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"I will forever at all hazards assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the British constitution, can have no existence."
—*Lord Erskine.*

Vol. V. Tuesday, June 11, 1929 No. 8.

Law and the Colonial Service.

A few years ago Lord Birkenhead addressing the undergraduates of Glasgow University made a plea for candidates for the Indian Civil Service. That service has not of late years proved as attractive to undergraduates of the English Universities as it did in the past. This has been due largely, if not entirely, to administrative changes in India, but despite those changes Lord Birkenhead, who was then Secretary-for-State for India, spoke highly of the advantages of a career in the service to young men of talent and ambition. The Colonial Service has, on the other hand, steadily advanced in importance and status with the rapid progress of those parts of the Empire which are under the direct control of the Colonial Office. The extent of the area administered by the Colonial Office and the size of the population within that area are not generally recognised. The Colonial Service is responsible for an area of some 2,000,000 square miles with a population of approximately 50,000,000, and with some small exceptions the whole of this area and its inhabitants lie within the tropical zone.

Reviewing in the House of Commons on the 1st May the last five years of Colonial administration, Mr. Amery, the then Secretary-of-State for the Colonies, pointed out that the total trade of the Colonial Empire had by 1927 come very close to the £500,000,000 mark, and expressed his conviction that for the present year the figures would well exceed that total. In the most important colonial group, the West African Colonies, the total trade had grown from £51,000,000 in 1924, to £66,000,000 in 1927, and during the same period the total trade of the East African group, rose from £25,000,000 to £32,500,000. The total trade of the Eastern Pacific group, Ceylon, Malaya, and the Pacific Colonies, rose from £153,500,000 to £247, 000,000. The total exports from Great Britain to all her Colonial Dependencies in 1905 was under £18,000,000. By 1924 the figure had risen to £47,000,000 and in 1927 it was just short of £55,000,000. Great Britain's imports from the colonies in 1905 were £19,500,000, in 1924 over £50,000,000, and in 1927 nearly £60,000,000. Mr. Amery went on to point out that as a purchaser of goods in Great Britain the Colonial Empire, taken as a unit, now ranked next to India and Australia as Great Britain's best market, and that in the last five years the Crown Agents for the Colonies had bought in Great Britain £33,000,000 worth of Government stores.

These facts and figures indicate the enormous importance of the Colonial Dependencies to the British Empire, and when it is remembered that the Native populations, who are the primary producers of this enormous trade, number some 50,000,000 and are regulated and governed by the Colonial Service, the importance of that Service will be equally recognised. To all young men studying law at our Universities, and to lawyers with sons to make their way in the world, the announcement that a Board has been set up in New Zealand under the Chairmanship of His Excellency the Governor-General to recommend candidates for this Service from amongst graduates of the New Zealand Universities is a fact of prime importance. It is not only the regulation of trade in the Colonial Dependencies that falls within the scope of the duties of the officials of the Colonial Office, but the government of a population as great as that of Great Britain herself.

In such government the man trained in legal principles and possessing a legal education must always find an important place. There are, of course, in such a service special branches such as the agricultural, the veterinary, the medical and the educational, but in the general administrative operations which are concerned with the establishment of justice and the preservation of law and order the general education of the University man, whose studies have included a course of law, is bound to be a qualification. The education for such service, considering the great diversity of peoples concerned, the different languages, the various stages of civilisation, and the forms of government, religions and cultures existing in the various Colonial possessions, should be general rather than special, and those whose duty it is to prescribe courses of legal education should always understand that a knowledge of legal principles and a degree in law are qualifications for administrative service as well as for actual practice in the Law. Inasmuch as service under the colonial administration is confined almost entirely to tropical countries, health, habit and outlook are essential requisites in an applicant, and generally speaking the qualifications required are probably those that go to the making of a successful lawyer who commands the confidence and respect of his clients.

It is impossible in an article such as this to do more than refer to the fact that a career in this Service should offer great attractions to the class of young man whose horizon has hitherto been confined to practising the profession of Law in the Dominion in which he happens to have been born. To such we suggest they should consider the opportunity now open for a career in an increasingly important Service. They should, if possible, obtain a copy of Mr. Amery's survey and seek information from the New Zealand Board. Mr. Amery says that in the Service salaries have been increased and that the Colonial Office has steadily raised the standard of the character and ability of the men who entered the Service as there is nothing more vital to the development of the whole of the Empire than the men who do the work on the spot. Members of the legal profession may well consider how the opening now presented for service of this nature affects the requirements of legal education and training.

Court of Appeal.

Herdman, A.C.J.
Adams, J.
MacGregor, J.

March 26; May 6, 1929.
Wellington.

NAPIER HARBOUR BOARD v. NEW ZEALAND TRAWLING AND FISH SUPPLY CO. LTD.

Harbours—Dues—Bunker Coal For Trawlers Brought On to Wharf and Loaded Direct Into Trawler by Employees of Trawling Company—Fish From Trawler Landed Direct Into Vehicles by Company's Employees and Taken Away—Gear Forming Part of Equipment of Trawlers Landed On to or Shipped From Wharves—Board Entitled to Levy Dues on Such Goods—Not Within Exemption of "Vessel Employed *in Fishing . . . and Not Conveying Goods for Hire*"—Harbours Act, 1923, Sections 5, 78 (1e), 226 (12).

Case stated under Rule 154 removed into the Court of Appeal for argument and for the determination of the questions of law arising. The facts as agreed were that the company was the owner of certain steam trawlers which were employed solely in fishing within, and in the immediate vicinity of, the Port of Napier. The trawlers berthed at the plaintiff Board's wharves to which they returned each day on the conclusion of their fishing operations. They carried no goods for hire nor did they trade with any other port. "Bunker coal" was required for the propulsion of the trawlers and was shipped on to such trawlers for that purpose. It was brought on to the plaintiff Board's wharves in vehicles belonging to the coal merchants and was put on to the trawlers fron the wharves by the defendant company's employees. The fish brought to the wharves in the trawlers was landed from there into defendant company's vehicles on the plaintiff Board's wharves, but all labour in connection with such loading was done by the defendant company's employees.

Wharfage amounting to £4 3s. 8d. was claimed in respect of certain gear. That gear included firstly the engine boiler tanks, timber, and other gear dismantled from S.T. "Weka" during June, 1925, when that vessel was taken out of commission and destroyed, which gear was landed on the plaintiff Board's wharf and upon which wharfage dues were claimed under By-law No. 116 (b); and secondly, 1 winch, 2 trawl-boards, 2 gallows, and 1 search-light consigned from Wellington to the defendant company at Napier, in November, 1926, per S.T. "Awarua," a fishing vessel not the property of the defendant company upon which wharfage dues were claimed under By-law No. 116 (b).

The questions of law arising were whether the plaintiff Board had a right to levy wharfage dues in respect of (a) "bunker coal" loaded over the wharves into and for the use of the defendant company's trawlers, or (b) in respect of fish the result of the trawlers' fishing operations landed on the Board's wharves, or (c) in respect of the whole or any part of the gear forming part of the equipment of the trawlers landed on to or shipped from the Board's wharves.

T. S. Weston for plaintiff.
Gray, K.C. and Buxton for defendant.

ADAMS, J., delivering the judgment of the Court, said that in a case between the same parties, reported (1927) G.L.R. 194; 3 B.F.N. 33, it was held that under Section 226 (12) of the Harbours Act, 1923, the Board had power by appropriate by-law to levy wharfage dues in respect of "bunker coal" brought on to the Board's wharf and placed from there on to the trawlers, but that that could not be done under the existing by-law No. 112 (a). The Board then amended by-law No. 112 by adding clauses (b), (c), and (d). The present questions arose under those clauses. In their Honours' opinion the decision to which they had referred was right both in the result and in the reasoning by which it was supported. But if the Board had power by appropriate by-law to levy wharfage dues in respect of "bunker coal," there was no reason why the power should be limited to "bunker coal." The enabling section was Section 226 of the Harbours Act, 1923, which read as follows: "The Board may from time to time, by by-laws made under this Act . . . . (12) Fix scales of dues, tolls and charges, to be paid for the use of such wharves or docks, and charges for labour supplied or services rendered in connection therewith, or on goods passing over or through the same." The only exception to be found was in Section 78 (1) (e) exempting (*inter alia*) any vessel employed in fishing and not conveying goods for hire. That exemption applied only to the vessel. The defendant company had used the plaintiff's wharf for the purpose of conveying "bunker coal" to its vessel, and also for the purpose of landing its fish. These articles were "goods" within the definition in Section 5 of the Act. They were, therefore, within the ambit of Section 226 (12), and by the amendment to by-law 112 the Board had fixed dues to be paid in respect of them.

The gear from the S.T. "Weka" was severed from the ship in the process of her destruction before it was landed on the wharf, therefore it had ceased to be part of a fishing vessel or its equipment, part or all of it might indeed at some future time become part of a fishing vessel or of its equipment, but when landed it had no relation to any particular ship. Their Honours thought that such gear came clearly within the definition of "goods" in Section 5. The gear ex S.T. "Awarua" might have been intended for one of the defendant's trawlers, but there was no suggestion that it was part of a fishing vessel or of its equipment. That gear was, therefore, in the same category as the gear from the S.T. "Weka."

Solicitors for defendant: **Kennedy, Lusk and Morling**, Napier.
Solicitors for plaintiff: **Sainsbury, Logan and Williams**, Napier.

Herdman, A.C.J.
Adams, J.
MacGregor, J.
Kennedy, J.

March 25; May 6, 1929,
Wellington.

R. HARDING & CO. LTD. (IN LIQUIDATION) v. HAMILTON

Company—Liquidation—Set-off—Claim for Calls by Liquidator of Company—Monies Due to Shareholder in Respect of Bills Signed by Shareholder for Accommodation of Company While a Going Concern and For Services Rendered to Company as Accountant—Claim of Set-off by Shareholder—Informal Arrangement When Bills Signed That Any Moneys Paid by Shareholder on Bills Should be Credited to Shares—Similar Arrangement as to Moneys Becoming Due for Services Rendered to Company—No Debts Payable *in praesenti* to Shareholder—Agreements to Set-off *in futuro*—Not Sufficient to Constitute Set-off—No Evidence of Set-off or of Any Transaction Equivalent to Payment—No Inference of Set-off Drawn from Failure of Receiver Appointed by a Debentureholder to Require Payment of Calls by Shareholder—Moneys Paid Not Advances on Account of Shares—Companies Act, 1908, Sections 66, 68; Table A. Art. 16.

Appeal from a decision of Ostler, J., upon a summons to show cause why the respondent, Hamilton, should not be ordered to pay to the liquidator of the appellant company the sum of £400 being an amount due in respect of a call upon his shares in the company and upon a motion for the removal of the respondent's name from the list of the contributories of the company. The summons was dismissed and an order was made removing the respondent's name from the list of contributories. The facts were that the respondent held 500 shares of £1 each in the company in respect of which £100 had been paid; that amount being credited to him on 29th March, 1927. On 23rd August, 1927, the balance of uncalled capital was called up, the call being made payable on 12th September, 1927, and in September, 1927, a receiver was put in by debentureholders. The company went into liquidation on 29th December, 1927. While the Company was a going concern the respondent signed certain accommodation bills to assist the company, and when the company was unable to take up the bills at maturity, the respondent came to its assistance and found sums of money aggregating £515 15s. Between April, 1927, and August, 1927, he rendered the company certain services as an accountant in respect of which there was payable to him the sum of £149 18s. After crediting a sum of £245 owing by him on account of a car purchased, there was due to him for moneys paid to meet promissory notes and for services rendered the sum of £424 13s., and he was contingently liable for the sum of £101 5s. in respect of three promissory notes which were not then due. There existed between the respondent and the company an informal arrangement to the effect that the company was to meet the various bills signed by the respondent as they became due, and that, if the company failed to meet the bills and if

the respondent was obliged to redeem them, the amounts so paid by him were to be credited to him in part payment of the amount unpaid by him to the company on his 500 shares. A similar arrangement was made in respect of monies which might become due to him for services rendered. If the monies due by the company to the respondent were to be set-off against the £400 payable by him for calls, he would owe the company nothing when it went into liquidation; on the contrary the company would be indebted to the respondent. The question arising was whether in fact the monies had been set-off. In addition to the above informal arrangements as to crediting in the future the amounts paid on bills (if any) or amounts due for services (if any) towards payments of the amount unpaid on shares, there was evidence that the receiver had taken no steps to enforce payment of the call. There was, however, no evidence that any of the monies paid by the respondent had in fact been received as advances upon shares or credited against the shares or even that the respondent had before liquidation attempted to have any record made in the books of the company that his liability in respect of his shares had been discharged.

