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"A strong, upright and independent Bar is essential to the welfare of a free people."
—*Mr. Justice McCardie.*

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Privilege of Solicitors.

In a previous article this Journal, when calling attention to and discussing the judgment of His Honour Mr. Justice MacGregor in *Keep Brothers v. Birch and Bradshaw Ltd.*, (1928) N.Z.L.R. 360, 4 N.Z.L.J. 108, dealt with the question of privilege attaching to communications made to a solicitor. The authority of *More v. Weaver*, (1928) 2 K.B. 520, for the principle that communications passing between solicitor and client on the subject upon which the client has retained the solicitor, and which are relevant to that matter, are absolutely privileged, has been confirmed by recent English decisions, and the application of the principle is well brought out in the questions submitted to the jury in *Minter v. Priest* reported in the *Weekly Notes* of the 6th April, 1929, at page 94, and more fully in 45 *Times Law Reports*, 393. In that case the plaintiff appointed one, Taylor, as his agent to find a purchaser of a Mayfair residence. Taylor obtained an offer to purchase from one, Simpson, and the offer was accepted. Simpson's solicitors not being able to assist him to pay the deposit required, suggested he should go to the defendant who was also a solicitor, and said that if he could find the money they would stand down and allow the defendant to act as solicitor in carrying out the business. Simpson and Taylor accordingly interviewed the defendant at his office and told him that they wanted his assistance to find the deposit and that, if he found it, he should act as solicitor for Simpson in completing the purchase. The defendant declined to have anything to do with the matter and, in giving his reasons, slandered the plaintiff, with whom he had had previous dealings. Taylor repeated the slander to the plaintiff in confidence and the plaintiff commenced an action for slander. At the trial the plaintiff called Taylor on subpoena to prove the slander but Taylor claimed privilege on the ground that he saw the defendant in his professional capacity. His Honour Mr. Justice Horridge ruled that the witness must tell what took place before he could give a decision on the question of privilege. The witness then said he went to the defendant to obtain "£475 good money and a good solicitor," and that at that interview the defendant gave cogent reasons why the business should not be proceeded with and made the remarks defamatory of the plaintiff. The defendant, relying on absolute privilege, called no witnesses. After leaving the usual question to the jury as to whether the defendant had uttered the words complained of, which the jury answered in the affirmative, Horridge, J., left them the following two questions: (*a*) At the time when the words complained of were uttered, did the relationship of solicitor and client actually exist between the defendant on the one part, and Simpson and Taylor, or one and which of them, on the other part? (*b*) Did the defendant reasonably believe that Simpson and Taylor, or one and which of them, would wish to retain him as solicitor? The jury answered both of these questions in the negative and fixed the damages at £1,500. On appeal, the Court of Appeal consisting of Lord Hanworth, Master of the Rolls, and Lords Justices Lawrence and Greer, allowed the appeal, the Master of the Rolls saying that, in his opinion, all that passed between a solicitor and a presumptive client with a view to, and for the purpose of, the client retaining the solicitor, was protected by privilege even if the solicitor did not accept the retainer.

The interest of the decision lies first in the finding that despite the fact that the solicitor refused to act, and never accordingly became the solicitor of the defendant, the privilege attached. It seems that the privilege belongs to the solicitor so long as he is acting as solicitor and does not appertain only to a solicitor and client relationship. The second point of interest is that the nature of the business on which Simpson and Taylor consulted the defendant, although it was only to find out whether the defendant could make the necessary advance, was properly characterised as "solicitor's business" The Court relied on *Jones v. Pugh*, (1842) 1 Ph. 96, and *Carpmael v. Powis*, (1846) 1 Ph. 687, for its finding that the business in question was properly characterised as a solicitor's business. In the former case, Lord Lyndhurst definitely stated that it was the business of a solicitor to lay out money for his clients, and in the latter, that it was an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients, and that it was not possible to dissect the proceedings at an interview for the purpose into parts which were protected and parts which were not protected, without getting involved in inextricable confusion. The Court held, following these cases, that, as the effect of the evidence was that the visit to the defendant was on professional business, and there was no evidence that the professional interview had ceased when the defamatory statements were made, questions (*a*) and (*b*) should not have been left to the jury.

It seems clear that the statements made by the defendant were made to explain to gentlemen, who were not and never had been his clients, why he could not oblige them, even though by doing so he would acquire them as clients, by making an advance to meet a deposit due by them under an agreement for sale and purchase. It does not appear that the defendant had any duty to either Simpson or Taylor in regard to the advisability or otherwise of their going on with the purchase but that such statements were made solely to explain why the defendant would not make the advance and consequently act as solicitor in the transaction.

The case is not on all-fours with either *Keep Brothers v. Birch and Bradshaw Ltd.* or *More v. Weaver*, but is an interesting example of the application of the broad principle that a solicitor's privilege, which is established in the interests of the administration of justice and for the protection of the confidence which exists between a solicitor and his client, will cover all cases where the solicitor is acting within the scope of his business. The principle has been established as one of public policy and the latest decisions of the Court seem to show that, rather than allow it to be whittled down, it will be extended to cover all the circumstances of a modern solicitor's varied practice.

Full Court.

Myers, C.J.
Blair, J.
MacGregor, J.

May 27; June 1, 1929.
Wellington.

MATHESON v. SCHNEIDEMAN.

Defamation—Practice—New Trial—Damages—Words Spoken on Privileged Occasion—Qualified Privilege—Evidence of Malice—Direction to Jury that Failure to Apologise Element for Consideration but not Evidence of Express Malice—No Misdirection—No Substantial Wrong to Defendant as Otherwise Ample Evidence of Malice—Damages Excessive—Limited Publication and Prompt Admission of Error—Probability that Malice Rather than Slander Considered by Jury—Exemplary or Punitive Damages—Damages not such as Twelve Men Could Reasonably Have Awarded—New Trial Ordered Limited to Issue of Damages.

Motion on behalf of the defendant for nonsuit, or alternatively for judgment for the defendant, or in the further alternative for a new trial, in an action wherein the plaintiff claimed £500 damages for slander. The slander alleged occurred in the course of an investigation into the value of certain stocks which had been sold by the plaintiff to the defendant, such enquiry being held with a view to verifying the stock sheet which were to be the basis of payments. The words alleged were spoken in the presence of two accountants, one representing each party, who were called in to verify the stock sheets. Three separate slanders were alleged. They were as follows: "You have wilfully overstated the stock sheets. You are a party to this wilful overstatement. They are overstated against my interests and in favour of your own." "Mr. Matheson, I wish you to leave these premises immediately as it is now probably a matter for the police to handle. Yes that is quite correct and I am quite prepared to prove all I said." "I do not know where he (Smith) is but I suppose he is so ashamed of himself over the part he has taken in the affair (of the overstatement in the stock sheets) that he would not turn up again."

Macgregor, J., held that the occasions on which the words complained of were spoken were occasions of qualified privilege. The jury awarded the plaintiff £500 damages.. The Full Court held that there was ample evidence of malice to go to the jury and held also that the words complained of were capable of a defamatory meaning, but the case is not reported upon these points.

O'Leary in support of motion.

Watson and Wilson *to oppose.*

MYERS, C.J., delivering the judgment of himself and BLAIR, J., after holding that there was ample evidence of malice to go to the jury and that the words complained of were capable of a defamatory meaning, said that it remained to consider the two other grounds upon which the defendant based that part of his application in which he asked for a new trial, namely (a) misdirection and (b) that the damages awarded were excessive.

As to the first point, the defendant claimed that the learned Judge misdirected the jury on a material point of law in that he directed that it would be evidence of malice or absence of honest belief on the part of the defendant if, after he had ascertained that he was mistaken, he refused to withdraw or apologise for the statements made. It would seem that while a refusal on the part of a defendant to apologise for, or retract, a defamatory statement when he became aware of its falsity might be properly considered by the jury on the issue of damages as part of the defendant's conduct, it was not (at all events *per se*) to be regarded as evidence of malice: **Gatley on Libel and Slander,** 2nd Edn. 713, citing **Couper v. Lord Balfour,** (1913) S.C. 492, 50 Sc. L.R. 320. And see also **Adams v. Coleridge,** 1 T.L.R. 84, at p. 87. But it was somewhat difficult to see, although it was unnecessary in their Honour's view of the case to express a concluded opinion upon the point, why a defendant's refusal to retract a defamatory statement under certain circumstances, and particularly when its falsity was made clear to him, should not be taken into consideration with the other facts of the case for the purpose of considering the issue of malice. That view seemed to be justified by **Simpson v. Robinson,** 12 Q.B. 511, 513. The learned Judge's report of his summing up on the issue of malice showed that he first of all explained what "express malice" meant; and the report proceeded: "By way of illustration I suggested to the jury that they might endeavour to put themselves in the defendant's place in considering the issue, e.g., would they in his position have persisted in the accusation made against the plaintiff after receiving a satisfactory explanation of the altered stock sheets? I then added, would they have declined to withdraw, or would they have declined to apologise? Could the defendant have had an honest mind in making the accusations when he refused to apologise after receiving this explanation?" The report then proceeded: "At the express request of defendant's counsel, I afterwards added that I did not direct them as a matter of law that defendant's failure to withdraw his charges or answer the solicitors' letter of the 8th March" (the letter did not in terms demand an apology, but purported to give him an opportunity of taking such steps as he might think fit in palliation of the matter) "was evidence of express malice on the part of the defendant." Counsel for the defendant had referred to the statement contained in **Gatley on Libel and Slander,** 2nd Edn. 713, as containing the law on that particular point, and the learned Judge told the jury that notwithstanding that statement they were entitled in his opinion to look at the whole conduct of the defendant, before, at, and after making the charges in coming to a conclusion as to whether or not the defendant was actuated by actual malice towards the plaintiff when making the charges; and the learned Judge emphasised that the important matter to consider was the state of the defendant's mind at that time. At the conclusion of the summing-up counsel for the defendant rose and said: "Do I understand your Honour to direct the jury as a matter of law that defendant's failure to withdraw his charges or reply to the solicitors' letter is evidence of express malice?" The learned Judge replied: "Oh, no," and then, addressing the jury, said:—"Gentlemen, you will understand that the defendant's failure to withdraw his charges or reply to the solicitors' letter is not evidence of express malice on his part." Counsel then said: "So long as the jury understand that, I am satisfied." In their Honours' opinion there was no misdirection on the part of the learned Judge. Even if their Honours had thought that there was reason for holding that there had been a misdirection on the point complained of, the defendant would still not be entitled to an order for a new trial on the issue of malice because plainly, in their Honours' opinion, the misdirection would not have occasioned any substantial wrong or miscarriage of justice inasmuch as, apart from the fact that the defendant had failed in answer to the letter of the 8th March to apologise for having made the defamatory statements, there was ample evidence not merely to justify, but to compel, an answer to that issue in favour of the plaintiff; and it was plain from the learned Judge's report that the minds of the jury were directed to that evidence. If there were a misdirection, and it was such a misdirection as might have affected the issue of damages, the position would be different: **Bray v. Ford,** (1896) A.C. 44, per Lord Herschell at pp. 52, 53.

There remained the question whether a new trial should be ordered on the ground that the damages were excessive. The plaintiff claimed the sum of £500 and the jury awarded the full amount. Plainly the amount was greater than would have been awarded by a Judge sitting without a jury. That however was not sufficient to justify the Court in setting aside the verdict. Before the verdict could be set aside the Court must come to the conclusion that having regard to all the circumstances of the case the damages were so excessive that no twelve men could reasonably have given them. If the Court was so satisfied then it was its duty to interfere and set aside the verdict. If the Court could see that the jury in assessing damages had been guilty of misconduct, or made some gross blunder, or had been misled by the speeches of counsel, those were undoubtedly sufficient grounds for interfering with the verdict: **Praed v. Graham,** 24 Q.B.D. 53; **Harris v. Arnott,** 26 L.R.Ir. 55; and see **Watt v. Watt,** (1905) A.C. 115, per Lord Halsbury at p. 118. There must be some reasonable relation between the wrong done and the damages awarded: **Greenlands Ltd. v. Wilmshurst and the London Association for the Protection of Trade,** (1913) 3 K.B. 507, per Hamilton, L.J., at pp. 532, 533; **Eden George v. Truth and Sportsman Ltd.,** 26 N.S.W. S.R. 595. The true test seemed to their Honours to be whether the Court could see that the jury had taken a reasonable view of the case and returned a verdict such as reasonable men would find. That was the test applied in **Daley v. Lundin,** 8 N.S.W.S.R. 447. It was true that in **Praed v. Graham** (*cit. sup.*) the Court refused to grant a new trial in an action to recover damages for a libel contained in a letter written by the defendant to the plaintiff' wife where the jury assessed the damages at £500. It might well be said that in that case the publication was of a restricted character; but nevertheless, although the report did not indicate what the defamatory matter was, the publication, being

to the plaintiff's wife, was of such a nature as might have caused injury of a most serious character. In **Butler v. Black,** (1920) N.Z.L.R. 17, the Court refused to disturb a verdict for £750 awarded as damages for slander. It might well be that in that case— the report was silent on the point—the defamatory words were spoken in such circumstances or to such person or persons as might have resulted in at least the probability of serious injury to the plaintiff.

