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"The high character of the English Bench is due to the great esteem in which the judicial position is held not only by the profession but by the whole public."
—*Mr. Justice Trueman (Manitoba).*

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Issues in Running Down Cases.

Running down actions are with us every day, yet the law seems to be by no means yet finally settled as to the proper form of the issues to be put to the jury in such cases. Hitherto, since *Black and White Cabs Ltd. v. Anson*, (1928) N.Z.L.R. 321, issues have frequently, though not always, been left in the following form: (1) Was the defendant negligent in any, and, if so, which, of the following respects? (2) Was the plaintiff negligent in any, and, if so, which, of the following respects? (3) If both were negligent, whose negligence was the real cause of the collision? In England, where it is not usual to leave specific issues to the jury, the Court of Appeal has laid it down in two cases—*Service v. Sundell*, 46 T.L.R. 12, and *Cooper v. Swadling*, 46 T.L.R. 73—where issues were left by the Lord Chief Justice and Humphreys, J., respectively, similar to the third issue in *Black and White Cabs Ltd. v. Anson*, that such an issue, if proper, must be left only with an adequate direction. These cases have been previously discussed in this column (*ante* p. 1).

Benson v. Chong, decided by our Court of Appeal on the 12th inst., must now be regarded as the leading decision in this country. The case is one with a curious history. At the first trial, before His Honour the Chief Justice, the jury were unable to agree and a new trial was ordered. At the second trial, before Mr. Justice Reed, the jury found that the plaintiff was not negligent in failing to give way at an intersection to the defendant's car approaching from his right. The learned Judge ordered a new trial on the ground that no jury could reasonably say that such an act was not negligent. At the third trial, before Mr. Justice Reed, four issues on the subject of negligence were put to the jury: (1) Was the defendant's driver negligent (specifying the acts of negligence alleged)? (2) Was the plaintiff negligent (specifying the acts of contributory negligence alleged)? (3) If you find that both were negligent could each up to the last moment have avoided the accident by the exercise of ordinary care? (4) If not, could either of them, and, if so, which? The jury found both the defendant's driver and the plaintiff negligent, answered "No" to the third issue, and, on the fourth issue, found that the defendant's driver could have avoided the accident by the exercise of ordinary care. Mr. Justice Reed removed the case into the Court of Appeal for argument, and that Court held that the jury's answers to the third and fourth issues were against the weight of evidence and that the plaintiff could by the exercise of ordinary care, up till the last moment, have avoided the accident; judgment was therefore entered for the defendant.

The issues which Mr. Justice Reed submitted to the jury are different from those regarded as proper by the Court of Appeal in *Black and White Cabs Ltd. v. Anson*, and it seems that, in view of the English authorities referred to above, the general issue—"If both were negligent, whose negligence was the real cause of the collision?"—will not generally be put in our Courts. The judgment of Herdman, Reed, Adams, and Blair, JJ., delivered by Reed, J., though containing valuable observations on the form of the issues, does not contain any comments on this particular general issue, but the matter is dealt with by Myers, C.J., in his separate concurring judgment:

> "In *Black and White Cabs Ltd. v. Anson* a certain form of issues was suggested raising the questions (1) whether the defendant was negligent, (2) whether the plaintiff was negligent, and (3) if both were negligent, whose negligence was the real cause of the collision or accident. Recent cases have shown that issues in this form are not satisfactory. In any event the third issue would involve practically as elaborate a direction as if no issues were submitted at all. I am not sure that it is wise under existing conditions to attempt to frame a model set of issues. Indeed that was not attempted by the Court in *Anson's case*: all that the Court there said was that the issues mentioned would have been proper in that case. Suffice it to say that in my view, speaking generally, issues framed somewhat on the lines adopted in the present case would seem to be sufficient, with appropriate and comparatively simple direction, to meet a large number of the cases of this kind that come up for trial."

While the learned Chief Justice was perfectly correct in saying that recent cases have shown that issues in the form approved in *Black and White Cabs Ltd. v. Anson* are not satisfactory, this observation must now be read subject to the very recent decision of the House of Lords in *Swadling v. Cooper*, reversing the decision of the Court of Appeal in that case referred to above, a brief note of which arrived, curiously enough, in New Zealand contemporaneously with the delivery by our Court of Appeal of its judgment. No full report of the judgment in the House of Lords is yet available, but it would seem that that tribunal has approved of the leaving to the jury, subject to a proper direction, of the question: "Whose negligence was it that substantially caused the injury?" This question, notwithstanding the slight difference in language, is obviously the same as the third issue in *Black and White Cabs Ltd. v. Anson*. So far as can be gathered from the information at present available, all that the House of Lords has decided is that such a general issue is a proper one. It does not appear to have decided that it is the only proper form of issue.

Whatever may be the law, the more specific issues approved in *Benson v. Chong* seem certainly more likely to lead to the doing of strict justice. They assist, in the first place, a clear and comparatively simple summing up. Again, though the jury may have the strongest leaning in favour of the injured man, some check on this tendency is imposed by requiring answers to the more specific issues. Further, answers to the more specific issues are much more readily examinable by the Court than an answer simply to the general issue. *Benson v. Chong* itself affords a striking illustration of this. Had the general issue been submitted in that case, the plaintiff might well have held his verdict.

Court of Appeal.

Reed, J.
Adams, J.
Ostler, J.

July 2; August 6, 1930.
Wellington.

RICHARDSON v. HARRIS.

Undue Influence—Unconscionable Bargain—Sale by Bankrupt with Consent of Official Assignee of Life Interest in Capital Sum—Ignorance of Vendor—Pressure by Creditors—Sale at Undervalue—No Independent Advice—Delay of Ten Years Not Amounting in Circumstances to Laches or Acquiescence—Act of Vendor in Effecting Insurance on Life in Name of Purchaser Not in Circumstances Act of Affirmation—Transaction Not a Sale by Official Assignee—Transaction Set Aside—Costs—Bankruptcy Act, 1908, S. 63 (a), 120 (g).

Appeal from a judgment of Herdman, J., reported 5 N.Z.L.J. 274, setting aside a sale to the appellant of the respondent's life interest under a will on the ground of undue influence. The facts are stated in the report of that judgment

Gray, K.C., Perry and **James** for appellant.
Macassey and **Lawson** for respondent.

ADAMS, J., delivering the judgment of the Court said, that the learned Judge in the Supreme Court thought it unnecessary to determine the question whether the proposal made to the appellant by the respondent was to borrow money on the security of his life interest or to sell that interest outright but that question might have to be determined because the appellant's counsel before the Court of Appeal relied on **Harrison v. Guest,** 8 H.L.C. 481—on the ground that the offer to sell proceeded from the respondent in the first instance. That was based on the evidence of the appellant, and was contradicted by the respondent and Mrs. Harris who said that he asked for a loan of £1,000. Their story was consistent with the reason which drove them to the appellant—that was to say, the threat to sell unless money was raised to pay the claims of the creditors in the bankruptcy which were afterwards settled by a payment of £840. If necessary their Honours thought that the Court of Appeal should find that the proposal made by the respondent was for a loan of £1,000; that the appellant declined to lend money on the security offered but made a counter-offer to purchase.

The principle upon which the Court, in its equity jurisdiction, would relieve against unconscionable bargaining had been established for upwards of two centuries. The passage from the dissenting judgment delivered by Lord Hatherley in **O'Rorke v. Bolingbroke,** 2 A.C. 814, 823, stated in brief form the modern rule. In **Fry v. Lane,** 40 Ch.D. 312, 321, Kay, J., observed: "In the case of a poor man in distress for money, a sale, even of property in possession, at an undervalue has been set aside in many cases, as in **Wood v. Abrey,** 3 Madd. 417, 423, where the only professional person employed was the purchaser's attorney." Kay, J., then referred to **Longmate v. Ledger,** 2 Giff. 157, apparently affirmed on appeal; **Clark v. Malpas,** 4 D.F. & J. 402; **Baker v. Monk,** 4 D.J. & S. 388; **Harrison v. Guest,** (*cit. sup.*), and proceeded (p. 322) as follows: "The result of the authorities is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction. This will be done even in the case of property in possession, and *a fortiori* if the interest be reversionary. The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, in **Earl of Aylesford v. Morris,** 8 Ch. App. at p. 491, that the purchase was 'fair, just and reasonable.'" The facts established brought the present case clearly within the principle on which the Courts had acted for centuries in the case of unconscionable bargains. The burden of proving that the transaction was fair, just and reasonable was thus thrown on the appellant. The question, therefore, was, had that burden been discharged, or, in other words, "was the transaction fair and reasonable having regard to the nature and degree of the risk run by the purchaser, or to any other criterion?": **Earl of Aylesford v. Morris** (*cit. sup.*), per Lord Selborne, at p. 496.

The appellant's own evidence showed that he made inquiries extending over three weeks before finally entering into the contract, and in the course of those inquiries he ascertained that the fund producing the income of about £400 was invested by the trustees on freehold lands, and that the capital sum of £7,250 was intact. He also obtained full information from the Official Assignee as to the bankruptcy account. He was advised by the witness Edwards that he should obtain a second policy for £1,000 on respondent's life. His solicitor made investigations on his behalf. He thus had the advice and assistance of a competent legal adviser who, the appellant said, informed him that the proposition was quite all right. He knew all about the bankruptcy. Briefly, he acted as a prudent investor should act, but did not impart his information to the respondent. He then concluded his bargain—that he would purchase the life interest for £1,750 on condition that a new policy for £1,000 should be obtained and, with the policy held by the Assignee, be transferred to him, and that before paying any of the purchase money to the respondent the sum required to satisfy all the claims of the creditors in the bankruptcy and the Official Assignee should be ascertained and paid. Those conditions were complied with and thereupon the transaction was completed. It was plain that in those circumstances the risk of loss had been practically reduced to the uncertainty of life and the risk of some loss of capital and corresponding diminution of income. The first of those risks was covered by the insurance policies which, in the event of the respondent's death at any moment after the execution of the assignment, would have produced at least £2,000; the second was met by the fact that the current investments were on good trustee securities and by the limitations as to margins imposed on the trustees by statute. Mr. Gostelow, who was a Government actuary, said that the life interest, the respondent being then 38 years of age, was worth £3,992 if protected by life insurance. The valuation was on an allowance of 6 per cent. for interest. There was, however, no evidence as to what price would be paid by a prudent purchaser, and the Court was accordingly left to form its own judgment as to the adequacy or inadequacy of the price in the present case. It might be treated as common knowledge that, as stated at the Bar, advances were readily obtainable on such securities, though perhaps at a slight advance in interest, and that purchasers were available who would pay a reasonable price on a sale of a well secured life interest fortified by insurance. That, however, was not the question in the present case. If the appellant were the only person who would entertain a purchase, that fact would not relieve him from his obligation to be fair and just and reasonable. The question of fairness or unfairness was in all such cases for the Court, and was to be determined according to the special circumstances. The appellant was not obliged to purchase, but as he chose to do so he must conform to the rules of the Court. Moreover, the Court was not fettered by any previous decisions as to the degree of unfairness in any particular case. In their Honours' opinion the price paid by the appellant was so inadequate as, to quote an expression occasionally used, to shock the conscience of the Court, and the transaction was unfair and unjust. In plain terms it was an unconscionable bargain. Further, their Honours thought it very unfortunate that the solicitor for the appellant, knowing as much as he did, thought it unnecessary to warn the respondent that he should consult an independent solicitor, and even to go the length of refusing to complete the transaction until he had done so. A separate solicitor could have discharged the duty of advising the respondent on the whole circumstances of the transaction, and would no doubt have advised the rejection of the appellant's proposal and have made arrangements with other persons for such financial assistance as the respondent required on fair and reasonable terms. In any event, the parties would have been placed at arm's length. Counsel for the appellant submitted that the life policies ought not to be considered in fixing a fair price for the life interest, but that argument was, in His Honour's opinion, untenable. The mere fact that the appellant insisted on obtaining the insurance policies as a condition of the purchase was sufficient to show that he, at any rate, realised that they were an important addition to the value, and it was the constant practice to reinforce such investments in that manner.

