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"The law of England is a law of liberty."
—Lord Ellenborough.

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Decisions of the Court of Appeal.

In *Rex v. Storey* (December 10th) the very interesting and by no means unimportant question was raised in the Court of Appeal as to how far that Court is bound by its own decisions. The question was brought directly in issue owing to counsel for the accused submitting that the Court of Appeal, at all events when both divisions of that Court were sitting together as they were in that case, was not coerced by its decision in 1911, in *Rex v. Dawe*, 30 N.Z.L.R. 673. We have always understood the position to be that our Court of Appeal not only in practice followed its previous decisions, but was bound by them, and it, therefore, comes as no surprise to us to find the question dismissed very shortly by the Chief Justice (in whose judgment Adams, J., and Kennedy, J., though the latter delivered a separate judgment, concurred) as follows:

> "If *Dawe's* case can be said to be an express decision on the meaning and effect of Section 171 of the Crimes Act, 1908, then clearly it *ought*, I think, to be followed by this Court. Mr. Cornish contends that, as both divisions of the Court are sitting, the decision may be open to review, and he cites *Kelly v. Kellond*, 20 Q.B.D. 569, per Lord Esher, M.R., at p. 572. But *Dawe's* case was decided in 1911, when the Court of Appeal sat in only one division, and it was a Court, as I have said, consisting of six Judges."

Herdman, J., also disposed of the matter very shortly; he said:

> "The question raised in the present case, in so far as it relates to section 171 of the Crimes Act, having been definitely disposed of in *Dawe's* case, nothing more need be said for by that judgment this Court is *bound*."

Not quite the same view, however, was taken by Reed, J., whose judgment was entirely concurred in by Smith, J., and on this point by Blair, J.:

> "This Court usually follows the decisions of the Court of Criminal Appeal and if it were here a question of common law the decision in *R. v. Dawe* might well be held to be open to reconsideration. . . . . As a general rule this Court of Appeal considers itself bound by its own previous decisions and it is convenient that that practice should be generally adopted and not departed from unless in very exceptional circumstances, but in law it does not appear to be so bound. . . . . It would appear that . . . . the weight of authority is in favour of the proposition that the Court is not necessarily bound by its own decisions. The right to decline to follow a previous decision, in view of the grave consequences following on uncertainty of the law, should be exercised only in very exceptional circumstances, and with the greatest hesitation. Moreover, in my opinion, it should never be exercised except by a Court constituted under the powers conferred by Section 9 of the Judicature Act Amendment Act, 1913, that is of both divisions getting together."

Kennedy, J., in his judgment reviewed at length the authorities as to the English Court of Appeal and its decisions and said:

> "I think that this Court should follow the practice of the English Court of Appeal. The rule to be adopted by that Court has recently been discussed in *Newsholme Bros. v. Road Transport and General Insurance Co.* (1929) 2 K.B. 356. Scrutton, L.J., took the view that the Court was bound by its own decisions in any case raising substantially similar facts, while Greer, L.J., took the view that the Court might decline to follow a previous decision though it would be only in most exceptional cases that those powers could be exercised. There are dicta and decisions in favour of either view although, in my opinion, the weight of authority is in favour of the view stated by Scrutton, L.J. I think that the weight of authority is in favour of the view that the English Court of Appeal is bound by its own decisions and that the Court of Appeal in New Zealand should hold itself likewise bound by its own decisions, unless of course, it appears, from the decision of a superior Court, that its earlier decision should not be followed."

Though the learned Judge said nothing, except impliedly, as to whether or not he himself was prepared to admit of any exceptions to this general rule, he went on to say:

> "Whether or not there is an exception to this rule where the Court, which ordinarily sits in divisions, sits as a Full Court of Appeal, it is immaterial to determine for the purposes of this case, because when *R. v. Dawe* was decided the Court did not sit in divisions. But even if the rule be that the Court may in exceptional cases, perhaps more readily where there are penal consequences, decline to follow its own decisions, but even then exercising extreme caution, this is not in my opinion such a case."

To sum up, then, the effect of these judgments. Two of the learned Judges (Myers, C.J. and Adams, J.) take the view that the Court *ought* to follow its own decisions; they do not go so far as to say that the Court is *bound* to do so, though there may be for all practical purposes but little difference between saying that the Court is bound to do a thing and saying that it ought to do a thing. Two other members of the Court (Herdman and Kennedy, JJ.) say in so many words that the Court is *bound* by a prior decision. The remaining three Judges regard the following of prior decisions as only a rule of practice—but a rule of practice that ought to be departed from only in exceptional cases and only when the prior decision is one of a single division of the Court and the Court not following that decision consists of both divisions of the Court sitting together. It might indeed be said on the above-quoted extracts from the judgments of Myers, C.J. (Adams, J., concurring) and Kennedy, J., that even those learned Judges did not go so far as to say that two divisions might not overrule one division; but perhaps the real truth of the matter is that the observations and the implications in the several judgments of the Court upon this point are *obiter* for *R. v. Dawe*, the case the effect of which was being considered, was a decision of the Court at a time when it did not sit in divisions.

The Court having laid down the rule that it ought to follow its prior decisions, there seems to be at least one grave danger in allowing of an exception where both divisions of the Court are sitting together and are considering a prior decision of a single division. Usually the Court sits only in single divisions; both divisions sit together only if the Governor-General in Council on the certificate of two Judges (of whom the Chief Justice must be one) so authorises, and this authorisation is in practice only seldom given. If the above exception to the general rule is admitted it means that a litigant may, if the Governor-General's authorisation is given, lose in the Court of Appeal a case which he would otherwise have an absolute right to win there. It is not proper that the result of litigation should depend upon such a contingency.

Court of Appeal.

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

October 16, 17, 20; December 10, 1930
Wellington.

REX v. STOREY.

Criminal Law—Manslaughter—Negligent Driving Causing Death—Degree of Negligence Required for Conviction—Effect of Contributory Negligence of Deceased—Causation—Evidence Admissible—Power to Leave Issues to Jury—Crimes Act, 1908, Ss. 40, 170, 171, 175, 442, 445—Motor Vehicles Act, 1924, S. 27.

Case stated by Myers, C.J., for the opinion of the Court of Appeal. The questions arising are stated in the judgment of Myers, C.J., and so also are the facts so far as they are material to the present report. The issues submitted and the jury's answers to those issues were as follows: (1) "Was the collision between the accused's motor car and the car in which Mr. and Mrs. Cook were driving caused by the negligent driving of the accused?" To this the jury answered: "The Jury's answer to Question 1 is in the affirmative, but strongly recommend that the accused be dealt with leniently on the grounds that the accident was brought about by an error of judgment." (2) "If so, would the death of Mr. and Mrs. Cook have resulted but for such negligence of the accused?"; to which they answered "The Jury's answer to Question 2 is in the negative."

Solicitor-General (Fair, K.C.) and **Evans-Scott** for Crown.
Cornish and **Foden** for accused.

MYERS, C.J., said that the first question was as to whether, where a prisoner was charged with manslaughter under the Crimes Act, 1908, the death of the person killed having been caused by the prisoner's negligent driving of a motor vehicle, anything more than what might be called ordinary negligence was required to be proved. Mr. Cornish's contention was that ordinary negligence was insufficient and that there must be what he called "criminal negligence" or "gross negligence." For that proposition he relied upon various English and Australian decisions, for example: **Rex v. Bateman,** 19 Cr.A.R. 8; **Rex v. Gunter,** 21 N.S.W. S.R. 282; and **Rex v. Newell,** 27 N.S.W.S.R. 274. His Honour referred at length to **Rex v. Bateman** (*sup.*) and said that it was not unimportant to point out that the class of cases of which **Rex v. Bateman** was an illustration was dealt with in New Zealand in S. 170 of the Crimes Act, 1908. That section and S. 171, were two of a group of sections under the title "Duties tending to the preservation of life." As His Honour read Section 170 it seemed to him clear that the decision in **Bateman's** case was not law in New Zealand so far as the criminal responsibility of a medical practitioner was concerned. The position was, that in New Zealand the same standard applied in regard to both civil and criminal responsibility. **Rex v. Gunter** (*sup.*) which was decided nearly four years before **Rex v. Bateman,** was also a case where persons who were described in the report as carrying on "a sort of medical practice" were charged with manslaughter by negligence, and it was held that the negligence which was essential before a man could be criminally convicted must be culpable, exhibiting a degree of recklessness beyond anything required to make a man liable to damages in a civil action. **Rex v. Newell** (*sup.*) was the case of a charge against a person for manslaughter by negligent driving of a motor car, and on the question of the degree of negligence required to establish criminal responsibility the Court followed and applied **Rex v. Gunter** (*sup.*) and **Rex v. Bateman** (*sup.*). But, even though **Bateman's** case and **Gunter's** case did not apply in New Zealand in the case of a medical practitioner, Mr. Cornish's contention was that they correctly stated the law applicable to such a case as the present. His Honour could not accept that contention. The law in New Zealand was laid down by the Crimes Act, 1908. By S. 175 (2) of that Act "culpable homicide" was defined as consisting in the killing of any person either, (a) by an unlawful act, or (b) by an omission without lawful excuse to perform or observe any legal duty, or (c) by both combined. By S. 186 it was enacted that culpable homicide not amounting to murder was manslaughter. The law as to criminal responsibility which prescribed the standard of care required, and the degree of negligence which was sufficient to found the offence, at all events in a case where the charge was one of manslaughter under the Crimes Act, was laid down by S. 171. In **Rex v. Dawe,** 30 N.Z. L.R. 673, the Court of Appeal consisting of six Judges considered the effect of that section. His Honour referred at length to that case and said that if it could be said to be an express decision on the meaning and effect of S. 171, then clearly it ought to be followed by the Court. Mr. Cornish, however, contended that all the statements made by the learned Judges regarding S. 171 were mere *obiter dicta*. His Honour did not think that that was so—**N.S.W. Taxn. Commrs. v. Palmer,** (1907) A.C. 179, 184; **Hole v. Garnsey,** (1930) A.C. 472, 497—but for His Honour's part he was content to say that even if they were *obiter* he agreed with the view taken by the majority of the Court. It seemed to His Honour that S. 171 meant exactly what it said and that no attempt should be made to whittle it down. The test under both S. 170 and S. 171 was that of "reasonableness." That term could not be defined, but the standard must be set in each particular case by the jury by applying their common sense to the evidence as to the facts of the case and any admissible expert evidence that was adduced. The standard should be neither too high nor too low; it should be a "reasonable" standard, the standard of skill and care which would be observed by a reasonable man. His Honour desired, however, expressly to say that while he thought, having regard to S. 171 and to what was said in **Dawe's** case, there was no distinction in New Zealand between negligence as the foundation of criminal liability and negligence as the foundation of civil liability, it followed that, under that section as under S. 170, a mere mistake or error of judgment which should in a civil action prevent an act or omission from being imputed as negligence was equally a good defence on a criminal charge involving negligence. But His Honour did not wish there to be any mistake as to what he meant when he referred to an error of judgment in respect of at least a charge where section 171 applied. His Honour had in mind cases like the **Bywell Castle,** 4 P.D. 219, where a person had to act and make up his mind on an emergency created by the negligent act of another. If a person by his own negligence placed himself in a position of peril in respect either of his own safety or the safety of others and then had to act on the spur of the moment and what he did turned out to be wrong, the position to His Honour's mind was quite different. In such circumstances the person who so acted could not in His Honour's opinion rely upon error of judgment as an answer.

