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"The key to the opening of every law is the reason and spirit of the law."

—*Sir John Nicholl.*

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Accountancy and Law.

The deliberations of the Second Convention of the New Zealand Society of Accountants have demonstrated that the profession of accountancy has much in common with the profession of the law and afford evidence of that spirit of friendly co-operation which prevails, and ought to prevail, between the two professions.

The Convention has shown, in the first place, that the difficulties which at present face the accountants are much the same as those which have been confronting the solicitors' profession. The most important remit discussed was one relating to a suggested guarantee fund—a proposal prompted, no doubt, by the legal profession's example. The number of practising public accountants in the Dominion is much smaller than the number of practising solicitors and as, comparatively speaking, the average public accountant handles trust moneys to a much less extent than does the average solicitor the number of defalcations, and their extent, among the ranks of the accountants has not had the same effect as regards the impairment of public confidence as, unfortunately, has been the case with us. The accountants, however, have no desire to wait until some regrettable defalcation casts a stigma on the whole profession, and we quote from the latest number of *The Accountants' Journal* some of the reasons advanced by the mover of the remit (Mr. Barton Hobbs) as to why their Society should proceed with some scheme of guarantee :

> "The chief reason why he contended that a fund of similar nature was needed for accountants was to protect the fair name of the Society, so that any wrongs could be promptly righted—wrongs which might constitute hardship to beneficiaries or widows and orphans deserving of protection. 'The reputation of a society is always in the hands of the weakest of its members,' declared Mr. Hobbs, who went on to suggest that there were secondary reasons in favour of the plan, one being that it would meet the legitimate competition of trust companies, which could not possibly default, and the Public Trustee who employed 106 solicitors and 85 professional accountants. Other trust organisations employed accountants, and he was not in any way complaining of these most useful institutions. However, there was no reason why they should continue to hold the advantage over accountants of having a guarantee behind them."

After a considerable discussion in the course of which much favourable comment was made on our own scheme, the following motion was carried by a large majority :

> "That the Executive be requested to set up a sub-committee to discuss with the New Zealand Law Society proposals for the formation of a joint guarantee fund, and that failing any co-operation a scheme be drafted for a separate fund."

As a gesture the suggestion that the two professions should form a joint guarantee fund is undoubtedly a friendly one although we doubt very much whether it is likely to materialize. Apart altogether from the many practical difficulties in the way of a joint scheme, some of which seem almost insuperable, the feeling, if it could be obtained, of most members of the legal profession as to the proposal would, at the present time, almost certainly be in favour of a retention of our present scheme, for it is difficult to see now what additional advantage would be secured from the adoption of a joint one. One thing, however, is certain, and that is that the accountants in any steps they may take towards the establishment of a guarantee fund of their own will have the whole-hearted and sympathetic support of the entire legal profession.

Another matter of importance to both professions was raised by Mr. E. W. Hunt in his address on "The Profession of Accountancy—its Development and Future Outlook," viz., the question of co-operation between accountants and lawyers. There is no doubt that the question of the proper limits of the work of both professions has in the past occasionally been the cause of just a little misunderstanding. Lawyers, for instance, have taken the view that accountants should not prepare memoranda and articles of association of companies; accountants have replied that solicitors should not act as company secretaries or prepare income-tax returns. But probably in the public interest, and indeed in the mutual interests of both professions, a middle view is the proper one, and it is just such a middle view that Mr. Hunt suggested in his address :

> "Speaking generally on the co-operation between solicitors and accountants, there have from time to time been mutual complaints regarding the one interfering with the other's work. It has been suggested that accountants have prepared memorandum and articles of association, have in some instances drawn wills, and have even prepared agreements which should more rightly be undertaken by solicitors. On the other hand, accountants have complained that solicitors keep trust accounts in their offices, have prepared land and income tax returns, have acted as secretaries to companies, and generally have carried out work which might rightly be considered to come under an accountant's duties. In my opinion, it would be far better if both professions were to confine themselves to their own special work. Personally, I would under no consideration prepare articles of association for a company, as I hold the opinion that the responsibility involved is far too great. The same applies to the other matters I have referred to. Why should one profession take the responsibility of the work of the other? I believe that co-operation would in every case be far preferable, and while there is probably very little to complain of on either side, yet it would be a graceful act for each profession to leave the other a free field for its legitimate work."

In the discussion which followed it is interesting to note that all the speakers expressed a similar note of co-operation. No doubt such matters as the preparation of memoranda and articles of association and other company documents are primarily, and as the preparation of wills preeminently, the work of the legal profession; but in many such cases it will be found that matters of law and accounts become so intermixed that there is definitely a place for collaboration with the public accountant. On the other hand the keeping of accounts and the preparation of income-tax returns are matters primarily for the accountant but when, as frequently is the case, legal questions arise the accountant ought, in the interests of his client, to confer with the lawyer. Although sometimes there may be room for difference as to the proper limits of the work of each there should, in most cases, be little difficulty in fixing the primary dividing line. It seems likely, if the solicitors approach the matter with the same spirit of co-operation as the accountants seem to be adopting, that any differences which may be found to exist could readily be resolved. The whole question would be a suitable one for full discussion by the profession at the Auckland Conference.

Court of Appeal.

Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

March 14, 1930.
Wellington.

SCALES v. YOUNG.

Practice—Appeal to Privy Council—Application for Conditional Leave—Matter of General or Public Importance—Question as to Power of Licensing Committee to Grant License to Appellant where "No License" District Merged in a "License" District to Form New District—Leave to Appeal Granted on Condition That Security for Costs Be Given Within Three Months—Privy Council Rules of 1910, Rule 2 (a) & (b).

Motion for conditional leave to appeal to Privy Council from the judgment of the Court of Appeal reported (1929) N.Z.L.R. 855, 5 N.Z.L.J. 354, on the grounds, firstly that the proceedings involved a civil right of the value of £500 or upwards, and secondly that the questions involved in the appeal were of such general and public importance that they should be submitted to His Majesty in Council for decision.

Sim in support.

Spratt to oppose.

MYERS, C.J. (orally) said that even assuming in Mr. Spratt's favour, although speaking for himself he was not prepared to make the concession without further consideration, that the case did not come within paragraph (a) of Rule 2—that was to say that there was not an appealable amount involved.—His Honour entertained no doubt that the case did come within Rule 2 (b). The question involved in the appeal was one of great general and public importance, and, that being so, it appeared to His Honour that the discretion of the Court could be exercised in one way and one way only—that was by granting conditional leave to appeal. His Honour did not think that the case was one which called for any special terms or conditions. In His Honour's view the appellant should give security for the full amount provided for by the Rules, that was to say the sum of £500. His Honour thought that was a sufficient indemnity to the respondents for their costs in the event of the appeal not succeeding. If on the other hand the judgment of the Court of Appeal should be held to be wrong and the appellant was entitled to redress, then His Honour saw no reason why the appellant should nevertheless be called upon to make a contribution towards the costs of the other side. In His Honour's opinion leave to appeal should be granted upon the terms that security be given pursuant to the rules to the amount of £500.

HERDMAN, J., said that he agreed entirely with the observations of the Chief Justice. He had a vivid recollection of the difficulties of the legislation which the Court of Appeal had to deal with and was of opinion that facilities should be given for carrying the matter further.

BLAIR, J., said that he also agreed. The suggestion that terms should be imposed seemed to be quite unnecessary even if it were a case in which terms should be imposed. The defendants were members of a Licensing Committee and had really no interest in the proceedings. Their interest was merely to see justice done, that was all. There was no necessity for the Licensing Committee to trouble to be represented before the Privy Council unless they were asked to do so by interested persons. His Honour agreed that leave to appeal should be granted on the usual terms.

SMITH and KENNEDY, JJ., concurred.

Conditional leave granted, security to be given to the amount of £500 within three months.

Solicitors in support of motion: **Duncan, Cotterell and Co.,** Christchurch.

Solicitors to oppose: **Orbell and Charles,** Christchurch.

Supreme Court

Myers, C.J.

March 7, 1930.
Wellington.

CLARK v. VARE.

Defamation—Libel—Defamatory Meaning—Reference to Plaintiff—Rival Advertising by Adjoining Traders in Small Town by Means of Placards in Shop Windows—Plaintiff a Married Man Living Separate from Wife and Having as Housekeeper a Married Woman Living Apart from Husband—Defendant Exhibiting Placard with Words "One Man, One Wife, One Trade,"—Words Capable of Defamatory Meaning in Circumstances—Reference by Name to Plaintiff Unnecessary.

Appeal on fact and law from the decision of Mr. T. B. McNeil, S.M. The facts were as follows: The respondent was a dealer in boots and shoes and stocked no other goods. His premises were next door to those of the appellant, who dealt primarily in drapery, but also stocked boots and shoes, and to that extent was a rival in trade of the respondent. Upper Hutt, where the two parties traded side by side, was a very small place. For some time prior to the publication of the matter complained of by the appellant the parties had been conducting a species of rival advertising by means of placards in their respective shop windows, each placard showing plainly that it was referable to the competition with the other trader. Finally the respondent, on 30th January, 1929, placed in his window a placard containing the words "One man, One wife, One trade." It appeared that the appellant was a married man living separate from his wife and had living with him as housekeeper a married woman who was living separate and apart from her husband. All the above facts were known to a number of residents at the Upper Hutt, and three of them, women who knew both the appellant and his housekeeper, gave evidence that, having seen the previous placards and knowing the circumstances as they did, the words of the placard were taken and understood by them to refer to the appellant and to the relations between him and his housekeeper. The appellant sued the respondent for damages for libel but was non-suited by the learned Magistrate. From this judgment of non-suit the appellant appealed.

A. J. Mazengarb for appellant.

C. A. L. Treadwell for respondent.

MYERS, C. J. (orally) said that the Magistrate seemed to have decided the matter as a matter of law only. He said in his short oral judgment: "If this case were before a Judge and jury it would be a case to withdraw from the jury." That view of the position was, in His Honour's opinion, clearly erroneous. Had the case been heard in the Supreme Court before a Judge and jury it was plain that, on the case as presented, the Judge must have held that the words complained of were capable of a defamatory meaning, and that he could not have nonsuited but must have submitted the case to the jury. The Magistrate also said: "In my mind there is no identification of the plaintiff in the advertisement." That was quite true in one sense—if it was intended to mean that there was no express reference in the placard to the appellant by name. But only in that sense, as it seemed to His Honour, was the statement correct. When once the facts of the case were clearly understood it was plain that the Magistrate's judgment could not be supported.

His Honour reviewed the evidence and said that in the circumstance the inference drawn by the witnesses for the appellant that the words referred to the appellant and to the relations between him and his housekeeper seemed to be quite a reasonable inference for those persons to draw. Indeed it seemed to His Honour that it would have been impossible for them to draw any other inference. There was ample authority to show that it was not necessary that the words complained of as a libel should refer by name to the person claiming that the defamatory words referred to him. If necessary it was sufficient to point to such cases as **Sadgrove v. Hole,** (1901) 2 K.B. 1; **Playle v. Riversdale Co-op. Dairy Factory Co.,** 33 N.Z.L.R. 1, and the recently decided case **Cassidy v. Daily Mirror Newspapers Ltd.,** (1929) 2 K.B. 331. His Honour had no doubt that the words complained of in the present case were, in the circumstances proved, capable of a meaning defamatory of the plaintiff, and

that they bore (and for that matter were intended to bear) that meaning.

Appeal allowed.

Solicitors for appellant: **Mazengarb, Hay and Macalister,** Wellington.

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

Myers, C.J. November 21, 1929; February, 21, 1930 Wellington.

GANNOW ENGINEERING CO. LTD. v. RICHARDSON.

