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"Acts are passed in such a state that it is almost impossible for the Courts to act upon them, and the Judges often toil in vain to find a meaning."

—*Lord Langdale.*

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Judicial Salaries.

At the Legal Conference held at Christchurch in April last, a remit was unanimously agreed to that the present salaries and pensions of the Supreme Court Judges are quite inadequate and require revision. The Attorney-General, in his address to the Conference, referred to this remit and is reported as follows :—

> "There was one remit which he regretted to see and that was in respect to the pensions and salaries of Judges. There was not much chance of increase being made—a Judge did not accept a position on the Bench from mercenary motives. He was generally in a position to accept the post at the salary offered. He did not think, speaking with some knowledge of the subject, that anyone had refused a Judgeship on account of remuneration only. After all, a Judge held the highest position a man could attain to."

The Canadian Bar Review, of February last, contains a memorandum in reference to judicial salaries in Canada, submitted to the Government of Canada by the Canadian Bar Association. The conclusion reached, namely, that the salaries paid to the Judges of the Supreme Court of Canada, the Exchequer Court of Canada and the Superior Supreme Courts in the Provinces are entirely inadequate, was arrived at only after very careful consideration and comparison between Canadian salaries and those paid to Judges in other parts of the British Empire. The memorandum states :—

> "Canada has always felt a justifiable pride in its Judiciary, a feeling that has not been weakened by a comparison of the Canadian Bench with the Bench of other countries; but this high standard cannot be maintained unless the Government is able to secure men of the highest attainments for these positions and the salaries are sufficient to enable the occupants of these important and honourable positions to retain their status in the community."

The view of the Canadian Bar is the same as the view expressed by the Profession in New Zealand at the Annual Conference with respect to New Zealand Judges and their salaries. The Canadian memorandum contains particulars of the salaries paid to Judges in England, the Irish Free State, Northern Ireland, Australia, New Zealand, South Africa, and the United States. Although the judicial salaries paid in one country are not of necessity a reason for paying the same salaries in another country, the position of the King's Judges throughout the British Empire is so much the same that comparison is a useful guide to the Governments of the various units in fixing a proper remuneration. Examination of the salaries paid throughout the Empire shows that, giving to the Supreme Court of New Zealand the same status as that of the Supreme Court of Canada, the High Court of the Irish Free State, the High Court of Northern Ireland, and the Federal Court of Australia, New Zealand judicial salaries are low by comparison with those paid elsewhere. The Chief Justice of the Supreme Court of Canada receives £3,000 a year and the Puisne Judges of that Court £2,400 a year. The Lord Chief Justice of the Irish Free State receives £4,000 a year, the President of the High Court £3,000 a year, Puisne Judges of the Supreme Court £3,000 a year, and the Puisne Judges of the High Court £2,500 a year. In Northern Ireland the Lord Chief Justice receives £5,000 a year, the Lord Justices £4,000 a year, and the Justices £3,500 a year. In Australia the Chief Justice of the High Court receives £3,500 a year, and the Puisne Judges £3,000. In New South Wales the Chief Justice of the Supreme Court receives £3,500 a year, and the Puisne Judges £2,600. In Victoria the Chief Justice of the Supreme Court receives £3,000, and the puisne Judges £2,500. In South Africa in the Appellate Division the Chief Justice receives £3,000 a year, two other Judges £3,000 a year, one £3,400, and one £2,700. The salaries paid to the Judges in England are well known and are, of course, very much higher.

If comparison of the salaries paid throughout the Empire is of any value, the £2,250 a year paid to our Chief Justice, and the £2,000 a year paid to our Puisne Judges are low, and the opinion of the New Zealand Bar that they are too low, being supported by that comparison, should be given careful attention by the Government. It is not fit that the New Zealand Judiciary should be underpaid. It is indeed dangerous to allow such a condition to continue. The Sydney Bulletin of 26th September, 1928, contains an article on "The Peril of the Cheap Judge," and the conclusion reached in that article that inadequate salaries to Judges is false economy and has led, where adopted, to a conduct of judicial administration which is deplorable, is fully justified. The real reasons for the proper remuneration of Judges are obvious to anyone with a proper understanding of the responsible duties Judges have to carry out—duties necessitating a freedom and position in the Judge commensurate with the dignity and importance of his office.

Lord Birkenhead's withdrawal from the British Government, on the ground that his obligations to his family were that he should use his abilities and obtain for them their full value, has led Dean Inge to a criticism of the large salary and the virtue of sacrifice in public men. His views seem to correspond with those of our Attorney-General. Reflection will, however, indubitably show that such criticism as that offered by Dean Inge must be relative and that the theory of limitation so expressed is nothing but a plea for mediocrity and for the elimination from public service of ability and industry.

The reasons for the proper remuneration of high judicial officers are many and compelling, and are so well understood that they do not need repetition. The salaries of yesterday are not, in the changing conditions of modern life, necessarily proper for to-day, and it is the bounden duty of all those concerned in the administration of justice to see that judicial salaries are adequate. It is not right or proper to ask from those qualified to carry out these duties such a sacrifice that their duty to themselves and their families is jeopardised on the plea of public duty.

Supreme Court.

Reed, J. August 15, 16; 23, 1928.
Auckland.

KUNST v. TATE.

Contract—Parties—Agreement to Give Option to Purchase Land to Person Named in Contract and Described as "Managing Director of" a named Company—Contract Signed by Such Person in His Own Name with Addition of Like Description—Director Inspecting Land and Agreeing to Buy Same—Subsequent Intimation That Company Would Pay Deposit—Contract Held to be Made with Director Personally and Not with Company—Presumption Where Agent Signs Contract on Behalf of Foreign Company—Effect of Non-Registration of Foreign Company on Contract—Companies Act, 1908, Section 300.

Vendor's action for damages for breach of a contract for the sale and purchase of land. The only question put in issue by the defence was whether or not the defendant contracted as agent for a disclosed principal, the Southern Cross Glass Co. Ltd., or on the other hand contracted as a principal. The validity and existence of a concluded contract and its breach were admitted during the course of the proceedings. The plaintiff was a widow. The defendant was a company director and in December, 1924, was the managing director of the Southern Cross Glass Co. Ltd., a company carrying on business in Australia, and at that time having no registered office, and carrying on no business, in New Zealand. An agent brought the plaintiff's property to the notice of the defendant and an option over it was taken by the defendant. By the terms of the option the vendor agreed in consideration of one shilling to give "William Ravage Tate of Auckland Managing Director of the Southern Cross Glass Company Limited an option to purchase over my sand property situate at Awanui in the Auckland Province for the sum of £5,500." The option was to be exercised in ninety days from the 10th January, 1925. The defendant signed the option as follows: "W. R. Tate Managing Director Southern Cross Glass Co. Ltd." The defendant, with his secretary Douds, went to Awanui to inspect the property, accompanied by one Herbert Subritzky, a brother of the plaintiff. A thorough inspection was made and samples taken and examined. The undisputed evidence of Subritzky was that the defendant told him to tell his sister when he got back to Auckland that the defendant had bought the sand and to notify the Glass Works that they were not to take more sand. At no stage did the defendant mention to Subritzky that he was buying the sand on behalf of a company. On return to Auckland they were met at the steamer by the plaintiff and her son, C. A. Hynes. In the presence of the defendant, Subritzky said to the plaintiff, "Mr. Tate has bought the sand" and they shook hands. The defendant walked up Queen Street with Hynes and told him that he was accepting the option and that he could tell the plaintiff he had purchased the sand. Hynes asked him if he would give the plaintiff something in writing to that effect and he said he would. He said that he might want a short extension of time to pay the deposit and Hynes told him that the plaintiff would be pleased to grant it. In pursuance of this conversation the defendant, on 16th January, 1925, wrote a letter to Hynes stating that he intended to purchase the land and intimating that he might want an extension of time and that if he did he would like Hynes to get the plaintiff's consent in writing. He further requested Hynes to notify the people then taking sand from the property that they must discontinue. On 21st January Hynes called on the defendant about payment of the deposit and the defendant told him that his company would supply that, and Hynes asked for something to that effect in writing, and obtained from the defendant a letter as follows:—

"Dear Madam,

"On behalf of my Company I beg to inform you that it is the intention of my Company to pay the deposit mentioned in agreement dated 24th December 1924 on or before the 10th day of April 1925.

"Signed on behalf of the Southern Cross Glass Co., Ltd.,
W. R. TATE,
Managing Director."

Upon the receipt of this letter and at the request of the defendant the plaintiff and her son visited the Auckland glass works and terminated the right to take sand, and followed it up with a notice under registered cover to the same effect Upon these facts the defendant contended that the contract was a contract with the Southern Cross Glass Co., Ltd., not a contract upon which he was personally liable.

Leary for plaintiff.
Northcroft for defendant.

REED, J., said that the sole question in issue was whether the contract was with the defendant or with the Southern Cross Glass Co., Ltd. The Statute of Frauds was not pleaded, and it was admitted that there was a good and valid contract. The defendant contended that the contract was made up of the option, the letter of 16th January, and the letter of 21st January, and that those disclosed that the contract was with the company and not with the defendant. The plaintiff contended that it was the defendant who was the contracting party and not the company. The first question to be discussed was whether the option was an option to the defendant or an option to the Southern Cross Glass Co., Ltd. The signature to it by the defendant had no legal effect, not being intended to signify an acceptance, and the most that could be made of it was that it verified the terms of the option. But assuming that the signature with the addition of "Managing Director—Southern Cross Glass Co. Ltd." should be read as explanatory of the option, it could not have any greater effect attached to it than if the document constituted an offer and acceptance. If it were a contract constituted by such offer and acceptance, should the addition in the body of the document of "Managing Director of the Southern Cross Glass Company Limited" or to the signature "Managing Director—Southern Cross Glass Co., Ltd," be construed as negativing a personal contract and constituting it a contract made for and on behalf of the company? The authorities as to the effect to be given to such an addition were conflicting until the case in the House of Lords of **Universal Steam Navigation Co. v. James McKelvie and Co.** (1923) A.C. 492. Following on this case was **Kimber Coal Co. v. Stone and Rolfe Ltd.** (1926) A.C. 414. The effect of those cases was that the additions in the body of the document being without any words limiting personal liability were only words of description. As to the addition to the signature to the document, in order to avoid personal liability the words added must clearly purport to so limit it. His Honour referred also to **Dutton v. Marsh,** L.R. 6 Q.B. 361. Even if the option were a contract requiring the signature of the defendant His Honour thought the addition would not exclude the personal liability of the defendant; a *fortiori* neither the addition to the signature nor in the body of the document constituted an option to the company. The option, therefore, was given to the defendant personally. On the undisputed evidence it was verbally accepted by him and he signified his acceptance more than once. The evidence of Hynes that the defendant said he was accepting the option and that the defendant instructed Hynes to tell the plaintiff that he, the defendant, had purchased the sand, was a sufficient proof of acceptance. He thereby constituted Hynes his agent to communicate the acceptance. He had previously stood silent while Subritzky communicated a similar message to the plaintiff, and thereupon shook hands with her. The Statute of Frauds was not pleaded and the defendant, who went into the box did not dispute the evidence. In these circumstances the verbal evidence was as effective as if in writing. His Honour, therefore, found that there was a full and complete acceptance of the terms of the option and that a complete and valid contract was made between the plaintiff and the defendant.

It was at the same time as the acceptance that the defendant stated he might want an extension of time to pay the deposit and Hynes stated that his mother would grant it. There was no evidence whatsoever nor any legitimate inference that that was in any respect intended as a variation of the contract. It was merely mentioned that a forbearance might be asked for and as indefinitely acquiesced in. It was not disputed that the letter of the 16th January constituted a notice of acceptance of the option, but it was contended that it was qualified by leaving one matter open for discussion, namely, the date for payment of the deposit. It was contended that there was not such an unqualified acceptance as was necessary to constitute a contract. The first paragraph was an intimation that he would purchase the property on the terms of the option. In the last paragraph he exercised his right as owner by prohibiting the removal of sand. The central paragraph did not purport to impose a condition but was simply a notification that he might want an extension of time for payment of the deposit and if he did so would like a consent in writing. That was really an intimation that he proposed to ask for forbearance or a concession on the concluded contract. The concession was made and a date arranged for payment of the deposit and on the defendant representing that his company would pay the deposit he was asked for a letter to that effect which produced the letter of 21st January.