Cornish for appellant.
Stevenson for respondent.

HERDMAN, A.C.J., delivering the judgment of the Court, said that it had been submitted that the transactions between the company and the respondent came within Article 16 of Table A of the Companies Act, 1908, which enabled directors of a company to receive payments from a member of the company who was willing to advance the same on account of moneys due upon his shares. Their Honours had no hesitation in stating that that was not the case. The respondent used his money to pay a debt which the company should have paid. In a sense the respondent was a surety and under an obligation to meet a debt if the principal debtor failed to pay it. He did not deposit money with the company on account of his liability as a shareholder. He consented to act as the medium through which the company secured money for its own purposes from lending institutions, and when the time arrived for the payment of the bills upon the strength of which money had been raised, the respondent found the ways and means. If the arrangement was that the monies paid by him were to be treated as advances within the provisions of Article 16 one would expect to find some stipulation about the payment of interest; but none was to be discovered. Then again, Prouse, the managing director, evidently considered that the essence of the agreement arrived at was "set off," for in a letter dated 28th February, 1928, addressed to the respondent, he said so. If the respondent was to escape from paying the amount of the calls which the liquidator claimed, he could only do so by proving that the moneys paid by him for the benefit of the company and the moneys earned by him for services rendered were in fact set-off against the liability on his shares before the company went into liquidation.

The respondent claimed that his liability to the company had been discharged by a transaction or transactions which were the equivalent of payment. The onus was upon him to prove that a set-off was so effected. The learned Judge in the Court below came to the conclusion that a set-off must be presumed from the inactivity of the receiver who had been put in charge of the company's business by debenture holders. The receiver heard the respondent's story and took no step to enforce payment of the call, but as to whether or not he had abandoned his claim against respondent there was no evidence either way. No inference of any value could, however, be drawn from the failure of the receiver to proceed against the respondent. Was then the respondent's indebtedness for calls extinguished by set-off before the company went into liquidation? Firstly, as to the bills mentioned in the case, the respondent's evidence showed that money was supplied by him as each bill fell due. It followed that, as eighteen bills matured before liquidation and eighteen payments were made by the respondent, there must have been eighteen separate instances of set-off, but nowhere could any record be found of any gradual diminution of the respondent's liability. Next, when the arrangement about set-off was made there were no debts payable *in praesenti*. The respondent might never have been called upon to meet the bills. The company might have been able to take them up as they fell due. No call had been made when the arrangement was made. Months elapsed before the resolution was passed which provided for the calling up of the uncalled capital. Then, as to the respondent's claim for services rendered, he might never have done any work. When the arrangement was made it amounted to an undertaking to do something *in futuro*. The situation disclosed by the facts resembled the situation with which the Court had to deal in **Kent's Case,** 39 Ch. D., 259. When the arrangements about set-off were made in the present case, no one could predict with certainty that the respondent would ever have a claim against the company for money advanced or for services rendered.

Their Honours then proceeded to consider whether it had been proved that any set-off had been actually consummated. The question arising was whether there was proof in the present case, as in **Spargo's Case,** L. R., 8 Ch. 407, that there was on the one side a *bona fide* debt payable at once for the purchase of property, and on the other side a *bona fide* liability to pay at once for shares and that one obligation had in fact been set-off against the other. The respondent, no doubt, was under liability on account of his shares, but when the agreement was made there was no debt owing to him by the company. There was nothing before the Court to indicate either that moneys paid by the respondent were received as advances or that they were, when paid, credited against his share liability. There was no entry in the minute book which recorded the terms of any arrangement made by the respondent with the company about set-off, nor was there any such record in the share register. There was no evidence of any attempt being made by the respondent before liquidation to have a record made in any book of the company that his liability in respect of his 500 shares had been discharged. No cash book, no ledger, not even a receipt for moneys paid on account of the company had been produced. There existed, however, sufficient proof of a somewhat nebulous executory undertaking which provided that moneys paid by the respondent on account of the bills already referred to and moneys payable to him for services rendered were to be credited against his liability on his shares. But that was not enough. The company was in liquidation. A liquidator had been appointed. His duty was to see that the interests of the creditors and contributories were protected, and for that purpose he must act in accordance with the directions in Sections 66 and 68 of the Companies Act, 1908, and insist that members of the company contribute to the assets of the company an amount sufficient for the payment of the debts and liabilities of the company and for the adjustment of the rights of contributories amongst themselves, subject, of course, to the limit provided for in paragraph (b) of Section 66. Section 68 expressly forbad any set-off by a member of moneys due to him by the company in his character of a member in competition with creditors to a winding-up. Their Honours did not think that **Grissell's Case,** L.R. 1 Ch. 528 assisted in the present case. In **Black's Case,** L.R. 8 Ch. 254, it was held that the contractor could not set-off the amount due to him from the company under his agreement as damages or otherwise against the amount due by him on the calls. In that case there was an agreement about a set-off before liquidation. That was so in the present case. In **Black's Case** the shareholder attempted to escape from paying the amount of a call made by a liquidator. In the present case the respondent sought to evade payment of a call which the liquidator was attempting to collect. If at some date before the liquidation proceedings supervened, the respondent and the company had met and arranged that the set-off agreed upon should there and then be carried into effect, that would have ended the matter at any rate so far as moneys owing by the company to the respondent were concerned. But that was not done. The case of **In re Law Car and General Insurance Corporation,** (1912) 1 Ch. 405, was in some respects, not unlike the present. A director of a company who was a large shareholder offered to guarantee an overdraft of £5,000 at a bank stipulating that any payments which he should make should, at his option, be treated as payments in advance on calls. Neville, J., pointed out that the contract made did not discharge the director from liability in respect of the unpaid balance due on his shares. If nothing were paid to the bank under the guarantee, or if he did not exercise his option, the liability upon his shares remained intact. The director paid moneys to the bank and exercised his option after the company went into liquidation. But the learned Judge decided that **Black's case** (*cit. sup.*) applied and that at the time of winding-up an amount was unpaid on the directors' shares and that, therefore, he was liable. Their Honours referred also to the judgment of Fry, L.J., in **Kent's case,** 39 Ch. D. 259, and distinguished **In re Jones Lloyd and Co.,** 41 Ch. D. 159, where the transaction under review amounted in effect to a payment for shares in cash. In the present case, however, no actual set-off was ever carried into effect nor was there any proof of any transaction which was equivalent to payment.

Appeal allowed.

Solicitors for appellant: **Morison, Spratt and Morison,** Wellington.

Solicitors for respondent: **Izard, Weston, Stevenson and Castle,** Wellington.

Supreme Court.

MacGregor, J. April 19; May 8, 1928.
Wellington.

HERDMAN v. C. DICKINSON & CO. LTD.

Principal and Agent—Land Agent—Commission—Written Authority to Sell Hotel at Certain Price—Commission Payable "Should a Sale be Effected"—Agent Obtaining Offer to Purchase at Lower Price Providing for Payment to Agent of Deposit "on Acceptance of Offer"—Agent Agreeing to Accept Less Commission—Offer Accepted—Deposit Not Paid by Purchaser—Refusal of Purchaser to Complete—Vendor Declining to Enforce Contract—Duty of Agent to Obtain Payment of Deposit—Failure to Perform Duty—Agent Not Entitled to Commission.

Appeal on law and fact from the decision of Mr. Barton, S.M., in favour of the plaintiff company in an action and counterclaim heard by him in the Magistrates' Court at Wellington. The respondent conpany was a land agent and the appellant the proprietress of the Railway Hotel at Marton Junction. The respondent claimed to recover from the appellant a sum of £100 as the amount of commission agreed to be paid by the appellant to the respondent for effecting the sale of her hotel premises. The appellant defended the action and counterclaimed for £150 damages alleging negligence by the plaintiff in acting as her agent. On 28th May, 1928, the appellant by a written authority to sell authorised the respondent to sell her leasehold interest in the hotel, including furniture, for £2,850. The authority provided: "I hereby authorise you to sell my hotel as per particulars hereunder mentioned and agree to pay you commission as stated below should a sale be effected by you or through your instrumentality. No sale, no charges. Commission on all sales 5% or arranged." On 5th June, 1928, respondent's servants informed the appellant that they had an offer for £2,500 for the lease and furniture of the hotel, to which the appellant replied that she could not accept less than £2,500 nett and enquired, "How about your commission?" Subsequently the respondent received from one Mrs. Annie Doogan an offer agreeing to purchase at £2,600, and they communicated this offer over the telephone to the appellant, informing her that their commission would be £100. Following on this communication they sent her a copy of Mrs. Doogan's offer which was addressed to the respondent company and by which she offered to purchase the lease and furniture of the Railway Hotel, Marton Junction, for the sum of £2,600 on certain terms. These terms included (*inter alia*) a provision that on acceptance of the offer she would pay a deposit of £100 to the respondent company as agent for the vendor, the balance of the purchase money (£2,500) to be paid in cash on date of settlement. On 15th June, 1928, on receipt of this offer, the appellant telegraphed to the respondent company: "Accept offer. Herdman." The respondent company then telegraphed to Mrs. Doogan: "Your offer accepted by Mrs. Herdman." On 19th June the appellant received a letter from Mrs. Doogan's solicitors purporting to withdraw her offer to purchase. The appellant took no steps to compel Mrs. Doogan to complete the purchase. Mrs. Doogan had not paid the deposit of £100 provided for in her offer.

O'Leary for appellant.

Cornish and James for respondent.

MACGREGOR, J., said that there was no controversy regarding the facts, the only question being whether the respondent had made good its claim in law to recover its agreed commission of £100 on the sale of the appellant's hotel. The answer to that question must depend upon whether the respondent had duly carried out its duties as appellant's agent in the transaction. After referring to **Bowsted on Agency,** 7th Edn., 201, and to the observations of Hosking, J., in **Samson v. McKay,** (1923) N.Z.L.R. 43, as to the duties of an agent, His Honour said that the crucial question was accordingly whether it had been established by the evidence that the respondent had procured a person approved by the vendor to enter into a binding contract of purchase upon the terms warranted by its authority. The case of **Progressive Agency v. Bennett,** (1928) N.Z.L.R. 100, was in point. Skerrett, C.J., in that case decided that a land agent who had been authorised by an owner to sell his property on the terms (*inter alia*) of a "£200 cash deposit," who procured the written acceptance of a purchaser to the terms but failed to obtain payment of the deposit, upon cancellation of the contract was not entitled to recover his commission. In His Honour's opinion that decision was in principle decisive of the present case. It was cited to the learned Magistrate who was able to distinguish it to his satisfaction from the present case; but in the result His Honour found himself unable to do so. It was clear, His Honour thought, from the language of the written offer, procured (and prepared) by the respondent itself, that it became part of its duty as agent on acceptance of the offer to obtain payment of the deposit of £100 from the purchaser. The first material term of the offer provided that: "On acceptance of this offer I will pay a deposit of £100 to C. Dickinson & C. Ltd., as agents for the vendor." It was clear also from the evidence that the respondent company realised that to collect this deposit was part of its duty as agent for the appellant, for Mr. Cullingham (one of the respondent company's representatives) said in evidence: "I called on Mrs. Doogan to get the deposit but she was away. I looked on it as my duty to try to collect the deposit." It appeared that although the offer was withdrawn on 19th June, the appellant was not told until 5th July that the £100 deposit had not been paid. Had she been promptly advised by her agent that no deposit had been paid as stipulated, she might well have adopted a different attitude towards the whole transaction. The words "On acceptance of this offer I will pay a deposit of £100 to C. Dickinson & Co. Ltd., as agents for the vendor," as used in a business document, could have no other meaning than that a sum of £100 was contemporaneously with the acceptance of the offer to be paid to the respondent: see **Progressive Agency v. Bennett** (*cit. sup.*) at p. 103. It was clearly laid down in **1 Halsbury's Laws of England,** 183, that "the first duty of an agent is to carry out the business he has undertaken, or to inform his principal promptly if it be impossible to do so." In the present case it appeared to His Honour from the evidence that the respondent had failed in that primary duty in both respects. It had failed in its duty to collect the deposit of £100 on acceptance of the offer, and had also failed to notify the principal promptly of that material fact. In those circumstances His Honour found it impossible to hold that the respondent had proved that it had duly or completely carried out its duties as the appellant's agent in this transaction. The respondent, therefore, was not entitled to its agreed remuneration.