Contract—Sale of Goods—Vendor and Purchaser or Principal and Agent—English Company Granting to Person in New Zealand "Sole Selling Rights" of Certain Machines and Undertaking Not to Offer for Sale in New Zealand Any Competitive or Similar Machines—Provision for "a Commission of Ten per cent. to be Allowed by Way of Deduction from the Actual Invoiced Value Less Packing, Freight or Any Such Incidental Charges"—Further Provision that "All Payments Due are to be Made Against Receipt of Shipping Documents by the Accredited Agent" of the Defendant in London or other English Port as Arranged — Word "Commission" Not Conclusive of Agency Where Context Shows Misuse of Term—Relationship of Parties that of Vendor and Purchaser and Not Principal and Agent—Agreement Unambiguous—Prior Correspondence and Evidence of Subsequent Course of Business Inadmissible to Prove Relationship Created.

Action by the plaintiff, a company, incorporated in England, against the defendant for an account of the proceeds of the sales of certain granulators, and an order that the defendant be directed to pay to the plaintiff the amount found to be due on the taking of such account.

There were two causes of action. In the first cause of action the plaintiff claimed that in or about January, 1928, it had consigned to the defendant a granulator and certain spare parts the total amount of the invoice (including charges) being £655 17s. 6d., that the goods were received by the defendant as agent for the plaintiff for sale on terms requiring the defendant to account for the proceeds of sale thereof, and that the defendant had sold the goods and had failed to account. The defendant admitted that after the granulator had been in New Zealand for a considerable time he sold it to the General Haulage Company at a price in excess of that at which it was charged in the invoice to himself. The plaintiff admitted that the defendant was (*prima facie*) entitled to 10 per cent. commission but said said that such commission was to be obtained by adding the same to the amount of the invoice, and further that assuming that the 10 per cent. had been obtained from the General Haulage Company the defendant was entitled to credit for it against the plaintiff only provided he had not taken a secret profit. In the second cause of action the plaintiff alleged that the defendant acted as its *del credere* agent for the sale in New Zealand of products of the plaintiff's manufacture, and as such agent sold in New Zealand four granulators to the Waiwetu Quarry Co., the Cherrybank Blue Metal Quarry Co., C. F. Pulley, and the Wanganui City Council respectively. In the case of each sale the defendant had, admittedly, sold at a price in excess of the plaintiff's invoice price of the granulator plus charges up to landing in New Zealand. The plaintiff alleged that in each case the defendant had failed to pay, or account to the plaintiff for, the sum in excess of the invoice price plus charges and claimed an account of the proceeds of the sales and an order that the defendant be directed to pay to the plaintiff the amount found to be due on the taking of such account, the defendant being credited with such commission as he was legally entitled to. In regard to the granulators sold to the Waiwetu Quarry Co. and Pulley, the purchasers themselves paid in England the total amount agreed upon between themselves and the defendant in exchange for shipping documents. The machines sold to the Cherrybank Blue Metal Co. and the Wanganui City Council were consigned to the defendant and at the latter's suggestion, made because, as the defendant pointed out, if he had a machine in hand for potential purchasers to see, sales were more likely to result. At the time these sales were made, there was in force an agreement dated the 1st June, 1925, made between the plaintiff and the defendant whereby the defendant was granted "the sole selling rights" of pulverising granulator machines manufactured by the plaintiff, "it being implied and understood that no competitive or similar functioning machine is offered for sale by him during the operation of this agreement throughout the British Colony of New Zealand for a period of twelve calendar months from this date continuing thereafter subject to three calendar months notice of termination by either party. A commission of 10% (ten per cent.) to be allowed by way of deduction from the actual invoiced value, less packing, freight, or any such incidental charges. All payments due and to be made against receipt of shipping documents by the accredited agent of F. Richardson in London or other English port as may be arranged." The plaintiff admitted that the defendant was entitled under this agreement to a commission of 10% on the net invoice value, i.e., the total invoice value less packing, freight, and incidental charges, unless he had deprived himself of the right to such commission by taking a secret profit, and also that the defendant was entitled to credit for 10% of the invoice price of two granulators which the plaintiff sold direct to the Pohangina County Council and Winstone Ltd. in breach of the defendant's rights under such agreement

Wilson for plaintiff.

Boys for defendant.

MYERS, C.J., said that it was convenient to consider the second cause of action first. The plaintiff contended that on the true construction of the agreement the relationship between the parties was that of principal and agent while the defendant contended that the relationship was that of vendor and purchaser. Similar questions had arisen in **Michelin Tyre Co. Ltd. v. Macfarlane (Glasgow) Ltd.,** 54 S.C.L.R. 1, 55 Sc.L.R. 35, **Ex parte White, In re Nevill,** L.R. 6 Ch. App. 397, on appeal to the House of Lords, *sub nom.* **Towle v. White,** 29 L.T. 78, 21 W.R. 465, and **Fraser-Ramsay (N.Z.) Ltd. v. De Renzy,** 32 N.Z.L.R. 553.

Turning to the agreement in the present case it was to be first observed that what the plaintiff purported to grant was the sole selling rights of its pulverising granulator machines. The expression "sole selling rights" was to His Honour's mind a neutral expression which was consistent with either of the contentions made by the parties. The agreement then provided that a commission of 10% was to be allowed by way of deduction from the actual invoice value less packing, freight, or any such incidental charges. It was said in **Ex parte White** (*cit. sup.*) and had also been said in other cases, that there was no magic in the word "agency" which was often used in commercial matters where the real relationship was that of vendor and purchaser. In the present case the word "agency" did not appear, nor did the word "agent." The term "commission" was, however, no doubt the term which was used primarily to denote the remuneration of an agent. If there were nothing further in the agreement His Honour should say that the relationship provided for was that of principal and agent, that the transactions contemplated were consignments by the plaintiff to the defendant of granulators which the defendant would sell in New Zealand on account of the plaintiff, collecting the proceeds of sale on the plaintiff's behalf, and remitting such proceeds less 10%, which was "to be allowed by way of deduction," and such expenses if any as might be incurred in New Zealand on the plaintiff's account. Just, however, as there was no magic in the term "agent" or "agency," so His Honour apprehended there was no magic in the mere use of the term "commission" if it appeared from a consideration of the whole document that the word was really misused and that with due regard to the context its real meaning was discount or rebate, one or other of which words, it might be pointed out, seemed to be primarily the appropriate expression to be used in the case of an allowance made not to an agent but to a purchaser. The agreement, however, did not end with that provision as to commission. But His Honour paused to make certain observations with regard to the provisions of the agreement up to that point. Firstly, whatever rights were granted by the agreement were expressed to be granted in regard merely to pulverising granulator machines. There was no reference whatever in the agreement to spare parts not supplied with (and consequently not as it were part of) a machine sold, or any other products manufactured by the plaintiff. Secondly, the so-called commission was not to be paid by the plaintiff to the defendant out of the proceeds of moneys which the plaintiff itself might collect in respect of machines which the defendant might sell. Nor was it expressed as "a commission of 10%" of the invoiced price, but as a sum "to be allowed by way of deduction" from the invoiced value whatever the words "to be allowed by way of deduction" might mean. Nevertheless, as His Honour had already said, if there were nothing more in the agreement he would have assumed that the transactions contemplated were sales of machines consigned to the defendant for sale in New Zealand on the plaintiff's account, the defendant collecting the proceeds of sale and accounting to the plaintiff therefor

after deducting the 10% commission. The agreement, however, showed that that was not the kind of transaction contemplated, for it proceeded as follows: "All payments due and to be made against receipt of shipping documents by the accredited Agent of F. Richardson in London or other English port as may be arranged." That provision showed, in His Honour's opinion, that the transactions contemplated were not sales on consignment at all but sales effected in New Zealand of machines to be shipped in England, the purchase price of which was to be paid in England, not by the person to whom the defendant sold but by the defendant himself through his own accredited agent in England against shipping documents. There was not a word in the agreement similar to the provision in the documents in the **Michelin case** (*cit. sup.*) requiring the defendant to sell granulator machines at prices fixed by the plaintiff. Even if such a provision could be held to be implied the **Michelin case** showed that it would be immaterial if on the true construction of the agreement the relationship between the parties was that of vendor and purchaser. In such a case the defendant would no doubt commit a breach of contract by selling at higher prices than those at which he had agreed to sell, but the plaintiff would have no other claim than a claim to damages for breach of contract and it was difficult to see what damages could be proved. The agreement contained no provision whatever as to the terms on which the defendant was to sell the machines. It could not, His Honour thought, be reasonably inferred that he was to sell only for cash because if so the person who purchased from him would have to pay him for the goods months before delivery and without even receiving the shipping documents. It was quite unreasonable to suppose that any person would purchase goods on such terms, and it would be unreasonable to assume that the parties contemplated a course of operations which would have made the transaction of any business impossible. Plainly enough, as it seemed to His Honour, a purchaser from the defendant would not be his accredited agent. The term "accredited agent of F. Richardson" must, His Honour thought, be construed in the light of known and recognised mercantile practices and customary methods of business. So read, the expression must, in His Honour's view, mean either a banking institution or one of the well known class of expert houses provided with funds or credit by the defendant with which to pay for the goods in exchange for shipping documents. And, so read, the payment would be made in England against shipping documents, the defendant paying not the full price, but the price less the so-called commission. If the plaintiff had intended otherwise and were providing for transactions on an agency basis one would have expected a provision that payments were to be made by the customesr or purchasers from the defendant against shipping documents in England and not by the defendant or his accredited agent. That, however, was not what the agreement said, and indeed if the agreement had so provided it would have been inconsistent with the provisions that commission was to be allowed "by way of deduction" from the actual invoice value because the whole amount of the invoice would have been paid not to the defendant but to the plaintiff, and the defendant would have had nothing in hand from which to deduct the so-called commission. The effect of the agreement therefore seemed to His Honour to be that the defendant, no matter on what terms he might arrange to sell a machine, was required to pay the plaintiff for that machine, even though the period of credit to the purchaser from the defendant had not elapsed, and even though the defendant might have received from such purchaser no portion whatever of the purchase money. It was mainly (if not entirely) because the agreement in the **Michelin case** (*cit. sup.*) was held to have that effect that it was decided in the House of Lords that the relationship constituted by the documents was that of vendor and purchaser, and not that of principal and agent. It was true that in the Court of Session Lord Ormidale referring to the agreement said: "It is of some importance that the word 'commission' which is the term generally used to describe an agent's remuneration nowhere occurs," but as His Honour understood the reasoning of their Lordships in the House of Lords the judgment would have been the same even though the word "commission" had been used instead of (as was there used) the word "rebate." The judgment of the majority in the House of Lords seemed to His Honour to turn upon the requirement in the agreement that the stockist or agent should pay for the goods sold either immediately upon sale or when the Michelin Company required him to do so, irrespective of whether the stockist or agent had been paid or not. It might also be pointed out that in the **Michelin case** no privity of contract seemed to be established between the original supplier of the goods and the ultimate purchaser, and that seemed to be also the case here. There was, His Honour observed, another point in the present case which would appear from the judgment in **Ex parte White** (*cit. sup.*) and in the **Michelin case** (*cit. sup.*) to be not without some importance. His Honour referred to the fact, that in at least some cases the defendant sold to the respective purchasers not a granulator machine simpliciter in the form in which it was shipped from England, but a machine installed and erected upon the customer's premises. That was to say, the defendant had to supply not only the machine but other articles, some of them at least obtained from sources other than the plaintiff, which were required in connection with the erection or installation of the machine; and the total price included the price of such articles and the defendant's own charge for professional engineering services. In other words he to some extent, to adopt the language used in **Ex parte White,** "manipulated" the machines or altered their character. On a consideration of the whole agreement, therefore, His Honour, for the reasons given, came to the conclusion that, just as in **In re White,** the **Michelin case,** and **Fraser-Ramsay v. De Renzy,** so here, the relationship constituted between the parties was that of vendor and purchaser and not that of principal and agent. **Ex parte Bright, in re Smith,** 10 Ch. D. 566, was distinguishable.