It was contended for the defendant that the terms of the letter established that the option was taken up by the company and not by the defendant. His Honour was unable to read anything of the kind into it. First, the writer did not purport to take up the option. He treated the option as a concluded agreement and simply undertook on behalf of the company to pay the deposit on 10th of April. The construction put upon the letter by Hynes appeared to be the only possible construction, that was to say, that it was in the nature of a guarantee by the company of an amount due by the defendant. It was not irrelevant to observe that when the defendant purported to contract on behalf of the company he used apt words for the purpose, whereas up till then no such words had been used. The contrast between the form of signature to this letter and the descriptive words in the option was most marked and significant. His Honour found that, even assuming that the contract was not complete until the date of payment of the deposit was arranged, that on the arrangement of that date as at 10th April, as was admitted, the contract was complete with the defendant, and that the letter of 21st January did not affect the contract by substituting the company for the defendant, nor had it any relation back so as to constitute acts of prior acceptance as being on behalf of the company.

The above conclusion rendered it unnecessary to consider the presumptions arising from the facts that the company was a foreign company, and that the day before the deposit was paid, a power of attorney to the defendant from the Southern Cross Glass Co. Ltd. was deposited, in accordance with Section 300 of the Companies Act, 1908, in the Supreme Court at Auckland, and that the company never at any time had a registered office in New Zealand in compliance with Section 302 of the same Act. The last-mentioned circumstance did not render the contract, if made by the company, illegal—**Picturesque Atlas Coy. v. Harbottle,** 10 N.Z.L.R. 348. The submission of Mr. Leary on behalf of the plaintiff was that as the contract was with a foreign company the presumption was that credit was given to the alleged agent, the defendant: that was to say, that the contract was made with him personally. Several authorities were cited the general effect of which was expressed in **Bowstead on Agency,** (7th Ed.), 389. Of course if the foreign principal was clearly bound by the terms of the contract and the agent did not purport to make himself personally liable no presumption of liability on his part arose—**Miller, Gibb and Co. v. Smith Tyrer Limited,** (1917) 2 K.B. 141. If there was no such evidence, the presumption prevailed that the agent had no authority to pledge the credit of the foreign principal in such a way as to establish privity between such principal and the other party, and that he was personally liable on the contract. Sankey, J., in **Harper and Sons v. Keller Bryant and Co. Ltd.,** (1915) L.J. K.B. 1696. As His Honour was of opinion, however, that even if the company were a New Zealand company the contract was clearly made not with the company but with the defendant personally, it was unnecessary to rely on the doctrine of presumptive liability.

It was further contended on behalf of the defendant that the plaintiff had by her acts treated the company as being the real contracting party and that by doing so she has caused the defendant to act to his prejudice and was, therefore, estopped from contending that the defendant was bound under the contract. His Honour, after considering the correspondence and evidence dealing with this aspect of the matter at great length, concluded that no case of estoppel had been established upon the evidence.

Judgment for plaintiff.

Solicitors for plaintiff: **Bamford, Brown and Leary,** Auckland.
Solicitors for defendant: **Orbell and Charles,** Ashburton.

MacGregor, J. September 14; 20, 1928. Wellington.

HANNAN v. THE GUARDIAN TRUST AND EXECUTORS COMPANY OF N.Z. LTD. AND OTHERS.

Power of Appointment—Fraud on Power—Trust to Pay Income of Property to Son for Life and to Hold Corpus "For Such Person or Persons Other Than the Beneficiary" as the Beneficiary Should by Deed or Will Appoint—Beneficiary Not Entitled to Terminate Trust by Assigning Income and Appointing Property for Value—Purpose of Appointment to Repay Advances Made by Appointee to Such Son and to Enable Son to Obtain Balance—Fraudulent Exercise of Power.

Originating summons for the interpretation of a deed of settlement. The particular clause in that deed which required to be construed by the Court was clause 4, which directed that the trustees should stand possessed of the trust property and of any income accruing therefrom after the death of the beneficiary "UPON TRUST for such person or persons other than the beneficiary and in all respects whatsoever, as the beneficiary shall at any time or times without transgressing the rule against perpetuities, by Deed (with or without power of revocation and new appointment) or by will or codicil appoint." The plaintiff was one of the sons of the late Daniel Hannan, who died testate, and was under his father's will entitled, subject to a life interest in the income of the whole estate which was given to the testator's widow, to an equal share along with the other children in the whole residue. It was clear, however, from the terms of the will that the assets could not finally be distributed among the children of the testator until after one year from the death of the widow. The widow was still alive. On 14th November, 1924, a deed of family arrangement was entered into between the plaintiff and the other children of the testator whereby it was provided at the request of the plaintiff that the sum of £3,650 should be paid to him or to a trustee for his benefit in full satisfaction of his share in his late father's estate. Of that sum the plaintiff then received £150 in cash, and the balance was paid over to the defendant company as trustees for the plaintiff under and in terms of the deed of settlement above referred to. By clause 3 of that deed the defendant trustee was to stand possessed of the income from the trust fund accruing during the lifetime of the plaintiff in trust for him absolutely. Then followed clause 4 set out above. The question for the determination of the Court was whether such clause permitted the son by assigning his income in the trust property to a person for value and then appointing the corpus of such trust property by deed in his lifetime to the same person for value, to vest the whole legal estate in such person so that such person could compel the trustee to transfer the property to him or as he should direct thereby putting an end to the settlement. The person in whose favour the appointment was proposed to be made had already advanced the plaintiff considerable sums upon mortgage, and it was proposed that he should retain these amounts out of the appointed fund and pay the balance to the plaintiff.

Dunn for plaintiff.
Spratt for defendant Company.
Watson for defendant Honora Hannan.
H. F. Johnston for defendant mortgagees.

MACGREGOR, J., said that after reading the relevant documents and considering the arguments of counsel, he concluded that the questions submitted must be answered in the negative. In the first place the deed of settlement in His Honour's opinion was not a voluntary settlenent, as suggested by counsel for the plaintiff, but a settlement for valuable consideration. When that settlement was executed in 1924, it was obvious from the terms of the will that the plaintiff could not immediately have demanded, as of right, his share in the estate from the trustee of the will. The money paid to him or for his benefit in November, 1924, was not in truth his share in his father's estate, but was rather a sum of money which the remaining members of his family agreed that he should have in satisfaction of that share, before it became actually payable to him. It was paid to him only on certain contractual conditions on his part: (1) that he released all further claim on his father's estate; (2) that he settled the greater part of the money so paid, and (3) that he indemnified the trustee in respect of any possible breaches of trust (regarding the existing infants' shares and otherwise). It was accordingly not a voluntary settlement of money then actually belonging to the plaintiff himself, but a settlement for value of certain moneys paid to a trustee for his benefit by third parties under a contract. Independently of that His Honour was satisfied that the paramount object or intention of the deed of settlement was to make provision for the plaintiff himself, that was to say, to provide him with an income for his lifetime, and at the same time, if possible, to prevent him from so dealing with the capital sum as to destroy or prejudice that income. That paramount intention might be gathered clearly enough from the whole context of the deed, and in particular from the language of clauses 3 and 4 thereof, whatever be the precise meaning and effect of the unusual words "other than the beneficiary," which occurred in the latter clause. His Honour thought also that the power of appointment given to the plaintiff by clause 4 of the settlement was a "special power," and not a "general power," as was contended on behalf of the plaintiff. In support of his contention that it was a general power, Mr. Dunn for the plaintiff, relied on **Drake v. The Attorney-General,** 10 Cl. & F. 257; **Edie v. Babington,** 3 Ir. Ch. Rep. 568, and **In re Byron's Settlement,** (1891) 3 Ch. 474. It seemed to

His Honour that the power to appoint given by clause 4, was not a general power, that was to say, not a power to appoint "in any manner" the plaintiff might think proper, but it was a power to appoint "in any manner" with the exception that it must be for some person "other than the beneficiary" (the plaintiff himself), which exception in His Honour's judgment destroyed the generality of the power. In other words, the power to appoint given by clause 4 was a "special" or limited power only. The power to appoint, then, being a special or limited power, the plaintiff must exercise it *bona fide* for the end designed, otherwise the exception was a fraud on the power and void, **23 Halsbury** 58. In other words, it must not be exercised "for a purpose, or with an intention, beyond the scope of, or not justified by, the instrument creating the power"—**Vatcher v. Paull,** (1915) A.C. 372, 378. In the present case the plaintiff's own affidavit showed clearly enough how he had already exercised his power of appointment under clause 4, and how he proposed to exercise it further if permitted. The affidavit stated that on 24th March, 1927, he appointed that the corpus of the trust fund of £3,000 be held by the trustee upon trust for two mortgagees to secure first and second advances of £1,000 and £500 respectively. The affidavit then went on to say:—

7. "On the same date I executed a first mortgage over (inter alia) all my interest in the said Trust property to the first appointee and a second mortgage to the second appointee.

8. "I now propose with the consent of the said first and second appointees to repay the moneys owing on the said mortgages and revoke and cancel the said Deed of Appointment dated the 24th day of March, 1927.

9. "In order to do this I propose to appoint the corpus of the Trust property to some person for valuable consideration and to give an absolute Assignment of the income to the same person for valuable consideration thereby vesting the whole legal estate in such person. Out of the proceeds of such absolute appointment and assignment I will repay the said mortgages. The balance of such proceeds I propose to utilise myself."

The frank statements in that affidavit clearly established that what was proposed to be effected by the plaintiff's appointment under clause 4 was: (1) to pay off certain mortgage debts already incurred by him, and (2) to give him the balance of the corpus (some £2,000) to be "utilised" by him, that was to say spent by him in his own discretion. In plain English the whole object of the appointment was broadly to benefit the beneficiary himself, and not some "person or persons other than the beneficiary." The result of such an appointment would, of course be to defeat the paramount object of the whole settlement (to provide an income for the support of the plaintiff) by dissipating the capital fund out of which the income was designed to be provided by way of interest. To make such an appointment in His Honour's opinion would clearly be a fraud on the power created by the settlement, and therefore void. To constitute a "fraud on a power" it was enough that the "appointor's purpose and intention are to secure a benefit for himself, or some other person not an object of the power"—see per Lord Parker in **Vatcher v. Paull** (*cit. sup.*) at p. 378. His Honour thought that was obviously the purpose and intention of the appointor in the present case. Such an appointment would be an exercise of the power for purposes foreign to those for which it was created, and therefore fraudulent within the meaning of **Aleyn v. Belchier,** 1 Eden 132, and the more modern cases on the subject.

Questions answered in negative.

Solicitor for the plaintiff: **Alexander Dunn,** Wellington.

Solicitors for defendant Company: **Morison, Spratt and Morison,** Wellington.

Solicitors for Honora Hannan: **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitors for defendant mortgagees: **Johnston, Beere and Co.,** Welllington.

Ostler, J. August 14, 18, 1928.
Dunedin.

RIDDLE v. CHAS. BEGG AND CO., LTD.

Apprentice—Contract—Breach—Infancy—Failure to Teach Trade—Damages—Person Apprenticed to Company for Five Years—Company Closing Down Factory—Apprentice Kept on Temporarily—Unsuccessful Endeavours by Company to Find Another Employer to Take Over Apprentice—Complaints as to Work by Apprentice and Threat to Sue for Failure to Teach Trade—Nothing Done Pending Further Endeavours by Company to Find Employment—Company Resolving to Reopen Factory—Apprentice Leaving Company and Commencing Action for Damages—Whether Apprentice Entitled to Rescind Contract—Whether Right of Rescission Lost—Rights of Infant Apprentice Under Contract of Apprenticeship—Right of Apprentice to Sue for Damages at Common Law—Whether Taken Away by Statute—Apprentices Act, 1923, S. 9 (2), (3), (4).