Appeal allowed.

(Leave to appeal to the Court of Appeal was subsequently refused by MacGregor, J.).

Solicitors for appellant: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for respondent: **Webb, Richmond, Cornish and Swan,** Wellington.

MacGregor, J. April 26; May 8, 1928.
Wellington.

GARDINER v. FLUX.

Landlord and Tenant—Option to Purchase Freehold—Provision for Lessee Giving Prior to Expiration of Term One Month's Notice in Writing of Desire to Purchase—Lessor to Transfer Land on or Before Expiry of Notice on Payment of Sum Stipulated and Arrears of Rent Owing up to Date of Payment—Notice Must Expire Before End of Term—Notice Given Three Days Before Expiry of Term Not Effectual.

Claim by plaintiff for the specific performance of a contract for the sale and purchase of land created by an option of purchase contained in an agreement to lease. The defendant was the landlord and the plaintiff the tenant under the said agreement of lease, the term of which expired on 1st December, 1928. The clause in the agreement which created the option of purchase in question was as follows: "And it is hereby declared and agreed that if the lessee at any time prior to the expiration of the term hereby granted shall give to the lessor one month's notice in writing that he desires to purchase the freehold of the said land hereby demised the lessor on or before the expiration of such notice will on payment of the sum of two hundred and

seventy pounds (£270) and of all arrears of rent owing up to the date of payment of the said sum of Two hundred and seventy pounds (£270) transfer the said demised premises to the lessee or as he shall direct in fee simple free from all encumbrances." A notice of desire to exercise the option to purchase dated the 26th November, 1928, was given by the solicitors for the plaintiff to the defendant and was received by the defendant on 27th November. The defendant refused, however, to transfer the land comprised in the option, adopting the attitude that the option had not been exercised within the time allowed by the above clause and that there was, therefore, no binding contract of sale and purchase. A small amount of rent was owing at the time the option was exercised, and a breach of agreement in failing to keep the land clear of noxious weeds was alleged.

L. H. Herd for plaintiff.

Putnam for defendant.

MACGREGOR, J., said that the broad question which he had to determine was whether a binding contract of sale and purchase was created between the parties on the receipt by the defendant of the notice on 27th November, 1928. In other words, had the conditions imposed by the clause in the lease on the exercise of the plaintiff's option to purchase been duly complied with? In considering that question of interpretation, one must keep in mind that "such a clause is always for the interest of the tenant, as it binds him to nothing, and allows him the advantage of a trial of the demised premises": **Woodfall on Landlord and Tenant,** 22nd Edn, 400. The conditions imposed on the exercise of options were always strictly construed: see **Dart on Vendor and Purchaser,** 7th Edn., 272; **Fry on Specific Performance,** 6th Edn., 515. The English cases cited in support of the propositions stated in those text-books appeared to bear them out. His Honour referred to **Lord Ranelagh v. Melton,** 2 Dr. & Sm. 278; **Weston v. Collins,** 13 W.R. 510, and **Smith v. Dawson,** 2 N.Z.L.R. S.C. 411. In the last case it was held that where a lease provided that if the lessee should at any time during the term be desirous of purchasing the land leased, and of such desire should give three months' notice, &c., then the lessor should convey, the whole three months' notice must expire within the term, and a notice given two days before the expiration of the lease was not sufficient. In His Honour's opinion the same result followed in the present case. It was true that the wording of the respective leases in question was somewhat different, but His Honour thought the same principle must govern the construction of both documents. It appeared that the clause giving a right to purchase to the plaintiff contemplated that the purchase was to be completed before the expiration of the term, and that the words "prior to the expiration of the term hereby granted" in effect governed the whole of what followed. In other words His Honour did not think it could be said that the plaintiff in point of fact gave to the defendant "one month's notice in writing" of his desire to purchase "at any time prior to the expiration of the term hereby granted." The term expired on 1st December, 1928. The notice was given to the defendant on 27th November, 1928. The plaintiff, therefore, had given to the defendant, not one month's notice as provided by the lease, but only three days' notice. The clause further provided that a transfer was to be executed on payment of the purchase price (£270) and "of all arrears of rent owing up to the date of payment of the said sum of £270." The lease expired on 1st December, 1928, and the rent ceased as from that date. There could, therefore, be no "rent owing up to the date of payment," presumably the 27th December, 1928. The plaintiff accordingly would on his construction of the clause be entitled to the use and occupation of the land from 1st to 27th December, 1928, for nothing. His Honour was satisfied that that could not the the true effect and meaning of the clause under discussion. On the contrary, His Honour was of opinion that on the true construction of the clause the "one month's notice" must expire, and the purchase be completed, prior to the expiration of the term, i.e., while the relation of landlord and tenant still subsisted between the parties to the lease. Otherwise a landlord, in such a case as the present, could not with safety make any effective preparation for leasing or otherwise dealing with his land until after the existing lease had expired. For those reasons, His Honour held that the plaintiff had given his notice too late, and had not proved the existence of a contract of sale and purchase. He was, therefore, not entitled to a decree for specific performance.

Judgment for defendant.

Solicitors for plaintiff: **Tripe, Herd and Herd,** Wellington.

Solicitors for defendant: **Fell and Putnam,** Wellington.

Blair, J. April 24; May 1, 1929. Auckland.

COLONIAL SUGAR CO. LTD. v. VALUER-GENERAL.

Valuation of Land—"Unimproved Value"—Lessee's Interest—Special Use to which Land Being Put Not Taken into Account—Principles of Valuation Stated by Supreme Court for Guidance of Assessment Court—Further Valuation by Assessment Court—Valuation on Wrong Principle—Special Use to which Land Being Put Taken Into Consideration—Whether Point That No Evidence to Justify Assessment Open to Supreme Court on Appeal From Valuation—Contents of Case on Appeal—"Consist of"—Statement of Facts may be Included—Case Remitted to Assessment Court with Directions as to Maximum Figure for Valuation—Valuation of Land Act, 1925, Sections 29 (c), 30.

Appeal under Section 30 of the Valuation of Land Act, 1925. One phase of the matter had already been the subject matter of a decision by Reed, J., reported (1927) N.Z.L.R. 617; 3 B.F.N. 138. The learned Judge had there directed the Assessment Court that in ascertaining and determining the value of the appellant's interest in the unimproved value of the land: "The Assessment Court is not debarred from considering the appellant company as a possible purchaser, but it must be as an unfettered purchaser—that is to say, the company's special requirements, owing to its established business in the vicinity, must not be allowed to be a factor in determining the value of this eight-years' lease of an unimproved mud flat. The use to which the land is being put or the nature of the existing occupation is quite immaterial." The matter came before the Assessment Court again on 3rd October, 1927. By a majority, that Court, purporting to act upon the principles directed by the Supreme Court, fixed the valuation at £1,500. The president of the Court who dissented fixed the valuation at £100 approximately, pointing out that the question was what would anyone give for an eight-years' lease of a tidal mud-flat for eight years at an annual rental of £15. The Sugar Company's special use of the area could not be considered. The appellant, pursuant to leave of the president of the Court, duly gave notice of appeal, the grounds being that the Court did not ascertain the lessee's interest in the unimproved value of the land in accordance with law; that there was no evidence to justify the assessment made of £1,500 in respect of the company's leasehold interest; that the company's special requirements and the special use made by the company of the land were the basis or the principal factors in the assessment.

Richmond for appellant.

Meredith for respondent.

BLAIR, J., said that no new evidence had been taken before the Assessment Court. It had before it only the evidence previously given, the material portions of which were set out in Mr. Justice Reed's judgment already referred to. From that evidence it would seem that in support of the original valuation of £1,660, evidence was given by a Government valuer, Mr. Chilcott; but it was clear that his valuation was based upon the special use to which the company put the land. Nowhere in his evidence did he indicate any idea of his valuation on the basis directed by the Court. Upon the company's side there was the evidence of three well-known valuers of Auckland, all of whom deposed to the value disregarding entirely the special use to which the land was put by the company. Their evidence, therefore, was the only real evidence of value upon the basis directed by this Court. Mr. Justice Reed made it clear in his judgment that the assessors were not in the position of experts or skilled witnesses. He stated: "The Assessment Court is in truth a judicial tribunal which must act on the evidence before it." It being, therefore, clear that any evidence brought in support of the valuation was evidence founded on an entirely wrong basis and it being equally clear that the only evidence tendered to the Court upon the proper basis of valuation was the evidence tendered by the company, it followed that the assessors, in coming to the conclusion that they did in fixing the value at £1,500, must have disregarded the only evidence before them. Whether that was due to wilfulness, or to inability to appreciate their proper functions, was immaterial. The fact unquestionably was that the judgment of the Supreme Court has been entirely disregarded. The utmost value placed upon the leasehold interest of the appellant company by any of the valuers was the sum of £300; and it was obvious, therefore, that the assessors in fixing a value far in excess of such utmost value had taken

it upon themselves to arrive at their conclusion upon a basis not authorised by law. It was true that Section 27 of the Valuation of Land Act, 1925, provided that the onus of proof should rest upon the objector. That no doubt was the position, but when the Assessment Court had before it statements by the valuer who made the valuation, which showed that the valuer acted upon an erroneous basis, the statutory onus of proof was entirely displaced. The first ground of appeal had, therefore, in His Honour's opinion been established.

The second ground of appeal was that there was no evidence to justify the assessment of £1,500 in respect of the company's leasehold interest. A similar ground of appeal was argued before Mr. Justice Reed, and he stated that he did not think that in an appeal from an Assessment Court the point was open, because there was no provision for bringing evidence before the Supreme Court: Section 18, subsection (c) of the Valuation of Land Act, 1908. That Subsection had been re-enacted in the 1925 Act (Section 29 (c)) and provided that the case on appeal should consist of copies of the valuation, of the objection thereto, of the decision of the Assessment Court, and of the notice of appeal. Reed, J., expressed the opinion that the statute contemplated that the "decision" of the Assessment Court should contain sufficient material to raise the question of law involved, because if that were not so the right of appeal was valueless. The evidence taken before the Assessment Court had been made part of the case on appeal, and Reed, J., acted upon that evidence notwithstanding his view that no provision had been made in the Valuation of Land Act for bringing the evidence before the Supreme Court. Read literally, Section 18 (c) of the 1908 Act, re-enacted in Section 29 (c) of the 1925 Act, provided that the case on appeal should comprise copies of certain documents. In "Words and Phrases Judicially Defined," Volume 2, page 1450, the following appeared against the words "consist of": "The words 'consist of' are not synonymous with the word 'including,' but where something is described as consisting of certain other things, it always implies that there may be others which are not mentioned." His Honour confessed, however, to some difficulty in agreeing that the statute contemplated that the "decision" would contain the facts. To get that meaning out of the statute, it appeared to His Honour to follow that the decision having been given would have to be re-written, so as to embody sufficient facts to apprise the appellate Court of the point involved. If the word "consist" in Subsection (c) meant "exclusively consist" then the case on appeal must comprise documents which left the appellate Court entirely in the dark as to the point of law involved, because there was no provision for introducing facts except such facts as happened to be mentioned in the decision. If, no the other hand, the word "consist" were construed to comprise *inter alia* the specified documents, then the whole of the provisions of Section 30 immediately following Section 29 were given full operative effect. An examination of Section 30 showed that it had been copied from the predecessor of Section 167 of the Magistrates Court Act, 1928, which provided the machinery for settling the statement of facts on appeals on points of law, Reading the word "consist" as meaning "exclusively consist," it would follow that if the facts were to be embodied in the decision, then the Assessment Court's decision was to be drafted by appellant and settled by respondent. That would make it possible that the decision of that Court would be drafted and settled without the Court being consulted at all. Absurdity would result if the decision of the Assessment Court could be framed without its knowledge and assistance. Seeing that the copy of the notice of appeal must be made part of the case on appeal, then if no facts could be stated in the case on appeal it would be open to ingenious counsel so to frame his notice of appeal as to embody as facts matters which suited him. His Honour preferred to read Section 29 (c), when read with Section 30, as contemplating and authorising a statement of facts settled as provided by Section 30. If that were not so then it was surely unnecessary to provide machinery for settling disputes as to what was to be embodied in a case on appeal, i.e., if Subsection (c) meant that the case must consist exclusively of copies of certain designated documents as to the contents of which there could not be any dispute.

