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"If the dignity of the law is not sustained, its sun is set never to be lighted up again."
—*Lord Erskine.*

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Professional Misconduct.

The Court of Appeal has had brought before it recently, on the application of the Law Society, some cases of neglect and irregularity as to trust accounts, where there was, however, no dishonesty on the part of the solicitors concerned, and for this reason the full rigour of the Court's disciplinary powers was not put in motion. The Court in each case nevertheless took the view—as has, of course, always been the view of the profession—that such irregularities, even in the absence of dishonesty, are not to be lightly regarded, but may constitute professional misconduct.

In *In re M.*, (1930) G.L.R. 175, 6 N.Z.L.J. 66, the practitioner had been convicted and fined for failing to have his trust account audited for the year ended 31st March, 1929, as required by the regulations made under the Law Practitioners Amendment Act, 1913. The Law Society called upon him to explain his conduct and to have his trust account promptly audited. The practitioner for some time ignored the Law Society, and did not have the audit made until several weeks after the Law Society commenced proceedings, and indeed until after the commencement of the sittings of the Court of Appeal at which the Law Society's application was set down for hearing. A few days before the application was heard the audit was made, and the practitioner's trust account was found to be correct not only for the period in question but also up to the 25th March, 1930 (the application was heard on 28th March). No dishonesty on the part of the solicitor therefore existed, and the Court, as it was the first case of the kind that had come before it, thought that the position would be sufficiently met by ordering the solicitor to pay the Law Society's costs. Myers, C.J., who delivered the judgment of the Court, made it clear, however, that such neglect might amount to professional misconduct. The learned Chief Justice said:

> "It is said that the omission of the practitioner was due merely to carelessness and that there has been no dishonesty on his part . . . . Nevertheless such neglect may, we think, amount to professional misconduct, quite irrespective of the offence against the regulations, and of the punishment for that offence . . . . We desire to make it plain, firstly that the Law Society, as indeed it has recognised by the attitude it has taken up in the present case, has a duty in matters of this kind; secondly that a practitioner will not be permitted to ignore the Society in the performance of that duty; and thirdly, that the Court is not disposed to treat lightly conduct such as that for which the practitioner in this case has been brought before the Court."

Another somewhat similar case against two solicitors practising in partnership came before the Court of Appeal at its last sittings. There had been no personal dishonesty on the part of either practitioner, but they had been fined for failure to have their trust account audited as required by the regulations and had failed to keep proper entries and accounts in connection with their trust account transactions. Moreover, when the Law Society, pursuant to its powers under S. 23 of the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, instructed an auditor to examine their trust accounts, they postponed his investigations, and did not make the books available to him until after he had called on several later occasions. The Court took the view that the solicitors would be sufficiently punished by the suspension which they had already undergone since the previous sitting of the Court and by ordering them to pay the costs of the Law Society. The following observations of His Honour the Chief Justice, who delivered the judgment of the Court, as to the duties of a solicitor as to whom a special audit is ordered by the Law Society under S. 23 of the Act of last year are of interest:

> "It frequently happens that the element of surprise is of vital importance to the making of an audit and we consider that if any solicitor as to whom a special audit has been ordered by the Law Society does not immediately make available to the auditor the whole of his trust accounts whatever may be their then condition, and whether the books have or have not been written up, such solicitor is guilty of delaying the auditor. There must never be any moment when the trust accounts of a solicitor are out of balance, and the fact that the books have not been written up does not in our view afford any excuse for not handing them over to the auditor for checking immediately he first calls."

In another case before the Court of Appeal at its last sittings, the solicitor had misused his trust account by making certain small advances out of it to persons for whom he held no sums in credit—the duration of these advances varying from a week or two to two or three months—and by overdrawing fees from his trust account to the extent of some £17, this overdrawing being to enable certain fees to be paid to permit transactions to be completed and enable costs to be collected. The items in question had since all been properly adjusted. The Court required the solicitor to give an undertaking that for the next three years he would faithfully and promptly comply with all proper requisitions made by the Law Society of the district in which he might be practising and ordered him to pay the Law Society's costs. Blair, J., who delivered the judgment of the Court, said:

> "We cannot too strongly emphasise the fact that any advance from composite trust funds unsupported by a corresponding credit to the client to whom the advance is made—whether such advance is of a large or a small sum, and even if of the most temporary nature—is improper and constitutes professional misconduct justifying the exercise of the disciplinary provisions in the Law Practitioners Act."

It is to be hoped that the day is near when the Law Society will itself have full disciplinary jurisdiction over solicitors in matters of professional misconduct. These applications to the Court, to which there is at present no alternative, involve a measure of publicity which is quite unnecessary; the Press gives them prominence in its columns; the public is thus induced to view them in a false perspective; and in the result the profession as a whole quite unfairly suffers because it, of its own initiative, puts the law in motion against its delinquent member. There can be no doubt that the Law Society, if it had jurisdiction, would perform its duty fearlessly and without favour; the proof of this lies in the fact that it is always the Law Society that makes these applications to the Court.

Court of Appeal.

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

September 30; October 10, 1930.
Wellington.

HAZLETT v. BUTTIMORE.

Reformatory Institutions—Jurisdiction of Magistrate to Hear Complaint at House of Alleged Inebriate—Observations as to Circumstances in which Jurisdiction Should be Exercised—Complaint Read and Explained to and Understood by Inebriate—Evidence Taken On Oath in Presence of Inebriate and Opportunity for Cross-Examination Afforded—Inebriate Afforded Opportunity of Answering Complaint and of Giving Evidence—No Necessity to Ask Inebriate in Precise Terms "To Show Cause Why an Order Should Not be Made," etc.—Inebriate Afforded Fair and Reasonable Opportunity of Being Heard—Reformatory Institutions Act, 1909, Ss. 7, 9, 30—Justices of the Peace Act, 1927, S. 63.

Appeal from a judgment of Smith, J., discharging a *rule nisi* for a *habeas corpus*. The facts of the case appear sufficiently in the report of the judgment. The appeal was based upon two grounds: (1) that the Magistrate acted without jurisdiction or in excess of his jurisdiction because the time and place of hearing of the complaint were illegal, and (2) that the appellant was irregularly and illegally committed to the Inebriates' Home at Roto-Roa Island in that he had no opportunity of being heard, and consequently there could not in law be said to have been a proper hearing.

Sullivan for appellant.
Johnstone for respondent.

MYERS, C.J. (delivering the judgment of Myers, C.J. and Blair and Kennedy, JJ.) said that as to the first question, Mr. Sullivan's contention was that the Magistrate had no jurisdiction to hear the complaint at the appellant's house or anywhere else than in a duly constituted Court-house. The contention did not—nor could it in the face of the provisions of the statute to which their Honours would refer—go so far as that the Magistrate was bound to hear the complaint in open Court. But Mr. Sullivan's contention was that it should be heard in the Court-house and in the Court-room, though the Magistrate might exclude the public, or, failing that, in the Magistrate's Chambers at the Court-house. A careful consideration of the relevant statutory provisions showed in their Honour's view that that contention was not well founded. By S. 7 of the Reformatory Institutions Act, 1909, it was enacted that any habitual inebriate desirous of being received into a certified Inebriates' Home might make application in person to a Magistrate for an order. Such application was required to be in writing, and the signature of the applicant had to be attested by the Magistrate to whom the application was made. Subsection (4) enacted that the application "shall" be heard and determined "in private." S. 9, the section under which the complaint in the present case was laid, provided that on the complaint on oath of a relative (as defined by the section) of any person that such person was an habitual inebriate a Magistrate might issue his summons to that person to show cause why an order should not be made for his detention in a certified Inebriates' Home; or if, by reason of special circumstances, the Magistrate thought fit, he might, instead of issuing a summons, or after the issue thereof, issue his warrant for the arrest of the alleged inebriate. Subsection (9) provided that any complaint under the section "may" be heard and determined by the Magistrate "in private." In the case of an application made by the inebriate himself under S. 7 therefore it was mandatory, while in the case of a complaint laid under S. 9 by a relative it was discretionary, for the Magistrate to hear and determine the complaint in private. The same expression "in private" was used in the two sections and must clearly have the same meaning in both sections. It was not unimportant to note the difference between the language of those two sections and that of S. 7 of the Inebriates' Institutions Act, 1908. Subsection (7) of S. 9 of the Reformatory Institutions Act, 1909, enacted that, subject to the provisions of that Act, all the provisions of the Justices of the Peace Act with respect to complaints and orders should so far as applicable apply to complaints and orders under S. 9, except that no order for the payment of costs should be made against the defendant. By S. 63 of the Justices of the Peace Act, 1927, it was provided that the room in which the Justices sat to hear and try any information should be deemed an open or public Court to which the public generally might have access so far as the same could conveniently contain them. It was of course the practice for Justices to sit and hear cases in the Magistrate's Court-house, but there was no express provision in the Justices of the Peace Act to that effect. In that respect the position was different from that which had obtained in England since the Summary Jurisdiction Act, 1879. His Honour referred to **Johnston's Justices of the Peace,** 3rd Edn., Vol. I, p. 107, Vol. II, p. 29, dealing with S. 15 of the Justices of the Peace Act, 1866, which was in the same words as S. 63 of the Act of 1927. In interpreting the words "in private," as used in Ss. 7 and 9 of the Reformatory Institutions Act, 1909, one had to consider the purposes and objects of the Act, and, at all events so far as S. 7 was concerned, having regard to those purposes and objects, their Honours could see no reason for restricting the meaning of those words. It might well be that a person desiring to invoke against himself the provisions of that section was in a poor state of health and confined to his house. In such circumstances what possible reason could there be why the Magistrate, if he thought fit, should not hear the complaint in the inebriate's own house instead of having him brought down to the Court-house? Their Honours could see none. If that was so under S. 7, the same position must obtain under S. 9 because precisely the same words were used, and used in a similar connection. That view derived support from **In re Maltby,** 7 Q.B.D. 18, per Denman, J., at p. 25, and per Pollock, B., at p. 31. It was also relevant to refer to S. 19 of the Indictable Offences Act, 1848, (Eng.) as to which the view held in England apparently was that the inquiries contemplated by the section might be made in private and not necessarily in a court-house: See 79 J.P.N. 159, 160. If that was so, then it seemed to their Honours to be clear, reading together S. 9 of the Reformatory Institutions Act, 1909, and S. 63 of the Justices of the Peace Act, 1927, that the position must be the same. In their Honours' opinion, therefore, the Magistrate in the present case was entitled, if he thought fit under S. 9, to proceed to the appellant's house and (in the absence of objection) hold the inquiry there. That being their Honour's view of the matter, it followed that the appellant failed on that branch of the case. Their Honours thought it desirable however to say that the jurisdiction to hear a complaint under S. 9 at the house of the alleged inebriate was one that should be sparingly and cautiously exercised. That course should, in their Honours' opinion, be followed by the Magistrate only in exceptional circumstances having regard to such factors as the physical and mental condition of the alleged inebriate and the risk, unless that course was followed, of his doing injury to himself or others. In the present case there was evidence that such a risk existed. It seemed also to have been the view of the medical men that at the time when the complaint was made, and on the following day when it was heard, the appellant's physical condition was such as that it would have been dangerous to his health to remove him from his home to the Magistrate's Court at Dunedin for the hearing of the complaint. The Magistrate, therefore, had reasonable grounds for the action that he took in going to the appellant's house to hear the complaint. Unless exceptional circumstances existed, it was preferable that the hearing should take place at the Court-house though it was competent (and no doubt in most cases desirable) for the Magistrate to hear the complaint in his Chambers, and not in the Court-house. Their Honours added that when the Magistrate heard a complaint in private, whether away from the Court-house or in his Chambers at the Court-house, he should have a full and accurate note taken and filed of the evidence given and of all that happened at and in connection with the hearing so that there might be a full record available in the event of any further proceedings.