Their Honours turned next to the defences raised on the assumption that the transaction was an unconscionable bargain. First, it was said that the claim was barred by laches or acquiescence. The transaction took effect in July, 1918, and the present action was not brought until 6th October, 1928—an interval of upwards of 10 years—and the contention was that that long delay created a presumption that the respondent knew the facts and resolved to affirm the transaction. Their Honours referred to 13 **Halsbury's Laws of England,** par. 205, where it was stated: "As regards knowledge, persons cannot

be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them. But it is not necessary that the plaintiff should have known the exact relief to which he is entitled; it is enough that he knows the facts constituting his right to relief." Reference was also made to **Rees v. De Bernardy,** (1896) 2 Ch. 437, per Romer, J., at p. 445; **Lindsay Petroleum Co. v. Hurd,** L.R. 5 P.C. 221, 241; **Cockerell v. Cholmeley,** 1 Russ. & M. 418, 425. In the present case the trial Judge had found as a fact that the respondent never realised the worth of the asset he possessed. Nor was there any evidence of a "fixed, deliberate, and unbiassed determination that the transaction should not be impeached" which was given as a test of acquiescence in such cases: **Wright v. Vanderplank,** 8 DeG.M. & G. 133, per Turner, L.J., at p. 147; **Inder v. Sievwright,** 18 N.Z.L.R. 348, 366. Herdman, J. had found as facts: (1) that Harris never realised the true worth of the asset possessed by him and (2) that in May, 1928, he might have suspected that he had been wronged, but that there was nothing to show that he did any act knowing that it was to have the effect of confirming the assignment, or that he acted with his eyes open. The learned Judge doubted whether the respondent had any sound ground for believing that the transaction was assailable until just before 28th August, 1928, when his solicitors wrote to the appellant threatening a writ. The defence on the ground of acquiescence failed.

In his statement of defence the appellant averred that the sale to him of the life interest was in substance and effect a sale by the Official Assignee in bankruptcy and not by the respondent. Counsel put it that it was the act of the Official Assignee through Harris, and that the deed of transfer, although expressed to be made between the respondent as the seller and conveying party and the appellant as purchaser, and signed by the respondent in his own name, was in reality the Official Assignee's deed signed by Harris as his agent. There were three answers to it: (a) a sale of the life interest or the insurance policy by the assignee by private contract would be in breach of S. 63 (a) of the Bankruptcy Act, 1908, and the assignment, not being in professed exercise of the power to sell conferred by the subsection, was not validated by the third paragraph of the subsection; (b) that an agent to execute a deed on behalf of his principal must be authorised by deed, and must execute the instrument in the name of his principal: **Berkeley v. Hardy,** (1826) 5 B. & C. 355; (c) it was contrary to fact. The intention throughout was that the respondent should sell. The appellant, no doubt, arranged with the Assignee for the payment to him of the sum required to pay the creditors in the bankruptcy, and when that was done, to transfer the life policy which he held to the appellant. But in that he must be regarded as acting as the respondent's agent. The Assignee could deal with him in that capacity only. Of course, until the Assignee was paid, the respondent had at law no power to assign any interest in the bankruptcy estate, but he could at any time give an equitable assignment of any surplus to which he might prove to be entitled under S. 120 (g) of the Bankruptcy Act. The Official Assignee took the property of a bankrupt for an absolute estate in law, but for a limited purpose, namely, for the payment of the creditors under the bankruptcy and all costs of the bankruptcy. Subject to that he was a trustee for the bankrupt of the surplus, if any. The bankrupt had a right to that surplus and could dispose of it by will or deed or otherwise during the pendency of the bankruptcy even before the surplus was ascertained: **Bird v. Philpott,** (1900) 1 Ch. 822. Before the insertion in the Bankruptcy Acts of an express provision in that regard, it was held in **Troup v. Ricardo,** 34 L.J. Ch. 91, that when the debts and claimants in a bankruptcy were all satisfied, the surplus assets belonged to the debtor under the general principles of resulting trusts. Those cases were sufficient authority for the proposition that the plaintiff, although an undischarged bankrupt, could maintain the present action.

The question of costs was reserved in the order from which the appeal was brought, and their Honours were asked to determine that question upon written argument submitted by counsel. In **Fry v. Lane** (*cit. sup.*) Kay, J., expressed his satisfaction that no absolute rule had been laid down as to costs in those cases. Sometimes where the only ground was undervalue, the plaintiff had been relieved on payment of costs, as in **Twistleton v. Griffith,** 1 P. Wms. 310. In some cases no costs were given, as in **Bromley v. Smith,** 26 Beav. 664, 676; sometimes the costs were thrown upon the defendant. In **Fry v. Lane** (*cit. sup.*) there was a charge of actual fraud which was not sustained. Counsel for the appellant said that the general rule in cases of undue influence was not to allow costs to the successful plaintiff, in analogy with the practice in redemption suits, but as their Honours had already said, the present was not a case of undue influence, but of unconscientious bargaining. In **Nevill v. Snelling,** 15 C.D. 679, 705, Denman, J., ordered the defendant to pay the costs on the ground that proper terms were offered by the plaintiff before action. In the present case the plaintiff's solicitors in their letter of 28th August, 1928, offered liberal terms and that offer had been adhered to throughout.

Appeal dismissed with costs.

Solicitors for appellant: **Perry and Perry,** Wellington.
Solicitors for respondent: **Card and Lawson,** Featherston.

Myers, C.J.
Herdman, J.
Adams, J.
Blair, J.

July 15; August 8, 1930
Wellington.

WAIRAU HARBOUR BOARD v. WAIRAU RIVER BOARD.

River Board—Harbours—River Board Entitled to Erect Flood Protection Works Within River District Except Within Actual Limits of Harbour as Defined by Governor-General's Warrant—Harbours Act, 1923, Ss. 5, 6, 7, 59, 134, 166—River Boards Act, 1908, Ss. 2, 73, 76, 84, 85, 86—Wairau Harbour Act, 1907, Ss. 3, 9.

Appeal from the judgment of Reed, J., reported *ante* p. 168, where the facts are stated.

Gresson and **Nathan** for appellants.
Johnston, K.C. and **Churchward** for respondent.

MYERS, C.J., delivering the judgment of himself and ADAMS, J., said that by S. 9 of the Wairau Harbour Act, 1907, the Wairau Harbour District was defined as comprising the Borough of Blenheim and the Omaka Road District. Reed, J., had held that the effect of S. 73 (2) of the River Boards Act, 1908, was confined strictly to S. 73, and that its provisions did not affect the powers granted to a river board by the succeeding sections. Their Honours agreed. Their Honours thought that that became clear on a comparison of S. 73 (2) with Ss. 84, 85 and 86. Each of those sections was restrictive of the powers of a river board, and each commenced with the words "Nothing in this Act," followed in Ss. 84 and 86 by the words "shall authorise," etc., and in S. 85 by the words "shall prejudice or affect, etc." S. 73 (2) said merely: "Nothing in this section shall be construed to authorise a river board, etc." S. 76 provided that a board should "in addition to any other powers given to it by this Act have and possess the following powers," and then followed a number of specific powers. Their Honours saw no reason why S. 73 (2) should be construed as excluding the powers conferred by S. 76. On the contrary, in view of, firstly, the words "Nothing in this section" contained in S. 73 (2), secondly the difference in language between S. 73 (2) and Ss. 84, 85 and 86, and thirdly the fact that the powers conferred upon a board by S. 76 were expressed to be in addition to any other powers given to a board by the Act, their Honours thought that there was every reason to adopt the view taken by the learned Judge in the Court below.

But, in their Honours' opinion, the defendant was entitled to succeed on another ground which was rejected by Mr. Justice Reed, a ground which had reference to S. 73 only without invoking S. 76 at all. Section 73 (2) provided: "Nothing in this section shall be construed to authorise a river board to exercise jurisdiction in a district within the jurisdiction of any harbour board." The learned Judge said that the word "district" was not defined in either the River Boards Act or the Harbours Act, 1923. It was, however, defined in S. 2 of the River Boards Act, which said: "'River district' or 'district' means a river district established under this Act." Their Honours thought that the word "district" in S. 73 (2) meant a river district. Reed, J., did not take that view, but thought that the word meant "harbour district." But even if their view of the meaning of the word "district" was wrong, their Honours did not think that the word could bear the meaning placed upon it by Reed, J. Assuming that it did apply to a district within the jurisdiction of a harbour board, the question at issue depended not so much upon the meaning of the word "district" as on that of the word "jurisdiction." Within what area or district then could a harbour board be said to have jurisdiction? As Reed, J., said in his judgment, there was no definition in the Harbours Act, 1923, of either "district" or "harbour district." There was, however, in S. 5 a definition of the term "harbours." That definition was as follows: "'Harbour' or 'port' includes any harbour properly so called,

whether natural or artificial, and any haven, estuary, navigable lake or river, dock, pier, jetty, and work in or at which ships do or can obtain shelter, or ship or unship goods or passengers, and any harbour defined under this Act: and when used in any provision relating to the jurisdiction or powers of a harbour board, extends to and includes the limits within which such jurisdiction or power may be exercised." Harbour-works which every harbour board was empowered by S. 166 to make, construct, erect and maintain, were defined (also by S. 5) as follows: "'Harbour-works' includes generally any works for the improvement, protection, management, or utilisation of a harbour; and in particular, but without limiting the general import of the term, includes any basin, graving-dock, slip, dock, pier, quay, jetty, wharf, bridge, viaduct, breakwater, embankment or dam, or any reclamation of land from the sea, navigable lake or river, or any excavation, deepening, dredging, or widening of any channel, basin, or other part of a harbour, whether complete or incomplete, in the sea, or in, on, or near the shore of the sea, or of any creek, bay, or arm thereof, or of any navigable river flowing thereinto, and all buildings thereon, and plant and machinery used in connection with any harbour-works." Under the Harbours Act, 1923, there was, as there was under previous repealed Acts, a provision for defining the limits of a harbour but no provision as to the definition of a harbour district. S. 6 of the 1923 Act provided *inter alia* that for the purposes of the Act the Governor-General might from time to time by warrant under his hand define the limits of any harbour; and S. 7 (1) enacted that no alteration of the limits of any harbour should prejudice or affect any rights or powers at any time exercised in respect of such harbour by any harbour board having jurisdiction in the harbour prior to such alteration. The Wairau Harbour Act, 1907, by S. 3 defined "harbour" as meaning the port and harbour of Wairau, and "harbour district" as meaning the Wairau Harbour District. As had already been said, by S. 9 the Wairau Harbour District comprised the Borough of Blenheim and the Omaka Road District. It was obvious, however, from the Act that the object of the definition of the district was simply to create an electoral district for the purpose of the election of members of the Board. The harbour was defined by Governor's warrant and their Honours assumed for the purposes of the present judgment that none of the works complained of were within the harbour limits as so defined. The word "jurisdiction" as used in S. 73 (2) as applied to either a river board or a harbour board was used in a purely ministerial sense, and could mean no more than power or authority, administration, rule, or control. Indeed the very words "jurisdiction or powers" were used in the interpretation of "harbour" in the Harbours Act, 1923. If then the words in the River Boards Act, "any district within the jurisdiction of any river board," related to a district in which the Harbour Board had jurisdiction, their Honours should interpret the words as meaning merely within any area within the authority, administration, or control of the Harbour Board, so far as the powers of the Board were concerned. That could not mean a district constituted merely to define an area for electoral purposes. Nor did their Honours think that it could mean a district constituted merely for the purpose of defining a rating area. As a matter of fact it would seem that originally the Wairau Harbour District was not a rating area at all but merely an electoral area. Apparently the Board had no rating power prior to the passing of the Wairau Harbour Board Empowering Act, 1922, whereby power was granted, in the event of the Board borrowing the moneys therein referred to, to make and levy a special rate upon all rateable property in the Wairau Harbour District—see also S. 87 of the Reserves and Other Lands Disposal and Empowering Act, 1922. If, as their Honours thought, the "jurisdiction" of the Harbour Board was limited to the exercise of the powers that all harbour boards had in common then the area of that jurisdiction was merely the area comprised within the harbour limits as defined by the Governor-General's warrant. It was true that S. 59 of the Harbours Act, 1923, enacted that a board should not levy any rate or toll within the limits of any harbour or harbour district other than that over which the board had jurisdiction. That section certainly, as was pointed out in the judgment appealed from, distinguished between "harbour" and "harbour district." But, in so far as the harbour district was concerned their Honours thought the word "jurisdiction" applied only to the making of a rate within that district, the word jurisdiction being loosely used in that connection. It was true also that S. 166 provided that a board might within the limits of its jurisdiction and subject to the provisions of the Act do certain things, as pointed out in the judgment appealed from, such as erecting, providing, maintaining, or carrying on freezing-works and cool chambers and erecting buildings on any lands legally vested in the board. Reed, J., thought that such buildings, etc., must be within the territorial limits of the board's jurisdiction and therefore must be construed as meaning within the harbour district and not merely within the limits of the harbour, but in the case of some boards, of which Wellington was an example, there was no "harbour district" at all. S. 134 gave a harbour board power *inter alia*, subject to the provisions of the Act, to acquire by purchase, lease, or otherwise, or by taking under the provisions of the Public Works Act, 1908, any lands, buildings, or easements, or any interest therein, for or in connection with any undertaking which the board was authorised to carry out. The result was that such a board might acquire land not within a harbour district (because in fact there was no harbour district) and yet outside the defined limits of the harbour, for such purposes as the erection of buildings or cool stores, etc., which it might require for the purpose of carrying out its powers and functions under the Act. Their Honours had already emphasised the words "or near" in the statutory definition of "harbour-works."