Mr. Cornish contended that at common law "gross" or "criminal" negligence was required to support a charge of manslaughter and (assuming that to be so) that the common law requirement still existed by reason of S. 40 of the Crimes Act. S. 40 was contained in Part III of the Act under the title of "Matters of Justification or Excuse." Section 171 was not in Part III, but in a later Part of the Act under the title "Duties tending to the Preservation of Life." Assuming the common law to be as Mr. Cornish contended, his argument was answered by S. 171 which superseded the common law.

The next question had reference to the meaning and effect of S. 27 (1) of the Motor Vehicles Act, 1924. In the first place it was the duty of the Court to consider the mischief aimed at by S. 27. It was well known that, prior to the passing of the Act of 1924, juries seemed to think that there was something very serious in a charge of manslaughter arising out of negligent driving, and that such a charge amounted almost to murder. The result was that they showed a great aversion to convicting in any case, no matter how strong, and that aversion resulted in many miscarriages of justice. Various Judges of the Supreme Court from time to time commented on that result and suggested an amendment of the law creating an offence under a different name but involving precisely or substantially the same elements as manslaughter. Eventually that suggestion was adopted by the passing of S. 27 of the Act of 1924. In those circumstances, to hold that S. 27 was merely intended to, and did in fact, enable to be raised the various defences that might be raised in a civil action would bring about a worse state of things then existed previously. In the second place S. 27 must be regarded as being in *pari materia* with the provisions of the Crimes Act relating to manslaughter by negligence, and S. 171 of the Crimes Act was, therefore, applicable in His Honour's opinion to both counts of the indictment. His Honour thought, therefore, that the standard of negligence required to be proved on a charge under S. 27 was precisely the same as that required to be proved in a case of manslaughter under the Crimes Act. If that were so, it followed once it was proved that the accused negligently drove his motor car and that the death or bodily injury to another person was a consequence of that negligence, that such negligence had caused the death or bodily injury. It was said by Pollock, C.B., in **Reg. v. Swindall,** 2 C. & K. 230—a charge of manslaughter—that generally it might be laid down that where one by his negligence had contributed to the death of another he was responsible.

The next question was whether or not contributory negligence on the part of the person killed where the accused was charged with manslaughter, or on the part of the person killed or injured where the charge was under S. 27 of the Motor Vehicles Act, was a good defence. Upon that point there was a good deal of common law authority and all the cases, which were collected in **Archbold's Criminal Pleading,** 27th Edn., 889, **Russell on Crimes,** 6th Edn., 767, **Roscoe's Criminal Evidence,** 15th Edn. 847, tended to show (with but one exception) that it was not a good defence. The one exception was **Reg. v. Birchall,** 4 F. & F. 1087, in which none of the previous cases where the contrary view was expressed appear to have been cited. But, as is pointed out in **Archbold,** in a later case, **Reg. v. Jones,** 11 Cox 544, Lush, J., ruled that contributory negligence on the part of the deceased was not allowed as an excuse in a criminal case, and, upon **Birchall's case** being cited, stated that that case was quite at variance with what he had always heard laid down. In the still later case **Reg. v. Kew and Jackson,** 12 Cox 355, Byles, J., held that contributory negligence on the part of the deceased was no answer. The point was dealt with in New Zealand by Reed, J., in **Rex v. Officer,** (1922) G.L.R. 175, where he directed the jury that contributory negligence was not a defence. That view was in accordance with the weight of authority in England, was consistent with the provisions of our Crimes Act, and was in His Honour's opinion correct. Manslaughter, or an offence under S. 27 of the Motor Vehicles Act, 1924, was a crime, a public wrong, an offence against the State, and His Honour could see no good reason why the negligent actor should be excused because the killed or injured person was also negligent. His act was none the less an offence against the State, no matter how negligent some other person or persons might have been. The truth was, His Honour thought, that from the point of view of the criminal law—His Honour was referring particularly to S. 27 of the Act of 1924—where two people were injured, each of them having been negligent up to the time of impact, each of them must be regarded as having caused the injury to the other.

The fourth question involved the right of the Judge on the trial of a criminal case to submit issues to the jury. His Honour thought that the same inherent power resided in the Court in New Zealand as in England. In New Zealand issues had in fact been submitted in several cases, particularly where the case would otherwise have involved directions on more or less complicated questions of law which it would have been difficult to make intelligible to a jury of laymen. The same course had been adopted in England even in cases where difficult questions of law did not seem to have existed. It was adopted for example in **The Queen v. Jameson,** (1896) 2 Q.B. 425, though the report did not refer to that particular point. The case was referred to in **9 Halsbury's Laws of England,** 373 Note (a), where it was said to be doubtful whether a Judge could lawfully adopt that course. In **Reg. v. Davies,** (1897) 2 Q.B. 199, issues were put to the jury and on a case stated as to the effect of the verdict of guilty entered upon the answers of the jury, Lord Russell of Killowen C.J., said: "It is true that it is still sometimes the practice to ask the jury to give special findings upon the facts, but it is ordinarily a safer and better course to get the opinion of the jury as to whether the accused is guilty or not guilty, the Judge directing them upon the law." His Honour referred also to **Reg. v. Morby,** 8 Q.B.D. 571; **Rex v. Hendrick,** 37 T.L.R. 447, and **Roscoe's Criminal Evidence** 15th Edn., 208, and said that in his opinion there was nothing to prevent the Judge putting specific questions to the jury, but the jury were not bound to answer them. In other words a jury might be invited, but could not be compelled, to answer specific issues. As was said by the Lord Chief Justice in **Reg. v. Davies** (*sup.*): it was better to leave the general issue to the jury, save, His Honour would add, in exceptional circumstances where in the interests of justice it seemed desirable that specific questions should be put. Even when they were put, however, the jury were entitled, if they thought fit, to return a general verdict instead of answering the issues. But it was unnecessary in the present case to rely upon any inherent right or power in the Court to submit issues because the course which His Honour adopted at the trial was expressly authorised by S. 442 of the Crimes Act, 1908. Important questions of law arose at a very early stage of the trial, and His Honour intimated during the trial and well before its conclusion that he intended to put issues and that if in the result the accused was convicted he would reserve all questions for this Court. It was necessary, or at least desirable to submit specific questions in order that the questions of law involved might be properly raised. That was just as much in the interests of the accused as of the Crown. His Honour saw no reason why the specific questions should not be asked either before, or after, the general verdict was taken, or submitted together with the general issue. In each case it seemed that the specific questions would be asked "separately" as provided by subsection (2).

A question was also raised as to the meaning of the verdict of the jury. Mr. Cornish contended that the answers of the jury amount to a verdict of not guilty. His Honour did not agree. In the first place the jury specifically answered the first issue in the affirmative, namely, that the collision between the accused's motor car and the car in which the two deceased were driving was caused by the negligent driving of the accused. The jury then proceeded to recommend that the accused be leniently dealt with "on the ground that the accident was brought about by an error of judgment." In His Honour's opinion those words did not derogate from or affect the specific finding of negligence. They did not form part, nor were they a qualification, of the general answer to the question: they were merely part of a recommendation to mercy. Moreover the authorities showed that the Court was justified in looking at the whole conduct of the case, and the evidence taken, in order to construe the findings,—per Denniston, J., in **Rex v. Dawe,** 30 N.Z.L.R. 673, 682,—citing **Dawson v. The Queen,** 3 N.Z.L.R. (C.A.) 1; **Myerson v. The King,** 5 C.L.R. 596. See also **Reg. v. Warne,** 3 N.Z.C.A. 1; **Rex v. Bourke,** 32 N.Z.L.R. 821; **Rex v. Roscoe and Holland,** (1922) N.Z.L.R. 405. The meaning of the words quoted above contained in the recommendation of the jury was, in His Honour's opinion, perfectly plain. There was no inconsistency between the answer to the question and the addendum; the addendum did not negative the essential element of negligence. It was no defence to prove that a man was honestly negligent: **Rex v. Gyles,** 1 Cr.A.R. 242.