Action by an apprentice against his master for damages for breach of contract. The plaintiff was in 1923 apprenticed to the defendant company to learn that branch of the trade of cabinet-making known as piano and gramophone case making. The contract was for five years, and was reduced to writing and duly registered as required by the Apprentices Act, 1923. The defendant company was at the date of the contract operating a factory at Dunedin, in which *inter alia* it carried on the manufacture of pianos. On 29th September, 1927, the defendant company resolved to discontinue the manufacture of pianos, players, and gramophones and to dispose of the factory and plant. The reason for this resolution was that it had been found that the manufacture of pianos did not pay. The factory was not, however, immediately closed. Some eleven journeymen were dismissed, but the plaintiff and another apprentice were kept on, under the direction of the manager, Mr. Newall, himself a journeyman in the trade and employed in completing a few pianos which the company had commenced to make, in doing any repairing work that came in, and other odd jobs. The apprentices were not, however, kept fully employed at the trade. The defendant company made honest endeavours to get them placed in some cabinet-making factory where they could complete their apprenticeship by learning another branch of the trade. Owing to the slackness of trade, however, they were unsuccessful in this. The apprentices complained that they were not being taught their trade, and early in February, 1928, consulted their solicitors. The solicitors promptly wrote to the defendant company, claiming that it had committed a breach of the contracts, and stating that unless the apprentices were compensated for the period during which there had been a failure to teach them, and another similar place found for them within seven days, proceedings would be commenced claiming damages. Interviews between the solicitors for the plaintiff and Mr. Ritchie, the manager of the defendant company, followed. It was first arranged that the company should be given a fortnight to find another similar place for the youths. The evidence established that on the 7th March, in a telephone conversation with the solicitor, the manager intimated that he had not been able to get a place for the youths, and that the company had only fourteen days work for them, but he requested the solicitor to do nothing until the matter was placed before the directors of the meeting. This was agreed to. A meeting of directors was held on the 14th March, when it was resolved that the general manager, accompanied by the company's solicitors, interview the solicitors for the apprentices, but that before doing so the general manager interview several of the cabinet-makers for the purpose of seeing if a monetary inducement would induce any of them to give these apprentices a job for the balance of their indenture. On the same day the solicitor for the defendant company rang up the solicitor for the plaintiffs and asked for further time to look into the matter and advise his clients, but this was refused. Mr. Ritchie, upon being informed that no further time would be given, interviewed his managing director, and the upshot of the interview was that the defendant company in order to provide for the teaching of the apprentices decided to resume the manufacturing of pianos. The company's solicitors then wrote to the plaintiffs' solicitors advising them of the company's resolution to continue the manufacture of pianos, and that the company would be in a position to complete teaching the apprentices their trade. The apprentices were personally informed by Mr. Ritchie of this position. The solicitors for the plaintiffs regarded the company's action merely as a device to gain time, and replied by letter dated 6th March that they proposed to claim damages for breach of contract. The company denied any liability. The plaintiff on the 23rd March, of his own accord, left the employ of the company. The evidence clearly showed that had the plaintiff remained on he would have been taught his trade in a competent manner. The plaintiff admitted that he had actually commenced

work on piano backs, that Newall was a competent man to teach him the trade, and that the company had done its best to provide work for him. An action for damages was commenced in the Magistrate's Court and removed into the Supreme Court. The principal allegation was that the defendant company broke the contract by putting it out of its power to perform it. Other allegations were made but they were not supported by the evidence.

R. S. M. Sinclair for plaintiff.
W. G. Hay for defendant.

OSTLER, J., said that the first question was whether the defendant company committed a breach of contract. In His Honours opinion it did. The company put it out of its power to completely fulfil the obligation it had undertaken to teach the plaintiff the trade of a piano case-maker, because it discontinued the trade. The defendant company itself realised that it was unable to perform its contractual obligation, because it made strenuous endeavours to find some other employer to take over its liabilities under the contract, even going so far as being prepared to pay for the service. In His Honours opinion the breach took place when the unfinished work left by the dismissed journeymen was completed, and when after a reasonable time the defendant company failed to get some other employer to take the plaintiff. Had the defendant company through mere slackness in trade not been able to keep the plaintiff employed sufficiently to enable him to learn his trade, then its duty would have been to find another employer willing and able to carry out its obligations: see **Section 13 Apprentices Act, 1923.** If it had failed to do so it would have committed a breach of its contract. *A fortiori* in the present case, where it had of its own volition ceased to carry on the trade. There was ample authority to show that a contract for employment in a business for a certain time was broken by the employer abandoning the business—**Maclure's Case,** 39 L.J. (Ch.) 685; **Rhodes v. Forwood,** 1 App. Cas. 256; **Hamlyn v. Wood,** (1891) 2 Q.B. 488; **Devonald v. Rosser,** (1906) 2 K.B. 728; **Ellen v. Topp,** 6 Ex. 424. By putting it out of its power to continue the obligation, and by not getting some other employer to undertake it, the company clearly committed a breach. It was beside the point to say that the work which it intermittently found for the plaintiff, such as repairing pianos, and stacking and measuring timber was all a part of his trade. No doubt that was so, but the trade was the making of piano cases, and the company ceased to carry on that trade. No doubt it acted in perfect good faith, but that consideration was irrelevant. No doubt also a considerable latitude must be allowed to employers, and apprentices should not too readily be heard to complain that they were sometimes employed on general work, not closely connected with the trade they were learning. But, making all such allowance, His Honour had no hesitation in holding that the defendant company broke its contract.

The next question was whether the breach was an essential breach, one which went to the root of the contract, and gave the plaintiff the right to treat the contract as void. Stating the proposition in other words, was the breach, having regard to the terms of the contract, its nature and its purposes, of such a nature as to justify the law in attributing to the parties an intention that in the event of such a breach the contract might be rescinded by the injured party: see **Salmond and Winfield** on Contracts, 270. The main purpose and intention of the contract was that the apprentice should be taught the trade to which he was apprenticed. If the defendant company failed to perform its obligation to teach, almost the whole of the consideration which it contracted to give failed. It is not necessary, in order to give a party a right to rescind a contract, that the whole consideration should have failed. In His Honours opinion the breach was an essential breach. It was not to be supposed that the parties intended that the employer could put it out of his power to teach, and that the apprentice should nevertheless remain bound. That being so the law imported into the contract an implied condition that in the event of the employer failing to teach the trade the apprentice could rescind the contract. But the breach of an essential term of contract did not of itself avoid the contract. It merely rendered it void at the option of the injured party. That party could if he liked, notwithstanding the breach, elect to keep the contract alive. But in that case he kept it alive for the benefit of the other party as well as his own. He remained liable to all his own obligations under it, and if while the contract remained in force the breach was effectively remedied, then the injured party had lost his right of avoiding the contract, and had no other remedy but an action for such damages as he could prove he had suffered by reason of the past breach. His Honour referred to **Avery v. Bowden,** 6 E. & B. 953; **Ripley v. M'Clure,** 4 Ex. 345. In the present case the letter of the plaintiff's solicitors of the 16th March, showed that up to that date, after they had been notified that the manufacture of pianos was to be continued, the apprentices still elected to keep the contract alive, and it was kept alive by the plaintiff until 22nd March, when the first steps in the manufacture had already commenced. He therefore lost his right to rescind, and his leaving his employment at that time was without justification.

It was contended by the Counsel for the plaintiff that the statement of intention by the defendant company to continue the manufacture of pianos was merely an offer of performance after breach, which could have no legal effect on the plaintiff's claim for damages for the breach which had already taken effect. That was quite true as regards the damages for the breach in failing to teach down to the time when they again commenced to manufacture pianos. The fact that they ceased to continue a breach could not affect the plaintiff's claim for damages for the breach already committed. And if the plaintiff had already rescinded the contract when they commenced the manufacture of pianos, their recommencement could have been no defence to the plaintiff's claim for damages. In that case he could no doubt have claimed larger damages than for a failure to teach for a month or two. But the recommencement of the work before the plaintiff had elected to rescind destroyed his power of election to avoid the contract, and therefore the utmost which he could claim in the present action was damages for the very temporary failure to teach.

His Honour stated that he had considered the question as though the plaintiff were twenty-one years of age and *sui juris.* But he was an infant, and the authorities showed that an infant apprentice had no power to dissolve his contract. Such a contract was avoidable only upon the apprentice attaining the age of twenty-one years: see **20 Halsbury's Laws of England,** 103; **Leake on Contracts,** 7th Ed., 400, and the cases there cited. The only ground, it seemed, upon which an apprentice was justified in leaving his master's service, was reasonable ground for fearing that grievious bodily harm would be inflicted on him if he remained: **Halliwell v. Counsell,** 38 L.T. 176.

The further question arose whether the plaintiff could sue in a Civil Court for damages for breach of contract. At common law an apprentice could apparently sue for damages for wrongful dismissal, though in that case the measure of damages was his actual loss down to the date of bringing the action, and no more: **Parker v. Cathcart,** 17 Ir. C.L.R. 778. His Honour could find no case in which an apprentice had sued his master for damages for failure to teach, though there were instances of actions by an apprentice's father on that ground: **Hughes v. Humphries,** 6 B. & C. 680; **Raymond v. Minton,** L.R. 1 Ex. 244. There were, however, authorities which showed that if a master relinquished a branch of his trade that amounted to a discharge of the apprentice: see **Ellen v. Topp,** 6 Ex. 424; though if the business was simply diminished in extent, provided that the master remained able to carry out his obligations to teach, the apprentice was not discharged: **Batty v. Monks,** 12 L.T. 832. His Honour saw no reason in principle why an apprentice, if he could sue for damages for wrongful dismissal, could not also sue for damages for failure of the master to teach him for a limited time. His Honour thought that such a right must have existed at common law. The question was whether the right had been taken away by the Apprentices Act 1923. That Act gave the Court of Arbitration larger powers to interfere with the freedom of apprenticeship contracts than it ever had before. Some of the powers of that Court were collected in Section 5 (4) of the Act, and they included powers even to cancel any contract of apprenticeship. Section 12 provided that an apprentice should be bound throughout the currency of his contract, notwithstanding that he might have attained the age of twenty-one years, thus abrogating the rule of the common law that an apprentice on attaining twenty-one years could avoid his contract. Section 9 provided that

any breach of a contract of apprenticeship should be deemed to be a breach of that Act: proceedings for a breach of the Act should be taken in the same manner as for a breach of award; and any party to a contract of apprenticeship might take proceedings for a breach thereof: see Subsections (2), (3) and (4). The Legislature had thus made the enforcement of contracts of apprenticeship a quasi-criminal matter. It was questionable whether the intention was not to take away all previously existing remedies and make the Act a complete code comprising all the rights and liabilities of the parties to apprenticeship contracts. In His Honour's opinion, however, if such was the intention it had not been expressed in clear enough words to take away every common law right. Every statute must be read so as not to take from the subject his common law rights unless the words used showed beyond doubt that it was the intention to abrogate those rights. His Honour was doubtful about the matter and therefore held that the rights had not been taken away, and the plaintiff retained his common law right to sue for a breach of the contract. In His Honour's opinion the plaintiff had suffered very little damage; he would be awarded £5 damages. Judgment for plaintiff.

Solicitors for the plaintiff: **Sinclair and Baylee**, Dunedin.
Solicitors for the defendant: **W. G. Hay**, Dunedin.

Ostler, J. August 28, September 17, 1928.
Invercargill.

STOPFORD v. THE SHELL COMPANY OF N.Z., LTD.

Motor Lorry Regulations—Heavy Traffic License—Application to Dunedin Corporation for License in Respect of Motor Lorry—Application Not Accompanied by License Fee and No Credit Given—Before License Granted Lorry Permanently Removed to Invercargill Borough in Exchange for Lorry Licensed by that Borough—Refusal to Take Out License in Invercargill Borough—License Granted by Dunedin Borough After Removal of Lorry—License Invalid.