It was necessary then to consider the facts in the present case which seemed to their Honours to be relevant to the issue of damages. The first of the defamatory statements was made on the 12th February at 6.45 p.m. at a meeting on the defendant's premises, at which there were present the plaintiff, the defendant, and Messrs. Forsyth and Benjamin, public accountants appointed by the parties respectively, to act in their respective interests in connection with the subject matter out of which the defamatory statements arose. The meeting was adjourned until the following morning, at the same place, when at 8 o'clock the same persons met again. At that meeting the second of the defamatory statements was made, and the third statement was made an hour or two later during the continuation of the discussion in another part of the defendant's premises. The publication therefore was of a most restricted nature. Further than that, at about 10 o'clock in the morning of the 13th February, before the conference concluded at which the last of the defamatory statements was made, and after the quantity of one of the lines of goods in dispute had been checked, it was common ground that the defendant accepted all the figures contained in the stock sheets submitted by the plaintiff and admitted their correctness. It was true that in his evidence the plaintiff said that the defendant "did not retract the statements he had made and made no apology." And Mr. Forsyth said that the defendant "in no way withdrew the charges of dishonesty against Matheson, nor did he apologise." But although the defendant did not apologise, as in the circumstances he undoubtedly should have done, his admission of the correctness of the stock sheets was, in their Honours' opinion, necessarily in effect a withdrawal of the charges of any dishonesty against the plaintiff. Mr. Forsyth himself said that the defendant said that "he was quite satisfied"; and the plaintiff gave evidence to the like effect. In those circumstances it was difficult to see what real damage it was possible for the plaintiff to sustain, as the only persons to whom the defamatory statements were published heard almost immediately afterwards the further statement which necessarily connoted the falsity of the defamatory statements previously made. True there was a faint suggestion that at the outset at all events of the interview on the morning of 13th February there was a fifth person present. If there was someone else present from the defendant's office when the parties first arrived, it was difficult to believe that he remained during the proceedings that followed. The identity of such person must in the circumstances of the case have been known to the plaintiff; but the plaintiff did not in his evidence mention the presence of a fifth party, and in the statement of claim all he alleged was that all the defamatory words complained of at each and every interview were spoken in the hearing of Mr. Forsyth and Mr. Benjamin. If there had been a fifth person present when any of the defamatory words were spoken, it was most extraordinary that that fact should not be alleged in the statement of claim or referred to by the plaintiff in his evidence; and if there were a fifth person present and he remained with the other members of the party during the whole of the proceedings on the morning of the 13th February he must, like Messrs. Forsyth and Benjamin, have heard the admission which was eventually made by the defendant and to which their Honours had already referred. It was somewhat curious that, though the plaintiff alleged in his statement of claim three separate slanders, one on the evening of the 12th February, and two on the following morning, he claimed only one sum in respect of all three. The three slanders seem to have been regarded as being connected each with the others and were in effect treated as one cause of action. On the argument of the motion counsel for the plaintiff urged a number of specific acts or episodes upon which he relied as evidence of malice. In all he relied on something like fourteen such specific acts or episodes, of which it was sufficient for present purposes to refer to no more than two. One was the defendant's dismissal of the plaintiff in such a manner as to commit a breach of a contract between the parties which was to subsist for two years; the other was the stoppage by the defendant of certain work which was being done for him under contract by the plaintiff and one Cowley, such stoppage being at least arbitrary and high-handed if not constituting a breach of contract. The learned Judge reported that at the trial counsel for the plaintiff in his address to the jury stressed the specific acts or episodes, upon which he relied as evidence of malice. Their Honours were not to be regarded for a moment as suggesting that counsel's conduct was in the least degree improper, but in the peculiar circumstances of the case the stressing of malice (and particularly the acts or episodes relied on and stressed) was likely, and indeed almost certain, to mislead the jury into the belief that it was the malice rather than the slander for which damages were to be given. True a jury was entitled to award exemplary or punitive damages in a proper case, and their Honours felt bound to say that in the present case there was evidence that the defendant's conduct was such as to deserve punishment. Nevertheless there must, their Honours thought, be some limit to the extent to which a jury might award exemplary or punitive damages, especially in a case of slander like the present case where malice was not regarded primarily as aggravating the damages but as an ingredient without which, the occasion being one of qualified privilege, no cause of action at all would exist, and more especially where as in the present case the publication was restricted and the amount the jury had chosen to award was out of all proportion to the loss or damage which the plaintiff under any reasonably conceivable circumstances could sustain. Their Honours took the same view of the case as was taken in **Eden George v. Truth and Sportsman Ltd.,** 26 N.S.W.S.R. 595. Taking all the relevant factors into consideration as in the case last cited their Honours thought the sum awarded was so excessive, and the proportion between it and the circumstances of the case was so unreasonable, as to suggest, and indeed compel, their Honours to think, that the jury must have considered the matter from a wrong point of view or without a proper understanding of their duty. It might be not altogether without importance to note that the jury were not satisfied to award the full amount claimed but also, although they were merely asked in the usual way: "What damages, if any, is the plaintiff entitled to recover," added the words "and costs" which words were struck out by the learned Judge's direction. The damages were so excessive in their Honours' opinion that no twelve men on a proper consideration of all the facts and circumstances could reasonably have given them. That being so the judgment was set aside and a new trial limited to the one issue of damages ordered.

MACGREGOR, J., delivered a separate judgment concurring.

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

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

Supreme Court.

Blair, J. March 3; May 18, 1929
Hamilton.

IN RE CORNFOOT AND OTHERS: EX PARTE GOULTER.

Mortgage—Transfer of Land Subject to First and Second Mortgages—Transferor Mortgagor Under Second Mortgage—Second Mortgage Subsequently Extended Under Mortgages Extension Act, 1919, on Application of Transferor and Transferees—Further Application by Transferees for Extension Under Mortgages Final Extension Act, 1924—Transferor Not a Party to Application—Extension Granted Conditional on Observance of Provisions of Memorandum of Agreement Signed by Counsel for Parties—Memorandum Providing that Mortgagors Should Do Certain Clearing and Burning—Provision that Mortgagors Should Perform their Covenants Under First and Second Mortgages "with Respect to Any Covenants where there has been a Breach" Except Covenant for Repayment of Principal Prior to Extended Date—Mortgagee's Rights Against Original Mortgagor Expressly Reserved—Transferees Not Personally Liable to Mortgagee for Repayment of Mortgage Debt.

Motion by one, Goulter, for an order reversing the decision of the Official Assignee rejecting a proof of debt lodged by him in the bankrupt estate of George, Margaret Elizabeth, and Harry Cornfoot. The proof was for £8,300 being for "arrears land tax, county rates and interest and difference of price obtained for Spring Hill Station on 1st and 2nd mortgages." The facts were as follows: In 1916 Goulter who was the registered proprietor under the Land Transfer Act of the "Spring Hill" station which was subject to a mortgage to the McLean Institute for £18,000, sold the property to one Monckton, Monckton

taking over the first mortgage and executing in favour of Goulter a second mortgage for a further £18,000 to secure the balance of purchase money. The second mortgage was duly registered. About March, 1918, Monckton sold the property to the above-named bankrupts. George Cornfoot was the husband of Margaret Elizabeth Cornfoot and Harry Cornfoot was their son. At the time of the purchase the last-named was an infant, 18 years of age, and all three signed the transfer as transferees. The arrangement between the Cornfoots was that Harry Cornfoot took only a very small interest (not exceeding one one hundred and eightieth part) in the property. The second mortgage to Goulter became due on 30th March, 1921, and in September, 1921, upon the application of Monckton and the three Cornfoots, an order was made under the Mortgages Extension Act, 1919, extending the time for payment of the purchase moneys under Goulter's mortgage to 31st December, 1922. The application was opposed and the order was made conditional on interest being raised to 6 per cent., on the payment of costs, and on leave being reserved to Goulter to apply for review if the property was neglected. In 1925 a further application was made under the Mortgages Final Extension Act, 1924, by the three Cornfoots (Monckton not being a party to the application) and on 11th June, 1925, an order was made by the Supreme Court pursuant to an agreement made by the three Cornfoots on the one part and Goulter on the other part. Mr., Grant, who acted as counsel for the Cornfoots in that application, in an affidavit stated that originally it was attempted to embody the terms of the arrangement in an order, and that a draft order was submitted to Hosking, J., who refused to accept the draft order, and endorsed on the notice of motion a minute stating that the parties having come to an agreement as per copy annexed the order extending the mortgage to 31st March, 1927, was made and that the Court's order was to cease to have effect in event of breach of the terms and conditions of the memorandum. His Honour forbad the sealing of the order until a copy of the memorandum was furnished. Accordingly counsel for the parties then prepared and signed a memorandum of their agreement. The memorandum was not signed by the parties themselves but bore the signature of N. R. Grant as "Counsel for Mortgagors" and of E. H. Sladden as "Counsel for Mortgagees." It was not disputed that Mr. Grant's signature must be taken as the equivalent of a signature of all the Cornfoots. The memorandum provided, in consideration of the parties having consented to an extension of the mortgage to the 31st March, 1927, (a) that certain paddocks would in certain respects be scrubbed and burnt before 1st November, 1925; (b) that certain blackberry be cut or burnt during the extended term; (c) that certain gorse be burnt or grubbed; (d) that up to date of the extension the mortgagors would faithfully perform their covenants under Goulter's mortgage and also under the first mortgage "with respect to any covenants thereof where there has been a breach and particularly the covenants hereinbefore mentioned" excepting the covenant for repayment prior to 31st March, 1927; (e) that the first mortgage be also extended so as not to expire before the second mortgage; (f) that interest be 6 per cent., and (g) that Goulter expressly reserved his rights against Monckton (the original mortgagor) and that neither the making of the extension order nor anything in the memorandum should release or be deemed to release Monckton from any liability under the second mortgage. The terms of the memorandum were not complied with by the Cornfoots and they failed to pay interest on the mortgage and as a result Goulter in exercise of his powers of sale as mortgagee had the property submitted for sale through the Registrar and in January, 1928, he himself bought it in at such sale subject to the first mortgage, at the declared price of £12,858 18s. 2d. His claim on the bankruptcy of the Cornfoots was in respect of the reduced price realised at the sale plus certain arrears of interest, rates, taxes, costs, etc. The Cornfoots filed a petition in bankruptcy in June, 1928, and were granted their discharge on 8th September, 1928. The only question argued before His Honour was whether Goulter was entitled to claim in the bankruptcy.

Johnson for Goulter.

Watts for Official Assignee and bankrupts.

BLAIR, J., said that the plaintiff's claim to rank as a creditor was based upon the fact that the bankrupts purchased the Spring Hill property and as such purchasers became liable to indemnify Monckton the original mortgagor, and that the bankrupts by their application to the Court for an extension of the mortgage and by the execution of the memorandum above-mentioned became jointly and severally liable to him, Goulter, on the second mortgage. It was admitted in argument that no claim to privity on the part of Cornfoot junior could be established because of his joining in the application for extension of mortgage made in the year 1921.

The authorities relied upon by Goulter were **Nelson Diocesan Trust Board v. Hamilton,** (1926) N.Z.L.R. 342; **Paterson v. Irvine,** (1926) N.Z.L.R. 352, and **Perpetual Trustees v. Elworthy,** (1926) N.Z.L.R. 621. In the last-mentioned case, following **In re Goldstone's Mortgage,** (1916) N.Z.L.R. 489, it was held that the execution of a memorandum of renewal of a mortgage implied an undertaking by the executor of a deceased assignee of the equity of redemption to pay the principal and interest in terms of the new contract.