Notwithstanding that all the questions so far dealt with must be answered against the accused His Honour still thought that there might be said to have been the possibility of a mistrial by reason of the fact that evidence was excluded. His Honour held in effect that, if the collision was caused or contributed to by the negligent driving of the accused, negligence, if there was any, on the part of the deceased, prior to the collision, would not, nor would anything that immediately followed by reason of the alleged defects in the car driven by the deceased, or anything in connection with the condition of the terrain, afford a defence to the charges—unless it could be shown that there was some *novus actus interveniens* with which the accused had nothing to do and which brought about the death of the deceased. That ruling was in His Honour's opinion correct. Nevertheless His Honour thought that, in the circumstances of the case, the evidence should have been admitted and been later the subject of direction to the jury as to how they should regard it. If the two deceased had been killed or injured at the very time of the impact it could not, His Honour thought, be said that the exclusion of the evidence relating merely to the alleged defects in their car or to any contributory negligence could possibly have resulted in a miscarriage of justice even if the evidence ought to have been admitted, and therefore the accused would not have been entitled to a new trial. The mere exclusion of evidence or a mere misdirection did not necessarily require that a new trial should be ordered—Crimes Act, 1908, proviso to S. 445 (1). But the supposititious circumstances to which His Honour had just referred did not exist here. The death of the two deceased happened after their car had travelled some 56 feet diagonally across the road, and through the car then falling over the bank. The question then was whether what followed after the impact was a consequence of the accused's negligence. Whether the deceased driver drove his car across the road voluntarily or whether it was forced across the road as the result of the impact it was at the trial and was now impossible to say. Even if he drove it voluntarily the accused would be responsible if it were a reasonable and natural thing to do for the purpose of taking the car to a place of apparent safety, whether to ascertain the extent of damage to the car or to see the accused and discuss the question of the responsibility for the collision. If then the deceased's car fell over the bank by reason of the earth being loose His Honour thought that that would be a consequence for which the accused was responsible. His Honour thought, however, in a case such as the present, where the actual injury was not sustained at the time of the impact but a few seconds after, that in the circumstances all the evidence should be admitted: **Rex v. Hoani Heta Hakiwai,** 6 N.Z.L.J. 374; **Rex v. Lawrence,** 25 N.Z.L.R. 129, 142.

His Honour had already said that negligence if there were any on the part of the deceased driver prior to or connected with the impact would be no answer to the charge against the accused. The same observation equally applied to the alleged defects in the deceased's motor car, whether they existed prior to the collision or were caused or accentuated by the impact. That would not be a *novus actus* intervening between the col-

lision and the death of the two deceased. Nor would the loose condition of the soil, if it were proved, come within the category of *novus actus interveniens* if the deceased driver acted reasonably in crossing the road after the impact for either of the purposes His Honour had indicated, or if the jury thought that, faced as the deceased driver was when he rounded the bend with two cars travelling towards him abreast on a narrow road and the apparent certainty of a collision—a position brought about by the accused's negligence—he lost his head and crossed the road. That, and the falling of the car over the edge of the road into the creek, would, His Honour thought, be consequences of the accused's negligence for which he would be responsible. But if it appeared that in some way or other the deceased driver was negligent after the impact and after the effect of the accused's negligence was spent, and that the death of himself and of his wife was due to that subsequent negligence, that would be a *novus actus*. On the case as it went to the jury His Honour would himself have thought that that did not appear, but he felt unable to say with certainty that the excluded evidence, if it had been admitted, subject of course to direction to the jury, might not have enabled that point to be more cogently put by the accused's counsel than it was. The evidence having been excluded an issue raising the point was not put to the jury. In the result all the necessary facts were not put, and in the circumstances could not be put, to the jury to enable a general verdict of guilty to be found. Applying therefore the principle stated by Cooper, J., in **Rex v. Lawrence** (*sup.*) His Honour thought the proper course was to order a new trial.

In the view that His Honour took he did not consider it necessary to discuss the many authorities that were cited at the Bar on that aspect of the case; the principles that were applicable were treated fully in **Salmond on Torts,** 7th Edn. 152 to 170. True, the learned author was there dealing with the question of damages in a civil action, but in His Honour's view the same principles applied in the present case. If the accused would have been liable in a civil action for damages by reason of the death of the two deceased being a consequence of his negligence, he was also in his opinion responsible criminally. **Reg. v. Forrest,** 20 S.A.L.R. 78, might also be usefully cited in that it was a case of criminal responsibility.

HERDMAN, J., delivered a separate judgment concurring that there should be a new trial. His Honour held that on a charge of manslaughter under S. 171 of the Crimes Act, it was not necessary to prove "gross" negligence. As to a charge under S. 27 of the Motor Vehicles Act, 1924, His Honour had always considered that it was sufficient for the Crown to prove a breach of a duty to the public on the part of the accused, and His Honour could discover nothing in the statute from which he could infer that proof of any higher degree of negligence than that which amounted to a breach of duty to take care was required. The sole question for the jury, both under S. 171 of the Crimes Act and under S. 27 of the Motor Vehicles Act, was, did the negligence of the prisoner materially contribute to the death of the deceased. The fact that the neglect of the dead man was a factor in causing his own death would not entitle a prisoner to escape. It was, however, always open to the prisoner to prove either that the sole cause of death was the negligence of the dead man, or that any negligence of which he himself had been guilty in the initial stage of the episode had ceased and that thereafter some new act or omission for which the dead man was alone responsible superseded and caused his death. It seemed to His Honour that in cases of the present kind evidence which went to prove negligence on the part of a man whose death had resulted from a motor collision was always admissible in support of the plea of "not guilty," for the object of tendering it was to prove that the negligence which produced the result was not the negligence of the accused but the default of someone else. His Honour thought that the evidence excluded at the trial ought to have been admitted. His Honour was not prepared to go the length of deciding that the trial was abortive because members of the jury were invited to answer specific questions. His Honour thought that the verdict of the jury was a verdict of guilty.

REED, J., delivered a separate judgment concurring that there should be a new trial. His Honour held that on a charge of manslaughter under S. 171 of the Crimes Act it was not necessary to prove "gross" negligence. No greater or grosser degree of negligence was necessary to support a criminal charge for a breach of S. 27 of the Motor Vehicles Act, 1924, than for a charge of manslaughter under the Crimes Act. Contributory negligence of the deceased was not a defence to a charge under either section where the negligence of the deceased was voluntary and independent of the acts of the deceased. His Honour agreed that the verdict of the jury was one of guilty. His Honour thought that the Chief Justice properly left issues to the jury, but he thought that the answers of the jury were not sufficient to enable the Court to give judgment treating them as a special verdict; before the accused could be found guilty there must be a finding that the chain of causation was complete between the negligence and the deaths. His Honour thought that the evidence excluded at the trial should have been admitted.

ADAMS, J., concurred in the judgment of Myers, C.J.

BLAIR, J., delivered a separate judgment concurring that there should be a new trial. On the question as to the degree of negligence required to be proved to establish the crime of manslaughter due to negligent driving or the crime of negligent driving causing death under the Motor Vehicles Act, 1924, His Honour fully concurred with the judgment delivered by the Chief Justice. The question in a charge of manslaughter was whether the death was the consequence of an unlawful act, and the question in a charge under the Motor Vehicles Act was whether the negligent act caused the death. If the Crown's case established negligence on the deceased's part, and the accused, even if he admitted that negligence, could produce evidence that the real and effective cause of the death was the victim's own negligence, surely the jury who were to try the question as to whether the accused's negligence caused the death must look at those additional facts for the purpose of saying whether the Crown had established that the death was the consequence of the accused's negligence. If the Crown's case carried the matter no further than to leave it in doubt as to whether the negligence of the accused or the negligence of the victim himself was the cause then in His Honour's opinion the case against the motorist under S. 27 failed. *A fortiori* if on the Crown's case it appeared that the victim was the author of his own death. His Honour appreciated that if both the victim and the accused were equally negligent the jury could find the accused guilty, and the jury could if the victim were guilty of greater negligence than the accused also find the accused guilty of causing the death. A man might be the effective cause of another's death even though others contributed to it. The question of cause was a question of fact for the jury. The matter could not be worked out mathematically. In His Honour's view the question as to whether the accused's negligence was the cause was particularly one for the jury, and all evidence touching the question as to whether the negligence of the accused or of the victim or even of a third party was the cause of the victim's death was relevant and material to the question of cause. It followed from what His Honour had said that in his opinion the evidence excluded at the trial should have been admitted. His Honour agreed that for the purposes of the present case it was proper to submit issues because the answers were required for the case mentioned in S. 442 of the Crimes Act. His Honour adopted the view expressed by the Chief Justice as to the meaning of the jury's verdict.

SMITH, J., concurred in the judgment of Reed, J.

KENNEDY, J., delivered a separate judgment concurring in the judgment of Myers, C.J.

New trial ordered.

Solicitors for Crown: **Crown Law Office,** Wellington.
Solicitors for accused: **Foden and Thompson,** Wellington.

