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"The liberty of the subject is the highest inheritance that he hath."

—*John Selden.*

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Issues and Directions in Collision Cases.

In England there is no uniformity of practice as to the issues submitted to juries in running-down actions, at all events where the defence of contributory negligence is set up. In New Zealand, however, issues of commendable simplicity proper to be submitted to juries in running-down actions of the usual type have been approved by the Court of Appeal in *Black and White Cabs Ltd. v. Anson*, (1928) N.Z.L.R. 321. Juries in our Courts are now asked: (1) Was the defendant guilty of negligence in any and, if so, which of the following respects (specifying the acts of negligence alleged)? ; (2) Was the plaintiff guilty of negligence in any and if so which of the following respects? ; and (3) If both were negligent whose negligence was the real cause of the collision? Cases may occur in which special circumstances may render it advisable to submit additional issues. For instance, in a recent case, *McIntyre v. Canadian Knight and Whippet Motor Co.* (unreported), in order to asscertain whether or not the principle of *Doherty v. Watson*, 21 Sc. L.R. 449, might determine the case before him, Myers, C.J., put to the jury, in addition to the usual issues, another, viz., "Was the accident the result of a mutual misunderstanding between the plaintiff and the defendant without negligence on the part of the defendant?" But the standard issues meet satisfactorily the requirements of most cases, and their adoption has gone some distance perhaps towards the simplification of what is not usually an easy inquiry.

In practice, of course, the jury is always fully directed as to the law and particularly as to the law applicable to the third issue. These directions are usually involved, though probably unavoidably so, and it may be an open question as to how far a common jury follows, appreciates, or understands them. Two recent decisions of the English Court of Appeal show, however, that an adequate direction on the third issue cannot be dispensed with. In the first, *Service v. Sundell*, 46 T.L.R. 12, the Lord Chief Justice had directed the jury that the plaintiff was not entitled to succeed unless they were satisfied either that there was no negligence on his part, or that, if there was, nevertheless the *real* cause of the collision was negligence on the part of the defendant. The jury intimated that they were agreed that there was negligence on both sides but that they were not agreed as to whose negligence was the greater. After some discussion with counsel Lord Hewart further directed the jury and asked them to consider the question: "Whose negligence was *really* responsible for the accident?" The jury were unable to agree on that point and the foreman afterwards added that the jury considered that both parties contributed to the accident. The Lord Chief Justice held that the disagreement of the jury on the question whose negligence was really responsible for the accident made it impossible to give judgment on their verdict for either party, and the Court of Appeal upheld this decision. As to the simple issue left by the Lord Chief Justice to the jury Lord Justice Scrutton had something to say:

> "The Lord Chief Justice asked the jury to consider what was the *real* cause of the accident. But juries must be warned that there might be two, or even three, causes of an accident. . . . . In view of the inadequate direction given by the Lord Chief Justice on the question of contributory negligence and of the disagreement of the jury on the question whose negligence was really responsible for the accident, it was impossible to enter judgment for either party."

The second case is *Cooper v. Swadling*, 46 T.L.R. 73, decided a month later than *Service v. Sundell*. Humphreys, J., had asked the jury to say what was the *substantial* cause of the accident. They found for the defendant and the Court of Appeal granted a new trial on the grounds of inadequate direction by the learned Judge. Lord Justice Scrutton again delivered the leading judgment in which he doubts, by the way, whether the English Courts should adopt the judgment of the Privy Council in *British Columbia Electric Railway v. Loach*, (1916) 1 A.C. 719, and refers, on the subject of contributory negligence to *Davies v. Mann*, 10 M. & W. 546, of which, so the learned Lord Justice tells us, "some people talk contemptuously as if the fact that the unfortunate victim was a donkey threw some suspicion on the principle of law which was there laid down," and says:

> "In any case where the facts may raise the question, the jury must be directed in plain terms: 'If you think the plaintiff was negligent, but that the defendant, after the plaintiff was negligent, by taking reasonable care could have avoided him, such negligence of the plaintiff is not, as a matter of law, negligence which contributes to the accident so far as to prevent the plaintiff from recovering.'"

With the necessity for this direction and with its terms Lord Justices Greer and Slesser unreservedly concurred. It is apparent, then, that our simple form of issue should never be put to the jury without an adequate direction. Juries should always be directed, as, probably in most cases in our courts they always are, first, that it is not necessary for them to decide what is the real cause of the accident, for the real cause may be the combination of the negligence of both the plaintiff and the defendant—a statement which Lord Hewart designates as "a penetrating glimpse of the obvious"—and, secondly, that the negligence of one party is not imputed to him as blame if the other party, after it happened, could by reasonable care have avoided the accident.

Cooper v. Swadling will probably lead to the adoption of a standard direction to juries in such cases and, if so, something will have been accomplished. In *Hargrove v. Burn*, 46 T.L.R. 59, will be found a considered direction by the Lord Chief Justice in the light of the two decisions referred to. That it is correct in law there is no room for doubt: whether such a direction is ever really understood by a common jury is a different question.

Supreme Court

Myers, C.J. September 20, 23, 24, October 25, 26; December 11, 1929.

NEW ZEALAND LOAN AND MERCANTILE AGENCY CO. LTD. v. WRIGHT STEPHENSON & CO. LTD.

Sale of Goods—Warehousemen—Sale of "A Grade Garton Oats" on Terms of Trade Federation—Contract Providing for Payment Against Store Warrant Accompanied by Grader's Certificate—Payment Made by Buyer Accordingly—Sacks on Delivery Found Not Individually Branded in Accordance with Grader's Certificate and Not Individually Sampled as Required by Federation Terms—Buyer Entitled to Reject Oats and to Recover Price Plus Interest and Storage Charges—Trade Usage as to "Stock-branding" of Oats Not Proved and Repugnant to Terms of Contract—Buyer Purchasing Further Oats from Third Parties Holding Store Warrants of Defendant—Buyer Requesting Delivery—Defendant Unable to Deliver Oats in Accordance with Description in Store Warrants—Buyer Rejecting Defendant's Tender of Oats—Conversion—Measure of Damages Recoverable by Buyer Not Price Paid for Oats But Market Value at Time of Tender.

Action by the plaintiff company to recover from the defendant company the purchase price of certain parcels of oats supplied by the defendant company and rejected by the plaintiff company and to recover the purchase price or damages for conversion, in respect of certain other parcels of oats. The plaintiff and the defendant were both dealers in grain and carried on business throughout New Zealand through branch offices in various places. They were both members of the New Zealand Grain, Seed, and Produce Merchants' Federation, which had from time to time since 1918 laid down terms and conditions of sale of grain, seed, and produce in New Zealand, which terms and conditions, unless expressly excepted, were to be deemed to be incorporated in all contracts. The terms of sale in force at all times material to the present action were the "New Zealand Terms 1925" and certain amendments thereof.

The transactions involved in the action were divided into two classes. The first consisted of two transactions, each for the purchase by the plaintiff from the defendant of 2,000 sacks of oats, the second consisted of a number of transactions whereby plaintiff purchased from third parties, who had previously bought them from the defendant, various quantities of oats for which store warrants were issued by the defendant to its purchasers, such store warrants being subsequently indorsed over to the plaintiff. As to the two transactions for the purchase in each case of 2,000 sacks of oats, the agreements were made on 7th and 9th May, 1928, respectively through a broker, the seller being the defendant by and on account of its Gore branch, and the buyer the plaintiff by and on account of its Wellington branch. The goods sold in each case were described as "2,000 sacks A. Grade Garton oats" and the sale was "at 4s. 3d. per bushel, f.o.b.s.i. Bluff, through Store Edendale" (the letters "s.i." meaning sacks included). The oats were sold for June delivery, and the agreements were expressed to be made on "N.Z. Terms 1925 and amendments." The evidence satisfied the Court that the defendant had available in June, 1928, and was in a position to deliver 4,000 sacks of oats corresponding with the description. On or about 20th June, 1928, the defendant drew upon the plaintiff for the price of the 4,000 sacks and attached to the draft a store warrant for the 4,000 sacks and a grade certificate for 2,000 sacks "branded S.T.E." A few days afterwards a second grade certificate for the further 2,000 sacks (referred to in the defendant's letter as branded "1750 N.S.O. and 250 A.T.S.") which had had to be forwarded to the grader at Invercargill for a certain correction, was sent to the plaintiff, and early in July the purchase money was paid by the plaintiff on the tender of the draft in exchange for the grade certificates and the store warrant. The grade certificates certified that the grader had sampled and passed as A grade Gartons 2,000 sacks "brand S.T.E.," 250 sacks "brand A.T.S.," and 1,750 sacks "brand N.S.O." The store warrant was dated 30th June, 1928, and purported to be a warrant for goods "warehoused" with the defendant by the plaintiff, the goods being described as "4,000 sacks, A grade Gartons (2,000 S.T.E., 1,750 N.S.O. and 250 A.T.S.)" On 24th January, 1929, the defendant wrote to the plaintiff requesting him to remove the 4,000 sacks of oats by 20th February. The plaintiff's Wellington Branch Manager on 5th February acknowledged the letter and stated that his company would arrange to take delivery of "our oats from your store by 28th inst." On 16th February the plaintiff's Branch Manager again wrote to the defendant asking that the 4,000 sacks of oats and certain further sacks which were included in some of the second set of transactions should be forwarded to the plaintiff's store at Bluff and the store warrants were forwarded with that letter to the defendant. It was shortly afterwards discovered by the plaintiff, some of the sacks having been sent to Bluff in accordance with those instructions, that none of the 4,000 sacks of oats, except a negligible few, which the defendant was asking the plaintiff to accept had been branded with the three letter brands referred to in the grader's certificates and the store warrant. The plaintiff thereupon refused to accept any of the oats. No objection was taken as to quality and the Court was satisfied the oats were "A grade Garton oats." It was also ascertained that only perhaps 10 per cent. of the sacks had been actually sampled by the official grader, although the defendant's storeman, who was himself a competent but not an official grader, had, when the various sacks arrived in store, but not in the presence of the official grader, sampled each and every sack, and gave evidence that all those 4,000 sacks were A grade Gartons. The plaintiff brought the present action to recover the money paid by him in respect of such goods. As to the second class of transactions, the plaintiff also, upon the same grounds, refused to accept various parcels of oats which were purchased by the plaintiff, not from the defendant, but from third parties who held store warrants issued by the defendant in respect of such various parcels of oats. It claimed against the defendant the purchase price as though it were vendor or alternatively damages for conversion.

Gray, K.C., and C. A. L. Treadwell for plaintiff.

O'Leary and Evans for defendant.

MYERS, C.J., said that it was necessary for a complete understanding of the position to refer to the New Zealand Terms, 1925, and amendments. After referring at length to the relevant provisions of those terms, His Honour said that the parties must be taken to have agreed that payment should be made against a store warrant accompanied by grader's certificate. The defendant, as it seemed to His Honour, was not bound in the circumstances to allow the goods to remain in its store; and the plaintiff, had it refused to give shipping instructions, would, His Honour thought, have committed a breach of contract. A printed set of conditions of a sampling and grading system "drawn up by the special committee appointed at a general meeting of the Federation on 10th September, 1924," purported to lay down "the system of sampling and grading under clause 7, New Zealand Terms, 1925." It was thereby provided (*inter alia*) that certificates should be issued according to the actual quality of the goods sampled, and that each certificate should show the brands of the goods sampled and referred to in the certificate, and the date on which the goods referred to therein were sampled. It was further provided in regard to oats, peas, and other grains, that each sack should be sampled with a suitable grain trier. It was contended on behalf of the defendant that the parties were not bound by the provisions of the sampling and grading system because those provisions were not expressly included or incorporated in the terms of sale, and clause 7 of the terms simply said that the regulations from time to time prescribed in regard to the conduct of appeals should be deemed to be incorporated in the terms. His Honour was unable to agree. The provisions relating to the sampling and grading system were printed in the Handbook. They were drawn up in September, 1924, in conjunction with the 1925 Terms; and it seemed to His Honour that they must necessarily be deemed to apply to a contract where a grader's certificate was supplied. Indeed, the defendant itself relied upon those provisions, though there was nothing in the 1925 Terms which expressly incorporated them. Apart from that, however, His Honour should have thought that the grader's certificate that he had sampled and passed as A grade Gartons, or as the case might be, 2,000 sacks

branded S.T.E., necessarily implied that every sack had been sampled and branded.