As to the second point, there was probably no more firmly established general principle than that no one was to be condemned, punished, or deprived of his property or liberty unless he had had an opportunity of being heard. There must be a reasonable and fair opportunity of being heard. The learned Judge in the Court below had held, and in their Honours' opinion properly held, that there was such an opportunity. There was a complaint duly lodged. There was a warrant issued for the appellant's arrest, and that warrant was executed at his own house. The Clerk of the Court read the complaint. The subject-matter of the complaint was also explained by the Magistrate, who, after explaining the position, asked the appellant whether he understood the application. The appellant replied "Yes and I won't go there," meaning of course that he was not willing to go to a reformatory institution. The appellant was present before the Magistrate throughout the proceedings. Witnesses were called and sworn evidence given.

The appellant was asked if he desired to ask the witnesses any questions and he did in fact put several questions to the witnesses. He was then asked if he desired to say anything in answer to the complaint. His answer was that it was not drink that was his trouble and that he was quite all right except for his heart. He was then asked if he desired to give evidence and he made no further reply. All the circumstances showed that the appellant had full knowledge of and quite understood the subject-matter of the complaint and that he had the opportunity of being heard. Indeed he was heard, inasmuch as he exercised his right to ask questions of the witnesses who were called in support of the complaint. He did not however choose to give evidence himself or make any statement beyond that already mentioned; and he did not ask for an adjournment for the purpose of enabling him to call evidence or for any other purpose. The Magistrate held the complaint to be proved, and upon the evidence he could have come to no other conclusion. The appellant's proper course, had he wished to carry the matter further, was to make a general appeal to the Supreme Court in accordance with S. 30 of the Reformatory Institutions Act, but of that right he did not avail himself. It was said that the appellant was not asked in precise terms "to show cause why an order should not be made" for his detention in a certified Inebriates' Home. But, as already stated, the complaint was read over to him and explained; and, even though the question with regard to showing cause might not have been put to the appellant in the precise form contemplated by the statute, it was certainly put in substance. Apart from authority, their Honours should have thought that that was sufficient, but the point was not without authority: **Turner and Shepherd v. Postmaster-General,** 34 L.J.M.C. 10, 12. Their Honours held, therefore, in agreement with the learned Judge in the Court below, that the various statutory requirements were complied with and that the appellant did have a fair and reasonable opportunity of being heard. The result was that the appellant failed on that branch of the case also. Their Honours added that **Rissetto v. Brooke,** (1918) N.Z.L.R. 657 was, in their view, of no assistance to the appellant in view of what they found to be the facts of the case.

HERDMAN, J., delivered a separate concurring judgment.

Appeal dismissed.

Solicitor for appellant: **J. J. Sullivan,** Auckland.
Solicitors for respondent: **Meredith and Hubble,** Auckland.

Supreme Court.

Kennedy, J. May 16; August 21, 1930. Dunedin.

SMITH v. SOUTHLAND ELECTRIC POWER BOARD

Electric Power Boards—Charges on Land for Cost of Installations—Existing Charges Not Affected by S. 7 of Electric Power Boards Amendment Act, 1928—Statute Not Retrospective—Principles Relating to Retrospective Operation of Statutes Considered—Electric Power Boards Amendment Act, 1920, S. 23—Amendment Act, 1925, S. 119—Amendment Act, 1927, S. 17—Amendment Act, 1928, S. 7.

Action for (*inter alia*) a declaration. From some date prior to 23rd October, 1924, until 8th June, 1929, J. W. Hyde was the owner subject to a memorandum of mortgage of a parcel of land in Southland comprising 531 acres. He made default under the mortgage and on 5th June, 1929, the mortgagee in exercise of his powers of sale sold the land to the plaintiff. On various dates prior to 15th May, 1925, the Southland Electric-power Board had completed the installation of a service line, electric wires and certain electrical fittings and equipment on the land. Prior to such installation Hyde and the Board had entered into an agreement whereby the Board agreed to accept payment by instalments. On 12th October, 1929, the Board deposited with the District Land Registrar of the Southland Registration District a notice of statutory land charge under the Statutory Land Charges Registration Act, 1928, claiming that the land was subject to a charge for £170 6s. 9d. and interest at 7 per cent. from 20th April, 1925, on account of the cost of the installation referred to. The plaintiff in the present action prayed a declaration that no part of the cost of the installation constituted a charge on the land, and an injunction directing the Board to deposit a certificate of release of the charge registered.

Barrowclough for plaintiff.
Macalister for defendant.

KENNEDY, J., said that it was conceded that prior to the commencement of the Electric-power Boards Amendment Act, 1928, the Board had a first charge upon the land recoverable as rates for the cost of the installation. S. 23 of the Electric-power Boards Amendment Act, 1920, conferred such a charge whether the installation was before or after the passing of that Act, and that provision was repeated in S. 119 of the Electric-power Boards Act, 1925, a consolidation Act which came into force on the 1st April, 1926. S. 17 of the Electric-power Boards Amendment Act, 1927, did not affect the charge already existing because that section applied only to installations "after the passing of this Act," namely 5th December, 1927. The position prior to the Electric-power Boards Amendment Act, 1928, was that power boards had charges for electrical equipment installed prior to the commencement of the Electric-power Boards Amendment Act, 1927. For installations between that date and the passing of the Electric-power Boards Amendment Act, 1928, power boards had a charge only when, prior to such installation, consent in writing to such charge, was given by the owner of the land where it was not subject to any duly registered mortgage, or by the owner and the mortgagee or mortgagees where it was subject to any duly registered mortgage or mortgages. His Honour quoted the provisions of S. 7 of the Electric-power Boards Amendment Act, 1928, and said that if that amendment had retrospective effect, then it cancelled out the previously existing charge of the Board upon the land and the plaintiff, if his action was not barred by S. 127 of the Electric-power Boards Act, 1925, was entitled to the declaration asked for; if on the other hand the operation of S. 7 was prospective only, the land was still subject to the Board's charge.

The principles of construction to be applied to statutes had been discussed in many cases. The general rule was that a statute was *prima facie* prospective. That leaning rested upon the presumption that the Legislature did not intend what was unjust: 2 **Co. Inst.** 292. Statutes were construed as operating only in cases and on facts which came into existence after the statutes were passed unless a retrospective effect were clearly intended: **R. v. Guardian of Ipswich Union,** 2 Q.B.D. 269. His Honour referred also to **Pardo v. Bingham,** L.R. 4 Ch. 735, 739, per Lord Hatherley; **Lauri v. Renad,** (1892) 3 Ch. 402, 421, per Lindley, L.J.; **Young v. Adams,** (1898) A.C. 469, 476, per Lord Watson, and **Smith v. Callander,** (1901) A.C. 297, 305, per Lord Ashbourne. The books contained many cases in which the effect of statutes upon vested rights had been considered. An acquired or vested right might be one vested agreeably to the existing laws. They were not affected unless the statute contained clear words or unless, having regard to its objects, it necessarily did so. His Honour referred to **Turnbull v. Forman,** 15 Q.B.D. 234, 236, per Brett, M.R.; **In re Athlumney,** (1898) 2 Q.B. 547, 551, per Wright, J.; **Henshall v. Porter,** (1923) 2 K.B. 193, 197, per McCardie, J. Even a statute which conferred a benefit, such as abolishing a tax, would not be construed retrospectively to relieve the persons already subject to the burden before it was repealed: **Prince v. United States,** 2 Gallison 204, cited in **Maxwell's Interpretation of Statutes,** 6th Edn. 388. If then, it was clear from the statute that it was retrospective, it would be so construed although the consequences might appear unjust and hard: **Bell v. Bilton,** 4 Bing. 615. Such retrospective operation of statutes was found particularly where the statute was passed to supply an omission in a former statute: see **R. v. Dursley,** 3 B. & Ad. 465 and **Atty.-Gen. v. Pougett,** 2 Price 381. It was frequently found in statutes which were in their nature declaratory: see **Atty.-Gen. v. Theobald,** (1890) 24 Q.B.D. 557. A third class consisted of statutes passed for the purpose of protecting the public against some evil or abuse, although retrospective operation might deprive some person or persons of a vested right: see **R. v. Vine,** L.R. 10 Q.B. 195.

The Amendment Act of 1928 did not come within any of the classes of statutes specially mentioned in which the retrospective operation of a statute was the more to be expected. It remained to apply the principles already enunciated. In His Honour's opinion it could not be said to appear very clearly that S. 7 of the Amendment Act, 1928, had retrospective effect. The amendment was introduced by the words "notwithstanding anything to the contrary in section 119." Such words did not necessarily indicate the retrospective operation of the statute. That language was used in the 1927 Amendment, which was prospective, and it appeared in other amendments which were not retrospective. In the 1925 Act the reference was in terms to installations both before and after the Act. In the 1927 Act

the reference was in terms to installations after that Act, while in the 1928 Amendment the installations to which the amending section referred were not expressly mentioned. The omission of the words "after the commencement of this Act" would be of significance if occurring in an amendment of S. 17 of the 1927 Act, but there was not the same significance when those words were merely not found in a provision substituted therefor. There was little context in the amending statute to assist, but an examination of the language of the amendment itself, did not clearly indicate that a retrospective reference was intended. The words, "unless prior to such installation consent in writing is given" had a prospective ring, and contemplated, His Honour apprehended, a condition which might be satisfied after the operation of the statute. The form of the draftsmanship was important. The amendment was drafted in the form of a rule "where, etc." No reliance in support of the view taken was placed on the words "shall not be a charge," because those words might be indicative as much of the determination of the Legislature as of futurity, and such language would not be inappropriate if the intention was to cancel certain charges previously existing. They were, however, not inapt where the reference was to the future. Apart from those words, the present tense was used.

At the commencement of the 1928 Amendment it would not be possible in many cases to create statutory charges even by consent, for the necessary consent was one "prior to the installation." It was submitted that a retrospective effect made the law uniform. Lack of uniformity in the law was often met with where the law had been amended by successive Acts.

By S. 119 of the 1925 Act the Legislature interfered with the rights of mortgagees and so interfered without notice. It was argued that S. 7 of the 1928 Amendment Act evidenced a compromise by which the Legislature remedied to some extent what was said to be the wrong committed in 1925 or earlier. By 1928, however, the Board had vested rights existing by virtue of the 1925 Act and those rights, like the rights of individuals, were not to be taken away except by clear words or by necessary implication: Cf. **Hedderwick v. Federal Commissioner of Land Tax,** 16 C.L.R. 27, 37, per Griffith, C.J. The statute contained no evidence of such a bargain. It might equally, if speculation were indulged in, have been designed, while leaving existing charges unaffected, to afford relief for the future to Boards and small landlords where the amounts due for installations were less than £30. Certainly the provisions of S. 17 of the 1927 Amendment Act must, in practice, have caused an inconvenience and embarrassment which installations under £30 might, because of the increased value of the land, scarcely seem to warrant. If it had been intended that the 1928 Amendment should cancel out all existing charges exceeding £30 where consent had not been given by the owners and the mortgagees of the land, if any, the language used was far from making it as Lord Ashbourne said, "appear very clearly in the terms of the Act" or by "necessary and distinct implication." The existing charge, in His Honour's opinion, was not cancelled by the 1928 Amendment Act and consequently the plaintiff's action failed.