Appeal on point of law from a decision of the Stipendiary Magistrate at Invercargill. The facts were as follows:—The respondent company, in March, 1928, applied to the Dunedin Corporation for the issue of a heavy traffic license for the ensuing year in respect of a five-ton Leyland motor lorry owned by it and then garaged in Dunedin. The application was in proper form but the license fee was neither paid nor tendered when the application was lodged at the Corporation Office, and no request was made that credit be granted for such fee. The Corporation officials stated that they were then too busy to issue a license, but would issue it in a few days. Before the license was issued the respondent company decided to remove its five-ton lorry to Invercargill, and to bring to Dunedin in its place a three-ton lorry then garaged in Invercargill, which had already been licensed by the Invercargill Borough Council for twelve months from the 1st April, 1928. For that license the company had paid a fee of £40. On 14th April, 1928, the five-ton lorry was driven from Dunedin to Invercargill. At that date no license had been issued by the Dunedin Corporation. On the 16th April, 1928, the respondent company wrote a letter to the Town Clerk of Invercargill in which it admitted that up to that date their five-ton lorry was unlicensed and that the license fee was due to the Invercargill Borough, as the lorry was then garaged in that Borough, but asked that the fee already paid in respect of its three-ton lorry which had then gone to Dunedin should be treated as part payment of the license due on the five-ton lorry. The Invercargill Borough refused to agree to such a course, and informed the respondent company that it had no authority to do so. On the 24th April, 1928, the company paid the fee for licensing the five-ton lorry to the Dunedin Corporation, and received in Dunedin a license issued by that Corporation for that lorry. The respondent company refused to take out a license in Invercargill and an information was accordingly laid charging the company with permitting this five-ton lorry to be used in the Borough streets without having obtained a license under the motor-lorry regulations. The Magistrate dismissed the information.

Longuet for appellant.
Stout for respondent.

OSTLER, J., stated that in his opinion the decision of the Magistrate was erroneous in law. The respondent company's letter of 16th April, showed that the company was well aware on that date that its five-ton lorry was unlicensed, and that the proper licensing authority was the Invercargill Borough. At that time the Dunedin Corporation had lost its jurisdiction to grant a license in respect of the lorry, for it was then garaged in Invercargill. Had the company actually obtained a license from the Dunedin Corporation before removing the lorry to Invercargill then the license would have been valid notwithstanding the removal immediately after its issue. But the company not only did not do that; it did not comply with the conditions prescribed by the regulations when it made its application, inasmuch as it did not pay the necessary fee. Section 10, clause (6) of the Motor-lorry Regulations stated:—"Upon receipt of such application and upon payment of the license fee" the licensing authority should issue the license. It was true that the Regulation went on to provide that the licensing authority might in its discretion allow credit for a term not exceeding nine months for payment of any portion of any license fee. But it was clear that no credit was asked for, nor could it have been given except by a resolution of the City Council: see **McCarthy v. Corporation of Wellington**, 8 N.Z.L.R. 168; **Bank of Australasia v. Manawatu Road Board**, 10 N.Z.L.R. 210; **Hooker v. Morris**, 20 N.Z.L.R. 195 at 213. Therefore the company was not in a position when the lorry left Dunedin to insist upon the Dunedin Corporation issuing a license, nor could it have succeeded in a mandamus to compel it to do so. When the company paid the fee to the Dunedin Corporation on 24th April, 1928, that authority had lost its jurisdiction to issue a license. His Honour thought that was plain from the terms of Section 10, clause (3) of the Regulations. The only authority having the necessary jurisdiction at that date was the Invercargill Borough where the lorry was garaged. The learned Magistrate had assumed that the company had, before the lorry left Dunedin, complied with all conditions precedent to entitle it to the issue of a license by the Dunedin Corporation, and he had therefore endeavoured to apply the maxim *actus curiae neminem gravabit* to the case. But as His Honour had pointed out, the company omitted to comply with one of the prescribed conditions precedent, and therefore, even if the maxim applied to delays by local authorities, it would have no application to the facts of the present case.

Appeal allowed.

Solicitors for appellant: **Longuet and Robertson**, Invercargill.
Solicitors for respondent company: **Stout and Lillicrap**, Invercargill.

Smith, J. August 3; September 7, 1928.
Palmerston North.

VINCENT v. McLEOD.

Contract—Specific Performance—Discretion of Court to Refuse Specific Performance Where Owing to Circumstances Under Which Contract Made it Would Not be Fair or Honest to Require Performance—Specific Performance Refused Even Though No Blame Attachable to Plaintiff Personally.

Claim for specific performance of an agreement for the sale and purchase of the defendant's land and a dwelling-house thereon, at Palmerston North, and alternatively for the return of a deposit of £100, and £100 damages for breach of contract. The defendant denied that she entered into the agreement, and alleged that, if she did, she was incapable of understanding, and did not in fact understand the alleged contract. She pleaded also that if she did enter into the agreement she was 78 years of age and infirm in body and

mind, that the land comprised in the agreement was her home where she had resided for many years, that the price was inadequate, that she was given no opportunity to consult an adviser before she signed the agreement, and that it would be a great hardship to her at her age and in her condition of health to leave her home and make a new home, and claimed therefore that specific performance should not be enforced. The Court found upon the evidence that an agreement had been completed, and that the plaintiff was capable of understanding and did understand the general nature of her agreement. The evidence showed, however, that the mind of the defendant could be easily moulded, and that she had in fact been influenced by the land agent, who was acting for the purchaser, to complete the sale. The plaintiff had not personally been in touch with the defendant. The defendant had acted without a solicitor, and had not been advised to consult a solicitor. The question remaining was whether the Court should in the exercise of its discretion refuse specific performance on the ground of want of fairness in the contract or of hardship on the defendant. The case is reported on this question only.

Grant for the plaintiff.
Baldwin for the defendant.

SMITH, J., said that the defendant submitted that on her evidence the Court's discretion to refuse specific performance should be exercised in her favour on two grounds, firstly want of fairness in the contract, and secondly hardship of the contract. As to the first ground, it was necessary to remember that the plaintiff was himself an innocent party. He was not responsible for the moulding of the defendant's mind which resulted in her signature to the contract. Nevertheless, that circumstance did not exclude the Court's discretion: **Fry on Specific Performance**, 6th Edn. pars 401, 403; **Mortlock v. Buller**, 10 Ves. 292, 305; **Cooke v. Clayworth**, 18 Ves. 12. It was clear that in judging the fairness of the contract, the Court was entitled to look not merely at the contract itself, but at all the surrounding circumstances including the mental capacity of the parties, their age or poverty, the manner in which the contract was executed, the circumstance that any party was acting without a solicitor, or that the price was not the full value: **Fry**, 6th Edn., par 399; 27 **Halsbury**, 38, and cases there cited. See also **Weily v. Williams**, 16 N.S.W.L.R. (Eq.) 190. The general principle upon which the Court would exercise its discretion to refuse specific performance was stated in **Fry**, 6th Edn., par. 401. It was the land agent McNeilly who secured the defendant's signature to the authority to sell. It was he who secured the defendant's signature to the agreement for sale and purchase late on a Saturday afternoon within two or three hours after she had called on a friend, Mr. Jones, and had asked him what the nature of the document was. On understanding it, she had explained to Jones that she did not want to sell her house, and he had told her not to do so, and that he thought it was not right for her to sell without a witness. The first time that McNeilly explained or attempted to explain the agreement for sale in detail to the defendant was on the Saturday afternoon after her agreement had been completed. At no time did McNeilly place her in touch with her solicitor, or advise her that she should consult him, and in His Honour's view, McNeilly must have known at the very least that it was difficult for the defendant to comprehend the main features of the agreement. Although the defendant admitted that the price was the market price, the terms seemed to be disadvantageous, when the vendor was 78 years of age and there was no provision for the reduction of the principal sum of £900 secured upon a house property of the present value of £1,000 over a period of five years. His Honour thought therefore that although no blame was attachable to the plaintiff, the circumstances were such as not to render it fair and honest to require the defendant to perform the agreement specifically. That conclusion rendered it unnecessary to deal with the alleged ground of hardship of the contract to the defendant. The plaintiff was entitled to the return of his deposit and to damages.

Solicitors for plaintiff: **Jacobs and Grant**, Palmerston North.

Solicitors for defendant: **Innes and Oakley**, Palmerston North.

Court of Arbitration.

Frazer, J. August 8; 24, 1928.
Auckland.

THE AUCKLAND PLUMBERS' AND GASFITTERS' UNION
v. THE HAMILTON HARDWARE CO. LTD.

Industrial Conciliation and Arbitration Acts—Award—Preference to Unionists—Union Disallowing Rebates on Contributions Not Promptly Paid by Member—Member Resigning from Union—Union Requiring Employer, under Preference Clause in Award, to Dismiss Member so Resigning and Employ Union Workers—Whether Preference Clause Applicable—Rebate on Contribution Not a Fine Within Meaning of Preference Clause—Onus Upon Union of Satisfying Employer that Union Workers Equally Qualified with Non-Unionist to Do Work Required—"Shall Hereinafter Engage"—Preference Clause Inapplicable to Workers Engaged Before Award Came into Force—Northern Industrial District Plumbers' and Gasfitters' Award, 1927, Clause 10.

Appeal on point of law from the decision of Mr. F. W. Platts, S.M., giving judgment for the defendant company in the Magistrate's Court at Hamilton in an action in which the plaintiff union claimed to recover from the defendant company a penalty for the refusal of the company to dismiss one Hollinger from its employ. Hollinger, a registered plumber and an old member of the union, had been in the service of the defendant company since 1921. He was a foreman plumber with special training in new developments of the trade and his qualifications were well above the average. The union had a system of fining its members by disallowing rebates if their contributions were not promptly paid. Every three months notices were sent to members requiring payment of 9s. 9d., the quarter's contribution, and providing for a rebate from 3s. 3d. to 2s. 2d. if the contribution were paid on or before the quarter-night. In 1925, Hollinger, working in the country, did not receive his quarterly notice in time to enable him to pay his contribution by the due date. He wrote explaining this to the secretary, who made no reply, but his rebate of 3s. 3d. was disallowed. He refused to pay the fine, and thereafter, although he paid all his quarterly contributions in time, a fresh fine was, because he had not paid the original fine, inflicted on him each quarter until his fines amounted to £1 12s. 0d. Hollinger then wrote to the secretary that he would pay the accumulated fines and resign from the union. This he did. The secretary replied that if Hollinger resigned the preference clause in the award would be enforced with the object of depriving him of his employment. The preference clause read as follows:—

> "10 (a) If any employer shall hereafter engage any worker coming within the scope of this award who shall not be a member of the union, and who shall not become a member thereof within seven days of his engagement, and remain such member, the employer shall dismiss such worker from his service if requested to do so by the union, provided there is then a member of the union equally qualified to perform the particular work required to be done and ready and willing to undertake the same."

There was a qualification that the provisions of the preference clause should not operate unless the rules of the union provided, *inter alia*, in regard to fines that a member might not be fined for being in arrear with his contributions unless default had continued without reasonable excuse for at least three months, and that the maximum fine for such default should not exceed 2s. 6d. The secretary, on 26th January, 1928, wrote to the defendants requesting them, under the preference clause, to dismiss Hollinger from their service and to employ in his place a registered plumber from Auckland. The union had, the secretary stated, a number of competent plumbers in Auckland unemployed, who were equally qualified to perform the particular work required to be done.

The defendant company replied that it very much doubted the accuracy of that statement and on 13th February, 1928, definitely refused to dismiss Hollinger. The union sought to recover £10 from the defendant company as a penalty for this refusal.

W. R. Tuck for appellant.
W. J. King for respondent.

FRAZER, J., said that three issues were argued at the hearing of the appeal: First that the appellant union had disentitled itself to the benefit of the preference clause in the award, by reason of the fact that it had imposed a fine of 3s. 3d. for late payment of contributions; secondly that the onus of proof was on the union to show that it had members on its books "equally qualified to perform the particular work required to be done, and ready and willing to undertake the same"; and thirdly that the preference clause could not operate so as to compel the dismissal of a non-unionist in favour of a unionist, if the non-unionist had been in the employment of the respondent company previously to the date on which the current award came into force.

As to the first issue, the learned Magistrate appeared to have regarded the refusal of the union to allow a rebate on contributions paid after the due date as being equivalent to imposing an unlawful fine. In this His Honour thought that the Magistrate was in error, for the preference clause of the award allowed a maximum contribution of 1s. per week to be fixed by the union, whereas only 9d. per week had actually been fixed. That 9d. per week was payable quarterly, the quarterly contribution being 9s. 9d. A rebate of 3s. 3d. was allowed for prompt payment. If a member failed to pay on due date, he was not entitled to the rebate. That, in His Honour's opinion, was not the imposition of a fine, any more than it would be in the case of a gas or electricity company that refused to allow a customer the usual discount if he did not pay his account until after the expiration of the discount period.