The defendant sought also to establish a trade usage which it said it adopted and acted upon in the present case and by which it contended that the plaintiff was bound. According to that usage, it was claimed, when a grader's certificate was given for the purposes of the issue of a store warrant, the grader did not where, as in the present case, the sacks had been placed in stacks, sample and brand, or cause to be branded, every sack, but sampled only the sacks on the face and side of the stack which were perhaps only about ten per cent. of the whole stack, and branded or caused to be branded perhaps only one or two of the sacks in each stack. Then later on, as and when the goods left the store, every sack was branded by the storeman in accordance with the brand indicated in the certificate; and, when the grader was available, he also sampled each sack. That practice was known by the name of "stack branding." In His Honour's opinion that alleged usage could not be relied upon: firstly because its generality was not sufficiently proved, and secondly because it was repugnant to the provisions of the sampling and grading system which His Honour had already said must in his view be deemed to be included in the 1925 Terms, or must at least be deemed to apply to every sale under those Terms where a grader's certificate was required and given. His Honour observed, however, that there was evidence that the plaintiff's Dunedin Store, and also its Timaru branch adopted the same practice of "stack-branding."

It was further claimed that the 4,000 sacks included in the two contracts in question were never appropriated to those contracts. It was contended on the other hand on behalf of the defendant that there was an appropriation; that there was consequently a completed sale and that from the time when the grader's certificate and store warrant were sent to the plaintiff the defendant had no longer any duty as vendor but was in the position of warehousemen or bailee. The point was important because, if the plaintiff's view were correct, it would seem to be entitled as on a failure of consideration to repayment of the price of the goods; while, if the defendant's view were correct, either the plaintiff was bound to accept the goods, or, if it had any claim against the defendant at all, such claim would be only on the basis of damages for conversion, if there could be said to be a conversion, and in that case the plaintiff would be entitled to recover only the market price or value of the oats as in February or March, 1929, which would be very much less than the price that the plaintiff originally paid for the oats. It was clear that so far as the original contracts were concerned they were contracts for the purchase of unascertained goods. His Honour after referring to Sections 2, 18, 20, of the Sale of Goods Act, 1908, said that it was necessary that there should be an appropriation to the contract of 4,000 sacks of A grade Garton oats in a deliverable state. The method of appropriation agreed upon between the parties was that there should be appropriated to each contract 2,000 sacks which were to be first sampled by the grader and branded in accordance with the three-letter brands indicated in the grader's certificate. Until that was done His Honour did not think that there could be said to have been an appropriation to each contract of 2,000 sacks of oats in a deliverable state. In point of fact it never was done, and in point of fact the certificate given by the grader was (as the defendant knew) an untrue certificate. If the case had rested merely on the Sale of Goods Act and were not complicated by the inclusion of the New Zealand 1925 Terms and by what was done in assumed pursuance of those Terms, it would, His Honour thought, have been simple enough. There would then have been presumably simply a contract for the sale of 4,000 sacks of A grade Gartons; a request by the plaintiff to the defendant to appropriate to the contract 4,000 sacks of oats to correspond with the description; and a further request to hold such oats in the defendant's store until called for. Had that been the position the defendant would have been able to show that the 4,000 sacks had been sufficiently appropriated to the contracts and that those 4,000 sacks of oats conformed with the description in the contracts. In such case the character of the defendant's possession as vendor would have been changed to that of bailee or agent, and the possession in that capacity would have been made actual delivery to and acceptance by the purchaser of the goods. Such was the position in **Castle v. Sworder,** 30 L.J. Ex. 310. In His Honour's opinion it was not the position here, because the arrangement between the parties was thay there should be appropriated to the contract 4,000 sacks, every one of which was to have been first sampled by the grader and passed as A Grade Gartons, and every sack of which was to have been branded with the brands mentioned in the grader's certificate and store warrant. **Hayman v. McLintoch,** (1907) 9 F. 936, would have been an authority in favour of the defendant had the circumstances been those of the suppositious case which His Honour had previously put; but it appeared to be an authority against the defendant in the actual circumstances of the case. **Batger v. Robertson Bros.,** 16 G.L.R. 574, was not complicated by the incorporation of or reference to any Federation terms.

Although His Honour had dealt with the case at some length the real point when once the facts were clearly ascertained might be put quite shortly. The goods were unascertained by the contracts; and by the arrangement made between the parties, expressly or impliedly, certain things remained to be done by the seller before the goods were in the state in which they were finally to be delivered to the purchasers and till those things were done the property in the goods would not pass: **Seath v. Moore,** 11 A.C. 350, per Lord Blackburn, at p. 370; **25 Halsbury's Laws of England,** 167 & 168; **Boswell v. Kilborn,** 15 Moore P.C. 309, at p. 322; **Badische Anilin and Soda Fabrik v. Hickson,** (1906) A.C. 419, at p. 421. The so-called appropriation made by the defendant was not the appropriation to which the plaintiff's Wellington office through which the plaintiff had made the contract as buyer had assented. In the case of **Parsons v. New Zealand Shipping Co.,** (1901) 1 Q.B. 548, cited by Mr. O'Leary, the question of the materiality of marks or brands on goods was considered, but that case was not one relating to the sale of goods, and was, His Honour thought, otherwise distinguishable. For the reasons given, ironical as it might seem to the defendant that the plaintiff should succeed in view of the practice of the plaintiff's own branches at Dunedin and Timaru, and however unmeritorious the claim might seem to be from a commercial viewpoint, nevertheless in His Honour's view succeed it must. His Honour held that the plaintiff was entitled to recover, so far as the two contracts for 2,000 sacks each were concerned, the amount of the purchase money, interest thereon at the rate of £6 10s. 0d. per centum per annum—**Startup v. Cortazzi,** 2 Cr. M. & R. 165—and a refund of the moneys actually paid to the defendant for storage.

So far as concerned what His Honour had referred to as the second set of transactions—that was, all the transactions other than the two contracts each for the sale of 2,000 sacks of oats—the position was in His Honour's opinion quite different. The various parcels of oats to which the second set of transactions were referable were purchased by the plaintiffs not from the defendant but from third parties who held store warrants issued by the defendant in respect of those various parcels of oats. The plaintiff had not, as was done in **Batger v. Robertson Bros.** (*cit. sup.*) and in such cases as **Buddle v. Green,** 27 L.J. Ex. 33, sued the persons from whom it purchased the oats. Whether or not the plaintiff could have succeeded in action against the vendors was a question which His Honour was not called upon to consider. Possibly it could not have recovered against the vendors for the reasons, so far as they applied to the present case, which in the opinion of the Court of Appeal (though there were other reasons also) caused the failure of the purchaser in that action. In the present case the plaintiff accepted and took over from the vendors the store warrants issued by the defendant: *cf.* **Bartlett v. Holmes,** 13 C.B. 630. In any event the plaintiff had elected to bring its action not against its vendors but against the defendant. It made alternative claims against the defendant. Firstly it claimed as if the defendant were the vendor of those parcels. Alternatively it claimed damages for conversion. The relationship of vendor and purchaser did not exist between the parties in respect of those parcels of oats; and in His Honour's opinion the alternative cause of action was the real ground on which the plaintiff was entitled to recover. As between the parties the defendant was bound by the statement in the store warrants. It was rightly claimed that the defendant failed to deliver the sacks of oats in accordance with the terms of its store warrants. Irrespective of the question of appropriation the defendant would appear to be liable in damages as for conversion: **Woodley v. Coventry,** 2 H. & C. 164: 32 L.J. Ex. 185; **Knights v. Wiffen,** L.R. 5 Q.B. 660. That being so, the plaintiff was entitled to recover, but its measure of damage was, His Honour thought, not, as the plaintiff claimed, the price which it paid to its vendors for those oats, but the market value of the oats at the time of the tender by the defendant (after being called for by the plaintiff) and rejection by the plaintiff: **Henderson and Co. v. Williams,** (1895) 1 Q.B. 521. The plaintiff would have had no difficulty, had it so desired, in purchasing oats of the same grade in the market.

Judgment accordingly.

Solicitors for plaintiff: **Treadwell and Sons,** Wellington.

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

Adams, J. December 5; 18, 1929.
Christchurch.

GILLARD v. McFARLANE.

Industrial Union—Mandamus—Membership—Rule Providing for Admission to Membership of "Every Person Provided he is in the Opinion of the Executive of Good Character and Sober Habits"—Application for Membership Duly Made and Fees, etc. Tendered.—Award Providing for Limitation of Membership by Agreement Between Workers and Employers Industrial Associations—Application Refused on Ground of Existence of such an Agreement—Existence of Agreement Not Proved—Quaere as to Power of Such Associations to Suspend or Abrogate Rules of a Local Union Even With Sanction of Arbitration Court—Good Character and Sober Habits of Applicant Admitted—Applicant Held Entitled to Membership and to Mandamus—No Evidence of Pecuniary Loss Through Refusal of Membership—Applicant Not Entitled to Damages.

Action for mandamus to admit the plaintiff as a member of the Lyttelton Waterside Workers Industrial Union of Workers, and for £50 damages for loss of work. The Union was duly registered as a Union of Waterside Workers under the Industrial Conciliation and Arbitration Act, 1925. The defendants were the members of its committee of management. Paragraph (a) and the relevant part of paragraph (b) of rule 5 of the Union were as follows: "5 (a) The Union shall consist of workers employed as waterside workers or intending to be employed as waterside workers, in the trades specified in Rule 4 in the Canterbury Industrial District (North of the Rangitata River) and any such member shall be eligible to become a member of the Union. (b) Every such person, provided he is in the opinion of the Executive, of good character and sober habits, shall be admitted to membership on application to the Secretary and subject to the following conditions:—If he applies on or before the 30th day of June in any year he shall pay in advance an entrance fee of 5/- and a sum of 30/- which shall be the annual subscription, and thereafter he shall be and be deemed to be a financial member for that year. If he applies after the 30th day of June in any year but on or before the 31st day of December he shall pay an entrance fee of 5/- and a half-yearly subscription of 15/- and thereafter he shall be and be deemed to be a financial member for the remainder of that year." The statement of claim set out those paragraphs and the whole of clause 54 of the Award of 1924 relating to preference of employment. Paragraph (a) and the first part of paragraph (d) of clause 54 read: "54 Preference. (a) If and so long as the rules of the respective unions shall permit any person over twenty years of age of good character and sober habits to become a member of any such union on payment of an entrance fee not exceeding 5/- upon his written or verbal application to the Secretary without ballot or other election and to continue such member upon payment in advance of subsequent contributions not exceeding 1/- per week for the first month's membership, and thereafter 13/- per quarter or £2 per annum then and in such case the employers shall employ members of the union in preference to non-members provided that there are members of the union available equally qualified with non-members, to perform the particular work required to be done and ready and willing to undertake it. The contribution of 13/- per quarter or £2 per annum shall not be payable until after the expiration of one month after joining the union. . . . (d) Notwithstanding anything contained in the foregoing subclauses the New Zealand Waterside Workers Federation Industrial Association of Workers, and the New Zealand Waterside Employers Industrial Association of Employers may agree to limit the membership of the union at any particular port or ports when in their opinion there are sufficient members in the union or unions to carry on the work of the port or ports concerned and may in like manner agree from time to time to increase or reduce the number of members so limited. Any limitation so agreed upon shall not affect any workers who at the time are members of the union, but new members shall not thereafter be admitted in excess of the number necessary to maintain the membership so limited."

