prize of the Premiership should his party later be successful at the polls. But to accept a peerage is an irrevocable act and there is many an ex-Lord Chancellor who after his party's defeat has sunk, so far as public life is concerned, into comparative obscurity, spending the rest of his days in hearing and determining appeals to the House of Lords —valuable and essential work, but not a task that attracts the public eye. Exceptions, of course, are to be found and amongst them stands conspicuous the case of Lord Birkenhead, who remains quite as well known under that title and quite as important a personage, as he ever was—which is saying a great deal—as F. E. Smith. Nevertheless most Lord Chancellors continue and probably always will continue to take the irretrievable plunge into the peerage. Two of the most famous Commoner Chancellors have been Sir Thomas More and SirFrancis Bacon, though the latter elected to become Baron Verulam some six months after his appointment, and a few years later, Viscount St. Albans.

The Lord Chancellor receives a salary of £10,000 a year and, on his retirement, a pension of £5,000. Unkind critics have bitterly attacked the latter payment, but it must be borne in mind that most Lord Chancellors, health permitting, continue to sit on appeals to the House of Lords and to the Judicial Committee of the Privy Council, and that tradition forbids them to return to practice at the Bar. On his retirement from the Woolsack Lord Birkenhead was attacked in some quarters for taking the pension attached to the office of Lord Chancellor. To this he made reply that when he accepted the office he abandoned an income of £20,000 a year at a pre-war value. "Ask any of the leaders of the Bar," he said, "whether if I returned to practice at the Bar, I could not now make £40,000 a year." While all ex-Lord Chancellors could not, perhaps, make £40,000 a year at the Bar, every one of them could earn in fees considerably more than £5,000, and this should effectively silence most of the critics.

"SERJEANT-AT-LAW"

The Value of Police Evidence

An Illustration.

In April of this year Bettina Warren, a tailoress in London, was charged at Bow Street Police Court with insulting behaviour.

Two police officers gave evidence that at midnight the girl placed herself in front of two separate men in Southampton Row and spoke to them. They both appeared annoyed and had to step aside to pass her. Neither of the officers had seen her before and knew nothing of her character.

Warren declared that she had been speaking to a friend, and after he left her she was followed for about ten yards by another man. He spoke to her, but she took no notice of him. She asked one of the constables how he could tell which spoke first if he was on the opposite side of the road.

The Clerk: "Isn't it rather difficult to see who spoke first at that distance?"

The Constable: "I could see by her action in placing herself in front of the man."

For the defence, Ivor Ospallo, a tailor, of Millman Street, Holborn, said that he was engaged to be married to Warren and met her by arrangement in Southampton Row. He was with another man and left him talking to the girl while he went away to buy some fruit. When he returned, the man had gone and the girl was in custody. She was in respectable employment.

Jack Gilbert, a tailor, of Marchmont Street, W.C., said that he remained for a time with Warren while Ospallo was away, but had to leave before he returned.

The Magistrate said he would give the girl the benefit of the doubt, and dismissed the charge.

If the report of the evidence given by the London "Times" and set out above, is correct, it seems more reasonable that the charge against the girl should have been dismissed on the evidence itself than on the ground that she should have the benefit of the doubt. The decision in this case does perhaps in its wording afford an example of an unconscious bias in favour of police evidence, which, when subjected to cold analysis, is not, without support of the uniform, as direct and weighty as the evidence for the defence.

Powers of Trustees.

Effect of Provision Making Determination of Trustees Binding on All Parties Interested.

Clauses are frequently inserted in wills and settlements purporting to give power to the trustees to determine questions and to declare their decision to be binding on the parties interested, but the precise effect of such provisions does not appear clearly to have been decided. The recent decision of Mann, J., in **In re Baillie: Whiting v. Cavendish** (1928) V.L.R. 171, is therefore of interest to those concerned with the preparation of instruments of this class. The will there under consideration contained a clause providing:

> "I declare that my trustees shall have the fullest powers of determining whether and to what extent any particular sum should be treated as capital or income and of determining all questions of value howsoever arising and of apportioning blended trust funds and of determining what property passed under any devise or specific bequest and generally of determining all matters as to which any doubt, difficulty or question may arise under or in relation to the execution of the trusts and powers hereof,"

and a further provision in the following terms:

> "I declare that every determination of my trustees in relation to any of the matters aforesaid shall bind all parties interested under this my will and shall not be objected to or questioned on any ground whatsoever."