In their Honours' opinion, therefore, whether the word "district" in S. 73 (2) meant a river district or an area within the jurisdiction of a harbour board in the limited sense in which their Honours thought the word "jurisdiction" must be construed, the result was the same. On that construction there was nothing in S. 73 to prevent a river board from exercising its powers and functions except within the actual limits of the harbour as defined by the Governor-General's warrant. In their Honours' opinion the judgment appealed from was correct provided that it was not construed as meaning that the defendant River Board might carry out works within the actual limits of the Wairau Harbour as defined by the Governor-General's warrant.

HERDMAN and BLAIR, JJ., delivered separate judgments agreeing that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant Board: **Claude H. Mills,** Blenheim.

Solicitor for appellant T. Eckford & Co. Ltd.: **A. C. Nathan,** Blenheim.

Solicitors for respondent Board: **Burden, Churchward & Reid,** Blenheim.

Supreme Court.

Herdman, J. July 21; August 13, 1930.
Hamilton.

LOVELOCK v. BOYLE.

Vendor and Purchaser—Specific Performance—Contract Providing for Taking Over by Purchaser of Existing Mortgages and that Sale Subject to Consent of First Mortgagee—Mortgage Containing Covenant by Mortgagor to Obtain Deed of Covenant from Purchaser Before Transferring Land—Title Searched by Purchaser's Solicitors and Transfer Sent to Vendor's Solicitors for Execution—Purchaser Subsequently Refusing to Sign Deed of Covenant and Refusing to Complete Contract—Search Affecting Purchaser With Notice of All Entries in Register Affecting Land Sold—Purchaser Bound to Sign Deed of Covenant—Consent of First Mortgagee Not Obtained by Vendor at Date of Purchaser's Refusal to Complete—Vendor Not Bound to Obtain Consent Before Date for Completion—Property Law Act, 1908, S. 115.

Action by the plaintiff (the vendor) against the defendants (the purchasers) for specific performance of an agreement for the sale and purchase of a certain farm known as Waverley Islands in the Waikato District. The agreement was dated 21st December, 1929. The price of the land was stated to be £9 per acre. The contract provided that a deposit of £10 was to be paid to the agents for the vendors (receipt of which was acknowledged) and £650 as a further deposit on 23rd December, 1929, and that the purchaser was to take over the existing first mortgage of £7,500, described as a table mortgage to the

Public Trustee, and a second mortgage of £3,500 at 6 per cent. with two years to run. The purchaser agreed to pay the vendot "the balance of equity in cash on delivery." The contracr provided that the date of possession should be 1st February, 1930, to which date all usual apportionments would be made. There appeared in the agreement as a special condition the words "Subject to consent of Public Trustee." The purchaser's solicitor had previously forwarded to the vendor's solicitors £224 5s. 9d. so that the contract might be stamped and, on 17th January, 1930, after search had been made, despatched to the vendor's solicitors in Hamilton a transfer for perusal and execution by the vendor. That transfer was accepted and duly executed. On 27th January, 1930, not anticipating any objection on the part of the purchasers, the vendor's solicitors wrote to the purchaser's solicitor forwarding deeds of covenant to be executed by the purchasers in accordance with the provisions contained in the mortgages. On 30th January the purchasers' solicitor notified the vendor's solicitors that the defendants would not execute the deeds of covenant. Correspondence then passed between the parties' solicitors and on 7th February, 1930, the purchasers' solicitor telegraphed giving notice that the contract was cancelled. An officer of the Public Trust Office gave evidence that the Public Trustee was prepared to give his consent to the sale, and he said that the consent to be given by the Public Trustee was not to be conditional upon the mortgagor's first obtaining a deed of covenant from the proposed purchaser.

West and **Gillies** for plaintiff.

Donnelly and **Brown** for defendants.

HERDMAN, J., said that the defendants refused to complete the purchase on the grounds (1) that the contract was made subject to a condition that the Public Trustee should consent to the sale and that that condition had not been fulfilled, and (2) that under the contract they could not be required to take over mortgages which contained covenants binding the mortgagor to obtain from a purchaser or new owner such a deed of covenant as was described in the following clause comprised in the mortgage: "If the said land shall during the continuance of this security be sold or cease to be the property of the mortgagor, then the mortgagor will forthwith and before the transfer to the purchaser or new owner shall be registered obtain from the purchaser or new owner thereof the execution by such purchaser or new owner of a deed of covenant by such purchaser or new owner, for himself, his executors and administrators, with the mortgagee to observe, perform, and carry out the covenants, conditions, and agreements contained or implied herein and on the part of the mortgagor to be observed and performed (but without releasing the mortgagor from his liability hereunder), and further covenanting that should such purchaser or new owner in turn sell the said land, or cease to be the owner thereof, he will procure from his purchaser or from such new owner the like deed of covenant with the mortgagee in every respect as is provided for by this clause, and so on with each succeeding change of ownership, the said deed of covenant and every succeeding deed of covenant to be prepared by the solicitors for the mortgagee at the costs in all respects of the mortgagor or other the person who shall be primarily liable to procure the deed of covenant in question."

The obligation to obtain the consent of the Public Trustee was a matter quite distinct from the provisions requiring a mortgagor to obtain a deed of covenant from a purchaser. A consent given by the Public Trustee to a sale would not release the mortgagor from his obligation to obtain from the purchaser before transfer and registration a deed of covenant. The two clauses were separate and distinct and dealt with separate and distinct matters. It was admitted that the Public Trustee could not have withheld his consent to this sale and evidence was given which satisfied His Honour that he was willing to consent to the sale to the defendants. He would, of course, for his own protection require the purchasers' covenants before the registration of any transfer but, as His Honour had said, that was another matter. As His Honour read the contract, it meant that before settlement the consent of the Public Trustee should be got by the vendor. The clause in the contract did not provide for a written consent on the part of the Public Trustee but, no doubt, before they paid over the purchase money some evidence of the Public Trustee's acquiescence would have been demanded by the purchasers. Provided it was available on the day of settlement, the vendor would have done all that was required of him under his contract. No date for completion was fixed by the contract, but the vendor seemed to have assumed that the date fixed for giving possession, namely, 1st February, 1930, would be the date for completion. However, on 30th January the purchasers' solicitor wrote stating that his clients refused to execute the deeds of covenant which under the mortgages covering the property were required by the mortgagees when property changed hands and so a deadlock was reached. The vendor had been prepared and was still prepared to sell, and the Public Trustee was prepared to consent. The conclusion that His Honour had come to was that the vendor was not bound to produce any consent until the time for completion arrived: **Clark v. Seymour,** 13 G.L.R. 28, and **Smith v. Butler,** (1900) 1 Q.B. 694. The purchasers themselves had prevented completion on 1st February, on which date, His Honour had no doubt, the necessary consent would have been forthcoming. Indeed, it was admitted, as already pointed out, that the Public Trustee's consent could not have been withheld. In such a case it seemed to His Honour that it was for the defendants to prove that the consent of the Public Trustee had been refused and that had not been done. On the contrary the inference to be drawn from the facts proved was that he was willing to consent. In any event the vendor's duty under the contract was to produce a consent on the day of completion—**Brickles v. Snell,** (1916) 2 A.C. 599—and that date had not arrived because of the default of the purchasers.

The more serious matter was the second objection which was urged by the purchasers. Under the contract to take over mortgages containing such a clause as clause 12, were they bound by such a clause, and were they bound to execute the deed of covenant which was tendered to them for signature? Such a clause was usual in mortgages in the Waikato district and it was well known to conveyancers who practised in that part of New Zealand. If a purchaser complied with it, it accomplished something more than did S. 88 of the Land Transfer Act, 1915. In the present case the contract expressly provided that the purchasers should take over existing mortgages, one a table mortgage in favour of the Public Trustee securing the repayment of £7,500, the other a mortgage securing the repayment of the sum of £3,500. A search had been made of the title to the property in December. The solicitor for the defendants admitted that, but declared that the search note did not disclose that the mortgages contained covenants for successive transferees of the property to execute deeds of covenant to the mortgagees. Although the search notes might not have contained that information there was no evidence that the searcher was not aware of the covenants. If he did not discover them then the search must have been perfunctory and he had only himself to blame if the clauses were overlooked. On the strength of the search, and with the knowledge of the existence of the mortgages, the purchasers' solicitor prepared a transfer and sent it forward for execution. The rule appeared to be that there was no obligation on a purchaser to make a search. But if he did make a search in person or by agent he would be affected with notice of all entries in the register which affected the land sold although he might fail to discover them: See **Williams Vendor and Purchaser,** 3rd Edn. 569. But whether the purchasers' solicitor did or did not know the nature of the covenants which were contained in the mortgages, and apart from S. 88 of the Land Transfer Act, 1915, a Court of Equity would compel a purchaser of an equity of redemption to indemnify the vendor against the mortage debt and he might be required by covenant to do so. See **Bridgmen v. Daw,** 40 W.R. 253, **Poole and Clarke's Contract,** (1904) 2 Ch. 173, and **William's Vendor and Purchaser,** 3rd Edn., 642. Moreover, notice of a deed was notice of its contents and the onus was on the defendants to prove that they did not have actual knowledge of the contents of the two mortgages. The existence of the covenants contained in the mortgages to which exception was taken would have come to the knowledge of their solicitor as such if, quoting from S. 115 of the Property Law Act, 1908, "such inquiries and inspections had been made as ought reasonably to have been made by the solicitor." From December until the end of January the purchasers allowed the transaction to proceed as if there was nothing to take exception to. They sent the money for stamp duty and they sent forward the transfer for execution. That did not necessarily operate as an acceptance of the title but it was a circumstance from which the inference might be drawn that outstanding objections or requisitions had been waived and the title accepted. The defendants in the present case agreed to purchase an equity of redemption, they contracted to take the property subject to the existing mortgages and, having given careful consideration to all the facts and circumstances, His Honour had been unable to discover anything which entitled them to be released from their bargain.

Judgment for plaintiff.

Solicitors for plaintiff: **Gillies and Tanner,** Hamilton.

Solicitor for defendants: **W. J. Stacey,** Christchurch.

Myers, C.J.
Reed, J.
Blair, J.

July 18; August 8, 1930.
Wellington.

NORTHCOTE BOROUGH v. BUCHANAN.

Rating—Exemption of Half-year's Rates "In Respect of any Dwellinghouse or other Building" Vacant and Unoccupied—Exemption Applicable Where System of Rating on Unimproved Value in Force as well as where System of Rating on Annual or Capital Value in Force—Rating Act, 1925, S. 69.

Originating summons under the Declaratory Judgments Act, 1908, raising the question whether S. 69 of the Rating Act, 1925, applied in a district where the system of rating on the unimproved value was in force.

O'Shea for plaintiff.
Mahony for defendant.

MYERS, C.J., delivering the judgment of the Court, said that S. 69 of the Rating Act, 1925, provided as follows: "In every case where (a) any dwellinghouse or other building remains actually vacant and unoccupied for a period of not less than six months in any rating-year whether continuously or not; and (b) the person rated in respect thereof gives to the local authority, within fourteen days after the expiration of such period, notice in writing of the dates on which such house or building became vacant and unoccupied, and on which it again became occupied, then such person shall be liable to pay only half the amount which would otherwise be payable for the year's rates in respect of such dwellinghouse or other building, and shall be entitled to a refund of whatever sum he may have paid in excess of such half." Mr. O'Shea on behalf of the plaintiff contended that the section applied only where there was in force a system of rating on either the annual value or the capital value, and that only in such cases could rates be said to be payable "in respect of a dwellinghouse or other building." The fact was, however, that the words quoted were in any case a misuse of language, because even under the system of rating on annual value or that of rating on the capital value rates could not in truth be said to be payable "in respect of a dwellinghouse or building." The most that could be said was that the rates were payable in respect of the whole property; or, as Williams, J., said in **Dunedin City Corporation v. Baird,** 33 N.Z.L.R. 149, 152: "The property rateable is the land and the buildings thereon." No doubt rates were made and levied upon the rateable value of all rateable property, but they were made in respect of "the rateable property" upon the basis of the "rateable value" according to the statutory definition of that term. The original section which now existed as S. 69 of the Rating Act, 1925, first appeared in the Rating Amendment Act, 1895, as S. 5. At that time the principal Act in force was the Rating Act, 1894, and at that time the system of rating on the unimproved value did not exist. That system was first introduced by the Rating on Unimproved Value Act, 1896, which, like the amendment of 1895, was to be read and construed with the principal Act of 1894. Even in 1895 it could not be said that a dwellinghouse or other building was rateable property because then, as at present, the statutory definition of rateable property was, subject to certain exceptions which were not material to the consideration of the present case, "all lands tenements or hereditaments with the buildings and improvements thereon." It was the land then with the buildings thereon that formed the rateable property, and not merely the buildings. When the Rating on Unimproved Value Act, 1896, was passed and had to be read and construed together with the principal Act of 1894 and the intermediate Amendment Act of 1895, their Honours could see no reason for not construing S. 5 of the Act of 1895 as applying to any case where its requisite conditions existed, no matter what the system or basis of rating might be. In 1908, when the Statutes were consolidated, the consolidated Rating Act made provision for all the various systems or bases of rating, and reproduced, as S. 64, the repealed S. 5 of the Act of 1895. Various Rating Amendment Acts were passed between 1908 and 1924, but S. 64 of the Act of 1908 was not affected by those Amendments, and that section was reproduced as S. 69 of the Rating Act, 1925, which again repealed and re-enacted in consolidated form all the Acts relating to rating. Their Honours could see no reason whatever for limiting the construction of S. 69 in the manner contended for by Mr. O'Shea. Reading the words "such dwellinghouse or other building," as their Honours thought they must be read, as meaning the land and the dwellinghouse, or what was the same thing, the dwellinghouse or building and the land within its curtilage, the basis or system upon which the property was rated seemed to them to be quite immaterial. The point was, their Honours thought, that the words "in respect of such dwellinghouse or other building," whatever they might mean, applied to the same subject-matter whatever the basis or system of the rating might be. When once that point was appreciated the supposed difficulty ceased, and it followed that S. 69 did apply to a district where the system of rating was on the unimproved value, as well as to a district where the system in force was that of rating on either the annual value or the capital value.