The plaintiff alleged that he was of good character and sober habits; that on 15th September, 1928, he applied to the defendant Flood, the Secretary of the Union, for membership of the Union, at the same time tendering the entrance fee and half-yearly subscription as prescribed by the rules; that his name was thereupon entered on a list of applicants for admission kept by the secretary; that thereafter from time to time the plaintiff renewed his application and tender but that the secretary had always replied that he had not been elected; that he had been unlawfully excluded from membership; that on many occasions he had been debarred from obtaining work by reason of the refusal of the defendants to admit him as a member; that the defendants justified their refusal by alleging that the membership of the Union had been limited to 700 under clause 54 (d) of the award, and that no such valid limitation had been agreed upon. If it were held that the membership of the Union had been validly limited as permitted by the award, the plaintiff alleged that applicants for membership had not been admitted in order of priority; that such applicants were submitted to and elected on a ballot of the committee; that the roll was "stuffed"; that he and many other applicants had complained and had been notified that they would be kept out of the Union; and that in September, 1928, and on many subsequent dates the defendants had without just cause excluded the plaintiff from obtaining the privileged status of membership.

Upham for plaintiff.
M. J. Gresson and Archer for defendants.

ADAMS, J., held on the evidence that the plaintiff duly applied for membership of the Union on 6th September, 1928, and on that date tendered his entrance fee and subscription to the Secretary of the Union.

His Honour, on the evidence before him, found it impossible to hold that any agreement between the N.Z. Waterside Workers Federation Industrial Association of Workers and the N.Z. Waterside Employers Industrial Association of Employers as to limitation of membership under clause 54 (d) of the award was ever made as alleged by the defendant Union, and it was, therefore, unnecessary to consider the question raised whether, if such an agreement had been made, it would have been valid. His Honour preferred to leave that to be decided in a case in which it directly arose. His Honour thought it right, however, to direct the attention of the parties to the fact that the Union was governed by the Act under which it was incorporated, and by its rules made under that Act. His Honour had nothing before him as to the constitution or powers of the two associations which might have been parties to an agreement under clause 54 (d) of the award, but as at present advised, His Honour thought it at least doubtful whether those associations could suspend or abrogate the rules of a local union as relating to the admission of members, even with the sanction of the Arbitration Court.

It was proved that in considering applications for membership from the date of the alleged agreement, or shortly thereafter, the committee adopted the practice of giving preference over all other applicants to members of other Unions who wished to be transferred to the Lyttelton Union. At its meeting on 23rd August, 1926, the Secretary was instructed to reply to a circular from the Federation re the transfer of members to the effect that the Union was limited to 700 members and that preference was given to applications from members of other Unions to fill vacancies. His Honour was satisfied that such preference was instituted shortly after the so-called agreement was discussed and that it had been continued to the present time in pursuance of an arrangement for reciprocity in that regard. The arrangement was in His Honour's opinion clearly contrary to Rule 5 (b). His Honour agreed with Mr. Gresson that it was for the committee of management to determine whether an applicant for membership under Rule 5 (b) was of good character and sober habits, but it was too late to rely upon that objection. If there were ever any question about it the committee had ample opportunity to ascertain the facts and reach a final conclusion upon the plaintiff's character. On the occasions on which the plaintiff inquired whether he had been elected the reply of the Secretary was "No, they are not making any more members." No reference to any other reason for non-election was suggested. Then it was expressly admitted in the statement of defence that the plaintiff was of good character and sober habits. Moreover, the minutes of the committee showed that at its meeting on 7th December, 1927, a resolution was passed that no new members should then be admitted, and that similar resolutions were passed on 30th August, 1928, 21st May, 1929, 13th June, 1929, and 20th August, 1929. On 11th September, 1929, the committee resolved to go over the list of applications and select a number of men to be again considered for membership of the Union, and the plaintiff with others, was thereupon "picked out" for admission. In thus "picking out" the plaintiff for membership the committee must be held to have at last given effect to its opinion that each of the persons so picked out was of good character and sober habits. The plaintiff having duly tendered the entrance fee, thus became a member of the Union and entitled to all the privileges of membership: **Flowers v. Wellington Wharf**

Labourers Industrial Union, 13 G.L.R. 453. In such cases no formal election by the committee was required by Rule 5 (b).

The question whether mandamus would go to a Union commanding it to recognise as a member a person who had acquired that status but was excluded by the Union was considered in **Flowers v. Wellington Wharf Labourers Industrial Union** (*cit. sup.*) and in **Gould v. Wellington Watersiders Industrial Union,** (1924) N.Z.L.R. 1025 and a mandamus was granted. In the present case His Honour had held that the plaintiff became a member of the Union on 11th September, 1929, and that the defendants had refused and still refused to recognise his status as such member. An order would, therefore, be made for the issue of a writ of mandamus commanding the defendants to recognise the plaintiff as a member of the Union and to enrol his name in the register of members. If counsel for the Union undertook that that would be done forthwith the writ need not be sealed in the meantime.

With regard to the claim for damages, His Honour agreed that mere non-compliance with the rules or even consistent disregard of the rules was not sufficient to found such a claim, and that there must be evidence not only of wrongful acts, but also of resulting pecuniary loss. In the present case there was no direct evidence of loss or deprivation of employment. The Union appeared to have claimed the right of preference for its members notwithstanding the fact that rule 5 (b) did not comply with the condition on which preference was granted by the award, and that claim had been generally conceded, with the result that its members had reaped all the advantages without complying with the condition of the preference clause. No notice was given to the employers resulting in refusal of employment as happened in **Flowers v. Wellington Wharf Labourers Industrial Union**(*cit. sup.*) and in **Osborne v. Greymouth Wharf Labourers Industrial Union of Workers,** 30 N.Z.L.R. 634, or of a threat resulting in dismissal as in **Chaplin v. Young,** 31 N.Z.L.R. 214. The claim to damages must, therefore, be dismissed.

Judgment for plaintiff.

Solicitors for plaintiff: **Harper, Pascoe, Buchanan and Upham,** Christchurch.

Solicitors for defendants: **Wynn Williams, Brown and Gresson,** Christchurch.

MacGregor, J. December 9, 10; 23, 1929.
New Plymouth.

GILBERT v. KAUPOKONUI CO-OP. DAIRY FACTORY CO. LTD.

Company—Co-operative Dairy Company—Bonus—Directors Empowered by Articles to "apply" Surplus Profits as Bonus to be Divided Among Suppliers—Amounts Credited to Suppliers' Accounts in "Suppliers' Balance Account" Ledger and Shown as Liability to Suppliers in Balance Sheets—Supplier Entitled to Sum so Credited Without Formal Declaration of Bonus—No Proof that Bonus Could be Paid only out of Capital—Supplier's Claim Not Barred by Acquiescence.

The plaintiff, a married woman, who in 1923, 1924, and 1925 was a supplier of milk to the defendant company, and who then was and still is a shareholder therein, sued to recover from the company the sum of £70 7s., which she alleged was payable to her as a "bonus" under clause 35 (d) of the defendant's articles of association. The facts as found by MacGregor, J., were as follows: The defendant company was founded in 1897; it was a co-operative dairy company. In its balance sheet for the year ended 30th June, 1924, the directors spoke of the balance in appropriation account as providing for a "pay-out" to suppliers, and also a further sum for "distribution." The appropriation account for that year showed a "balance for distribution" of £24,552 5s. 6d. That balance was carried forward to the next year, when the balance sheet showed the £24,552 5s. 6d. on one side of the appropriation account, and on the other side of the appropriation account there was an entry of what appeared to be a payment "to suppliers" of £13,175 11s. 3d. The present claim of £70 7s. was the plaintiff's proportion as a "supplier" of that sum of £13,175 11s. 3d. and represented 13,507 pounds of butter-fat supplied by her at 5¼d. per pound. In the result it would appear that a large balance for "distribution" among suppliers was shown in the 1923–1924 balance sheet, and that the method of its "distribution" was shown in the 1924–1925 balance sheet. That balance or sum of £13,175 11s. 3d. "to suppliers" had, however, never been actually paid over to the suppliers for the season in question, but was in 1925 definitely taken out of the appropriation account, and had since appeared as a "liability" to "suppliers" in each succeeding balance sheet. Apparently a new private ledger was opened in 1925 headed "Suppliers' balance account," for balances unpaid for the 1923–1924 season, amounting in all to £13,175 11s. 3d., and in that ledger the plaintiff's account showed a credit of £70 7s., which professed to be a credit balance or debt due by the defendant company to the plaintiff, and was the sum sued for. How that "Suppliers' balance account" ledger came to be opened in 1925 became apparent from the correspondence between the defendant company and the Commissioner of Taxes relating to income tax payable on the figures disclosed in the 1923–1924 balance sheet. From that correspondence it was quite clear that such balance or sum of £13,175 11s. 3d. was then represented by the Company as belonging to the suppliers, and was in fact treated as the amount "paid or payable by the company during the income year to suppliers of milk to the company," within the meaning of S. 100 of the Land and Income Tax Act, 1923. No part of the £13,175 11s. 3d. had been actually paid out to the suppliers. The company's financial position had, however, improved since 1925, and the balance sheets had been duly audited and passed at annual meetings in the usual way. In October, 1928, the defendant company sent out to the plaintiff and the other interested "suppliers" a memorandum offering to the plaintiff shares in satisfaction of the amount standing to her credit in the company's books. The plaintiff declined to accept the offered shares.

North for plaintiff.

W. J. Treadwell for defendant.

MACGREGOR, J., said that the first question to be determined was whether the plaintiff in view of all the facts had brought her case within the terms of Article 35, which provided for "Dividends and Payments to Suppliers." Article 35 read as follows:—

"(a) In this Article the terms 'share' and 'member' do not include 'T' shares or members holding only 'T' shares.

(b) The Directors may whenever they deem it expedient so to do declare a dividend to be paid to the members not exceeding six pounds per centum per annum upon fully paid shares only.

(c) The Directors before declaring any dividend may set aside out of the profits of the Company (other than profits of 'The Store') such respective sums as they think proper as a reserve fund and to carry forward to the following financial year.

(d) The Directors may at their discretion after paying the dividend mentioned in clause (b) of this Article and setting aside the respective sums mentioned in clause (c) thereof apply such portions as they think fit of the surplus profits (other than profits of 'The Store') in manner following that is to say as a bonus to be divided among the contributors of milk to the Company (such contributors being also members) in proportion to the respective amounts of milk actually supplied or contributed by them respectively to the Company as appears by the Company's books, provided also that the Directors may (if by reason of special circumstances they think fit so to do) permit any supplier of milk to the Company not being a member to participate in such surplus profits to such extent and on such terms as they may decide.

(e) Should the expenditure (other than for plant and machinery) in any season exceed the receipts by the Company the suppliers shall be bound to return the amount required to make good the deficit in proportion to the milk supplied by them individually as shown by the Company's books, and the proportion to be returned by each supplier shall be deemed a debt due to the Company and may be sued for accordingly."

The question was whether it could be affirmed in the present case that what the directors had done was to "apply such portions as they think fit of the surplus profits . . . . in manner following that is to say as a bonus to be divided among the contributors of milk to the Company . . . . in proportion to the respective amounts of milk actually supplied or contributed by them respectively to the Company, &c." in terms of article 35 (d). It was to be noted that the word used in the article was "apply"—not "pay" or "pay or apply." The sums so "applied" were "to be divided" among the suppliers in proportion to their supply of milk to the company, as appeared by the company's books. That in His Honour's opinion was really what in fact

had been done in the present case. The books and balance sheets of the company spoke for themselves in this respect, apart from the company's letters to the Commissioner of Taxes on the subject. Having "applied" the amount of £70 7s. as a bonus to the plaintiff as a supplier for the season 1923–1924, the company in 1928 asked the plaintiff in turn to "apply" that sum (then belonging to her) in the purchase of further shares in the defendant company. She refused that offer, as she was entitled to do, and claimed to recover from the company the dividend or "bonus" of £70 7s. payable to her. In His Honour's opinion that sum did become payable to her in 1925, when it was "applied" to her credit in the company's books in pursuance of the resolution of the directors dated 20th April, 1925. His Honour thought it then became due and payable to her, in the same manner as a dividend that had been duly declared by the company.