Supreme Court

Ostler, J. December 16; 18, 1930.
Wellington.

SIMMONDS AND OSBORNE LTD. v. BIGHAM.

Contract—Restraint of Trade—Sale of Business Including Goodwill—Covenant by Vendor Not For Period of Ten Years to Carry on in Wellington or Within Ten Miles Thereof or "Be Engaged or Beneficially Interested in or Connected With Save as a Shareholder or Director of a Company any Similar Trade or Business"—Employment as Servant in Similar Business Prohibited by Terms of Agreement.

Action for an injunction under Rule 462. The plaintiff company was a duly incorporated company carrying on business at No. 369 Adelaide Road, Wellington, as makers and vendors

of non-alcoholic beverages known as "soft drinks." By memorandum of agreement dated 29th August, 1929, the plaintiff company purchased its business including the goodwill from the defendant and one Chapman who had been carrying it on in co-partnership. The defendant had been the manager of the business during the partnership. In the agreement of sale the defendant and Chapman entered into a covenant in the following words: "Neither of the vendors shall for a period of ten years from the date hereof either in his own name or in the name of any other person or company or otherwise howsoever without the license of the Company under its common seal first obtained carry on in the City of Wellington or within ten miles thereof or be engaged or beneficially interested in or in any way connected with save as a shareholder or director of the Company any trade or business similar to that hereby agreed to be sold." Upon the sale of the business to the plaintiff company the defendant entered into a written agreement with plaintiff company (dated the same day as the agreement of sale) whereby the plaintiff company agreed to employ defendant, and the defendant agreed to serve as its manager, for the term of one year from 1st April, 1929, and thereafter until the agreement should be terminated by either party giving to the other three months notice in writing of such intended determination. The defendant served as manager of plaintiff company's business until 22nd June, 1930, when he was dismissed without notice and without any salary in lieu of notice. He claimed that that dismissal was a breach of contract on the part of the plaintiff company. The company, on the other hand, claimed that the defendant was rightfully dismissed on the ground of misconduct and dishonesty. The defendant admitted that since 18th October, 1930 he had been employed by the Star Aerated Water Company as an engineer looking after its machinery. That company was engaged in a similar business to that of plaintiff company, and its place of business was within ten miles of the City of Wellington. There was also evidence that the defendant admitted to Chapman that he was employed as brewer and manufacturer for the Star Company, and Ostler, J., was inclined to accept that evidence.

Cousins for plaintiff.

C. A. L. Treadwell for defendant.

OSTLER, J., said that several defences were raised which he disposed of at the hearing. He held that the covenant was not void as being an unreasonable restraint of trade, and that the dismissal of defendant, even if wrongful, did not absolve him from performance of the covenant. One question of law was raised, however, which His Honour reserved for consideration, viz., whether the wording of the covenant was wide enough to make the defendant's employment as a servant in a similar business within ten miles of Wellington a breach of the covenant. That was a question which had come before the Courts on a great number of occasions, and there were a number of authorities bearing on the question, but of course each case dealt with the words of the particular covenant which was being construed. On two occasions the question had been before the New Zealand Courts—in **Woodville v. McGonville,** 26 N.Z.L.R. 1032, and in **Grantham v. Campbell,** 29 N.Z.L.R. 1019, which cited a number of the English authorities. In the present case the defendant covenanted *inter alia* not to be engaged in any similar business. It had been held in a number of cases that those words were wide enough to cover employment as a servant in a similar business: see **Watts v. Smith,** 62 L.T. 453; **Rolfe v. Rolfe,** 15 Sim. at p. 190; **Cade v. Calfe,** 22 T.L.R. 243; **Pearks v. Cullen,** 28 T.L.R. 371. See also **Newling v. Dobell,** 19 L.T. 408. Moreover the defendant had covenanted not to be in any way connected with any similar business. Those words were wide enough to cover employment as a servant. None of the cases cited on behalf of the defendant supported his proposition of law. **Bird v. Lake,** 1 H. & M. 338, merely decided that it was not a breach of a covenant not to be engaged in a specified trade for the covenantor to lend money on mortage of his trade premises to a person in that trade; although it would seem that if the mortgage debt was charged on the profits of the trade that would be a breach. In **Smith v. Hancock,** (1894) 2 Ch. 377, **Clark v. Watkins,** 11 W.R. 253, 319, and **Allen v. Taylor,** 19 W.R. 35, the words of the covenant were not nearly so wide as they were in the present case, and those cases were, therefore, of no value in construing the covenant. In His Honour's opinion the defendant had broken his covenant and the plaintiff company was entitled to an injunction restraining the defendant from being engaged in any capacity in any part of the business being carried on at Petone under the name of the Star Aerated Water Company.

Decree accordingly.

Solicitors for plaintiff company: **Ronayne and A. M. Hollings,** Wellington.

Solicitors for defendant: **Webb, Richmond and Swan** Wellington.

Blair, J. July 23, 25, 26, August 11; December 19, 1930. Wellington.

HALLENSTEIN BROTHERS LTD. v. LAWRENCE AND HANSEN ELECTRICAL CO. LTD.

Landlord and Tenant—Agreement—Statute of Frauds—Damages—Signed Letter From Tenant Company's Head Office to its Branch Office Enclosing Landlord's Form of Agreement to Lease with Suggested Alterations Made Thereon Sufficient Memorandum of Contract if Alterations Later Agreed to by Landlord—Tenant Repudiating Contract and Quitting Premises—Measure of Damages—Landlord Not Precluded from Suing for Damages by Accepting Possession of Premises and Re-Letting—Deduction of Interest from Damages for Present Payment of Moneys Accruing in Future.

Action for damages for breach of a contract to take a lease. The defendant contended: (1) that there was no concluded contract between the parties as to the granting and taking of a lease, (2) that there was no memorandum in writing of the contract sufficient to satisfy the Statute of Frauds, and (3) that the plaintiff by reletting the premises must be regarded as having concurred in the breach and as having treated the contract as ended. The case is reported on the second and third points only. His Honour held on the facts that there was a concluded agreement made between the parties on 22nd October, 1926, for the granting by the plaintiff and the taking by the defendant of a lease for five years from 1st January, 1927, at £500 per annum plus rates, this agreement being varied as to certain minor terms, on 27th April, 1927.

The facts relevant to the second contention were as follows: On 2nd December, 1926, the plaintiff's manager at Auckland handed to the defendant's Auckland manager a form of agreement to lease for execution by the defendant. This form of agreement was sent on 21st December, 1926, by the defendant's Auckland manager to the defendant's head office at Wellington enclosed in a letter in the following terms: "We are enclosing herewith an agreement of renewal of our lease with Messrs. Hallensteins for a term of five years and would be pleased if you would attach your signature and the company's seal to this agreement and return to us as soon as possible." The head office of the defendant sent the agreement to its solicitors for perusal; the solicitors later returned the agreement to the defendant's head office with some suggested alterations made thereon in pencil. On 21st March, 1927, the document, so altered in pencil, was sent by the defendant's head office to its Auckland manager enclosed in a letter in the following terms: "Ref. Auckland lease. This has been perused by our solicitors and they have altered some of it in pencil. We shall be glad therefore if you will have these alterations made and the extra clauses inserted. We shall then be pleased to sign same. We think that the clauses as suggested by the solicitors are reasonable and they advise us that the lease in the form sent down to us they do not consider it advisable for us to sign. Please therefore arrange that these clauses be inserted and sent down to us when we will sign same." The defendant's Auckland manager duly handed the altered form of lease to the plaintiff's Auckland manager. The plaintiff's Auckland manager forwarded the altered form of lease to the plaintiff's head office at Dunedin, asking that if the alterations met with their approval the agreement be sent to the defendant's head office at Wellington for completion. On 27th April, 1927, the plaintiff's head office at Dunedin sent to the defendant's head office at Wellington a new engrossment of the agreement embodying the whole of the alterations suggested by the defendant. There was also other correspondence between the parties to which it is unnecessary for the purposes for which the case is reported to refer.

The facts relevant to the third contention referred to above were as follows: on 29th March, 1928, the defendant's Auckland manager gave the plaintiff's Auckland manager written notice that the defendant would quit the premises on 20th April, 1928. On 5th April, 1928, the plaintiff's head office replied claiming that the lease was for five years from 1st January, 1927, and

saying that it would take action to make good any loss. The defendant vacated the premises on 30th April, 1928. The defendant had paid the rent up to this date and had paid the rates up to 31st May, 1928. On 22nd May, 1928, the plaintiff's head office advised the defendant's Auckland manager that it was compelled to seek another tenant and would let the premises as soon as it could at the best possible rental, and advising that it would hold the defendant responsible for any loss. The plaintiff relet the premises for storage purposes at £1 per week from 1st May, 1929, to 1st July, 1929, and relet the premises from 1st July, 1929, for the balance of the term at £7 per week plus rates. The defendant did not suggest that the plaintiff did not do the best it could as regards reletting. The plaintiff claimed £946 6s. 8d. as damages, made up as follows: (a) Rent from 1st May, 1928 to 1st May, 1929, £500; (b) Difference between rent at £500 per annum (i.e. £9 12s. 3d. per week) and at £1 per week from 1st May, 1929 to 1st July, 1929, £73 4s. 1d.; (c) Difference between £9 12s. 3d. per week and £7 per week from 1st July, 1929 to 1st January, 1932, £340; (d) Rates from 31st May, 1928 to 31st May, 1929, £28 11s. 4d.; (e) Proportion of rates from 31st May, 1929 to 30th June, 1929, £4 11s. 3d.; total £946 6s. 8d.