Solicitor for plaintiff: **J. O'Shea,** Wellington.
Solicitors for defendant: **Mahony, Dignan and Foster,** Auckland.

Blair, J.

June 10; August 16, 1930.
New Plymouth.

ARTHUR v. WANGANUI FRESH FOOD CO. LTD.

Contract—Implication of Term—Agreement to Purchase Buttermilk Output of Butter Factory for Term of Five Years—Purchaser Paying by Quarterly Instalments Fixed Annual Sum Irrespective of Quantity of Buttermilk Supplied—Factory Closed Down Owing to Loss of Trade—Term Obliging Vendor to Continue Supply of Buttermilk for Term of Contract Not Implied.

Case stated. The plaintiffs were husband and wife, and in 1927 they farmed an area of about ten acres, the husband also following his trade as a furnisher. On 18th August, 1927, the male plaintiff entered into a contract with the defendant company for the purchase of its buttermilk output for two years. On 15th May, 1928, a new contract was entered into, the material terms of which were as follows: "1. That the purchaser (N. A. Arthur) will undertake to remove the whole of the buttermilk output from the above Company's Factory, situated corner Eliot and Lemon Streets, New Plymouth, and to have the receiving tank emptied not later than 2.30 p.m. on each day, (unless in case of accidents affecting either party). 2. That due care will be taken to avoid spilling buttermilk about the factory building and yard. Also to keep the vessels used for carrying the buttermilk, in a sanitary condition. 3. That I, the undersigned, agree to pay the sum of £25 per year, for the complete payment on above contract and that I agree to take same for five or more years, as from this day, 16th May, 1928, the payments to be made quarterly, and in advance on the 20th August, November, February and May of each year respectively. 4. And further that I shall have the right to extend this Contract for a further period at the end of the five years." In August, 1929, the plaintiffs leased a further 100 acres of land and erected piggeries thereon for the purpose of disposing of the buttermilk purchased from the company. On or about 2nd September, 1929, the company by reason of loss of trade closed down its factory at New Plymouth. This loss of trade was due to the opening of a co-operative factory in the vicinity of the company's factory, as the result of which a large proportion of the farmers supplying the company with milk sent their outputs to the co-operative factory. It appeared from the evidence given in the case that there were 124 suppliers in 1927, and only 54 when the company closed down. Prior to the execution of the contract no mention was made by either party of the possibility of the company ceasing operations at the New Plymouth factory. It was admitted that the company knew that the contract was entered into for procuring food for pigs in connection with plaintiff's partnership in the pig-farming business. The company was still carrying on business at its Wanganui and Hawera branches, and as far as was possible it diverted its New Plymouth suppliers to its Hawera branch. The case stated raised the question of law whether on the above facts the discontinuance of the company to supply butter-milk to the plaintiffs was a breach of contract entitling plaintiffs to damages.

Moss for plaintiff.
Bennett for defendants.

BLAIR, J., said that the defendant company denied that it was bound to provide or supply buttermilk for any particular time or in any particular quantity. The plaintiffs, while admitting they had to take the risk of variation in supply and were bound to take all there was, howsoever small, said that the defendants could not without breach of contract close down their factory. The contract on the plaintiff's part was to remove daily the whole of the buttermilk output from the com-

pany's New Plymouth factory. The plaintiffs agreed to pay £25 a year payable quarterly in advance on certain fixed quarter days. The contract had a currency of 5 years from 16th May, 1928, with right in plaintiffs of renewal for "a further period" at the end of the five years. His Honour was not concerned to attempt to define the words "a further period." There were no express words in the contract binding the company to continue its business at New Plymouth for five years. The plaintiffs in effect said that an agreement to continue the company's operations for the whole contract period must be implied in the contract. His Honour referred to **Salmond and Winfield on Contracts,** at pp. 48, 51, and **Hamlyn v. Wood,** (1891) 2 Q.B. 488, and said that there had been numerous cases where the Courts had made implications and there had been equally numerous cases where the Court had refused to do so. Few of those cases were helpful in the present case because the circumstances were entirely different, and it was not only the contract itself but the circumstances that must be looked at in order to see whether the Court was "necessarily driven to the conclusion" that an implication must be made.

The contract concerned a by-product of a dairy factory. The right and responsibility of removing daily that by-product was given to and imposed upon the plaintiffs for a fixed term. There was no undertaking by the company that such by-product would be of any fixed minimum quantity, and admittedly the plaintiffs, when the factory was running, took the risk as to whether the quantity of that by-product would be great or small. That right and responsibility was secured to and imposed upon the plaintiffs for the payment of a small fixed sum—£25—per annum, and that amount had no reference to the amount of by-product produced. If the factory were kept open with only a small output the quantity of by-product available to the plaintiffs might be so small as not to be worth the cost of removing. Moreover, if the company instead of making butter changed over to cheese manufacturing there would not be any buttermilk to remove. The implication sought to be read into that contract was an agreement or covenant on the part of the company to keep its factory going manufacturing butter for the full period during which the plaintiffs had the right to remove the by-product. The question of a failure of sufficient supplies from farmers to enable the factory to be profitably conducted or the possibility of the company's being compelled to change its output from butter to, say, cheese, or some other dairy product which utilised the whole milk was not mentioned at the time the contract with the plaintiff was made. One had to place oneself in the position of the parties when they were making their contract and assume that the question was contemplated by the parties and discussed. Was one in such case driven to the conclusion that if that question had been raised the company would for the sake of the amount it was receiving from the plaintiffs have agreed that it would covenant in any and all events to continue to manufacture butter and not cheese or other whole milk products for the whole period of the plaintiffs' by-product contract? When the test imposed by Kay, L.J., in **Hamlyn v. Wood** (*cit. sup.*) was applied, could it possibly be said that one was necessarily driven to the conclusion that the company would have entered into such a covenant? It was of course possible that, if the parties had contemplated the case which had arisen, some term would have been inserted to meet such a case or similar cases, but it was going much too far to say that the parties would have inserted the term sought to be implied. The point was stressed for the plaintiffs that the contract provided for a renewal after the fixed period, and that was relied upon as implying a covenant that there would for at least the contract period be some by-product to remove. Another point relied upon by the plaintiff was that payments by the plaintiff had to be made quarterly in advance and that the contract was for future goods and there would be a failure of consideration if the factory shut down while some portion of a quarter paid for had still to run. When Kay, L.J.'s test was applied to each of those contentions the answer was that already given. At most the implication against the company in the last-mentioned case would be that the company must return the proportionate part of the fee paid for the unexpired period. Although, as His Honour had said, the cases upon that point were not helpful because of entirely different circumstances, His Honour referred to **Krell v. Henry,** (1903) 2 K.B. 740, and **Hamlyn v. Wood,** 65 L.T. 286. His Honour quoted certain passages from the judgments of Lord Esher at p. 291, and Lord Justice Kay at p. 291, in the latter case, adding that, shortly put, the extracts quoted meant that if the plaintiffs in that case had paid in advance for the output of the brewery for ten years there would be read into the contract an implication that plaintiffs must get what they had already paid for. It was because the terms of payment in the present case stipulated for a yearly fixed sum irrespective of the quantum of output and prescribed also for quarterly payments in advance that it was sought to bring the case within the supposititious one taken by the learned Judges in **Hamlyn v. Wood.** If one reverted to the principle enunciated time and again in the cases, the greatest implication that could be got out of quarterly payments in advance was that there must be implied a continuity of the contract for such period as the plaintiffs had paid for. In all those cases where an implication was sought to be incorporated in the contract the Court always had the benefit of being aware of the event which had happened, the knowledge of which event was by a fiction of the law sought to be imputed to both parties at the time of the making of the contract. It was a trite saying that it was easy to be wise after the event, but one must be careful not to assume all the wisdom in one party and none in the other. Unless one was forced to the conclusion that the parties, if discussing what was to happen in the event which later did happen, must necessarily have provided for that event in the manner asked to be implied, then one could not read in the proposed implication. His Honour could not read into the present contract that the defendants agreed that in the event of the sale of its business or the enforced closing of its branch by trade competition or any other like event, it would agree to produce a by-product for the plaintiffs to take away. His Honour must impute to the defendant at least that measure of wisdom that, had the question been raised, sensible business safeguards would have been insisted upon. It was quite impossible to say what terms would then have been arranged by the parties. Cases where there was a principal subject-matter in the power of one of the parties, and an accessory or subordinate benefit arising by contract out of its existence to the other party, were, when the question of making implications arose, in a distinct category. That was made clear by Scrutton, J., in **Lazarus v. Cairn Line,** 106 L.T. 378. In cases in that class—which might for convenience be designated by-product cases—that learned judge said that the Court would not, in the absence of express words, imply a term that the subject-matter should be kept in existence merely in order to provide the subordinate or accessory benefit to the other party.

His Honour must hold that he could not read into the present contract the implication sought by the plaintiffs and it followed, therefore, that the discontinuance of the supply of buttermilk by the defendants under the circumstances disclosed in the case stated was not a breach of contract entitling the plaintiff to damages.

Solicitors for plaintiffs: **Moss and Spence,** New Plymouth.
Solicitors for defendant: **Nicholson, Bennett and Kirkby,** New Plymouth.

Smith, J. April 8; August 6, 1930.
Palmerston North.

BLACK v. MacFARLANE.

Husband and Wife—Tort—Liability of Husband for Torts of Wife—Husband Not Liable for Tort of Wife Arising Exclusively From Ownership of Chattel by Wife Independently of Husband—Married Women's Property Act, 1908, S. 5.

Motion for judgment against wife in respect of her separate estate and against both husband and wife jointly; and, alternatively, for an amendment of the pleadings to enable judgment to be entered as claimed. Both in the writ of summons and in the statement of claim, the plaintiff described the defendants as "Elizabeth MacFarlane of Levin, wife of John MacFarlane of Levin, boarding-house keeper (sued in respect of her separate estate) and the said John MacFarlane." The general ground of negligence alleged by the plaintiff was that "the defendant Elizabeth MacFarlane by her agent or servant so negligently drove her motor car wherein the defendants were driving" that it caused the collision and did the damage alleged. The plaintiff claimed general and special damages "against the defendant Elizabeth MacFarlane (in respect of her separate estate) and against the defendant John MacFarlane," and also added a prayer for general relief. Both defendants by their solicitor filed one statement of defence denying the plaintiff's allegations save for the fact of the collision. At the trial, the hearing appeared to proceed upon the basis that both husband and wife were liable to judgment in the form claimed. In

a reserved judgment (1929), 5 N.Z.L.J. 308; G.L.R. 524, Smith, J. found that the plaintiff had established negligence on the part of Elizabeth MacFarlane's driver, and that the plaintiff was not debarred by contributory negligence from claiming against her. His Honour reserved leave to the plaintiff to show cause why judgment should be entered against the husband as well as the wife.

Cooke for plaintiff.

Baldwin for defendants.

SMITH, J., said that it was submitted by counsel for the husband, that even if the pleadings raised a claim against both husband and wife jointly at common law (which he denied), or could be amended to raise such a claim (which he also denied), no judgment could be entered against husband and wife jointly at common law in respect of the negligence alleged in the present action, upon the ground that the liability of the wife arose *ex contractu* in that she was liable for the negligence of her own servant or agent, but that at common law, since she could not contract as a principal, she could not engage or appoint a servant or agent on her own account. There was, His Honour thought, much to be said for that submission, but as the service of the agent in the present case appeared to have been gratuitous, His Honour preferred to deal with the matter from a different point of view.