In the case of "dividends" properly so-called, the sums due for dividend became debts due by the company to the shareholders on the date on which the dividend was declared, and the shareholders could thereafter sue the company for the dividends, if unpaid. In the present case no formal "declaration" of bonus appeared to be required by article 35 (d). All that was necessary was the due "application" by the company of the bonus in question, which His Honour thought was effectively made on 27th April, 1925, when the amount of £70 7s. was credited to the plaintiff's account in the "Suppliers' balance account" ledger, as already stated. In His Honour's opinion, accordingly, the plaintiff had established her right to sue for the amount claimed in the present action, and the defendant company was not entitled to a non-suit, as claimed by its counsel at the hearing.

The second ground of defence was, shortly, that it would be illegal for the company to pay the plaintiff's claim, inasmuch as the dividend or bonus claimed could be paid only out of capital, there being no profits available out of which to appropriate or pay it. If that defence could be proved, it would of course afford an absolute answer to the plaintiff's claim. It was clear law that dividends must not be paid out of capital, and might be paid only out of profits. At the same time, it was equally clear law that where directors, after proper investigation of the financial position of a company, declared, and the shareholders confirmed, a dividend or bonus, the Court would not review the decision, on the ground that the estimates had proved erroneous, if the view taken was one which reasonable men might take: **In re Peruvian Guano Co.,** (1894) 3 Ch. 690; **In re Kingston Cotton Mill Co.,** (1896) 1 Ch. 331; **Rance's Case,** L.R. 6 Ch. 104, at 122, per Mellish, L.J. His Honour reviewed the evidence and said that he was satisfied that the defendant had not proved either that the £13,175 11s. 3d. was not profits of the company, or that the dividend or bonus in dispute could be paid only out of capital. That being so His Honour did not think that the case of **Lagunas Nitrate Co. Ltd. v. Schroeder & Co.,** 85 L.T. 22, had any real application to the present case. In the result His Honour was of opinion that that affirmative defence had not been established by the defendant company.

The last ground of defence relied on was that the plaintiff was in some way barred by her own acquiescence from enforcing her claim to the sum of £70 7s. in dispute. It was contended for the defendant that the plaintiff had for some years received other sums of money for milk supplied, and had thereby impliedly acquiesced in the company retaining as it had done the particular sum sued for. In support of that contention the case of **Wilsher v. Whakaronga Co-operative Dairy Co. Ltd.,** (1917) G.L.R. 357, was cited. His Honour had examined that case with care, but in the result was unable to see how it helped the present defence; on the contrary, it appeared rather to support the view contended for by the plaintiff. His Honour could not see in the evidence any "acquiescence" by the plaintiff barring her right to sue. Once a dividend had been declared by a company, the Statute of Limitations immediately began to run against the debt so created: **In re Severn and Wye and Severn Bridge Rly. Co.,** (1896) 1 Ch. 559. In like manner, in the present case, the Statute of Limitations commenced to run when the bonus was "applied" in 1925 in terms of Article 35 (d); the period of limitation had not yet expired. For the foregoing reasons His Honour thought that the three several grounds of defence had failed, and that the plaintiff was entitled to recover.

Judgment for plaintiff.

Solicitors for plaintiff: **Halliwell, Thomson, Horner and North,** Hawera.

Solicitors for defendant: **Welsh, McCarthy, Beechey and Houston,** Hawera.

Kennedy, J. December 11; 18, 1929. Dunedin.

HARVEY v. BARLING.

Licensing—Illegal Sales—Information Charging Respondent with Selling Liquor Without a License—Reception Held by Society in Premises of Respondent—Society Charging for Admission and Respondent Providing Refreshment—Gift of Liquor to Society by Third Party—Liquor Served by Respondent—Supply of Liquor a Sale by Society—No Evidence of Knowledge by Respondent that Society Charging for Admission—Respondent Not Party to Sale—Offence "Sale" and not "Supply"—Information Dismissed—Justices of the Peace Act, 1927, S. 54.

Appeal on point of law from decision of Mr. H. W. Bundle, S.M., at Dunedin, dismissing an information charging the respondent with selling liquor without being duly licensed to sell the same. The facts found were briefly as follows: On 30th January, 1929, the Council of the Scottish Societies held a reception in the Somerset Lounge of Savoy Ltd., for admission to which a charge of five shillings was made. The respondent, the managing director of Savoy Ltd., had undertaken to permit the reception to be held in the Somerset Lounge, which was not a restaurant, and to provide a supper, which did not include alcoholic liquor, and all necessary service. Prior to the reception Mr. McKenzie, a prominent supporter of the Societies, obtained permission from the president and the vice-president to supply, at his own cost, liquor for the purposes of the reception and the liquor so provided was sent to the Somerset Lounge and was there taken charge of by the respondent. The persons admitted to the reception were the guests and nominees of the Council, and not of the respondent. The liquor was later served, with the respondent's knowledge and consent, by employees of Savoy Ltd., as well as by members of the Societies to the guests present, some of whom had paid for admission. No employee of Savoy Ltd. was in charge of the door for the purpose of admitting those attending or of collecting tickets, and the respondent was unaware of a public advertisement that tickets of admission might be procured on payment.

Adams for appellant.
Sinclair for respondent.

KENNEDY, J., said that it was clear that, if the five shillings charged was a payment for the supper and entertainment including the liquor provided, there was a sale or a transaction in the nature of a sale of liquor by the officials of the Scottish Societies. It would be none the less a sale because when the five shillings charge was originally fixed there was then no intention to supply alcoholic liquor. The transaction must be judged by its own intrinsic nature and not by the intention of the parties at some antecedent time. If the liquor supplied was the property of the persons charging for admission, that was of the Council of the Scottish Societies, then it could not properly be said that the liquor was a gift to the persons paying for admission and was not paid for directly or indirectly by them any more than it would be open to a restaurant owner, supplying a dinner for a given sum, to say that certain courses were supplied free and that the charge made was only in respect of what courses remained. Whatever the parties might say, the Court was entitled to look at the real substance of the transaction. The cases of **Taylor v. Smetten,** 11 Q.B.D. 207, and **Horgan v. Driscoll,** (1908) 42 I.L.T. 238, were authorities which confirmed that view. The case was of course stronger where there was either an express promise or a course of dealing, which was well known, to supply liquor free of charge with other refreshment which was paid for. His Honour did not think, however, that where a charge was made for admission, the position was different because there was no advertisement of an intention to supply liquor with other refreshment, and because the guests, when they paid for admission, were unaware that liquor would be supplied. In such a case, in His Honour's opinion, it might properly be held that there was a sale or a transaction in the nature of a sale of liquor to each person to whom liquor was supplied.

Counsel for the appellant and counsel for the respondent differed in their submissions as to the exact findings of fact upon which the Magistrate's decision was based. Upon the respondent's submission the appeal, being on law, was precluded by the Magistrate's finding of fact that the supply of liquor was a gift by the Council of the Scottish Societies. It was unnecessary for His Honour to discuss that point because,

or other reasons, His Honour had reached the conclusion that the Magistrate's decision must be affirmed. It might be assumed that liquor was in fact sold by the Council of the Scottish Societies to those who paid for admission and that the respondent might, under the circumstances, if he was aware that the liquor was being sold, have been guilty of aiding and abetting the sale and liable accordingly as if he had himself sold the liquor, Justices of the Peace Act, 1927, S. 54. There was, however, no finding of fact that the respondent was aware that a charge was made for admission and that the supply of liquor and other refreshment was for some consideration and was not a gift. If the liquor and other refreshments were supplied without charge, and if there was consequently no sale by the Council of the Scottish Society, then no offence was committed either by the Council or by the respondent. The offence lay not in the supply of liquor, but in the sale or in the transaction in the nature of a sale. Before the respondent might properly be found guilty of the offence charged, it must appear not only that the liquor was sold but that the respondent was accessory to the illegal supply: **Williamson v. Norris,** (1899) 1 Q.B. 7. There was an express finding that none of the employees of Savoy Ltd. had anything to do with the admission of guests and that the respondent was not aware of the advertisement of a charge for admission. The prosecution must prove the respondent's knowledge, or the facts from which that knowledge might be inferred. The learned Magistrate had not found that the respondent knew of the charge for admission. There was a finding that rendered ignorance of that charge probable and a specific finding that the respondent was unaware of a matter of no importance whatever, if the Magistrate had concluded that the respondent was aware of the charge for admission. Under such circumstances it was not proper for the Court to assume, as against the respondent, that he had knowledge and consequently to hold that he must be taken to have known that the liquor supplied was the subject of a sale or of a transaction in the nature of a sale. If the respondent was in fact aware then the requisite evidence should have been available, and, if such evidence was not adduced, it was not for the Supreme Court to reverse the learned Magistrate's determination and to record a conviction when it could do so only by assuming, without proof, that the respondent had knowledge.

Appeal dismissed.

Solicitors for appellant: **F. B. Adams,** Crown Solicitor, Dunedin.

Solicitors for respondent: **Solomon, Gascoigne, Sinclair and Solomon,** Dunedin.

Kennedy, J. December 3, 4, 5; 13, 1929. Dunedin.

TWADDLE v. RUSSELL.

Contract—Formation—*Consensus ad Idem*—**Partnership—Sale by Auction of Partnership Business—Objection by One Partner to Inclusion in Conditions of Sale of Covenant Not to Compete—Auctioneer Proceeding with Sale Notwithstanding Objection—Purchaser Signing Agreement for Sale and Purchase on Terms of Conditions of Sale—Purchaser Subsequently Willing to Complete Purchase without Covenant of Objecting Partner—Objecting Partner Willing to Complete on That Basis but One of Other Partners Not—No** *Consensus ad Idem.*

Action claiming a decree for specific performance of an agreement to sell a business of newspaper proprietors, printers and stationers carried on by the defendants at Balclutha, with the land, plant, machinery and stock involved in that business. The plaintiff offered to dispense, in the case of the defendant McNaughton, with the execution of a deed of covenant in restraint of trade, and alternatively, claimed that an agreement in writing be rectified by omitting a covenant by the defendant McNaughton and that the agreement so rectified be specifically enforced. Damages for delay were claimed and there was an alternative claim that if specific performance could not be had a deposit of £680 paid be refunded and that £1,500 damages be paid by the defendants for breach of the agreement. The claim for damages was abandoned. The three defendants were partners carrying on the above business, the defendant Russell owning a half share and the other two defendants, McNaughton and Millis, each owning a quarter share. McNaughton and Millis disagreed and Russell gave his partners notice terminating the partnership. Negotiations between the solicitors for the partners for the purchase of the partnership assets by one of the partners were fruitless and the solicitors agreed that the partnership assets should be submitted for sale by public auction, that each partner should be at liberty to bid, and that Mr. Walter, who acted as solicitor for Russell, should draw up particulars and conditions of sale to be approved by the solicitors for the partners. Mr. Kelly was solicitor for McNaughton, Mr. Grigor for Millis, and Mr. Walter for Russell. During the negotiations between the partners McNaughton had objected to giving a covenant not to compete. That attitude was approved by Mr. Kelly who intimated, however, that he should not carry his objection too far. Mr. Kelly approved of a covenant by the partners against competition and he insisted that this covenant should be tightened up because, as he admitted in cross-examination, he expected a syndicate, for which he was acting as solicitor and in which he represented a person entitled to a share, to be a buyer at the auction. The sale was advertised for 3rd August, 1929. In the preceding week McNaughton, who had been given the particulars and conditions of sale for the purpose of checking the schedules, read the covenant not to compete and consulted other solicitors in Dunedin. He was anxious that there should be competition and the syndicate, of which Mr. Kelly was a member, ensured competition. But Mr. Kelly did not inform McNaughton of his own special association with that syndicate. On 31st July, 1929, a quarrel took place between Mr. Kelly and McNaughton, and the latter declined to agree to sign the covenant. Mr. Kelly did not thereafter act as McNaughton's solicitor. On receiving advice from his Dunedin solicitors, McNaughton delivered a written notice to Mr. Grigor, Mr. Walter and Mr. Kelly that he would not sign clause 4 of the conditions of sale which bound the partners not to compete. Prior to the auction sale Mr. Kelly and Mr. Walter both held the view that McNaughton could be compelled to sign the covenant set out in clause 4. The auctioneer had been instructed by Mr. Walter on behalf of all three partners, and, at a meeting immediately prior to the auction, the auctioneer mentioned that he had received a notice from McNaughton. Mr. Kelly said that the objection was too late and that the sale would have to proceed. He, to the auctioneer's knowledge, had previously been acting as solicitor for McNaughton and the auctioneer was unaware that Mr. Kelly had ceased to act, if he had ceased to act, or that he was then acting as solicitor for the syndicate of which the plaintiff was a member. Mr. Walter also informed the auctioneer that the objection was too late. After reading the conditions of sale at the auction the auctioneer asked McNaughton if he was going to make a statement. McNaughton said "No, I have given you my objection." The auctioneer then said that one of the partners objected to clause 4 and in reply to a question he said the objector was McNaughton. He then stated that to make the matter clear he would re-read the clause objected to and he re-read that part of clause 4 which related to the covenant. The auctioneer then stated that, notwithstanding the objection, his instructions were to proceed with the sale and to sell to the highest bidder, and he declared the plaintiff to be the highest bidder. The auctioneer, the plaintiff and Mr. Kelly then proceeded to the last-named's office where the plaintiff, under Mr. Kelly's instructions, signed the agreement to purchase as follows: "W. Twaddle as agent for a company to be formed." The agreement signed referred to a purchase upon the terms and subject to the conditions contained in the particulars and conditions of sale which were read out by the auctioneer. The plaintiff accordingly alleged that the real agreement between the parties was an agreement of which the terms were the particulars and conditions of sale read out as varied by a condition that McNaughton should not be bound to sign the covenant in restraint of trade, and that, through mistake, the agreement actually made was not accurately recorded in the written document. The defendants Russell and McNaughton pleaded that no contract was made as alleged and that no note or memorandum in writing existed sufficient to satisfy the Statute of Frauds.