The construction suggested by His Honour was consonant with the course adopted in previous appeals. See **Nightcaps Colliery Co. v. Valuer-General of Land,** 25 N.Z.L.R. 977. Construing the statute as His Honour did, and the evidence having been embodied in the case on appeal, it appeared to His Honour that the appellant was entitled to succeed also on his second ground of appeal. The question as to whether there was any evidence to support a finding was a question of law and the proper way of bringing such a question before an appellate Court was to embody in the case a copy of the evidence: **Bethune v. Churches,** 17 N.Z.L.R. 129.

The third ground of appeal was really embodied in the first ground. By Section 31 of the Valuation of Land Act, 1925, it was provided that on the hearing of the appeal the Supreme Court might make such order as it thought fit. It was not usual, and, in fact, it was highly inconvenient, for the Supreme Court to attempt to fix a sum, that being peculiarly the province of the Assessment Court; but it was obvious that the Assessment Court had disregarded the evidence and that the assessors evidently required plain directions before they were able to appreciate their duty. It would simplify the matter if His Honour made an order remitting the case to the Assessment Court for re-assessment on the evidence already given, with a direction to re-assess at such sum as they thought fit not exceeding the maximum valuation given by any valuer called on behalf of the appellant company. This His Honour did.

Solicitors for appellant: **Buddle, Richmond and Buddle,** Auckland.

Solicitors for respondent: **Meredith, Hubble, and Ward,** Auckland.

Blair, J. March 13; May 3, 1929. Hamilton.

JONES v. CUMMINGS AND OTHERS.

Family Protection Act—Application by Husband for Provision Under Will of Wife—Husband a Poor Working Man at Date of Marriage and Wife Comparatively Wealthy—Husband After Marriage Ceasing to Work and Living on His Wife's Means—Wife Not Encouraging Husband to Live in Idleness—Husband Able to Earn Own Livelihood—No Provision Made for Husband in Will—Beneficiaries With One Exception Not Financially Better Off Than Applicant—Applicant Not Entitled to Provision Under Will of Wife—Bounty Given in Lifetime by Wife Not Affording any Moral Claim to Provision After Death.

Application under the Family Protection Act, 1908, by a husband against the executors of his wife's estate based on the ground that adequate provision had not been made in her will for his proper maintenance and support. The facts are set out in the report of the judgment.

Northcroft for plaintiff.
Strang for trustees.
A. H. Johnstone for beneficiaries other than trustees.

BLAIR, J., said that the applicant married the testator in October, 1920, she then being a spinster aged 43. The applicant now aged 55, was a widower with seven children. His eldest son was now 27 years of age; his youngest daughter, aged 14, was still at school; one daughter, aged 21, was feeble-minded; the others were at work. At the time of his marriage applicant was a cobbler employed by Hannah & Co., on piecework, his wages being £5 10s. a week, later falling to £3 10s. His wife was a woman of considerable means. She had a draper's shop at Matamata and had worked all her life and saved money, with the result that she was worth approximately £11,000. She sold out shortly after her marriage. At the time of her death her estate was approximately £7,750. Shortly after she married plaintiff he left his employment with Hannah & Co., and he had not since 1922 done any work. The whole burden of supporting him and bringing up the younger members of his family, plaintiff left to his wife, and that was suggested as explaining the diminution in the value of her estate. He apparently spent the bulk of his time in following horse-racing or in playing bowls. The eldest son married and for some considerable time lived in a house belonging to the deceased, but, possibly emulating the example of his father, he paid no rent and had ultimately to be turned out of the house. The plaintiff also procured from his wife advances of very large sums of money which were put into property in his name. The position was becoming so unsatisfactory that testator's brothers or sisters, several of whom had materially helped her to amass her small fortune, deemed it proper to intervene, and pressure was brought to bear upon the plaintiff, which ultimately resulted in the placing of his wife's advances on a proper footing. At first he claimed all the advances as gifts, but subsequently he had to abandon that contention. The deed incorporating the arrangement made was dated 19th September, 1924. The will, under which there was no provision for the plaintiff was dated 6th August,

1924. She divided the whole of her estate amongst her brothers and sisters. The parties were never separated and continued to live together up to the time of her death, but plaintiff said they did not live happily. He apparently still continued to devote his time to sport, and left her to provide the expenses of the household. Plaintiff sustained an accident in 1923, whereby his right hand was injured. He could play bowls with the injured hand, and in fact was looked upon as a champion player, but he said he could not work with it at his trade as a boot repairer. This was true as there was some permanent interference with some of the movements of wrist or fingers. The plaintiff admitted, however, that he was an expert boot salesman, and the hand would not be any disability in following that occupation. He admitted that he had not made any attempt for the last two years to obtain any employment. He obtained £964 damages in respect of the injury to his hand, which he claimed to have used "for living purposes," but this statement was shown to be false as there was still £600 of the money secured to him on mortgage, and he said he thought he got 6 per cent. interest on it. He had also £300 invested in a property at Claudelands. With the assistance of his wife he acquired a property at Hamilton East and built thereon a building comprising shops and a billiard room above. The billiard room was not let but the shops were bringing in £300 a year. The outgoings by way of rates, insurance and interest on first mortgage absorbed £180 a year. Upon that property there was a second mortgage of £1,500 to his wife, and it was part of the arrangement set out in the deed before mentioned that that £1,500 should be free of interest while the parties were living together. As from the date of his wife's death interest at 6½ per cent. would be payable. When that was added to the present outgoings there remained only a surplus from the present gross income of of some £33. But as against that it was to be noted that the billiard room portion of the premises was not let and plaintiff himself had kept a billiard saloon and could no doubt himself make use of it if he could spare time from the amusements to which he had hitherto devoted himself.

The deceased divided her estate equally between her four brothers and three sisters so that each of them should benefit to the extent of approximately £1,000. One of the brothers, a draper, was very well-to-do; the rest of the sons worked for their living and were not possessed of much estate. One sister was a war widow dependent on her pension; another was a spinster dependent for her subsistence on the rents of two small house properties; and the remaining sister was a shop assistant in her brother's drapery shop and had no assets. Except in the case of one brother, it might be said that the rest of the family were financially no better off than the plaintiff. Some of them, were it not for the fact that they were entirely free from the objection to work which plaintiff had cultivated in himself, would be worse off than he. The impression left upon His Honour's mind from the evidence was that plaintiff apparently married the deceased for her money and that shortly afterwards he entirely ceased work, relegated to her the burden of providing for and looking after his large family, and selfishly devoted himself entirely to his own amusements, taking no interest in his wife except as a source of supply. He based his claim on a breach of her moral duty to him. When asked to indicate what he had done for his wife except marry her, he made no reply.

The question arising was whether in the above circumstances the plaintiff had established any right to an order under Part II of the Family Protection Act. The principle on which the Court acted in applications under the Act was stated by Edwards, J., in **Allardice v. Allardice,** 29 N.Z.L.R., 959 at p. 972, and by Salmond, J., in **Welch v. Mulcock,** (1924) N.Z.L.R. 673, at p. 684. The application was made by a husband in respect of his wife's estate and it might well be that the moral claims of a husband upon his deceased wife were not comparable with the moral claims of a wife on her husband's estate. It was certainly not common for a man to marry a rich woman in New Zealand, and expect her to keep him in idleness. Such cases had occurred, but they were rare, and a man content to accept that unenviable position lost caste among his fellows. Although before the Married Women's Property Acts a husband became entitled to the whole of his wife's estate when he honoured her by taking her in marriage, that doctrine had received such severe handling both by legislation and trend of modern ideas that it was doubtful if marriage by a poor man to a rich woman now gave him any moral claims on her purse. A man with any pride in manhood would scorn to advance such a claim. It appeared to His Honour that plaintiff was driven to maintain that his wife was indulgent to him in his lifetime, and that having so indulged him it was her duty after her death to continue to indulge him: see **Golightly v. Jefcoate,** 33 N.Z.L.R. 91, per Williams, J., at p. 93. That case, however, differed from the present in that the husband was bedridden and destitute. He was in great necessity and the beneficiaries were not. In **Allardice v. Allardice** (*cit. sup.*) 959, at p. 969 Stout, C.J., said: "A child for example that has been living on a father's bounty could not be expected to begin the battle of life without means." The questions of indulgence and bounty were, no doubt, relevant to the question of the existence of moral duty, particularly where a child was led by words or conduct to believe that he or she was to be provided for. In the present case that element was absent. It was true that the wife financed the husband to enable him to get into business, but nowhere could His Honour find any evidence that the wife encouraged her husband in idleness. Indeed the deed which under pressure she got signed by him, provided that he was to pay household expenses. After her experience that financial assistance to him did not result in making him work, she insisted also on a strict business arrangement as to advances made to him. He could not, therefore, base his moral claims upon a promise implied by a course of conduct.

His Honour proceeded to examine all the reported cases of applications by husbands in respect of their wives' estates. He referred to and discussed **Nosworthy v. Nosworthy,** 26 N.Z. L.R. 285; **Brown v. McCarthy,** 26 N.Z.L.R. 762; **Colquhoun v. Public Trustee,** 31 N.Z.L.R. 1139; **Geen v. Geen,** 33 N.Z.L.R. 81; **Golightly v. Jefcoate,** 33 N.Z.L.R. 91, and **Hooker v. Guardian Trust and Executors Company** (1927) G.L.R. 536. In all the cases above referred to where an order was made the husband was in want, unable to keep himself, and had moral claims on his wife. In the present case the husband was able-bodied, and if he liked could work, and had years of work before him. As the result of assistance from his wife he had some means and he should be able materially to increase his income if he would trouble to do so. His Honour did not see that he had any moral claim on his wife who had discharged family burdens that he himself should have discharged, and did not think that he had established any right to an order.

Application dismissed.

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

Solicitors for trustees: **Strang and Taylor,** Hamilton.

Solicitors for other beneficiaries: **Stanton, Johnstone and Spence,** Auckland.

Court of Arbitration.

Frazer, J. May 13, 1929.
Dunedin.

CHRISTIE v. WILL.

Workers' Compensation—Worker—Gardener Employed by Doctor in Private Garden Not a "Worker"—Not Engaged in any "Trade or Business" Within Meaning of Act—Workers Compensation Act, 1922, Sections 2, 3 (2).

Claim for compensation under the Workers' Compensation Act, 1922, in respect of an injury by accident. The one question arising in the case was whether the claimant, a gardener employed by the defendant, a retired medical man, and working in the defendant's own private garden, was a worker entitled to compensation under the Act for an injury by accident sustained by him while so working.

W. Ward for plaintiff.
A. N. Haggitt for defendant.

FRAZER, J. (orally) said that counsel for the plaintiff placed reliance on the definition of "trade or business" in Section 2 of the Act, which definition read as follows: "'trade or business' includes any trade, business, or work carried on temporarily or permanently by or on behalf of an employer." That definition had to be read with Section 3 (2), which read: "(2) This Act applies only to the employment of a worker—(a) In and for the purposes of any trade or bysiness carried on by the employer; or (b) In any occupation specified in the First Schedule hereto, whether carried on for the purposes of the employer's trade or business or not." It was admitted that work done in a man's private garden was not a trade carried on by the employer. It was admitted, of course, that it was not a business carried on by the employer. Was it, then, work carried on temporarily or permanently by or on behalf of the employer?