The legal liability of the defendant Elizabeth MacFarlane for her son's negligence, when established, had not been disputed before His Honour, and it could not be doubted that it was on the principle of **Samson v. Aitchison,** (1912) A.C. 844, that she was liable. That case was authority for the proposition that where the owner of a vehicle being herself in possession and occupation of it, requested or allowed another person to drive, the owner's right and duty of control was not thereby excluded; and in the absence of further proof that the owner had abandoned the right of control by contract or otherwise, the owner was liable as principal for the negligence of the person driving. In the present case, the wife was the sole and absolute owner of the car, she was herself riding in it, and clearly in possession and control of it. Her liability depended essentially upon her sole ownership of the car and the power of control resulting therefrom. The question arose whether such liability could exist at common law.

Stated generally, the common law rule was that a husband was liable to be sued with the wife for a tort committed by her during coverture: **Edwards v. Porter,** (1925) A.C. 1. That remedy was different from the remedy against a married woman for her torts under the Married Women's Property Act, 1908. In respect of the liability of a married woman arising under S. 5 of that Act, the claim was made only against the married woman. The position was clearly stated by Lord Sumner in **Edwards v. Porter** (*cit. sup.*) at p. 37. Further differences between the common law remedy and the remedy under the Act might be noted. As husband and wife could only be sued jointly during coverture, the common law action was subject to certain limitations, such as that the husband went free if the wife died or the marriage was dissolved before judgment. Again, as husband and wife must be sued jointly, there could be only one defence, and one judgment: **Beaumont v. Kaye,** (1904) 1 K.B. 292. Execution was not limited, upon such a judgment, to the wife's separate estate. In England, before the Debtor's Act, 1869, she could be taken upon a ca. sa., though if she had no separate estate the Court might exercise its discretion to discharge her: **Edwards v. Martyn,** 17 Q.B. 693. At the present time, in New Zealand, the law appeared to be that under a judgment against husband and wife jointly at common law for the wife's tort committed during coverture, she was subject to an application to commit her to prison for default in payment of the judgment, subject to the provisions of the Imprisonment for Debt Limitation Act, 1908. It might be noted that the decision in **Scott v. Morley,** 20 Q.B.D. 120, was expressly limited to judgments recovered against a married woman under S. 1 (2) of the Married Women's Property Act, 1882 (England)—see per Lord Esher at p. 125, Bowen, L.J., and Fry, L.J., at p. 130. It might be noted also that the remarks of Viscount Cave in his dissenting judgment in **Edwards v. Porter** (*cit. sup.*) at p. 12, applied only to an action against a married woman alone under S. 1 (2) of the Married Women's Property Act, 1882 (England).

The right to proceed against husband and wife jointly at common law was limited to what had been called "naked torts." Examples of those were: trespass, assault, assault and false imprisonment, libel, and the tortious conversion of another's property: see **Lush on Husband and Wife,** 3rd Edn. 328, and cases there cited. The reason for that limitation was that, as a married woman could not during coverture make a contract at common law, the Courts would not allow a transaction intended to issue in a contractual obligation on the part of the wife to be enforced against the husband (jointly with the wife) under the guise of an action for deceit: see **Liverpool Adelphi Loan Association v. Fairhurst,** 9 Ex. 422; **Wright v. Leonard,** 11 C.B. (N.S.) 258; **Edwards v. Porter** (*cit. sup.*); and contrast **Earle v. Kingscote,** (1900) 2 Ch. 585. That limitation of the right against both husband and wife jointly to torts which were "naked torts" indicated the further inquiry whether the husband's liability to be sued jointly with his wife for her torts committed during coverture was limited not only by the incapacity at common law of a *feme covert* to contract but also by her incapacity at common law to acquire or hold property independently of her husband.

By virtue of S. 5 of the Married Women's Property Act, 1908, a married woman might during coverture, and without the intervention of any person as trustee, become the sole owner of an absolute or limited interest in a chattel, such as a motor car. If she was the sole and absolute owner, as in the present case, she might become liable as a principal for the negligence of her own agent, the driver of her car. The husband, *qua* husband, had no right of property or possession in the car, and no responsibility for the driver of it. At common law, however, as the wife's existence became merged, in the eye of the law, in that of her husband, it became well established that she could not possess property apart from her husband. There were some special rules regarding choses in action, chattels real, and paraphernalia, which it was not necessary to discuss. During coverture, a married woman could neither own nor possess chattels independently of her husband: see **Pollock and Maitland's History of English Law,** Vol. 2, p. 427, and **Salmond and Winfield on Contracts,** 471. The inability to contract seemed to depend upon the inability to own property independently of the husband. In His Honour's opinion, such inability to own property must, on principle, have a like effect to the inability to contract, in determining the extent of a married woman's liability in tort at common law during coverture. If her liability depended exclusively upon the sole ownership of a chattel, she could not, His Honour thought, be liable at common law. The case of **Keyworth v. Hill,** 3 B. & Ald. 685 (decided in 1820), supported that view. There was in that case a declaration in trover against husband and wife stating that the defendants had converted a bond and two promissory notes to their own use. It was held that that was sufficient after verdict but only upon the ground, as stated by the four Judges who heard the case, that the allegation of conversion did not, *ex vi termini*, imply an acquisition of property by the defendant wife, but a deprivation of property to the plaintiff, e.g., by the destruction thereof, or by some other kind of conversion, not involving the acquisition of property by the wife, of which the wife might be guilty. His Honour was of opinion, therefore, that if it appeared that a married woman's liability for a tort committed during coverture depended exclusively upon the legal consequences flowing from the married woman's sole ownership of a chattel independently of her husband, such a liability did not exist at common law.

In the present case, the wife's liability arose out of her sole ownership of the car, and the power of control resulting therefrom, in which ownership and control the husband had neither lot nor part. It followed, therefore, that the wife was not liable at common law for the tort alleged against her. It followed also that her husband could not be made liable, since at common law, he was joined with her only for conformity.

His Honour did not find it necessary to discuss the other questions raised as to the form of the action, although His Honour might say that he thought that the only proper form of pleading was that set out in **Salmond on Torts,** 7th Edn., p. 90. The result of the view expressed in the present judgment was that an innocent husband was liable to be sued at common law jointly with his wife for the actual personal negligence of his wife while driving a vehicle, whether her own or another's; but he was not liable to be so sued for the actual personal negligence of a third party when the wife's liability for the negligence of that party arose only out of her sole ownership of a chattel, and the power of control resulting therefrom. That did not seem to His Honour to be an unreasonable or an unjust conclusion.

Judgment entered only against the defendant Elizabeth MacFarlane in respect of her separate estate, for £471 7s. 6d. with costs. Defendant John MacFarlane dismissed from action without costs.

Solicitor for plaintiff: **Frank H. Cooke,** Palmerston North.
Solicitors for defendants: **Park and Adams,** Levin.

Compensation under the Public Works Act, 1928.

By A. C. Stephens, LL.M.

History of Legislation.

The first New Zealand Statute dealing with the subjectmatter of this article was the Lands Clauses Consolidation Act, 1863. This statute was "an Act to prescribe the mode in which land shall be taken for works and undertakings of a public nature," but a great part of it was devoted to prescribing the mode in which compensation was to be obtained, not only for land taken, but also for damage sustained by severance or other injurious affection (Sec. 35). Further provisions in regard to compensation were contained in the Immigration and Public Works Act, 1870, and the Immigration and Public Works Act Amendment Act, 1871, which were passed to facilitate the execution of the great public works scheme of Sir Julius Vogel. In 1876 all the Acts and Ordinances of the Provinces and the Acts of the General Assembly upon this subject were consolidated in the Public Works Act, 1876, and the provisions of this statute have been substantially repeated with additions from time to time in the Public Works Acts of 1882, 1894, 1905, 1908 and 1928.

This article is designed to supply a digest of the cases in regard to compensation claims under the foregoing legislation. For the sake of completeness references to the statutory provisions have also been incorporated where it was thought desirable, but, for the sake of brevity, references thereto have been condensed as far as possible, and no mention has been made of sections which deal with matters of technical detail or which are relatively unimportant. It will be necessary, therefore, for anyone who should make use of this article to read it in conjunction with the Act.

Introductory.

The English decisions are of use in many cases, but they should not be relied on without an examination of the statutory provisions under which they are decided. Compare *Russell v. Minister of Lands*, 17 N.Z.L.R. 241, 250, 1 G.L.R. 15, 16; *Fitzgerald v. Kelburne Tramway Co. Ltd.*, 4 G.L.R. 42, 45; and *Walker v. Wellington and Manawatu Railway Co.*, 5 N.Z.L.R. S.C. 193.

The provisions of the Act in regard to compensation are frequently incorporated in other Acts, but sometimes there are variations in the latter Acts. See, for example, *Handley v. Minister of Public Works*, 16 G.L.R. 683; *Sullivan v. Mayor of Masterton*, 28 N.Z.L.R. 921, 12 G.L.R. 136.

Ground for Application for Compensation.

Every person—(1.) having any estate or interest in any lands: (a) taken under the Act for any public works; (b) or injuriously affected thereby, (2.) or suffering any damage from the exercise of the powers given by the Act, is entitled to full compensation for the same from the Minister or local authority by whose authority such works may be executed or power authorised: Sec. 42.

The legislature has given to a claimant for compensation the right to recover all damages which he suffers from the exercise of the powers contained in the statute. It has been stated that this damage may arise in any one of the following ways:—

1. By actual taking of land.
2. By severance.
3. By injury where no land taken.
4. By injury arising from the construction of the work.
5. By injury arising from the user of the work.

See *Fitzgerald v. Kelburne Tramway Co. Ltd.*, 4 G.L.R. 42, 45.

It is questionable, however, whether this analysis is helpful. It seems better to adopt a classification based on the words of the Act into claims for taking of land, claims for injurious affection (of whatever kind), and claims for damages. See *O Brien v. Minister of Public Works*, 12 G.L.R. 744, 750, 752, 29 N.Z.L.R. 1053.

Injurious Affection.

Injurious affection may arise from severance or from the nature of the works: Sec. 79. The term "severance" means "partition," "separation," "division" in accordance with its ordinary etymological significance: *Handley v. Minister of Public Works*, 16 G.L.R. 683, 686. See also *Kellick v. Minister of Public Works*, (1927) G.L.R. 406. For a case in which a claim for severance was allowed, see *N.Z. and Australian Land Co. v. Minister of Lands*, 13 N.Z.L.R. 714.

When a claim for compensation for injurious affection arises from the nature of the work, the compensation is to be assessed on the basis of the work as a going concern. The Court must take into account the effects upon the claimant's land arising not only from the construction of the work, but also from its user: *Fitzgerald v. Kelburne Tramway Co. Ltd.*, 4 G.L.R. 42, 46.

Damage.

The term "damage" means mere temporary damage arising from the exercise of some power under the Act: *O'Brien v. Minister of Public Works* (*supra*). Temporary disturbance arising from the execution of works would be included under temporary damage: See *Jenkins v. Mayor of Wellington*, 15 N.Z.L.R. 118, 128. For other cases where temporary damage was considered, see *Fitzgerald v. Kelburne Tramway Co. Ltd.* (*supra*), and *Pike v. Mayor of Wellington*, 30 N.Z.L.R. 179, 195, 13 G.L.R. 221.

The position in regard to a claim for compensation for damage resulting from something in the nature of personal injury or loss is a little confusing. In *Fitzgerald v Kelburne Tramway Co. Ltd.* (*supra*) it was held that the claimant was not entitled to compensation for temporary personal discomfort caused by the execution of the works, and it is clear that compensation cannot be allowed for purely sentimental loss, e.g., personal attachment to a particular spot: *Russell v. Minister of Lands*, 17 N.Z.L.R. 241, 253, 1 G.L.R. 15. It has also been laid down that the damage or injury which is to be the subject of compensation must not be of a personal character, but must be a damage or injury to the "land" of the claimant considered independently of any particular trade that the claimant may have carried on upon it: *Hone Te Anga v. Kawa Drainage Board*, 33 N.Z.L.R. 1139, 1149, 16 G.L.R. 696. See also *Martin v. Westport Harbour Board*, 14 N.Z.L.R. 521, 531. On the other hand, in *Russell v. Minister of Lands* (*supra*), the Court held that compensation for the taking of land should include allowances for the expense and loss from delay likely to occur in obtaining an investment or another property and for loss likely to result from a forced sale of stock. See also *Plimmer*

v. Wellington Harbour Board, 7 N.Z.L.R. 264. The explanation of the apparent conflict appears to be that the judgment in *Hone Te Anga v. Kawa Drainage Board* (*supra*) refers only to a claim for injurious affection or damage. When the claim is for the taking of land, different principles apply: *Russell v. Minister of Lands* (*supra*) at p. 251. The claimant in such case is entitled to recover in respect of all injury which is not purely personal. The distinction seems to be based on a strict reading of Section 42 of the Act.