The terms of the memorandum in the present case contained an express reservation by the mortgagee of his rights against Monckton, the original mortgagor. Goulter was not, therefore, relying upon the substitution of the liability of the Cornfoots for that of Monckton but must claim the liability of the Cornfoots as in addition to that of Monckton. That was of course possible: see **Lindley on Partnership,** 9th Edition, 320. Mr. Watts had submitted that there was no undertaking express or implied on the part of the Cornfoots to assume liability on the mortgage. His Honour was invited, therefore, to look at the order to see whether it contained any express or implied covenant by the Cornfoots to assume liability under the mortgage. Mr. Watts submitted that it contained no covenant but that its effect was that if the Cornfoots did certain things they got the advantage of an extension of the mortgage, but if they omitted to do those things the penalty was that the extension disappeared and the mortgagee was free to exercise all his rights including his rights under his personal covenant with Monckton. His Honour thought Mr. Watts' contention that the memorandum was really part of the order was sound. And it was clear also that if the terms of the memorandum were not complied with then Goulter was no longer bound by the extension granted. The order said: "This order is to cease to have effect in the event of a breach of any of the terms and conditions set forth in the memorandum." Monckton was no party to the last application to the Court and the memorandum expressly reserved all rights against him. The position, therefore, as far as Monckton was concerned was that he was no party to an extension of the mortgage. In **Nelson Diocesan Trust Board v. Hamilton** (*cit. sup.*) the Court at page 350 pointed out that if the arrangement between assignees and mortgagees were not substitutionary the result would be that the original mortgagor could have sued the assignees for breach of their covenant with him to pay the principal on the due date. Here the parties themselves had expressly declared the arrangement not to be substitutionary and if that resulted in absurdity it was their own making. In the three cases quoted the Court held that the variation arranged between assignee and mortgagee created a new contract compounded of the terms of the old and the new instrument. It was held in the **Perpetual Trustees v. Elworthy** (*cit. sup.*) following **In re Goldstone's Mortgage** (*cit. sup.*) that all just inferences were to be drawn as were necessary to make the new contract effective. Mr. Watts claimed that there was no undertaking by the Cornfoots to pay the mortgage debt, and he submitted that full business efficacy could be given to the order and its accompanying memorandum without implying such an undertaking.

His Honour proceeded to examine the order and memorandum. The order itself merely extended the term of the mortgage, but did not purport to create additional liabilities on the Cornfoots. If that were done it was done by the memorandum itself. The document commenced as follows: "Memorandum of Agreement made this 11th day of June, 1925, between the abovementioned parties in reference to the abovenamed application in consideration of the parties hereto having consented to an extension of the term of the above-mentioned Memorandum of Mortgage registered number 28413 to 31st day of March, 1927." As a matter of fact the "abovenamed parties" included Monckton, but he was not a party to the agreement. Following directly upon the above-quoted heading there were mentioned certain things to be done. It was usual in any agreement to state which party was to do any specified thing. But the first three items to be done comprised scrub cutting and clearing but the document did not state which of the parties was to do those things. If the specified scrub cutting and clearing was not done the extension of mortgage became ineffective so that it would fall upon whomsoever desired the subsistence of the extension to have that work done. Of all the clauses in the memorandum clause 4 was most like a covenant or undertaking. It read: "That up to the expiration of the said extension the mortgagors will well and faithfully perform their covenants under the said Memorandum of Mortgage No. 28413 and under Memorandum of Mortgage No. 20144 prior thereto with respect to any covenants thereof where there has been a breach and particularly the covenants hereinbefore mentioned (excepting howsoever the covenant for repayment of principal moneys prior to the 31st day of March, 1927.) That

was a somewhat remarkable piece of draftsmanship and its meaning was obscure. Goulter himself was the mortgagor under the first mortgage (No. 20144) and Monckton was mortgagor under the second mortgage (No. 28413). The Cornfoots were never mortgagors except that by virtue of their liability as purchasers of a mortgaged property they were "mortgagors" within the definition of that word in the 1924 Act. Moreover Mr. Grant acted as counsel for them and not for Monckton and Mr. Grant signed as "counsel for Mortgagors." Was the use of the word "mortgagors" in that clause intended to exclude any reference to Monckton or Goulter or both? The rights against Monckton were preserved. The clause called for the performance up to the date of the extension of all covenants in respect of which there had been a breach. Did that mean that breaches already committed must be repaired or did it mean that for the term of the extension there must be no more breaches like those in the past? His Honour presumed that the latter was the meaning intended but if so it would not have been difficult to make the meaning clear. Clause 5 of the memorandum stated: "That an order of extension be made by the Court in respect of Memorandum of Mortgage No. 20144 (and of collateral Deed of Mortgage No. 45640) so that the same shall not expire before the extended term of the said Memorandum of Mortgage No. 28413." That meant that a Court order had to be obtained extending the first mortgage and some other mortgage collateral with it. The mortgagee of the first mortgage was a stranger to the proceedings and it would be difficult to read clause 5 as a covenant by the Cornfoots that the Court would grant such an application. The wording of that clause was more consistent with the interpretation contended for by Mr. Watts that there was no undertaking or covenant by the Cornfoots but only the loss of the extension if the conditions were not fulfilled. Clause 6 of the memorandum provided that the rate of interest on Goulter's mortgage be 6 per cent. That was the statutory increase of interest provided by Section 12 of the 1924 Act and such increase of interest had already been provided for by the earlier extension order. The clause was susceptible of the meaning that the Cornfoots agreed to pay 6 per cent. and it was equally susceptible of the meaning that as long as Goulter got his 6 per cent. the extension should stand. The last clause in the agreement was that providing for the preservation of all Goulter's rights against Monckton. There was certainly nothing in the clause to support the claim that the agreement must be read as constituting an undertaking by the Cornfoots to assume liability to Goulter for the mortgage as extended. A somewhat remarkable result ensued owing to Monckton not being party to the proceedings and the rights against him being reserved. As was pointed out by the Court in the **Nelson Diocesan Trust Board v. Hamilton** (*cit. sup.*) Monckton not being bound by the extension order could have sued the Cornfoots for their failure to pay the mortgage on due date. It was also open to Goulter at any time to call upon Monckton to fulfil his covenants, one of such covenants being to pay principal on due date. Monckton could not successfully raise as a defence to such a claim by Goulter that Goulter had agreed with the Cornfoots not to exercise his claims against him (Monckton), because the answer to him would be that he was no party to the arrangement with Cornfoots, and even if he was, such arrangement specifically provided that Goulter was to be free to pursue all his remedies against Monckton. Although, therefore, the Cornfoots had obtained an order whereby Goulter agreed that as far as they were concerned he, Goulter, would on the fulfilment of certain conditions allow the due date of the principal moneys to be extended, Goulter stipulated as one of such conditions that Goulter could at once pursue Monckton who would pass the responsibility on to the Cornfoots, and the result also of the stipulation was that Monckton need not wait for the extended term to expire or even wait for Goulter to move before he, Monckton, sued the Cornfoots. It would appear, therefore, that if the Cornfoots by signing the memorandum thereby assumed full personal and several liability to Goulter as fully as if they were original parties to the mortgage, they did not get really anything in return. It would be answered that when Goulter agreed to extend the term, he did not intend to worry Monckton until the extension had expired. But clause 7 of the memorandum did not provide for that but stated the very contrary.

In the cases His Honour had quoted novation had taken place and the original mortgagor was discharged. In the present case novation had not taken place. The claim was that the responsibilities of the original mortgagor remained untouched and in addition that third persons had agreed to shoulder the whole of the original mortgagor's responsibilities with one exception only, namely, that additional time was to be given to them. His Honour had already shown that the document had been so framed as to make illusory that promised additional time. In the present case the position contended for by Goulter was that novation did not occur, that the contract with A and B remained intact but that in addition C had agreed with B that a new contract was created between B and C, such contract being compounded of the A and B contract and additional terms inconsistent with the A and B contract. Not only was that new contract inconsistent with the A and B contract, but B could not exercise his rights under the A and B contract without entirely disregarding the rights of C in the new compounded contract. The above appeared to His Honour to be the result if the memorandum were construed as imposing on the Cornfoots the whole liability as original mortgagors. The memorandum required the assistance of an implied covenant in order to give it that effect. Mr. Watts submitted that the document had complete business efficacy if it was read as meaning that the Cornfoots did not covenant to assume the whole liability under the mortgage, but had provided that if the matters mentioned in the memorandum were done then the extension so far as they were concerned became effective. That extension, as His Honour had already shown, did not amount to very much, and it was at best a kind of floating extension liable to sink at any moment if any of the matters mentioned in the memorandum should not materialise. A refusal by the Court of an application to extend the first mortgage would have wrecked the extension. The order ceased to have any effect if the conditions in the memorandum were not complied with. If the order became void then, if the memorandum were part of the order, it would fall with the order. The facts showed that by reason of breach of the conditions the order actually did become ineffective and Goulter exercised his rights before the expiry of the extended time. The preparing and signing of a separate memorandum was due to the Judge's objection to the form of the order. The parties agreed to a form of order and a copy of that was attached to Mr. Grant's affidavit. That document provided that the Court was to be at liberty to rescind the order. Had the form of order as agreed upon and settled by the parties been adopted then Goulter, if he had desired to be free to exercise his power of sale, would have required to get the order rescinded. In that event the whole order and its conditions would have gone. The affidavits showed that counsel did not consult the parties as to the preparation of the memorandum because they looked upon the alteration as formal. It was thus the accident of the Judge's objection which placed Goulter in possession of the document which was now invoked as creating rights against the Cornfoots. His Honour thought that looking at the document and the whole circumstances the construction suggested by Mr. Watts was the more reasonable and His Honour accordingly adopted it.

Motion dismissed.

Solicitors for Goulter: **Burden, Churchward and Reid,** Blenheim.

Solicitors for Official Assignee and bankrupts: **Watts and Armstrong,** Hamilton.

Smith, J. March 6, 7, 8; April 30, 1929
New Plymouth.

TUNBRIDGE v. TARANAKI PUBLISHING CO., LTD.

Master and Servant—Negligence—Duty of Master to Provide Reasonably Safe Premises—Workman Injured by Fall from Platform—Platform Erected as Bridge Over Pit in Machine Room Used at Date of Accident as Means of Access to Paper Room—Workman Having Alternative Route—Platform Not Intended for Such Purpose—Platform Reasonably Safe for Purpose Intended—No Duty to Make Safe for any other Purpose—Alterations Made Subsequent to Accident Not Evidence of Breach of Duty—Plaintiff Negligent in Encountering Risk with Knowledge of Danger—Consent to Run Risk—Maxim *Volenti non fit injuria* Applied—Matters to be Considered in Determining Whether Maxim Applies.

Action by the plaintiff to recover from the defendant company damages for injuries sustained by him in the course of his employment by falling from a platform while on his way to a lavatory. The platform bridged a slope or pit in a room known as the machine room. From the evidence it appeared that in the premises where the plaintiff worked there were three rooms known as the paper room, the machine room, and the linotype room. The floor of the paper room was level with that of the linotype room, but was 18½ in. above the floor of the machine room. A portion of the floor of the paper room about 8 feet

in width sloped downwards towards the machine room and this slope continued, at a width of about 4 feet, into the floor of the machine room to form a pit about 1 foot 9 inches deep under the printing machine erected in the machine room. This pit was bridged by the wooden platform in question. The platform proceeded from the door of the linotype room, over the machine room and in the direction of the paper room. The end of the platform did not, however, reach the paper room but merely bridged the pit. From the end of the platform to the floor of the paper room was a distance of about 4 feet and the floor of the paper room was five or six inches higher than the end of the platform. The platform was a wooden one, about 7 feet long and about 2 feet 6 inches wide and was slightly springy. It was hinged at the end nearest the linotype room and could be raised or lowered. When lowered it sometimes rested on a benzine box placed on its side. The object of the box was to keep the platform raised above the paper rolls which were placed in the pit under the printing machine. After a paper roll had been used for two days it was sufficiently diminished in size to allow the platform to be lowered on to the machine room floor. The platform had been erected some four or five years. It was used to slide heavy forms of type from the linotype room to the machine room as well as for the passage of the men. The platform depended for its support entirely on its hinges. These were originally fixed by screws, but when the screws became loose, nails bent over were inserted in their stead. At the time of the accident the platform was to some degree wobbly, sufficient to permit of its canting if a workman sprang from it. It was proved that whether resting on the benzine box or on the machine room floor, the platform was also used by most of the workmen to pass to the outside of the building to the lavatory on the far side of the machine room. For five days out of seven, they must have stepped up the height of 18½ in. to the paper room floor either directly or by using the slope itself for an intermediate step. For the remaining two days, most of them sprang the gap of 2 ft. 11½ ins., rising some 6 ins. going out and descending some 6 ins. coming in, and requiring some 4 feet to execute the manoeuvre. There were two other ways to the lavatory. One was to go round the printing machine, and the other was to cross the sloping floor. There was no danger by either route. While the platform was raised all of the workmen going to the back had to adopt the alternative route round the machine. There was no evidence that the plaintiff or any other workman had ever complained to the defendant company before the accident that the platform was dangerous, nor was there any evidence of any previous accident to a workman in the use of the platform. Prior to the accident, the plaintiff's view was that the platform was dangerous, but he had always used it, and when it rested on the benzine box, he stepped or sprang across to the paper room floor. That was, he admitted, the habitual way. On the occasion of the accident the plaintiff was using the platform to spring to the paper room floor and not to descend to the machine room floor.