The *ejusdem generis* rule of construction applied in the present case: the word "work" must be given a meaning analogous to the words "trade or business," thus confining it to work that brought in some profit, or prospect of profit, to the employer, or had a commercial aspect, or, at all events, enabled the employer to discharge his functions in some way. Apart, altogether, from that view of the definition, the Court had to examine Section 3 (2), which made the Act apply to the employment of a worker (a) "in and for the purposes of any trade or business carried on by the employer" or (b) "in any occupation specified in the First Schedule hereto, whether carried on for the purposes of the employer's trade or business or not." The last sub-paragraph distinctly carried with it, by the use of the words "in any occupation whether carried on for the purposes of the employer's trade or business or not" an implication that "work" in Section 2 referred only to work in a sense analogous to that of "trade or business," and that Section 3 (2) (b) applied to exceptional cases, in which "work" was given a wider sense. The First Schedule specified a number of cases, including that of domestic servants whose employment was for not less than three days, as being within the Act if an injury was received at work. If the Court were to regard the word "work" all through the Act as having the wider meaning, as suggested by counsel for the plaintiff, then Section 3 contained a contradiction in itself. It was perfectly clear, under Section 3 (2) (b), that domestic servants were not entitled to compensation unless their employment was for three days; but if a worker could proceed under Section 3 (2) (b), the Court must arrive at the conclusion that a domestic servant was entitled to compensation, if injured, although her employment was for only half-an-hour. That was certainly a contradiction.

It was somewhat difficult to give a precise meaning to the word "work," but in the ordinary usage of the English language, one would never say that Dr. Will "was carrying on work as a gardener." The word must be used in its ordinary everyday sense. That was the proper rule of construction. Nobody would suggest that to say that Dr. Will was carrying on work as a gardener was an appropriate way of conveying the impression that the doctor had his own private garden in which he occasionally might dig or occasionally might employ a man to dig for him. Those words, in the ordinary every day usage of the language would imply that the doctor was engaged in commercial gardening of some kind. Some little light was given by Section 3 (4) which read as follows: "The exercise and performance of the powers, duties, or functions of any Corporation or of any local authority or other governing body of a Corporation shall, for the purposes of this Act, be deemed to be the trade or business of the Corporation." It might be that there were other meanings that could be given to the word "work." His Honour noticed that the definition of "trade or business" in Section 2 did not specifically include professional work. "Work" was a very general term, and a solicitor's clerk who broke his leg when going downstairs in his employer's office in the performance of his duties would probably be entitled to compensation, for the Act covered clerical work so long as the remuneration did not exceed £400 a year. But there again the word "work" carried with it a distinct analogy to "trade or business," inasmuch as a professional man usually made an income by practising his profession. Admittedly, a profession was something more than a trade or business, but there was nevertheless the element of deriving an income from its practice.

His Honour next referred to the amendment to the definition of "trade or business" made in the Workers Compensation Act, 1922. The wording of the Workers Compensation Act, 1908, was almost exactly the same as that of the 1922 Act, except for the following additional words "to which the Act would apply if such trade, business, or work were partly or wholly the regular trade, business, or work of an employer." Those words seemed unnecessary, and if it had been intended to bring a case such as the present within the Act, it could have been done more simply and clearly by amending Section 3 so as to include any work done for an employer in or about his house or grounds. Something like that would have met the case, or the schedule itself might have been amended. All that had been done had been to cut out some words apparently useless and confusing, which did not appear in the English Act. The present case was, in His Honour's opinion, covered by the judgment in **Allison v. Milsom,** (1923) N.Z.L.R. 776.

Judgment for defendant.

Solicitors for plaintiff: **Aslin and Brown,** Dunedin.

Solicitors for defendant: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Police Powers and Procedure.

Summary of the Royal Commission's Report.

(Continued from p. 139).

The Obtaining of Evidence.

It is impossible even to summarise, in the course of an article such as this, all the topics connected with the investigation of crimes and offences and with the obtaining of evidence by the police. The use of plain clothes, the employment of police as *agents provocateurs*, the right of entry into registered clubs, the methods of holding identification parades and the practice of enquiring into the characters of accused persons are all subjects of great importance and are all fully dealt with by the Royal Commission's Report; but they must be discussed here with extreme brevity.

Certain offences cannot in practice be proved unless the police or persons employed by the police are, unknown to the offenders, present when the offences are being committed; and in some cases suspicion is aroused unless the watcher participates in the offence. At the same time there is a natural public dislike to anything which savours of the creation of an offence for the purpose of obtaining a conviction in respect of it; and the employment of the police in visiting, ostensibly as members of the public, clubs suspected of breaches of the law involves:

> "the risk, amounting almost to certainty, that habitual employment in visiting clubs where these offences are suspected is likely to have a demoralising effect on the Police concerned. These constables must often be chosen for their youth. They are dressed in clothes to which they are unaccustomed and given money to spend freely, in order that they may lull suspicion by conforming to the habits of those who frequent these places. In this way they are brought into contact with a mode of life very different from their own, even if it is not actively undesirable. This procedure seems to us wholly objectionable."

The Commission recommended that, as a general rule, in the case of offences of this class, the police should observe and not participate, but that:

> "as an exception to the general rule . . . participation in offences may be resorted to by the Police only on the written authority of the Chief Constable and in cases where there is good reason to believe that the offence is habitually committed in circumstances in which observation by a third party is *ex hypothesi* impossible."

With regard to clubs it is proposed that statutory power should be given to Chief Constables to authorise in writing selected Police Officers to enter and inspect any registered club, it being understood that this power is to be exercised only when there is reason to suspect that the law is being broken.

The Right of Search.

With regard to the right of search of premises, the Report recalls the storm of protest which was raised to a clause—ultimately withdrawn—in the Bill which became the Criminal Justice Act of 1925, giving wide powers as to the issue of search warrants by magistrates. The present practice of the Police in England is to search, without a warrant, premises, as well as an arrested person, where it appears that evidence is likely to be obtained thereby. No statutory sanction for this practice exists and the Commission, taking the view that the practice is necessary and enunciating the undeniable principle that:

"the Police should never exceed their legal powers, and consequently the powers necessary to enable them to investigate crimes and offences should be clearly defined and should rest upon unimpeachable authority,"

recommend:

"that the practice of the Police as regards the search of premises should be regularised by a statute authorising them to search without a warrant the premises of persons who have been arrested."

Identification Parades and Enquiries as to Character.

Various recommendations of detail are made as to the holding of identification parades with a view to making a process which, whilst obviously necessary is by no means easily conducted satisfactorily, as free from objection as possible.

On the subject of police enquiries into the antecedents and characters of accused persons the Commission makes some very important observations and recommendations. It has become the practice, apparently at the instance of certain judicial persons, for the Police to make enquiries as to the character of accused persons before they are convicted and therefore whilst they are presumed to be innocent. These enquiries are made so that if the accused is convicted Court may be the better able to assess his punishment; but the fact that such enquiries are made may obviously seriously damage the reputation, amongst those who know him, of a person who may be perfectly innocent of the particular offence with which he is charged. Whilst there are advantages no doubt in a full history being before the Court which has to sentence a man, the Commission say that:

"after weighing the advantages and objections, we have reached the conclusion that the Courts should forgo this information unless the accused is willing that it should be obtained. The Police should therefore be instructed not to make special enquiries as to the character and antecedents of accused persons, other than previous convictions, for the purpose of giving the Court information after verdict and before sentence, unless the accused himself is willing for such information to be obtained."

There is another matter which arises in this connection with which the Report deals.

"It has been represented to us that the statements as to character given by the Police are not always confined to facts which they have ascertained, but sometimes include impressions or opinions which they have formed as to the accused's manner of life or the character of his associates. We think that the Police should only depose to facts within their knowledge, and should refrain from expressing opinions which may be incapable of proof or disproof."

These recommendations, if adopted, will put an end to a practice which should never have arisen.

Treatment in Custody.

The difficult topics which arise with regard to the arrest and charging of prisoners, detention on suspicion and the questioning of prisoners in custody are fully considered. With regard to the taking of voluntary statements from prisoners a series of recommendations designed to protect the maker and to ensure that no gloss—accidental or otherwise—appears in his statement, are made.

"If a prisoner expresses a wish to make a voluntary statement, he should be cautioned, offered writing materials, and left to write without being overlooked, questioned, or prompted. If the prisoner prefers to have his statement taken down, he should be required to make a request to that effect in writing. His statement should then be taken down as nearly as possible in the actual words used.

"All questions put by the Police (for the purpose of removing ambiguities), and the answers to them, should be recorded *verbatim*, at the point in the statement where they actually occurred. If the prisoner has written his own statement and the Police on reading it feel it necessary to clear up any obvious ambiguity . . . any questions put by them, and the answers, should be recorded at the end of the prisoner's own statement and signed by him.

"The prisoner should invariably be allowed to read over, to himself, any statement which has been taken down at his dictation, and should also be given ample time to peruse and correct any statement which has been taken down at his dictation, and should also be given ample time to peruse and correct any statement, whether dictated or written by himself.

"Two officers, of whom one should be the officer in charge of the station, should always be present throughout the whole time when a prisoner is dictating a voluntary statement. A prisoner who wishes to make a voluntary statement should be entitled, if he so desires, to have his legal adviser present."

The Judges' Rules are given a chapter to themselves, and the conclusion is reached that whilst their "spirit" is faithfully observed, the "letter" is productive of misunderstanding. In the light of the Commission's views the precise form of the Rules will no doubt be reconsidered.

(To be Concluded).

Judicial Slang.

Upon the subject of the judicial use of metaphor, simile and "slang," an original and delightful essay is waiting to be written. The writing of it will, of course, involve an immense labour. Sparkles in the Law Reports are by no means common, but the tireless "prospector" in both old and modern reports, will in the end be rewarded with some choice unexpectedness in the judicial use of language. The English Bench *en negligé* is, of course, a picture we are too reverent to conjure with; but the old reporter who preserved intact for us Judge Jeffreys' lecturing protest against the admission in evidence of what he called, with more expressiveness than restraint of phrase, "a little lousy history written by God knows whom," gave us, we are tempted to believe—Lord Birkenhead's polished *apologia* notwithstanding—the true index to the nature and manner of the man. Judge Jeffreys, however, must be the only member of the Bench who permitted himself to use in Court such an adjective as "lousy," his isolation in this respect being, no doubt, characteristic. But, in Moseley's Reports, 1726-1730, we find, at page 211, the Lord Chancellor using the expression "pretty odd." And Lord Bramwell's classic phrase, "This beats me," (*Bank of England v. Vagliano Bros.*, (1891) A.C. 107, at page 138) was quoted with relish by Russell, L.J., in a dissenting judgment in the Court of Appeal as recently as July last. Equally "classic," too was the phrase "giving the go-by" used by Vaughan Williams, L. J., in *Re Pitt Rivers: Scott v. Pitt Rivers*, (1902), 1 Ch. at page 407. These are, no doubt, but few of many such instances.

Law though sometimes a necessary medicine, is generally a nauseous one; and it resembles some other medicines in this, that it is apt to induce ailments more disagreeable than those for the cure of which it is invoked. I trust that the respondent when he reflects on the order of this Court will realise the truth, and will also realise that attempts to administer medicine to others may sometimes result quite justly, in having to swallow it oneself.—Sir Edmund Barton.

The Offence of "Dangerous Driving."

Motor-Vehicles Act, 1924, Section 28.

By S. A. WIREN, B.A., LL.B.

Deserved prominence in the daily Press has been given to a judgment of Mr. Maunsell, S.M., at Nelson, to the effect that merely exceeding the speed limit along a street where no members of the public happen at the time to be is not an offence under Section 28 of the Motor-vehicles Act, 1924. The offences created by that section include driving "at a speed or in a manner which, having regard to all the circumstances of the case, is or might be dangerous to the public or to any person." The writer had previously contended before a Magistrate at Wellington that the presence of the public or some person was necessary before the offence was established, but the contention was rejected somewhat contumeliously. Mr. Maunsell's judgment recalled this fact, and also suggested as a natural sequence some of the other abuses which the section has brought with it.

The penalties fixed by the statute are substantial, namely, a fine of £100 or imprisonment for three months; a sum recoverable as a fine of £50 for any person injured (Section 30) and suspension of a motor-driver's license for any period whatever (Section 22). It is a fair inference that the section was intended to be invoked only where there was strong reason for complaining of the motorist's behaviour. The police have not so regarded it. With some officers it has become a habit to prefer a charge under Section 28 either in addition to or in lieu of a prosecution under other regulations. This is done although the conduct complained of is quite a pecadillo. At Nelson where the *gravamen* of the charge was travelling at 35 miles an hour where the speed limit was 30 miles is by no means an isolated one. In almost any newspaper one finds reports of motorists being convicted for what the reporter calls "dangerous driving" and fined probably £2 or £3; there have been cases where the fine has been costs only.