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

Solicitors for defendant: **Macalister Bros.,** Invercargill.

Reed, J. October 7th, 1930.
Auckland.

BENNETT v. BENNETT.

Divorce—Practice—Petition by Husband—Marriage Beyond New Zealand—Change of Domicil to New Zealand—Wife Still Resident Abroad—Order as to Service of Petition—Form of Notice to be Served With Order.

Motion for an order for directions as to service of the citation and petition in a suit by a husband against his wife for divorce. It appeared from the petition that the parties were married in Sydney on 17th June, 1917, that they had no issue, and that owing to unhappy differences they were separated by mutual consent in December, 1919. The husband then went to sea, and later set up business in New Zealand as a butcher. A maintenance order was obtained by the wife against her husband on 5th August, 1920, and in 1923 the husband was brought back to Sydney as the result of extradition proceedings commenced by her. These proceedings were not, however, continued, and the petitioner and his wife lived and cohabited together. The petition alleged that in or about February, 1924, it was agreed between the parties that the petitioner should return to New Zealand to resume business and that his wife should follow him within one month. The petitioner then returned to New Zealand but his wife did not follow him and the petitioner and his wife had not since lived together. The petition alleged that the petitioner sent his wife maintenance until August, 1926, when he became seriously ill and had since been able to earn only sufficient to maintain himself. Upon those facts the petitioner claimed: (1) that there was a separation by mutual consent in February, 1924, or alternatively (2) that the respondent wilfully deserted the petitioner in March, 1924, and prayed for a divorce.

Dickson for petitioner.

REED, J., said that since his judgment in **Liversey v. Liversey,** (1926) N.Z.L.R. 117, he had reconsidered the form of notice to the respondent in cases of the present class, and had had the further advantage of discussing the matter with some of his brother Judges, with the result that he thought the form appended was more suitable. The petition, as was required in cases of the present nature—**Parsons v. Parsons,** 32 N.Z.L.R. 723, **Burfield v. Burfield,** (1916) N.Z.L.R. 524—quite properly set out in detail the domestic history of the parties. After reading the allegations contained in the petition, His Honour said that there would be an order for personal service upon the respondent, the answer thereto to be filed at the office of the Court within thirty days of service. The order, including a copy of the notice below, should be served upon the respondent with the other proceedings.

NOTICE TO THE RESPONDENT.

"This Order fixing the time for filing the Answer of the Respondent has been made by a Judge of the Supreme Court of New Zealand upon certain conditions.

"1. The Petitioner alleges that he is domiciled in New Zealand—that is to say, that he is a permanent resident of this Dominion.

"2. If the Petitioner has been domiciled in New Zealand for not less than two years he is entitled to sue in the Supreme Court of the Dominion for a divorce based on any ground specified in the Statute laws of the Dominion and no other Court has jurisdiction to entertain a Petition by the Petitioner or grant a divorce on his application.

"3. The Petitioner alleges two alternative grounds for divorce: (a) Separation by mutual consent, (b) Desertion of the Petitioner by the Respondent.

"4. As to the first of these the law of New Zealand is that if a husband and wife by mutual consent agree to separate and such agreement is in full force and has so continued for not less than three years either party may in New Zealand sue for a divorce. Such agreement need not necessarily be in writing, but proof must be given by the Petitioner that there was either an express or implied agreement to separate.

"5. As to the second the law is that a Petitioner may obtain a divorce if he proves: 'That the respondent without just cause has wilfully deserted the petitioner, and without just cause has left the petitioner continuously so deserted for three years or more.'

"6. The Respondent has a right to appear and defend the suit if she has a defence or desires to bring before the Court any matter relevant to the case or touching the question of alimony or custody of children.

"7. Application may be made to the Court either by separate Petition or in the course of the proceedings for alimony or maintenance for the benefit of the respondent even though the Petitioner may be entitled to the divorce.

"8. Lest her absence from the Dominion may impose a hardship on the Respondent His Honour the Judge directs the Petitioner to forward to his wife the sum of £5 in order that she may take advice in case she should desire to defend the suit.

"9. If she desires to defend the suit or apply for maintenance she should either directly or through a Solicitor in the place where she is send authority to a Solicitor in New Zealand instructing him to act for her.

"10. The Petitioner by accepting this order, undertakes to repay the Respondent's Solicitor the cost of filing an answer to the Petition or filing a Petition for alimony and of appearing before a Judge in Chambers upon an application as to the Respondent's future costs and as to the expenses to which she may be put in proceeding to New Zealand to conduct her defence should she decide to go there."

Solicitor for petitioner: **J. F. W. Dickson, Auckland.**

Reed, J. October 21: 24, 1930.
Wellington.

WANGANUI ABATTOIR CO. LTD. v. HANSEL AND WANGANUI MILD CURE BACON CO. LTD.

Practice—Discovery—Production of Documents—Order Refused on Ground of Tendency to Expose Defendant to Prosecutions Under Statute—Time Limit on Prosecutions Under Statute—Production of Documents Outside Time Limit Refused Because of Possibility of Their Assisting in Proof of Subsequent Offences—Slaughtering and Inspection Act, 1908, Ss. 17, 52, 53—Amendment Act, 1917, S. 4.

Summons by plaintiff company for an order for production and inspection of documents. The summons was resisted by the defendants on the ground "that the information contained therein might tend to lay the company open to prosecutions under S. 53 of the Slaughtering and Inspection Act, 1908." The documents in question were the defendants' ledger, day books, invoice books, copies of statements and orders from June, 1928, to July 30th, 1930. The action was brought by the plaintiff company, as controlling the registered abattoir and under a deed of delegation from the City Council of Wanganui, for fees under the above Act for selling or exposing for sale the carcases of pigs without having such pigs slaughtered at the registered abattoir or paid to the plaintiff company the fees payable when pigs were not slaughtered at such abattoir.

Parry for plaintiff.

Perry for defendants.

REED, J., said that the rule was that discovery and production of documents and discovery by interrogatories were all subject to the same general principles: **Roskruge v. Ryan,** 15 N.Z.L.R. 246, 254. It was *prima facie* a valid objection, therefore, that the production for inspection of the account books of the defendant company might tend to lay the company open to prosecution. The affidavit that it would do so was not, however, conclusive; the Court must see, from the circumstances of the case, that there was reasonable ground to apprehend danger of incrimination: **R. v. Boyes,** 30 L.J. Q.B. 301. So far as His Honour was advised the present action was based on the provisions of S. 4 of the Slaughtering and Inspection Act Amendment Act, 1927. By S. 17 of the principal Act it was declared to be unlawful "to sell or expose for sale" in any district in which there was a registered abattoir "any meat slaughtered elsewhere than in a registered abattoir." That section was subject, however, to the special provisions in the Act relating to meat-export slaughterhouses. There was also a proviso authorising the Governor to exempt from the operation of the section any slaughter-house the principal business whereof was the tinning of meat or the curing of bacon and hams. It was only to that proviso that S. 4 of the Amending Act could possibly apply; but His Honour was informed at the Bar that the defendant company had no such exemption nor was it a meat-export slaughterhouse. Whatever ground, therefore, upon which the plaintiff company relied to recover the fees claimed it did not appear to be based upon any statutory provision which would render the defendant company liable to penalties for non-payment. That disposed of the contention of the defendant that the non-payment of fees might be held to be a continuing offence rendering the company liable to prosecution for a period outside the statutory limitation of six months, as provided by S. 50 of the Justices of the Peace Act, 1927. That contention was addressed to the submission by the plaintiff that an order for inspection of the books and accounts might be made limited to the period between June, 1928, and say March, 1930, so that no information could be obtained from the books which would assist the prosecution for any offence alleged to be committed within the limitation period. If the defendant company had committed unlawful acts as declared by S. 17, it had, by S. 52, committed offences for which it was liable to penalties under S. 53. Although the inspection of the books and accounts might be confined to the limited time suggested it was not possible to say with certainty that the information thereby obtained would not be of assistance in proving the commission of those offences. If it once appeared that the production of documents might place the producer in danger of incurring penalties, great latitude should be allowed to him in judging for himself of the danger and his statement to that effect in his affidavit should be accepted. The object of the law was to afford to such a party protection against being brought by means of his own documents within the penalties of the law: **R. v. Boyes** (*cit sup.*). For the above reasons His Honour thought that no order should be made.

Summons dismissed.

Solicitors for plaintiff: **Treadwell, Gordon and Treadwell,** Wanganui.

Solicitors for defendants: **Marshall, Izard and Barton,** Wanganui.

Ostler, J. October 8; 15, 1930.
Wellington.

N.Z. FRUITGROWERS' FEDERATION LTD. v. REGISTRAR OF BUILDING SOCIETIES.

Industrial and Provident Society—Rules—Rule Providing for Allocation of Portion of Profits Among Non-Member Purchasers from Society *intra vires*—Companies and Industrial Societies Contrasted—Duties of Registrar as to Amendments to Rules—Industrial and Provident Societies Act, 1908, Ss. 5, 7, 10, and Second Schedule.

Appeal by way of case stated, under Ss. 5 and 7 of the Industrial and Provident Societies Act, 1908, from the refusal of the respondent, the Registrar of Building Societies for the Wellington District, to register certain amendments to its rules made by the appellant society. That society was registered under the above-mentioned Act in 1916. It had no private persons as members, all its members being local incorporated associations of fruitgrowers. Its objects, as shown by its amended rules, which were registered in 1926, were: "(a) To engage in any business dealing with the fruit industry or in any enterprise calculated to advertise extend or otherwise advance the interests of those it represents. (b) To act in any capacity for the Fruit Control Board to be set up under the Fruit Control Act, 1924. (c) To edit any literature relating to fruit or fruit disease. (d) To carry on any business as merchants and buy and sell anything which may be of use to fruitgrowers. (e) To promote and protect the fruit industry throughout the Dominion and to establish a closer bond of unity and co-operation amongst all those engaged in the production of any kind of fruit." The capital of the Society was made up of £1 shares, each association member having by the rules to take up one share for every fifty members or fraction thereof on its register. The shares were not transferable. The profits of the Federation had been practically all made by dealing as a merchant in such goods as were required by fruitgrowers, such as agricultural implements, sprays, packing case and wrapping materials, etc. It had traded with all members of the public who had chosen to buy and not merely with its members or members of local associations. Its 1926 rules provided that its profits might be applied to any lawful purpose which it should in general meeting determine. Power was reserved in the 1926 rules to make new rules. At its Annual Conference on 3rd July, 1929, the Federation passed a new rule relating to the allocation of profits, providing, in short, for the allocation by the directors of portion of the profits of the Society among fruitgrowers (not members of the Society) in proportion to the value of their purchases from the Society.

The Registrar refused to register the new rule, and the appeal was from that refusal. The ground of the refusal was, briefly, that the new rule gave the Federation power to distribute a large part of its profits among persons who were not members, and it was thought by the Registrar that such power was contrary to the spirit of the Act, and to the principles of law relating to incorporated societies.

Parry for appellant.

Cooke for respondent.