Donnelly and Adams for plaintiff.
Hay for defendant, Russell.
Bremner for defendant Millis.
Calvert for defendant McNaughton.

KENNEDY, J., said that it was clear that if there had been an agreement and that if, by mistake, the agreement had not been recorded correctly, then the Court had jurisdiction to rectify the contract and, notwithstanding the Statute of Frauds, to enforce the contract so rectified although apart from the rectified contract there was no memorandum or note in writing sufficient to satisfy the Statute of Frauds. The Statute in fact only provided that no agreement, not in writing and not duly signed, should be sued on, but, when the written instrument

was rectified, there was a writing which satisfied the Statute, the jurisdiction of the Court to rectify being outside the prohibition of the Statute: **United States of America v. Motor Trucks Ltd.,** (1924) A.C. 196. There could be no rectification unless in the first place there was an actual agreement or contract by which to rectify the written document: **Fry on Specific Performance,** 6th Edn., 372. Before a written instrument could be rectified there must be clear proof of such an agreement and of a mistake common to all parties. See **Fowler v. Fowler,** 4 De G. & J. 250, 264.

In His Honour's opinion there was no concluded contract as alleged between the plaintiff and all the defendants at the time when the alleged contract sued on was reduced into writing, and, furthermore, the plaintiff and the auctioneer did not sign a document which, by mistake, did not represent their real agreement, but they signed a document which, assuming the auctioneer had authority to sell, correctly recorded the sale. What the auctioneer purported to do was, notwithstanding McNaughton's letter to him and his objection continued at the auction, to proceed with the sale, according to the conditions he had read out. He proceeded with the sale "notwithstanding" or "in spite of" the objection taken by McNaughton. The sale which the auctioneer proceeded to make was the sale he would have made had no objection been taken. He said that his instructions were to proceed although McNaughton, one of his principals, was there and objected, and, relying no doubt on what he had been told by Mr. Kelly and Mr. Walter, he proceeded to hold and conclude the sale. His Honour had not overlooked the fact that the auctioneer re-read that part of the clause which related to the covenant, prefacing his reading by the remark that it was in order "that there should be no mistake" or "to make the matter perfectly clear." His Honour was satisfied, however, that the words "notwithstanding" or "in spite of" and the proceeding with the sale under all the circumstances, properly conveyed to his auditors the meaning that the sale was to proceed on the terms already read out and that the reading of the condition objected to was no doubt intended to bring the objection to the notice of the buyers so that, although the sale proceeded on the terms read out, it could always be said that notice had been given that an objection had been taken by one of the partners. The signing of the conditions without alteration immediately after the auction confirmed the view that the sale was a sale on terms of the conditions, and the insistence of the purchaser, through his solicitor Mr. Kelly, until 2nd September showed what was the purchaser's view of the terms of the sale. In His Honour's opinion the auctioneer intended to sell and did proceed to sell on the terms and conditions which he read out. That indeed was how the plaintiff himself understood the position. His Honour concluded then, that Russell and the auctioneer meant to sell and that a reasonable person hearing the auctioneer would take it that he was selling subject to the conditions read out without variation. McNaughton, in fact, did not intend to sell on those terms but only on terms of being himself exempted from the covenant not to compete, and the auctioneer had no authority from McNaughton to pledge him by the sale, as he did, to a covenant not to compete. A sale on the terms on which the auctioneer sold was in fact prohibited by McNaughton. On the other hand the auctioneer had no authority from Russell or from Millis to sell on terms binding them only not to compete. The auctioneer purported then, in the presence of his principal, to overrule his principal's objection and to sell on terms which his principal did not authorise and upon a term to which the other partners could not bind him. McNaughton, then, was no party to the sale which the auctioneer purported to make. Russell was no party to a sale on the terms suggested at the trial. It was clear, accordingly, that there was no *consensus ad idem* between all the partners on the one hand and the purchaser on the other. McNaughton was no party to the contract at all, although he was willing to sell upon terms of being personally exempt from the covenant not to compete. In His Honour's opinion that willingness had been wrongly taken to indicate an assent by McNaughton to a sale upon the terms read out.

It was urged that McNaughton's conduct was not that of a man overruled and that in allowing the sale to proceed he was assenting to a sale upon the terms read out. After hearing the witnesses and seeing what manner of man McNaughton was, His Honour did not accept the view urged. He had refused to sign the covenant prior to the sale, notwithstanding pressure by one whom at that time he believed to be acting solely as his solicitor, and he had, before the sale, given written notice of his objection to clause 4 to the solicitors for his partners, to the auctioneer and to the man who was subsequently in fact the plaintiff's solicitor, or solicitor for the syndicate. After the letter to Mr. Kelly and the reference to his objection at the auction, his neglect to do anything further at the auction could not be taken by a purchaser to be an assent to a sale upon the terms read out. No contract, therefore, was concluded at the auction between the plaintiff on the one hand and all the defendants on the other, and all subsequent preparation by the partners and their solicitors was not to carry out the same contract but, in the case of Russell, Millis and the purchaser, to carry out a contract the terms which appeared in the written contract produced, and, in the case of McNaughton, was to complete upon those terms but with a variation that he was not to be bound by the covenant not to compete. The purchaser, however, insisted upon McNaughton's covenant when McNaughton was not party to the contract and had concluded no contract with him until Russell, having heard that McNaughton was not bound to sign and would not sign, declined to complete or to join his partners in a sale to the purchaser. When the purchaser intimated that he would complete without McNaughton's covenant, Russell was unwilling to complete, although McNaughton was then willing. No new contract to complete upon the terms and conditions of sale, with the exemption of McNaughton from the covenant, was at any time concluded between all the three partners and the purchaser. In fact, the three defendants were never all parties to the one contract with the purchaser and there had been no concluded contract between the plaintiff and the defendants, such as that alleged, which might be enforced or with which the written contract might be made to conform by rectification. Rectification of the written document would be refused and specific performance of the contract alleged could not be ordered. His Honour added that the plaintiff was not entitled to judgment as against the defendants for the deposit paid. That was held by the auctioneer as a stakeholder and not for the defendants: **Harrington v. Hoggart,** 1 B. & Ad. 577. No doubt if the plaintiff accepted the judgment the auctioneer would pay the deposit over on request.

Judgment for defendants.

Solicitors for plaintiff: **Stewart and Kelly,** Balclutha.
Solicitor for defendant Russell: **J. T. Walter,** Balclutha.
Solicitor for defendant Millis: **R. R. Grigor,** Balclutha.
Solicitors for defendant McNaughton: **Brugh, Calvert and Barrowclough,** Dunedin.

Rules and Regulations.

Animals Protection and Game Act, 1921-22: Revocation of regulation 6 of Regulations made on the 1st February, 1924.—Gazette No. 13, 20th February, 1930.

Defence Act, 1909: Re-constitution and re-establishment of the Samoa Military Police as a unit of the New Zealand Permanent Force.—Gazette No. 13, 20th February, 1930.

Land Act, 1924: Regulations under the Land Laws Amendment Act, 1929.—Gazette No. 13, 20th February, 1930.

Mining Act, 1926: Amendments to Regulations of 9th November, 1926.—Gazette No. 13, 20th February, 1930.

Samoa Act, 1921: Samoa Administrators' Additional Powers Order, 1930.—Gazette No. 11, 13th February, 1930.

Shipping and Seamen Amendment Act, 1929: Proclamation intimating assent of His Majesty, and fixing 15th February, 1930, as the date of coming into operation of the Act.—Gazette No. 11, 13th February, 1930.

Weights and Measures Act, 1925: Weights and Measures Regulations, 1926, Amendment No. 2.—Gazette No. 11, 13th February, 1930.

Justices of the Peace.

The *New Zealand Gazette* of February 20th contains the names of some 214 new Justices of the Peace. Five of them are women. It is to be hoped that Lord Herschell's example has been followed and that those responsible have examined the case of every candidate and are satisfied that every one of the appointees is a fit person to administer justice. When appointments are made on such a wholesale scale there is a grave danger of the true nature of the office being overlooked.

Recent English Cases.

Some of the Latest Decisions of Dominion Interest.

Below will be found a review, so far as reports are available at the time of writing, of the English decisions of Dominion interest decided during the latter portion of last year; the decisions of the first half of 1929 have already been reviewed in our columns (Vol. IV, p. 216). It is necessary to make the observation that the reader must not, owing to considerations of space, expect to find reference to all the important cases; rigid care has been exercised in their selection and, in the main, cases dealing with branches of the law dealt with in an average practice have been preferred to cases dealing with the more specialised branches. Omissions, however, there must necessarily be. It may be as well to draw attention to the possibility of some of the decisions included being ultimately reversed on appeal.

BREACH OF PROMISE.

The question whether an action for breach of promise for marriage will lie after the death of the promisor, even if special damage affecting the estate of the promisee be proved, was raised but not decided in *Riley v. Brown*, 45 T.L.R. 613, although Roche, J., notwithstanding certain *dicta* to the contrary, clearly indicated his own opinion that it will not. The plaintiff alleged as particulars of special damage the taking of a flat at the promisor's request, the giving up of a remunerative business in order to nurse the promisor, and the costs of the action up to the date of the promisor's death. Roche, J., held that these items of special damage did not affect the estate, as distinct from the person of the plaintiff, and that she was therefore not entitled to recover.

CHARITABLE TRUST.

In *In re Gwyon*: *Public Trustee v. Attorney-General*, 46 T.L.R. 96, a testator devised his residuary estate on trust, the income to be applied for ever in providing knickers for boys who resided in the Farnham district, who were not supported by any charitable institution, and whose parents were not in receipt of parochial relief. Eve, J., held that the trust was not a good charitable trust and that the bequest was void as offending against the rule against perpetuities.

COMPANIES.

S. 76 of our Companies Act, 1908, corresponds with S. 84 of the now repealed English Companies Act of 1908. In *Clark v. Urquhart*, (1930) A.C. 28, the House of Lords has decided that the measure of damages recoverable in an action under the latter Section for untrue statements in a prospectus is the same as in the common law action of deceit.

CONTRACT.

In *Graves v. Cohen*, 46 T.L.R. 121, Wright, J., has decided that a contract by a jockey to ride the horses of an owner is dissolved by the death of either party, and that where a contract is so dissolved by death no claim can be maintained under it in respect of rights which only accrue, and can only accrue, after the dissolution of the contract.