Cooke and **James** for plaintiff.

Gray, K.C. and **Cunningham** for defendant.

BLAIR, J., said that the defendant pleaded the Statute of Frauds, and pleaded also that the plaintiff by taking over the premises and re-letting them had waived its claim to damages. The defendant said that assuming there was a breach of contract on its part the breach having been concurred in by the plaintiff by re-taking possession of the premises absolved it from damages for its breach. It was clear to His Honour's mind that if one party to a contract repudiated it the party not in default might if the contract was a continuing contract treat it as still subsisting, and refuse to concur in the breach. In such event the contract remained and the party not in default could enforce the contract and claim the benefits under it as they from time to time accrued. The plaintiff by re-letting the premises must as from such date be taken as concurring in the breach and treating the contract as ended. It was then entitled to recover damages for the breach. Mr. Gray on the authority of the case of **Walls v. Atcheson,** 3 Bing. 462, submitted that where a landlord upon a tenant quitting premises re-let them to a third party the landlord's rights under his contract with the tenant were ended. In that case a furnished house was let for a year and the tenant left the premises after about one quarter. The landlord took possession and re-let for various short periods and subsequently sued on the contract for rent for the vacant periods. It was held that the tenancy must be deemed ended. There was nothing in that case to say that the landlord could not have sued for damages for the breach of contract. His Honour thought that from the moment the plaintiff re-took possession of the premises and re-let them it must be taken as treating the contract as ended, but that did not preclude it from suing for damages in respect of defendant's breach of contract. As a matter of fact, the plaintiff informed the defendant that it would re-let and hold the defendant responsible for the loss.

As to the Statute of Frauds, unquestionably there was prior to December, 1926, a verbal contract by the defendants with the plaintiff for the renewal of the lease for five years from 1st January, 1927, at the varied rent plus rates. It might be that the letter dated 21st December from defendant's Auckland manager to the defendant's head office at Wellington, accompanied as it was by the engrossment of the lease and expressly referring to it, provided sufficient writing to satisfy the Statute of Frauds. That letter was a written acknowledgment by the Auckland manager of the defendant of the existence of a five-year contract and the conduct of the parties showed that that contract was in fact acted upon and treated as binding by both parties. But whether the above were or were not the position the facts clearly showed that there was in March, 1927, a variation of the contract mutually agreed upon by the parties, and the written evidence as to the existence of that varied contract was complete. The draft lease which the defendant's Auckland manager had sent to the defendant's head office at Wellington was sent by the latter to its solicitors for perusal. The solicitors, treating the engrossment as a draft, made some pencil alterations. On 21st March, 1927, Mr. Vickery, who admittedly was head of the defendant company for New Zealand, sent that draft to his Auckland manager calling attention to the solicitors' alterations and saying that if Auckland could get those alterations made the company would execute the lease. The Auckland manager of defendant company passed that request on to plaintiff's Auckland manager, who on 5th April passed it on to Dunedin, with a request that the reply be sent to defendant's head office at Wellington. The plaintiff's head office at Dunedin, on 27th April, 1927, forwarded to Mr. Vickery the engrossment embodying the whole of the defendant company's solicitors' amendments, thus concluding acceptance of the variation of the agreement asked for by Mr. Vickery. There was thus a complete contract and the terms of it were clearly set out in the correspondence and accompanying documents. **Behnke v. Bede Shipping Co.,** (1927) 1 K.B. 649, at p. 660, was an illustration of a case where the necessity for written proof of a contract was, as here, satisfied by reference to a number of documents. It appeared to His Honour, therefore, that the requirements of the Statute of Frauds were satisfied and the contract between the parties was that embodied in the engrossment of the defendant's solicitors' altered draft.

As to damages, the defendant occupied the premises until 30th April, 1928, and paid rent for the period so occupied. They also paid the proportion of rates actually up to 31st May, 1928. It was proved that the premises remained vacant for a year although efforts were made to re-let them. The plaintiff was therefore entitled to the two items (a) and (d) above-mentioned. The premises were then let for storage purposes for two months at £1 per week, and the defendant was entitled to credit for this £1 per week, but as against that they would be liable by way of damages for the rent payable under the lease. The item (b) totalling £73 4s. 1d. covered that. As from 1st July, 1929, the premises were re-let to Midlane Brothers at £7 per week and rates for the remainder of the term. The difference between the agreed rental of £500 per annum and £7 per week for the period 1st July, 1929, to the end of the term, vis. 1st January, 1932, was £340 as detailed in item (c). But as against that item His Honour thought that a reduction should be made for present payment on the principle enunciated in **In re English Joint Stock Bank, Yelland's case,** L.R. 4 Eq. 350. His Honour would deduct one year's interest at 7% on the amount to cover that, and the item of £340 was, therefore, reduced by £23 16s. 0d. and allowed at £316 4s. 0d. The item (c) for proportion rates from 31st May, 1929 to 30th June 1929, was also allowed.

Judgment for plaintiff.

Solicitors for plaintiff: **Chapman, Tripp, Cooke and Watson,** Wellington, agents for **Mondy, Stephens, Monro and Stephens,** Dunedin.

Solicitors for defendant: **Luke, Cunningham and Clere,** Wellington.

Smith, J. November 17; December 15, 1930.
Auckland.

BRADY v. MANAKAU COUNTY COUNCIL.

Bylaw—Buildings—"Dwelling-house"—Bylaw Prescribing Minimum Area and Minimum Frontage of Site for a "New Dwellinghouse"—Building Under One Roof Containing Two Entirely Separate Flats a Single Dwelling-house and Not Two Separate Dwelling-houses for Purposes of Bylaw.

Motion for writ of mandamus to defendant Council to grant a building permit to the plaintiff. The plaintiff, a builder and contractor, made application to the defendant Council for permission to erect "a building for residential purposes" at Mangere. The plans and specifications of the proposed building showed that it was a one storey structure under one roof containing two flats. Those flats were entirely separated by a wall running down the centre of the building. The fireplaces in each flat were adjacent to the wall and only one chimney projected above the roof. The flats had no common hall or entrance but had separate means of ingress and egress. Externally, the building was one structure under one roof; internally, it consisted of two entirely separate sets of rooms. The building was intended to stand on one section of land with a frontage of 55 ft. and a depth of 206 ft. The defendant refused permission to erect the building upon the ground that the proposed building did not comply with Bylaw 123. That Bylaw, as made on 1st January, 1924, was as follows: "Except as provided by this Section and by Bylaw 124, no person shall erect a new dwelling-house in the County upon a site of less area than one-fifth of an acre and unless such site shall have a frontage of at least 50 feet to a public road." On 8th October, 1928, the bylaw was amended by adding the following words:

" nor in such a position that any portion of such dwelling-house shall stand closer than 3 feet to either of the side boundaries of its site provided however it shall not be a breach hereof if the eaves only of such dwelling-house project to a distance not closer than 2 feet from either of the said side boundaries."

Meredith for plaintiff.
Prendergast for defendant.

SMITH, J., said that the question before the Court was whether upon its true construction Bylaw 123 meant that the inclusion of a separate set of apartments of the kind in question in a house to be newly erected constituted the erection of a new dwelling-house for the purposes of that bylaw. If so, then neither the site nor the frontage of the section was sufficient. If not, then both site and frontage were sufficient. That question must be determined according to whether Bylaw 123 applied upon its true construction only to a new dwelling-house as a complete structure or whether it applied to any portion of the structure which could be described as being a dwelling-house. His Honour was of opinion that the bylaw made it clear that the dwelling-house was treated simply as a complete structure for human habitation. It was not directed in any way to a portion of a building which might be separately occupied. The addition to the bylaw prohibited the erection of any portion of the dwelling-house closer than 3 feet to either of the boundaries of its site provided that it should not be a breach if the eaves of such dwelling-house projected to a distance not closer than 2 feet from either of the side boundaries. Such a provision clearly referred to the external walls and the sides of the roof of the structure. That addition must be taken into account in interpreting the bylaw. It was plain, His Honour thought, that the internal arrangements of the house were not in question. *Prima facie* then, the bylaw, standing by itself, applied and applied only to a building intended for human habitation whatever might be the internal arrangements.

As the addition to the bylaw was not referred to in argument, His Honour dealt with the matter also upon the argument before him. In certain cases and for certain purposes flats with separate entrances had been held to be separate houses. On that point reference might be made to the inhabited house duty cases in England, such as **Chapman v. Royal Bank of Scotland,** 7 Q.B.D. 136. On the other hand there were cases upon particular covenants deciding that a building containing several residential flats constituted only one house within the meaning of the word " house " in the covenant, such as **Kimber v. Admans,** (1900) 1 Ch. 412. A contrary construction had been put upon other covenants of which **Rogers v. Hosegood,** (1900) 2 Ch. 388, was an example. His Honour was of opinion however, that the decision of the present matter depended upon the true construction of the particular bylaws and was not governed by authority. The plaintiff applied to the Council for a permit to erect " a building for residential purposes." The Council had declined to grant the permit and based its refusal upon a bylaw referring to " a new dwelling-house." Both sets of words appeared in the bylaws. There appeared to be no substantial distinction between those descriptions. It might be that the words " a dwelling-house " applied to what was generally known as a private dwelling and that the words " a building for residential purposes " applied to a hotel or a block of flats. The bylaws did not, however, interpret either of those terms. They did interpret, however, the words " building " and " house," the interpretations being as follows : " ' Building' includes house, and all included in the interpretation of the word ' house,' and whether the same shall be inhabitable or uninhabitable. ' House ' includes hotel, boarding-house, school, Public Hall, store, shed, office, or any other building in which human beings dwell, or intend to dwell, occupy or use, for any purpose, or which may be inhabitable, and includes a shop with dwelling rooms attached." It was important to note that " house " (which appeared to mean " dwelling-house " apart from a shop with dwelling rooms attached) was defined by reference to the word " building." It was, therefore, clear, His Honour thought, that the word " house " of itself imported the meaning of the house as one structure without regard to its internal housing arrangements. The words " a new house " were defined by Bylaw 127, but that definition applied to the present case only because what was proposed was " the erection of a new house upon vacant land." Bylaw 127 defined a new house as being also " the conversion into more than one house of a building originally constructed as one house only." Counsel for the defendant relied upon that phrase but it was clear that it did not apply in the present case. Bylaw 123 applied only to the erection of a new dwelling-house. In any event, the definition of a house as a building would indicate that what was meant was the conversion of one building into two.