OSTLER, J., said that the analogy between a limited company under the Companies Acts and a society incorporated under the Industrial and Provident Societies Act, 1908, was by no means a complete one. The differences were referred to by Lord Tomlin in a recent case in the House of Lords: **Hole v. Garnsey,** (1930) A.C. 472 498. Both were corporate bodies, but the sole purpose of a company was the making of pecuniary profit for its members; whereas that was not the case with an incorporated society, which was shown by the fact that no member other than a registered society could have an interest in the funds of the society exceeding £300, and also by the fact that such a society might apply its profits to any lawful purpose. A company's powers were closely circumscribed by

its memorandum of association, which could not be altered, except for certain purposes, and then only with the sanction of the Court, which acted as the guardian of the interests of its members. An incorporated society had no such limiting memorandum. As a condition of incorporation it must make rules on certain specified subjects, one of those subjects being the mode of application of its profits: see Second Schedule to the Act. But those rules were not in the same position as a memorandum of association of a limited company. A society could alter them from time to time: see S. 7; and the Act contained no reference to the manner in which the rules might be altered, except that the new rules must not be contrary to any provision of the Act. As His Honour said, one of the provisions of the Act was that the profits of such a Society might be applied to any lawful purpose: see S. 10 (f). As an incorporated society could alter its rules in any way so long as the new rules were not contrary to the provisions of the Act, and as the Act provided specifically that the profits of such a society might be applied to any lawful purpose, it seemed to His Honour to follow that such a society might from time to time by new rules alter the purpose to which its profits might be applied, and the Registrar was not justified, so long as the purpose was lawful, in refusing to register the altered rule merely because it provided for the profits going outside its members. That point had never so far been expressly decided. His Honour referred to **Warburton v. Huddersfield Industrial Society,** (1892) 1 Q.B. 817, where the Court of Appeal expressly refrained from deciding the question. That was the only decision which His Honour could find dealing with the matter, except a note of a Scotch case, **Lafferty v. Barrhead Co-operative Society,** (1919) 1 Sc. L.T. 257, in **Fuller on Friendly Societies,** 4th Edn. 386. No report of that case was available and it was impossible to ascertain from the note in **Fuller** what the ground of the decision was. His Honour gathered from the context of the book that the ground of the decision was the same ground as was taken by the Court of Appeal in **Warburton's case,** that was to say that the purpose to which it was proposed to devote the money was not within the provisions of the rules. His Honour came to that conclusion because the learned author said that the English statute "enables a society to vote a portion of its profits to the furtherance of political ends if the purposes are stated in the rules," etc. That passage seemed to show that if the rules clearly provided for the application of the profits to political ends the rules were good and registerable and the profits could be applied to political ends. His Honour pointed out that the English statute had since **Warburton's case** been amended, and, as amended, authorised the society to make rules providing for the appropriation of profits to "any purpose" stated therein or determined in such manner as the rules direct. The words "any purpose" replaced the words "any lawful purpose" appearing in the earlier statute, but His Honour could not see that the amendment had widened the purposes to which the profits could be applied. "Any purpose" must mean "any lawful purpose." On the best consideration His Honour could give to the matter it seemed that an incorporated society had power to alter its rules from time to time so as to apply its profits to any lawful purpose; that it was not bound to apply its profits only among its members; and that so long as the purpose was lawful such rule was not contrary to the provisions of the Act; and in that case the Registrar had a duty under S. 7 (d) of the Act to register the new rules. Apparently in England rules were allowed which provided for the distribution of profits among non-members of the society. In **Hampton v. Toxteth Co-operative Provident Society,** (1915) 1 Ch. 721, that Society's rules provided for the division of a portion of its profits among members and non-members in proportion to their purchases, which was exactly what the new rule in the present case purported to do. That rule ran the gauntlet of the Court of Appeal without so much as one adverse comment, and, moreover, the whole of the judgments proceeded upon the ground that an incorporated society might amend its rules so as to apply its profits to any lawful purpose without giving a member any right to complain. His Honour stated that a close perusal of that judgment showed that the Court of Appeal held the opinion that a member could not object to an alteration to the rules so as to dispose of the profits in a different way from that provided for by the rules when he became a member. In His Honour's opinion, such a decision was in accordance with principle. Every member when he joined such a society was presumed to know that the society had the right to apply its profits to any lawful purpose and to amend its rules. It therefore should be within the contemplation of every member that the rules in that respect might be altered at any time. When a member joined he merely contracted, as it was put by Phillimore, L.J. for the contingent chance that the rules would not be altered.

The case was presented by counsel for the Registrar rather as if the new rule were an attempt by a majority of the society to take away from the minority vested rights. His Honour did not think that aspect was one with which the Registrar ought to concern himself, because there was implied power in the Court, where there was attempted fraud or bad faith or oppression of a minority, to grant redress. In the present case there was no evidence of any dissent by any member, and it might well be that the rule had the approval of the whole of the members of the society. In the absence of any evidence of dissent, His Honour thought that the Court ought to assume on the present application that the new rule expressed the wish of all the members. If it did not, then, notwithstanding its registration, its validity could be attacked on proper grounds, but His Honour was satisfied that it could not be attacked merely on the ground that it provided for the disposal of its profits or a large part of its profits among non-members. It was clear from the decision of the House of Lords in **Hole v. Garnsey,** (1930) A.C. 472, that as against dissentient members the power of amendment of the rules must be confined to such amendments as could reasonably be considered to have been within the contemplation of those members when they joined the society. In His Honour's opinion, however, that was not a consideration with which the Registrar should concern himself. That was a question entirely for the Court. The Registrar had his statutory duty clearly defined. So long as any amendment to the rules was not contrary to the provisions of the Act, in His Honour's opinion, it was the duty of the Registrar to accept it and to issue an acknowledgement of registry in the form provided by the Act.

Solicitors for appellant: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

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

Adams, J. October 6; 14, 1930.
Christchurch.

IN RE GRANT.

Administration—Capital and Income—Salvage Expenses—Testator Partner in Theatre Business—Partnership Assets Including Lease of Theatre—Purchase by Surviving Partner of Deceased's Interest in Partnership—Surviving Partner Becoming Insolvent—Rent Under Lease in Arrears—Executors Taking Assignment from Surviving Partner of Lease and Plant and Chattels Used in Theatre and Later Paying Sum to Landlord for Surrender of Lease—Executors' Expenditure in Nature of Salvage and Payable out of Capital.

Motion to determine in what manner the loss resulting to the estate of P. Grant, deceased, from the carrying on of the Lyric Theatre at Auckland, and the cost of surrendering the lease of the theatre should be borne or apportioned as between capital and income. The deceased was, prior to his death, in partnership with one W. J. Bannehr in a motion picture business carried on at the Lyric Theatre, the partners being lessees of the theatre under a memorandum of lease dated 29th July, 1926, for a term of years expiring in 1934, and liable for the rent and other obligations under the covenants of the lease. The outgoings under the lease were approximately £3,000 per annum. The testator died in February, 1927, and the partnership therefore terminated. The surviving partner, under an option given him by the executors, purchased the testator's interest in the partnership for £202 11s. 4d. and paid the purchase money to the executors. The business was a failure. In November, 1928, the rent and rates were heavily in arrear and, Bannehr being insolvent, the whole liability for the rent and other outgoings under the lease was thrown back upon the estate of the testator. The executors, then, with the view of protecting the estate, took an assignment from Bannehr to themselves of his interest in the lease and the plant and chattels used in the theatre. In March, 1929, the trustees applied for and obtained an order of the Supreme Court authorising them to exercise certain powers in relation to the management of the theatre and its disposal, including power to surrender the lease. After futile efforts in other directions the lease was finally surrendered, the trustees having to pay the lessor £7,500 as consideration on the surrender. The total loss in relation to the partnership business amounted to £9,612 7s. 9d.

Burns for Perpetual Trustees Estate and Agency Co. Ltd.
Ongley for Matthew Barnett Grant and others.
Cuthbert for Public Trustee.

ADAMS, J., said the trustees' action throughout was in the nature of a salvage operation. The share of a partner in the property of the partnership was his proportion of the joint assets after their realisation and conversion into money, and after payment and discharge of the joint debts and liabilities. As stated in **Marshall v. McLure,** 10 A.C. 334, it was not a definite or immediately ascertainable quantity, but only what might be coming to him upon the partnership being wound up and the accounts taken. To assume that under the will of the testator the executors took an equal half interest in the lease was, therefore, a fallacy. The lease was, and continued to be, part of the partnership assets at any rate until 26th October, 1927, when the executors sold to Bannehr, and did not pass to the executors until 18th February, 1929, by assignment from Bannehr. The present case fell directly within the second proposition laid down by the Vice Chancellor in **Allen v. Embleton,** 4 Drew. 226, where it was held that certain liabilities for rent and dilapidations should in similar circumstances be borne by the corpus. The answer to the question in the originating summons was, accordingly, that the loss should be borne by the corpus.

Solicitors for plaintiffs: **Clifford Jones and Lee,** Christchurch.
Solicitors for children of testator: **F. W. Ongley,** Wellington.
Solicitor for Public Trustee (representing the widow and present and future grandchildren): **R. A. Cuthbert,** Christchurch.

Ostler, J. October 10; 16, 1930.
Wellington.

CLARKE v. ELLERMAN BUCKNALL & CO. LTD. (No. 2).

Practice—Striking Out Party—Co-defendants—Plaintiff Entitled at any Stage of Proceedings to Have Party Joined by Him as a Defendant Struck Out Unless Co-defendant Prejudiced—Procedure Summons to Strike Out and Not Discontinuance—Fact that Striking Out of the Defendant will Enable Plaintiff to Have Action Tried by Jury Not a Ground for Refusing Order.

Plaintiff's summons to strike out a party to the action. The writ was issued by the plaintiff on the 23rd December, 1929, against Ellerman Bucknall and Co. Ltd. and the Federal Steam Navigation Co. Ltd. The latter company was joined merely as agent for the former company. The allegations in the writ were that the plaintiff was an employee of the New Zealand Shipping Co. Ltd., which company was engaged as stevedores to unload the steamship "City of Lincoln" (a ship belonging to the first-named company) at Wellington, in September, 1929. The plaintiff claimed that he was injured during the unloading of the ship by the breaking of some tackle, which owing to the negligence of the shipowner was not reasonably fit for the purpose for which it was used. On the application of the plaintiff an order was made on 11th April, 1930, joining the New Zealand Shipping Co. Ltd. as a defendant. An amended statement of claim was thereupon filed on behalf of the plaintiff, in which an alternative cause of action was added, claiming that the accident was caused by the negligence of the foreman of the stevedoring gang employed by the New Zealand Shipping Co. Ltd. in using tackle, which was intended for raising light cargo only, for raising heavy cargo. The New Zealand Shipping Co. Ltd. later applied for and obtained an order for discovery as against the other two companies. The plaintiff now filed this summons for an order that the New Zealand Shipping Co. Ltd. be struck out as a defendant, on the ground that the plaintiff had no cause of action against that company. The application was opposed on behalf of Ellerman Bucknall and Co. Ltd. but it was supported by the New Zealand Shipping Co. Ltd.

O'Regan for plaintiff.
Treadwell and **James** for N.Z. Shipping Co. Ltd.
Watson for the other defendants.