Mr. Boys tendered in evidence certain correspondence between the parties prior in date to the written agreement of 1st June, 1925, and embodying the negotiations leading up to that agreement. Mr. Wilson contended that that correspondence was not admissible because there was no ambiguity in the agreement when read as a whole. His Honour agreed, though he took a different view of the meaning of the agreement from that for which Mr. Wilson contended. Even if the correspondence were admissible His Honour could only say that it would probably be of little use because, as Mr. Wilson rightly said, it was itself not very clear. If the correspondence preceding the agreement was of little value, even if admissible, His Honour thought that the same observation might be made in regard to the course of business and the correspondence subsequent to the agreement: See per Jessel, M.R. in **Ex parte Bright** (*cit. sup.*). If the agreement was plain and unambiguous, the fact (if it were the fact) that the parties had interpreted the contract in a sense different from that which the words themselves plainly bore could not affect the construction: **North Eastern Railway v. Hastings,** (1900) A.C. 260. The position was different if the contract was ambiguous and the parties acted upon a special interpretation of it, of which class of case **Topliss v. Cohr,** 24 N.Z. L.R. 540, was an illustration. The correspondence subsequent to the agreement showed to His Honour's mind that the parties were in fact disputing throughout as to the real effect of the agreement and the nature of their respective rights thereunder.

So far, therefore, as the sales to Pulley and the Waiwetu Quarry Co. were concerned, in His Honour's opinion, as the relationship between the parties was that of vendor and purchaser, the plaintiff was not entitled to recover the difference between the original price and the price at which the machines were sold by the defendant. The defendant was entitled in account to credit against the plaintiff for the 10% which was spoken of in the agreement as a commission, but which, in His Honour's view, must be interpreted as a discount or rebate. His Honour had not overlooked the fact that so far as the sales to Pulley and the Waiwetu Quarry Co. were concerned those two purchasers actually themselves paid in England the total amount agreed upon between themselves and the defendant in exchange for the shipping documents. That, however, was an arrangement which the purchasers of the machines and the defendant chose to make between themselves. The mere fact that the ultimate customer paid the plaintiff instead of the defendant really made no differance so far as the plaintiff was concerned; and the mere fact that that course of business was adopted in those two cases could not in His Honour's opinion affect the construction of the agreement. The machines sold to the Cherrybank Blue Metal Co., and the Wanganui City Council were machines which were consigned by the plaintiff to the defendant at the latter's suggestion, made because, as the defendant pointed out, if he had a machine in hand for potential purchasers to see, sales were more likely to result. First one machine and then another was accordingly consigned by the plaintiff to the defendant. The plaintiff insisted always that the price must be paid as soon as the machine was sold. In other words it was to be paid for in the same way as a machine that was sold directly under the agreement; that was to say the defendant was to pay the plaintiff no matter what credit the defendant might have given and even though he had himself received no portion whatever of the purchase money. His Honour thought that the transactions in regard to those machines were in precisely the same position as the transactions with Pulley and the Waiwetu Quarry Co. The relationship was that of vendor and purchaser, but the defendant was entitled to credit as against the plaintiff for 10% of the plaintiff's invoice price.

As to the first cause of action, His Honour could see no difference, so far as the relationship between the parties and the terms of that relationship were concerned, between that transaction and the other transaction with which His Honour had already dealt. As soon as any of the goods were sold the invoice price had to be paid by the defendant to the plaintiff (less the so-called commission) irrespective of whether or not the defendant had himself been paid; and indeed, after the goods had been for some time in New Zealand, and remained unsold, the plaintiff pressed the defendant for payment. So far as regards spare parts which were sent on consignment and not sold with a machine, but intended for separate sale, His Honour had already pointed out that those did not appear to be covered by the written agreement of 1st June, 1925. They were made the subject of a special and new arrangement which was set out in a letter from the plaintiff dated 29th July, 1927, in which the plaintiff agreed to a so-called commission of 5%, but insisted from first to last throughout the correspondence that those spare parts should be paid for immediately upon sale; and indeed in some of its letters the plaintiff insisted upon payment being made by the defendant in advance. Mr. Wilson made the admission at the hearing, upon the assumption of course that the relationship was that of principal and agent, that under the letter of 29th July, 1927, the defendant was to receive 5% in addition to the 10% mentioned in the written agreement of 1st June, 1925. His Honour did not think that he should act on that admission, though probably it was what the plaintiff really intended. So far as the spare parts were concerned it seemed to His Honour that the relationship was that of vendor and purchaser in regard to any parts that were sold; and that in the accounts between the parties the defendant must account for the plaintiff's invoice price and not for the price at which he himself sold, but was entitled to credit for the so-called commission, which as His Honour had said seemed to be a discount or rebate of 5%—not 10% plus 5%—of the plaintiff's invoiced price.

A decree would be made for accounts to be taken before the Registrar in respect of all the transactions referred to in the statement of claim, such account being taken on the basis of the relationship between the parties being that of vendor and purchaser, the defendant accounting for the plaintiff's invoiced cost and charges in respect of all goods sold by the defendant and receiving credit in account for 10% (as mentioned in the agreement) in respect of all machines and parts actually sold therewith (including the machines sold by the plaintiff direct to Winstone Ltd. and the Pohangina County Council) other than spare parts sent for sale on consignment in respect of which he was to receive credit in account for 5%, the defendant being of course credited also with all amounts paid by him to the plaintiff. The plaintiff would be entitled to the return of such of those spare parts (if any) as had not been sold. As the defendant had substantially succeeded he was entitled to costs but His Honour would reserve the question of quantum until after the accounts were taken. Decree accordingly, reserving liberty to apply.

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

Solicitor for defendant: **R. H. Boys,** Wellington.

Herdman, J. February 24; 26, 1930.
Auckland.

CHECKER TAXICAB CO. LTD. v. STONE AND DULIEU.

Contract—Relationship Created—Bailment on Partnership—Agreement Between Taxi Proprietor and Driver Relating to Motor Car Held to Constitute Relationship of Owner and Hirer and Not one of Partnership—Car While Driven by Hirer Damaged in Collision with Other Vehicle—Drivers of Both Vehicles Negligent—Owner Entitled to Recover Damages Notwithstanding Negligence of Hirer.

Appeal from the decision of a Stipendiary Magistrate in Auckland, in an action in which the appellant sued the respondents for damages alleging that injuries which had been done to its taxi-cab in a collision were the result of the negligence of the respondent, Dulieu, who was the servant of the respondent Stone. The learned Magistrate determined that the drivers of the vehicles involved in the collision were both in fault and nonsuited the appellant. The appellant company appealed on the ground that the driver of the Checker cab, one Thompson, was a bailee, and that the negligence of the bailee was no answer to the company's claim for damages in respect of the damage to the chattel bailed. The respondent's solicitor contended that the contract between Thompson and the appellant company was not a contract of bailment but a partnership agreement and that Thompson as a partner was an agent of the appellant company. The relevant terms of the contract are set out in the report of the judgment.

Richmond for appellant.
Goldstine for respondent.

HERDMAN, J. said that the point of interest to be decided in the appeal was whether an instrument signed by one O. Thompson, dated 27th June, 1928, which on its face purported to record the terms and conditions for which he hired a taxi-cab from the appellant company was a contract of bailment or a partnership document. It had been pointed out on behalf of the appellant company that the culpability of a bailee of its taxi-cab was no answer to its claim for damages against another person who, having been negligent, had damaged the chattel bailed. Being a bailor of the Checker cab the appellant company's right to recover damages against a person whose negligence had damaged its property was not destroyed because the bailee of its cab was in some degree responsible for the injury. In **Mears v. London and South Western Railway Co.,** 11 C.B. N.S. 854, Erle, C.J., said: "That trover will not lie for the conversion of a chattel out on loan, is clear; but, in **Tancred v. Allgood,** 4 H. & N. 438, it was by implication held that an action for a permanent injury done to a chattel while the owner's right to the possession is suspended, may be maintained." That principle was not disputed by counsel for the respondents. His view was that the contract made between the appellant and Thompson was not a contract of bailment but was a partnership agreement. The document on its face purported to define the terms and conditions of hire of a Checker taxi-cab. The period of hire was 24 hours calculated from 4 p.m. The contract provided that on the termination of the hiring, the hirer should immediately return the taxi-cab to the owner intact, and in proper condition in accordance with the terms and conditions of the contract. The hirer if he pleased, might use the owner's garage, telephone, uniform and greasing and inspection service. The hirer was to purchase his own motor spirit but from the owner at the ruling price. The hirer bound himself to keep the cab in his personal custody and was not to allow any other person to drive it. The cab was to be used exclusively for the carriage of passengers for hire within a radius of 100 miles from the G.P.O. Auckland, but with the owner's consent that limit could be exceeded. A right to inspect the cab was reserved to the owner's servants. Clause 13 of the contract provided: "The hirer shall as rent for the hiring pay to the owner on the expiration of the hiring sixty per cent. of the fares earned by him in plying the taxi-cab for hire during the hiring as shown by the taximeter therein." Repairs to the cab were to be done by the owner. His Honour observed that within the 100 miles the hirer could, within the period of hiring, take his cab where he pleased and carry whom he pleased, subject to the conditions above narrated and to others which His Honour did not consider material. The hirer was in reality his own master and could regulate his own business as he pleased as soon as he started out with his hired cab, provided, of course, he plied for hire in a proper and diligent manner. His Honour was unable to discover anything in the contract to prevent the hirer taking away the cab at the beginning of the 24 hours and keeping it under his sole control and away from the owner's premises for the whole of that period. In substance the case was that of a person handing over a chattel to another to be used by him in the way of his trade at his own discretion and subject to no control by the owner. In England, independently of the Acts of Parliament relating to the subject, the relation between cab proprietors and cab drivers was that of letter and hirer, and not that of master and servant: **Beal on Bailments,** 1st Edn., 215. The view which the Courts in England took of that relationship was illustrated by the case of **Doggett v. Waterloo Taxi-cab Co. Ltd.** (1910) 2 K.B. 336; **Smith v. General Motor Cab Co. Ltd.** (1911) A.C. 188, to which His Honour referred at length. But it was said that the present document interpreted in the light of all the surrounding circumstances was a contract of partnership and not a contract of bailment, and His Honour was invited to place the same construction upon the contract as did Cooper, J., upon the relations that existed between the owner of a taxicab and the driver in the case **Aldridge v. Paterson,** 16 G.L.R. 593. The Partnership Act, 1908, provided that "partnership was the relation which subsisted between persons carrying on a business in common with a view to profit. There must, His Honour pointed out, be the carrying on a business in common. As Vaughan Williams, J., said in **In re Whitley,** 66 L.T. 291, cited by Cooper, J., in his

judgment, the test was "aye or no; is the business carried on the joint business of those who are suggested to be the partners?" That test was applied by Cooper, J., in **Aldridge v. Paterson** (*cit. sup.*), but the facts there differed from those in the present case. In the present case the businesses carried on by the Checker Taxicab Company and Thompson were separate and distinct. In the case of the company its business was a continuing business. In the case of Thompson his business might last for 24 hours only. In the case of the company it owned cabs and it hired them to other people. It might ply for hire with its own vehicles and its own servants. In the case of Thompson his business was to ply for hire with a cab which he had rented and the quantum of his income depended upon his own exertion. No doubt the business in which Thompson was engaged might result in mutually benefiting both parties to the contract, but that might always happen and did happen in contracts involving the hire of a chattel. From the statement of facts appearing in **Aldridge v. Paterson** (*cit. sup.*) it was plain that the owner of the car and the driver for their mutual advantage entered into an arrangement to engage in the business of plying for hire, but in the present case it seemed to His Honour that the company in hiring a car to Thompson was doing no more than carrying on independently of Thompson, a branch of its business which consisted in hiring cars to men who wished to carry on the business of plying for hire. The other case relied upon by Mr. Goldstine was **Piercey v. Macklow Brothers,** 11 G.L.R. 647. In that case the determining factor was the circumstance that the parties to the agreement had an equal voice in the conduct of the business. In the present case once the driver of the taxi-cab was clear of the owner's garage he could in effect ply for hire within a limit of 100 miles as he pleased for the duration of the hiring—24 hours. The present case so closely resembled the cases decided in England that His Honour had no hesitation in deciding that the relation between the company and Thompson was that of letter and hirer. The Magistrate having found that the driver of Stone's car was negligent, the inference was that his negligence contributed to the damage sustained by the appellant's cab. The amount of the damage must, therefore, be assessed and for that purpose the case would be remitted back to the Magistrate.