After the accident a carpenter was engaged to alter the platform and to make it satisfactory. He took up the play at the hinged end; fixed a board at that end for support underneath, in addition to the hinges; added a hinge (making three in all); used screws instead of nails to secure the hinges; and fixed two trestles each one foot high underneath the platform and extending to its full width so that with the platform in a horizontal position the trestles rested one on each side of the slope to the pit.

In the circumstances above stated the plaintiff claimed that his injury was due to the negligence of the defendant company.

Weston for plaintiff.
Cooke and R. H. Quilliam for defendant.

SMITH, J., stated that the plaintiff's claim was that the defendant was negligent in allowing its employees to use the platform with a slight downward slope and without support for its full width, as a bridge over the pit. It was not a claim that the defendant allowed its employees to use the platform in that state as a jumping-off platform to the floor of the paper room. The first question was—what duty did the defendant owe to the plaintiff in respect of the platform? The allegation was that the platform which the plaintiff used by permission was dangerous to use within that permission. The platform was part of the premises. The obligation of a master to his servant in respect of the premises was to use reasonable care to provide safe premises, and to use reasonable care to keep them safe. The duty was, in general, that of an invitor to an invitee. The master did not absolutely warrant safety. The duty to provide proper premises could not, His Honour thought, be delegated, but the duty of subsequent inspection and care might be. That was the rule with regard to plant: **Toronto Power Company v. Paskwan,** (1915) A.C. 734. His Honour thought it was also the rule with regard to premises. The plaintiff's attack was therefore upon the construction of the platform as part of the premises for which the defendant was responsible and for which the responsibility could not be delegated to a foreman.

The plaintiff naturally relied upon the alterations and said that they proved his claim. His Honour did not think so. The plaintiff's express claim was limited to the use of the platform as a bridge over the pit. No other use ought to be implied against the defendant. The platform was not long enough to bridge anything but the pit. For five days out of seven, it rested directly on the machine room floor. It was, in short, not a passage to the far shore of the paper room, but to the near shore of the machine room. The alterations were effected to provide against a tip when the workmen chose to jump to the paper room floor. That involved a new construction. Thereafter the platform could not be lowered to the machine room floor, and the formes of type could not be slid down as before. The defendant having paid for this alteration could not be heard to say thereafter that the platform was not to be used for jumping-off purposes; but because the defendant adapted its premises to the impulses of its workers, it did not follow that the defendant was foolish before. *Cf.* the observations of **Bramwell, B.,** *in* **Hart v. Lancashire and York Railway Co.,** 21 L.T. (N.S.) 261. In the present case, it was the workers who were foolish in using the platform not for the purpose for which it was adapted and authorised, but for a purpose for which it was not adapted and not authorised. His Honour found that the platform was reasonably safe for its authorised purpose. It must have been used many thousands of times within the last four or five years for that purpose without accident, and without complaint. The plaintiff himself made no complaint at the time of the accident, or for nine months thereafter, that the platform was dangerous. His Honour concluded that at the time of the accident the benzine box was properly fixed for the purpose of enabling the platform to act as a bridge over the pit, that there was no concealed trap of any kind and that the platform could have been negotiated safely to the floor of the machine room by any person walking with ordinary circumspection. Such a person could then quite safely have ascended the slope to the paper room floor, or stepped up 18½ ins. to that floor. The plaintiff did not use the platform for any such purpose, and the defendant owed him, at that time, no duty to see that the platform was reasonably safe for any other purpose. It followed that the defendant was guilty of no breach of duty towards the plaintiff and was not negligent.

His Honour said that there were two other grounds upon which he thought the plaintiff must fail: (1) Contributory negligence. For that purpose, His Honour assumed that the defendant was guilty of negligence in not providing a platform sufficiently safe at all times as a jumping-off platform for the paper room floor. The plaintiff stated, and His Honour must accept his evidence as against himself, that he always considered the platform to be dangerous. Notwithstanding that, he always used it, and always took a long step or jumped. He could, His Honour found, have used one or other of the two alternative routes. It would have been no real inconvenience to do so. When the platform was raised, another route had to be used. In those circumstances, the plaintiff's knowledge of the danger established the existence of contributory negligence on the part of the plaintiff: **Salmond on Torts,** 7th Edn., 61, 5 (b), the text of which was approved by McCardie, J., in **Baker v. James,** (1921) 2 K.B. 674, 684. *Cf.* **Canadian Pacific Railway Co. v. Frechette,** (1915) A.C. 871. (2) *Volenti non fit injuria.* The principle of that maxim in its strict operation negatived the existence of negligence on the part of the defendant. "The duty," said Bowen, L.J., in delivering the leading judgment in **Thomas v. Quartermaine,** 18 Q.B.D. 685, 695, "of the occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger, and voluntarily run the risk." The question in each instance was one of fact: **Smith v. Baker,** (1891) A.C. 325, overruling **Thomas v. Quartermaine** in so far as that case decided that the question was one of law. There must be not merely perception of the existence of danger, but also comprehension of the risk. Accordingly, the maxim did not apply unless it was found as a fact, that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it: **Canadian Pacific Railway Co. v. Frechette** (*cit. sup.*); **Letang v. Ottawa Electric Railway Co.,** (1926), A.C. 725. On the one hand, the employees generally regarded the platform, when resting on the benzine box, as suitable for use as a jumping-off

platform. On the other hand, the plaintiff (whose evidence His Honour must accept as against himself), although he followed the usual habit for a period of four or five years, always regarded the platform as wobbly and dangerous. The risk involved was the risk of falling, but he made no use of the safe alternative routes. He made no complaint, and no one else made any complaint. Yet he retained his view that the platform was always dangerous when resting on the box, and nevertheless used it. In those circumstances, His Honour found: (1) that the plaintiff clearly knew and appreciated the nature and character of the risk that he ran, and (2) that he voluntarily incurred it. "If," said Lord Atkinson, delivering the judgment of the Judicial Committee in **Canadian Pacific Railway Co. v. Frechette** (*cit. sup.*) at page 880, "a person, with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act, it must be assumed that he voluntarily incurred the attendant risk and danger, and the maxim *volenti non fit injuria* applies."

The following authorities showed varying circumstances in which a plaintiff had been held to be *volens* within the operation of the maxim. All of them operated together in the present case: (a) Encountering a known risk over a long period of time: **Membery v. Great Western Railway Co.,** 14 A.C. 179, 186; **Bellambi Coal Co. v. Murray,** 9 C.L.R. 568. (b) Alternative routes: **Bolch v. Smith,** 7 H. & N. 736, 746 (alternative routes to a lavatory). In **Letang's Case** (*cit. sup.*), the Privy Council said (p. 729) that in the circumstances of that case it was at least doubtful whether the existence of alternative routes would disentitle the plaintiff to the legal rights of an invitee, but they found it unnecessary to decide the question, as on the facts the other routes were more dangerous. Their Lordships did not rule out the importance of alternative routes, and the circumstances of that case were very different from the present, e.g., in that case, there was no habitual user of the steps by a servant, as there was in the present case of the platform. Alternative routes went to negative compulsion. If there was evidence of compulsion, as in **Yarmouth v. France,** 19 Q.B.D. 647, the plaintiff might not be *volens*. (c) Knowledge of the likelihood of injury: **Canadian Pacific Railway Co. v. Frechette** (*cit. sup.*) at p. 881. (d) No complaints: **Bellambi Coal Co. v. Murray,** 9 C.L.R. 568, 596.

Mr. Weston ingeniously suggested that as the plaintiff was not aware of the fact that he had an action at Common Law, if injured, he could not be regarded as *volens*. But the maxim required only a free and clear agreement to take the risk of the danger. The plaintiff's legal remedies were not the danger but the solution for the danger when actionable at his suit. Whether it was actionable or not in relation to the maxim, depended on the existence or otherwise of the agreement to take the risk of the danger itself and of nothing else.

Action dismissed.

Solicitors for plaintiff: **Weston and Billing,** New Plymouth.

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

Smith, J. May 8; 31, 1929. Dunedin.

WINSLEY BROTHERS v. WOODFIELD IMPORTING CO.

Sale of Goods—Implied Condition that Goods of Merchantable Quality—Sale of New Machine to be Imported from Abroad "Ex Wharf Oamaru"—Sale by Description—Machine on Arrival Found to be Damaged—Refusal by Buyer to Take Delivery—Test of Merchantable Quality Whether Machine Reasonably Capable of Doing Work for which New Machines of that kind Designed—Machine as Delivered Not Capable of Doing Such Work Though Damage to Machine Capable of Repair at Small Cost—Machine Not of Merchantable Quality—Magistrate's Finding of Merchantable Quality Not Binding on Supreme Court when Wrong Test Applied—Sale of Goods Act, 1908, Sections 13 (1), 16.

Appeal on law and fact from the decision of the Magistrate at Dunedin, in an action wherein the respondents (as plaintiffs) claimed to recover from the appellants (as defendants) the price of a thicknessing machine sold by the respondents to the appellants under a contract which provided for the sale of a thicknessing machine for the price of £90, all charges to be paid ex wharf Oamaru; terms, cash on delivery. The machine which was to be used for planing boards to an even thickness was to be imported from abroad. It weighed about a ton. When working, the planing blades, according to the specifications, revolved at a speed of 4,900 revolutions per minute. A shield which could be raised or lowered by a set-screw prevented the shavings from flying upwards. The machine arrived in New Zealand in October, 1928; when first examined, it appeared that the bolts holding the heavy machine to the packing case had pulled through the case. The result was that the machine and parts thereof were loose in the case. When the machine was delivered to the appellants on 5th November, 1928, they found further that, on opening the case, the machine and parts thereof had been improperly packed, with the result that the shield had been broken and that a bolt holding the set-screw had been sheared off. The appellants accordingly refused to take delivery of the machine on the ground that the machine was not of merchantable quality. At the hearing before the Magistrate, the respondents' evidence showed that the shield had two cracks in it several inches long, but that these did not show right through; also that a bolt evidently holding the set-screw had been sheared off. It was admitted that this shearing might have been caused by jolting in the case. It was also admitted that if the machine had had a severe shaking, other parts of the machine might have been strained, and that the spindle might have suffered injury, but these were said to be very improbable. The actual result was that the planing blades, when turned by hand at a speed of about 20 revolutions to the minute, clicked against the shield. It was also shown that the cost of supplying a new shield casting would be £1, and if the shield were oxywelded and a new set-screw supplied, the cost would be 7s. 6d. The Magistrate in an oral judgment held that the machine was of merchantable quality, in that there was nothing wrong with the mechanical parts, that the crack in the shield did not affect a vital part of the machine, and that it was of a trifling nature, and gave judgment for the plaintiff.