A consideration of the other requirements of the bylaws with regard to the erection of a new dwelling-house lead to the conclusion that Bylaw 123 should be construed as His Honour had already indicated. Referring first to the question of site, His Honour said that " Site " was defined by Bylaw 128 as follows : " The ground upon which any house is erected, together with the whole curtilage thereof enclosed within the boundary fences, walls or lines of the premises, shall be deemed to be the site of such house within the meaning of these bylaws." In that bylaw the word " house " was used and that must include a dwelling-house. The word " house " as there used indicated merely a structure having regard to its external construction. An addition was made to Bylaw 128 by Section 4 of the amendments to the bylaws made on 8th October, 1928. That addition was as follows : " 4. The following section shall be added at the end of Section 128, namely :—Section 128A : No person shall erect a building or structure so as to leave the land (occupied or intended to be occupied with any building then erected), without the requisite frontage depth area and side space required by these bylaws, and no person shall convert into or use as a dwelling-house only, any building erected as a shop, or shop and dwelling-house combined, except the site thereof shall have the minimum area frontage depth and side space required by these bylaws in respect of a building intended for use as a dwelling-house only." That addition referred to a " building intended for use as a dwelling-house only." It recognised that a dwelling-house must have, pursuant to the bylaws, a certain minimum area frontage depth and side space and it imposed such a standard for the conversion of any building erected as a shop, or shop and dwelling-house combined, into a dwelling-house. In interpreting that provision, it was to be remembered that Bylaw 123 was not enacted until 1st January, 1924. It was clear, however, in His Honour's opinion, that the standard so imposed referred to the dwelling-house as an external structure. Bylaws 139 and 140 relating to frontages applied to dwelling-houses or buildings for residential purposes viewed only as structures, and the sections applied, therefore, to any buildings intended for human habitation in accordance with the definition of " house " regardless of their internal arrangements. The same indication as to frontage as it affected a dwelling-house was given by Section 128B (b) enacted on 18th March, 1929, and applying to certain streets in the Mangere Riding. Again the dwelling-house was dealt with as a complete structure under one roof. Section 125 dealt with air spaces. The terms " building " and " house " were there used interchangeably, but the important point was that a house, being an inhabitable building, included " dwelling-house " and that the air space was in no way made dependent on the question whether there were two definite sets of apartments within the structure itself. The regulation as it affected dwelling-houses depended for its operation upon considerations affecting a dwelling-house as one structure under one roof.

His Honour accordingly held that Bylaw 123 itself and the whole of the bylaws dealing with the site of the dwelling-house, the frontage and the air space lead to the conclusion that the words " a new dwelling-house " as referred to in Bylaw 123 referred only to the structural entity. It was a building under one roof in which human beings intended to dwell, regardless of the internal housing arrangements. His Honour treated the term as being practically equivalent in this case to a building used wholly for residential purposes.

Writ of Mandamus.

Solicitors for plaintiff : **Meredith and Hubble,** Auckland.
Solicitors for defendant : **Brookfield, Prendergast and Schnauer,** Auckland.

Smith, J. November 21 ; December 12, 1930. Auckland.

SWEET v. RAHERE TANUI.

Land Transfer—Caveat—Application for Removal of Caveat—Persons Acquiring Land from Native Owners by Fraud Subsequently Transferring Such Land to Persons Without Notice of Fraud—Caveat Lodged by Native Owner—No Beneficial Interest to Support Caveat—Caveat Removed—Land Transfer Act, 1915, Ss. 152, 197, 198.

Summons under S. 152 of the Land Transfer Act, 1915, for the removal of a caveat. The main facts are set out in the case

of **Erena Pou and another v. Nicholson,** (1923) N.Z.L.R. 256, and were made applicable to the present proceeding by Mr. Quartley's affidavit filed herein. Following upon the decision of the Court of Appeal in that case one of the plaintiffs, Rahere Tanui, lodged a caveat on 9th November, 1922, against the title to the block of land in question. At that time Messrs. Sweet and Beetham were the registered proprietors of the block. By her caveat, Rahere Tanui claimed an estate or interest as the beneficial owner of fifteen thirty-seconds of the land alleging that Beetham and Sweet held that portion for her as trustees. Beetham died in 1929 and Sweet then became by transmission the sole registered proprietor. Sweet now made the present application as plaintiff against Rahere Tanui as defendant for the removal of the caveat.

Vallance for plaintiff.

Quartley for defendant.

SMITH, J., said that it appeared for the purposes of the present application that one W. B. Nicholson acquired the block of land from the natives by conduct amounting to fraud. It appeared also that when in October, 1912, Nicholson sold shares in the block to a syndicate he retained fifteen thirty-seconds of the beneficial interest for himself. In the same month he transferred the whole block to Sweet and Beetham. They became the registered proprietors of the whole block but actually held the land as trustees for the members of the syndicate, including Nicholson. Subsequently, on 3rd September, 1913, Nicholson sold his interest to another member of the syndicate and thereafter he died. For the purposes of the present application it must be taken that Nicholson's conduct in acquiring the block from the natives amounted to fraud. No other member of the syndicate had at any material time knowledge of the fraud or was affected by it. The Court of Appeal held that the relationship of the members of the syndicate was not that of partners and that they were not affected by the previously existing fraud of Nicholson. The Court said at p. 262 of its judgment "The transaction on which the defendants Beetham and Sweet base their title is not that by which the plaintiffs allege they were defrauded, but a separate and subsequent transaction, altogether unconnected with the transaction affected by Nicholson's fraud." The Court then held: (1) that Nicholson's fraudulent conduct in acquiring the property did not consist in some betrayal of a trust which might have stamped with a trust the property so acquired which came into his hands. The Court said "A person acquiring property by fraud of the kind charged against Nicholson would not thereby be converted into a trustee, although, on the persons defrauded disaffirming the transaction and coming to the Court for relief, the Court might for the purpose of rendering its remedies effective declare the fraudulent purchaser to be a trustee." (2) That Ss. 197 and 198 of the Land Transfer Act extended to protect the shares of all members of the syndicate other than Nicholson. The defendant had taken no steps to have Nicholson's representatives and the registered proprietor declared trustees for her in respect of the fifteen thirty-second share of the block and it followed from the judgment of the Court of Appeal that the land had not been and was not now impressed with any trust in favour of the defendant. She had not shown in the present proceeding that she was entitled to any beneficial interest in any part or share of the land itself whether by virtue of any trust expressed or implied or otherwise howsoever. She had, therefore, not established her right to lodge or maintain a caveat to protect such an interest.

It was unnecessary to determine what the Court of Appeal exactly meant in **Erena Pou's** case (*cit. sup.*) by saying that the protection of the Land Transfer Act extended to protect the shares of all members of the syndicate other than Nicholson. His Honour held it to be clear upon the facts before him, which were substantially the facts assumed before the Court of Appeal, that Sweet and Beetham took a transfer from Nicholson as the registered proprietor of the whole of the land without notice of any fraud. They (and Sweet as successor to Sweet and Beetham) appeared to be within the very words of S. 197 of the Land Transfer Act, 1915. Although Sweet held a fifteen thirty-second share in the land and the proceeds thereof in trust for Nicholson's representatives or assigns, he could not be prevented by the present application from dealing with the whole of the land by the present caveat because, as pointed out above, she had not established a beneficial interest in any part or share of the land.

Caveat removed.

Solicitors for plaintiff: **Wynyard, Wilson, Vallance and Holmden,** Auckland.

Solicitor for defendant: **A. G. Quartley,** Auckland.

Smith, J. December 12; 17, 1930.
Hamilton.

SCHAARE v. SCHAARE.

Criminal Law—"Convict"—Alienation of Property—"Person Sentenced to Imprisonment for a Term of Three Years or Upwards"—Person Sentenced to Two Years' Imprisonment on Each of Three Charges Sentences Being Cumulative Not a "Convict" Within Definition—Prisons Act, 1908, S. 52.

Motion for an order sanctioning the compromise of an action commenced on the 18th March, 1930, in which the plaintiff, the infant daughter of the defendant, by her guardian-ad-liten, claimed damages from her father upon the ground that he had committed incest upon her without her consent; and had thereby caused injury to her health and reputation. The action was set down for trial at Hamilton on the 22nd July, 1930; but on the previous day terms of settlement were arranged by which the defendant agreed to pay a sum to the plaintiff's solicitors for costs and to execute a third mortgage for £500 over certain property. On 25th November, 1927, the defendant had pleaded guilty to three counts of an indictment, each charging incest. He was sentenced to two years' imprisonment on each count, the sentences being made cumulative. The defendant's total term of imprisonment upon the three counts was, therefore, six years. The question arose as to whether the defendant was in July, 1930, a "convict" within the meaning of S. 52 of the Prisons Act, 1908, and so incapable of alienating or charging any property or of making any contract save as provided in Part III of that Act.