Appeal allowed.

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

Solicitors for respondents: **Goldstine and O'Donnell,** Auckland.

Kennedy, J. February 14; 28, 1930. Dunedin.

HARVEY v. BARLING.

Practice—Appeal—Costs—Prosecution by Police Officer Dismissed by Magistrate—Unsuccessful Appeal by Police Officer Against Dismissal of Information—Rule of Practice That Costs Will Not be Allowed Against Police Applicable where Police Unsuccessful Respondents But Not where Police Unsuccessful Appellants—Costs Allowed Against Police.

Question of costs reserved. The appellant was a police officer who commenced a prosecution and unsuccessfully appealed against the dismissal of the information. The appeal was on point of law but the point of law, on which counsel for the appellant addressed the Court, did not arise on the facts as found by the Magistrate.

Adams for appellant.

Sinclair for respondent.

KENNEDY, J., said that in **Batley v. Cullen,** 6 N.Z.L.R. 755, Prendergast, C.J., and Richmond, J., considered an application for costs with a view to laying down a general rule of practice. Prendergast, C.J., said: "The general rule appears to be that costs are not given against the prosecution, at least in cases like the present, where the prosecution is by the police. The prosecution was commenced by the police and resulted in a conviction. The defendant appealed, and the conviction was held bad. I think in cases of this nature the general rule ought to be that costs be not given against the police. This appears the rule in England: see **Copley v. Burton**; that was a prosecution under the licensing laws and the conviction was quashed. Where there is no doubt about the law, costs are given, but where there is a genuine point of law raised, no costs are given." **Joe Tong v. Dew,** 34 N.Z.L.R. 868, **Schroder v. Duddy,** (1916) N.Z.L.R. 767, and **Munro v. Swan,** (1918) N.Z.L.R. 382, were cited as cases in which mention was made that no costs were allowed against the police. All were cases in which police officers were unsuccessful respondents. In **Joe Yee Wah v. Cooper,** (1916) G.L.R. 81, Stout, C.J., considered the practice and referred to it, as being laid down in **Batley v. Cullen** (*cit. sup.*). "It is," he said, "established that costs will not be given against the police if there is a genuine point of law to be argued. Several cases have decided this: see, for example, **McBride v. Gamble,** 7 N.Z.L.R. 396, where it was said that costs would only be allowed where the police had acted in an unjustifiable manner. **Barnett v. Bishop,** 12 G.L.R. 167, affirmed the same principle."

In all the cases cited in the judgment of Stout, C.J., the police were unsuccessful respondents. No case was cited which pointedly referred to the question of costs where a police officer, who had laid an information in pursuance of his duty, had unsuccessfully appealed against its dismissal, but His Honour's attention was directed by counsel for the respondent to the case of **Petersen v. Paape,** (1929) G.L.R. 445, where a Full Court (Myers, C.J., Herdman, Adams and Smith, JJ.) allowed costs to a respondent in circumstances similar to those in the present case. The practice, referred to in **Batley v. Cullen,** applied, in His Honour's opinion, where the police officer was an unsuccessful respondent, but not where he was an unsuccessful appellant. It would be oppressive in such a case, if the person charged received no allowance for his costs on the appeal, when the point of law taken against him on appeal could not arise on the facts found. The individual concerned in the present case should not, on such an attempt by the police to determine the law, have to forego the costs usually awarded against unsuccessful appellants. His Honour was not, he thought, acting contrary to any rule of practice in awarding costs as against a police officer so unsuccessfully appealing.

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

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

Kennedy, J. February 21; 27, 1930. Invercargill.

BRYCE v. MERCANTILE AND GENERAL INSURANCE CO. LTD.

Insurance—Fire—Misstatements in Proposal—Statements in Proposal Made Basis of Contract—Incorrect Answer to Question as to Cancellation of any Previous Policies—Unilateral Termination of Policy Insurers held to Amount to a Cancellation Notwithstanding Insured's Signature to Cancellation Voucher.

Action to recover £265 alleged to be moneys due by the defendant to the plaintiff under an interim policy of insurance against fire effected by the plaintiff with the defendant. The interim policy made the truth of all statements in the proposal the basis of the contract. In addition to other defences the defendant denied liability on the ground of an incorrect answer to a question asked in the proposal. The question was: "Has the proponent either individually or in partnership or the wife or husband or partner of the proponent ever had any risk declined or renewal refused or any policy cancelled by any insurance office? If so give particulars of all such cases stating date, place, and office or offices." This question was answered by the plaintiff: "No." The defendant alleged that this answer was untrue in that policies of insurance with the Standard Insurance Co. Ltd. and the State Fire Insurance Office respectively had in fact been cancelled by the respective companies. The relevant facts appear in the report of the judgment.

O'Beirne for plaintiff.

James for defendant.

KENNEDY, J., said that the truth of the statement contained in the proposal, apart from the question of materiality, was a condition of the liability of the insurer under the policy or interim policy: **Dawsons Limited v. Bonnin,** (1922) 2 A.C. 413; for as Viscount Dunedin said in **Glicksman v. Lancashire and General Assurance Co.,** (1927) A.C. 139, at page 143: "It is possible for persons to stipulate that the answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those

questions." If then, any of the answers to the questions contained in the proposal were incorrect, that would invalidate the policy and prevent the plaintiff recovering.

The defendant alleged that a policy of insurance in the nane of the plaintiff or her husband in the Standard Insurance Company Limited had been cancelled prior to the plaintiff's signing the proposal now under consideration. No witness was called who had any personal knowledge of such a cancellation and His Honour found that the allegation was not proved.

The evidence did, however, establish that the plaintiff made a proposal for insurance to the State Fire Insurance Office, in her husband's name; that the proposal was accepted and that a policy was prepared. The premium was not paid although accounts debiting the insured were sent, and an officer under instructions from the manager called on the plaintiff to collect the premium or, failing collection, to cancel the policy. His Honour accepted his evidence that he paid two visits and that on the second visit the plaintiff did not pay the premium and was told that if she did not pay the premium, it would be necessary to cancel the insurance. The witness said: "I produced the necessary voucher. Mrs. Bryce did not say that she did not want the insurance. I told her the reason for cancelling the policy was because the premium had not been paid for so long." Later in cross-examination, referring to his second visit, he said: "I did not have to go back to the office for the voucher. I had the voucher with me. Mrs. Bryce said that she was not prepared to pay the premium and I told her that in view of the fact that the premium was so long outstanding we had no alternative but to cancel the policy." His Honour was unable to accept the plaintiff's statement as a full and truthful account of all that took place at the meeting with the insurance officer. In cross-examination she stated that, being pressed for the premium, she said it did not matter and the insurance officer, so she said, then stated that he would have to bring a paper for her to sign to that effect and he brought the document and she signed it. Later in cross-examination she admitted that Mr. Meffin, the insurance officer, did not have to go back for the paper to be signed. The fact that Mr. Meffin had the cancellation voucher with him indicated clearly the attitude of the insurance officials and was consistent with the evidence given by Mr. Meffin that he was to collect the premium or to cancel the policy. His Honour found then, that the premium was not paid on demand, and, that the plaintiff was notified, when she did not pay the premium, that the policy was cancelled. The termination of the insurance was the act of the insurance company, as it was not willing to continue an insurance when it could not secure payment of the premium therefor, rather than a termination by mutual agreement between the insurer and the insured. The termination, contrary to the plaintiff's desire for insurance evidenced by her proposal, was a unilateral act. It was complete on the notification, for writing was not required. The nature of the termination was not altered because the plaintiff, on request, signed a cancellation voucher. The facts in the present case showed it to be very different from **Wilcocks v. N.Z. Insurance Co. Ltd.,** (1926) N.Z.L.R. 805.

Judgment for defendant.

Solicitor for plaintiff: **F. G. O'Beirne,** Invercargill.
Solicitors for defendant: **Stout, Lillicrap and Hewat,** Invercargill, agents for **Webb, Richmond, Cornish and Swan,** Wellington.

Compensation Court.

Blair, J. February 6, 7, 8, 9, 10, 11, 12, 13; 14, 1930. Wellington.

HENRYS v. MINISTER OF PUBLIC WORKS.

Public Works—Compulsory Taking of Land—Compensation—City Property—Value—Observations as to Mode of Arriving at Value per Foot of Frontage.

Claim for £40,000 compensation in respect of the compulsory taking under the Public Works Act of a piece of land in Wellington having a frontage of 50 feet to Lambton Quay with an average depth of 55 feet 6 inches to Bowen Street.

Gray, K.C. and McGrath for claimant.
Currie for respondent.

BLAIR, J., delivering the judgment of the Court said that the section was irregular in shape, the Bowen Street frontage being at right-angles to Lambton Quay for a depth of about 32 feet, and thence running back for approximately 70 feet to meet the southern boundary of the section. During the hearing a number of witnesses as to value used for comparative purposes details of sales of land in the city as indicative of values. Some of those witnesses took the total price received, deducted therefrom the value of the improvements and then divided such result by the number of feet in the frontage, and treated that as disclosing the price at per foot of frontage. Such a basis was, in the Court's opinion, unsound. It was true that, in New Zealand, city properties were commonly priced at per foot of frontage; but when endeavouring to ascertain the price of frontages in any particular street for the purpose of ascertaining the average price of frontages in such street, it was obvious that unless all the sections were the same depth the method adopted by some of the witnesses could not give accurate results. The subject had received particular attention in the United States, and several books on the subject had been published, and tables prepared for the purpose of standardising values. The method there commonly adopted was to take 100 feet as the basis of depth of sections and adopt a curve of proportion of value over or under such standard depth. The writers on the subject did not agree as to the proportion curve. The method had, however, received some recognition in Australia, and a book on the subject, Collins' "Valuation of Land," was used during the hearing of the present case. The valuers did not all use the same proportion curve, but the variations in the curves were not so marked as to make very great difference in the particular depths of sections which came up for comparison in the present case. The Court found that the evidence of those valuers who in ascertaining frontage values disregarded the comparative depth of sections was of little assistance to the Court in arriving at its decision. The sum of £26,000 was awarded in full compensation and in lieu of interest the Court embodied as part of its award a written arrangement dated 13th February, 1930, signed by counsel for the parties.

Solicitor for claimant: **J. J. McGrath,** Wellington.
Solicitor for respondent: **Crown Law Office,** Wellington.

Court of Arbitration.

Frazer, J. February 28; March 11, 1930. Auckland.

FLOWERDAY v. AUCKLAND CITY CORPORATION.