Regarding the second issue, the onus of proof was primarily on the union. It had to present the member for whom it sought employment to the employer, with a request that he be examined with a view to his qualifications being ascertained. If the employer gave the unionist a test, and was *bona fide* satisfied that he was not equally qualified with the non-unionist employee, it was difficult to upset his decision. The Court (per Chapman, J.) had laid down the rule thus: "We think it ought to be understood that the employer must be considered as *prima facie* entitled to make the selection; and he shall only be subjected to a penalty if it is shown that he has not done so in good faith and on the merits, the onus of proof of which is on the union." (**Book of Awards,** Vol. VI. p. 257). Of course, if the employer refused to consider the claim of a union member, the onus, if not shifted, was more easily discharged, for the union then had only to prove that its man was equally qualified; and it had not to undertake the difficult task of proving that the employer had not made his selection in good faith and on the merits. In the present case, it appeared from the correspondence that the respondent company did not refuse to consider the qualifications of any unionists who might be submitted to it, but simply challenged the secretary of the union to prove his claim that they were equally qualified for the performance of the company's particular work. The secretary, without tendering any members of his union for trial, requested to be informed if the company would dismiss its non-unionist employees, which it refused to do. It was entitled to refuse to comply with a peremptory demand of that nature. The union did not discharge the onus of tendering its members for examination as to their qualifications, and the company did not waive its right to examine unionists who sought employment in the place of non-unionists, nor did it state that it would not examine them if they were tendered for examination. In any event, and apart altogether from the correspondence, the evidence as to the qualifications of the union members given before the lower Court was quite insufficient to establish the contention, that they were equally qualified with the non-unionist employee to perform the particular work of the respondent company.

As to the third issue, it was clear that the words "shall hereafter engage" in the preference clause could refer only to a new engagement made after the coming into force of the award. The wording was plain and unambiguous, and the Court could not read other words into it. The learned Magistrate had correctly stated the rule of interpretation to be applied in such cases. Even though the Courts had sometimes disregarded the apparently plain meaning of a section, it had been because that section was repugnant to the general purpose of the enactment in which it appeared. In the present case, all the provisions relating to preference to unionists were contained in the one clause, and there could be, therefore, no general purpose expressed in the award as a whole, to which it was repugnant.

Appeal dismissed.

Solicitors for appellant: **Tuck and Wood,** Auckland.
Solicitors for respondent: **W. J. King,** Hamilton.

The Honourable Mr. Justice Blair.

His Honour Mr. Justice Blair is a son of the late Mr. William Newsham Blair, M.I.C.E., one-time Engineer-in-Chief of New Zealand, and was born at Dunedin, in 1875. He was educated at the Terrace School, Wellington, Wellington College, and Canterbury College. In 1893 he commenced his legal career as associate to the late Mr. Justice Denniston, and remained with him for some five years. He was admitted to the Bar in 1899.

Mr. Blair was for about a year in the office of Mr. T. F. Martin, of Wellington, and then joined the Hon. J. A. Tole, K.C., Crown Solicitor, of Auckland. Some four years later he became managing clerk to Mr. Andrew Hanna, of Auckland, with whom he remained for about two years. In 1905 he returned to Wellington and joined the staff of Skerrett & Wylie, as managing clerk. The firms of Skerrett & Wylie and Chapman & Tripp amalgamated, and shortly afterwards Mr. Blair was taken into partnership. When Sir Charles Skerrett was appointed to the office of Chief Justice, in 1926, the style of the firm was altered to Chapman, Tripp, Blair, Cooke & Watson, and Mr. Blair became its head. On 1st February, 1928, he was elevated to the Supreme Court Bench.

From 1912 to the date of his appointment to the Bench Mr. Justice Blair was a member of the Council of the Wellington District Law Society, and on two occasions held the office of President.

Magnanimity or Humbug.

In a recent case at the Middlesex sessions one of three persons charged with felony pleaded that he was responsible for the fact that the other two men had taken part in the crime. The learned chairman said it was much to his credit. We do not doubt that it was in this particular case. But it is a question to be decided carefully by the court in each case, having regard to all the circumstances, including the behaviour and demeanour of the defendants throughout the proceedings. A prisoner who takes all the blame and appears to be sheltering a co-defendant generally takes very little risk of increased punishment, because his magnanimity is likely to be set-off against his major share in the offence; and his co-defendant will almost certainly derive some benefit from his advocacy. Often it is difficult to decide whether apparent nobility of nature in these cases is genuine, or only a piece of clear strategy, and whether, therefore, to attach weight to it or merely to ignore it.—"Justice of the Peace and Local Government Review."

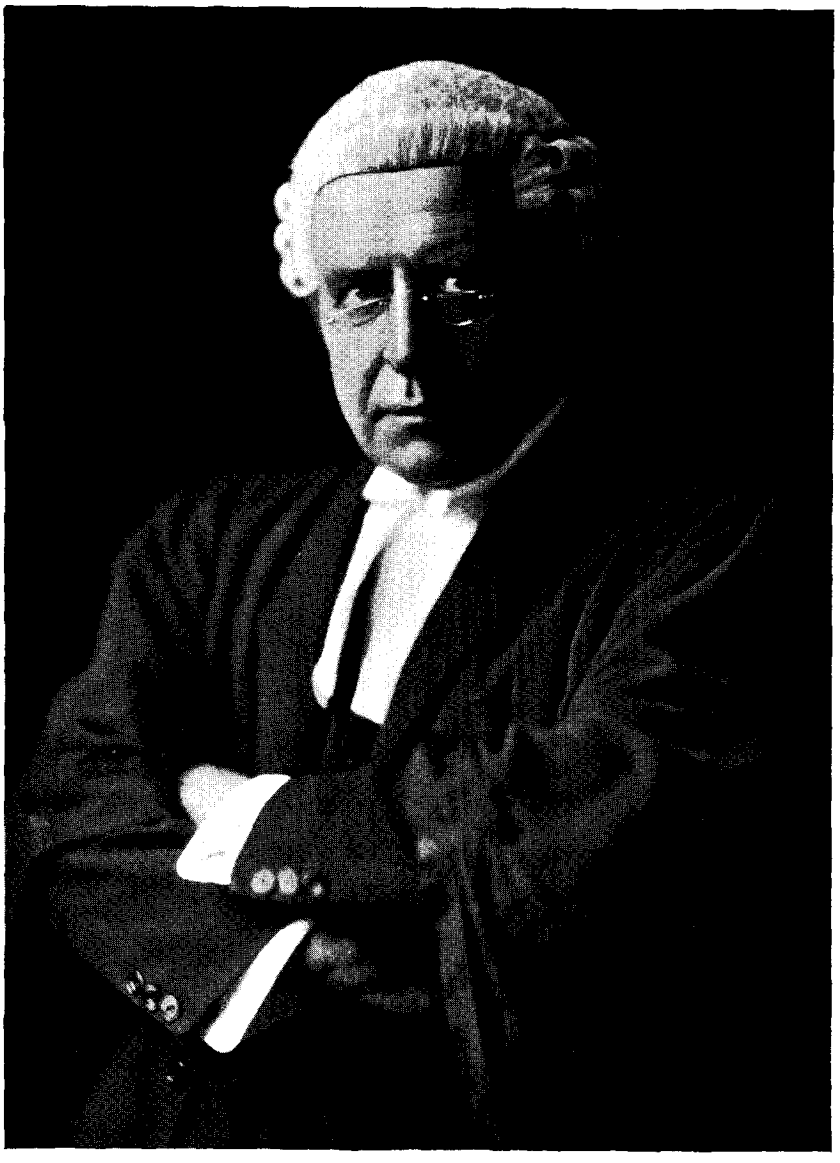

Photo by S. P. Andrews

The Honourable Archibald William Blair,
Judge of the Supreme Court of New Zealand

Recent Cases on Banking and Negotiable Instruments.

By Professor A. L. GOODHART, M.A., LL.M.

(Concluded from page 256.)

MORE ABOUT PASS BOOKS.

Just as a pass book is not binding as against a bank so to an even greater degree it is not binding upon the customer. In *Kepitigalla Rubber Estates Ltd. v. National Bank of India, Ltd.* (1909) 2 K.B. 1010, it was held that the mere fact that a customer of a bank takes his pass book out of the bank and returns it without objecting to any of the entries contained therein, there being a pencil entry of the balance, does not amount to a settlement of account as between him and the bank in respect of those entries. On the other hand in the United States there is a duty on the customer to examine his pass book. In *Leather Manufacturer's Bank v. Morgan,* 117 U.S. 96, it was said, "The depositor cannot, therefore, without injustice to the bank, omit all examination of his account, when thus rendered at his request. His failure to make it or have it made, within a reasonable time after opportunity given for that purpose, is inconsistent with the object for which he obtains and uses a pass book," and in *Critten v. Chemical National Bank,* 171 N.Y. 219, the Court held that, "If the depositor has, by his negligence in failing to detect forgeries in his cheques and give notice thereof, caused loss to his bank, either by enabling the forger to repeat his fraud or by depriving the bank of an opportunity to obtain restitution, he should be responsible for the damage caused by his default."

That the English banks do not necessarily wish to adopt the stricter American rule is evident from the fact that they have made no such stipulations with their customers. As was said by the Court in the *Kepitigalla* case, at p. 1025, "If the bank desire that their customers should make these promises, they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious—to the banker it is negligible.

CROSSING A CHEQUE "ACCOUNT PAYEE."

In *Importers Company Ltd. v. Westminster Bank Limited,* (1927) 2 K.B. 297, the Court of Appeal had to consider the application of Section 82 of the Bills of Exchange Act, 1882, which has given rise to more litigation than any other section of the Act. It provides that "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The collecting bank is, therefore, only protected (a) where it collects for a customer and (b) where it has not been negligent. The plaintiff company had sent large cheques drawn on the National Provincial Bank to certain customers in Germany. These cheques were crossed and marked "Account payee only." They were stolen, and the thief, having forged the indorsements, paid them into his account with a German bank. The German bank indorsed them to the defendant bank with whom they had an account. The defendant collected the cheques from the National Provincial Bank and credited the amount in their books to the German bank. The plaintiff company claimed that the defendant bank was liable (a) because the German bank was not a customer, as one bank could not be a customer of another bank, and (b) as the cheques were crossed "Account payee only" it was the duty of the defendant bank to see that they were paid into the proper accounts.

On the question as to who is a customer, although the decisions "are conflicting to a bewildering degree," it is clear that the German bank could be included in this category. In *Great Western Railway Company v. London and County Bank,* (1901) A.C. 414, 421, Lord Davey gave what has since become the classic statement:

> "It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer of a banker."

As one bank can have an account with another bank there is no reason why it should not be considered a customer.

Was it the duty of the defendant bank to see that the cheques were paid into the accounts of the payees? The words "account payee" or similar words on a crossed cheque are not recognised by the Bills of Exchange Act, 1882. This comparatively modern practice is explained in a few cases, but the law is still uncertain. It is clear that the paying bank is not concerned with these words. In *Akrokerri Mines Ltd. v. Economic Bank,* (1904) 2 K.B. 465, 472, Bigham, J. said: "The paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words 'Account A.B.' are a mere direction to the receiving bank as to how the money is to be dealt with after receipt." On the other hand if the bank which is collecting for the payee is negligent in not paying attention to these words they are not protected by Section 82. In *Morison v. London County and Westminster Bank,* (1914) 3 K.B. 356, 373, Lord Reading, C.J., said: "The words 'A/c payee' are a direction to the bankers collecting payment that the proceeds when collected are to be applied to the credit of the account of the payee designated on the face of the cheque." In the present case the defendant bank had an intermediate position as it was merely acting as agent for another bank which was collecting on behalf of the payee. It would be impossible in practice for such an agent bank to see that its principal bank was applying the funds to the accounts of the payees. Therefore, in the present case the Court of Appeal held that the defendant bank was not negligent in paying no attention to the words. As Lord Justice Bankes pointed out, "any other rule would destroy this form of business."