H. E. Barrowclough for appellants.

A. C. Stephens for respondents.

SMITH, J., said that the contract was not one for the sale of an ascertained machine but one for the sale of an unascertained machine by description. It was not in dispute that the machine was bought by description from a dealer in machines of that description. It followed that the operation of the maxim *caveat emptor* was limited by the implied condition that the goods must be of merchantable quality: Section 16 (b) of the Sale of Goods Act, 1908. The meaning of merchantable quality had been the subject of some discussion. In **Bristol Tramways Co. v. Fiat Motors,** (1910) 2 K.B. 831, where motor omnibuses were in question, Farwell, L.J., said (at page 841) that the phrase was used as meaning that the article was of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he bought for his own use or to sell again. That view was adopted by Cooper, J., in **MacEwan and Co. Ltd. v. Ashwin,** (1916) N.Z.L.R. 1028, where the article in question was a cream-separator; and by Sim, J., in **Burns v. John Chambers and Son, Ltd.,** (1921) N.Z.L.R. 916, where the article was a milking machine. In **MacEwan and Co. Ltd. v. Ashwin,** (*cit. sup.*) at p. 1037, Cooper, J., stated that he had directed the jury in that case that "merchantable quality" in reference to such an article as a cream-separator, meant that the separator was reasonably capable of performing the work for which it was designed. On the other hand, Salmond, J., in his remarkable judgment in **Taylor v. Combined Buyers Limited,** (1924) N.Z.L.R. 627, at p. 644, submitted the term to a detailed analysis, and he criticised the definition of Farwell, L.J. Salmond, J., at p. 645 said: "Goods sold by description are merchantable in the legal sense when they are of such quality as to be saleable under that description to a buyer who has full and accurate knowledge of that quality and who is buying for the ordinary and normal purposes for which goods are bought under that description in the market." In criticising the view of the Lord Justice, Salmond, J., said: "If, however, by 'performance of his offer' is here meant performance of his contract, the definition seems open to the comment that a reasonable man acting reasonably will accept the goods if he is legally bound to accept them as being in accordance with the contract; and therefore the hypothetical conduct of such a buyer cannot be used as a test of whether that condition is fulfilled or not. If, on the other hand, 'performance of his offer' means acceptance of an offer made by the seller, a reasonable man will only accept if the goods are fit for the particular purpose for which he requires them; but this, as already indicated, is not the true test of merchantable quality." His Honour dealt at some length with Salmond, J.'s criticism of the view of Farwell, L.J., and said that

in his opinion the tests proposed by Farwell, L.J., and by Salmond, J., would lead to the same result. The reasonable man acting reasonably after a full examination and under all the circumstances of the case would reach the same conclusion as to the merchantable quality of the particular goods in question as the reasonable buyer who had a full and accurate knowledge of the quality of those particular goods and who was considering that quality from the point of view of a person buying for the ordinary purposes for which goods of that description were bought in the market. In either case, the reasonable person would have regard to the state and condition of the particular goods as compared with the state and condition of normal goods of that description.

Tests such as those must be expressed in very general terms in order that they might be applicable to all classes of goods. But where definite defects existed in a particular type of goods, such as new machines, it might be possible to state a test of merchantable quality which, while within the purview of the general test, might yet be capable of more precise and ready application to the facts of a particular case than was the general test. As His Honour understood the matter, that was what Cooper, J., had in view in **MacEwan and Co. Ltd. v. Ashwin** (*cit. sup.*). His Honour ventured to think that the test Cooper, J., propounded to the jury in that case was a valuable one—viz.: whether the cream-separator there in question was reasonably capable of performing the work for which it was designed. It appeared to His Honour, however, that that test, as stated, was incomplete. It seemed necessary to add to it a reference to the kind of machine purchased, so as to indicate the norm of judgment. That was necessary because the sale was a sale by description. It was necessary to remember also that defects might exist in a new machine which might not render it incapable of doing the work for which it was designed, but which might nevertheless render it unmerchantable. Defects affecting the appearance, though not the working, of a new machine might be of that type. A computing scale, to be used on a counter, delivered with a broken glass dial, would be properly regarded as unmerchantable, although it worked perfectly; compare **International Business Machines Co. Ltd. v. Sheherban,** (1925) 1 D.L.R. 864, 39 English and Empire Digest, 451, note (f). But where a new machine had been bought by description, and on inspection it was found to be subject to defects hindering its operation, a proper test of its merchantable quality might, His Honour thought, be thus expressed: "Is this particular machine, as a new machine of the kind described in the contract, reasonably capable of doing the work for which new machines of that kind are designed?" Assuming a proper examination of the state and condition of the machine, then if the answer was in the negative, the machine would not be saleable as a new machine to a reasonable man who had regard to all the circumstances (per Farwell, L.J.) or to buyers in a market who were buying for the ordinary and normal purposes for which goods of that description were bought in the market (per Salmond, J.). From either point of view the machine would not be of merchantable quality. His Honour thought that the test suggested was the test actually applied by Salmond, J., on the facts in **Taylor v. Combined Buyers Ltd.** (*cit. sup.*) at p. 647. In applying the test proposed to new machines, regard must be had to the following matters: (1) The reasonable buyer must consider whether the "defects" were really defects. If, for example, there were dust and surplus oil or grease on a new machine when delivered, the reasonable buyer might well regard such defects as of no account. *De minimis non curat lex.* Such defects or blemishes might indeed be contemplated by the contractual relationship between the parties. Where, however, the defects were such that the reasonable man would take them into account, they would in general be defects requiring a remedy to enable the machine to operate as machines of that kind were designed to operate; and the cost thereof would be measurable, in the circumstances, at a money value. (2) It was important to know whether the defects were patent or latent at the time of inspection. If the defects were then patent, it was not to be supposed that the buyer's treatment of the new machine had been responsible for the defects. The machine had been in the control of the seller only. Where the defects were latent at the time of the buyer's inspection, and had been revealed only after some use of the machine by the buyer, it was reasonable to suppose that the Court would require proof of substantial defects in order to enable the Court to be satisfied that the defects complained of were defects existing at the time of inspection. That seemed to be a fair construction of the view taken by Salmond, J., in respect of the motor car in question in **Taylor v. Combined Buyers Ltd.** (*cit. sup.*). In such a case, the question would still remain whether the buyer was entitled to reject the machine, or whether by the length of his user he had lost that right and was limited to a claim in damages only. On the other hand, the fact that the property had passed would not of itself prevent rejection. Those matters were dealt with in **Taylor v. Combined Buyers Ltd.** (*cit. sup.*) at pp. 648 to 652. (3) The express terms of the contract between the parties might, in any particular case, modify the right of immediate rejection conferred upon the buyer by reason of a breach of the implied condition of merchantable quality. An agreement to "service" a machine might possibly, upon its true construction, have that effect. (4) The test, as stated, applied only to a new machine subject to a defect or defects interfering with its proper operations. It was inapplicable to a defect touching some other state and condition of a new machine, such as its appearance.

It now remained to apply the test proposed to the facts of the present case. The question must be: "Is this machine, as a new A.T.E. Thicknessing Machine, reasonably capable of doing the work for which new A.T.E. Thicknessing Machines are designed?" No regard was paid in the Magistrates' Court to the point whether new machines of the kind described in the contract might be expected to have the defects of that particular machine. It was obvious, His Honour thought, that they could not, for the planing blades would be destroyed if worked with such defects. Furthermore, it was a proper inference from the respondents' letters that the defects in question could not be expected to exist in new A.T.E. Thicknessing Machines. The respondents' view was that the defects were trivial, and could be easily remedied. The machine was, however, new. The defects were patent at the time of inspection. The buyer immediately rejected the machine and did not use it. The defects could not have been such as pertained to the state and condition of new machines of the kind described in the contract. The result of running the machine as delivered, and as it appeared at the time of inspection, would have been to destroy the planing blades of the machine. Such defects required repair. The cost of repair was measurable in money; and the Magistrate found that cost to be £1. The reasonable buyer would conclude, His Honour thought, that the machine, as a new A.T.E. Thicknessing Machine, was not reasonably capable, as delivered, of performing the work for which new A.T.E. Thicknessing Machines were designed. It was not, then, of merchantable quality. The reasonableness of that conclusion was shown by the fact that if the machine were forced upon the buyer as a machine of merchantable quality, he would, in effect, be obliged to pay £91 for a new machine which he had agreed to buy at £90. That view appeared to be supported by **International Business Machines Co. Ltd. v. Sheherban** (*cit. sup.*).

Mr. Stephens had urged that His Honour was bound by the finding of the Magistrate, as by the finding of a jury, that the machine was of merchantable quality. His Honour did not think so. If the Magistrate had really decided that there was no breach of the condition of merchantable quality, he should have given judgment for the full price of £90. It would be not unfair to say that he had found that the appellants were entitled to damages to the extent of £1 for some breach on the part of the respondents. That breach could only be a breach of the condition of merchantable quality. But the appellants had done nothing to compel them to treat such a breach of condition as a breach of warranty sounding in damages only; and the right of waiving the condition belonged to the appellants and to them alone: Section 13 (1) of the Sale of Goods Act, 1908. If they had elected so to do, they could have brought their own action or counter-claim, and supported it by their own evidence. The Magistrate had not applied the proper test of merchantable quality, and from his judgment it would appear that he had misdirected himself. His Honour was, therefore, not bound to accept his finding.

Appeal allowed.

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

Solicitors for respondents: **Mondy, Stephens, Monro and Stephens,** Dunedin.

It is no uncommon thing for experienced counsel inadvertently to address justices or magistrates as: "Your Honour." The other day a young counsel, accustomed apparently to other spheres, reversed this order of things by twice addressing the Court of Appeal as "Your Worships."

Desertion by a Husband.

Effect of Payment of Maintenance on Wife's Right to Divorce.

The interpretation placed upon the decision of Salmond, J., in *Morris v. Morris*, (1920) N.Z.L.R. 706, by the more recent case of *Roulston v. Roulston*, (1928) N.Z.L.R. 562 (see the note on "Desertion" contained in *Sim's Divorce Act*, 4th Edn., at page 16), is a matter of some concern to the practitioner who is asked to advise a wife on the right to divorce on the grounds of desertion particularly so where, apart from questions of maintenance during the period, the necessary elements seem to be present.

Prior to the coming into force of the Divorce and Matrimonial Causes Amendment Act, 1913, the existence of a separation order under the Destitute Persons Act, 1910, was an absolute bar to a wife, who had obtained such an order, subsequently obtaining a divorce on the grounds of desertion, such desertion arising from the making of the order: *Harriman v. Harriman*, (1909) P. 123. Section 6 of the Divorce and Matrimonial Causes Act, 1913, provided that, if a married woman while living separately from her husband was for any period habitually and without just cause left by him without reasonable maintenance, he should be deemed for the purposes of the principal Act to have deserted her wilfully and without just cause or reasonable excuse, whether her separation from her husband took place or continued by mutual consent, or by virtue of a judicial decree or order made under any statute or in any other manner. The effect of this provision was to extend the law in favour of a wife living under such circumstances and to allow her to obtain a divorce.

The interpretations now under discussion seem to regard the Section as a restriction and to make the question of payment or otherwise of maintenance a matter for consideration in cases where, it is submitted, it was never intended to apply.

Smith, J., in his decision in *Roulston v. Roulston*, (*cit. sup.*) at p. 565, says:

> "In *Morris v. Morris*, (1920) N.Z.L.R. 706, Salmond, J., held that the effect of that section" (Section 6 of the Divorce and Matrimonial Causes Amendment Act, 1913) "was that the husband who provides his wife with reasonable maintenance, even though he does so under the legal compulsion of the Destitute Persons Act, cannot be treated as having deserted her."

The logical result of this would be that in every case where a wife claims a divorce on the grounds of desertion, and the desertion was otherwise proved, then the fact that adequate maintenance had been paid to the wife by the husband during the period would be a bar to the wife obtaining her divorce although, if the act of desertion had been that of the wife, the husband would be entitled to succeed in a petition presented by him: *Davie v. Davie*, 15 G.L.R. 205; *Burfield v. Burfield*, (1918) G.L.R. 18. The position thus created is an impossible one as is illustrated by the following examples:

(a) A husband leaves his wife with her consent and goes on an extended holiday. He decides not to return but pays his wife adequate maintenance regularly.

(b) A husband says to his wife: "I will not live with you any longer," and without her consent leaves the matrimonial home and does not return but makes her an adequate allowance.

If the law as laid down in *Roulston v. Roulston* is correct it would seem that in both of these cases the wife could not obtain a divorce.