Workers Compensation—Accident—Worker Employed by City Corporation on Section of Tramline and Living in Camp in Reserve Owned by Corporation—Worker Returning to Work After Spending Week-end Away from Reserve—Worker Travelling on Jigger Used with Permission of Corporation to Convey Workers Living Off Reserve to and from Work—Jigger Derailed and Worker Injured—Scene of Accident Over Two Miles from Work—Accident Not Arising Out of and in Course of Employment—Worker Not Entitled to Compensation.

Claim for compensation in respect of an injury by accident received by the plaintiff on 5th August, 1929. The plaintiff was employed by the defendant corporation as a platelayer on a length of tram-line approximately two miles in length, running between the Huia waterworks dam and a quarry. The corporation owned a considerable area of land at Huia, as a waterworks reserve, the distance from the western boundary of the reserve at Huia Bay to the quarry being about six miles. A construction camp had been erected near the dam, which was about four miles from Huia Bay and two miles from the quarry. The tramline to which reference had been made ran from the quarry to a landing at Huia Bay, and passed close to the construction camp and the dam. A number of the men employed on the waterworks construction work, including the plaintiff, lived at the construction camp. They were not required by their contracts of employment to live there, but they elected to do so. The plaintiff's work was confined to the section of the tram-line running between the dam and the quarry, and he had been working on that section for about a year. The men who lived off the reserve used to travel to and from their work on the corporation's locomotive or on a jigger owned by one of the men, who had permission to run it on the tram-line. The

men who used the jigger made their own arrangements as to fares with the owner. It was known to the corporation's officers that the jigger was so used by the workers, and the user was tacitly acquiesced in. It was the custom of the plaintiff to spend the week-ends, when he was free from duty, at Huia Bay, and he frequently travelled between the construction camp and Huia Bay on the jigger. He had been spending a week-end at Huia Bay, and was returning on the jigger with a number of other workers, to the construction camp, shortly before 7 a.m., on 5th August, 1929. He was in his working clothes, and it was his intention, on arriving at the camp, to leave his hand bag at his hut, pick up his lunch at the cookhouse, and proceed at once to his work on the farther section of the tram-line. When the party was about 1¾ miles from Huia Bay, the jigger was derailed through striking a boulder that had fallen on to the line, and the plaintiff was seriously injured. He accordingly claimed compensation in respect of his injuries.

Tuck for plaintiff.

A. H. Johnstone for defendant.

FRAZER, J., delivering the judgment of the Court, said that it was unnecessary to examine in detail the cases cited by counsel for the general rules were perfectly clear. Where a worker was required by his contract of service to use a particular means of transport to enable him to reach or leave his employer's premises, he was safeguarded by the Act, but that was not the case when he was under no obligation to use the provided means: **Hewitson v. St. Helen's Colliery Co. Ltd.,** 16 B.W.C.C., 230. Where, however, a worker was actually on his employer's premises, the employer's responsibility existed and continued so long as the worker was on a permitted way, even though he was not obliged to use that special way or means of access to or egress from the particular shed or room or mine-face where his actual work was performed: **Howells v. Great Western Railway Co.,** 21 B.W.C.C., 18. As had often been said, it was highly dangerous to attempt to apply the words of a judgment based on one set of facts to a case in which a different set of facts was involved. Commenting on what were known as the "dock cases," in **Holding v. South Australian Railways Commissioner,** (1925) S.A.L.R. 92, Angas Parsons and Napier, JJ., at p. 98, said: "In our opinion the principle of all these cases may be stated as we have stated it: that the workman has reached the outskirts of the area which is to be regarded as the place where his work is to be done, and from that point is traversing that area under the implied command or direction of his employer." In **Stewart v. Longhurst,** 10 B.W.C.C. 266, 276, Lord Dunedin said: "I venture to go so far as to say that control of the place where an accident happens is neither here nor there, except in so far as it may represent a fact tending to show that the accident arose in the course of the employment." When a worker in a factory or a coal-mine reached the gate of the factory yard or the entrance to the colliery, he came within the protection of the Act. The intervals of time and space reasonably required to enable him to go to and from his actual place of work were regarded as widening the scope of his employment to that extent. The reasonableness of those intervals, however, might be the occasion for questions of fact. In the present case there was a very considerable area of land, on which a number of entirely different works were in progress. The plaintiff's work was confined to platelaying on a section of tram-line on the farther side of the construction camp, where his temporary home was. He went to Huia Bay for the week-end, entirely for his own purposes, and was not subject to the control of his employer until 7 a.m. on 5th August, and he was injured at a spot some 2½ miles away from the nearest part of the section of line at which he would normally have reported for duty at 7 a.m. Had he then, for the purposes of the Act, reached his "employer's premises?" It seemed to the Court unreasonable to regard the whole waterworks reserve as if it were a single farm, dock, colliery, or munitions works. If analogies were to be applied, the facts of the present case seemed to the Court to be more akin to those in **Chalmers v. Gibbs,** 15 G.L.R. 396, and **Holding v. South Australian Railways Commissioner** (*cit. sup.*) than to those in the cases cited for the plaintiff. His Honour referred also to **Benson v. Lancashire and Yorkshire Railway Co.** (1904), 1 K.B., 242, per Collins, M.R., at p. 249.

If, however, the whole waterworks reserve was regarded as a single factory enclosed in a yard, the gate of which might be taken to be at the Huia Bay landing, the plaintiff's right to compensation was not thereby strengthened. His temporary home was close to the section of tram-line on which he was conclusively employed, and his employment ceased for the day when he left the neighbourhood of that section: **Philbin v. Hayes,** 11 B.W.C.C., 85; **Chalmers v. Gibbs** (*cit. sup.*) Those workers who lived off the reserve were obliged to traverse part of the reserve each day as they went to and from their work, and, on the assumption that the whole reserve was to be regarded as being analogous to a factory yard, they would be covered by the Act while they were traversing it by a permitted route within a reasonable time before the commencement of their day's work and within a reasonable time after its close. The plaintiff, however, was not under any obligation to leave the reserve, though, of course, he had a perfect right to do so. If he had elected not to leave the reserve during the week-end in question, it could not be contended that an accidental injury suffered by him while walking about the reserve, or while shooting or fishing within its boundaries, would be a subject of compensation. If, as he had a right to do, he left the reserve, the Court could not see that his claim would be any stronger merely because, as was the case, he returned to it immediately before the time for commencing work on the Monday morning, instead of on the Sunday night, as in the case of **Rogers v. Auckland City Corporation,** (1924) G.L.R. 66. The only question that the Court could put to itself was whether it was a duty that the plaintiff owed to his employer to be at the place where, and at the time when, the accident occurred. The answer to that question was obviously "No," for the plaintiff, though he had a right to be at that place at that time, was not then there in pursuance and discharge of his obligations to the defendant corporation. His Honour said that the position might be summed up in a few sentences. If the Court regarded the area contiguous to the section of tram-line on which the plaintiff was employed as being the ambit, scope or scene of his duties, then, on the authority of **Hewitson v. St. Helens Colliery Co. Ltd.** (*cit. sup.*) his claim could not succeed, because it was not a term of his contract of employment that he should make use of a jigger in order to go to his work. If, on the other hand, the Court regarded the whole waterworks reserve as the ambit, scope or scene of his duties, though the Court thought that such was not the case, the plaintiff's claim must still fail, because, though the use of the jigger was tacitly permitted, he was not, at the time of the accident, on a part of the reserve where his duties required him to be. In either case, the fact that his temporary home was on the reserve, near the scene of his work, would have the effect of suspending his employment from the time that he left the vicinity of his work in the afternoon until he reached it again in the morning. For those reasons the plaintiff's claim failed.

Judgment for defendant corporation.

Solicitors for plaintiff: **Tuck and Wood,** Auckland.

Solicitors for defendant: **Stanton, Johnstone and Spence,** Auckland.

The Nature of International Law.

"It is simply not true to say that international law is a body of rules without Courts to administer it. On the other hand, it is true that it has, as yet, no Supreme Court. Neither has the Common Law, nor yet the Napoleonic Codes; and in the region of municipal law not even Supreme Courts, with the one exception of the House of Lords, hold themselves incapable of reviewing their own decisions. Thus the pretended want of coherence in the law of nations is a chimera of laymen and a few sciolist lawyers. Another fallacy, rather dear to minds of a bureaucratic type, is that no law can be quite law till it is formulated in official terms by a law-giver: whereas lawyers know that codes are successful according as the law is more or less thoroughly settled before they are made."

—Sir Frederick Pollock in the *Law Quarterly Review.*

"I have always advised young barristers—and I am supported by the high authority of Lord Birkenhead—that they had better leave politics alone for a considerable period. There comes a time when, if they choose, they can go into national politics."

—Mr. Justice Roche.

Title to the Motor Vehicle.

By RALPH L. ZIMAN.

In this Dominion, wherein motor-vehicles daily become more numerous, it may be useful to discuss briefly the present title to the motor-vehicle and the directions in which reform may be advisable. In this connection it is singular that the Legislature, assiduous as it has been for the welfare of the subject in other directions, appears to have overlooked the need of protecting him in this somewhat important matter. In fact it may, perhaps, be suggested that Parliament has been over-generous in providing facilities for dealing with motor-vehicles which, while convenient for the actual parties concerned, have opened the door for fraud on and deception of the public generally. The position now is that a man may be the registered and ostensible owner of a valuable motor-vehicle, and yet have paid only a comparatively trifling sum as deposit thereon, the legal ownership of the article remaining in a person from whom the ostensible owner holds it under an agreement which is not registered, and of which the public can, and do, know nothing. The result is a continual crop of frauds, some of which become publicly known by reason of criminal prosecutions or civil litigation, but many more of which avoid the light of publicity by reason of the parties affected preferring to make privately the best arrangements they can after the fraud is discovered.

It will be useful to consider for a moment the statutory enactments bearing on the matter. These are the Sale of Goods Act, 1908; the Chattels Transfer Act, 1924 as amended by the Chattels Transfer Amendment Act, 1925, and the Motor Vehicles Act, 1924, and its amendments.

A motor-vehicle is within the definition of "goods" under the Sale of Goods Act, 1908, the provisions whereof apply accordingly. It follows, therefore, (Section 19) that where there is a contract for the sale of a specific motor-vehicle, the property in it is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard is to be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. All that is needed, therefore, to effect a transfer of the property in a specific motor-vehicle, however valuable, is for the parties to the contract to display an intention that it shall be transferred. No formalities whatever are required, so long as the intention appears.

Notwithstanding the simplicity of the procedure under the Sale of Goods Act, cases in which frauds occur by reason of the facilities for transfer afforded by that Act are comparatively few. This appears to be due to the fact that the procedure under the Sale of Goods Act is not a plant of sudden and rank growth, but has been gradually evolved as the result of centuries of experience in the working of the Law Merchant, and contains such safeguards as that experience has shown to be desirable. In particular the Act shows a strong tendency to protect the party who takes the precaution of obtaining possession, or who deals with the person in possession. Especially is this tendency shown in Section 27, which safeguards the title of a person dealing in good faith with a person who has already sold goods, but has been allowed to remain in possession thereof.

In contrast with the carefully evolved system under the Sale of Goods Act is the growth of the practice of "hire-purchase," and its latest development—the "customary hire-purchase agreement" sanctioned by the Chattels Transfer Act, 1924; and it may be useful briefly to trace the stages of that growth. On examination, it will be found that the development of that practice is in the main a struggle against the beneficent policy of the Sale of Goods Act to protect the title of a person in possession of the goods. The first onslaught failed in *Lee v. Butler*, (1893) 2 Q.B. 318, in which it was held that an arrangement which, although in form a hiring, bound the so-called hirer to pay the full price of the goods of which he had obtained possession, was in reality a contract of sale, and that the property in the goods had, therefore, passed to the so-called hirer. A subsequent attack in *Helby v. Matthews*, (1895) A.C. 471, was more successful. In that case it was held that a contract under which the owner of a chattel let it out on hire and undertook to sell it to, or that it should become the property of, the hirer conditionally on his making a certain number of payments, he having an option of returning the chattel and ceasing further payments, was effectual to prevent the property in the chattel passing until the last payment was made. These two authorities settled the law for many years, the principle being that in each case the substance of the agreement must be looked at and not the mere words. The difference between a contract of sale at a price payable by instalments: (*Lee v. Butler*) and a contract of hire-purchase: (*Helby v. Matthews*) is that in the former the intending purchaser has no option of terminating the contract and returning the chattel, whereas in the latter he has.