In *Handley v. Minister of Public Works* (*supra*) it was held that the claimant would be entitled to recover for personal injury arising from injurious affection, but only because of the terms of the special Act under which the claim was made.

It is to be noted that proof of actual physical damage to the claimant's land is not a condition precedent to his right to recover compensation: *Fitzgerald v. Kelburne Tramway Co. Ltd.* (*supra*).

Dedication of Land.

A further ground for claiming compensation arises when land is dedicated for the widening of an existing road or street: Sec. 128 (5). Where the dedication is made in connection with a subdivision for the purpose of sale there can be no claim for injurious affection: *Allan v. Halswell County Council*, (1928) G.L.R. 404.

ASSESSMENT OF COMPENSATION.

General.

In determining the amount of compensation the Court is required to take into account severally:

1. The value of the land or interests in land taken (including riparian rights).
2. The extent to which any lands in which the claimant has an interest are or are likely to be injuriously affected by severance or by the nature of the works.
3. Any increase in the value of such lands likely to be caused by the execution of the works. Section 79.

The Act provides for "full compensation": Sec. 42. The Court takes into account all the circumstances to see what sum of money will place the claimant in a position as nearly similar as possible to that which he was in before: *Russell v. Minister of Lands*, 17 N.Z.L.R. 241, 253, 780, 782, 1 G.L.R. 15, 195.

For an indication of the variety of circumstances which will affect the amount of compensation, see *Fitzgerald v. Kelburne Tramway Co. Ltd.*, 4 G.L.R. 42. The following matters were held by the Full Court to be *relevant:*

1. The raising of an embankment of spoil on neighbouring property.
2. The blocking by such embankment of the natural drainage from the claimant's land and the concentration of surface water thereon.
3. The probable affection of the piles of the claimant's building by dampness and the destruction of vegetation on the claimant's land owing to dampness and loss of sunlight.
4. The shaking of the foundations of the claimant's house owing to blasting operations.
5. The loss of privacy.
6. The subsidence of part of the claimant's land and the sinking of part of the floor of his house.
7. The noise and vibration arising from the operation of the work.

The following matters were treated by the Court as *irrelevant:*

1. The loss by the claimant of the advantage which he formerly derived from the fact that the section adjoining his property was covered with trees and other vegetation and was not built upon and could not be built upon without infringing city by-laws.
2. Temporary personal discomfort caused to the claimant or his family.
3. The object for which the land is taken and the expense to which the respondent will be put are also irrelevant: *N.Z. and Australian Land Company v. Minister of Lands*, 13 N.Z.L.R. 714.

No compensation will be awarded for sentimental losses, such as personal attachment to a particular spot, or for money expended on land which would bring no return, such as money spent in boring for coal which had been proved not to exist: *Russell v. Minister of Lands* (*supra*).

Where a claim is made for the taking of land or for injurious affection, the value of the land is to be assessed as at the time when the land was first entered upon for the purpose of carrying out the work: Sec. 80. A previous entry for another purpose does not fix the date for the assessment: *Mayor of New Plymouth v. Minister of Public Works*, 33 N.Z.L.R. 1541, 16 G.L.R. 598. If there has been no entry before the proclamation, then the date of the proclamation is treated as the time when the land was first entered upon: *Ibid.*

As to the consequence of the claimant's doing some act in regard to the land with the purpose and effect of making the execution of the work more difficult and costly, see Sec. 81.

It is to be noted that compensation for injurious affection or damage is not necessarily assessed on the basis of the circumstances as existing at the time the claim is made. Under Sec. 79 the Court is to take into account the extent to which the lands "are or are *likely to be*" injuriously affected by severance or by the nature of the works. The Court may, therefore, be placed in a difficult position where prospective or speculative damage has to be assessed: see *Kyle v. Hutt River Board*, 5 G.L.R. 437. When a claim is made, however, compensation must be assessed once and for all whether or not there is any element of future damage. See *White v. Minister of Railways*, 16 N.Z.L.R. 71, 74; *King v. Shand*, 23 N.Z.L.R. 297, 305; *Hawera County Electric Company v. Mayor of Eltham*, 27 N.Z.L.R. 1002, 1019; *Fortescue v. Te Awamutu Borough*, (1920) N.Z.L.R. 281, 300. Contrast *Wood and Olsen v. Taranaki Electric Power Board*, (1927) N.Z.L.R. 392, (1927) G.L.R. 235.

Taking of Land.

Compensation for the taking of land should be proportionate to the loss which the claimant has sustained: *Russell v. Minister of Lands* (*supra*).

(a.) The market value is not necessarily the test, as the property may be worth more or less to the claimant than the market value. In some cases, taking land and paying only the market value would amount to taking it without compensation: *Russell v. Minister of Lands* (*supra*).

It was suggested by Williams, J., in an earlier case, that the fair selling value of the land taken was the measure of the loss of the claimant: *N.Z. and Australian Land Company v. Minister of Lands* (*supra*). See also *Martin v. Westport Harbour Board*, 14 N.Z.L.R. 521, 531.

(b.) The gain or loss of the respondent is not the measure of compensation: *N.Z. and Australian Land Company v. Minister of Lands* (*supra*).

(c.) In addition to the loss suffered by the claimant from the actual taking of land, he is entitled to compensation for loss arising in business in consequence of the taking of the land or resulting from the necessary delay in finding another suitable property or another investment: *Russell v. Minister of Lands* (*supra*).

(d.) There is no rule that 10 per cent. of the value of the land should be added on the ground that the land is taken compulsorily, but the Court should, in view of the circumstances, deal liberally with the claimant, even to the extent, in proper cases, of 10 per cent. of the amount which a vendor who is anxious to sell might be willing to accept. If the Court makes an addition to the value of the land in this way, it should not allow any further sum to cover such items as dislocation in business or loss during period of reinvestment, etc.: *N.Z. and Australian Land Company v. Minister of Lands* (*supra*); *Russell v. Minister of Lands* (*supra*).

(e.) Interest from the time of the taking of the land may properly be allowed by the Court as part of the sum given as compensation: *Re Johnsonville Town Board*, 27 N.Z.L.R. 36, 9 G.L.R. 636. See also *Walker v. Wellington and Manawatu Railway Co.*, 5 N.Z.L.R., S.C. 193, and *Pike v. Mayor of Wellington*, 30 N.Z.L.R. 179, 13 G.L.R. 221.

(f.) In a case where a farm has been taken under the Act, the compensation should include a sum to cover loss on realisation of stock: *Russell v. Minister of Lands* (*supra*).

(g.) The compensation should not be assessed on the basis of the income produced by the land (e.g., a sheep farm). The income is only one element to be considered by the Court: *Russell v. Minister of Lands* (*supra*); *Kingdon v. Hutt River Board*, 25 N.Z.L.R. 145, 167, 7 G.L.R. 634, 642.

(h.) Evidence as to sales of similar land in the locality will be considered by the Court along with any other relevant circumstances: *Kingdon v. Hutt River Board* (*supra*).

(i.) As to the position where land has been taken by proclamation which was subsequently partly revoked, see *Pike v. Mayor of Wellington*, 30 N.Z.L.R. 179, 13 G.L.R. 221.

Injurious Affection.

Where no land is taken, the test is whether the marketable value of the premises has been diminished: *Russell v. Minister of Lands* (*supra*). See also *Martin v. Westport Harbour Board*, 14 N.Z.L.R. 521, 531; *Jenkins v. Mayor of Wellington*, 15 N.Z.L.R. 118; *Hone Te Anga v. Kawa Drainage Board*, 33 N.Z.L.R. 1139, 1149, 16 G.L.R. 696.

DAMAGE.

[See note under heading "Ground for Application for Compensation."]

(*To be Continued*)

Third Party Risks.

New Legislation in England.

England has now followed the example of New Zealand as regards legislation on the subject of third party risks. Indeed, it would appear from the information at present available here that England has gone even further than we have, for the Third Parties (Rights Against Insurers) Act would seem to apply to all third party liability which is the subject of insurance and not, as does our Act of 1928, only to insurance against third party liability arising out of the use of motor-vehicles. In practice, however, the difference, if it exists, would probably not be very important or far-reaching, for by far the most frequent subject of third party liability insurance is that arising out of the use of motor cars. We have not yet seen copies of the English measures but their effect is thus stated in the editorial columns of our contemporary the *Law Journal*:

"The Third Parties (Rights against Insurers) Bill received the Royal Assent on July 10, and a reform of the law for which we have strenuously contended in these columns for several years has thus become an established fact. For the future, a person who becomes entitled to damages in respect of an occurrence in respect of which the party liable is insured against liabilities to third parties will—subject only to the insurer being solvent, a contingency which happily does not often arise—be assured of receiving whatever damages may be awarded to him, whether the insured person is insolvent or not. Until this Act was passed, the doctrine as to privity of contract compelled the insurers to settle with their insured, and where he was a bankrupt, the policy moneys payable under the third party insurance formed part of the insured's general assets, and were divisible amongst all his creditors. Indeed in some cases, owing to the operation of the bankruptcy law, which makes unliquidated claims unprovable in a bankruptcy, the unfortunate plaintiff, whose injuries were the cause of the claim arising under the policy, could not even prove in the bankruptcy, and the damages awarded him by a jury and paid by the insurance company to the defendant's trustee in bankruptcy went to swell the dividend of the other creditors; for the insured's claim against his insurers was deemed to have arisen on the happening of the event giving rise to the liability, whilst the right of proof did not arise until after judgment. The Act has been carefully framed to deal with all points likely to arise upon it; its language has received unusually careful consideration from the legal members of both Houses of Parliament, and it removes an injustice which could by no ingenuity be defended, and which has, so far as we know, never been denied. Taken in conjunction with the provisions of the Road Traffic Bill, which was read a third time in the House of Commons on Wednesday, as to compulsory insurance against third party risks, the Act will ensure to persons injured by the negligent driving of motor cars that they will receive the compensation to which they may be found entitled."

The Privy Council.

The English *Law Journal* of July 28th contains the following editorial comment on the views expressed at our last Legal Conference on the subject of Appeals to the Judicial Committee:

"The third annual Conference of the Legal Profession in New Zealand, which was held at Auckland on the 22nd, 23rd and 24th of last April, was marked by strong expressions of opinion in favour of the retention of the appeal to the Privy Council. The Chief Justice, Sir Michael Myers, in his Inaugural Address, said there was no desire in New Zealand to get rid of the Privy Council, and he hoped it would remain in its present form. A very able paper on the subject was read by Mr. J. B. Callan, B.A., LL.B., of Dunedin, who strongly supported the same view, and at the close of the discussion on his paper, the following resolution was carried unanimously:

> "That this the Third Annual Conference, representative of the whole of the profession for New Zealand, resolves that the retention of the final right of appeal to His Majesty in Council is in the best interests of the Dominion of New Zealand and of the administration of justice therein."

"Mr. Callan, in his paper, which with the other proceedings of the Conference, is printed in the *New Zealand Law Journal* of May 27, recalled that once, in *Wallis and Others v. Solicitor-General*, (1903) A.C. 173, the Judicial Committee had gone astray, owing to their failure to appreciate the real nature of New Zealand land tenure, a lapse which was met by dignified protest from Chief Justice Sir Robert Stout, whose death was recorded in last Monday's *Times*, and the late Sir Joshua Williams, then a Judge in New Zealand, and later a member of the Judicial Committee. But neither of these eminent lawyers allowed the incident to diminish their respect for the Imperial Court of Appeal. Mr. Callan's argument was founded mainly on the value of the Judicial Committee in maintaining the uniform development of judge-made law throughout the Empire. As he pointed out, the tendency in the United States has been for the law, though starting from the same basis, to develop on different lines. There has been no common Court of Appeal to maintain uniformity, nor in any case would circumstances have allowed this to be done. But in New Zealand it is different. English decisions are treated as authoritative, and New Zealand lawyers look to the same judicial sources as we do here. 'As a profession,' said Mr. Callan, 'we must suffer if severed from our fellowship with English workers in the law, and such a severance would be the ultimate result of severance from any Court of Appeal manned by English Judges." The paper was described as having reached the highest level of a paper at the Conferences. It is certainly one of the best arguments yet made for the retention of the right of appeal."

"We live under a network of by-laws and regulations, which, if not more indulgently administered than made, would make reasonably comfortable existence impossible. It is a pity that the reasonable methods of the common law are not more trusted to, and that, instead, resort is made on the slightest or no provocation to the peddling pedantries of indefinite code making."

—Mr. Thomas Bevan (in 1908).

Correspondence.

The Editor,
N.Z. Law Journal.

Sir,

Audience on Behalf of Bodies Corporate.