The question which had to be determined was whether the trustees had power to apportion a large sum of money in their hands, some £15,000, as between capital and income so as to bind all parties.

The learned Victorian Judge said that he could see no reason at all for suggesting that the first of these clauses was not perfectly good and valid. It seemed to do no more than declare powers which the trustees would implicitly have by virtue of their office, and it related to matters which were not only within the powers of the trustees to deal with, but which it was their duty to deal with either with or without the assistance of the Court as circumstances might require.

But as to the second clause, considering it from the point of view as to how far it precluded interested parties from going to the Court to correct what they might consider an improper or unlawful determination as between capital and income, the learned Judge thought, in the circumstances of the case, that it had no effect at all in that direction—that it did not prevent either the life tenant or those interested in the corpus from taking the ordinary legal steps to challenge the determination of the trustees upon any matter affecting their interests. The clause was not followed by any provision in the nature of forfeiture in the case of a party having recourse to the Courts; but if it had been the authorities showed that such forfeiture would be relieved against, or would be held to be void. It could only mean, therefore, if the clause was to have any operation at all, that it was to operate by way of binding the Courts when such questions were brought before them for determination, and precluding the Courts from putting right that which they might believe to be clearly wrong and not in accordance with the law. His Honour had no doubt that that could not be done, and as far as the clause purported to do that, or might have the effect of doing that, giving it its full verbal meaning, it was void as being repugnant to the gifts made by the will and as being an attempt to oust the jurisdiction of the Courts to deal with rights of property. But that did not exclude, of course, the giving of great weight to the discretion of the trustees when such a discretion had been exercised, and it might even be a decisive weight, when cases were brought before the Court after the exercise of the trustees of their discretion in a matter of that kind and in circumstances of doubt and difficulty. In particular the exercise of the trustees' discretion had been regarded more than once as the determining factor in the answer given by the Court to a question as between income and corpus where that discretion had been exercised with regard to the apportionment of burdens, or the apportionment of items of expenditure—a class of question which was peculiarly one in which there was room very often for the exercise of a just discretion on the part of those having the management of the estate.

The Proper Study of a Lawyer.

In 1828 there were, according to the scholarly computations of Mr. Park, in a moderate law library 2,500,000 points of law. It makes one shudder to contemplate the increase of the ensuing century, and one turns with infinite relief to the cheerful modern authorities who assure the lazy and the fearful that all law can be reduced to about seven principles, wherefrom the intelligent can arrive at any required point by the application of logic and common sense.

And the complete lawyer must not confine his study to the three million points. He must not be ignorant, said Dr. Cowell, "of either beasts, fowls, creeping things, nor of the trees, from the cedar of Lebanon to the hyssop that springeth out of the wall." And the Mr. Chitty of the period round about 1850, advised the study of anatomy, physiology, pathology, surgery, chemistry, medical jurisprudence, police and mankind. It is no wonder that the modern practitioner has been forced to specialise and to confine his attention, e.g., to Golf, Conveyancing and Mankind.—"Law Journal."

Rules and Regulations.

Fisheries Act, 1908: (a) Permitting Marine Department to take trout, salmon or other acclimatised fish during closed seasons, for purposes of pisciculture; Order-in-Council of 3rd November, 1909, revoked; (b) Regulations prohibiting trawling and use of Danish seine nets and purse seine nets in Mercury Bay.—Gazette, No. 45, 31st May, 1928.

Customs Amendment Act, 1927: Duties and exemptions from duty in force in Cook Islands.—Gazette No. 47, 7th June, 1928.

Merchant Shipping Act, 1894 (Imp.): Recognition of load-line certificates issued by Portuguese authorities to Portuguese ships.—Gazette No. 47, 7th June, 1928.

Legal Literature

Underhill and Strahan's Principles of the Interpretation of Wills and Settlements.

Third Edition, by J. B. RICHARDSON, M.A., LL.B. (pp. 313 : Butterworth & Co. (Publishers) Ltd.)