Berry v. Berry, (1929) 2 K.B. 316, deals with the effect of the variation of the provisions of a deed by a writing not under seal. A wife instituted proceedings against her husband claiming arrears of allowance under a deed of separation. The deed had been varied by a written agreement not under seal. The Divisional Court (Swift and Acton, JJ.) held that, applying the rules of equity which must prevail when there is any conflict or variance between them and the rules of the common law with reference to the same matter, the plea by the husband of the simple contract was a good defence to the wife's action under the deed.

DIVORCE.

Hill, J., in *G. v. G.*, 46 T.L.R. 69, has held that if a woman marries a man whose business or career demands his residence out of England, and by persistent extravagance she makes it impossible for him to live with her there without jeopardising his business position, his refusal to have her living with him is not desertion if he maintains her in England with a suitable allowance. Proof of such facts set up as an answer to a wife's petition for restitution of conjugal rights would be a good defence in law so long as such circumstances continue to exist.

HUSBAND AND WIFE.

May v. May, (1929) 2 K.B. 386, is an important decision on the subject of deeds of separation. A husband covenanted that he would during the life of his wife pay to her an annual sum of £600. Throughout the deed the parties were referred to as "the husband" and "the wife" respectively. It was provided that if the husband and the wife should be reconciled to each other and return to cohabitation the deed should become void. The husband subsequently committed adultery and the wife obtained a divorce. He then made default in paying the full annual sum provided for by the deed and the wife brought an action to recover the arrears. The Court of Appeal held that the deed was not subject to any implied term that it should operate only so long as the marriage relation continued to exist between the parties and that the plaintiff was entitled to recover.

INSURANCE.

Newsholme Brothers v. Road Transport and General Insurance Co. Ltd., (1929) 2 K.B. 356, deals with the vexed question of incorrect statements in a proposal filled in by the insurer's agent, and goes a long way towards clarifying and settling the law, at all events in cases where the statements in the proposal are made the basis of the contract. The effect of the decision is summarised in the following passage from the judgment of Scrutton, L.J.: "In my view the decision in *Bawden v. London, Edinburgh, Glasgow Assurance Co.*, (1892) 2 Q.B. 534, is not applicable to a case where the agent himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue, and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imparted to the insurance company. In any case I have great difficulty in understanding how a man who has signed without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and

the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

LIBEL AND SLANDER.

A recent decision of the Court of Appeal on the question of privileged occasions is of interest. *Watt v. Longsdon*, (1930) 1 K.B. 130, lays down that the fact that a person to whom defamatory matter is published has an obvious interest in the matter published is not, of itself, enough to make the publication a privileged communication. In order that such communication may be privileged the person making it must have an interest in the matter communicated, or there must be a duty, legal, moral or social, to make the communication incumbent on the person making it towards the person receiving it. In the circumstances of this case publications by a director of a company of defamatory statements alleging immorality, drunkenness and dishonesty on the part of the company's managing director abroad to the chairman of the board of directors and to a foreign manager of the company were held to be made on privileged occasions; but the publication to the plaintiff's wife was held not to have been made upon a privileged occasion.

Cassidy v. Daily Mirror Newspapers Ltd., (1929) 2 K.B. 331, deals with the question of the capability of a defamatory meaning. The defendants had published in a newspaper a photograph of one M.C. and a Miss X together with the words "Mr. M.C. the race horse owner and Miss X, whose engagement has been announced." The plaintiff was, and was known to her acquaintances as, the lawful wife of M.C., but the defendants did not know this. The majority of the Judges of the Court of Appeal (Scrutton and Russell, L.JJ.) held that the publication was capable of conveying a meaning defamatory of the plaintiff and, the jury having found that it conveyed to reasonably minded people an aspersion on her moral character, that she was entitled to damages. Greer, L.J., dissented.

Tolley v. J. S. Fry and Sons, 46 T.L.R. 108, was one of the most discussed decisions of last year. The plaintiff, Tolley, an amateur golf champion, claimed damages from the defendants who were chocolate manufacturers, in respect of an alleged libel published by the defendants and consisting of a caricature of the plaintiff playing a golf stroke while a caddie looked on. Below the picture appeared the following limerick:

"The caddie to Tolley said: 'Oh, Sir!
Good shot, Sir, that ball see it go, Sir!
My word how it flies,
Like a cartet of Fry's;
They're handy, they're good and priced low, Sir.'"

The plaintiff alleged that this advertisement meant that he had for gain agreed or permitted his portrait to be exhibited for the purpose of advertising the defendant's chocolate, and had prostituted his reputation as an amateur golfer for advertising purposes. The jury found for him, assessing the damages at £1,000. In the Court of Appeal Greer and Slesser, L.JJ., held that there was no evidence entitling the jury to attach a special defamatory meaning to words otherwise innocent and that the verdict must be set aside and judgment entered for the defendants. Scrutton, L.J., dissented; but he agreed with the other members of the Court in their view that the damages awarded were excessive.

(To be concluded)

Soviet Marriages.

Not Recognised by English Courts.

In *Nachimson v. Nachimson* Hill, J., has held that a Soviet marriage is, in English law, no marriage at all and that the English Courts will not entertain proceedings in reference to it, whether for dissolution or otherwise. Before an English Court will recognise the validity of a foreign marriage such marriage must be in its nature a "voluntary union for life of one man and one woman, to the exclusion of all others"—*Hyde v. Hyde*, L.R. 1 P. & D. 130. per Lord Penzance. A Soviet marriage fails to answer the test because, though the parties may at the outset intend a life-long union, the marriage is in fact dissoluble by mutual consent and even at the instance of one only of the parties. If at the instance of both parties, registration of the dissolution is required: if at the instance of only one, a decree of the Court is necessary, but the decree goes as of right and is a purely ministerial act. Such a marriage, in the view of Hill, J., is no marriage at all, and there is no basis for the intervention of an English Court. In this result the learned Judge sees difficulties, but these difficulties are, he says, made not by English law or by the laws of other countries which share with England a common view of marriage, but "by the law of the Soviet which has cut itself adrift from the yiew of marriage hitherto held by civilized communities."

Former Judge as Solicitor.

Sir James O'Connor, a former Lord Justice of Appeal in Ireland, has been re-admitted as a solicitor by the Supreme Court at Dublin, subject to an undertaking that he will not seek personal audience in any of the Courts.

Kennedy, C.J., who made the order for re-admission, said that he asked counsel on both sides to refer him to any modern precedent but in vain, and he must assume that there was no precedent. He would have felt the greatest difficulty in yielding to the application but for the fact that counsel for the Attorney-General had frankly admitted that there were special facts in the case of Sir James O'Connor. In the first place he had been retired not on his own motion or voluntarily but as a consequence of the abolition of his office. He would not, when re-admitted, be an officer of any Court in which he had sat as a Judge. The compensation which had been paid for the loss of his judicial position was paid not by Ireland but by Great Britain. Further, there had been a lapse of upwards of five years since he had ceased to hold judicial office, and during the greater part of that time he had lived out of Ireland.

"A King's Bench Judge who deals with juries soon learns that the fact that he takes a particular view does not mean that no other is reasonable."

—Lord Justice Scrutton.

Australian Notes.

By WILFRED BLACKET, K.C.

The account in your Journal of the proceedings at the Wellington Supreme Court, when Mr. T. M. Wilford was sworn in as King's Counsel is very interesting reading in New South Wales, for here we have no such ceremony. When a junior desires silk he sends formal notice to his seniors of the Inner and Outer Bar that he is about to make application for it, and then writes to the Attorney-General stating shortly his claims for the advancement desired. Upon receiving his letters patent he appears in full-bottomed wig and silk gown and announces his appointment to the Full Court, and also to the Chief Judge in Equity and to the Judge in Bankruptcy, and receives formal but brief congratulation. He is not required to take any oath before exercising his office. I am sending copies of your report to the Attorney-General and Council of the Bar, for I think it would be well that we should adopt the oath and ceremony your Journal describes.

In recent years silk has been granted in this State almost as a matter of course. I can only recall three refusals in the last ten years. In earlier times it was necessary for a barrister to have won fame as a leader before he could obtain it. When Sir Julian Solomons was Attorney-General a barrister who had higher estimation of his own ability than anyone else had, and who may here be called Mr. Caphipps, applied for silk, and in six sheets of drafting paper asserted his claims to the honour. He concluded with the statement: "Silk has never been refused to a man of such attainments and record as mine." Sir Julian thus minuted the application: "Silk was refused to Lord Brougham; it is now refused to Mr. Caphipps." It was the same barrister who at a later time sued a former client for the slander: "Oh yes, I lost the action I know; but if it had not been for my flaming fool of a barrister I couldn't have lost it."

One of our King's Counsel many years ago made rather a serious mistake soon after his appointment. A brief to prosecute in an important criminal case was delivered to him and he sent it back with a very nice polite letter stating the reasons why he did not wish to prosecute in that case. The brief came back at once with a statement that when the King commanded one of his Counsel to prosecute, the said Counsel had to get busy and obey the King's command. In Australia a King's Counsel may always take any brief against the King in civil cases, but may not, unless his services have for the purposes of a particular case been dispensed with by the King, defend a prisoner in the Criminal Courts. Dispensation has always been granted upon application as of course, except that formerly a fee of five guineas was required to be paid. "Jim" Gannon, K.C., a notable defender in Criminal Courts, acted under a document under the hand of the Governor purporting to dispense with his services in all criminal cases, but it is impossible to regard this as a precedent worthy to be followed.

The decision by the English Solicitor-General that the Crown will not in criminal trials in the future claim the right of reply is, to me, an atrocious decision. Still I do admit that in New South Wales in ancient times the right did not always pass without question. It was always admitted that the Attorney-General had the right of reply in all cases, but when Crown Prosecutors appointed or briefed to "prosecute in the absence of the Attorney-General" appeared there was, until thirty years ago, a doubt as to whether they had the right to reply in cases where no evidence was given for the defence. In later years the right of Crown Prosecutors to reply has never been questioned. I hold the firm opinion that the Crown should have the right of reply, and I may mention, to clear myself of any charge of prejudice, that my own practice in criminal cases has been just about as considerable in prosecution as in defence. A wise prosecutor will exercise his own judgment whether he should claim the right or not. I have always believed that the duty of the Crown Prosecutor is limited to two things—he has to see that all evidence within his knowledge *for or against* the prisoner is put before the jury, and he has to see that the jury are not misled. I have already suggested that in many cases the Crown Prosecutor should not reply, but there are many cases in which it is absolutely necessary in the interests of justice that he should state the Crown case in reply to the evidence and speech for the defence.

The closed Courts of the long vacation give an opportunity of stating the belief I have long and firmly held that the practice of New South Wales Supreme Courts under the old Common Law Procedure Acts, with some local amendments, is speedier, cheaper, and in every way preferable to the practice under the Judicature Acts followed in nearly all other Superior Courts of the Empire. In these latter Courts men "work incessantly upon the preliminaries of actions which are never fought" (see 4 N.Z.L.J. 514) but in New South Wales these things are not done. In nearly all cases, except where the cause of action is for breach of a special contract, the counts of the declaration are in the clear and simple forms contained in *Bullen and Leake*, '68 edition, and the pleas, equally plain, are copied from the same book. Forty years ago all pleadings were drawn by junior counsel: in nearly all cases now they are copied out by a solicitor's clerk. After the pleadings have been filed, with joinder of issue added, the case may be at once set down for trial, and in the great majority of cases there are no costs to the parties until the briefs are in preparation. We have no interrogatories, and discovery, when required, is generally arranged by the solicitors without application to the Court. Years ago "advice on evidence" was obtained but this is very rarely required now, the consultation on the brief being utilised for any necessary advising.