Your contributor of the interesting article in your issue of 2nd September, on the Right of Audience on Behalf of Bodies Corporate, says: "There seems to be no New Zealand authority on the point." May I call the attention of your readers to *Free Wheel Co. Ltd. and Others v. Inglis Bros.*, 23 N.Z.L.R. 309, at p. 318, in which the following enlightening and entertaining dialogue is recorded:

"W. Montgomery (one of the shareholders of the appellant Company) asked that the company might be allowed to appear in person.

"Williams, J.: It would be very interesting to see a Company "in person." [I well recall the dry humorous way in which the learned judge made the remark. There was a twinkle in his eye similar to that therein on his delivery of judgment on the question of domicil in *Sells v Rhodes*, 26 N.Z.L.R. 87, at p. 92, which indicated that he had "Pinafore" in his mind when he said: "He however resisted the temptation" offered by an ancestral state and a title of nobility to become 'an I-tal-i-an' and expressly decided to 'remain an Englishman.'"]

"Mr. Montgomery explained that the application was that the Company might be allowed to appear by its chairman of directors or agent.

"H. D. Bell representing the Bar, intimated that if the matter was to be discussed he desired to be heard on behalf of the Law Society.

"The Court intimated that, if necessary, counsel would be heard."

Later in the day Stout, C.J., gave the decision of the Court of Appeal as follows: "We are of opinion that the Company cannot appear in the coming case unless by solicitor or counsel, and that the case of *In re The London County Council and the London Tramways Co.*, 13 T.L.R. 254, is decisive on the point. Natural persons can appear in person before the Court to conduct their own case, but a company cannot appear except by solicitor or counsel. Application refused."

I am, etc.,

H. F. von Haast.

Wellington.

The Editor,
N.Z. Law Journal.

Sir,

Right of Audience in the Supreme Court.

The writer of the article on this subject in your Journal of 2nd September appears to have overlooked the case of *Free Wheel Company Ltd. and Ors. v. Inglis Bros.*, 23 N.Z.L.R. p. 309, at p. 318. The plaintiff company in this case was incorporated prior to the passing of "The Companies Act, 1903," which permitted the incorporation of private companies. The company was in effect a private company, the shareholders being

the two inventors named in the case, with their mother, two sisters, an uncle and an aunt. When the case was called in the Court of Appeal, all the shareholders filed into the Court, and one of the shareholders stated that the company appeared in person, but the Court held that such an appearance could not be made, and the hearing was accordingly adjourned to permit of counsel being instructed. No doubt if this case had been cited in the *Wanganui case* it would have been conclusive.

am, etc.,

W. HAYDON MACLEAN.

Taihape.

Bench and Bar.

Mr. M. C. Barton, of the firm of Marshall, Izard and Barton, Wanganui, died suddenly on the 6th inst. The late Mr. Barton was thirty-five years of age, and the youngest son of Mr. and Mrs. E. A. Barton, of Wanganui. He was educated at Huntly School, Marton, and at Wellington College. After qualifying for admission to the profession he joined the staff of Messrs. Marshall, Hutton and Izard, and on the death of Mr. Hutton he was taken into partnership.

Mr. H. B. Chapman died at Hobart, last week. Mr. Chapman was born in Tasmania and came to New Zealand at an early age. He received his early legal training in the office of Messrs. Whitaker and Russell, of Auckland. After qualifying as a solicitor he joined the staff of Messrs. Bell, Gully & Co., of Wellington, in 1895, and remained in their service until his retirement last year.

Judicial Errors.

The following interesting comments of Lord Brougham, prompted by an admission of error by the then Lord Chancellor (Lord Cranworth) as to the correct attitude of a Judge who has made a mistake, will be found in *Ridgway v. Wharton*, 6 H.L.C. 237, at pps. 269, 270:

> "I must, in the first place, express my very great satisfaction at the candid manner in which my noble and learned friend has dealt with the case as regards the change or at least the modification of his opinion since he heard the case in the Court below. I would that all Judges showed equal candour, and that if any thing happened to alter their opinion they would state, as he has done, fairly and openly, and in a manly manner, their change of opinion, and not attempt to maintain at the expense of the law as well as of the suitors, their own apparent consistency against the facts, the result of which has been a good deal of bad law to be found in our books, and not a little delay in rectifying errors, which ought in the first instance to have been set right, instead of being delayed, sometimes year after year, with the intention of making it appear that they had not originally fallen into mistakes, to which all mortals, Judges as well as others, are liable."

Forensic Fables.

THE INDUSTRIOUS YOUTH AND THE STOUT STRANGER.

One Evening an Industrious Youth was Sitting in his Chambers Reading the Current Number of the Law Reports. He was Full of Hope, but Briefs had hitherto been Rare and of Poor Quality. Hearing a Knock, the Industrious Youth Opened the Door to a Stout Stranger. Seating himself in the Arm-Chair, the Stout Stranger Told the Industrious Youth that he was Looking Out for a Capable Junior, and that he had been Much Struck by the Industrious Youth's Skilful Conduct of a Case in the Whitechapel County Court. Could the Industrious Youth Undertake a Heavy Job which the Stout Stranger had On Hand? The Industrious Youth having Intimated that a Heavy Job would Suit him Nicely, the Stout Stranger Expressed Extreme Satisfaction and Said that he would Send the Instructions Along the First Thing To-morrow. He Added that he was on his Way to Give a General Retainer to Sir John, as Money was no Object. The

Industrious Youth Applauded this Excellent Choice of a Leader. Having Gathered up his Papers, the Stout Stranger was Preparing to Depart when, with a Cry of Annoyance, he Discovered that he had Left his Purse on the What-Not in his Office. Did the Industrious Youth Happen to have Five Guineas Upon him? It was Vital that Sir John should be Retained forthwith, as the Other Side might Snap him Up. The Industrious Youth was Afraid he had Only Got Three Pounds, but the Stout Stranger was Very Nice about it and said he Could Probably Borrow the Balance from Sir John's Clerk. The Stout Stranger then Withdrew, Leaving behind him a Fragrant Smell of Cloves. As the Expected Instructions did not Come, the Industrious Youth Caused Enquiries to be Made at Sir John's Chambers. But Sir John's Clerk had not Seen or Heard of the Stout Stranger. And as the Instructions have not Yet Arrived the Industrious Youth is

In a review, necessarily short, it is impossible to do of Opinion that the Stout Stranger must have met with a Serious Accident, or been Visited by a Sudden and Complete Loss of Memory.

MORAL: *Caveat Junior.*

The Oath.

Re-swearing Witnesses on Second Day's Evidence.

"In *R. v. Saldanha*, at the Central Criminal Court, on 4th July, the defendant, who was indicted for perjury, gave evidence in his own defence, and said that he was called as a witness on the first day of the High Court action (in which the perjury was alleged to have been committed) and that he went into the witness box again on the second day, when he took it for granted that he was not then on oath. Two other witnesses had been called in the meantime, and, he said, placed in the position in which he was, he was entitled to use what students of philosophy called 'mental reservation.'

"This line of defence failed, and the prisoner was sentenced to three years' penal servitude. As to the merits of the case, there is not much to be said for a man whose attitude of mind permits him to indulge in "mental reservation" which most people call falsehood, merely because he thinks his oath has technically spent itself. On the law, we should certainly suppose that the oath binds a witness throughout the hearing of the case, even if it occupy several days. In order, however, to prevent possible misunderstanding and subterfuge it might be well to swear a witness afresh on each day that he gives evidence. We have come across at least one court where, if a witness is recalled, even though he has not long left the witness box, the magistrate reminds the witness, before questioning him, that he is still on oath; a thoroughly sound practice, even if not strictly necessary."

—*Justice of the Peace and Local Government Review.*

Running Down Cases.

Statements Made to Police by Witnesses.

The Council of the Law Institute of Victoria takes the view that statements obtained by police officers as to motor car accidents should be made available to the public on payment of a fee, and it has made representations to the authorities accordingly. The Departmental reply is to the effect that, while there is no objection to the continuance of the existing practice of supplying the names and addresses of witnesses to any interested person, thus enabling them to pursue any further inquiries they may deem necessary, the request of the Institute that the statements made to the police should be made available to the public cannot be acceded to.

"It has often been pointed out that the House of Lords has lost much of its power, but what it has lost in power it has gained in prestige."

—LORD SANKEY.

Legal Literature.

The Lady Ivie's Trial.

Edited by SIR JOHN FOX.
(pp. c; 163; xi; Oxford University Press.)

In 1684 a Thomas Neale holding under lease from the Dean and Chapter of St. Paul's sued Lady Ivie for ejectment in respect of some seven-and-a-half acres of land known now as Shadwell Park, lying near St. Paul's in London. The Lady Ivie was a woman of very questionable character. She was thrice married, her second husband being Sir Thos. Ivie. When the trial now under review was heard she had married a third husband, a commoner, but she renounced his name for the more aristocratic one she acquired on her second marriage. Interesting details of all the actors in the drama are contained in a well-written introduction.

Sir John Fox's edition of this famous trial, which is now to hand, is full of interest to the profession. The editor's task has been performed with the most meticulous detail and we are accordingly allowed to read a trial, which is reported almost verbatim, before the terrible Jeffries, L.C.J. However, it affords a pleasant relief to see the way in which he conducted himself in this trial in contrast to the uncouth and unjust behaviour on which his reputation is based in other, particularly criminal, trials of note.

The details of the trial showing a greater latitude in the admission of evidence are interesting. Counsel argued their points of law as they arose shortly, without citations, and in most cases the L.C.J. rudely rejected any attempt to change his mind. There were eight counsel for the plaintiff, including two Serjeants, and there were seven for the defendant, including the Attorney-General, the Solicitor-General and two Serjeants. The jury was a special one on account of the importance of the case and contained three Baronets and three Knights in its number.

There was much evidence of old identities to show the nature of certain parts of the land affected. The defendant relied on certain deeds of title which, at the end of the trial, were discovered to be forgeries. Evidence was allowed also to the effect that Lady Ivie was likely to have forged these documents because she had forged other documents on another and independent occasion, though the defendant does not appear to have been indicted before. There appeared to be no rules affecting admissibility of any evidence tendered except, and even this was hardly apparent, that it should be relevant to the general inquiry. One matter of practice seems clear from the trial and that is that the witnesses were hardly cross-examined at all, except of course by the L.C.J., who kept up a running fire of interjections throughout.

The L.C.J., though undoubtedly a man of great ability for those days, does not show the knowledge of law we see in our judiciary nowadays. Nor would counsel making an objection expect nowadays to be told, as Jeffreys told one counsel: "Lord, Sir, you must be cackling too; we told you your objection was very ingenious, but that must not make you troublesome; you cannot lay an egg, but you must be cackling over it."

justice to this interesting trial. To anyone interested in the manner in which a civil law suit was conducted by our forefathers the work affords a most excellent example. Sir John Fox, who was Vice-Chairman of the Oxford Quarter Sessions and a late Master of the Supreme Court, Chancery Division, has by his knowledge of the law and his great ability as a writer produced a valuable addition to any lawyer's private library.

C. A. L. TREADWELL.

Legal Education Bills.

A Further Amendment.

The Statutes Revision Committee of the House of Representatives has made a further amendment in both the Law Practitioners Amendment Bill and the New Zealand University Amendment Bill.

It will be remembered that Clause 2 of the former Bill, as originally drawn, provided that the examination of candidates for admission as barristers or solicitors should be conducted by the Senate of the University, and provided that the Senate should prescribe the nature and conditions of such examinations and the educational and practical qualifications of candidates and might also prescribe such courses of study and practical training and experience for such candidates as it should think fit. Corresponding provision was also made in Clause 4 of the New Zealand University Amendment Bill. Now to Clause 2 of the former Bill there has been added a proviso in the following terms:

> "Provided that it shall not be competent for the Senate to require that any candidate for admission as a barrister or solicitor shall have taken any course of study or practical training at a University College in New Zealand."

A proviso, substantially the same in all material respects, has also been added to Clause 4 of the New Zealand University Amendment Bill.

Apparently the object of the amendment is to prevent the Senate from making the keeping of "terms" a compulsory qualification for candidates for admission as barristers or solicitors simpliciter, though of course the Senate may still as at present, require such a qualification for the University degree of LL.B. Perhaps the amendment was introduced so as to avoid hardship to students residing at a distance from a University College, but it is difficult to imagine that the Senate itself, if minded to make the keeping of "terms" compulsory, would not have made exceptions appropriate to the case of the country student as it does now in its LL.B. prescription; as the amendment now stands the Senate cannot require even those who live in a University town to keep "terms." The door, apparently, still remains largely open to the many miscellaneous forms of "cramming."

The United States, with one lawyer for every 862 inhabitants, has a larger percentage of lawyers in its population than any country in Europe. The best state of affairs in the world appears to prevail in Sweden, which has only 370 lawyers in a population of six millions—one lawyer to every 16,450 persons.

Bills Before Parliament.