Wiseman for plaintiff.

Northcroft for Public Trustee.

Macarthur for defendant.

SMITH, J., read S. 52 of the Prisons Act, 1908, and said that penal servitude having been abolished in New Zealand the question arose whether the defendant was a person sentenced to imprisonment for a term of three years or upwards. In His Honour's opinion, he was not. "Sentenced" meant, His Honour thought, "sentenced on any charge." Each count in an indictment should charge a separate crime, though crimes might be charged in the alternative in a single count. In the present case, the defendant was charged with a separate crime in each count. In respect of each charge, he was separately sentenced to two years' imprisonment. His Honour thought that the question of his status, viz., as to whether he was a "convict" or not, was to be determined by that fact and not by the fact that the Judge chose to exercise his discretion to make the sentences cumulative. His Honour was, therefore, of opinion that the defendant was not a "convict" within the meaning of S. 52 and that he was personally entitled to agree to the aforesaid settlement of the civil action.

Solicitors for plaintiff: **Hampson and Bell,** Matamata.

Solicitors for Public Trustee: **Cave, Kent, Massey and Northcroft,** Auckland.

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

The Interrupting Judge.

Sir Alfred Hopkinson, K.C., in *Penultima*, tells a good story of an unnamed talking Lord of Appeal, vouched for on the authority of Lord Shand:

"A story told to me by Lord Shand, one of the best lawyers and also one of the most courteous judges, might then have applied to more than one member of the House. He said that a grandchild of one of his colleagues had been brought to see the House of Lords, and when counsel was trying to state the case for an appellant, the boy asked his mother who was that man in a wig standing up and so often interrupting grandpapa when he talked."

Law and Literature.

Lord Macmillan's Address to American Bar Association.

I am happy to have this opportunity of acknowledging in person the distinction which you conferred on me when in 1924 you elected me an Honorary Member of the American Bar Association, thus enabling me to-day to enjoy the privilege of addressing you as one of yourselves. But indeed a lawyer can never feel himself a stranger at a gathering of the members of his profession in whatever quarter of the globe, for I am convinced that there is no profession which binds its members in a closer fraternity. It is not for nothing that in the law we call each other brethren. We may not succeed in attracting the same measure of popular affection as do certain of the other professions. The "beloved physician" has canonical authority. I have yet to hear of a beloved barrister or a beloved solicitor. Nevertheless, our services to the community are indispensable, and I suspect are valued much more highly than it is customary to avow.

I may remind you that one lawyer at any rate has attained beatification in the person of St. Ives of Brittany, the patron saint of our profession, who was famous for his zeal in defending the poor. At the annual celebration held in his honour in his native land I have been told that these lines are chanted:

> Advocatus sed non latro
> Res miranda populo,

which I may render thus:

> An advocate yet not a thief,
> A thing well-nigh beyond belief.

The symbol with which he is always depicted is a black cat; I hope not as a suggestion that we practise the black arts.

If I were to seek for the explanation of the bond which binds in brotherhood the servants of the law throughout the world, I venture to think that I should find it in our common devotion to a great ideal, the promotion of the orderly progress of civilisation. The famous orders of chivalry in the Middle Ages dedicated their lives and labours to some noble cause. We in these modern and more prosaic days have no less need, we have indeed more need, of a similar inspiration; and the cause to which we are devoted is truly a worthy one,—that justice and truth shall prevail throughout the world. Amidst the daily drudgery of court and office we are apt to lose sight of the lofty aims of our profession. Occasions such as this enable us to recapture the enthusiasm of our high calling, to realise afresh the great and vital interests which are committed to us, and in the glow of mutual encouragement and good-fellowship to rekindle ideals which, when we separate once more on our several ways, will long continue to illumine our daily path of duty.

I read recently that the great Chief Justice of the United States Supreme Court, John Marshall—*clarum et venerabile nomen*—wore during his life an amethyst ring with the mottor *Veritas Vincit* engraved upon it. No minister of the law ever observed more loyally the lesson of that daily reminder. Steadfastly and unswervingly, through good report and through evil report, he pursued the even tenor of his way, and proved to the world once more that truth is great and must prevail. His memory is revered not only here in his own country but wherever the law is practised, and his noble judgments will ever continue to echo down the corridors of time. To me, as a Scotsman, it is of peculiar interest that the Chief Justice should have adopted this talisman, for the words *Veritas Vincit* are the motto of the famous Scottish family of the Keiths, the Earls Marischal of Scotland, whose name is associated with many of the most stirring and romantic episodes of my native land. His right to wear it came to him from his maternal grandfather, the Reverend James Keith, a member of this historic Scottish family who fled to Virginia to escape the consequences of his participation in the Jacobite rebellion. Thus Marshall could count among his ancestors Sir Robert Keith, the commander of the Scottish horse at Bannockburn in 1314; George Keith, the fifth Earl, a famous scholar and diplomatist, who in 1593 founded and endowed Marischal College in the University of Aberdeen; and William, the seventh Earl, who saved the regalia of Scotland by concealing them in his castle at Dunnottar. If heredity counts for anything, it is not surprising that John Marshall, coming from such a stock, found himself equally at home in the camp and in the law courts, and won distinction in each. And now I must tell you that over the doorway into the law library in the Old Parliament House, where the law courts meet in Edinburgh, there is hung the standard of the Earl Marischal of Scotland, which was carried at the fateful battle of Flodden Field in 1513, and which bears embroidered on it, along with the Keith arms, those self-same words—*Veritas Vincit*. Thus the advocates of the Scottish Bar have ever before their eyes the same admonition which the great Chief Justice of the United States adopted as the keynote of his life-work.

There are other pleasant links between the Chief Justice and Scotland besides the fact that some of our best Scottish blood ran in his veins, for he received his first tutoring from a young emigrant Scottish divine, James Thompson, who lived for a year in his father's house; while his second instructor was the Reverend Archibald Campbell, who belonged to a Glasgow family of Virginian merchants and was an uncle of the poet Thomas Campbell, the well-known author of *The Pleasures of Hope*. In the school which he started in Westmoreland County, Virginia, he no doubt imparted to his young pupil the sound classical teaching which he had himself imbibed at a Scottish University. I note, too, that among the earliest books which the Chief Justice bought were the *Lectures on Rhetoric* of the famous Professor Hugh Blair of Edinburgh University, and the *Principles of Equity*, a treatise written by the Scottish judge, Lord Kames.

The name and fame of John Marshall lead me easily to the theme on which I should like to say a few words to you to-day, namely, the association between law and letters, for, as I shall show, he exemplified that association in a conspicuous degree. I am convinced, as he was convinced, that no lawyer is justly entitled to the honourable and conventional epithet of learned if his learning is confined to the statutes and the law reports. It is the province of the lawyer to be the counsellor of persons engaged in every branch of human activity. Nothing human must be alien to him. "You are a lawyer," said Dr. Johnson to Mr. Edwards. "Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants." Equally the man of letters has what

the lawyer wants, for if he is to fulfil his role usefully and wisely he must have a mind not merely stored with the precedents of the law, but possessing that width of comprehension, that serenity of outlook, and that catholicity of sympathy which can nowise be so well acquired as from consort with the great masters of literature. In such company is found the corrective for the narrowness of mere professionalism. The lawyer does well from time to time to lift his eyes from his desk and look out of the window on the wider world beyond. There can be a too sedulous devotion to the text-books of the law, and I do not commend the example of Chief Baron Palles, who is said to have taken *Fearne on Contingent Remainders* with him for reading on his honeymoon.

Fortunately the law has always been on excellent terms with the Muses. You have only to read the biographies of our great judges and advocates of the past to realise how versed in letters most of them were, and what solace and inspiration they drew from that source. Take Chief Justice Marshall himself. Before he was twelve years of age he had copied out every word of Pope's *Essay on Man* and committed his favourite passages to memory. He bought Mason's Poems about the same time as he acquired Blackstone's *Commentaries*, and among his other early purchases were Chesterfield's *Letters*, the *Life of Clarendon*, Machiavelli's works, and translations of Æschines' Orations, and Demosthenes on the Crown—a sufficiently varied intellectual diet. When he was seventy-one years of age he read the whole of Jane Austen's novels, of which he made this perspicacious estimate in a letter to his colleague, Joseph Story: "Her flights are not lofty. She does not soar on eagle's wings; but she is pleasing, interesting, equable, and yet amusing." In a letter written in 1829 he said: "The plan of my life I had formed for myself to be adopted after my retirement from office is to read nothing but novels and poetry." Alas, in his case, as in that of so many others who have looked forward all their lives to the delights which they have promised themselves on retirement, this happy time never came, for he died six years later still in harness.