OSTLER, J., said that as both the plaintiff and the New Zealand Shipping Co. Ltd. desired that an order should be made on the summons His Honour had to consider only one point—whether the making of such an order would prejudice the other defendants. Mr. Watson opposed the summons on the grounds first that the New Zealand Shipping Co. Ltd. was joined at the instance of the plaintiff, and secondly upon the ground that the learned Judges who reviewed the order for discovery stated that there were questions to be decided between the New Zealand Shipping Co. Ltd. and Ellerman Bucknall & Co. Ltd. His Honour could see no ground on which Ellerman Bucknall and Co. Ltd. could possibly be prejudiced by such an order. The mere fact that the plaintiff had mistakenly thought that another defendant should be joined and had secured that joinder was no reason why, when the mistake was discovered, the plaintiff should not be allowed to strike out the defendant who had been joined under the misapprehension. The plaintiff must, of course, pay the costs of the party wrongly joined, but that seemed to His Honour to be the only penalty he must pay for his mistake. It was unquestionable that if the plaintiff decided to discontinue the action and commence a new action against Ellerman Bucknall and Co. Ltd., that company could not raise any objection owing to the fact that the New Zealand Shipping Co. Ltd. was not joined as a defendant. It could, of course, as it could in the present proceedings if the New Zealand Shipping Company's name was struck out, issue a third party notice, but it certainly would not have the right to have the New Zealand Shipping Co. Ltd. joined as a co-defendant. Ellerman Bucknall and Co. Ltd. pleaded that it provided proper gear, but through the negligence of the New Zealand Shipping Co. Ltd. that was not used. That plea would not be affected by the striking out of the New Zealand Shipping Co. Ltd., and if it was able to establish that, and show that there was no negligence on its part, then the plaintiff could not succeed against it. In His Honour's opinion, a plaintiff in general had a right to discontinue at any time against one or more defendants whom he thought he had wrongly joined. There was no method of discontinuing under our rules similar to that in force under the English rules, and therefore the method adopted in our practice was a summons to strike out a party wrongly joined. See **Blair v. Duntroon Hakateramea Railway Company,** N.Z.L.R. 5 S.C. 309. Mr. Watson contended that if the name of the New Zealand Shipping Co. Ltd. were struck out the plaintiff would be able to obtain a jury for the trial of the action, which he could not do if the summons was refused, because the New Zealand Shipping Co. Ltd. was his employer, and the action could be founded on contract. In His Honour's opinion, that consideration should not affect the decision of the Court. The plaintiff now was of opinion that he had no cause of action except as against Ellerman Bucknall and Co. Ltd. In that action he was entitled to a jury. In His Honour's opinion, it was not the duty of the Court to punish the plaintiff for a mistake made by him or his advisors beyond making him pay the costs occasioned by that mistake.

There would be an order accordingly striking out the name of the New Zealand Shipping Co. Ltd. as a defendant. With regard to the costs of the New Zealand Shipping Co. Ltd., those would be reserved, and probably counsel could agree as to those.

Solicitors for plaintiff: **O'Regan and Son,** Wellington.
Solicitors for N.Z. Shipping Co. Ltd.: **Treadwell and Sons,** Wellington.
Solicitors for the other defendants: **Chapman, Tripp, Cooke and Watson,** Wellington.

Kennedy, J. July 17; 19, 1930.
Nelson.

KIDSON v. KIDSON.

Divorce—Permanent Maintenance—Wife Found Guilty of Adultery—Wife Able to Work and to Maintain Herself Except for Intermittent Periods Owing to State of Health—Permanent Maintenance Allowed at Four Shillings per Week—Form of Order.

Petition for permanent maintenance by wife (respondent in suit) found guilty of adultery. The facts are stated in the report of the judgment.

Moynagh for respondent in support of petition.
Fell for petitioner to oppose.

KENNEDY, J., said there was no dispute as to the jurisdiction to award maintenance for a guilty wife without means and unable to earn her own living: see **Earee v. Earee,** 6 G.L.R. 197; **Ridder v. Ridder,** (1920) G.L.R. 3, and **Bolton v. Bolton,** (1928) N.Z.L.R. 473. The contest was as to the wife's ability to live without some contribution by her former husband. No question arose upon the present application as to the maintenance of the child although the wife appeared to have suffered

a breakdown because of the acceptance of work too great for her strength in an endeavour to earn further money for the maintenance of the child in a boarding school. On the present application only the wife's own ability to earn and her personal needs would be considered. It appeared from a medical certificate, admitted by consent, that the wife was incapable of hard or strenuous work, but that she was fit for light or moderate work and would enjoy better health if she was so employed. The doctor giving the certificate stated: "There will be periods when she will be incapable of work so that at whatever type of work she will be engaged in, her employment is likely to be intermittent. I do not think her condition has materially altered in the last four years, nor is it likely to do so. She will always be in a condition of more or less poor health." His Honour thought, therefore, that the respondent's condition of health was not as bad as stated in her petition wherein she said that she was destitute and unable to work owing to the state of her health nor was it quite as good as that stated by her when cross-examined when she said: "Apart from the child what I earn would keep me." His Honour thought, having regard to Dr. Low's evidence that there must be some small supplement to her earnings to provide for intermittent periods when she could not work. Upon the scanty material before him His Honour assessed that at four shillings per week. Section 41 of the Matrimonial Causes Act, 1928, might be availed of, if necessary, by the petitioner or by the respondent. The following order would be made: "That the petitioner pay the respondent during their joint lives and so long as the respondent remains chaste and unmarried the weekly sum of four shillings from the date of this order, such sums to be paid monthly, for her maintenance and support. Leave is reserved to the petitioner and to the respondent from time to time to move to discharge this order or to vary or to modify this order either by altering the time of payment or by increasing or diminishing the amount or by temporarily suspending the order as to the whole or any part of the money ordered to be paid and by subsequently reviving it wholly or in part as the Court thinks just." The petitioner would pay the respondent the costs of the present application fixed at £3 3s. 0d. costs and disbursements.

Solicitors for wife: **Harley and Moynagh,** Nelson.
Solicitors for husband: **Fell and Harley,** Nelson.

Kennedy, J. June 19; 24, 1930. Christchurch.

McDOUGALL v. MILLER.

Master and Servant—Wrongful Dismissal—Notice—Damages—Measure of Damages in Case of Yearly Hiring Not Greater Than Wages for Unexpired Portion of the Year—Award Applicable to Trade Providing for One Week's Notice—Contract of Employment on Terms of Award Except as to Wages—Servant Entitled Only to Week's Notice—Notice Given by Employer But Employment Continued After Expiration of Notice—Fresh Notice Required—Servant Coming From Scotland to Take up Employment in New Zealand Not Entitled to Recover as Damages Travelling Expenses of Himself and Family Where Contract of Employment Not Concluded Until After Arrival of Servant in New Zealand.

Action for damages for wrongful dismissal. The plaintiff alleged that he was in July, 1928, in Scotland, employed for an indefinite period by the defendant as a draper's assistant and therefore upon a yearly hiring, and that he was, after he had come to New Zealand to undertake his duties, wrongfully dismissed by the defendant. He claimed as damages a year's salary at £5 per week and also £50 for expenses said to have been incurred by himself and his family in coming to New Zealand. The facts sufficiently appear in the report of the judgment.

McLachlan for plaintiff.

Donnelly for defendant.

KENNEDY, J., said that the plaintiff proceeded to New Zealand and commenced work for the defendant on the 14th December, 1928. He ceased to be employed by the defendant on the 18th May, 1929. If, then, the yearly hiring commenced either on the date of the alleged agreement in July, 1928, or on the 14th December, 1928, then it was clear that the plaintiff could not claim for a dismissal in May, 1929, one year's salary in lieu of notice; for, if the hiring were a general hiring, it would, without notice, terminate at latest on the 14th December, 1929, and the wages, which the plaintiff could have earned from the 18th May, 1929 to the 14th December, 1929, would be approximately £146 and the damages for wrongful dismissal could not, upon any view, exceed the sum.

His Honour was of opinion, however, that the hiring was not a general hiring arranged in Scotland, but that the plaintiff's employment was agreed to in New Zealand and that the terms of his employment, except as to wages, were to be found in the award regulating the class of employment undertaken by the plaintiff. His Honour reviewed the evidence as to the discussions in Scotland between the plaintiff and the defendant and said that he accepted the defendant's evidence and found that, while there was discussion as to New Zealand conditions and as to the advisability of the plaintiff going to New Zealand, there was no definite engagement of the plaintiff as a draper's assistant by the defendant made, nor one to be concluded by the plaintiff actually coming to New Zealand.

The plaintiff then, on his arrival in New Zealand, was employed by the defendant as a packer at £5 per week. An award applied to his employment and, apart from the salary agreed upon, the plaintiff's employment was on the terms of the award and terminable, in accordance with that award, by one week's notice. The defendant did not induce the plaintiff to bring his family to New Zealand but, subsequently to the employment, when his advice was asked, not unnaturally advised the plaintiff as to how best to bring his family to New Zealand, namely, through the Immigration Department. No damage was claimable therefor.

The plaintiff was dismissed without a definite notice. The defendant said that he gave the plaintiff an intimation that his employment would be continued only until his wife's arrival, but after her arrival in New Zealand, the plaintiff's employment was continued until, on the 18th May, 1929, without further notice the defendant intimated its termination. His Honour thought that as no definite time, other than the arrival of plaintiff's wife in New Zealand, was notified as the time to make the termination of the employment, and as the defendant continued the employment beyond that time without a new arrangement, he was bound to give a fresh notice.

The defendant alleged, as justifying summary dismissal, misconduct by the plaintiff. If the misconduct existed, the defendant did not avail himself of his power summarily to dismiss but continued the plaintiff in his employ, and no misconduct of recent date to the dismissal was proved justifying a summary dismissal. A general unsuitability for the position and a failure by the plaintiff to adapt himself to the conditions of his work and conscientiously to discharge his duties were alleged. The defendant, being aware of those matters, such as they were, chose to continue the employment and His Honour thought that he could not, on the ground either of incompetence or of any matter proved to have recently occurred justify a summary dismissal.

The plaintiff had, therefore, failed to prove a general hiring, but he had proved a hiring in terms of the award and a dismissal without notice required by the award. He was entitled to a week's wages in lieu of notice. There would, therefore, be judgment for the plaintiff for £5 with costs, disbursements and witnesses' expenses on the Magistrate's Court scale to be fixed by the Registrar.

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

Solicitors for defendant: **Williams and White,** Christchurch.

RICHARDSON v. HARRIS.

In the report of this case, *ante* p. 246, the following correction should be made: Substitute for the sentence commencing "Further their Honours thought it very unfortunate" in line 57 in the second column, the following sentence: "Further their Honours thought it very unfortunate that the solicitor for the appellant (who was not the solicitor for the appellant on the record) 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."

Compensation under the Public Works Act, 1928.

By A. C. Stephens, LL.M.

(*Continued from page 307.*)

Time Limits.

No claim can be made in respect of lands taken under the Act after a period of five years after the date of the proclamation taking the land. If the claim arises in respect of damage, the period is twelve months after the execution of the works out of which the claim has or may thereafter arise: Sec. 45 (1). The provision in regard to time limits first appeared in the Public Works Act, 1876, Sec. 72, where the period for claims in respect to damage was six months from the execution of the works. This period was extended to twelve months by the Public Works Act, 1882.

The period of five years applies only in the case of a claimant having an interest in the land taken, and not to a case ot a claimant suffering damage through the taking of the land of some other person: *Colenso v. Minister of Public Works*, 6 N.Z.L.R. S.C. 650. See also *Re Public Works Act, 1908*, (1916) G.L.R. 547. But if land has been taken from the claimant under the Act the period of five years applies both to the claim for the land and to a claim for injurious affection arising from the taking of it: *Kellick v. Minister of Public Works*, (1927) G.L.R. 406.

The term "execution of the works" was the subject of judicial interpretation in *O'Brien v. Minister of Public Works*, 29 N.Z.L.R. 476, 1053; (sub. nom. *O'Brien v. Chapman*) 12 G.L.R. 623, 744, and it was held by the Court of Appeal that the phrase meant the execution of the whole works. This decision was deprived of effect by the Public Works Amendment Act, 1910, which provided that the term "execution of the works" means the completion of the construction of any portion of a work where such portion in itself (and without reference to any other portion of the work) causes the damage; and such portion of the work shall be deemed to be completed when anything further that may be required to be done thereon to finish the same will have no effect either to lessen or increase the damage. This provision appears in the present Act: Sec. 45 (2).