It is submitted that on the authorities there is no justification for such a rule. A careful examination of the judgment in *Morris v. Morris* shows that no such general rule was laid down in that case. The learned Judge in that case said (pp. 70, 71): "A wife who had by her own act obtained a judicial decree which destroyed the obligation of marital cohabitation was precluded thereby from alleging that her husband's act in remaining apart from her constituted a wilful desertion without just cause. The law on this point, however, has been mofified in favour of the wife by S. 6 of the Divorce and Matrimonial Causes Amendment Act, 1923." (The learned Judge here quotes the provisions of the Section). The lines which then follow:

> "This being so, the petitioner can succeed only if she can show that for the statutory period of three years she has been habitually left by the respondent without reasonable maintenance,"

apply, it is submitted, only to the particular facts of that case and are not intended to lay down any general proposition of law which would be applicable to all cases of desertion.

In England desertion has been a ground for divorce or judicial separation since the Matrimonial Causes Act, 1857, and it was laid down as long ago as 1858 in *Ward v. Ward*, 1 Sw. & Tr. 185, that the party charged with desertion must be proved to have withdrawn from cohabitation contrary to the wish of the petitioner. A similar definition is found in *Reg. v. Leresche*, (1891) 2 Q.B. 418, at p. 420, where it was said by Lopes, L.J., delivering the judgment of the Court of Appeal, that "a husband deserts his wife if he wilfully absents himself from the society of his wife, in spite of her wish." The case of *Macdonald v. Macdonald*, 4 Sw. & Tr. 242, laid down the law that where a husband has abandoned the society of his wife without good cause the fact that after doing so he pays an allowance regularly is no answer to a charge of desertion. In *Jackson v. Jackson*, (1924) P. 19, the essentials of desertion are discussed and no support can there be found for the proposition in *Roulston v. Roulston*. It seems on the other hand to be settled law that the mere payment of maintenance, unless paid and accepted on the condition that the wife will no longer molest the husband, is not bar to a petition on the grounds of desertion: *Buckmaster v. Buckmaster*, L.R. 1 P. & D. 713; *Parkinson v. Parkinson*, L.R. 2 P. & D. 25.

It is generally accepted by the authorities that desertion is committed by the party who by his or her acts brings the cohabitation to an end and that payment of maintenance is only evidence that there was not an intention to desert, but once prove desertion and then payment is immaterial. If this be so it is difficult to see how the payment of adequate maintenance is in itself a bar to a wife's petition in New Zealand on the grounds of desertion, except in cases where the parties are living apart as a result of an order for separation obtained by the wife under the provisions of the

Destitute Persons Act, 1910, and there seems further to be no authority for invoking Section 6 of the Divorce and Matrimonial Causes Amendment Act, 1913—now Section 13 of the Divorce and Matrimonial Causes Act, 1928—in order to lay down a rule *that in all cases there can be no desertion where adequate maintenance is paid.*

R. H. MACKAY.

Taranaki District Law Society.

Second Annual Conference.

Last year the Taranaki District Law Society tried the experiment of holding a Conference of its members and so successful were the proceedings that it was decided to make the function an annual one. The Second Conference was held in New Plymouth on Wednesday, the 12th June, some thirty-five members from all parts of the Taranaki Province attending.

In the morning the practitioners met in conference with representatives of the medical, dental, accounting, architectural, surveying, and engineering professions, and various matters affecting the different professions were discussed. The local Members of Parliament, Messrs. S. G. Smith, H. Dickie, and G. R. Sykes were present, and expressed great pleasure at having the opportunity of obtaining, at first-hand, information on these questions. In the afternoon members of the Law Society met in conference, Mr. G. M. Spence, President of the Society, presiding. Mr. H. F. Johnston (Wellington) delivered an address on "The Importance of the Profession to the Progress of the Empire," and Mr. A. K. North (Hawera) read a paper on "Anomalies of Legislation." At the conclusion of the latter paper the Conference discussed in committee the proposed Solicitors' Guarantee Bill and placed its views before the Members of Parliament.

At the conclusion of the proceedings the members attending the Conference, as the guests of the N.Z. Shipping Company, paid a visit of inspection to the s.s. "Ruapehu" at the port. In the evening a dinner was held at the "White Hart" Hotel. Mr. C. H. Weston proposed the toast of "Our Guests," to which reply was made by the Mayor (Mr. H. V. S. Griffiths), Mr. C. H. Wynyard, and Dr. G. Home. The toast of "Parliament" was proposed by Mr. L. A. Taylor, and Mr. S. G. Smith, M.P., replied. Mr. W. D. Armit, proposed the toast of the "Legal Profession," and Mr. H. F. Johnston (Wellington) responded

By the Judges Retirement Act, 1918, Judges of the Supreme Court of New South Wales have to retire when they reach the age of seventy. Mr. Justice Campbell, believing himself nearly to have attained that age, announced his retirement, but on subsequently obtaining a copy of his birth-certificate found that he had already in fact celebrated his seventieth birthday, and had been performing his judicial duties after reaching the age for retirement. It is stated in the *Australian Law Journal* that it is understood that a summons has been taken out to test the validity of a judgment given by Campbell, J., after he had reached the age of seventy.

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 172)

FINDING A SEAT.

About this time the great inconvenience of having a Solicitor-General without a seat in the House became urgent, and the Prime Minister (Disraeli) had to come to a decision on the point. So the Lord Chancellor (Cairns) wrote to Hardinge Giffard as follows:—

September 14, 1876.

Confidential.

MY DEAR SOLICITOR-GENERAL,—

A vacancy on the Bench will occur on the promotion of Mr. Justice Blackburn, and I shall be happy, if it is agreeable to you, to submit your name for Her Majesty's approval to fill it.

I do not know whether you will be inclined to relinquish, for the repose and dignity of the Ermine, your prominent position at the Bar, but it is only fair to you that I should, on an occasion like the present, communicate with you frankly as to the relations between the Law Officers of the Crown and the Government.

It has been a matter of much regret and no small inconvenience to the Government that, owing to the difficulty you have found in obtaining a seat in the House of Commons, they have been during the last Session deprived of the advantage of your aid in Parliament. They would deeply regret that the continuance of this state of things should lead to a severance of their official connection with you, but it would be absolutely necessary, if this connection is to continue, that you should be able to meet Parliament at the commencement of the ensuing Session with a seat in the House.

The Prime Minister wishes me to express to you the satisfaction he would feel if both the present Law Officers had seats in the House of Commons, but he is convinced that you will see how indispensable this condition is to the tenure of office.

Believe me, my dear Solicitor-General,

Yours faithfully,

CAIRNS.

Sir Hardinge Giffard's answer.

September 20, 1876.

DEAR LORD CHANCELLOR,—

Your letter dated the 14th has only now been put into my hands. Permit me first to express to the Prime Minister and yourself my sense of the kindly tone of your communication. In anticipation of the difficulty which might arise unless I were provided with a seat in the House of Commons, a seat (I believe a perfectly safe one) has been provided for me. The Writ will be moved for the first day of the Session, and I have myself no doubt of the result of a contest, if a contest there be. Under these circumstances I feel myself justified in declining the great honour your lordship is good enough to offer me, an honour, however, which in my case

would involve the most acute feelings of disappointment, as it would involve the relinquishment of any participation in political life. It still remains my hope that I may be of some use in the House of Commons, and I certainly do feel with the Prime Minister that without a seat in the House my official connection with the Government would not continue.

I remain, dear Lord Chancellor,
Very truly yours,
HARDINGE GIFFARD.

So Sir Hardinge Giffard, like his ancestor at the Battle of Hastings, "preferred the fighting line." And indeed it took some courage, as by refusing a Judgeship he ran some risk of losing any further promotion under "Dizzy's" administration. But his position at the Bar was so unassailable that his confidence was justifiably strong. All the same, if he had lost Launceston it would have been awkward, especially as it happened that the Conservatives went out of office in 1880.

In February, 1877, Giffard was elected member for Launceston, and retained the seat at the General Election of 1880, among the general overthrow of the Conservative party. When he took his seat in the House of Commons he wrote to his friend, Cecil Raikes, to remind him of an old promise to act as one of his sponsors, which promise was duly kept. Indeed they were always friends, but the friendship was cut short by Cecil Raikes' death at the age of 53, in 1891.

Rather an amusing scene took place when Giffard arrived at the table of the House of Commons with his sponsors, and was called upon to produce the return to the writ. For several minutes he searched in vain for the all-important paper, and it did indeed look as if the malign fates had reserved their energies for one last blow, for it could not be found. Giffard desperately sought in pocket after pocket, laying their contents on the table, while the House laughed at his anxious face and shaking hands. But at last the document was found on the bench under the Gallery, where he had been waiting for his summons. His popularity was attested to by the hearty burst of cheering when he at last handed it in, and by the number of friends who crowded round to congratulate him.

THE PENGE MYSTERY.

Another case, which was described as the Penge mystery, became something of a *cause celebre* in 1877. The Attorney-General (Holker) and the Solicitor-General (Giffard) prosecuted for the Treasury. Four people conspired to murder by starvation the wife of one of them, Louis Stanton, who was then living in criminal intercourse with a young woman, Alice Rhodes, and wished to marry her and live on the proceeds of his wife's property. His brother, Patrick Stanton, with his wife and her sister, Alice Rhodes, were all implicated. Louis Stanton first caused his wife to sign a paper making over to him all her property, 3,000*l*, and then deliberately shut her up and starved her. All four were condemned to death.

To pass from these dark scenes of horror and crime to other scenes of treachery or dishonesty, and always to see the seamy side of human nature, must tend in most cases to harden and sour a man's outlook on life. But it never seemed to touch Hardinge Giffard. His naturally sweet and strong nature seemed incapable of harbouring cynical or bitter thoughts. His daughter, Lady Evelyn Giffard, writes of him: "I think my father's character was a confutation of the idea that the Law makes men harsh and suspicious. I never knew him say a hard thing of anyone, or judge anyone unheard. I remember his quoting from a sermon, 'The Almighty did not judge the first of men without hearing first what he had to say for himself.' He did not like to refuse to help any hard case, and, I fear, was often taken in, as he had, of course, no time to make searching enquiries."

THE TURF FRAUDS CASE.

In the same year, 1877, Sir Hardinge took a leading part in what was known as "The Turf Frauds" case. Before Baron Huddleston at the Old Bailey, Harry Benson, William Kerr, Frank Kerr, and Edwin Murray were indicted for forging a warrant for 10,000*l*. Counsel for prosecution: The Solicitor-General, Messrs. Bowen and McConnell. Counsel for prisoners: Messrs. Willis, Q.C., Avory, Sergeant Parry, Crain, Straight, Bisley, and Montagu Williams. The prisoners had induced the Comtesse de Goncourt to enter into a number of betting transactions, by means of a sham "sporting paper" and an alleged "system." The Comtesse was at first successful, and received large cheques drawn upon "The Royal Bank of England," so continued sending remittances as requested. She was then told that, if she wished to keep the money she had already won, she must comply with the requirements of the laws of England, and send another £1,200. She was willing to do this, but, as she had found some difficulty in cashing her cheques, she was obliged to raise money. She therefore consulted her legal advisers in Paris, who at once made enquiries, and found the whole thing was a fraud. The prisoners were all convicted, Benson getting seven years' penal servitude, the two Kerrs and Bale ten years each, and Murray, who was accessory after the fact, 18 months' hard labour.

During the trial it came out that attempts had been made to corrupt some of the prison officials, and plans for an escape were found in Benson's possession. As a result, Chief Inspectors Meiklejohn, Druscovitch and Palmer, and a solicitor named Froggatt, were arrested and charged with conspiracy. It was proved that the detectives had connived at the frauds, and helped Benson and Kerr to evade arrest, and had been handsomely paid for so doing. Also that they had refrained from stopping the bank notes which had been paid to the prisoners, or, if they had already been stopped, they warned the prisoners of the fact. Froggatt was charged with destroying evidence. All the prisoners were convicted, and got two years' hard labour apiece.

Hardinge Giffard was instrumental in bringing these rogues to justice. So many raids had failed that he, then Solicitor-General, decided that high officials at Scotland Yard must be involved. So he sent for the High Commissioner of Police, and with him went to the Chief Magistrate at Bow Street and obtained a warrant, unknown to anybody but these three. Liverpool police were sent for, and, until they arrived, did not know what they had come for. Sir Hardinge Giffard met them personally at Euston Station, and put the warrant into their hands. They were ordered to execute it, and the raid was successful, catching amongst them the Chief Inspectors, as has been said.

(To be continued.)

London Letter.

Temple, London,
24th April, 1929.