The principles established by these two cases were largely relied on in practice as dealings in motor-vehicles became more frequent. It thus became not unusual for a motor-vehicle to be parted with under a hire-purchase agreement whereby the intending purchaser paid a deposit and was given possession of the vehicle at a rental payable by periodical instalments, with the provision that when these instalments reached the prescribed total, the vehicle should be his, but that meantime he should have the option of returning the vehicle and being freed from further payments. This afforded a convenient and private method of dealing; but the result was unsatisfactory in two respects:—

1. As the purchaser had the option of returning the vehicle the vendor not infrequently had returned to him a secondhand vehicle which had depreciated considerably more in value than the amount paid while the agreement was in force.
2. The door was opened wide for frauds on third parties. See, for example, *Archibald v. Washer*, (1922) G.L.R. 451, in which the hirer of a motor-vehicle under a hire-purchase agreement had caused it to be sold by auction, and where it was held that the purchaser at such auction obtained no title as against the grantor of the hire-purchaser agreement, who still remained the owner of the vehicle.

The enactment of Section 57 of the Chattels Transfer Act, 1924, has overcome the first of these difficulties in cases where the intending vendor of the motor-vehicle is a manufacturer of or dealer in motor-vehicles of that description. The Section provides:—

" (1) A customary hire-purchase agreement is a deed or agreement in writing made between the owner of or a dealer in certain chattels and a conditional purchaser of these chattels where—

(a) The owner of or dealer in the chattels is either the manufacturer thereof or a person who is engaged in the trade or business of selling or disposing of chattels of such nature or description :

(b) The deed or agreement provides expressly or impliedly for delivery of possession to the conditional purchaser, but that the property in the chattels shall not pass to the conditional purchaser, or shall only conditionally so pass, until the completion of the payments to be made by him :

(c) The chattels the subject of such deed or agreement are such as are described in the Seventh Schedule hereto . . . .

" (2) A customary hire-purchase agreement may be either an actual contract for sale and purchase or a contract of bailment under which the purchaser has an option of purchase of the chattels defined in the agreement.

" (3) A customary hire-purchase agreement is valid and effectual for all purposes without registration thereof.

" (4) Chattels the subject of a customary hire-purchase agreement shall not be deemed to be in the order and disposition of the purchaser or bailee thereof within the meaning of any law relating to bankruptcy or insolvency.

" (5) The purchaser or bailee of chattels the subject of a customary hire-purchase agreement shall not have any right to sell, deal with, or dispose of such chattels otherwise than as may be specially provided in the agreement ; and no sale, dealing, or other disposition purported to be made by such purchaser or bailee shall be effectual to confer title upon any person as against the vendor or bailor named in the customary hire-purchase agreement, or against the assigns of such vendor or bailor."

(The Seventh Schedule includes motor-vehicles).

If, therefore, the intending vendor of a motor-vehicle is a manufacturer of or dealer in motor-vehicles of that description, the vehicle may be sold under an agreement containing a provision that the property therein shall not pass until completion of the payments : and such provision is effectual whether the agreement is an actual contract for sale and purchase or a contract of bailment under which the purchaser has an option of purchase of the vehicle. The manufacturer or dealer intending to sell a motor-vehicle is thus now fully protected without the need of giving the intending purchaser any option of returning the vehicle. The enactment of this legislation undoubtedly encouraged dealing in motor-vehicles by " customary hire-purchase agreement," which is, of course, a private document, the contents whereof need not be known to anybody except the parties to it.

With regard, however, to the second difficulty above-mentioned, viz., the risk of fraud on innocent third parties, there can be no doubt that, with the increase in the number of dealings by " customary hire purchase agreement," the number of such frauds has also increased ; and it may fairly be said that in this respect the operation of the system sanctioned by Section 57 of the Chattels Transfer Act, 1924, is, from the public point of view, unsatisfactory.

At the present time thousands of motor-vehicles—many of them of substantial value—are sold under " customary hire-purchase agreement." The purchaser in each case obtains possession of the vehicle and is registered as and reputed to be owner thereof ; he has paid only portion of the price and the unpaid vendor remains the true owner of the vehicle. It speaks well for the motor trade in general that this system rarely gives rise to difficulty regarding title to new vehicles. It is usually with used motor-vehicles that the trouble arises. A purchaser of a motor-vehicle under a " customary hire purchase agreement " suddenly decides to dispose of it, either by sale or in exchange, and is tempted to overlook the fact that he is not entitled to do so. The innocent purchaser may obtain possession of the vehicle and become registered as owner thereof in good faith ; the original vendor is nevertheless entitled to retake possession of the vehicle, leaving the innocent purchaser without remedy except the right (frequently worthless) of action against the person who committed the fraud.

Coming now to the provisions of the Motor Vehicles Act, 1924, and its amendments, it may be said, generally, that that legislation, while it requires the person entitled to possession of the motor-vehicle to effect registration, does not afford any evidence of title ; but merely a ready means of tracing the person who has possession of the vehicle for the time being. The question then arises as to whether it would not be possible to convert the system of registration into a system also of registration of title, so that an innocent purchaser could rely on the register ; and there seems to be much in favour of that course.

Sound, practical precedents are afforded in the system of registration of ships and the system (derived therefrom) of registration of title to land (commonly called the " Torrens " or " Land Transfer " system). Each of these systems has now been in force for many years, and has been found to work satisfactorily in practice ; with the result that instances of persons being deprived by fraud of title to registered ships or registered land are rare. Following the analogy of the systems of registration of title to land, the certificate of registration of a motor-vehicle could also be made a certificate of title ; and provision could be made for memorials of transfer, transmissions, mortgages, and bailments of motor-vehicles to be entered on the register and on such certificate. It seems unreasonable that a purchaser of a piece of land should be entitled to obtain a secure title thereto ; whereas the purchaser of a motor-vehicle worth, in many instances, considerably more, has no security of title. If a system on the lines above suggested were evolved, motor-vehicles, just as ships are, might well be exempted from the provisions of the Chattels Transfer Act, 1924.

Nearly every purchaser of a motor-vehicle is averse to giving an instrument by way of security registered under the Chattels Transfer Act ; but there should be no more objection to the giving of a mortgage registered under the Motor Vehicles Act than there is to the giving of a mortgage of a ship or of a piece of land. All practitioners are aware of the lurking element of doubt and anxiety regarding title when taking an instrument by

way of security. It would be an advantage if a mortgagee of a motor-vehicle had the security of title which, under the suggested system, a mortgage registered on the register of motor vehicles would confer. The contents of the register of motor vehicles would not be published: and, as with dealings with registered land, the fact of a search fee being payable would serve to deter idle curiosity. The selling of motor-vehicles under bailments could continue; but (instead of the bailee being registered as owner of the vehicle) a memorial of the bailment would be entered on the register and on the certificate of registration.

Such a practice, based on sound precedent, simple in operation, and secure, would replace the present unjust system under which the innocent purchaser from the registered holder of a motor-vehicle obtains no protection.

Discredit from the Cause Lists.

"In a successful appeal against a receiving order to the Court of Appeal, the debtor, who had obtained a stay of the statutory advertisement, also succeeded in avoiding the publicity which, perhaps, would have resulted in robbing the appeal of most of its value. The case as advertised in the cause list appeared in the orthodox form of "In re a debtor," with its rota number and year, thus giving no clue to the identity of the person whose solvency was at issue. The reason for this secrecy is obvious. The mere suspicion of insolvency will, very naturally, set every creditor to the immediate collection of the debt, with the probable result of destroying the debtor's last chance of recovery. The secrecy, therefore, is preserved in the true English spirit of giving fair play to one struggling with adversity. It thus testifies to our instincts of justice in commerce. While the standard of our commercial law and honour remains so high, however, our neglect of a proper code of family law still continues, and the credit of subsisting marriages is damned in every divorce cause list, not to mention that of the respondent, and, if the petitioner is the husband, the co-respondent in each case. Even the nomination of a doctor or a schoolmaster as a co-respondent may seriously injure his reputation, a fact, of course, perfectly well known to blackmailers who trade on it accordingly. . . . . There is a fashion in a certain section of the press to dredge through the divorce lists at the beginning of each term, pick out any names of prominent persons which may appear in it, and announce to the world their unhappy domestic differences. This may be regarded as pure mischief, and could be very easily circumvented if matrimonial credit was rated as high as personal solvency and ability to pay debts. The recent Acts curtailing divorce reports may have checked the garbage served up in certain newspapers, but it has done nothing for the credit of existing marriages."

—*The Solicitors' Journal.*

"In my opinion a Judge of first instance is not only not bound, but not entitled, to follow the *dicta* of other Judges which are not in accord with his own judgment."

—Mr. Justice Neville.

Australian Notes.

(By Wilfred Blacket, K.C.)

The decision in the Brisbane "crowing roosters" case mentioned by me in these Notes in your issue of November 26th last was reversed by the Full Court on appeal, the Court holding that it was the exceptional temperament of the three ladies respondent that caused the sleeplessness they complained of and not the exceptional crowing of the roosters owned by Dr. Ferguson, appellant. This decision is supported by the fact that although the ladies complained of a nuisance of noise, and disturbed rest during a period extending from April to November, the cocks that crowed at night and morn were not hatched until March. The findings of fact disposed of the matter, but the opinion of the Court appeared to be that keeping fowls in Brisbane backyards was a right and proper thing to do, and that the neighbours ought not to complain. It is a regrettable fact that the roosters will not share their owner's triumph for they were killed as soon as the trial Judge had declared them to be a nuisance. The plaintiffs applied to the High Court for special leave to appeal from the decision of the Full Court, but the application was refused with some degree of enthusiasm.

The defalcations of Robert McGowan, solicitor of Brisbane, amounting to £33,000 have once again proved the utter futility of the statutory provisions as to audit of solicitors' trust accounts. During the last two years McGowan's cash deficiences amounted to many thousands, while his assets were of trifling value; but in each year a certificate, signed by two auditors and the solicitor, was duly filed in the Justice Department, in accordance with the local Trust Accounts Act. Now it is said that one of the auditors is dead, and the other beyond the seas, and it is admitted that there never had been any proper audit of the accounts. The Queensland Law Society seems to have been slow to act upon information within its knowledge as to McGowan's affairs, but is now organising a deputation to the Minister for Justice asking that a Bill similar to your Solicitors' Fidelity Act should be passed. This effort of reform is admirable, as a gesture, and as a pious hope is commendable, but it may well be doubted whether such an Act could be passed unless "1,499 out of 1,500 solicitors" as in New Zealand were behind it.

In *Burns v. Crockett* in the Supreme Court of New South Wales the plaintiff's cause of action was that by reason of the defendant's default and negligence she had contracted a disease. The defendant demurred to the declaration, and when the case came on for argument counsel for the lady admitted that a case in the Irish Law Reports had decided that such a claim could not be prosecuted because "*Ex turpi causa non oritur actis*," and that he could not argue to the contrary.