The subsection is not well designed. It would have been better to have established a general rule that the time runs from the completion of the whole work with a proviso that, if the respondent can show that the completion of a portion of the work has caused the damage which is the subject of the claim, the time should run from the completion of such portion. This is apparently the effect of the subsection, but it could be more clearly expressed. The phrase "required to be done thereon to finish the same" is unsatisfactory. The Court would have to decide whether there remained anything required to be done to finish any portion of the work, but there is no indication as to whether the intention of the respondent as shown in its plans and specifications is to be the deciding factor. Presumably it was the intention of the Legislature that the rule in regard to the completion of a portion of the work should apply to the whole work, but the matter is not clear.

The mere taking of land where the execution of work is contemplated, does not amount to the execution of the work within the meaning of the section: *Kellick v. Minister of Public Works*, (1927) G.L.R. 406.

With regard to claims for compensation arising on the dedication of land for widening streets, it is questionable whether there is any time limit: *Cooper v. Karori Borough Council*, 30 N.Z.L.R. 273, 13 G.L.R. 322.

Title to Compensation.

If any doubt or dispute arises as to the right or title of any person to receive any compensation awarded under the Act, the respondent may, within sixty days after the filing of the award, cause the sum awarded to be paid into the Public Trust Office. The Public Trustee then holds the compensation subject to the order of the Supreme Court made on the application of any interested person: Sec. 91. See also Sec. 90 (3). This course was followed in the following cases:—

1. Where the compensation was awarded by a second Court after the first Court had dissolved without making an award and a new claim had been made in the same terms as the first one: *Minister of Public Works v. McLean*, 6 N.Z.L.R. 273.

2. Where the claim was barred owing to lapse of time: *Colenso v. Minister of Public Works*, 6 N.Z.L.R. 650. Probably it would have been more correct in this case to move to set aside the award. See *Sullivan v. Mayor of Masterton*, 28 N.Z.L.R. 921, 12 G.L.R. 136.

3. Where the respondent contended that as a matter of law no compensation was payable: *Penn v. Stratford County Council*, 13 N.Z.L.R. 33. See also *Kaihu Valley Railway Co. v. Nimmo*, 7 N.Z.L.R. 699, 707.

Payment of the amount of the award into the Public Trust Office does not preclude the respondent from contesting the validity of the award: *Minister of Public Works v. McLean* (*supra*); *Re Public Works Act*, (1916) G.L.R. 547.

The usual course is to move to set aside the award and for an order that the compensation be repaid to the respondent: *Minister of Public Works v. McLean* (*supra*); *Kaihu Valley Railway Co. v. Nimmo* (*supra*).

Payment to the Public Trustee should not be made unless there is a doubt or dispute as to the right to compensation. If there is any abuse of the provision the respondent may be made to suffer in respect to costs: *Hallenstein v. Mayor of Wellington*, 21 N.Z.L.R. 64, 4 G.L.R. 165.

General.

1. *Assignability of claim for compensation.*

This question has been raised but never decided: *Fern Hill Railway Co. v. Mayor of Dunedin*, 3 N.Z.L.R. S.C. 86, 91; *Re Public Works Act 1908*, (1916) G.L.R. 547.

2. *Interest on award.*

Interest on the amount of the award may be recovered from the time the award takes effect as a judgment of the Supreme Court: *Hallenstein v. Mayor of Wellington*, 21 N.Z.L.R. 64, 4 G.L.R. 165.

3. *Stamp Duty.*

Where the claim is made for the taking of land, stamp duty is apparently not payable on the amount of the award: *Walker v. Wellington and Manawatu Railway Co.*, 6 N.Z.L.R. S.C. 411. See also note to *Edgecumbe v. Borough of Hamilton*, 11 G.L.R. 234.

4. *Native Land.*

There are special provisions in regard to compensation for native land: Secs. 104-106.

5. *Originating Summons.*

When a question arises in connection with compensation under the Act and cannot be settled by any of the usual methods it may be made the subject of an originating summons. See *Hallenstein v. Mayor of Wellington* (*supra*); *Chairman, etc. of County of Kairanga v. Bannister*, 33 N.Z.L.R. 1184.

(*Finis*)

Costs in New Trial Cases.

"No Evidence to go to the Jury."

In our Courts it is seldom that an action for negligence heard before a Judge and a jury is, at the conclusion of the plaintiff's case, withdrawn from the jury; where such an application is made by the defence its consideration is generally reserved and the trial is proceeded with, this course being adopted on account of the balance of convenience, and to save the expense of a second trial, should the defendant's submission be upheld by the trial Judge and be subsequently reversed by the Court of Appeal.

In England the Court of Appeal has lately considered the matter from the point of view of costs and has laid down the rule that, where a defendant succeeds in getting the plaintiff's case withdrawn from the jury, and the trial Judge's ruling is reversed by the Court of Appeal and a new trial ordered, the defendant shall in no event have the costs of the first trial: *Halliwell v. Venables*, (1930) 99 L.J.K.B. 353. There Scrutton, L.J., said (at p. 355):

> "There has been too much lately of this trying to run cases on no evidence to go to the jury. It is very much better for the parties in the matter of expense that the verdict of the jury should be taken in such a case coupled with the submission that there is no evidence to go to the jury, because then you save the expense to the parties of a second trial. By way of enforcing that view we propose to act in the same way as the Court of Appeal did in the case of *McGowan v. Stott* in 1923, of which we have been supplied with a shorthand note, and to make the order that the plaintiff has the costs of this appeal, but with regard to the costs of the first trial, if the plaintiff succeeds in the new trial she is to have the costs of the first trial, but the defendant is not to have the costs of the first trial in any event. Perhaps when counsel for the defendant know that this is added to their risk they may not be quite so ready to take the point that there is no evidence to go to the jury."

"For the peace of the world the lawyers of the world should co-operate, since, under the pressure of such a body of thinkers, Governments will be forced to bring within the realm of law that which is now under the realm of anarchy." —Sir William Jowitt, K.C.

"Some day we will have a state of affairs in which people who administer the law will require to know something about it." —Lord Hewart.

New Zealand Law Society.

Proceedings of the Council.

A meeting of the Council of the New Zealand Law Society was held in Wellington on Friday, 3rd October, 1930.

The following gentlemen were in attendance as the representatives of the District Law Societies, namely:

Auckland	(represented by)		Mr. R. P. Towle
Canterbury	,,	,,	Mr. G. T. Weston and Mr. M. F. Luckie (proxy)
Gisborne	,,	,,	Mr. C. A. L. Treadwell
Hamilton	,,	,,	Mr. F. A. Swarbrick
Hawke's Bay	,,	,,	Mr. E. F. Hadfield
Marlborough	,,	,,	Mr. H. F. Johnston, K.C.
Otago	,,	,,	Mr. R. H. Webb
Southland	,,	,,	Mr. P. Levi (Proxy)
Taranaki	,,	,,	Mr. C. H. Weston
Wanganui	,,	,,	Mr. W. A. Izard
Westland	,,	,,	Mr. A. M. Cousins
Wellington	,,	,,	Messrs. A. Gray, K.C., (President) C. H. Treadwell (Vice-President), & A. A. Wylie.

Late Rt. Hon. Sir Robert Stout, P.C., K.C.M.G.

Before proceeding with the business of the meeting, the President referred to the death of the Rt. Hon. Sir Robert Stout, P.C., K.C.M.G., formerly Chief Justice of New Zealand, which had occurred since the previous meeting of the Council, and on his motion it was resolved:

> "That the Council of the New Zealand Law Society records with very deep regret its sense of the loss sustained by the community in the death of the Rt. Hon Sir Robert Stout, P.C., K.C.M.G., for many years Chief Justice of New Zealand, and tenders to Lady Stout and the members of her family its sympathy with them in their bereavement."

Various matters of interest to the profession were considered, some being of a more or less confidential nature. Among other subjects the following were dealt with:

The Administration Act, 1908, Section 20.—Remuneration of Executors.

The subject of apportionment of remuneration between executors, where there are more than one, received further consideration.

It was resolved to recommend that legislation be promoted empowering the Court to apportion the remuneration to executors, and also empowering the Court to grant remuneration in the following cases, viz:

1. To an executor or administrator who acts with or without the consent of any other executor or administrator appointed with him.

2. To the representatives of an executor or administrator who dies before the estate in which he is acting is wound up.

Brokerage on Government Loans.

At the request of a District Council, it was resolved to communicate with the Secretary to the Treasury, asking him to consider favourably the question of making the same allowance to solicitors as is now made to brokers

and bankers on application for Government debentures. The matter was later referred to the Secretary to the Treasury, who decided not to depart from the present practice which provides for payment of brokerage to registered sharebrokers and bankers only.

Scale of Conveyancing Charges.
Agreements for Sale and Purchase.

The Committee set up to consider a suggested alteration of the scale for preparation of agreements for sale and purchase recommended as follows :

1. Where the purchaser is let into possession before taking title, the charge shall be two-thirds of the appropriate charge for a deed of mortgage securing a sum equivalent to the total amount of the purchase-money, inclusive of mortgages agreed to be taken over by the purchaser.

2. Where separate solicitors act for vendor and purchaser, the fee chargeable by the vendor's solicitor shall be as above, and the fee chargeable by the purchaser's solicitor shall be the equivalent of one half of the vendor's solicitor's fee.

3. That no maximum charge is fixed.

Solicitors' Fidelity Guarantee Fund.

The Committee appointed to carry out a general publicity scheme for the purpose of acquainting the public with the provisions of the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, reported that the form of the advertisement already published had been altered and increased in size. The action of the Committee was approved.

Reference was made to Regulations in course of preparation relating to the procedure to be followed in the matter of claims against the Fund, and it was intimated that after the draft of the Regulations had been considered by the District Councils, and approved by the Attorney-General, a special meeting of this Council would be convened for the purpose of dealing with suggestions of amendments and formally passing the necessary resolution for adoption of the Regulations.

Appeals from Oral Judgments.

Rule 13 of our Court of Appeal Rules requires that where the reasons for the judgment or order appealed from have been stated orally a proper report, to be approved by the Judge, of the statement made by him of such reasons shall be printed as part of the case. There is apparently no such express rule in England, but the wisdom of some such provision as ours is shown by the following comments of Scrutton, L.J., in *Lawrence v. Cassel*, (1930) 2 K.B. 83, at p. 87 :

> " This appeal comes before the Court in a very unsatisfactory way. We have very scanty information of what the learned Judge said in his judgment. There is no shorthand note, although we always allow the cost of a shorthand note of the judgment under appeal, and there is no note, as there ought to be, by junior counsel on either side. It is not fitting that an appellant should come to this Court saying : ' The judgment is wrong, but I cannot say exactly on what grounds the learned Judge decided.' "

Examination of Persons in Custody.

The Home Secretary's Recent Circular.

In England they have what we have not here—a number of rules of practice laid down by the Judges to be observed by police officers in their examination of persons in custody. Differences of opinion have existed as to the proper construction of some of the Rules and, on the recommendation of the recent Royal Commission on Police Powers and Procedure, these difficulties were submitted to the Judges. The following circular has recently been issued by the Home Secretary, with the approval of the Judges, relative to the matter :

" I am directed by the Secretary of State to say that he has had under consideration that part of the Report of the Royal Commission on Police Powers and Procedure, namely, Chapter VI, paragraphs 180-194, inclusive, in which the Commissioners draw attention to the evidence they had received, which seemed to show that there were marked divergencies of opinion among Police Officers as to the proper construction to be placed upon what are known as the Judges' Rules, and suggest that this matter should be brought to the notice of His Majesty's Judges for any action which they may deem advisable.