For such purposes it is suggested, the statute was never intended. But the Legislature has chosen to use language of glorious uncertainty. Some of the words can undoubtedly be treated as surplusage. Every police information so treats them. The charge is always driving "in a manner which .... might be dangerous .... to any person." Why worry about "at a speed" when you have the wider words "in a manner"? Why worry about "the public," when "any person" is sufficient? Why worry about "is" when you have the delightful freedom of "might be"? The length of Chancellor's feet has varied, but the variation is small compared with the varying distances that Magistrates will venture into this land of the "might be." One cannot, however, blame the Magistrates. One was understood to have laid it down that any breach of a motor regulation or by-law can be punished under Section 28. Possibly he is right. Who can say what might be or might not be dangerous? Inevitably every Magistrate regards these cases, be he motorist or pedestrian, in a different manner from his colleagues. What is the result? Large numbers of motorists are prosecuted under the section, and nearly every one of them must defend. He must defend because of the penalties that can be inflicted upon him. It would be different if he were sure that only the facts as he believes them would be placed before the Court. He could then do what he usually does when prosecuted for speeding—submit whether guilty or not guilty. But he can seldom do that. The facts in such cases are so susceptible of misstatement or exaggeration. A witness may be honest, he may be impartial, he may be a police officer, but his observation of fast-moving vehicles is probably inaccurate. When the penalties can be so heavy a motorist must attend in Court and see that the facts are not distorted against him. Again, he usually wishes to defend because of the very nature of the charge. The offence is popularly called "dangerous driving." Nobody likes to be convicted of that. Possibly he was guilty of a small offence—he is willing to pay the penalty. He does not want to be branded in the newspaper as a dangerous driver nor does he want to have brought up, in the event of a future brush with the police, the previous conviction of "dangerous driving." At such a time the offence might mean anything and will probably be regarded in the worst light possible. He himself does not regard his offence as "dangerous driving" and he cannot understand why a Magistrate should so regard it.

These being the results of the section, the position should be remedied. The remedy should not be difficult to find. We have now—which we had not when Section 28 was passed—a comprehensive set of regulations under which every motoring offence can be dealt with. A motorist so charged is charged with a specific offence and should know at once whether or not to defend himself. Any person examining the records of the offence at a later date will know wherein exactly the motorist offended. All ordinary cases should be so treated.

There may be cases where the gravity of the offence requires a greater penalty than is provided for by the regulations. These cases should not be frequent, and for them a separate offence may be retained. The section should, however, require proof of actual dangerous driving. The words "might be" should be eliminated; and so, from the standpoint of good draftsmanship, should expressions growing from the less to the greater, such as "at a speed or in a manner," "to the public or to any person." Let us be drastic but let us be precise.

It should be noted that the English statute from which our Act is taken is better than its offspring—Motor Car Act 1903, Section 1 (1). The offence there, is driving "at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case, including the nature, condition and use of the road and to the amount of traffic which actually is at the time or might reasonably be expected to be on the road." The words from "including" to the end have been held to be mere surplusage."—**R. (Cahill) and Dublin Justices** (1904) 2 I.R. 698, and see **Elwes v. Hopkins,** (1906) 2 K.B. 1.

A Paris newspaper has recently drawn attention to an old law of 1770 which has never been repealed. It reads:—

> "Anyone who entices into marriage a male subject by rouge or scent, or artificial teeth, or false hair, shoes with high heels, crinolines, or false hips, will be prosecuted for fraud and the marriage will be declared invalid."

Lord Halsbury.

His Life and Times.

Permission has been granted to the " NEW ZEALAND LAW JOURNAL *" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.*

(Continued from page 140)

ELECTION EXPENSES!

Sir Edward Clarke was proved a true prophet in the matter of election petitions, for at Westminster, at Bolton, and at Windsor, Hardinge Giffard saved Conservative seats that had looked hopeless. Before the passing of the Ballot Act, Giffard had had some strange election petitions to deal with. On one of these at Bewdley, Worcestershire, when it was sought to upset the election of Sir Richard Glass, for bribery and corruption, he and Poland had found two curious entries. They were not unnaturally questioned by the petitioners, as 12*l* 12*s*. was charged for "Screaming women" and 100*l*. for "Watchers." They thought this smacked rather of the police court, and had some difficulty in unravelling the mystery. They turned out to be that when the candidate addressed the crowd from the hustings, certain ladies of strong lung power were hired to scream him down. "Watchers" were a more reputable company, being men paid to prevent the kidnapping of voters in the good old times.

By this time Giffard had almost ceased to appear in the Criminal Courts, and was in the full tide of a leading practice at Westminster.

CANDIDATE FOR CARDIFF.

In the jubilee year of the *Western Mail* in 1919, Lord Halsbury wrote an article for the paper, which is framed and hung in the hall of the Cardiff Conservative Club, of which he was one of the founders. The original founders had a star opposite their names in the list, and his was the last star for many years. He was ninety-six when he wrote it.

"I suppose there are but few people living at Cardiff who can remember as vividly as I can my two attempts to capture Cardiff for the Conservative cause. Although both were unsuccessful, I may be permitted to say that the poll on the second occasion was so close as to constitute a moral victory for the Constitutional Party, while it foreshadowed the complete triumph which came later. In 1868, the Conservatives of Cardiff, then a comparatively small body, determined to undertake what we all recognised was the formidable task of endeavouring to eject Colonel Stuart, a cousin of the then Marquis of Bute. The *Western Mail* was not, of course, in existence, and I remember how we were hampered by the fact that we had no powerful press support. The *Cardiff and Merthyr Guardian* did its best, but it was a weekly paper, while against us was the *Cardiff Times*, which kept up a vigorous and determined attack on my cause and myself from first to last. It was indeed violently Nonconformist and anti-Tory.

"My supporters in Cardiff naturally felt that the town and district of South Wales ought to have a Conservative daily paper, which should present and defend our cause with force and dignity, especially as those who were associated with me in that first contest shared my view that we should be able to put up a much better show when we fought again. But it was urgent that we should be fortified with a robust paper. . . . . The *Western Mail* began its career well. It was edited and managed with commendable vigour, right up to the time of my second and final Cardiff election in 1874, when, largely owing to the work of the *Western Mail*, we reduced the majority of Colonel Stuart to nine votes. Mr. Gladstone's Government had resigned, after what had been a precarious existence, and I ventured to come forward again. The election was, of course, notable because it was held under ballot, the old hustings, which were in the first contest erected where the Cardiff Arms Park stands now, having been done away with.

"One amusing incident lives in my memory. After one of my meetings, a fellow came to my rooms, pressing for an interview. He was described as a Scotsman, and he was particularly anxious to see me privately. I complied with his request.

"'There is no beating about the bush,' he said. 'I have got a vote, and I will give it to you if you will lend me twenty pounds.'

"I do not propose to relate here and now the precise terms in which I intimated I could not yield to the temptation!

"I also remember a remarkable gathering at the Sophia Gardens, at which 30,000 people came to demonstrate in my favour, and I lost my voice trying to make that vast crowd hear me. Cardiff people, who had always been very kind to me, gave me many gifts before I left, including a piece of plate, a clock, and some vases. In addition they made me their guest at a great function, of which, no doubt, the early files of the *Western Mail* have a record. Decades have rolled by since then, but I afterwards had the kindest thought for Cardiff, which later I visited so often in a professional capacity. I read the *Western Mail* for a great many years, and always had, and still have, the greatest admiration for the unswerving devotion to the great cause it has been its purpose to expound and defend, for its vigour and brightness, and for what it has done in so many ways for the service of Cardiff and of Wales."

LAST DAYS ON CIRCUIT.

The last case Hardinge Giffard appeared in on Circuit was one in which he was retained by Mr. Price, solicitor, of Haverfordwest, for the defence of a military surgeon who was accused of the murder of a brother officer. The Lord Chief Justice presided. For the prosecution Mr. Francis Williams, Q.C. For the defence Mr. Giffard, Q.C., and Mr. Bowen Rowlands. Sydney Alder, 45, was charged with the wilful murder of Philip Carrol Walker, at Hubberston, on May 21, 1875. There appeared to have been a quarrel between two brother officers, while both were more or less under the influence of drink. Evidence was given by the corporal in charge of the mess that they were alone together when the crime was committed, and various officers testified to their previous friendship and amity. The prisoner had suffered from fever in the Boer War, and was subject to fits of anger and depression. Mr. Giffard's examination of the witnesses was very skilful, and called forth several expressions of approval from the Judge. The prisoner was acquitted.

(To be continued).

London Letter.

Temple, London,
13th March, 1929.

My dear N.Z.,

It is a new, and by no means unhealthy, thing for a Judge to protest from the Bench against the exaggeration of counsel's fees and the disastrous effect which the tendency has upon litigation in general. It is the more exciting when the Judge is not only a Judge of the High Court but a Lord Justice of Appeal. Whatever the fashionable leaders may think, and whatever arguments any critics of the Bench may see fit to advance, I have no doubt whatever that the observations of Scrutton, L.J., made early last week upon the subject, are entirely right; that his warning to the Bar as to the killing effect of the extortion is beyond gainsaying; and that his action in the matter, supported by Sankey, L.J., who agreed to disallow the luxury fee while allowing the necessary fees in the case before them, is, if the first, yet the wisest possible step in the right direction.

We know quite well, and if we do not know of our own knowledge the fact is readily ascertainable in chambers of any standing and of any distinguished past, that the leaders in our forefathers' days habitually demanded fees hardly equal to a tithe of the fees our big leaders demand to-day. Next, we know that so far from the leaders of to-day being of more value than those of yesterday, the reverse is probably the case; their acumen is probably as great, but their guts are infinitely less. Last, we know that whereas almost every other professional business in the country is as thriving and as remunerative as it has never been before in living memory (medicine, money and even the solicitors' trade being as never before) the work of the Bar grows less and less, until it has become a feasible prospect that it will soon cease to exist at all in any reality. Is it possible to refrain from putting two and two together and arriving at a total of four The cause for litigation remains, and the spirit to litigate is undying; into every junior's chambers comes, or came till recently, a flow of contentious business wherein the contention is maintained and there is much at stake at the first stages, but the later stage is never reached and no more is heard of the case when all the arduous and barely remunerated work of initiation has been done.

The truth is, many of our present day leaders are, in a way, feckless people, never as ready to put up a battle to the death against the Judge as they are ready to put up the fee as high as it will go against the client. They are all very nice, and I am sure very clever; but I sometimes think they are rather poor stuff (I am not sure that your learned leader, who came over to the Privy Council some time ago, did not feel the same way about them ?) and never more so than when this subject of extortion and exorbitancy is in the air. The un-warlike and, it must be confessed, the unsporting element tends to predominate. The older Judges comment audibly and disappointedly that there are no longer any "bruisers" at the Bar, an epithet whose contempt is affectionate merely and bespeaks not satisfaction but regret; the younger Judges do not share this view, but welcome the atmosphere of sweet reasonableness between Bench and Bar and between Bar and Bar, and applaud and encourage the tendency to politeness rather than persistence, conciliation rather than conflict, tact rather than tactics, and any other agreeable sounding alliteration you can think of which represents a high ideal of court conduct, but a singularly little concern for the interest of the client. He has, after all, employed the advocate rather less to improve the manner of advocacy than to win his case. To sacrifice the interests of ones client, in any degree, to the convenience of the Court or the abstract conceptions of the Judge seems to me to be, in an intelligent man who knows or should know what he is doing, something like treachery: and once such treachery is the vogue, well, it is a short step further to run up the fee against the man betrayed, isn't it ? Lord Justice Scrutton and Lord Justice Sankey, though not the most popular personalities on the Bench, are well fitted to protest against the inordinate tendency of fashionable leaders' fees, for they are the uncompromising sort themselves. To sum the matter up: I think you will see at the English Bar, or your sons will see, the old prestige, the old brisk business, the old fighting qualities and the old reasonableness as to fees, just so soon as the existing generation-in-power is gone and forgotten and the new generation has taken up the lead. There is not getting away from the fact, and from the grim results of it, that much of the present "influence," whether leading the Bar or forming the tail of the Bench, consists of men who did not fight and who are the abnormal substitute for the men who did fight; the latter, if they had not had to fight, would be the main influence now in the Courts.