In *Croll v. McRae*, tried in a Jury Court at Sydney, the indiscretion of counsel raised a point that is without precedent in our reports. When the defendant was in the box, he was asked in cross-examination: "If you never got the benefit of any of this timber why did you instruct your solicitor to offer us £350 in settlement?" The defendant denied that he had done so, but his counsel asked that the Judge should discharge the jury on the ground that the question had so pre-

judiced the defendant's case that a fair trial could not be had. The Judge refused to do so, but told the jury that the question was a most improper one, and directed them to dismiss it from their minds. There was a verdict for the plaintiff for the amount claimed, but the defendant easily obtained an order for a new trial from the Full Court. In the course of his judgment Street, C.J., after quoting the question said: "Human nature being what it was, of what use was it to tell the jury to disregard such a statement? The poison, once instilled into their minds, must inevitably work, and who could possibly feel any confidence in a verdict in the plaintiffs' favour arrived at after so prejudicial a statement had been made? Such a warning in the summing up to disregard it was only to revive their recollection of it, and to renew its damaging effect."

Reverting to the matter of the simplicity and speed of procedure under the Common Law Procedure Acts, I approach the subject from a new angle. Prior to 1873 procedure in English Courts had been stripped of many ancient and useless technicalities. Side-bar rules, rules to plead, special demurrers, express colour, and replications *de injuria*, had all been discarded and the trend of change was wholly towards simplicity in practice and procedure. Then came the Judicature Act, with its fusion of Law and Equity, imposing upon every Common Law action as much of the burden of Equity procedure as could be made to apply, and since the disastrous day when that Act passed, the constant tendency has been towards ever-increasing complexity and technicality. In 1887, when I got my call, pleading was an art and four members of the Bar had high repute therein. Our pleadings were then very strictly construed and amendments in pleadings, on trial were seldom allowed. Therefore there were frequent applications to make small amendments in pleadings, or to add counts and new assignments to make more exact description of any possible cause of action. Very great strictness was also applied in other matters. For instance an application was struck out with costs because it was endorsed under a repealed Act, instead of under a consolidating Act by which it had just been repealed. Still the growing tendency was to condone merely technical irregularities, and so year by year pleading and practice ceased to be a monopoly fo specially expert men. Then came the decision in *Falk v. Lysaght*, 2 C.L.R. 421. To an action on a contract the defendant had pleaded that he "did not promise as alleged" and at the trial sought to show that his agent and the plaintiff had conspired to defraud him in the making of the contract. It was held on trial that this defence could not be set up under the plea denying the contract, and that leave to amend could not be given. The High Court ruled that the evidence of fraud was admissible to show that the contract was not the defendant's contract and that, if it had not been, leave to amend should have been given. That decision killed more technicalities in every jurisdiction of the Court. Until this decision the ample powers of amendment conferred by the C.L.P. Act and Rules were rarely exercised. Now they are always used unless an amendment would involve an injustice. Quite recently some plaintiffs brought an action against the Railway Commissioners for breach of contract. After the case had been on hearing for a couple of days two fresh counts were added, but these did not seem to be much good, so the plaintiffs imported a new leader into the case, and he was allowed to add two more counts, but even then the plaintiffs' claim for damages could not be supported.

Advocacy Hints for Young Solicitors.

By C. J. F. Atkinson, a Registrar of the County Court (Eng.)
(Reprinted, by permission, from *The Law Journal*)

The following hints from one who has heard many cases tried in County Courts may be helpful to young solicitors. I have seen actions lost when they had an equal chance of being won, and others succeed against odds—where it was not the case itself, so much as the way it was handled, that produced the result. I am writing chiefly of County Courts, but the same points may be observed at Petty Sessions.

Before Trial. In most cases you will have some correspondence with the other side. This may be made to serve a most useful purpose at the hearing, if you are not so foolish as to mark the letters "Without Prejudice," and so put it out of your power to use them. Never do that unless you are reduced to bluff. It was fashionable once with the under-educated practitioner, but it is nearly always a mistake. Many counsel in large commercial practices will tell you that on reading through their papers, they have often come across letters which were powerful levers for lifting doubts, and then at the end of all they were baffled by these miserable words "Without Prejudice." Let all letters go in if you can. If, when the correspondence is handed up to the Judge, he sees that your letters have been candid, open, and well-expressed, you will have created a clear atmosphere in your favour from the first. In some cases, your letters may make more impression than your witnesses—and they are *there* all the time, whereas the words of a witness may have only a transient effect.

Then, in drawing your claim, defence, counterclaim, or anything else in the nature of pleadings, remember that these papers are what the Judge sees first, and that he, being human, wants to know from the first what he is asked to try. His Honour has no magic to find this out until it is put before him. If your papers are well expressed and show what they mean, you have secured your battle-ground. If the other man's papers are scrappy, incoherent, and expressed in office boy's language, you have got a good start. Another point to be remembered is that, if your case involves figures, you should set them out in good concise order on your particulars. It is never safe to rely on spoken words for explaining figures. A Judge cannot take notes of them all, or if he tries to do so with the best intentions, he may confuse them—for His Honour is human. Figures are for the eye, not for the ear. Demagogues know that, and when they want to bamboozle a crowd, they know that it is safe to "wade into figures." But a Judge is not a crowd, so put figures before his eyes, and do not burden his ears with them.

In Court. When the hearing day comes, you may have to repress the expectations of your client. He (or especially she) may want to play to the gallery, or to the reporters, and make a noise. Don't. If you are to win your case, you must concentrate on the bench and forget the gallery.

It is always worth while to take pains with your opening. Until you are accustomed to the work, prepare it word for word—but with as few words as possible. Cut out adjectives. In preparing the speech,

try to imagine that you are explaining the case to a respected friend whom you wish to know all about your side, who knows nothing of it until you have told him, and who is too experienced to stand any clap-trap. I know one successful advocate (first a solicitor and afterwards a K.C.) who in his early days rehearsed his openings to his wife. They were always lucid in Court, and admirably brief—not a wasted word.

Above all things, begin at the beginning. Keep all your facts in one orderly line, and go straight on without digressions and without turning back. In speech there is nothing so confusing as a parenthesis. Don't let your client influence you to put any passion into your opening, stil less any personalities. Your only business is to impart your set of plain facts into the mind of the Judge. If your opening has this effect, you have got a good start, and your opponent will have his work set to overtake you. Don't let your client prompt you or interfere. He is over-wrought with the worry of the trial, and his sense of sportsmanship is probably below your own—certainly below what the Court will expect of you.

If there are any hostile complications or appearances which look bad for you, but are capable of explanation, it is usually best to mention them candidly in your opening, and show how you propose to explain them. By so doing you may disarm your opponent, and, at any rate, you will prevent the Judge from forming an unfavourable impression. But if you are for a plaintiff, do not anticipate your opponent's defence—or you may make him a present of a point he had never thought about.

If you have to argue a point of law, be careful to have your reports or text-books all ready to hand up to the Judge. Do not assume that he, or any man, can carry in his head the whole body of English law. If you are relying on statutes, mention them early in the case, so that the Acts can be brought in for the use of the Judge. Always remember that His Honour is a human being—not an encyclopaedia.

As to speeches generally, a clear conversational voice, if distinct, is the best. Speak slowly, very slowly, when you begin. Remember this particularly, if you are at all nervous, for your nervousness will be apt to cause you to speak too quickly, and your points may then miss fire. Never shout or throw your arms about. Many great advocates have been distinguished by the fact that they never raised their voices, even under provocation. Keep your chest expanded, your chin up, and look the Bench straight in the face. Modulate your voice distinctly, and whatever you do, don't drop it at the close of a sentence, because then you are usually pronouncing the most important words. Try to avoid a monotonous tone. Many young lawyers do a little lecturing in their spare time. Very good, but don't take the lecturing style into Court. There is no style so ineffective. Judges and magistrates hate to be preached at.

If the case seems to be going against you, don't let your manner become truculent, or you will only make it worse. Never try to show what a fine fellow you are—that has lost many a case. Candour always pays better than bluff.

Examination of Witnesses. Your client will often bother you with the notion that the more witnesses you can call, the better it will be. He may have heard that the other side have subpœnaed six, so he wants you to turn out a team of equal number. Remember that the more the witnesses, the more is the chance of their contradicting one another. So long as you can prove all your points, and can leave the other side no chance of saying that a material witness has not been called, the fewer you put into the box, the safer you are—and it pleases the Judge. Be careful about calling women as witnesses. They are apt to be too fluent, and they are too much moved by their feelings. If they are keen on the case, they will say whatever they think should help their side to win, facts being a secondary consideration—or, at any rate, so elastic as to be stretched so as to fit their views.

Cross-Examination. Here again think of the impression you can make on the Bench and forget the gallery. It is not the questions you ask, so much as the answers you induce, that will win your case. I have heard advocates (of both branches) cross-examine as if they were wrangling at a public meeting, or even in a public-house. They would ask three questions in a breath without waiting for the answer. A quiet candid manner in cross-examination will always succeed best. Let the witness, think that you are not hostile to him, but are only trying to get him to say what he knows. If I may resort to that much-abused subject, psychology, associate yourself with the witness's ideas and draw them out. Above all, don't frighten him either with your manner or mode of expression—the average witness shies at long words.

When defending, great care should be taken against being influenced too much by your client. He has probably imagined all manner of things about his case, has discussed it with his friends, who have added their ideas, and he will want you to broadcast the Court with a number of trifles. To talk at large like that would help the other side and bewilder the Bench. After doing all you can, before trial, to make the other side give particulars, and then sifting your own evidence, you will usually find that the real defence reduces itself to one point, or two at the most. Concentrate on that point, and stand or fall by it. Brevity is more important in defence than when you are for the plaintiff or prosecutor. A long-winded noisy defence often creates the impression that the advocate is conscious of a poor case.

As a young advocate, you will probably find your own feelings and sympathies going out to your cases. Train yourself not to allow that. It is your mind, not your feelings, that will do the best work for your client. By your mind, not by your sympathies, you will impress the Bench. You may not be able to avoid worrying at first, and when you lose an early case you will perhaps feel as if you had been kicked by a horse. But you should accustom yourself to keep your feelings controlled so that your brain will be clear. For if you lose your temper, you are almost certain to lose your case.

Finally, and once again, whether before judges or before magistrates, remember that your one object is to impress the Bench with your case—the Bench and no-one else. "They are human, so treat them as such." (Kipling).

"Law should be swift, sure, and certain."
—Mr. S. C. Davis (President, Plymouth Law Society).

Disputed Retainer.

An Interesting Victorian Decision.

Gummow v. Bloom, (1929) Argus L.R. 331, is a decision of interest to solicitors. In the Court of Petty Sessions at Melbourne, Gummow, a solicitor, laid a complaint against one, Bloom, for the recovery of £19 2s. 6d., the amount of a bill of costs. Evidence was given by the complainant that on 8th December, 1928, he had an interview with the defendant and a man named Jewell when a discussion took place concerning a certain company and the defendant produced a cheque of the company's and asked the complainant to take out a summons upon it; that the complainant told the defendant to present the cheque and bring it back; that on the next day the cheque was left at the complainant's office; that the complainant told the defendant he would take out a summons and that the defendant instructed him to do so; that the complainant issued a summons and proceeded to execution; that the defendant from time to time telephoned to know how matters were going; that a letter was sent by him to the defendant informing him about the bailiff's report and that the defendant did not reply to that letter. The defendant denied the retainer. The Court of Petty Sessions made an order in favour of the complainant and an order *nisi* to review the decision was granted on the ground that there was no sufficient or proper evidence of retainer.

Irvine, C.J., made absolute the order *nisi* and in the course of his judgment said: "Where a solicitor commences legal proceedings on a client's behalf he should have written authority to do so. The absence of written authority is not conclusive against the existence of authority, because it may be established by inference from other evidence or from conduct; but if there is no written authority, and the dispute in substance resolves itself into one assertion against another assertion, then the solicitor is to be taken as if he had no authority or retainer. The authorities for the principle I have laid down and on which I rely in this judgment are those cited in *Halsbury's Laws of England*, vol. xxvi. p. 729, and *Cordery on Solicitors* (3rd ed.) 53; and in particular *Martindale v. Lawson*, Coop. 73."