We have no Practice Court, and need none. Three times a week a Judge sits for half-an-hour to hear special cases and applications under various Acts, and sometimes there is an application for leave to amend or strike out a declaration or plea but these "preliminaries of action," are not of common occurrence. I must necessarily present my case against the Judicature Acts in instalments for your available space would not suffice for a complete article and so I can only deal now with one aspect of the matter. Some years ago I was in Brisbane and a solicitor told me that we were fools not to have adopted the Judicature Acts. "We can make four times as much out of a case as you can," he said. For answer I pointed to the list of cases for trial at the ensuing sittings. They numbered eight, but he said that only four of them would be tried. It is impossible to get figures to show the number of

cases as compared with the population of each State, for there is no uniform method of compiling the statistics. Recently Harvey, C.J., in Eq., made sad lament because the total of Supreme Court cases had trebled in the last fifteen years. During that time the number of barristers had increased from about 170 to 230. In each Supreme Court case tried from two to four barristers are engaged. Each term there are about 400 cases for trial and others are added during the sittings. In eleven monthly lists of District Court cases there are altogether about 4,000 set down for trial, and jurisdiction extends to £400. Included in this total there are probably 300 jury cases. I put forward these approximate figures to prove that the public appreciate the comparatively cheap and speedy justice they obtain in our Courts, and that their satisfaction in this behalf is good for the legal profession. I am afraid that in Victoria barristers are not so happily circumstanced. In earlier years of this country, and I suppose the same things are done now, it was a common practice in that State, in contract and other commercial cases, for the parties to agree that the opinion of a barrister should decide the matter in order that the costs of ordinary procedure should be avoided. In New South Wales, on the other hand, the Commercial Causes Act, designed to simplify procedure, has been but rarely used because procedure could hardly be made more plain and simple than it is under the present system.

New Zealand Law Society.

Auditing of Solicitors' Trust Accounts.

At a meeting of the Standing Committee of the Council of the New Zealand Law Society held in Wellington on January 31st, it was resolved to appoint Messrs. P. Levi, and C. G. White, of Wellington, to act as a sub-committee to meet members of a sub-committee already appointed by the Council of the New Zealand Society of Accountants for the purpose of considering amendments to the Regulations governing the audit of Solicitors' Trust Accounts.

Companies Acts.

A Proposed Bill.

The Government has decided on the preparation for introduction next session of a Companies Bill to replace the present Companies Act and its amendments. It is intended to adopt with variations the English Companies Act, 1929. Every care is to be taken to produce a satisfactory measure. An Advisory Committee has been appointed to confer with the Crown Law Draftsman who will submit to the Committee for advice such difficulties as should arise in the course of preparing the Bill. The Advisory Committee consists of two members of the legal profession—Messrs. P. Levi and H. E. Anderson, of Wellington—and two members of the accountancy profession—Messrs. H. D. Vickery and J. L. Griffin, of Wellington.

The Last Word.

A New Zealand Case.

In the note in the N.Z.L.J. of 4th February, upon the right of reply given to the Attorney-General and the Solicitor-General—a privilege that must appear particularly abhorrent to the woman juror of England—it is stated that so far as we in New Zealand are concerned the matter is one of academic rather than practical importance. This may be so now, but in at least one *cause celebre* in this country the right was hotly contested. In *The Queen v. Thomas Hall and Margaret Houston*, charged with attempted murder of Kate Emily Hall by antimony poisoning, Mr. T. I. Joynt, counsel for the male accused, raised the question as to whether the Attorney-General, Sir Robert Stout, who led the prosecution, had the right of general reply at the close of the case, mentioning that to the best of his belief the point was raised for the first time in New Zealand. He desired a ruling as the matter was one that materially affected the conduct of his defence, but Mr. Justice Johnston deferred complying with this request until he saw how the case developed. On the seventh day of the trial the Attorney-General himself raised the question, the ensuing discussion appearing in the Timaru "Herald" on the 18th day of October, 1886:—

> "The Attorney-General: 'I understand that Your Honour ruled that I had a right to reply if I liked to exercise it.'
>
> His Honour: 'Do you propose to sum up, or merely to reply?'
>
> The Attorney-General: 'I only wished to assert my right as a precedent.'
>
> His Honour: 'I see on referring to the rule as it exists in England that the Attorney-General theoretically is considered to be the prosecutor in every case. The Solicitor-General also had the right of replying. What was the origin of the practice I cannot say. The thing has gone on without any protest as regards the colonies; it has been decided in three colonies, New South Wales, Victoria, and Canada, that the Attorney-General holds the same right. If no more argument is brought, as at present advised, I will not decide against the right.'
>
> Mr. Joynt: 'I am not prepared to argue the point. From the Attorney-General's conduct throughout the case I inferred that he did not intend to exercise the right. I have found that some of the English judges have considered the practice an objectionable one.'"

The exercise of the privilege in England appears, from time to time, to have occasioned much ill-feeling, especially in cases where the law officer of the Crown has allowed a note of passionate persuasion to creep into his final address. Mr. Justice Byles was definitely opposed to it and did not hesitate to say so, and several other judges commented on its unfairness. In 1884 the matter was settled by a resolution by the English judges, "That in those Crown cases in which the Attorney-General or Solicitor-General is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the Crown and in no others."

W. E. Leicester.

Solicitors' Guarantee Fund.

An Australian View of Our New Act.

The scheme of guarantee provided for by our Law Practitioners (Solicitors' Fidelity Guarantee Fund) Act of last year is already attracting the favourable attention of members of the profession in other parts of the Empire, and it seems likely that the example set by New Zealand will soon be followed elsewhere. The New Zealand Law Society has, we believe, received requests for copies of the Act and enquiries concerning it from the Law Societies of some of the Australian States, and the Act itself has been favourably and sympathetically discussed in the columns of legal journals and the daily press of Australia, as well as in the newspapers of New Zealand. From the *Sydney Morning Herald* of January 16th, we reprint below an interesting and well-informed article, by a contributor "LEX," who is apparently a member of the profession, dealing in very commendatory terms with what he describes as our "remarkable and praiseworthy effort in legislation" and advocating its adoption in New South Wales in preference to the provisions of a Bill relating to audit at present before the legislature of that State.

THE PROTECTION OF CLIENTS.

"The New Zealand Solicitors' Fidelity Guarantee Act, 1929, as it may be shortly intituled, is a splendid effort to give absolute security to clients whose moneys are held in trust by solicitors. Its purpose is to make the whole body of solicitors guarantor to every client of all such moneys. One cannot see how this purpose can fail to be effective.

"Before dealing with the provisions of the Act, it is of interest to note the series of legislative efforts made in the Dominion to protect clients from loss by the defalcations of solicitors. The first notable statutory provision is in the Law Practitioners' Act, 1908, requiring solicitors to open trust accounts and to pay in to the credit of such accounts all trust moneys received. After ten years' experience of the inefficacy of this provision an Act was passed providing for the audit of solicitors' trust accounts. One may describe this Act by mention of the fact that the Bill for audit of solicitors' trust accounts now before our Parliament reproduces all its main provisions. It is not quite a Chinese copy of the Act, but has no important points of difference in the letter, although there would be great difference in the operation of the local measure, if enacted, for there are here no statutory provisions relating to these trust accounts.

DEFALCATIONS.

"The provisions of the New Zealand Act requiring annual audit and certificate of the auditor did not prove effective in preventing defalcations. "The New Zealand Law Journal," 1929, page 139, states with admirable moderation: 'Our audit provisions having been found not an absolute safeguard, our colleagues in New South Wales, view with mixed feelings' the Audit Bill. The commendable restraint of the writer is seen in the fact that defalcations by an average number of 1,400 practising solicitors in the Dominion during the last ten years amounted to £38,000. This, of course, was disastrous to clients, and involved the legal profession in discredit . . . . Fortunately for the legal profession there is in the Dominion the Law Society. It has statutory powers that make for efficiency, and it has always—or certainly in recent years—had men of splendid energy and talent directing and assisting in its work. At its annual conferences, and upon every other proper occasion, it planned and discussed schemes for the rescue of the profession from the impending disaster. It wasted no time in considering any amendment of the auditing provisions of their Act, for these, in practice, for reasons that need not be mentioned, had proved to be as foolishly futile as they will prove to be here if our legislators should waste their time in enacting the bill already mentioned. The scheme favoured by the Law Society from the first was that every client of any solicitor should be guaranteed payment of trust moneys in due course by every member of the profession; or to state it in another way, that the security of his fidelity attaching to any solicitor should be as unquestionable as the security offered by the Public Trustee.

THE FUND.

"The Act recently passed provides that every solicitor in practice on his own account shall, on applying for his annual certificate, pay the fee prescribed under the Guarantee Act, not less than five nor more than ten pounds, and this goes into a fund the property of the N.Z. Law Society. If required to meet liabilities, the society may in any year impose a levy of £10, but no solicitor shall be liable to pay more than £50 during his years of practice, and no contributions shall be required so long as the fund exceeds £100,000. (The contribution for the first year has been fixed at £5/5/-, so this should yield a total sum of about £7,875.) The society may, in its discretion, repay the whole or any part of the money contributed by a solicitor to him upon retirement, or to his representatives at his death.

There are ample provisions for control and investment of the fund by the Law Society.

The all important section of the Act is 18 (1), as follows:—

> 18. (1) Subject to the provisions of this Act, the fund shall be held and applied for the purpose of reimbursing persons who may suffer pecuniary loss by reason of the theft by a solicitor with respect of whom this Act applies, or by his servant or agent, of any money or other valuable property entrusted to him, or to his servant or agent, in the course of his practice as a solicitor, including any money or other valuable property as aforesaid entrusted to him as a solicitor-trustee.

In the bill, after being passed by the Lower House on the second reading, and after going through Committee, there was a proviso in this sub-section:—

> That no solicitor to whom this Act applies nor any person practising as a barrister shall have any claim against the fund in respect of thefts committed by any solicitor to whom this Act applies.

But this was struck out by the Statutes Revision Committee, and the amendment adopted by the House on the third reading. This is an instance of the very important work done by that committee in New Zealand. It not only deals with matters of draftsmanship, but with questions of policy as well. In this same bill it had been provided that so long as the fund exceeded £100,000 the income should be paid to the general funds of the Law Society, but the Revision Committee

struck out this provision, and the House agreed to the amendment.

The Law Society, or its council, may settle all claims arising under 18 (1), but the client must first exhaust his remedies against the defaulting solicitor, and will then be entitled to recover the balance of loss he has sustained.

The safeguarding and machinery sections of the Act need not be mentioned, the present purpose being only to draw attention to, a remarkable and praiseworthy effort of legislation.

Pedestrians on the Highway.

Recently we dealt editorially (Vol. IV, p. 385) with the rights of pedestrians on the highway and expressed the opinion that the right which the law gives them of *walking along* the highway was scarcely reasonable in view of the requirements of modern fast-moving traffic. We did not, however, advocate any restriction of a pedestrian's legal right *to cross* the street, for cross it he must. However, at the Traffic Conference held in London last January many expressed the view that some limitation ought to be imposed upon even this latter legal right of the pedestrian; but such a restriction would seem hardly to be demanded at present in this country. Indeed, even as applied to England, the suggestion does not meet with the approval of many and our English contemporary, the *Law Journal*, says with reference to it:

> "*Tempora mutantur*; and the time may be near when the ordinary wayfarer will be permitted to cross the street only at certain places; but we doubt if public opinion will, even as things are at present, assent without demur to such a change. So far as we can see the restriction, if imposed at all, must continue through the whole day or, at least, the whole business day. Even on a busy day there are many occasions when a man can cross any street without danger to himself or obstruction of others. It is a 'tall order' to say that he must not do so."

Clearing the Court.

Presiding in the Criminal Court in Auckland last month in a case where a woman was being tried on a charge of procuring abortion, Herdman, J., is reported to have said, with reference to a number of women in the public gallery: "If they have any self-respect they will leave the Court." Several women complied but others, so says a Press Association telegram, "remained till cleared out by an orderly." Just recently, in England, Hawke, J., addressed to the ladies present at the opening of an unpleasant criminal trial at the Leeds Assizes a somewhat similar invitation to withdraw. Few complied. The learned Judge then perpetuated the jest which Judges of all ages have essayed, generally with success, in similar circumstances and observed to counsel: "You may proceed; the ladies have gone." But even after the playing of this last trump there was, it is said, no general exodus.

Bench and Bar.