My dear N.Z.,

The retirement of Lord Shaw of Dunfermline and the consequential Scottish appointments have, for our purposes, a double interest. The most practical is the change in the constitution of your Judicial Committee as well as the change in the constitution of our House of Lords, appellate tribunal. The second interest is more remote and abstract: the illustration of how that stream of promotion, once a man is lucky to be afloat on it, carries him further and further from the struggle of existence and the courts but into quiet and pleasant pools which are anything but backwaters! The Lord Advocate, who becomes our and your new judge of ultimate appeal, is a young and attractive-looking man, of whom I know no more than that I once had the seeing through the House of Commons of a Bill in which he was authoritatively concerned and was then informed, and came verily to believe, what a pleasant and efficient man he was and is. He follows the footsteps of his father, Lord Watson of Thankerton, who also floated upon that stream upon which he had had the hardihood and the judgment and skill to throw himself: Solicitor-General for Scotland, Lord Advocate and Lord of Appeal. Of the new Lord Advocate, formerly Solicitor-General for Scotland, and of the new Solicitor-General for Scotland I know little or nothing at the moment; for us, in the law, Scotland is veritably a foreign country, and indeed I think I have had occasion to point out to you earlier that, as to certain provisions as to procedure and service out of the jurisdiction, Scotland is even more foreign, more remote, than the other countries of the world which are foreign in common parlance, also.

The death of Sir Herbert Austin is too sad to comment upon here, and I ask your leave to make no more reference to it than this, that the tributes paid to his memory on Monday last, at the Old Bailey, where he so long and so arduously worked in official capacity, and by the City Recorder, the Common Serjeant, the Director of Public Prosecutions and the leader of the Bar there practising (not to mention the confirmation of Judge Atherly Jones, K.C., and Sir William Waterlow on behalf of the Court of Aldermen and the City Corporation) contemplate a man of great forensic learning, as you may suppose, and also a man of many friends and their friendships formed as well by ready help on all difficult occasions as by the gaiety of a disposition reluctant to be in the least depressed by continual and increasing pain. You have, alas! had more than your share recently, of sad deprivations among judicial authority; I have just had the privilege of reading your public, professional appreciation of the man whose death was perhaps your most striking loss. We will not further contemplate this aspect of things.

The publication of Lord Birkenhead's speeches, prefaced by a note by Lord Hugh Cecil, will attract your attention. The belligerence of the speaker is interesting to observe in the speeches thus collected: there you see portrayed a feature of the great man and from it you can infer his courage as advocate and, without offence, careerist. There is missing, however, to my mind the humourous atmosphere, less a matter of word and phrase than the general effect of the sally framed by the personal attitude and expression of the man delivering it. Lord Birkenhead, though good on paper, is not found at his best there; he must be seen to be believed, or at least to be appreciated. To read his orations is to miss the footlight element, a prevailing element, though in the best sense, in the man. As well as his ready tongue, his profound learning and his nimble brain, it is his personal magnetism, "got over," that achieves his results. Those of you who have not yet been to England, but shortly propose coming, I venture to advise to read the speeches and form your impression of a man whose actual oration, if he happens to make an interesting one in the House of Lords or on the political platform and you happen to be there to hear him, you will find very much more enjoyable. I can illustrate my point by saying, as contrast, that if you thus made the acquaintance of our admirable honest and idealistic Mr. Baldwin by reading the wonderful things he says, and then came to hear him, you would be singularly disappointed, though not so much disappointed as you might have been a year or two ago, for he improves. The truth of Lord Birkenhead is, of course, his astonishing vitality; physical, as instanced by his adequate (though always well-groomed) head of hair; mental, as made manifest by the working of his mind and tongue as you hear him speak; of morale, as you appreciate from a study of his career and from the realisation of your feeling, upon seeing and hearing him, that there must still be lots more career to come, though what that may be, gone into the City, it is impossible to conceive. His infinite, and admirable, exuberance will, we may be sure, devise a something else and achieve it; and if you hear talk of any bad qualities in him, forget that talk, since, even if it were true, it is no concern of ours and has no bearing upon his public values and services. For my part, having known him by sight from his (professional) youth up, and having seen no deterioration in him but a constant development, I do not believe a word I hear in this regard, and I take care that I hear as little as possible. There is always personal gossip about such "star-performers": sometimes it is wholly false, sometimes it is wholly true, and most often it is half false and half true. I have never collated, in my mind, exactly what is said to the personal detriment of the Earl of Birkenhead, any more than I did so in the case of F. E. Smith; I only know that an eminent Judge of the High Court, Oxford colleague of his and family acquaintance of mine and a single-minded man of all the domestic virtues, entertains the highest opinion of him both as to his abilities and his aforesaid vitality.

The divergence of view of the Court of Appeal, Lords Justices Greer and Russell (Lord Justice Scrutton dissenting), upon the subject of votes attributable to the residence of directors upon their Company's premises—*Frost v. Caslon*; *Frost v. Wilkins*, decided early this week—is amusing in its context, but not necessary to be reported here in detail. It represents, or will on many a political platform come to represent, the battle of capitalism against labour, in that it may be made to indicate a ruse on capital's part to weight the balance of democracy by getting more than a fair share of its voice, in politics, for wealth. The case turned upon the occupation of "business premises"; and you will readily understand the points made on both sides, when the premises were, for business purposes and primarily at any rate, the company's and not the director's.

The less recent case, *Carr v. Carr and Goldup*, is of a general interest from the point of view of those concerned in the administration, or the obtaining for clients, of justice. The case was, in origin, an undefended divorce suit, promoted under the poor persons' provisions and procedure. Hill, J., observing a suspicious reference in the correspondence to the petitioner's complacency or even sympathy in contemplation of the respondent's prospective adultery, felt himself unable to decree; the assistance of the Court of Appeal was invited, investigations made upon the basis of the observations of Hill, J., having proved to be to the advantage of the petitioner; and the Court of Appeal, praying in aid the consideration, enquiry and supervision of the King's Proctor, remitted to Hill, J., for retrial upon a basis free of the suspicion which he had had to entertain. Now, there is no point of law and little point of fact in all this; but the instance serves to show how a poor person may avoid injustice under the merciful provisions of the day; and great interest attaches to, or great enlightenment is afforded by, the utterances of Hill, J., when the case came before him on the second occasion. Not before had been so appreciable the difficulties of a tribunal having to deal with a matter upon evidence given in chief only; nor before had been realisable the assistance which a Court derives from the process of cross-examination of a witness by the opponents of the case in support of which he testified. The whole matter is something of a lesson to advocates who, at one time or another, may find themselves briefed to present a case to which no answer is made but as to which there is more than a formal need for the Court to be satisfied. The obvious deductions, from the process of the case and from the observations made during the course of it, is that counsel, upon being instructed in such a case, should put himself in the position of an unwilling, or at least a disinterested, judge and have himself, in that capacity, satisfied before he lets himself be taken into court upon the case.

The least recent of all my cases, *Sasha Ltd. v. Stoenesco* has a technical and, to all of us in the profession who have ever reached that first eminence when the professional photographer thinks it worth while to photograph us in case we may go higher and our picture have a press value, a personal interest. Is the ownership of the copyright in a photograph in the photographer or in the sitter? This is not a new question, nor is it capbale of an answer of a general overriding nature. It depends upon the circumstances; in the circumstances, here, Mackinnon, J., found for the plaintiff. Was the plaintiff the photographer or the sitter, you ask? Think again, Sir, I pray you. Invest though we may our company with all the *persona* and privileges of the individual, I hardly think the most advanced legal thought conceives a company capable of being photographed for press purposes.

So much for the law and things legal. It is to me a significant sign, that the lawyer is now with increasing frequency becoming the object of kindly and even laudatory references in the press and in public, whereas the stockbroker comes to be the villain of the piece and the victim of odious expression. That means, to me, that the latter is drawing upon the private purse of the public in lieu of the former!

Yours ever,

INNER TEMPLAR.

Australian Notes.

(By Wilfred Blacket, K.C.)

The New South Wales Bill to amend the Matrimonial Causes Acts passed by the Legislative Council, and subsequently agreed to by the Assembly with amendments, remained at that stage when the Session ended. It provides for several very important changes in jurisdiction and procedure and in particular enables any three Judges of the Supreme Court by rules of Court to delegate to the Registrar power to do such things and "transact such business and to exercise such authority and jurisdiction as is now done, transacted or exercised by the Court except in respect of the hearing of suits (in which an appearance is entered) or in respect of matters relating to the liberty of the subject," with power to the Registrar to refer any matter to the Court, and with power to the Court to direct any matter decided by the Registrar to be reargued before the Court. Obviously the intention of the clause as it originally stood was to cast upon the Registrar the duty of hearing cases in which no appearance had been entered, but in the Assembly the words included in parenthesis were struck out and we shall have to wait until September to know "whether the words proposed to be omitted shall stand part of the Clause," but even if the will of the Assembly prevails, the Registrar may be clothed with very important judicial powers.

Another very important amendment is in Clause 2 of the Bill which provides: "The Court may make any order as to the costs of any proceedings . . . . which it deems just, and except in the case of proceedings on appeal may order payment of costs as between solicitor and client . . . . The Court may by consent of all parties appearing at the hearing before the Court assess the costs of any proceedings, and in the case of interlocutory proceedings may do so without the consent of the parties and the costs so assessed shall be recoverable from the person ordered to pay the same in the same manner as if they had been duly taxed and certified by the taxing officer."

Under the Acts to be amended, orders for payment of alimony and maintenance are enforceable by attachment only, but this Bill provides that in cases where there is inability, through lack of means, to proceed by attachment, proceedings may be taken in the Police Court and empowers the Justices to deal with the matter in all respects as though it were a complaint under the Deserted Wives and Children Act—even to the extent of casting the defaulter into the dungeon for such case made and provided. One other amendment provides for a jury of four in lieu of the jury of twelve as now required in cases where damages are claimed against a co-respondent.

Miss Olive Pearce had an agreement with her employer, W. H. Gardner, of Petersham, hairdresser, that if she attended to the hair of any of her, or anyone else's girl friends after 1 p.m., closing time on Saturday, that she would put one-half of the proceeds into the cash register, and invest the balance on ponies or otherwise as she thought fit. The Union Secretary caught her putting a permanent wave into some deplorably flat hair at 3.30 p.m. on one Saturday. The Court held that Olive was an employee and that there had been a breach of

the award. It is to be hoped that the wave will be as permanent as the penalty for no one ever troubles about paying up any penalty in the Industrial Court. A penalty imposed upon employees is simply the expression of a pious hope; a penalty imposed upon employers is a matter to be dealt with by the Minister of Justice.

School-teaching is not an industry. The Federated State School Teachers—who are always anxious to learn—found out that fact when they listened to the majority wisdom of the High Court. The decision of the majority of the learned Judges, Knox, C.J., Duffy, Rich and Starke, JJ., contains this passage: "They are not connected directly with the production or distribution of wealth, and there is no co-operation of capital and labour in any relevant sense, for a great public scheme of education is forced upon the communities of the States by law." Isaacs, J., dissented. He said that "the contention of the respondents sounds like an echo from the dark ages of industrial and political economy. It further neglects the fundamental character of industrial dispute as a distinct phenomenon of modern society." Surely His Honour spoke without his usual accuracy when he describes an "industrial dispute" as a "phenomenon." Is it not rather the natural and inevitable result of industrial legislation when applied to an industry. The learned Judge is also reported to have said of and concerning the contention of the respondents: "It not merely ignores the constant currents of life around us, which is the real danger of deciding questions of this nature, but it also forgets the memorable industrial organisation of the nations not for the production or distribution of material wealth but for service, national service, as the service of organised industry must always be." *C'est magnifique*—and no one, except the other four Judges, would venture to say it is not the law.

The Industrial Commission, after jolting over many ruts on the road to fixation of the basic wage for a man and one wife, has now settled down to arduous work The walrus, it will be remembered, wanted to chat about "shoes and ships and sealing wax and cabbages and kings": the Commission's enquiry has an equally wide range. It has been informed upon sufficient evidence that a bricklayer must wear a four-shilling silk necktie in working hours. Other evidence proves that the wife of a worker pays £5 6s. a year for face powder at 4s. 6d. a box. The boxes costing 1s. 6d. a box are as, it is alleged, only suitable for use by other women. Tweed suits for workers must be made to order at a cost of £9 9s. It is within the knowledge of the public that "ready-to-wear suits" are sold at 60s. to 80s., but these are probably snapped up by Supreme Court Judges who can shop early.