It should, however, be noted that our own Supreme Court (Prendergast, C.J., and Richmond, J.) held in effect, in *Smith v. Buller*, N.Z.L.R. 5 S.C. 41, that where there is conflicting evidence as to retainer the Court can decide according to the preponderance of evidence without the production of a written retainer; but that case was not one simply of oath against oath for the solicitor's evidence as to retainer was corroborated by that of another witness.

"The authority of the Court of Appeal rests with the Court and not with the individual."

—Mr. Justice Neville.

"Expert witnesses are apt to make themselves partisans and thus diminish the weight of their testimony."

—Lord Macnaghten.

Forensic Fables.

MR. JUSTICE CATTEMALL AND MR. JUSTICE DEARLOVE.

Mr. Justice Cattemall and Mr. Justice Dearlove were Experienced Judges of the King's Bench Division. Their Views and Methods in Connection with the Treatment of Prisoners Differed Widely. Cattemall, J., always Looked in *Archbold's Criminal Pleading* to See How Much he could Give them, and Proceeded to Give it. If there were Three Counts in the Indictment he Ladled out Five Years on each Count, and Made

them Run Consecutively. The Lamentations of the Relatives of the Accused Seemed Rather to Gratify him than Otherwise. When he Went on Circuit the Home Office Laid on an Extra Temporary Staff to Deal with the Petitions which Poured in; and the Court of Criminal Appeal Became so Busy that it had to Borrow a Judge from the Admiralty Division to Cope with the Work. Mr. Justice Dearlove was the Very Opposite of his Learned Brother. He liked to Bind Over the Wicked to Come up for Judgment if Called Upon, and he Shed Tears when he had to Send Anyone to Prison. Towards Old Offenders he was Particularly Gentle, because they had Never had a Chance; and he Let Off all Youthful Malefactors because he did not Wish to make Criminals of them. Cattemall, J., and Dearlove, J., often Discussed the Relative Merits of their Respective Systems. Here is a Picture of them so Discussing. The Short One is Cattemall, J., and the Tall One is Dearlove, J.

MORAL: *You Can Never Tell.*

Bench and Bar.

Mr. J. J. Molony, of Westport, has moved to Napier where he is practising on his own account. On the occasion of his departure from Westport Mr. Molony, as borough solicitor, was accorded a civic farewell, at which the Mayor, Mr. J. H. Harkness, presided.

Mr. H. D. C. Adams, LL.M., of the staff of the Public Trust Office and until recently a member of the firm of Tudhope & Adams, Hamilton, has been appointed to the position of Assistant Crown Law Draftsman.

Mr. W. E. Ward, of the firm of Meredith, Hubble and Ward, has commenced practice on his own account at Auckland.

Mr. S. C. Childs has commenced practice at Wellington on his own account. Mr. Childs commenced his legal training with the firm of Hollings & Hollings, Wellington, and has been for the past four years on the staff of Bell, Gully, Mackenzie & O'Leary, Wellington.

Correspondence.

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

Nachimson v. Nachimson.

From the note of the above case in your issue of 4th March, it appears that the English High Court holds a Soviet marriage to be no marriage on two grounds, (1) that it is dissoluble by the consent of the parties, (2) that it is dissoluble, without matrimonial offence alleged or proved, at the will of one of them. If the former ground is valid, it would seem that in England, or indeed any British jurisdiction, a marriage solemnised in New Zealand since the Divorce Amendment Act, 1920, came into force must be held to be no marriage! Having celebrated my copper wedding I am personally not concerned; but these English Judges seem to need a bit of watching.

I am, etc.,
"D. Y. L."

County Court Judges and the High Court.

Only once has an English County Court Judge been promoted to the High Court Bench. The occasion was when Lord Birkenhead, then Lord Chancellor, promoted His Honour Judge Acton, in June, 1920. Recently, during the vacation, Judge Crawford sat, by arrangement, in the High Court; this is the first time, it is believed, that a County Court Judge has sat, as such, on the High Court Bench. Judge Crawford, however, was not at all impressed and complained bitterly of the Court's low temperature.

Auckland District Law Society.

Annual Meeting.

The annual general meeting of the Auckland District Law Society was held in the Magistrate's Court, Auckland, on Friday, 14th March. The retiring President, Mr. F. L. G. West, occupied the chair, there being a very large attendance of members. The annual report and balance sheet for the year ended 31st December, 1929, was adopted. It appeared from the report that there were at the end of the year on the roll in the District, 229 barristers and 519 solicitors.

Reference was made to the loss which the profession had sustained by deaths of the Chief Justice, Sir Charles Skerrett, Mr. C. F. Buddle, one of the oldest practitioners in Auckland, and Mr. C. N. Hayes, of Dargaville.

The President in referring to the Solicitors' Fidelity Guarantee Fund drew attention to the large amount of extra work thrown upon the Council of the New Zealand Law Society, and said that the thanks of this Society were due to the members of that Council for their labour and exertions in their successful efforts.

The want of Library accommodation was severely criticised, the room available for practitioners being taxed to the utmost, whilst great difficulty is being experienced in finding room for the ever-increasing number of legal works constantly coming forward.

The Council had been notified by the executors of the estate of Mrs. E. J. Campbell, widow of the late Mr. Hugh Campbell, that by her will interest on the sum of £1,000 would be available to provide an annual scholarship for law students in the Auckland District, to be called "The Hugh Campbell Scholarship."

Annual Legal Conference: The Council was glad to report that the visiting practitioners from the South were notifying the Secretaries of their intention of being present, and the wish was expressed that all visitors would supply this information not later than the first week in April.

The following Officers of the Society were elected for the current year:—

President: Mr. R. P. Towle.
Vice-President: Mr. J. H. Reyburn.
Treasurer: Mr. A. M. Goulding.
Members of Council: Messrs. G. P. Finlay, A. H. Johnstone, F. H. Massey, L. K. Munro, H. M. Rogerson, F. L. G. West.
Auditor: Mr. N. A. Duthie.
Delegates to the New Zealand Law Society: Messrs. R. P. Towle, A. H. Johnstone and F. L. G. West.
Members of Council of Law Reporting: Messrs. R. McVeagh and H. P. Richmond.

"I am afraid prolonged experience of these Courts has accustomed me to finding the thing has happened which the witnesses upon each side declared to be quite impossible."

—Lord Justice Scrutton.

"It has never been the wont of the common law to measure wrongs by the judicial foot."

—Lord Atkin.

Legal Literature.

Willis and Olliver's Roman Law.

Fourth Edition: By J. W. C. TURNER, M.A., LL.M. (Butterworth & Co. (Publishers) Ltd.).

This work has now been about 30 years in use, the latest edition being published at the end of 1929. That there should have been four editions of the book in 30 years is strong evidence that it has been in steady demand; and the fact that it has been in steady demand is proof that the book has been found useful. The latest edition, which differs from its predecessor only so far "as the use of the book in teaching and the results of recent research have prompted," is the work of Mr. J. W. Cecil Turner, M.A., LL.B. of the Middle Temple, and Fellow of Trinity Hall, Cambridge.

The book is what it claims to be—"An Examination Guide for Bar and University." It is not a text-book in the ordinary sense, in that it proceeds by way of question and answer. Actual questions that have been set (and that no doubt recur) are given, and then follow model answers. Though the method, usually employed in text-books, of developing the subject continuously from its beginnings is not used in *Willis and Olliver*, it is not to be imagined that there is an absence of plan or method. There is, on the contrary, a very definite plan followed, and any student who reads the whole book through will get a good view of the whole subject. Probably the best way to read *Willis and Olliver* is to study it in conjunction with some other book such as Buckland's "*Manual.*" So read and studied, it will prove of very great assistance to the student. An excellent bibliography preceeds each main division of the book.

—H. H. CORNISH.

Topham's Company Law.

Seventh Edition: By A. F. TOPHAM, K.C., LL.M. (pp. xlvii; 352; 50: Butterworth & Co. (Publishers) Ltd.; Shaw & Sons Ltd.)

Topham's Company Law has become a classic among text-books and requires no introduction. Though intended primarily for students it is so comprehensive, and Mr. Topham a company lawyer of such repute, that the work has become exceptionally popular with practitioners both in England and in New Zealand as a book of first reference. Of course on difficult points or on matters of detail one would always consult the larger works, but as a handy book to keep on the desk *Topham* is unrivalled. This new edition has been rendered necessary by the consolidating Act passed last year in England for which it seems that we are likely shortly to have a counterpart. The book is thoroughly up-to-date as regards case-law and while on this aspect of the matter one cannot help marvelling at the number of decisions which Mr. Topham has included in his work. Between six and seven hundred cases are referred to; the more important ones from a student's point of view are set out in the text and in the footnotes the practitioner will find authorities enough for most purposes. A useful feature of the work is a comparative table of sections and of the clauses of Table A, thus enabling the reader to trace the provisions of the English Act of 1908 into the new Act. As a handy companion to the general practitioner and as a student's work *Topham* merits the highest commendation.

New Books and Publications.

Palmer's Company Precedents. Supplement to Thirteenth Edition. By A. F. Topham and A. R. Taylor, M.A., assisted by A. M. R. Topham. (Stevens & Sons, Ltd.). Price 23s.

Annual County Courts Practice, 1930. By Judge Ruegg, K.C. (Sweet & Maxwell, Ltd.). Price 45s.

The Landlord and Tenant Act, 1927. Second Edition. By the Editors of Law Notes. (Law Notes). Price 9s.

Industrial Arbitration in Great Britain. By Lord Amulree Oxford Press. Price 15s.

Canterbury College Law Students' Society.

ANNUAL MEETING.

The annual general meeting of the Canterbury College Law Students' Society was held on the 13th ult., at Canterbury College.

The annual report reviewed the activities of the Society during the past year and showed the Society's membership as now standing at 95. During the year Mr. M. J. Gresson had delivered an address to the Society on the Second Legal Conference, and Mr. E. W. White an address on "Customs and Ceremonies of the City of London." Three moots were held during the year, Messrs. W. J. Hunter, W. J. Sim, and R. Twyneham acting as judges. As a result, the report stated, of representations made by the Society, the Council of the Canterbury Law Society has decided to revive the granting of a gold medal to the most promising graduate of the year. Mr. C. E. Weston Wacher was the winner of this medal for the current year.

The following officers were elected for the year 1930: Patron, The Honourable Mr. Justice Adams; Honorary Presidents, W. M. Hamilton, Esq., C. S. Thomas, Esq., W. J. Hunter, Esq., H. D. Acland, Esq., F. W. Johnston, Esq., M. J. Gresson, Esq., A. T. Donnelly, Esq., A. S. Taylor, Esq.; President, J. N. Laurenson; Hon. Secretary, J. G. D. Ward; Hon. Treasurer, J. T. Watts; Committee, C. F. Jones, J. E. Farrell, E. A. Cleland, A. G. van Asch; Hon Auditor, C. W. Evans, B.Com, A.P.A.N.Z.

A Flogging Judge.

Day, J., had great faith in the efficacy of the "cat." During his fourteen years on the Bench he is said to have sentenced 137 hardened criminals to 3,766 strokes of the "cat," an average of approximately 27.5 strokes each. Once in the case of the High Rip Gang at Liverpool his judgments miscarried. Some members of the gang were certified as medically unfit to be flogged, and so escaped unhurt with only a short term of imprisonment. He took precautions thereafter. On the next occasion he postponed judgment until after the medical examination. Thereupon he prescribed flogging for those who could stand it and an adequate sentence for those who could not.