CONFLICT OF LAWS AND INDORSEMENTS.

An interesting point on the conflict of laws arose in *Koechlin et Cie v. Kestenbaum Brothers,* (1927) 1 K.B. 616 and 889. A bill of exchange drawn payable to the

order of M.V. was accepted by the defendants payable at a London bank. The bill was returned to Paris where it was indorsed by E.V., M.V.'s son and authorised agent, in his own name and discounted by the plaintiffs. When the bill was presented for payment the defendants refused to meet it on the ground that it did not bear the indorsement of M.V. the payee. It was proved in evidence that this was a valid indorsement by French law, although doubt has subsequently been expressed as to whether this is an accurate statement of French law.

By Section 31, subsection 3 of the Bills of Exchange Act, 1882, "a bill payable to order is negotiated by the indorsement of the holder, completed by delivery." By Section 32, subsection 1, the indorsement must "be signed by the indorser." It is clear from this that according to English law this bill was not validly indorsed, and could not be sued upon. The question, therefore, turned on whether the bill, having been validly indorsed in France according to French law, was good in England. Section 72, subsection 1, declares that "where a bill drawn in one country is negotiated, accepted, or payable in another . . . the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement . . . is determined by the law of the place where such contract was made." And subsection 2 declares that "subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance . . . is determined by the law of the place where such contract is made."

The trial judge held, however, that Section 72 did not apply as there was no indorsement to interpret. "This is an indorsement not recognised by the law of England. It is not merely an indorsement invalid by that law. I have not overlooked Section 72, subsection 2, by which the law of the place of indorsement governs its interpretation. Whatever scope may be assigned to the word 'interpretation,' there is no indorsement here within the meaning of the Act to interpret." This distinction was, however, too fine a one for the Court of Appeal. As Bankes, L.J., said: "It seems to me that when the position is accepted that the indorsement is good by French law, and therefore good for all purposes, nothing else can be wrong with the bill except its form, and that is governed by Section 72, whether one speaks of the validity of the Bill as regards requisites in form or the validity as regards requisites in form of the supervening contracts including the indorsement." The Court held that the case could not be distinguished from *Embiricos v. Anglo Austrian Bank*, (1905) 1 K.B. 677. In that case a forged indorsement, valid according to Austrian law, was held to give a good title, since the transfer of the cheque having been made in Austria it was governed by the law of that country. Therefore, in both the above cases although the indorsement would be invalid according to English law it was held to be effective because made in a country where its validity was recognised.

PAYMENT OF CHEQUE AFTER BANKING HOURS.

In *Baines v. National Provincial Bank, Ltd.*, (1927) 32 Com. Cas. 216, the Lord Chief Justice had to decide whether a bank had a right to pay a cheque after business hours. The plaintiff, a bookmaker, was a customer of the defendant bank. He drew a cheque at such an hour that it was impossible for the payee to present it for payment on that day before 3 p.m., the advertised closing hour for the bank. It being market day, however, the bank remained open for some time after their usual time of closing, and shortly after 3 o'clock the bank paid the cheque. Later in the day the plaintiff decided to stop payment of the cheque, but he was too late to do so. He brought an action for a declaration that the bank was not entitled to debit his account with the amount of the cheque. Lord Hewart, C.J., before whom the action was tried, held that a bank is entitled to deal with a cheque within a reasonable business margin after their advertised time of closing, and therefore that the action failed. He did not attempt to define "a reasonable business margin." "What precisely are the limits of time within which a bank may conduct business, having prescribed, largely for its own convenience, particular times at which the doors of the building will be closed, is a large question which is not raised here." He also left unanswered the question whether a bank could dishonour a cheque after business hours. Apparently he thought that it could not. "The argument really is this, that a bank may not cash a cheque after 3 o'clock closing time, because it could not have effectively dishonoured a cheque after banking hours. In my opinion there is no substance at all in the plaintiff's contention." But if a bank can pay a cheque after business hours it ought also to be able to dishonour it. In *Garnett v. Woodcock*, (1817) 6 M. & S. 44, it was held that a presentment of a bill of exchange at the banking house where payable, after banking hours, was sufficient if there was a person stationed there for the purpose of returning an answer. It is true that this was not an action against the bank, but the *ratio decidendi* of the case was that the bank was acting within its agency. *Whitaker v. Bank of England*, (1835) 6 C. & P. 700, on which the plaintiff in the present case relied, only held that a bank need not act after business hours. It did not hold that the bank could not do so. As Lord Abinger, C.B., said: "All that bankers contract for is to pay the bills of their customers within banking hours."

It is submitted that on the authority of the above cases the rights and duties of a bank may be stated to be as follows. A bank need not deal with the bills or cheques of its customers after banking hours. It may, however, if it sees fit, deal with them so as to pay or dishonour them within a reasonable business margin of the fixed hours.

NOTICE OF STOP PAYMENT.

The last case which we can consider is *Westminster Bank Ltd. v. Hilton*, (1927) 43 T.L.R. 124. The point at issue was what constituted valid and sufficient notice to stop payment on a cheque. The case is chiefly remarkable for the divergence of judicial opinion on the facts. Unfortunately these are too complicated to be given here. On the first trial the jury disagreed. At the second trial without a jury the judge held that the instructions given to the bank were not so clear and specific as to render it liable for negligence, and gave judgment for the bank. The Court of Appeal unanimously reversed the decision and found for the plaintiff. The bank obtained its revenge when the House of Lords unanimously reversed the Court of Appeal. It was, however, a Pyrrhic victory as the whole amount involved was under £8, and, as the plaintiff was only a small bookmaker, the bank must have had to meet a heavy bill of costs.

The only gain to the bank is to be found in Lord Shaw's judgment. It establishes that a bank cannot

be held liable if it pays a stopped cheque, unless the customer has given his instruction in a clear and unequivocable manner. "It rests upon the customer to prove that the order to stop reached the bank in time and was unequivocably referable to a cheque then in existence, and signed and issued by the customer before the notice to stop. . . . If these last things are not clearly proved (and the onus of doing so is no light one), then the bank acts rightly in declining to dishonour a cheque which *ex facie* bears a date subsequent to the stoppage."

As we said at the beginning of this article, the cases we have considered have no relation to each other except that they all deal with the same branch of the law. They illustrate, however, that this part of the law is not stereotyped but is steadily developing. Perhaps the comparatively recent origin of the new crossing "Account payee" illustrates this as well as anything. Even where the law has been codified, as in the Bills of Exchange Act, 1882, there are still important and difficult questions which remain to be solved. That in nearly fifty years no case has arisen which has required a detailed construction of Section 64, dealing as it does with alterations in a bill or a note, is one of the mysteries of the law.

Transfer of Land in Consideration of Money Lent.

REGISTRABILITY UNDER LAND TRANSFER SYSTEM.

In our issue of April 24th reference was made to a Victorian decision *Putz v. Registrar of Titles* (1928) V.L.R. 83, where Mann, J., held that the Registrar of Titles was right in refusing to register a transfer of land by one, Putz, to another, Maddock, in which the consideration was stated as "the sum of £200 lent to me by John Henry Maddock, which sum is to be repaid within two years from the date hereof, together with interest at the rate of £6 per centum per annum in the meantime;" the learned Judge held that the statement of the consideration in the transfer was in effect an attempt to register an equity of redemption, and would be a breach of the provisions of Section 55 of The Transfer of Land Act, 1915, (Vic.), corresponding in effect with Section 130 of our own Land Transfer Act providing that the Registrar shall not enter in the register book notice of any trust whether express, implied, or constructive.

From this decision appeal has been made to the Full Court of Victoria—see (1928) V.L.R. 348—which by two Judges to one, dismissed the appeal. The majority Judges (McArthur and Lowe, JJ.) held that the Registrar was justified in refusing to register the transfer because (1) if on its true construction the instrument was an absolute transfer it did not comply with the requirements of Section 121 relating to transfers, inasmuch as it did not state the true consideration, and (2) if on the true construction of the instrument the transfer was by way of mortgage, it was not an exercise of the power to transfer given to the proprietor by Section 121, and it did not conform with the method and form of mortgage prescribed by the Act. Irvine, C.J., dissented.

The Supreme Court Bench.

A Temporary Appointment.

Owing to the present indisposition of the Chief Justice, the recent death of Sir William Sim, and the absence from New Zealand of His Honour Mr. Justice Herdman, the ranks of the Supreme Court Bench are, at the moment, seriously depleted, and in these circumstances the majority of the Profession will probably be inclined to approve of the appointment of His Honour Mr. Justice Frazer as a temporary Supreme Court Judge. With the work normally performed by nine Judges falling upon six, an immediate appointment was called for. His Honour Mr. Justice Frazer has presided with efficiency over the Court of Arbitration for some seven years, and his judicial experience, particularly as a judge of fact, is without doubt a valuable qualification. It cannot, however, be overlooked that the Court of Arbitration has but a very limited jurisdiction and, as regards matters of law, is concerned exclusively with the law relating to industrial disputes and awards, and the law of compensation to workers. His Honour Mr. Justice Frazer will, in the Supreme Court, be called upon to consider and determine intricate and important questions of law of every conceivable class, all of them entirely outside the jurisdiction of the Court of Arbitration, and it is difficult therefore to see how his permanent appointment could be expected to strengthen the Bench where strengthening is most required.

The fact that the elevation of a Judge of the Court of Arbitration is not without precedent may possibly tempt the Attorney-General to take a short cut through the present situation, and it is only because of this that we repeat what we said on a previous occasion, viz.: that the circumstances demand that the best—and only the best—of the available men be appointed to the present and future vacancies.

We recall that in 1923 the Wellington District Law Society passed a resolution in the following terms:—

> "That in the emphatic opinion of this Council all appointments to vacancies on the Supreme Court Bench, including that of Chief Justice, should in the public interest be filled from the actively practising Bar."

The above resolution was communicated to thirteen District Law Societies, and definite replies were received from ten Societies (representing in all 1,325 practising solicitors out of a total of 1,501 then practising) expressing unqualified approval of the resolution.

Service by Post.

"I consider that this is one of the most stupid methods with which I have ever come in contact. It is simply an effort to avoid mileage, is seldom successful and causes endless trouble to the Court officials," remarked Mr. A. W. Mowlem, S.M., recently, in the Napier Magistrate's Court, with reference to the service of process by registered post. "Who is going to expect a Maori debtor to collect a registered letter knowing that there are ninety-nine chances out of a hundred of it containing a summons?"

London Letter.

Scotland,
30th August, 1928.

My Dear N.Z.,

In personal matters, my last recollections of the past term in London are of Lord Haldane and of J. B. Matthews. Of the latter, the sadness of whose death is infinitely deepened by the temporary delusion under which he sought it, the whole Bar has nothing but the liveliest, the kindest recollection. "Old J.B." was best known to us all, and will ever be clearly remembered, in the halcyon days of his large Junior practice, when he stood in fair comparison with uch Juniors as Macardie (the Judge), Disturnal and Norman Craig (who have died), F. E. Smith, John Simon, Stuart Bevan, Schiller, and Rowlatt: such men as Jowitt and Birkett were mere boys at the business, then. He was obviously not destined to the same greatness as were those, his peers; but he had a very remarkable character of his own, an irresistible personality combined with an immense knowledge of case and statute authority, which should, by all reckonings, have ensured for him a very comfortable, and possibly a famous, position as a leader. He took silk in due course, not at an early age, but by no means at a late one; as King's Counsel he appeared, at the outset, to begin to get his foot in; and we of his circuit, the Oxford, thought to ourselves that here was a candidate for those honours on the bench to which the circuit had, in his day, become accustomed, with its A. T. Lawrence, its Darling, its Jelf, and its Rowlatt. I wonder if perhaps we thought too much aloud? It is conceivable that J.B., tremendously devoted to the Bar as he was, may have become too keen and even obsessed with the possibilities of his own future, having regard to the prestige of the Circuit, which he loved, and to the fact of his own growing prominence as a Junior of it at its zenith; we may have encouraged his hopes so much that our unconscious act gave this desperate bitterness to his ultimate disappointment. There is no doubt that he was not a success as a leader, when he came to be tried out; his glory and his practice gradually diminished; and I have little doubt that this breezy, jolly, stout, and talkative man cherished, secretly, an increasing melancholy as to himself and that the end came about at a crisis of that melancholy. If you have read of his death, in the gun-room of his country house, one Sunday after lunch, you may now be entirely surprised to have it from me that old J.B. was essentially the most cheerful and cheering of men. It is a curious memory that Rowlatt, J., at the dinner which the Circuit gave him according to its wont when a member reaches the Bench, singled out J.B. from all, as being the appropriate butt for a friendly jest. Rowlatt was bemoaning the deprivation of intimates which removal to the Bench means to a Barrister; it might be glorious to survey us all from his lonely heights, but it would be miserable to be no longer of us. He looked at J.B., large, corpulent and yet always active of tongue and movement; he reminded us of his own nautical outlook, as a sailor by hobby, and he said: "My last recollection, as I leave the corridors of the Law Courts for the Judicial apartments, behind, is of old J.B. sailing down them, every stitch of canvas drawing!" With that picture of the dear fellow, hurrying from one Court to another in his busy days and with his gown flying about him, let us leave him: R.I.P.