One of the most thankless and unprofitable tasks which falls to the lot of the Solicitor is that of drawing a will—a task surpassed in point of difficulty only by that of interpreting the written document and of applying its trusts, descriptions, conditions and provisoes to the facts as they are found to exist after the death of the testator. In *Underhill and Strahan* it may unreservedly be said that the practitioner will find to lead him through the maze of a testator's obscurities not only a safe guide but an indispensable one. Many wills—mainly perhaps those drawn by laymen—are ambiguous, equivocal and even contradictory, and in such cases the principles upon which the Courts have from time to time acted in arriving at a conclusion as to the intention are indisputably of great value. No doubt one must not "construe one man's nonsense by another's"—to do that is one thing: to interpret the nonsense in the light of rules of construction (which are rules as much of common sense as of law) long judicially recognised and applied, is another. As the late Mr. Vaughan Hawkins has pointed out in algebraical language, a rule of construction may always be reduced to the following form :— "Certain words or expressions, which may mean either x or y shall *prima facie* be taken to mean x." Such a rule yields, of course, to a contrary intention expressed in the document; some rules are much stronger than others and require a greater force of contrary intention to exclude them. In *Underhill and Strahan* these rules are stated clearly and succinctly. The method adopted is to set forth the rule (all the rules are arranged and classified into appropriate divisions) and then to illustrate it by reference to the decided cases. The judicious use of heavy type for headings and subheadings enables the reader to find with the minimum of effort the statement of the law for which he is in search. The work (as its title indicates) includes the rules of interpretation applicable not only to wills, but also to settlements; though there are some important exceptions the general principles applicable to both are much the same, and it is believed that apart from treaties on interpretation generally no other work treats of wills and settlements together. At the end of the volume is added an exceptionally useful glossary of words and phrases most frequently occurring in such documents. This edition is some 120 pages larger than its predecessor which was published 22 years ago. A matter of no small importance to the New Zealand practitioner is that the text is but little affected by the English Law of Property Acts for, however far-reaching and revolutionary those Acts may be as regards other aspects of the law relating to wills and settlements, they introduced no sweeping changes in the rules of interpretation. Where any such changes do occur the system has been followed of setting out both the old and the new rules in the same article.

New Books and Publications.

Rating and Valuation Law. By Scholefield and Crouch. Butterworth & Co. (Publishers) Ltd. Price 18s.

Grotius Society Transactions. Volume 13. Sweet & Maxwell, Ltd. Price 9s.

Landlord and Tenant Act, 1927. Second Edition. By T. J. Sophian. Sweet & Maxwell, Ltd. Price 9s.

Guide to Land Registry Practice. By J. J. Wontner. Solicitors' Law Stationery Society. Price 7s.

Historians of Anglo-American Law. By W. S. Holdsworth. Oxford University Press. Price 17s.

State Sovereignty and International Law. By Mattern. Oxford University Press. Price 13s. 6d.

European Legal History and Other Papers. By Munroe Smith. Oxford University Press. Price 18s.

History of Continental Civil Procedure. (Continental Legal History Series, Volume 7). By Arthur Engelmann and others. John Murray. Price £1 15s.

Stone's Justices Manual. Sixtieth Edition. By F. B. Dingle. Butterworth & Co. (Publishers) Ltd. Price £2 3s.

General Average Law and Rules. An Introductory Handbook on the York-Antwerp Rules. By S. D. Cole. Effingham Wilson. Price 5s.

Garsia's New Guide to the Bar. Sixth Edition. By Marston Garsia. Sweet & Maxwell, Ltd. Price 6s.

Railway and Canal Cases. Volume 19. Sweet & Maxwell, Ltd. Price £2 7s.

Railway Passengers and Their Luggage. By G. B. Lissenden. Solicitors' Law Stationery Society. Price 6s.

Strahan's Digest of Equity. Fifth Edition. By J. A. Strahan. Butterworth & Co. (Publishers) Ltd. Price £1 6s.

Death Duties. By Cleary. Butterworth & Co. (Publishers) Ltd. Price 15s.

Correspondence.