In accordance with the suggestion of the Royal Commission, the Secretary of State has communicated with His Majesty's Judges, and the purpose of this circular, which is issued with their approval, is to remove any difficulties or divergencies of opinion as to the meaning of the Rules such as may have existed in the past. For convenience of reference the Judges' Rules are here set out as follows :—

(1) When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

(2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions, as the case may be.

(3) Persons in custody should not be questioned without the usual caution being first administered.

(4) If the prisoner wishes to volunteer any statement the usual caution should be administered.

It is desirable that the last two words of the usual caution should be omitted, and that the caution should end with the words " be given in evidence."

(5) The caution to be administered to a prisoner when he is *formally* charged should therefore be in the following words :—

> ' Do you wish to say anything in answer to the charge ? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.'

Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

(7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

(8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other person charged, but each of such persons should be furnished by the police with a copy of such statements, and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

No particular difficulty appears to have arisen with regard to Rules (1) and (2), but the Royal Commissioners say that divergencies and conflicting views are prevalent as to how Rule (3) should be reconciled with the first sentence of Rule (7).

Upon this point His Majesty's Judges have advised as follows :—

> Rule (3) was never intended to encourage or authorise the questioning or cross-examination of a person in custody, after he has been cautioned, on the subject of the crime for which he is in custody, and long before this Rule was formulated, and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence ; but in some cases it may be proper and necessary to put questions to a person in custody after the caution has been administered, for instance, a person arrested for a burglary may, before he is formally charged, say ' I have hidden or thrown the property away,' and after caution he would properly be asked ' Where have you hidden or thrown it ? ' ; or a person, before he is formally charged as a habitual criminal, is properly asked to give an account of what he has done since he last came out of prison. Rule (3) is intended to apply to such cases and, so understood, is not in conflict with and does not qualify Rule (7) which prohibits any question upon a voluntary statement except such as is necessary to clear up ambiguity.

The Royal Commissioners next draw attention to the fact that the expression ' persons in custody ' is used in Rule (3), whereas the expression ' prisoner ' is used in the four subsequent Rules, and say that they have found some difference of opinion as to whether these two terms are intended to be synonymous. His Majesty's Judges advised upon this point as follows :—

> ' *Prima facie* the expression " persons in custody " in Rule (3) applies to persons arrested before they are confined in a Police Station or Prison, but the Rule equally applies to prisoners in the custody of a gaoler. The term " persons in custody " and " prisoners " are therefore synonymous for the purpose of this Rule.'

As regards any difficulties that may have arisen as to the proper form of caution : (*a*) at any time before the formal charge is made, and (*b*) immediately before the formal charge is made, the Judges say :—

> ' With regard to the form of the caution it is obvious that the words in Rule (5) are only applicable when the formal charge is made and can have no application when a violent or resisting prisoner is being taken to a Police Station. In any case, before the formal charge is made, the usual caution is, or should be, " You are not obliged to say anything, but anything you say may be given in evidence." '

In the Secretary of State's opinion that is a simple, emphatic and easily intelligible form of caution which may be properly used at any time during the investigation of a crime at which it is necessary or right to administer a caution. For example, where a person is being interrogated by a Police Officer under Rule (1), whether at a Police Station or elsewhere, and a point is reached when the Officer would not allow that person to depart until further inquiry has been made, and any suspicion that may have been aroused had been cleared up, it is in the opinion of the Secretary of State desirable that such a caution should be administered before further questions are asked. When any form of restraint is actually imposed, such a caution should certainly be administered before any questions or any further questions, as the case may be, are asked. When it comes to cautioning a prisoner immediately before he is formally charged, the form prescribed in Rule (5) should be used.

Attention is drawn by the Royal Commissioners to the fact that the word ' crime ' is used in Rules (1) and (2) and the word ' offences ' in Rule (8) and that some Police Forces have attached importance to this. The Judges point out that for the purpose of these Rules the words ' crime ' and ' offences ' are synonymous and include any offence for which a person may be apprehended or detained in custody.

The Secretary of State would remind the Police that the Judges' Rules were formulated for the purpose of explaining to Police Officers engaged in the investigation of crime the conditions under which the Courts would be likely to admit in evidence statements made by persons suspected of or charged with crime. Such Officers will usually be experienced Police Officers, and it is quite impossible to lay down a code of instructions which will cover the various circumstances of every case. They should bear in mind, however, the purpose for which these Rules were drawn up, namely, to ensure that any statement tendered in evidence should be a purely voluntary statement and therefore admissible in evidence. In carrying out their duties in connexion with the questioning of suspects and others they must, above all things, be scrupulously fair to those whom they are questioning, and in giving evidence as to the circumstances in which any statement was made or taken down in writing they must be absolutely frank in describing to the Court exactly what occurred, and it will then be for the Judge to decide whether

or not the statement tendered should be admitted in evidence.

I am, Sir,

Your obedient Servant,

JOHN ANDERSON."

Home Office,
Whitehall.
24th June, 1930.

N.B.—The foregoing letter relates primarily to the procedure proper to be followed in investigating crime, for instance, in the matter of administering cautions. The references to the administration of cautions immediately before formal charging do not, of course, exclude the administering of the caution immediately after a charge has been accepted, taken down and read out to the accused, in which event both the form of question and the form of caution set out in Rule (5) should be used.

"Dangerous Driving."

A Unique Situation.

A situation, described by Mr. John Flowers, K.C., as quite Gilbertian, and one that the well-known Recorder said in all his experience he had never met, arose at Horsham petty sessions on 12th September. Two defendants, one from Hove and the other from Chichester, were summoned for driving at a speed dangerous to the public at Broadbridge Heath on 4th August. One defendant was driving a motor car and the other a motor cycle combination. They met at cross-roads and a collision was so serious that one defendant was rendered unconscious and was taken to hospital. The justices agreed that the cases should be taken separately, and the result was that one defendant was called as a witness for the prosecution against the other defendant, and *vice versa*, each alleging that the accident was the fault of the other's driving. Such a position was quite unique in a magistrates' court, declared the learned counsel who was appearing for one of the defendants; and the solicitor appearing for the other defendant, agreed.

Remarking that in his considerable experience of police courts he had never met with similar circumstances where two defendants summoned for driving at a speed dangerous had been called as witnesses for the prosecutor against each other, Mr. Flowers suggested that the matter should have been thrashed out in a civil court. The justices marked their sense by dismissing both summonses.

"I see the common lawyers have taught the Scotch lawyers to talk about the delays of the Court of Chancery. As to that I say only "*sat cito si sat bene.*"
—Lord Eldon in *Woolley v. Maidment*, 6 Dow. 257, 276.

"It does not become any man in a judicial situation to look at the conduct of the parties with reference to any other consideration than the legal effect of it."
—Lord Eldon.

Probability.*

One factor which is ever present to the judge is the probabilities of the case before him, and he will consciously or unconsciously bring all the evidence to this rough test. The more improbable the story, the more carefully will he scrutinise the testimony offered in its support. The more probable it seems, the more ready will he be to accept without question what the witnesses have to say.

This attitude of mind is eminently natural, and not altogether unreasonable, but it holds a danger.

It is highly probable that any person accused of a serious crime will deny it. It certainly does not always happen, for men have admitted murder after an opportunity of reflection. But, generally speaking, no voluntary and deliberate admission will be made where the consequences of confession are likely to be serious. Too often, however, the corollary is accepted that no denial of guilt is of evidential value. In truth, either denial or admission obtains much of its importance from time and place and other surrounding circumstances.

Among these circumstances are tone and demeanour. It is true that some people can tell lies with every appearance of candour. This is especially true of the young, and is peculiarly effective when the person concerned is first self-deceived, as a child is apt to be. But, after making every allowance for possible deception, some statements are made in such terms and in such a manner as to carry conviction. Let us leave this particular illustration of our subject, which is put in the foreground merely to indicate the kind of thing we wish to talk about, and consider briefly the nature of probability, as it affects the process of enquiry which we call a trial at law.

Probability is a high degree of possibility. Certainty is a high degree of probability. The wider our range of knowledge, the less are we disposed to include in the realm of the impossible, and the more are we assured that what we regard as impossible is so only relatively to certain conditions in which we find ourselves. Further, we discover that there can for us be no absolute intellectual certainty. Let us illustrate these statements. Innumerable men still living at one time of their lives regarded human flight through the air as impossible. But those who were experimenting regarded it as probable, and those who had trained themselves to have the open mind, while, perhaps, ignorant of the work proceeding to turn an age-long dream into a present reality, certainly felt no surprise when the problem of human movement through the air was solved. One can imagine parts of the world, even to-day, where twelve intelligent men confronted with an issue dependent on the fact of flight by human beings, would from sheer ignorance decide it wrongly, because something entirely outside their experience and knowledge seemed impossible.

There can be no greater certainty in a judicial investigation than a plea of guilty by a person accused of a crime, coupled with the testimony of eye-witnesses of the crime that they saw him commit it. But at most we have here only a high degree of probability, for it is not inconceivable, though extremely unlikely,

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that witnesses and accused are in a conspiracy at all costs to shield the real culprit. It has, indeed, been known for a man to plead guilty to a charge of which he was innocent to save another person.

There are, of course, limits to what can, in the world constituted as we know it, be treated as possible. We should not waste our time on examining an allegation made in evidence that a man was in two places at once, though philosophically we may hold that time and place can be transcended. We should be entitled to treat as false pretences a statement that lead had been transmuted into gold as a commercial process, though we have credible evidence that laboratory experiments in the transmutation of chemical elements have succeeded. This, by the way, is a beautiful illustration of the thesis that what seems possible or impossible is largely a matter of education and mental capacity. Time was when it was a commonplace of thought that metals were transmutable ; only the means were lacking. Then the philosopher's stone became the symbol of the utterly impossible. Now we discover that the earlier belief was sound. But it ought never to have been acted upon as a truth, being, as it was, entirely in the realm of the suppositious. Nor ought the subsequent incredulity be maintained to close the mind to the possibility of development.

It is a curious and painful experience to see in a court of justice the setting up of a defence involving the unusual and strange, meet, not with the circumspection which it ought to arouse, but with a closing of the mind which renders the infiltration of truth a difficult and sometimes hopeless process.

Yet the unexpected does happen. Take the sequences in an experiment in pure chance. The work of Venn and Galton and Karl Pearson has shown that a curve can be drawn to which the results of tossing a penny (or any similar haphazard process) will conform, if the series of operations be prolonged, and this curve includes points contributed by the happening of the rare events. Thus if ten pennies be tossed simultaneously a very great number of times the moment will come, sooner or later, when all ten will fall heads upwards. With an experimental series still more prolonged occasions will arise when all ten will fall heads upwards twice or more times in succession, and no possible limit can be put to the number of consecutive times a rare falling out may occur.