Let us turn to that very great man of our profession, Lord Haldane, who died at Cloan, on August 19th. I would like to be able to make those of you, who do not know it, visualise the environment of our Houses of Parliament, that you might see that most typical picture of this great man as I last saw him. Round the Houses at Westminster, and necessarily to be crossed whether you are going to the Commons or the Lords, is a stream of traffic; it is the one spot in London where our godlike, impartial police, allow themselves to make personal distinctions, for here they habitually hold up the whole traffic to let a member of either House cross to his business. More like a large, homely beetle than anything else, comes down busy Whitehall the wonderful old man, smiling to himself at some profound philosophical conception or jest, part of the incessant stream of pedestrians on the pavement—sightseers, civil servants, Members of Parliament and others. At the turn of the street and the edge of the pavement, others pause upon the brink of the rush of vehicles, hesitating to cross it at all or at least pausing to choose the safe moment. Not so Lord Haldane; his back bent, his absent smile unchanging and still preoccupied, he walks unconcernedly on, assuming that the policeman at the crossing will deal with traffic and all other mundane matters, as indeed he does. And so the old man walks uninterruptedly on, past the entrance to Palace Yard and into the distance of the House of Lords. And that is the last I saw of him, and I expect it very accurately represents the last everyone else, save his family, saw of him.

We passed through Auchterarder, a remote township in Scotland in the neighbourhood of Perth, on our way up here; and we paused to look in the direction of his home, Cloan, not so far from our route. Haldane's intimate connection with the Army, and with that reorganisation of it which made it possible for so unmilitary a nation as ours to take part in the earliest stages of the Great War, makes of him a man to be brought to the attention of one's children; it was for that purpose that we paused on our journey to note the place of his origin and, though we did not then know it, of his end. How remarkable a contrast was the peace of that place to the turmoil of London and Westminster!

Haldane as an advocate was a man, of course, hardly known to my generation; it is not to be forgotten, however, that as such, he was very closely associated with your litigation and was your champion at a crisis when their Lordships of the Judicial Committee of the Privy Council erred somewhat, if I am rightly informed. Lord Davey, to whom perhaps he owed his beginnings, had also, at the Bar, been associated, as I know, with your appeals; so that, from the very outset of his career till almost the very end (for he presided over the Board which heard your Flour Millers' important Appeal recently) there is an association between New Zealand and Lord Haldane. I suppose he was the greatest thinker and philosopher, in legal matters, of our day; and, so far as concerns your history, it is a happy incident that he tried, and John Simon, his intellectual successor, argued, that Appeal. I should have said "defended" for "argued," for it is again a happy event that a last-minute change of order of battle brought it about that your own Myers made the appeal, convincing Haldane and defeating Simon.

I do not think that any attempt at a personal assessment is appropriate from me in this instance; he was

of an age long before my own and of his peers I only knew Lord Finlay, and him remotely. He appeared, to my generation, to be, if not actually asleep, at least always comatose, physically; mentally, he was presumed to have an active mind, a vivid imagination, incapable of being at rest and idle. He seemed to be towards you, as you addressed him, systematically courteous, but in fact quite different. I remember that as I made that always unwelcome address, the Junior's addition to a leader's argument in an obviously finished cause, he smiled graciously at me every time he thought I was finishing, but looked away at once into the far distance every time I was compelled by another of their Lordships' questions, to resume. He gave the impression that he felt it his duty to be courteous, but his right to be bored. I mention this, because it appears, from all accounts, to be typical of his attitude to all, and to be the explanation of the fact that he never engendered in those about him any affectionate appreciation such as would have been his salvation in 1914, when his tactless disregard of the anti-German passion (very natural in simple, loyal minds at the time) completely obscured the credit due to him for the preparations he had made long ago to meet this enemy.

Enough to say that Haldane was a very great Lawyer and a very great Administrator and a very great mind, for chapter and verse of which epitome I may refer you to the biography of him in the London "Times" of Monday, August 20th; that in the matter of popular appreciation his personal characteristics, one of which was possibly a conceit if a legitimate conceit, prevented him being a conspicuous success; and that, given the notable difference of physique between the tall and even slim, John Simon, and Haldane's loose bulk and large, strange face, there is very much in common between these two outstanding figures of our time, the essential of both of them being best summed up, from the point of view of our profession, in the words "Legal Acumen." I am, of course, an intense admirer of both these remarkable liberal statesmen; but I confess to some little human relief in turning from the conception of them to the thought of our roystering old Tories, less infallible, no doubt, but rather more engaging, with all their many faults, as human beings.

Yours ever,

INNER TEMPLAR.

The Truck Act.

Orders on Workmen's Wages.

We are requested by Mr. P. Keesing to point out that in the article under the above heading appearing in the last number of this Journal, an error appeared in the last three lines owing to the wrong copy of his manuscript having been handed to us. The last sentence of the article should read as follows:—

> "If this construction be correct, then in New Zealand no employer may safely honour an order given by a workman upon his wages in respect of the cost of goods purchased by the workman from any source."

A professedly religious witness takes credit for so many virtues that he allows himself much license in dealing with truth.—Lord Darling.

The Slater Case.

The Judgments of the Scottish Court of Criminal Appeal.

The manner in which the case of Oscar Slater was disposed of in the recent appeal to the newly established Scottish Court of Criminal Appeal raises questions of considerable interest to all concerned in the administration of our criminal law. A full report of the judgment of the members of that Court is not, so far as we are aware, yet available in this country and it is difficult from the somewhat meagre cabled reports, and the other sources of information so far generally available, properly to appreciate the matter. The case has not, however, been allowed to pass unobserved by English legal periodicals and we reprint for general information the following trenchant comment of the "Law Journal" upon the decision of the Scottish Court of Criminal Appeal.

"Not the least unsatisfactory thing in the protracted Slater case is the judgment which the Scottish Court of Criminal Appeal delivered. The conviction was quashed on the ground of misdirection by the late Lord Guthrie, who presided at the trial. The misdirection in question seems so clear as not to merit discussion, but it was held to be decisive as the case against the accused was so very doubtful; or, as the Court prefers to say, "The decision of the case—particularly with regard to the vital point of satisfactory proof of identity—presented an unusually difficult and narrow issue."

Following the publication of a book on the case by Mr. William Park calling for a public inquiry, and after persistent activity on behalf of Slater by the "Daily News," the appellant was released from prison on November 14, 1927. Thereafter the case was referred to the Scottish Court of Criminal Appeal under the Criminal Appeal (Scotland) Act, 1926. The unsatisfactory element in the judgment of that Court is that the conviction was quashed on a technical ground, whereas we believe—with great respect to the Court—that, given better consideration, the conviction would have been set aside for more solid reasons. The Court does not appear to have grasped altogether the course of events at the trial, and consequently the judgment, which is difficult in parts to follow, leaves the impression of being incomplete, ill-considered, and inaccurate.

In the forefront of the judgment there are radical omissions concerning the evidence of identification. Without the evidence of three of these identification witnesses, Mr. Watson admitted, the case against the appellant went. Yet the Appeal Court does not discuss the evidence in detail, but confines itself to general observations. "These criticisms," we read, "are most formidable . . . but all these difficulties (were) impressed on the jury by the presiding Judge . . ." The Appeal Court entirely overlooked the fact that it was not known until years afterwards that the witness Lambie declared to the police on the night of the murder that she would not be able to identify the man she had seen. No mention is made of the showing to witnesses of photographs of the man they were to identify, and having passed over these matters, the Court conclude that the jury were entitled to convict. Of the sufficiency or otherwise of the evidence there is no word, and so we are to infer that the Court approves of a conviction

on a capital charge on the evidence of three witnesses who saw the accused (if they saw him at all) for a total period of a few seconds, and whose evidence is otherwise subject " to most formidable criticisms."

Incidentally, during the appeal Lord Alness took it upon himself to criticise the American proceedings, by which he evidently meant the cross-examination of Lambie by Mr. Hugh Gordon Miller, of the New York Bar. A reading of the shorthand note, however, does not lend support to that criticism, which has been widely reported in America. The new evidence is brushed aside as unimportant, but an examination of some of it, read along with the proceedings at the trial, may well cause a different impression from that arrived at by the Court. It was proved on the appeal that during his so-called " flight " Slater registered at an hotel in Liverpool as " Oscar Slater, Glasgow," " whereas," says the judgment, " it was represented at the trial that the only change of name was the one made on stepping on board. We are unable to regard this as materially affecting the case." The case put by Mr. Ure, the Lord Advocate, who prosecuted, was that Slater, " knowing that the police were on his track, took every step possible to baffle the ends of justice and to escape the hands of the authorities." We presume the explanation of this peculiar method of escaping the authorities is that advanced by the Lord Justice General, who said during the appeal, that " a change of name at that stage might have been dangerous." The more vulgar, however, might well consider this explanation to be an instance of the doctrine of " Heads I win; tails, you lose." The mass of other evidence from Liverpool (all of which was known to the Crown at the trial) is not even mentioned in the judgment, although during the appeal Lord Sands remarked upon it, " You called one witness who said he was agitated, and suppressed a whole lot who did not say he was agitated." The reply of Mr. Watson to that remark was that he did not feel called upon to answer.

The deposition of Duncan MacBrayne given at the 1914 inquiry, and of which during the appeal Lord Alness said:

> " To his mind far and away the most important part of the additional evidence—its importance was surely undeniable—was that a man who was alleged to have battered this old lady to death at 7.15 p.m. was seen to be standing unconcerned at 8.15 p.m. at the door of his house,"

is strangely and arbitrarily dismissed in the judgment as " of no materiality." The judgment quotes half a sentence from MacBrayne to the effect that he did not notice " whether (Slater) was excited or not," but omits the beginning of that sentence, which is, " I did not notice anything peculiar in his manner." The Lord Advocate at the trial painted a lurid picture for the jury of Slater bolting terrified to the underground railway shortly after the murder, after which his movements were unknown until ten o'clock, when he appeared excited and " panting and gasping " for money. As MacBayne's evidence was known to the Crown, and as it is obviously inconsistent with the Crown case, the prosecution must have anticipated the opinion of the Appeal Court, and accordingly did not trouble to have MacBayne produced.

The glaring misstatements of fact in the Lord Advocate's speech escape without comment from the Appeal Court, perhaps because, as the Lord Justice General suggested in reply to a question he himself had put to Mr. Watson, " It is only counsel's speech," or perhaps for the equally curious reason advanced by the same learned Judge, that " any inaccuracy was very much to be regretted, but nobody could completely avoid inaccuracies in such circumstances."

Lord Guthrie's charge, although fatally bad in one respect, is said by the Court to be unexceptionable in every other. " In some respects, indeed "—we are surprised to hear—" it was indulgent to the appellant." That the late Lord Guthrie himself may not have held this view is suggested by his altering his summing-up before allowing it to be published. In the printed version, for example, a prohibition against convicting on the circumstantial evidence was introduced, but the jury never heard that prohibition, for it was never uttered to them.