Chartered Associations (Protection of Names and Uniforms). (HON. MR. MASTERS). Governor-General may by Order-in-Council made on application of any association incorporated by Royal Charter, not being an association representative of any profession or business, protect: (a) name of association; (b) any special name or designation used by association for members; (c) any uniform with distinctive markings or badges used by association; (d) any badge to be worn without uniform used by association, provided that nothing to affect right of any *bona fide* national organisation to use any designation, uniform or badge at time of passing of Act in regular use by association: application for Order-in-Council to be made in such manner and to be accompanied by such particulars as Minister of Internal Affairs shall direct: Minister to consider objections made by persons or societies affected: Order-in-Council to be laid before Parliament, and may be revoked or varied by resolution of both Houses within 21 days thereafter: Order-in-Council may be amended or revoked by subsequent Order-in-Council.—Cl. 2. Offence to use protected uniform, badge, etc., or any so closely resembling same as to lead to belief that it is such; penalty fine not exceeding £10 on summary conviction: provided that uniform, badge, etc., may be used in course of plays, cinemas, etc., if not worn or used in such manner as to bring it into contempt. Order-in-Council may be made for protection of uniform or badge notwithstanding expiry of any copyright under Part II of Patents, Designs and Trademarks Act, 1921-22.—Cl. 3. Detailed description of uniform in respect of both form and colour to be furnished on application for protection.—Cl. 4. No Order-in-Council to be made protecting any article (other than badge or decoration) used in connection with uniform in respect of which any design registered under Patents, Designs and Trademarks Act, 1921-22, unless owner of registered design shall without fee or reward be ready to permit use of design by any person willing to supply such article to any member of association: nothing in Act to prevent continued use of any mark or device *bona fide* used as trade-mark before coming into force of Act.—Cl. 5.

Destitute Persons Amendment. (MR. BANARD). S. 8 of Act of 1926 amended: (a) by omitting words "so long as such order continues in force"; (b) by inserting after word "enforced" the words "*varied, suspended, cancelled,* restored or otherwise dealt with."—Cl. 2. Upon registration in office of Magistrate's Court of copy of an order of Supreme Court under S. 8 of Act of 1926 no further proceedings to enforce, vary, suspend, cancel, restore, or otherwise deal with such order shall be taken in the Supreme Court: provided that if proceedings shall have been taken on such order in a Magistrate's Court and such order shall have been enforced, varied, suspended, cancelled, restored, or otherwise dealt with by a Magistrate the complainant or defendant, or any other person prejudicially affected, may appeal to the Supreme Court in accordance with provisions of Parts IX and X of the Justices of the Peace Act, 1927, in same manner as if appeal was from an order to pay sum exceeding £5, and all provisions of that Act to apply to any such appeal accordingly, with all necessary modifications.—Cl. 3.

Electric-power Boards and Supply Authorities Association. (MR. J. A. NASH). Object of Act to establish an association of electric-power boards and municipal electric-lighting authorities to be known as "The Electric-power Boards and Supply Authorities Association of New Zealand" and to empower such association to watch over and protect interests, rights, and privileges of electric-power boards and other local authorities supplying electrical energy. Electric-power Boards and Supply Authorities Association constituted.—Cl. 3. Incorporation of Association.—Cl. 4. Membership and subscription.—Cl. 5. Payment by boards or local authorities of subscriptions and travelling expenses of representatives.—Cl. 6. Meetings.—Cl. 7. Delegates.—Cl. 8. President.—Cl. 9. Executive Committee.—Cl. 10. By clause 11 the Association is authorised to carry out following functions and duties: (a) Generally to watch over and protect the interests, rights, and privileges of Power Boards and supply authorities: (b) To take action in relation to any subject or legislation affecting its members: (c) To procure legal opinions on matters of general interest to Power Boards and supply authorities: (d) To promote the efficient carrying-out throughout the country of the functions of Power Boards and supply authorities: (e) To

undertake litigation by way of test cases where, in the opinion of the Executive Committee, the subject-matter of the litigation proposed to be undertaken is of general interest to Power Boards and supply authorities. The cost incurred by the Association in respect of any such test case shall be provided by the members of the Association in proportion to the amount of their annual subscriptions: (f) To compile and collate statistics and to take such other steps as the Executive Committee shall deem necessary for the dissemination of useful knowledge amongst its members: (g) (i) To enter into any contract with any person, firm, or corporation for advertising throughout New Zealand the use of electrical energy, or to unite with the Minister of Public Works, or any association of persons having a common interest in the increased distribution of electrical energy, in making any such advertising contract: (ii) Any such advertising contract may provide that all moneys payable thereunder shall be received by, and applied at the sole discretion of a committee consisting of representatives from each of the parties joining in such advertising contract: (iii) The Association may enter into agreements with its members providing for the payment by each such member to the Association of a proportionate part of the moneys payable by the Association under any such advertising contract. The Association may recover from any such member the moneys agreed to be contributed as aforesaid. Powers of regulation-making conferred on Executive Committee.—Cl. 12. Financial operations.—Cl. 13. Secretary and Treasurer.—Cl. 14. Association may obtain legal assistance and appoint standing counsel.—Cl. 15. Contracts.—Cl. 16. Liability of Association.—Cl. 17. Members authorised to make contributions to Association.—Cl. 18. Travelling-expenses.—Cl. 19.

Imprest Supply (No. 3). (Hon. Mr. Ransom). Authorising imprest grant of £2,672,000 out of funds and accounts in first schedule and imprest grant of £302,000, out of accounts in second schedule.—Cl. 2. Grants to be charged as provided in subsequent Appropriation Act.—Cl. 3.

Local Elections and Polls Amendment (No. 2). (Mr. McCombs). When special order made by local authority adopting provisions of Part II of principal Act, the local authority may in the special order, or at any time subsequently by resolution, declare that the alternative provisions (as to preferential voting) set out in detail in Schedule to Bill shall apply in lieu of corresponding provisions in Part II.—Cl. 2.

National Art Gallery and Dominion Museum. (Hon. Mr. Ransom). Authority for establishment of National Art Gallery, Dominion Museum, and War Memorial Carillon.—Cl. 3. Incorporation of Board.—Cl. 4. Constitution of Board.—Cl. 5. Representation of absent members.—Cl. 6. Meetings of Board.—Cl. 7. Contracts of Board.—Cl. 8. Functions of Board.—Cl. 9. Land vested in Board as site for National Art Gallery, Dominion Museum, etc.—Cl. 10. Fund established by public subscription to be vested in Board; acts of provisional Board validated.—Cl. 11. Officers of Board.—Cl. 12. Powers of Board to charge for admission and grant use of buildings for approved purposes.—Cl. 13. Power to provide accommodation for New Zealand Academy of Fine Arts.—Cl. 14. Committees of management.—Cl. 15. Exemption from rates and taxes.—Cl. 16. Payment of Board's moneys into bank and mode of withdrawal therefrom.—Cl. 17. Investment of Board's moneys.—Cl. 18. Audit of Board's accounts. Cl. 19. Science and Arts Act, 1913, and S. 64 of Finance Act, 1929, repealed.—Cl. 20.

Painters and Decorators Health Protection. (Mr. Jordan). On and after passing of Act it shall be unlawful (a) to prepare any paint of which lead is a constituent part; (b) to employ on any structure process of dry rubbing-down or any process for same purpose except that of wet rubbing-down; (c) for any employer to permit any workman to do burning-off for more than four hours in any day or more than three days in any week.—Cl. 3. Employers of painters or decorators on any structure for a lengthy period to provide lavatory and sanitary conveniences.—Cl. 4. Governor-General in Council empowered to make all such regulations as he shall deem necessary to give Act full force and effect.—Cl. 5. Penalty £50 for breach of provisions of Act.—Cl. 6.

Shearers' Accommodation Amendment. (Mr. Langstone). Act to come into operation on 1st January, 1931.—Cl. 2. S. 3 of principal Act amended by repealing word "may" in subsection (3) and substituting word "shall."—Cl. 3. S. 6 of principal Act amended by adding after word "furniture" in paragraph (b) the words "including beds and mattresses."—Cl. 4 (1). Beds or bunks to be not less than two feet above floor and top bunks not to be allowed; spring mattresses as well as flax or kapoc mattresses to be provided; separate sleeping quarters for women of Native race; separate quarters for married couples; separate lighting of rooms; dogs not to be housed or tied within 100 yards from living quarters: S. 6 of principal Act amended accordingly.—Cl. 4. S. 14 of principal Act repealed.—Cl. 5.

Stock Amendment. (Hon. Mr. Murdoch). Every person who drives, leads or conveys any stock over any highway, Crown lands, river, lake, harbour or other waters during period between half-an-hour after sunset and half-an-hour before sunrise, unless provided with permit so to do from a Justice, auctioneer, Postmaster, constable, or Inspecort under principal Act or Slaughtering and Inspection Act, 1908, commits offence and liable to fine not exceeding £50 and not less than £5: Exceptions (a) owner of stock, his agent or servant, driving, etc., such stock within limits of land in his lawful occupation; (b) person driving, etc., stock within limits of borough in accordance with by-laws; (c) owner of stock, his agent, or servant, driving or leading stock to or from public saleyard not more than six miles from his homestead; (d) person driving or riding horse or horses in harness or driving cattle in harness; (e) person in employment of Government Railways Department driving, etc., stock in course of employment; (f) owner or master of any vessel or any other person, in respect of carriage of stock under bill of lading, or other shipping document: S. 58 of principal Act repealed.—Cl. 2. S. 64 of principal Act amended by omitting from paragraph (b) words "any Registrar," and substituting words "any fit person."—Cl. 3.

Wellington Law Students' Society.

The following case was argued recently before Mr. F. C. Spratt: "The Tuesday Illustrated Herald published a photograph of Jones and his recently acquired wife leaving the Church after the marriage ceremony, but owing to a compositor's error the following caption appears beneath it on publication:—'A tense love scene from this week's daring film at the Palace.' Jones is made the subject of several practical jokes by his friends. As a result his employer discharges him on the well-founded grounds that he has been made ridiculous. Jones sues the proprietors of the newspaper for £10,000 damages."

Hurley for plaintiff: Caption undeniably false. Injury resulted to plaintiff's reputation in that he was made ridiculous. See *Cropp v. Tilney*, 3 Salk. 225; *Du Bost v. Beresford*, 2 Camp. 511; *Mason v. Jennings*, Raym. 401. Animus of defendant irrelevant if in fact statement is defamatory: *Cassidy v. Daily Mirror*, (1929) 2 K.B. 331; *Stubbs v. Marsh*, 15 L.T. 312; *Shepherd v. Whittaker*, L.R. 10 C.P. 502. See also *Emerson v. Grimsby Times*, 42 T.L.R. 238. Liability of defendant clear.

Ennis in support: Plaintiff entitled to recover general and special damages, in that statement: (1) libellous; (2) occasioned dismissal from employment. Libel here of a serious nature as appeared in an illustrated newspaper of wide circulation. See *De Crespigny v. Wellesley*, 5 Bing. 402. No apology been tendered. Plaintiff in this case entitled to exemplary damages. See *Smith v. Harrison*, 1 F. & F. 565. See also *Knight v. Gibbs*, 1 A. & E. 43.

Cahill for defendant: Matter published not libellous as not defamatory. Common ground that plaintiff made ridiculous, but that was not the libel of defendant but of certain foolish and eccentric persons. See *Spencer Bower on Actionable Defamation*, 257; *Pollock on Torts*, 12th Edn., 260; *Salmond on Torts*, 7th Edn., 519-524. No imputation thrown upon the plaintiff. Element of contempt is of essence of ridicule. Not even a jest here; a chance and pointless juxtaposition. He referred to *Mulligan v. Cole*, L.R. 10 Q.B. 549; *Cook v. Ward*, 6 Bing. 409; *Capital and Counties Bank v. Henty and Sons*, 7 A.C. 745; *Cassidy v. Daily Mirror*, (1929) 2 K.B. 331 (distinguished); *Wood v. Edinburgh Evening News*, (1910) S.C. 895; *Emerson v. Grimsby Times*, 42 T.L.R. 238; *Tolley v. Fry and Sons*, (1930) 1 K.B. 467.

Diederich in support: Damages claimed excessive. Moreover damages too remote: *Speake v. Hughes*, (1904) 1 K.B. 138. This is a case of *novus actus interveniens*. See *Salmond on Torts*, 7th Edn., 165-170. The direct cause of damage suffered by plaintiff was not the publication of alleged libel but the wrongful subjection of plaintiff to ridicule of his friends, such intervening act constituting "the voluntary act of a free agent over whom the defendant had no control and for whose acts he was not answerable," per Tindall, C.J., in *Ward v. Weeks*, 7 Bing. 211; *Odgers on Libel and Slander*, 6th Edn., 336-337.

Mr. F. C. Spratt, delivering "judgment," said that the case was not one where the plaintiffs could succeed on the ground of libel. The statement or caption was not libellous in law. Even if it were it might be arguable that the damage was too remote. Judgment for the defendant.