Owing to his appointment to the Chair of English and New Zealand Law at Victoria University College, Professor H. H. Cornish, M.A., LL.M., has retired from the firm of Webb, Richmond, Cornish and Swan, and is practising as a barrister only at 57 Ballance Street, Wellington. Messrs. R. H. Webb, D. R. Richmond and G. A. Swan will continue in partnership under the style of Webb, Richmond and Swan.

Mr. T. D. H. Hall, LL.B., of the Crown Law Drafting Office, has been appointed to the position of Clerk to the House of Representatives.

Messrs. Lovegrove and Rice, of Papakura, had dissolved partnership. Mr. Lovegrove will continue to practice at Auckland, and Mr. S. D. Rice will carry on the practice at Papakura on his own account.

Arbitrations and the Court.

In England it has for long been the practice for important arbitrations to be held in the High Court. But when the precedent was established it was laid down that the arbitrators were not to sit upon the Bench. The occasion was that of a difference arising between Lord Durham and his jockey, Wood, who had been accused of pulling one of his Lordship's horses during an important racing event. The arbitrators were James Lowther, who became Chief Secretary for Ireland, the Earl of March, afterwards Duke of Richmond, and Prince Solty-Koff. These gentlemen would have seated themselves upon the Bench; but Lord Coleridge, L.C.J., regarding such a threatened invasion of the judicial precinct as sacrilege, said no, and directed that they should take their seats at the associates' table on the floor of the Court. Succeeding arbitrators have followed this example. "Herein," says "Outlaw" in the *Law Journal*, "is a symbol; for despite the prevalence of arbitrations in our time, one knows that an award is a low thing and of poor authority compared with a judgment."

The Cause of Action.

Action by a woman for alleged misrepresentation on the sale of a fruit and greengrocery business. The plaintiff's husband who negotiated the purchase gave evidence and in cross-examination said that he understood that the defendant was also a dog-fancier and bred and sold pups.

The C.J. (to Counsel for the plaintiff): "That is your cause of action, Mr. . . . ., is it not?"

Counsel: "No, your Honour."

The C.J.: "But surely it is!"

Counsel: "In what way, your Honour?"

The C.J.: "Is it not your cause of action in colloquial language that he sold your client one?"

Wellington District Law Society.

Annual Meeting.

The Annual General Meeting of the Wellington District Law Society was held in the Supreme Court Buildings on 24th February, 1930. There was a large attendance of members; Mr. C. G. White, the retiring President, took the chair until the election of his successor, Mr. Albert A. Wylie.

The following officers of the Society were elected:—

President: Mr. Albert A. Wylie.

Vice-President: Mr. Harry E. Anderson.

Treasurer: Mr. Wilfred E. Leicester.

Auditor: Mr. J. S. Hanna.

Ordinary Members of Council: Messrs. A. T. Duncan, M. M. F. Luckie, P. Levi, William Perry, G. G. G. Watson, and C. G. White.

The Annual Report and Balance Sheet for the year ended 31st December, 1929, were adopted. The report indicated that the practitioners' certificates in the District totalled 378, and of that number 289 covered certificates in the city and suburbs, and 99 in the country towns. The increase for the year (7) mainly concerns the city. The membership of the Law Society numbered 223 in the city and 48 in the country, the number (accounting for several changes) being practically the same as in the previous year.

Reference was made to the loss sustained by the deaths of Sir John Findlay, K.C., Messrs. T. F. Martin and E. Y. Redward.

Members of the Society were gratified to learn of the appointment of Mr. M. Myers, K.C., to the office of Chief Justice. The following resolution regarding the appointment was passed: "That this meeting places on record its high appreciation of the services rendered to the Society by Sir Michael Myers, K.C.M.G., who was a member of the Council for many years and held the office of President in the year 1924, and also congratulates Sir Michael on the honour of Knighthood which has been conferred on him by His Majesty the King."

The following members of the Law Society were elected to be the Society's representatives on the Council of the New Zealand Law Society: Messrs. A. Gray, K.C., C. H. Treadwell, and Albert A. Wylie. The Wellington representatives elected to the New Zealand Council of Law Reporting were Messrs. C. H. Treadwell and H. F. O'Leary.

The question of the Easter holidays to be observed was considered and it was decided that the period during which law offices in the City should be closed at Easter should extend from 5 p.m. on Thursday, 17th April, until the usual opening hour on Monday, 28th April.

Reference was made to the passing of the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, which was introduced into Parliament and passed at its last session. The retiring President in his address referred to the benefits which the profession and the public should derive under the provisions of this enactment by reason of the protection it affords for the establishment of a Solicitors' Fidelity Guarantee Fund for the purpose of re-imbursing persons who may suffer pecuniary loss through the misappropriation by a solicitor of trust funds committed to his care. He referred to the warm sympathy shown by Sir Thomas Sidey, Attorney-General, to the proposals, and to the assistance given by him in connection with the placing of the Bill on the Statute Book. The President referred also to the great amount of work undertaken by Mr. P. Levi in the drafting of the Bill, to the invaluable assistance given by Mr. J. Christie, Crown Law Draftsman, and also to the great trouble Mr. A. Gray, K.C., took in connection with the passing of the Bill through Parliamentary Committee stages.

Otago District Law Society.

Annual Meeting

The Annual Meeting of the Otago District Law Society was held in the University Club Rooms, on Friday, 21st February, at 8 o'clock.

Mr. H. L. Cook, President for the past year, presided over a large meeting. Mr. Cook moved the adoption of the Annual Report and commented on the various points of interest which it contained. After the report had been adopted the following office-bearers were elected for the year:

President: Mr. A. C. Stephens.

Vice-President: Mr. J. M. Paterson.

Treasurer: Mr. R. R. Aspinall.

Council: Messrs. H. L. Cook, J. B. Nichol, E. J. Anderson, W. L. Moore, W. G. Hay, and C. L. Calvert.

Mr. R. H. Webb, of Wellington, was re-appointed the Society's representative on the Council of the New Zealand Law Society.

It was decided to ask the New Zealand Law Society to approve of the holding of the Law Conference in Dunedin, in 1931.

It was suggested by Mr. Barrowclough that the Society should make a move in the direction of having the annual holiday for the whole community changed from Christmas to February, and the Council was instructed by the meeting to bring the matter under the notice of all bodies who were likely to be interested.

Mention was made of the Conference to be held in Auckland, in April, and members who intended to be present were urged to send in their names to the Secretary without delay.

The holidays for the next year were fixed as follows: Easter, Thursday, 18th April to Saturday, 26th April (inclusive); Christmas, Wednesday, 24th December to Wednesday, 7th January (inclusive).

"The influence that the legal profession exercises on the other groups in Society cannot be accurately measured. We are proud to think that members of the profession are in various countries in the world engaged in important work of administration; it would not be untrue to say that lawyers are the rulers of the world."

—Mr. S. C. Davis, President of the Plymouth Law Society.

Legal Literature.

Yearly Practice of the Supreme Court for 1930.

Twenty-second Edition : By Sir Willes Chitty, Bt., K.C. and H. C. Marks, assisted by F. C. Allaway.

Vol. I, pp. ccccxcv, 1488, 423 : Vol. II, pp. vi, 1071, 423. Butterworth & Co. (Publishers) Ltd.

The *Red Book* is without doubt one of those legal works which are absolutely indispensable to every practitioner who has any measure of practice in the Supreme Court. In very many instances our rules of practice are identical with the English rules, and in still more cases there is a close similarity ; an English text-book on this branch of the law is, therefore, of very considerable value and service to the New Zealand lawyer. Indeed it is but seldom that any question of procedure is argued in our own Courts without a citation either from the *Red Book* or from its contemporary the *White Book*. In its two volumes the work contains over 2,500 pages without including a table of cases extending over some 450 pages and two indices of 420 pages each. The detail of the work and its exhaustiveness are phenomenal and its absolute accuracy is assured by the very fact of its annual revision over a long period of years.

Practice, while of vital importance, cannot be claimed to be one of the most enthralling parts of the law and it would be only tedious to review at length the contents of this work. Two cases decided during the year and duly noted in the *Red Book* deserve, however, special notice. The first, *In re British Reinforced Concrete and Engineering Co.*, 45 T.L.R. 186, deals with the not altogether unusual event of the death of a Judge during the hearing of proceedings. The course to be adopted when a Judge dies during trial with a jury had been dealt with in the previous year in *Coleshill v. Manchester Corporation*, (1928) 1 K.B. 776. In the *British Reinforced Concrete Co.'s case* the action was being heard without a jury : in such a case, it was held, another Judge may, if there is no conflict of evidence, and if the parties so request, preside at the continuation of the hearing after reading the shorthand notes, it not being necessary to recall the witnesses. Curiously enough a case on a somewhat cognate point—the incidence of the costs of trial rendered abortive by the death of a Judge before judgment—has been decided by our own Supreme Court during the year : *Tasker v. Algar and Algar*, (1930) N.Z.L.R. 61, 4 N.Z. L.J. 358. The second case of interest is *Grinham v. Davies*, (1929) 2 K.B. 249, a decision of the Divisional Court holding that where in an action for damages for personal injuries the fact that the defendant is insured is disclosed to the jury, the Judge, in his discretion, may discharge the jury and order another trial. The point will not perhaps be now of great practical importance in New Zealand for our juries need no reminder of the effect of the Motor-vehicles Insurance (Third-party Risks) Act, 1928.

Those who are acquainted with the *Red Book* will require no recommendation from this reviewer, but for the benefit of any to whom the work may not be a familiar tool of trade it is unhesitatingly given.

Hammond and Davidson's Law of Landlord and Tenant in N.S.W.

Third Edition : By J. H. Hammond, K.C., B.A., LL.B., and F. W. Kitto, B.A., LL.B.
(pp. xcvi ; 492 ; 82 : Butterworth & Co. (Aus.) Ltd.).

Limitations of market have always imposed a check upon the number of our New Zealand legal publications, and the same restriction operated for a long time in Australia. Of recent years, however, due no doubt to the growing demand, many valuable text-books have been written and published in the Commonwealth and these are, for the most part, of considerable practical utility to the New Zealand lawyer. *Hammond and Davidson's Law of Landlord and Tenant* was first published in 1906 and the second edition appeared in 1920 ; now we have the third edition and with it a change in authorship, for Mr. Justice Davidson's judicial duties have prevented him from participating in its preparation. The learned Judge has had time, however, to contribute a foreword in which he says : " A brief perusal of the proof sheets of the present edition has satisfied me that it reflects the experience gained during the twenty-three years over which former editions have extended."

It is not proposed to deal at length in this review with the contents of the work. The law of landlord and tenant in New South Wales resembles our own law even more closely than does the English law ; there are, of course, differences but they are, on the whole, comparatively few. Not only have cases decided in all the States of Australia been included but the decisions of our own Courts are frequently cited—in fact, glancing quickly through the table of cases, this reviewer has found references to over 200 New Zealand authorities. Every part of the subject appears to have been exhaustively explored by the authors and there can be no doubt that this Australian work compares very favourably in every respect with such well-established English treatises as *Redman* and *Woodfall*.

New Books and Publications.

Mahaffy and Dodson's Law Relating to Motor Cars. Third Edition. Butterworth & Co. (Publishers) Ltd. Price 26s.

Mozley and Whiteley's Law Dictionary. Fifth Edition. By F. G. Neave, LL.D., and G. Turner, M.A. Butterworth & Co. (Publishers) Ltd. Price 15s.

Willis and Oliver's Roman Law. Examination Guide. Fourth Edition. By J. W. C. Turner, M.A., LL.B. Butterworth & Co. (Publishers) Ltd. Price 18s.

Yearly Supreme Court Practice, 1930. Two Volumes. Butterworth & Co. (Publishers) Ltd. Price 45s.

Hammond and Davidson's Law of Landlord and Tenant in New South Wales. With a Foreword by The Honourable Mr. Justice Davidson. Third Edition. By J. C. Hammond, K.C., B.A., LL.B., and F. W. Kitto, B.A., LL.B. Butterworth & Co. (Aus.) Ltd. Prize 65s.

The Law Relating to Weights and Measures. First Edition. By George A. Owen. Charles Griffen & Co. Price 40s.