The most interesting matter, of a technical nature in English legal matters, has transpired in Scotland, a Bench of 12 Judges having been assembled to pronounce upon that very vexed question: once a habitual criminal, always a habitual criminal The question arose, as it has previously arisen from time to time, upon the appeal of a man convicted of being, and sentenced as, a "habitual criminal" upon proof only of a previous conviction in this regard. The logic and illogic of the position are at once and simultaneously apparent, if you have (as I make no doubt you have) the corresponding provision in your criminal law and administration. If you have not, then the matter can be of no interest to you, and I had best get through with it quick. The position is not quite the same in Scotland as in England, but the state of the law in the former serves to bring the question into stronger relief; there the section of the Act has been so construed as to preclude the calling of evidence that for a term of years a man has been leading an honest and useful life to rebut the effect of the previous conviction. The Scottish Court, though not being too precise upon the question, appears to have gone some way to establish the fairer, whether more or less logical, position that a previous conviction of being a habitual criminal shall not be decisive upon a present charge, or indeed unduly influential upon it.

I digress to raise the question: do I bore, or insult, you by dwelling at too much length in these letters on the criminal aspect of the common law practitioner's practice ? What I mean is this. No doubt with you, as with us, in the ordinary practice crime assumes a large, overshadowing proportion in the beginning of things, but as a man progresses it looms smaller and smaller, till he observes, with complete satisfaction, that it has disappeared altogether; in their capacities, as private practitioners, readers of this paper will not, for their interest or their pride's sake, wish to hear

too much of this side of the law. But is it, or is it not, also so the case with you, as with us, that any common law practitioner of any distinction is also in some capacity or other, most often as Recorder, a Judge in criminal matters, so that the forgotten interest of his youth becomes even more present in his maturity? I must find out the truth as to the general situation with you; if I knew it now it would enable me to know whether or not your Eminents are interested in such matters as "habitual criminals." If I have insulted you, you will be good enough at least to observe that I have made good by accrediting all of you with Old Age and Eminence?

Yours ever,

INNER TEMPLAR.

Correspondence.

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

Sir,

Divorce or Dissolution?

Under the above heading a correspondent raises the question whether a petition should now be for "divorce" or "dissolution," since the 1928 Act has introduced the word "divorce" for "dissolution," and attention is called to the fact that the old form has been retained in *Sim on the Divorce and Matrimonial Causes Act*. I am glad of the opportunity afforded to add a few words on the subject.

Under the title of "Forms" (at page 85 of the book) the following comment appears: "It is to be noted that these forms existed under the 1908 Act, and minor alterations may be necessary in certain cases, e.g. Forms No. 2 and 18 (2)," and in the preface the following observation is made: "The Rules at present in force are those existing under the 1908 Act. In certain instances slight modifications are called for, and attention has been called to these in the notes."

As the Act came into force on the 1st day of February, it seemed to me desirable, for the convenience of practitioners and as this had been the late Judge's intention, to bring out a new edition before that date, or as soon thereafter as possible. In the meantime I made reasonable efforts to have the Rules and Forms brought into line with the new Act, but in the circumstances this was not possible. The Rules and Forms are, therefore, produced as they exist in statutory form, and comment is made where the 1928 Act has made any radical alteration. Where the amendments are mostly trivial such as the substitution of "George the Fifth" for "Edward the Seventh," no attention was called to these matters, following the practice of Mr. Justice Sim in this respect in the 1921 edition of the Divorce Work and the Civil Code. The forms cannot control the Act (*Thomas v. Thomas*, (1916) N.Z.L.R. 676) and it would seem, in answer to your correspondent, that the petition should now be for "Divorce." One may perhaps respectfully submit that Their Honours would take a generous view of an application for amendment in the event of a practitioner having followed a form which in a minor matter is not in keeping with the Act.—I am, etc.,

W. J. SIM.

Christchurch,
1st June, 1929.

Australian Notes.

(By WILFRED BLACKET, K.C.)

The Lord Justices of England many years ago met to consider the draft address for presentation to Royalty upon some great occasion. The clerk read "Conscious as we are of our own shortcomings we nevertheless" and then "the shoutings and the tumult" began, for their Lordships thought the words were too abject. Lord Justice Bowen suggested a small amendment. "I think," he said, "we should alter it to read 'Conscious as we are of each other's shortcomings.'" The Industrial Commission of N.S.W. at the present time would be quite justified in signing any document containing the statement drafted by Lord Justice Bowen. Mr. Piddington, who was or had been President of the Federal Interstate Commission, some years ago, acting under Federal authority, fixed the basic wage for adult male workers at £4 4s. This rate was fixed upon the assumption that each such worker had one wife and two children. With the Lang Labour Government in office, Mr. Piddington was appointed President of the Industrial Commission and again enquired as to the basic wage and left it at £4 5s. The Lang Government passed a Child Endowment Act, providing for the additional payment as wages of 5s. per week for each child of any employee, and imposed a tax of three per cent. on wages to provide for Workmen's Compensation on a generous scale. The next thing was the reduction of the working week in most trades from forty-eight to forty-four, the wages remaining unaltered. Then the Lang Government by Act of Parliament directed Mr. Justice Piddington, for his position gave him the status of a Justice of the Supreme Court, to fix the basic wage of an adult worker in rural and non-rural industries. The Bavin Government, whose Premier has never really loved Mr. Justice Piddington, appointed two admirable colleagues Mr. Justice Street and Mr. Justice Cantor, to assist him. That was fifteen months ago and the wage for one adult has not yet been fixed, although at intervals some evidence has been taken as to the high cost of the silk ties and the silk socks necessary for navvies. Months ago Mr. Justice Piddington addressed a protest to Parliament pointing out the evil, i.e., the reduction of wages, that would ensue if the Commission performed its statutory duty, but Parliament made no response and now is about to prorogue for six months. Mr. Justice Cantor and Mr. Justice Street want to get busy and fix the living wage under the Act, while the President wants to call certain evidence which his colleagues think unnecessary. He also regards it as "the duty of the Commission to keep the wheels of industry moving," and thinks that the decision should not be declared until September, so that Parliament may have "an opportunity to rectify any injustice that may follow from the new wage." Vehement in his own opinion as to the proper view of the matter the President has on several occasions said some bitter things that show him to be fully conscious of the shortcomings, if any, of his colleagues, but so far they have exercised admirable restraint. We get about a column a day of this deplorable disagreement, and as good old Pepys says: "What the end of all this shall be I cannot tell."

I read recently that an American Judge had called a witness a "liar," and on its being pointed out that

he had committed a contempt of Court assented and fined himself five dollars. I at once thought of Judge McFarland. He was sitting at Wollongong District Court in the seventies when *Curran v. McFarland* was called on—a case in which the plaintiff was suing for the cost of repairs to the Judge's buggy. His Honour proceeded to hear the case. He took off his wig because he was the defendant, but retained his gown because he was the Judge. After a long and patient hearing of the case the Judge gave the plaintiff a verdict for half the amount claimed with leave to the defendant to move for a new trial next time the Judge sat at Wollongong, for the defendant was not at all sure that the plaintiff's work was well done, and thought he would be able to convince the Judge that it wasn't.

R. v. McCann, a case in the Court of Criminal Appeal—not the "Criminal Court of Appeal" as erroneously stated by a nervous junior recently—established a very important rule in respect of a Judge's power of revision of the notes of his charge to a jury. In our Courts the summing up is taken down in shorthand and the transcription is before the Court on appeal. In *McCann's* case, counsel appearing on an appeal stated that one sentence in the summing up noted by him at the trial did not appear in the transcription (it was not a direction but a somewhat confused explanation of a direction already given). The matter was referred to Judge Mocatta and he said:—

> "I dealt with the transcript notes of my summing-up when they were sent to me for the usual revision in a manner in which I have hitherto regarded as intended and required in such circumstances—that is, by making such emendations only as in my mind were properly to be regarded in relation to the entire text as being merely tautological and redundant, while duly preserving all matters which to the best of my judgment appeared to be of substance or import."

Upon this report the Court allowed the appeal and in giving judgment Ferguson, A.C.J., said that the notes should be a "phonographic reproduction of what was actually said," and further stated: "Any revision that so alters the language in which the direction was expressed as to remove obscurity or make the direction more precise may defeat the very object for which the shorthand note is required. Every Judge, unless he is exceptionally fortunate, finds many passages in a report of his direction to a jury which he would prefer to have expressed differently, but while it is his right and duty to correct any material errors in his report it is essential that in the result the Appeal Court should be informed as accurately as possible, not what he would like to have said, but what he actually did say."

In *Rex v. Babcock and Wilcox Ltd.*, the decision depended upon the sufficiency of evidence. Mr. Arnott, of Sydney, acting on behalf of the Company in England, whose tender for machinery to be supplied had then been accepted, agreed with S.Y. Maling an official of the Sydney Municipal Council whose duty it was to deal with contracts made with the Council, that £10,600 should be paid by the Company to the credit of one Buckle to the use of Maling. Arnott wrote, stating the agreement to Sir James Kemnal, acting for the Company in London, and shortly thereafter £10,600 was paid into Buckle's account and used by Maling. Maling, against whom further facts than those here stated were proved, was prosecuted and convicted under the Secret Commissions Act, and the Company was then prosecuted under the same Act, convicted, and fined £1,000 and ordered to pay £10,600 to the Council. On an application for a prohibition the majority of the Court, Ferguson, A.C.J., and James, J., did not think that the conviction was "based on evidence clearly sufficient to lift the case out of the region of suspicion into that of established fact." Mr. Justice Halse Rogers dissented, and in the course of his judgment said: "Suspicion of course was not enough to make a case on a criminal charge, but on the other hand the Crown had only to prove its case beyond reasonable doubt. Such a multiplicity of coincidences, interconnected and unexplained, was sufficient to carry the mind beyond suspicion to certainty." The prohibition was granted with costs.

Bench and Bar.

The Honourable Mr. Justice Herdman, senior puisne Judge of the Supreme Court, has had conferred upon him in the Birthday Honours List the title of Knight Bachelor.

Mr. James Watt, of the firm of Watt & Blenerhasset, Wanganui, has joined the firm of Currie & Jack, Wanganui. The new partnership will practise under the style of Watt, Currie & Jack.

Rules and Regulations.

British Nationality and Status of Aliens (in New Zealand) Act, 1928.—Notification of His Majesty's assent to Act which is to come into operation on 1st July next.—Gazette No. 31, 2nd May, 1929.

Motor Vehicles Act, 1924: Motor Vehicle Amendment Regulations, 1929, re erection of compulsory-stop signs.—Gazette, No. 38, 23rd May, 1929.

Motor-vehicles (Tractors) Regulations, 1928. Tractors declared to be Motor-vehicles.—Gazette No. 37, 16th May, 1929.

Motor-vehicles Insurance (Third Party Risks) Act, 1928. Amendment to Motor-vehicles Insurance (Third Party Risks) Regulations, 1929, re premium payable in respect of certain classes of motor-vehicles.—Gazette No. 39, 24th May, 1929.

Prisons Act, 1908. Prisons Regulations: regulation 389, *re* prisoners escaping from custody, and replacement of departmental property damaged or lost by prisoners, amended. —Gazette No. 31, 2nd May, 1929.

Public Works Act, 1928. Motor-lorry Regulations, Amendment No. 3, re payment of Heavy Traffic Fees.—Gazette No. 39, 24th May, 1929.

War Regulations Continuance Act, 1920: Passport Regulations, 1929.—Gazette No. 31, 2nd May, 1929.

Law Lords and their Privileges.

The recent promotion of Tomlin, J., from the High Court of Chancery to the House of Lords recalls the fact that the Law Lords were once upon a time hedged about by insidious conditions. After their retirement from office they could neither sit nor vote in the House of Lords and, further, their children could not take the prefix "Honourable." The first grievance was removed by a statute passed, it is said, because a certain Law Lord despite failing faculties refused to relinquish either his post or his stipend unless he were allowed to retain the privileges of the peerage. The other matter was remedied in 1896 when by Royal Warrant it was directed that the sons and the daughters of life peers, living or deceased, should be entitled to the courtesy prefix of "Honourable." The origin of this latter reform was alleged to be the complaint of one of their Lordships that the existing system caused the ignorant multitude rashly and regrettably to assume that there had been some technical flaw in his matrimonial arrangements.

Legal Literature.

Redman's Law of Landlord and Tenant.