Be it observed, too, that the rare happening, being sure to take place at some time, if the experiment be persisted in, may happen at any moment. So that if a man's guilt depends, as it may do, on an alleged repetition of an odd chance circumstance an almost unbelievable number of times, we ought to approach his case with the utmost circumspection, but not predetermined to regard his defence as impossible. Marshall Hall asserted that he had seen the same number turn up five times consecutively on a roulette table ; and a friend hole out the first hole at golf in one stroke twice on the same day ; and he cited a statement by a friend that three card players cutting for deal all cut first a three, then all three a seven, then all three an ace. It is said (see " the Romance of the Calcutta Sweep," by Major H. Hobbs), that the drawer of the winning horse one year, drew that horse also in his club sweep, and a third time in a coach sweep while on his way to the racecourse. On the other hand, in a practical world, we cannot lightly accept assertions of the marvellous, and we must never lose sight of the very relevant facts that an accused person, who does not plead guilty, has a strong motive for setting up an untruthful defence, and that an explanation twisted to fit awkward facts is likely to be a little fantastic.

Luckily the issue to be determined in criminal trials is not the guilt or innocence of the accused. Those are absolute certainties, and such are unattainable by any processes open to human beings. The issue is the much simpler one : is there evidence sufficient to convict the accused ? In other words does it raise that very high probability of his guilt, which is our nearest approximation to certainty. If less, he is entitled to acquittal. This is the meaning of giving the accused the benefit of the doubt. Somewhere on the imaginary curve, whose terminal points are positive or negative, certitude lies ; another point which it is the whole purpose of the trial to find. It marks that degree of belief in one side or the other upon which the judge of fact (be that judge one so named, or a jury member, or justice of the peace) would be satisfied to act in his own private affairs of moment. That is the greatest degree of perfection we imperfect men can attain in judicial proceedings.

Fortunately we have certain aids in the judicial process such as the onus of proof being on the person who makes an assertion, the so called presumption of innocence and so on. But they are mere pieces of idle machinery unless they be operated by persons of education, mental flexibility, and some powers of imagination. To some men or women life is a mould in which they harden ; to others it is a changing environment to which they continually adjust themselves. The former are a danger on the bench and in the jury box ; to the latter alone ought the judging of their fellows be entrusted.

Bench and Bar.

Messrs. Fotheringham and Wily, of Auckland and Pukekohe, and Messrs. Beale and Hall, of Auckland, have amalgamated their practices which will henceforth be carried on by Mr. H. J. Wily and Mr. J. K. S. Hall under the style of Wily and Hall, at Auckland and Pukekohe.

Mr. Osborne Stevens, who has been for some years past managing clerk to Messrs. Moore, Moore and Nichol, Dunedin, has commenced practice at Dunedin on his own account.

"Well Argued."

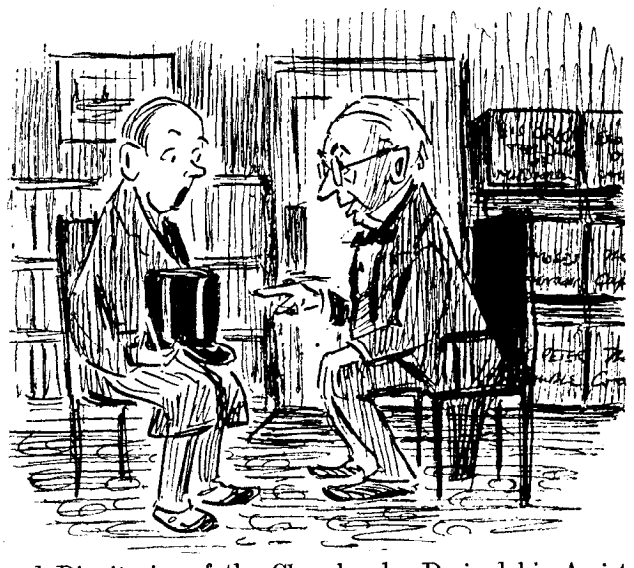
One of Lord Dunedin's criteria of a good argument is plainly indicated by him in the following passage from his judgment in *Fry v. Burma Corporation*, (1930) A.C. 321, at p. 326 :

> " My Lords, although I say that, it does not mean that this case is not arguable. It is arguable, and it has been remarkably well argued by the Attorney-General, and I say remarkably well argued because he has done what we in this House always like, that is, he has not troubled us with cases that do not apply."

Forensic Fables.

THE YOUNG SOLICITOR AND THE SAGACIOUS OLD BUFFER.

There was Once a Young Solicitor who Began to Fear that he would Never Get On. He Worked Hard, but, Try as he Might, he Could not Learn any Law. Persons who Sought his Advice were Clearly Disappointed when the Young Solicitor Told them he would Look it Up and Let Them Know To-morrow. The Young Solicitor therefore Determined to Consult a Sagacious Old Buffer whose Name was a Household Word in the Profession. The Street in which the Old Buffer's Palatial Offices were Situate was Blocked from Morning to Night by the Rolls-Royces of the Bankers, Ladies in Distress, Shipowners, Jockeys,



and Dignitaries of the Church who Desired his Assistance. The Old Buffer Made them Pay through the Nose, but they all Went Away Satisfied that they had Received Good Value for their Money. Nor was this Surprising. For the Old Buffer Possessed both a Dignified Appearance and a Sympathetic Manner, and was Never at a Loss when a Complicated Legal Problem had to be Solved. The Old Buffer Always Remembered that Baron Parke, or Cairns, or Blackburn had Discussed the Topic in an Old Case. He would then Tell his Clerk to Bring him "2 Meeson & Welsby," "6 Term Reports," or "4 Barnewall & Cresswell"; and, Lo and Behold, the Volume was Sure to Contain Something Apposite and Helpful. When the Client Expressed his Astonishment at the Old Buffer's Amazing Feat of Memory he would Smile Quietly and Say it was Nothing. The Old Buffer Received the Young Solicitor with the Utmost Courtesy and Listened Attentively to his Story. When he had Finished, the Old Buffer Locked the Door and Whispered to the Young Solicitor that, if he would Swear Never to Divulge it to a Soul, he would Impart to him the Secret of his Success. "Like you," said the Old Buffer, with Tears in his Eyes, "I Knew no Law and Could not Learn any of the Beastly Stuff. But One Day I Found on a Railway Book Stall an Admirable Work Entitled 'Law for the Million.' It Cost Two Shillings and Six Pence. I Saw at once that it was a Mine of Useful Information. I Purchased Three Copies and had them Rebound. One is Called '2 Meeson & Welsby,' Another is '6 Term Reports,' and the Third is '4 Barnewell & Cresswell.' When I am Asked to Advise about a Charter Party, a Bill of Sale, a Gambling Debt, or a Faculty I Turn Up the Appropriate Heading with the Happiest Results. I Strongly Advise You to Do the Same. The Book is Arranged Alphabetically," the Old Buffer Concluded, "so that it is Quite Easy to Find what you Want."

The Young Solicitor Thanked the Old Buffer Warmly and Withdrew.

Within Five Years the Young Solicitor was a Knight, a Member of Parliament, the Owner of Three Cars, and a Resident in Carlton House Terrace. And if the Old Buffer had not Retired from Practice meanwhile (with a Cool Quarter of a Million) the Young Solicitor would Assuredly have Cut him Out.

MORAL: *Bind Your Books Carefully.*

Legal Literature.

Paget's Law of Banking.

Fourth Edition: By SIR JOHN PAGET, BART, K.C.

(pp. xlv; 449; xlviii: Butterworth & Co. (Publishers) Ltd.)

Of the leading text-books on the law of banking probably none is more widely used by bankers and their legal advisers than *Paget*, a work which has gone through four editions since 1904. Its popularity will now be increased, for the very considerable number of cases decided in this branch of the law during the past few years has rendered somewhat out-of-date some of the other works.

There is perhaps a tendency on the part of the general practitioner to regard works on banking as being written only for bankers and to overlook them as fields of reference when considering some problem or other as to such matters as cheques, accounts, or guarantees; but in those works he will, as a rule, find as lucid and as detailed a statement of the law as anywhere else. The chapter in *Paget* on guarantees, to take but one instance, is from a practical point of view one of the best and most useful expositions of the law known to this reviewer.

Some idea of the scope of the work can be obtained from a glance at the titles of the chapters: The banker; the customer (with separate treatment of special customers—corporations, partners, trustees, etc.); current account with a minor; relation of banker and customer (including the Statute of Limitations); the current account (with a discussion of the effect of bankruptcy, of overdrafts, and of the law of appropriation of payments); obligations of a banker as to secrecy, banker's references, and valuables; deposit accounts; cheques, drafts and analagous documents; crossed cheques; crossing by collecting banker; marking cheques; the paying banker and the conditions under which he is bound to pay; paying bearer cheques; paying order cheques; conversion; the collecting banker, and particularly as to his negligence; the pass-book; forgeries; securities for advances—stocks and shares, lien, pledge, documents of title to goods; realiza-

tion of securities; money paid by mistake; guarantees; and the special statutory provisions as to evidence of bankers' books—all treated with detail. For the New Zealand lawyer the book has its maximum value for only in a few minor respects does our law as to the matters within its scope differ from that of England.

New Books and Publications.

The Indian States. By Sirdir P.K. Sen., M.A., B.C.L. (Sweet & Maxwell Ltd.). Price 12s.

Emery's Receivers and Liquidators. By Borregaard. (Effingham Wilson). Price 15s.

Mahaffy & Dodson's Road Traffic Act, 1930. (Butterworth & Co. (Pub.) Ltd.). Price 29s.

Cahill's Householder's Duty Respecting Repairs. Second Edition. Revised by H. Borregaard. (Effingham Wilson). Price 7s.

Palmer's Company Law. Fourteenth Edition. By A. F. Topham, K.C. (Stevens & Sons, Ltd.). Price 29s.

Chalmer and Asquith's Outlines of Constitutional Law. Fourth Edition. (Sweet & Maxwell Ltd.). Price 18s.

Steven's Elements of Mercantile Law. Eighth Edition. By Herbert Jacobs, B.A. (Butterworth & Co. (Pub.) Ltd.). Price 12s. 6d.

The Unemployment Insurance Acts, 1920-1930. By A. Crew. (Jordan & Sons, Ltd.). Price 12s.

Williams' Treatise on the Law of Executors and Administrators. Twelfth Edition. By David H. Parry and J. Cherry, M.A. Two Volumes. (Stevens & Sons Ltd.). Price £5 15s. 6d.

A Handbook on Death Duties. Second Edition. By H. A. Woolley. (Solicitors' Law Stationery Society). Price 12s. 6d.

Chitty on Contracts. Eighteenth Edition. By W. A. Macfarlane and G. W. Wrangham. (Sweet & Maxwell Ltd.). Price 50s.

English De-Rating Appeals, 1930. By Rowe & Stanton. (Argus Press). Price 32s. 6d.

Criminal Law for Examinees. By R. W. Parrin. Recent Examination Questions with Answers. (Sweet & Maxwell Ltd.). Price 7s.

Constitutional Law and Legal History. By D. M. Griffith. Questions and Answers. (Sweet & Maxwell Ltd.). Price 6s.

The Principles and Finance of Fire Insurance. By F. W. Cornell. (Effingham Wilson). Price 9s.

Rules and Regulations.

Agricultural Labourers' Accommodation Act, 1908. Amended regulations.—Gazette No. 70, 9th October, 1930.

Defence Act, 1909. Amendments to Financial Instructions and Allowance Regulations for N.Z. Military Forces.—Gazette No. 70, 9th October, 1930.

Land and Income Tax Act, 1923. Additional regulations re returns of income derived from lands used for agricultural or pastoral purposes.—Gazette No. 70, 9th October, 1930.

Unemployment Act, 1930. Unemployment Act Registration Regulations, 1930. Unemployment Board Nomination Regulations, 1930.—Gazette No. 71, 16th October, 1930.