The Editor,
"N.Z. Law Journal,"

Sir,

Solicitors' Trust Funds.

This subject has been receiving a great deal of attention lately both by members of the profession and by the public both in New Zealand and also in Australia, as disclosed by an article in the April number of the Secretarial Gazette. The present method of audit supervision appears to be totally inadequate. It cannot be suggested that a superficial examination of books by persons with no practical knowledge of legal transactions is of any use whatever; the audit should be conducted at frequent intervals by competent audit officials appointed by the New Zealand Law Society. A fee proportionate to the audit work performed could be levied on all legal offices in the Dominion and the fee could be made to cover the contribution to the Solicitors' Guarantee Fund which would scarcely be required if there were proper supervision. It is obvious that any system which does not provide for constant supervision is entirely useless. It is to be hoped that the matter will be pressed to finality by the representative Committee appointed. The operation of the Law should also be fully extended to include all persons and companies handling trust moneys such as executors and trustees of deceased persons, accountants and estate agents.

"JUNIOR MEMBER."

Bench and Bar.

Chief Judge Jones, of the Native Land Court, upon whom the honour of C.B.E. was conferred in the last Birthday Honours, was born in Belfast, in 1863, and came to New Zealand in 1867. In 1890 he was admitted as a Solicitor, and as a Barrister in 1899. In 1903 he was appointed Judge of the Native Land Court and the Native Appellate Court and President of the Tairawhiti Maori Land Board. He became Chief Judge and Under-Secretary for Native Affairs in 1918.

Mr. J. Miller, Registrar of the Supreme Court at Christchurch, has been appointed a Stipendiary Magistrate. Mr. Miller was born in 1881, and joined the Justice Department some twenty-eight years ago. He has occupied the position of Clerk of the Magistrate's Court at Wanganui, Masterton, and Hamilton, and has been Registrar of the Supreme Court at Hamilton and Christchurch. Mr. Miller is a Solicitor of twenty years standing. The district in which Mr. Miller will take up his duties has not yet been announced.

Messrs. Smith & Dolamore, of Gore, have opened an office in Invercargill. The firm have admitted into partnership Mr. T. R. Pryde, who has been for many years on their staff, and who will control the Invercargill office.

Mr. E. W. R. Haldane, LL.B., who has been for the last nine years on the staff of the Public Trust Office, has commenced practice at Lower Hutt, Wellington.

The following have been recently admitted as Solicitors at Wellington: Messrs. A. R. Cooper, W. B. Gamble, E. M. Kelly, V. M. Roache, and L. H. G. Sinclair.

Mr. G. R. Martin, of Dunedin, has been admitted as a Solicitor.

When is an Invalid Marriage Binding ?

If a man contracts an invalid marriage with a woman, is he still her husband ? This is a legal conundrum arising from a strange nullity suit heard by Mr. Justice Hill recently—**Woodland v. Woodland** (" Times," 28th Mar.)—and his answer to it in effect was: " Yes; when he has estopped himself from proving that he is not her lawful husband." It is an illustration of the familiar clash of the strict law of evidence with a hard case. In this suit, the petitioner was married in 1914, to a woman whose marriage, in 1907, had not been dissolved. She thought that the decree of a Paris Court the month before had dissolved the marriage, but this was only in the nature of a decree *nisi*. The result was that the second form of marriage was void *ab initio*, the first husband being still alive. In the ordinary course, the petitioner would have been entitled to a decree of nullity, but, in 1921, an order for restitution of conjugal rights had been made against him on behalf of his reputed wife. In that final judgment the couple were declared to be lawful husband and wife, and he had not defended the suit or raised the issue of the validity of the marriage. Mr. Justice Hill suggested that the conundrum was a fit one for the Court of Appeal, but decided that the restitution decree operated as an estoppel.

Wellington Law Students' Society

The following case was argued before His Honour, Mr. Justice Smith, on Friday, 1st June, 1928: " A hovers for some days in a stationary air-ship at a height of some 500 feet over B's private training stables whilst B.'s horses are being exercised immediately prior to a big race meeting, for the purpose of touting for a rival stable. B. sues A. for: (1) An injunction as for a Nuisance. (2) Damages for Trespass £50."