Supplement to Eighth Edition: By J. C. ARNOLD and G. E. HART.
(pp. xiii; 144; xii: Butterworth & Co. (Publishers) Ltd.)

Occasionally there is a feeling that an excuse for the publication of a new edition of an established work is somewhat too lightly seized upon, and that in many cases the work could be brought up-to-date efficiently and at comparatively slight expense to the practitioner, by a supplement. This new and highly commendable supplement to *Redman* proves adequately that there are occasions which permit of the adoption of such a course. And to the New Zealand practitioner this method of modernising a legal treatise has, at least in this case, particular advantages, for the last edition of *Redman* was published in 1924, before the passing of the Law of Property Acts of 1925, and while the supplement, as well as including all the recent cases, shows the changes effected by these statutes, reference can always be made to the main work for the previous law, whereas in the case of a new edition one almost invariably finds the old law stated too briefly to be of real assistance to those who are not concerned at all with the recent changes in English Law.

The Supplement follows the last edition page by page and contains references to over one hundred and sity cases. The remainder of the volume is devoted to an annotation of the Landlord and Tenant Act, 1927, and to an annotation of the statutory rules and orders under that Act. The volume has its own index.

New Zealand Justices Handbook.

Second Edition: By W. G. RIDDELL, S.M.
(pp. iv; 127; vii: Butterworth & Co. (Aus.) Ltd.)

There are, it is believed, some 5,000 Justices of the Peace in New Zealand and each one of them has to take an oath binding his conscience to do right to all manner of people after the laws and usages of the Dominion without fear or favour, affection or ill will. Nobody, of course, really expects a Justice of the Peace to have a thorough or detailed knowledge of the law; but in order that the oath should not be considered a farce—it is a bad thing for the administration of justice when oaths become to be considered as meaningless formulae—every Justice of the Peace should, and there seems nowadays to be a tendency to recognise this obligation, make an honest endeavour to familiarise himself with that part of the law with which the performance of his ministerial and judicial duties is likely to bring him into touch. Mr. Riddell's "*New Zealand Justices Handbook*," the first edition of which appeared in 1923, since when the Justices of the Peace Act has been consolidated and there has been much change in the law as to youthful offenders, is apparently intended for this purpose and as such is an ideal little treatise. In a clear, succinct, essentially accurate, and, what is perhaps as important, readable manner the author states what a Justice of the Peace ought to know about his imnisterial and judicial duties. On the criminal side the rules as to criminal liability generally, summary jurisdiction, conservation of the peace, indictable offences and their summary trial by justices, bail, probation, and suppression of names are given. Special chapters are devoted to juvenile offenders, Children's Courts, and the Child Welfare Acts, and there are chapters on the jurisdiction of justices in civil cases, as to mental defectives, and under the Coroners Act. The chapter on evidence, a branch of the law which is particularly confusing to the layman, which appears for the first time in this edition deserves special mention. This reviewer has not the slightest hesitation in saying that no Justice of the Peace can afford to be without this volume, and it can be recommended also to clerks and students.

Federal Bankruptcy Law and Practice.

By D. CLAUDE ROBERTSON and J. B. TAIT, LL.B.
(pp. lxxxviii; 684; lxxix: (Butterworth & Co. (Aus.) Ltd.)

Robertson and Tait on *Federal Bankruptcy Law and Practice* is one of the most substantial Australian legal text-books which this reviewer knows and is in every way a credit to the authors and the publishers. In Australia by the Federal Bankruptcy Act, 1924-28, there has been created for the first time a uniform Commonwealth Law of Bankruptcy and each State no longer has its separate law differing in many important respects from the law in force in each of the other States. It would appear that on the whole the new law has been brought more into line with that of England and consequently the treatise cannot fail to be useful to the practitioner in this country—just as useful, in all probability, as the standard English works on bankruptcy, for as well as citing the important English decisions the work provides a readily accessible storehouse of the High Court's and State Courts' decisions applicable to the new law. Now and then a reference is given to a New Zealand case.

With the changes introduced by the new Federal Act it is not, probably, within the province of a review to deal, but an alteration which may be noticed as likely in its effects to be most far-reaching is one relating to the subject of fraudulent preference. By English and New Zealand law it is an essential ingredient of a fraudulent preference that it be made "with a view" to giving a preference; by the Federal Act it is sufficient if the transaction has the effect of giving a preference. This change in the law is one which might well be followed in New Zealand, for many a transaction which should not in justice to the general body of creditors be allowed to stand is rendered secure because of the difficulty in proving the bankrupt's intent, the preferred creditor being generally able to show that the transaction was effected under pressure by him, or that the debtor's real intention was to be able to carry on his business.

In a foreword the Hon. J. G. Latham, C.M.G., K.C., the Commonwealth Attorney-General, says:

> "I congratulate the authors upon the high standard and completeness of their work. They have rendered most useful service, not only to the whole legal profession but to the community as a whole. They have exhaustively annotated the Act, citing authorities from both Australian and English

Courts and indicating the distinctions which must be remembered in applying such precedents to the elucidation of the Federal Act."

So far as this reviewer has been able to see from a lengthy series of tests this praise of the leader of the Australian Bar is well-merited.

New Books and Publications.

Butterworth's Index to the N.Z. Statutes, 1928. By J. D. Willis. (Butterworth & Co. (Aus.) Ltd.). £1/-/-.

N.Z. Justices Handbook. By W. G. Riddell. Second Edition, 1929. (Butterworth & Co. (Aus.) Ltd.). 7/6.

Elements of the Law of Contract. By Victor Morawetz. Second Edition, revised, 1927. 12/6.

Snell's Principles of Equity. By H. C. Rivington and A. Clifford Fountaine. Twentieth Edition. Sweet and Maxwell. £1/15/-.

Questioned Documents. By A. S. Osborn. Second Edition. Boyd Printing Co. and Carswell Co. £3/2/6.

Shipping Enquiries and Courts. By A. R. G. McMillan, M.A., LL.B. Stevens & Sons. 12/-.

Trial of J. Donald Merrett. By William Roughhead (Notable British Trial Series). (Butterworth & Co. (Aus.) Ltd.). 9/-.

Guide to Law Reports and Statutes. (Sweet & Maxwell). 5/-.

Annual Survey of English Law, 1928 and London School of Economics and Political Science. (Sweet & Maxwell). 12/6.

Kerr on Fraud and Mistake. Incorporating May's Fraudulent Dispositions. By Syd. E. Williams. Sixth Edition. (Sweet & Maxwell). £2/7/6.

Roman Law in Medieval Europe. By Paul Vinogradoff. Second Edition. By F. de Zulueta. (Oxford Press). 6/-.

Lawrence on Equity Jurisprudence. 2 Vols. 1929. Matthew Bender & Company. £4/10/-.

The Agra Double Murder. By Sir Cecil Walsh. (Ernest Benn). Price 9/-.

Administrative Law. By Fred. K. John Port, LL.D. Foreword by Rt. Hon. Lord Justice Sankey. (Longmans Green & Co.). Price £1/4/-.

English Port Law History. Part 2 (2 volumes). By Sydney and Beatrice Webb. (Longmans Green & Co.). Price £2/1/-.

The Working of the Bill of Exchange. Second Edition. By A. M. Samuel. (Effingham Wilson). Price 9/-.

The Conveyancer's Note Book. Third and Revised Edition. By A. H. Cosway. (Effingham Wilson). Price 9/-.

The Practice of the Divorce Division. By C. A. Phillips, LL.B. (Solicitors Law Stationery Society). Price 18/-.

The Landlord and Tenant Act, 1927. By S. P. J. Merlin. (Solicitors Law Stationery Society). Price 3/6.

Principles of the English Law of Contract. By Sir W. R. Anson, Bart. Seventeenth Edition. By J. C. Miles, Kt., M.A., and J. L. Brierly, M.A. (Oxford Press). Price 18/-.

Cases in Law of Contract. By J. C. Miles, Kt., M.A., and J. L. Brierly, M.A. (Oxford Press). Price £1/9/-.

Wellington Law Students' Society.

The following case was argued before H. F. O'Leary, Esq., on May 17th :—

"Mr. Crabb has at the back of his shop a door leading to his private apartments on the upper floor. Close to this is a flight of steps leading to a cellar, and ordinarily covered by a trap door which is suitable for the purpose in all respects. Mr. Crabb invites Mr. Brown to his house. As Mr. Brown is leaving he falls down the cellar steps, the trap-door covering of which has been carelessly left open by Mr. Crabb's servant. Mr. Brown, who is severely injured sues Mr. Crabb for damages."

Ball for plaintiff. Plaintiff was a licensee. It is a licensor's duty to warn licensees of circumstances of danger : *Corby v. Hill*, 4 C.B. N.S. 556 ; *Barrett v. Midland Railway Co.*, 1 F. & F. 661 ; *Gallagher v. Humphrey*, 6 L.T.N.S. 684 ; *Clerk and Lindsell on Torts*, 8th Edn. 445. ; *Fairman v. Perpetual Investment Society*, (1923) A.C. 74, and *Connor v. Howden*, (1924) N.Z. L.R. 181, are recent cases in point. It is submitted that *Fairman's Case* proceeded on the ground that the defect in the stairs in that case was a patent defect. In *Salmond on Torts* 7th Edition, 454, it is stated that a concealed danger is a danger which a reasonable person would not have seen and that an occupier is bound to give notice to licensees of any concealed danger.

Jessop in support. Persons on dangerous premises can be classified as (1) Trespassers ; (2) Licensees, and (3) Invitees. An invitee is defined in *Salmond on Torts*, 6th Edition, 436. It is submitted that the distinction between a licensee and an invitee is unsatisfactory : see *Salmond*, 436. It is submitted Brown was both a licensee and an invitee. It is the duty of an occupier to protect an invitee from hidden dangers : 21 *Halsbury* 388. An invitor must use reasonable care : *Indemaur v. Dames*, L.R. 1 C.P. 274 ; *Norman v. Great Western Railway*, (1915) 1 K.B. ; *Public Trustee v. Waihi G.M. Co.*, (1926) N.Z. L.R. 449. Submitted defendant liable even if only a licensee : *21 Halsbury* 393. *Gallagher v. Humphrey* covers this case. In *Latham v. Johnson*, (1913) 1 K.B., a trap is defined by Hamilton, L.J., at p. 415. It is submitted *Fairman's case* distinguishable on ground that there (1) The danger was obvious. (2) There was no negligence of defendant.

Rollings for defendant. It is submitted Brown visited Crabb's for social purposes and was consequently a licensee. *Gallagher v. Humphrey* is distinguishable. In that case there was definite evidence of negligence. This case is similar to *Mersey Docks v. Proctor*, 39 T.L.R. 275. A licensor is liable only if a positive trap is laid and not for a mere omission : *Latham v. Johnson*. A licensor is not bound to correct existing traps ; he must not create fresh ones : *Hayward v. Drury Lane Theatre*, (1917) 2 K.B. 899. In *Sutcliffe v. Clients Investment Co.* (1924) 2 K.B. 746, Bankes, L.J., said a trap was something of which the licensor did know or should have known. It is submitted : (1) There was not a trap here ; (2) It was not known to defendant.

Paul in support. There was no duty of care on defendant. Plaintiff was a licensee : *Salmond*, 435. A licensor must reveal a concealed danger. This is not a concealed danger : See *Sullivan v. Waters*, 14 Ir. C.L.R.

Mr. O'Leary, delivering "judgment" said that it must be found as a fact that an ordinary man would not have seen the trap door. There were four relationships : (1) Contractual ; (2) Invitor and Invitee ; (3) Licensor and Licensee ; (4) Trespasser. Brown was either an invitee or a licensee, but he did not think it mattered which. In his opinion defendant was liable. In the absence of evidence that a reasonable man would have seen the opening, he must hold that he would not have seen it. He held there was a concealed trap and thought that the defendant must be fixed with the knowledge of his agent.

Proctor's case was explainable on the grounds that the plaintiff had ceased to be a licensee. Had Brown in this case commenced to wander all over Crabb's house and been injured, Crabb would, no doubt, not have been liable. In *Fairman's case* plaintiff was up and down the stairs in question all day and every day.

Judgment for plaintiff.

The Bar alone knows whether a Judge is competent to do his duty. The Bench knows better than anyone else who is doing the work of the Bar best and most effectively.—Mr. Justice Duffy.