In England there is more or less strictly observed rule of old origin that the words of a living text-writer must not be cited to the Courts as authorities. The following dialogue is reported as having recently occurred in the Court of Appeal:

Counsel: "I now refer, my Lords, to Scrutton on Charter Parties, 12th Edn., p. —."

Scrutton, L.J.: "You are aware that the author of that book is still alive?"

Counsel: "I'm sorry, my Lord."

Rural Intermediate Credit.

Progress to Date.

The following account of the operations to date of the Rural Intermediate Credit Board has been supplied to this Journal by the Commissioner of Rural Intermediate Credit (Mr. J. W. Macdonald, C.M.G.):—

"Now that the system of rural finance which was instituted by the Act has been put into practical operation, it will be of interest to readers, and to country practitioners, in particular, to learn what progress has been made with the scheme.

"In terms of Section 14 of the Act, the Dominion has been divided into sixteen districts, in which district boards have been established, with headquarters in the following towns: Whangarei, Auckland, Hamilton, Gisborne, Napier, New Plymouth, Wanganui, Palmerston North, Masterton, Blenheim, Nelson, Greymouth, Christchurch, Timaru, Dunedin, and Invercargill. Officers of the Board, under the designation of 'District Intermediate Credit Supervisor,' have been appointed at each of these towns; and in addition, for the more convenient conduct of the Board's business in certain of the districts, additional District Intermediate Credit Supervisors have been appointed at Waipukurau, Dannevirke, Hawera, and Wellington.

"In deciding upon the personnel of the district boards the central Board has aimed at making them as representative as possible, and, as a general rule, the constitution of the district boards is as follows:—

(a) The District Intermediate Credit Supervisor stationed at the headquarters of the district, as chairman of the district board:
(b) A representative of a Government Department with such special knowledge of farming matters as to render his services of particular value to the district board; the Lands and Survey, Valuation and Agriculture Departments are represented on the district boards:
(c) A stock and station agents' representative nominated by the local stock auctioneers and agents' association:
(d) and (e) Two prominent farmers resident in the district, selected as far as possible so that all farming interests in the district are represented.

"The calibre of the district boards is uniformly high, and the announcement of the personnel evoked favourable comment in regard to the qualifications of the members appointed. It is a matter for general satisfaction that persons of such prominence in their respective spheres of activity should be willing to make their services available in the interests of the farming community. The personnel of the district boards is a guarantee that in the granting of loans all relevant factors will receive due consideration, and that the interests both of investors in the Board's debentures and of borrowers will be properly studied. In addition to the specific functions with which they are entrusted under the Act, the Boards are in a position to render valuable advice on problems of rural finance not only to the central Board but also to all classes of borrowers.

"The Act authorises the Rural Intermediate Credit Board to invest its funds in any of the following ways:—

(a) By advances to farmers as members of a special class of limited liability company, termed 'co-operative rural intermediate credit associations' (Part II of the Act);

(b) By advances to farmers individually, the loans being additionally secured by the partial or entire guarantee of a company or private individual (Part III of the Act);

(c) By loans to farmers' co-operative organizations (Part IV of the Act);

(d) By discounting farmers' promissory notes or bills of exchange (Section 15 of the Act, and paragraph 46 of the Rural Intermediate Credit Regulations of the 21st December, 1927).

"It should be noted that the total advances which a farmer may obtain from the Board, whether he applies through an association or direct, or obtains accommodation through a promissory note or bill of exchange presented to the Board for discounting, may not exceed the sum of £1,000; and, in the case of loans to farmers as distinct from loans to co-operative organisations, the loan must be applied for one or more of certain specified purposes set out in Sections 48 and 60 of the Act.

"The securities taken by the Board are mainly chattels securities being mortgages of live and dead stock, implements, crops, produce, and the like with, in suitable cases, collateral securities over land, and, in the case of loans to individual farmers under Part III of the Act, guarantees by approved persons or companies for not less than 20 per cent. of the original amount of the loan, or, where deemed necessary, for a larger percentage. Where a loan is granted to a member of an association the advance is made by the Board to the association and the security from the farmer-borrower is taken in the association's name. The Board is suitably secured in each case by a charge over the association's assets and the investments made by the association out of the funds advanced by the Board.

"In view of the formalities to be complied with in the formation of associations established under Part II of the Act, the bulk of the earlier loans granted by the Board were made direct to individual farmers, with a collateral guarantee, under Part III of the Act.

"Meanwhile, active steps were taken to form associations in various districts, with the result that twenty-one associations have already been registered under the Companies Act. The names of these associations are: Northern Wairoa (Dargaville); Helensville; Waiuku; Hamilton; Otorohanga; Te Awamutu; Te Aroha; Hauraki (Paeroa); Morrinsville; Te Kuiti; Taumarunui; North Taranaki (New Plymouth); Kaimata (Inglewood); South Taranaki (Hawera); Waimarino (Raetihi); Oroua (Feilding); Horowhenua (Levin); Wairarapa (Masterton); Tapanui; Central Southland (Wright's Bush); Mataura.

"An encouraging feature in connection with these associations is the fact that many prominent farmers, who do not propose to avail themselves of the borrowing provisions of the Act, have joined the associations in order to assist in their formation and to see that they receive a good start.

"A considerable amount of money has also been made available for farmers under the discounting powers conferred on the Board by the Act. The great majority of the promissory notes discounted have been indorsed by Dairy Companies to enable suppliers to purchase manures and seeds or other seasonal requirements. As a rule the Company protects itself against its contingent liability as indorser by deductions from the milk cheques of the supplier whose note is discounted, and takes up the note from the Board before due date. Where a company is doing extensive discounting business, it can utilise the funds available for the deductions from its suppliers' milk cheques for the purpose of taking up selected promissory notes before due date; and the Board allows the company rebates of interest, provided the company distributes the rebates equitably among the suppliers whose notes have been discounted.

"In the conduct of its lending business the central Board has kept steadily in view the consideration that the funds at its disposal will ultimately depend upon the sale of debentures to the public. Although the Rural Intermediate Credit Act authorises an advance from the Consolidated Fund of £400,000, to enable the Board to commence lending operations immediately, one-third of that sum has to be placed to a special fund for the redemption of debentures and so cannot be used for lending purposes. Apart from the Treasury advance, the Board relies entirely upon funds raised by debentures, which will mainly be secured on the stock mortgages taken by it from its borrowers. It should be mentioned, however, that the Rural Intermediate Credit Act provides that the claims of debenture-holders against the Board have priority over that of the Crown in respect of the advances from the Consolidated Fund. In addition, the debentures are constituted a floating charge over all reserves and other assets of the Board.

"While there are thus substantial assets as security for debenture-holders over and above the mortgages held by the Board in respect of its loans, it has been the policy of the Board to insist on adequate margins of security for all loans guaranteed by it. This has given rise to suggestions in some quarters that the Board has adopted an unduly high standard of security; but it is felt by the Board that the farming community as a whole will benefit by its policy, which is to obtain and keep the confidence of the investing public, with a resultant steady flow of money into rural investments made by the Board.

"The Board realises also that the fact that its debentures are created trust investments casts upon it an added responsibility to see that its standard of security is maintained at a high level.

"The Board has hitherto been able to obtain the requisite funds to meet applications for loans without finding it necessary to go on the public market, as, in addition to the amounts received from the Treasury under the provisions of the Act, a considerable sum has been provided by investors who have approached the Board with offers to purchase its debentures."

The Chief Justice of Victoria is paid a salary of £3,000 per annum, and puisne Judges of the Supreme Court of that State receive £2,500. It is proposed to increase these salaries by £500 a year.

Legal Literature.

Stone's Justices' Manual.

Sixty-first Edition (1929): By F. B. DINGLE. (pp. cclvix; 1914; clvi: Butterworth & Co. (Publishers) Ltd.: Shaw & Sons, Ltd.)

It is doubtful whether the utility of *Stone* is generally recognised by practitioners in this country, and possibly the title of the work is to a large extent responsible for its being overlooked. It deals, of course, with all matters which fall to be determined in England by justices, and so numerous and varied are such matters that it becomes a work from which information can be readily gleaned on numerous subjects not dealt with as a connected whole in any other legal treatise. Merely to enumerate the separate topics treated would occupy considerable space but it may be said, generally, that it deals with every offence punishable summarily in England. No doubt the wording of the English Statutes and Rules in any given case "made and provided" may differ slightly from the New Zealand Acts or Rules; but it is by a comparison of the English legislation and the decisions interpreting it that very valuable assistance is so frequently obtained. Take for example, the chapters on animals, apprentices, assault, bastardy, births and deaths, building societies, by-laws, children, clubs, coin, compounding offences, dangerous drugs, disorderly houses, false pretences, felony, friendly societies, gaming and betting-houses, guardianship of infants, highways, husband and wife, intoxicating liquor laws, lottery, merchant shipping, money-lenders, obscene books, etc., offences against the person, pawnbrokers, public health, shops, Sunday, Town Clauses Act, vagrants, weights and measures, women and girls—to mention only a very few of the different titles—and an idea, though necessarily an inadequate one, of the vast scope of *Stone*, with its 1,900 pages of closely-printed text is obtained.

To those whose practices take them into the Police Court and who are unacquainted with *Stone* this reviewer without the slightest hesitation recommends it; those who use it will know that this recommendation is unnecessary.

Anson's Principles of the English Law of Contract.

Seventeenth Edition: By J. C. MILES, Kt., M.A., B.C.L., and J.L. BRIERLY, M.A., B.C.L. (pp. xl; 446; 15: Oxford University Press).

Anson's Law of Contract is, of course, primarily intended as a work for students. Nevertheless such a reputation for accuracy and lucidity has it now acquired that many practitioners have come to regard it almost as a *vade mecum*, as a perusal of the outward appearance of the volume on the shelves of any Supreme Court Library will testify. This latest edition is in entirely new hands for the editor of the last five editions, Sir Maurice Gwyer, finds himself prevented by the duties of the office of Solicitor to the Treasury, to which he has been appointed, from again undertaking the editorship; but the new editors come with the qualification of having already published, almost as a supplement to *Anson*, a case book on the law of contract. Naturally the revision has been considerable and many important alterations have been made. The subject of part performance has been differently treated, and on the whole more satisfactorily treated. The topics of infants' contracts, mistake, restraint of trade, severability of illegal contracts, acquisition of rights under contracts with third persons, assignment of liabilities (where one would have expected some discussion of the assignability of part of a debt), discharge by agreement, conditions and warranties under the Sale of Goods Act, and *quantum meruit*, are others where considerable change has been made in the text in order to bring it into line with recent decisions.

Leake, *Chitty*, *Pollock*, and *Addison* (if this last ever comes to be modernised) will of course always remain the standard works of reference for the practitioner, but as a book, as it were, of first instance, there will always be a place in any legal library for *Anson*.

Correspondence.

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

Sir,

Legal Education.

It seemed to me that the case in relation to Legal Education presented to the recent Conference was thus: The Hon. the Attorney-General pleaded that the day for clerkships and articles was past and gone and that college-bred lawyers were the order of the day in up-to-date countries. Professor Adamson followed with a very thoughtful paper on the benefits derivable from the same university course recommended by the Attorney-General.

What I am concerned to enquire about at the moment is "What is the son of the country practitioner going to do if he desire to become a solicitor?" Distasteful though it may be to country lawyers, I believe that the barrister can be properly equipped for his work only by attendance at a university, and I believe that so far as they are concerned, the time will yet come when all our barristers will go through the university and not merely take an extra-mural course. From time immemorial the aspirant for forensic honours has left home and kindred and gone to the Court towns, there has read in chambers, eaten the prescribed number of dinners, been admitted and then has started to practise in the Courts. So far as barristers are concerned, I can see no reason, therefore, why they should not all become university graduates.

But what of the solicitors? From time immemorial these have commenced their careers by licking stamps and posting letters. There was nothing wrong with the system of articles—the product was a well-equipped law agent, a doer, as they say in Scotland. What niche in the suggested reforms is he hereafter to fill? Will he be required to go to a university town, too, or will the universities conduct glorified correspondence classes? Is it true to say that the system of articles is irrevocably relegated to the past?

I confess that the need to embark upon some system of legal education is clamant; but I see no reason yet why those who propose to follow the solicitor side should be compelled to go to a university town.—I am, etc.,

LL.B.