Bannister, for the plaintiff, dealt with the question of injunction. He submitted that whether damage suffered or not, if damage were anticipated, an injunction should be granted. *Dreyfus v. Peruvian Guano Co.*, 43 Ch. D. 316. The remedies of injunction and damages for trespass are co-existent not mutually exclusive. *Salmond on Torts*, 6th Edn. 231. If there is a future prospective damage it is sufficient for the Court to act on. Although the air is a public highway the Courts will have to formulate new law to meet the new circumstances. The defendant has a right to pass and re-pass only. *Gifford v. Dent* (1926) W.N. 336. The English Air Navigation Acts are not applicable, and are of no use to the plaintiff.

McPorland, in support: There are two remedies: see *Brown's Case* (1913) 2 Ch. 420. It is a trespass to hover over plaintiff's property and constant hovering in the vicinity is also a nuisance. *Pollock on Torts*, 12th Edn. 185; *Ashby v. White*, 2 Ld. Raym 955. It is a trespass to enter the air space *27 Halsbury 844; Salmond*, 6th Edn., 219, 221. See also Air Navigation Act (Imperial), 1920, Sec. 9—the object of the Act is to constitute the air a national highway only. The right of passage has been abused. See *Pickering v. Rudd*, 4 Camp. 219; *Kenyon v. Hort*, 6 B. & S. 252; *Butterworth's Fortnightly Notes*, 7th June, 1927.

James, for defendant: We have some rights over the air column above plaintiff's land. Plaintiff has proved no damage. English Law recognises no bare right of privacy, and the Court will not grant an injunction if the matter is trivial. *Kerr on Injunctions*, 6th Edn., 6 and 32; *Ryder v. Hall*, 27 N.Z.L.R. 419. See *English v. Metropolitan Water Board* (1907) 1 K.B. 588, 603. The form of the proposed injunction is bad. *Kerr*, 647. The exception of " ordinary quick air passage " is not defined clearly enough. It is impossible to define precisely what acts should be restrained: in *Smith v. Smith*, 14 N.Z.L.R. 4, an injunction was refused on this ground. The present case is analogous to those concerning overhanging trees, but no injunctions were granted there. The remedy, if any, is self help, and no injunction should be granted. *Spear v. Rowlatt* (1924) N.Z.L.R. 801, 805.

Sutherland, in support: This branch of law is new. A new ruling should be given consistent with modern conditions. There is a right to pass and re-pass given in the English Act, Section 9—we must accept this as the standard. See N.Z. Gazette, 1921, Vol. 1, for Regulations. As defendant was 500 feet up, he was not a sorce of danger to the plaintiff. We have more than a mere right of passage; we have a right to fly in the air at will. See *Pollock*, 12th Edn., 351, 352; *Salmond*, 6th Edn., 226. As the plaintiff cannot prove actual damage he cannot succeed.

His Honour, Mr. Justice Smith, delivering " judgment," outlined the facts, and said that the first question to decide was whether the acts constituted a trespass or a nuisance as the two forms of tort were mutually exclusive—*Salmond*, 249. It had been suggested that mere flight would constitute a nuisance—it was certainly a nuisance when it caused harm, danger, or inconvenience to the plaintiff or his land. There was a well-recognised right of passage across land of others, and aircraft might fly across the land of others if flown in such a way that fumes, noise, etc., did not escape—otherwise the owner of the aircraft would commit a nuisance. The airship, in the present case, was distinguishable from an aeroplane passing rapidly. It was in some respects like a tower 500 feet high, erected on B.'s land for several days. Regarded in that viewpoint it was, in His Honour's opinion, a trespass.

The next question was the remedy. His Honour considered that the wrong remedy had been claimed, but if need be, in proper proceedings, it would not be beyond the ingenuity of the Court to frame a suitable injunction. In the case as framed damages for trespass alone could be awarded. The plaintiff was entitled to damages as claimed, £50; but no injunction would issue. If the conduct were repeated no doubt proper proceedings to obtain an injunction would succeed.

At the conclusion of the proceedings Mr. C. E. Scott, President of the Society, thanked His Honour for his presence that evening, and a vote of thanks was carried by acclamation.