By far the most important thing to the public, however, in this case is the allegation that evidence in the prisoner's favour was known to the Crown and suppressed by the authorities. It is admitted now that the names of a number of witnesses favourable to the accused were kept out of the list, and we are told by the Court of Criminal Appeal that " The Lord Advocate, after making an inquiry as thorough as the lapse of time allows, is unable to give any information regarding the reason. . . . . " We we suggest that it is impossible to accept the timid refusal of the Appeal Court, in the absence of explanation, to believe that there is any sinister reason for this concealment. Nor can we understand, after the allegations made at the appeal, the statements of the Court that no charge of wilful concealment had been made. It may be only a coincidence that all the evidence kept out was in Slater's favour, but as the case against him was always very fragile, that coincidence—if it be one—is not reassuring. Years ago this charge was first made, and the only reply of the authorities was to dismiss the very distinguished detective officer who made it. It is useless to say that Slater himself knew, for example, how he had registered at the Liverpool hotel, for the rest of the evidence which was " kept out " could not have been known or accessible to him. In any event, it must often happen (as it did in this case) that the Crown in the course of investigation comes across evidence in favour of the accused, and it would be dangerous indeed if the authorities were to constitute themselves the sole judges of its materiality. We believe that, as a rule, evidence of this kind is brought to the notice of the defence, but we hope that a result of this case will be the passing of an Act to make this course compulsory. On this matter of suppressed evidence, Lord Sands is reported to have said during the appeal, " The Crown had to try to get a conviction, and not to select things in the prisoner's favour." That is a strange statement, but it describes exactly what the Crown succeeded in doing in this case. If the judgment of the Court was designed to allay public misgiving over this matter, it has failed completely in its object.

Finally, it is to be noted that the Appeal Court, like the court of first instance, accepted as a fact the alleged bad character of the prisoner, when there was before it in support of that opinion but a few hearsay answers in cross-examination.

Men have been wrongly hanged before now, but we know of no case in which such veritable rags of evidence against the prisoner have been made to cover so much, and in which, on the other side, so much weighty evidence has been kept from the Court. That being so, we regret exceedingly that the Court of Criminal Appeal were not bold enough to say, as the fact was, that the conduct of the prosecution in this case was a disgrace to British justice."

Mental Defectives Act.

LAST SESSION'S LEGISLATION THROUGH ENGLISH SPECTACLES.

The provisions of our Mental Defectives Act, 1928, have already attracted no little attention abroad, but it is mainly the views of members of the medical profession and of psychologists that have found a place in the cabled reports. To the lawyer the following comments of the "Solicitors' Journal" of 25th August, are of particular interest.

"Any serious innovation in Dominion legislation must inevitably interest the Mother Country; not only may it cause repercussions over here—as in the case of our Australian legacy, the "Tote" Bill, now before Parliament—but it is also the immediate concern of every British subject that his constitutional rights should remain unimpaired throughout the Empire. The Mental Defectives Bill, now before the New Zealand House of Representatives, would appear to require careful consideration. This Bill proposes to establish a board of medical, educational, and prison authorities, whose duty shall be to compile a register of all persons who, *though not of unsound mind*, may be classified as feeble-minded, epileptic or socially defective; the board is to have authority to order the sterilisation of any person so registered, and the marriage of *all* registered persons is to be prohibited. Whilst appreciating the eugenic aspect and commending in principle an attempt to avert the tragedy of the unfit child, the peculiar practical difficulties involved in this method of dealing with the problem must not be overlooked. In particular the liberty of the subject should never be placed at the mercy of loose phrases. We doubt if the Courts would find it easy to determine what is a "social defective," and we certainly consider that the interpretation of a phrase which involves the right of the subject to marry and create children should not be left, in the first instance, to the direction of schoolmasters and prison authorities. The possibilities of abuse are obvious. The extensive litigation in which the unfortunate Mr. Harnett was recently involved showed that risks are inevitable under our Lunacy Acts. How much greater, and how irremediable, would be the dangers if the New Zealand proposals were adopted in this country?"

Court of Appeal.

The sitting of the Court of Appeal adjourned to 23rd October, 1928, has been further adjourned to 14th December, 1928, at 10.30 a.m.

Counsel (at last sitting of the Court of Appeal): "I refer now to the case of *Gammon v. Stone*, 1 Ves. Sen. 399 two hundred and forty years old, your Honours!"

MacGregor, J.: "Gammon, I am afraid, is much older than that, Mr.———."

Bench and Bar.

His Honour Mr. Justice Reed has been appointed President of the Prisons Board, in succession to the late Sir William Sim. Mr. Justice Reed ranks high in the list of New Zealand's criminal Judges, and there can be no doubt that the appointment will meet with the unanimous approval of the Profession.

Mr. Justice Frazer who has been temporarily appointed to the Supreme Court, was born in 1880. He was educated at Nelson College, Otago University, and Canterbury College, taking the degree of LL.B. in 1905, the degree of B.A. in 1908, and that of M.A. in the following year. In 1906 he was admitted as a barrister and solicitor, and practised in the country and for a short time at Christchurch, until June, 1911, when he was appointed a Stipendiary Magistrate. Mr. Frazer continued in this office until 1919, in which year he acted in the capacity of Chairman of the Public Service Appeal Board, and also of the Post and Telegraph Appeal Board. In 1920 he was appointed Public Service Commissioner, and in January, 1921, was made Judge of the Court of Arbitration.

Mr. W. C. Mason, one of the Deputy-Registrars of the Supreme Court at Wellington, has been appointed to the office of Clerk of Awards in succession to Mr. E. G. Rhodes.

The following admissions to the profession have been made recently at Wellington: Mr. G. R. Powles (Barrister); Mr. J. F. Paul (Solicitor).

The firm of Skedden & Beveridge, Wellington, has been dissolved. The practice will be carried on by Mr. W. J. Beveridge. Mr. J. F. Skedden has joined the staff of the Public Trust Offic.

Messrs. T. F. Simpson and C. M. Williamson, practising at Hamilton, under the style of Simpson, Bate & Williamson, have dissolved partnership. Mr. T. F. Simpson will carry on the practice.

Mr. T. A. Kinmont, formerly with Messrs. Mondy, Stephens, Monro and Stephens, of Dunedin, has acquired the practice of Mr. H. L. Spratt, of Hawera.

Mr. T. G. Nelson, LL.B., who has been for several years managing clerk to Mr. M. P. Stewart, Auckland, and who acted as managing clerk for Mr. E. J. Stewart, Hamilton, for several months during this year, has been admitted into partnership by Mr. H. H. Gillam, Dannevirke. The firm will practise under the style of Gillam & Nelson.

Mr. Wyvern Wilson, S.M., has been appointed Chairman of the Licensing Committee for the district of Hamilton, vice Mr. F. W. Platts, S.M.

Legal Literature.

Women Under English Law.

Second Edition: By MAUD I. CROFTS, M.A., LL.B.

(pp. 101. Butterworth & Co. (Publishers) Ltd.)

There are many well established text-books dealing with the law relating to different classes of persons: we have treatises devoted, for instance, to the law affecting lunatics and infants; but curiously enough it was not, it is believed, until the publication in 1925 of the first edition of Miss Croft's "Women Under English Law," that there was any work devoted solely to the law relating to women. Special chapters had, of course, found a place in the books on Contract and Property, and no insignificant treatment was given also in works on the Law of Husband and Wife; but in view of the number and the diversity of the occasions on which women figure in Courts of law, it may well be doubted whether the space hitherto devoted to their place in our system of jurisprudence was altogether adequate. To some extent this apparent injustice has been remedied by Miss Crofts in this work which, while not intended as much for the lawyer as for the lay reader, gives an admirably clear and succinct account of woman's peculiar position in English law, and the changes concerning her status which have been effected within the last fifty years. The author divides her subject into five divisions: (1) women as citizens; (2) women as wives; (3) women as mothers; (4) women as workers and (5) offences relating to women. A chapter, written by Miss M. H. Kidd (Advocate), is added, dealing with women under Scots Law. Considering the limitations imposed by the size of the work, the statement of the law would appear to be remarkably accurate. A lawyer would, however, have liked to have seen included references to the decided cases to the effect of which Miss Crofts so frequently refers.

It is not without interest to note that the volume was first published by the National Council of Women of Great Britain with the assistance of the Stansfeld Trust. That Trust was founded in 1906, its objects being "to promote the equality of men and women before the law of the land, to diffuse a knowledge of the position of women as compared with men under that law, and as it might become under any suggested alterations of it, and, in regard to the relation of the sexes to maintain their equal responsibility to one and the same moral law."

New Books and Publications.

Transport by Railway. Second Edition. By Alan Leslie LL.M. (Sweet & Maxwell Ltd.). Price £2/15/-.

Cases Illustrative of the English Law of Torts. Fifth Edition. By C. S. Kenny. (Cambridge Press). Price £1/9/-.

Trial of King Charles I. Edited by J. Muddiman. (Butterworth & Co. (Aus.) Ltd.). Price 9/-.

Outlines of Landlord and Tenant. Fourth Edition. By Edgar Foa, M.A. (Law Times). Price 9/-.

Rules and Regulations.

Fertilizers Act, 1925. General regulations. Regulations of 2nd February, 1906, revoked.—Gazette No. 72, 4th October, 1928.

Fireblight Act, 1922. Fireblight Regulations, 1927, Amendment No. 2.—Gazette No. 73, 11th October, 1928.

Land and Income Tax Act, 1923; Land and Income Tax (Annual) Act, 1928. Fixing date and place for payment of Land Tax and Income Tax.—Gazette No. 73, 11th October, 1928.

Orchard-tax Act, 1927. Fireblight Committee Regulations, 1928; Gazette No. 72, 4th October, 1928.

Products Export Act, 1908. Hemp Grading Regulations Amendment No. 1.—Gazette No. 72, 4th October, 1928.

Stock Act, 1908. Regulations governing importation of Sausage Casings into New Zealand.—Gazette No. 72, 4th October, 1928.

Commixtio in Roman Law.

An Examination Question and an Answer.

During the next few weeks law students throughout the country will be undergoing the rigid test of examination, and no doubt the examiners will receive many an answer not entirely devoid of humour. We are indebted to a Dunedin subscriber for the following actual answer to a question set by an examiner in Roman Law at Otago University:—

QUESTION: A. and B. accidentally mix their rice; C. wilfully and without permission takes this rice, also eggs and milk belonging to D. and makes a pudding. Who is the owner of the pudding? What are the rights of the parties?

ANSWER: The effect of the accidental mixing of the rice is that each remains the owner of his own share. This is a case of *commixtio*. If such things as rice, wheat, cattle, etc., belonging to different persons, are mixed together accidentally, each person remains the owner of his share. I think that C. can be dismissed at once. The fact that he acted wilfully and without permission disentitles him to any compensation for his labor. If he had acted *bona fide* he would have had a claim on the owner of the pudding. The fact that C. did act wilfully and without permission, however, absolves A. and B. on the one hand and D. on the other from any blame in the dastardly proceeding, and the party who is decided not to be the owner of the finished product will have a claim on the other for the value of the materials used. The question comes to this: that A.'s and B.'s rice has become mixed in an inseparable manner with D.'s eggs and milk under circumstances which cast no blame on either side. If the articles had been separable the rice would have continued to belong to A. and B. in proportion to their shares, and the eggs and milk to D. Unfortunately the matter has gone too far for me to be able to come to that happy conclusion. As the articles are inseparable it is necessary to decide whether the rice is accessory to the eggs and milk or *vice versa*. This is much too difficult a question for one inexperienced in everything connected with rice puddings except the eating of them, and I suggest that it be referred to the arbitration of Professor B———— and Mrs. T————, with Dr. I———— as chairman, in order that an authoritative statement on this difficult matter may be obtained. In the absence of such distinguished assistance, I submit—albeit with great diffidence—that the eggs and milk are an accessory to the rice, which must, I think, be regarded as the foundation of the pudding. The ownership of the pudding is, therefore, in A. and B. in proportion to their shares in the rice. D. has an action against them (*condictio*) for the value of the milk and eggs. A consideration of the relative values of the ingredients would, I am afraid, prove this result to be inequitable, and perhaps the best way to settle the matter would be for A., B. and D. to fall to and consume the "bone of contention." C. might be allowed to scrape the dish.