Abraham Lincoln in his early days had even greater difficulties to surmount in the pursuit of learning than John Marshall. I may properly call him also as a witness to my plea, for although his greatest triumphs were in the realm of statesmanship, he was also an accomplished lawyer. As a boy "he read," we are told by his stepmother, "every book he could lay his hands on, and when he came across a passage that struck him, he would write it down on boards, if he had no paper, and keep it there until he did get paper. Then he would rewrite it, look at it, repeat it. He had a copy book, a kind of scrap-book, in which he put down all things, and thus preserved them." Lincoln diligently borrowed such books as were to be found in the neighbourhood of his early home in Indiana. They were not many, but they included *Robinson Crusoe*, *Æsop's Fables*, Bunyan's *Pilgrim's Progress*, Weem's *Life of Washington*, and a *History of the United States*, while Shakespeare and Burns were his favouirte poets. With these he mitigated the perusal of the *Revised Statutes of Indiana*, in those days happily not so bulky as now. Thus Lincoln acquired his marvellous command of clear-cut simple English, which reached its perfection of combined brevity and beauty in the dedicatory speech at Gettysburg and the great Second Inaugural. His happy gift of style is illustrated not only in resounding aphorisms such as the famous "He who would be no slave must consent to have no slave," but also enabled him in more colloquial moments to coin innumerable delightful sayings. Thus, when speaking of his difficulties in the organisation of recruits, he said that he felt like a man trying to shovel a bushel of fleas across a barn floor; or again, when besieged by office-seekers while his own position was highly precarious, he complained that his task was like letting rooms at one end of his house while the other end was on fire; or yet again, when reproached for the stern measures which war necessitated, he asked, Would you prosecute it in future with elder-stalk squirts charged with rose-water?

I have given you evidence of the debt which two of the greatest American lawyers and statesmen owed to literature. May I in turn say something of the connection of the Bar of Scotland with the world of letters, for nowhere have law and literature been more closely related? I cannot say how far this may have been due to the fact that the Scottish Bar has for two and a half centuries lived in daily contact with the famous Advocates' Library, the greatest library which ever belonged to any professional body in the world. Founded in 1682 by the famous, some would say notorious, Lord Advocate, Sir George Mackenzie of Rosehaugh—that "noble wit of Scotland" as Dryden called him,—it had grown to over three-quarters of a million books and pamphlets, not including its priceless collection of manuscripts, when in 1925 the Faculty handed it over as a free gift to the nation, beyond all comparison the greatest literary benefaction in our country's history. With such resources at hand to inspire them, the Bar of Scotland have always lived in an atmosphere of what used to be called polite learning. It should not be forgotten that Sir Walter Scott was a practising Scottish advocate, and for many years held office as a Sheriff or County Court Judge, and as Clerk of the Court of Session, the Scottish Supreme Court. He was a lawyer of no mean attainments, and his pen was not solely devoted to poetry and romance. I suppose I am one of the few people of this generation who have read his official disquisition on the technical subject of jury trials. In *Guy Mannering* Sir Walter has stated my thesis for me in his own inimitable way. You remember the visit which Colonel Mannering pays to the study of his counsel, Mr Pleydell, in the High Street of Edinburgh. "The library into which he was shewn," we read, "was a well-proportioned room, hung with a portrait or two of Scottish characters of eminence by Jamieson, the Caledonian Vandyke, and surrounded with books, the best editions of the best authors, and in particular an admirable collection of classics. 'These,' said Pleydell, 'are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.'"

I enjoy for the moment the privilege which the lawyer is so rarely accorded of being as irrelevant as I please, and I cannot refrain from referring here to a literary link with the past which may interest you. The late Archbishop of Canterbury told me that Sir Walter tried out his *Tales of a Grandfather* by reading them over to the Archbishop's mother, Mrs. Davidson, then a little girl of seven, and according to her verdict retained or rejected what he had written. Dining at Grillion's Club one evening only a year or two ago, I sat between the Archbishop and Lord Finlay, who in turn told me that he was reading the *Tales of a Grand-*

father to his own little granddaughter. So the ages are bridged.

Another Scottish advocate of our own day has attained a literary fame second only to Sir Walter's. It cannot be said that R. L. Stevenson had much professional association with the Bar, to which he was called as a contemporary of Lord Dunedin, who is with us here to-day. Yet he found the inspiration of some of his best writing in the legal life of Edinburgh, whose characteristic flavour no one appreciated better than he. There is general agreement that his masterpiece was his unfinished *Weir of Hermiston*, in which he gives us with amazing insight and infinite gusto a portrait of a Scottish Judge of the old School. I could mention many other names: Lord Jeffrey, for instance, the pungent Edinburgh reviewer who is perhaps best remembered for the petulant "This will never do!" with which he greeted the publication of Wordsworth's *Excursion*; and Aytoun, the author of the *Bon Gaultier Ballads* and the *Lays of the Scottish Cavaliers*, who confessed that although he followed the law he never could overtake it. But I content myself with reminding you that the two greatest biographies in the English language—Boswell's *Life of Johnson* and Lockhart's *Life of Scott*—were written by members of the Scottish Bar. So we may accept with becoming modesty Dr. Johnson's reluctant tribute: "The Scotch write English wonderfully well."

The fine scholarship of the Bench and Bar of England is traditional. It has exhibited itself perhaps less in actual contributions to literature than in the professional sphere. The deliverances of the Judges of England in the leading cases of the law are distinguished by the highest qualities of literary craftsmanship. Witness the historic judgments in which Lord Mansfield enunciated the principles of the Common Law in their application to commerce, the masterful brevity of Jessel, M.R., the elegant irony of Lord Bowen, and those delightful passages in which Lord Macnaghten contrived to illumine with humanity and humour the most accurate exposition of the technical doctrines of the law. Of him it could certainly never be said, as was said of another Law Lord, that he was not only dull himself, but the cause of dullness in others. The compilers of anthologies have at last discovered how much admirable literary matter is concealed within the unpromising covers of the law reports, and in a recent volume of selections of the best English prose will be found two passages from judgments of Lord Sumner, that incomparable master of the English language, whose retirement from the judiciary even his inadequate successor may be permitted to lament.

While literature for its own sake has always possessed a special attraction for the members of our profession, I venture to suggest that its study has a utilitarian side also. Words, the spoken and the written word, are the raw material of the lawyer's trade, and the possession of a good literary style which enables him to make effective use of that material is one of the most valuable of all professional equipments. Such a style is often a natural gift, but even where it is not so bestowed, it may be acquired by study and by practice. We may all at least aspire to such a style as, we are told, characterised the judgments of a well-known American judge—"clear, compact and complete, carrying no immaterial discussions and losing no weight through grammatical leaks or rhetorical cracks." For the attainment of good English style there is no discipline so admirable as the reading of the Bible, a statement appropriate for a son of the Scottish manse, which I take leave to endorse as a Lord of Appeal. I have been pleased to observe in the advertisement columns of the journal of the American Bar Association the Bible finding a place among the notices of legal publications. It is there commended to purchasers "bound in high-quality buckrum that looks well with other books in your library. Every lawyer in active practice," says the advertiser, "needs it . . . you'll find it a wonderful help in your practice." I respectfully agree, though I am not quite sure that we mean exactly the same thing. It was Daniel Webster who said: "I have read the Bible through many times, and now make it a practice to read it through once every year. It is a book of all others for lawyers as well as divines; and I pity the man who cannot find in it a rich supply of thought and of rules of conduct." In that delightful and friendly series of letters which those two veteran combatants, Adams and Jefferson, exchanged in their old age, and which fortunately has been preserved for our edification, I find Adams on Christmas Day 1813 confessing to his correspondent: "The Bible is the best book in the world. It contains more of my little philosophy than all the libraries I have seen." I am for the moment, however, thinking of the Bible purely as literature, and I am very sure that those who have learned to drink from that well of English undefiled have sought the best source of literary inspiration. If to this you add some generous draughts from the Pierian springs of the classics, you can never descend to the mean vulgarity which characterises so much of the writing of the present day.

There is no reason why legal arguments or judicial judgments should not be expressed in good English. There is every reason why they should. The advocate who can impart a literary flavour to his address adds to its persuasiveness and attraction. "Nor pleads he worse who with a decent sprig of bay adorns his legal waste of wig." Exotic flowers of oratory are not suitable adornments for our modern Law Courts, but the Temple has never disdained to deck its plots with the classic blossoms of the English flower-garden. It is of even more vital importance that those who sit in judgment should have a mastery not only of law but of letters, so that they may be able to use with ease and freedom—and I should like to add, with distinction—the vehicle of language in which their decisions must be conveyed. The draftsman comes to take a joy in his sheer craftsmanship. I venture to think that there are few higher intellectual pleasures than success in the task of expressing an argument or a conclusion in just precisely the right language, so that the thought is caught and poised exactly as we would have it. Clear thinking always means clear writing, and clear writing is always good writing.

And so I come back to the point from which I set out, that alike for the preservation of our position as a learned profession and for the promotion of efficiency in the art we practise, it is essential that the lawyer should be steeped in literature, and keep his mind constantly refreshed and renewed by contact with the great thinkers of the past. He will thus be best able to obey the injunction of one of the most illustrious of all lawyers. "I hold every man," said Bacon, "a debtor to his profession, from the which as men of course do seek countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and ornament thereto."

Issues in Criminal Cases.

The Position under S. 442 of the Crimes Act and at Common Law.

While in our Courts in criminal cases issues are not usually put to the jury, this course has been adopted occasionally by different Judges for different reasons. The course was taken by Myers, C.J., in the recent case of *R. v. Storey* where the prisoner was indicted for manslaughter and for negligent driving causing death. Early in the trial it became apparent that important questions of law would arise and the learned Chief Justice intimated during the trial and well before its conclusion that he intended to put issues to the jury, and that, if in the result the accused were convicted, he would reserve all questions for the Court of Appeal.

S. 442 of the Crimes Act, 1908 (subsections (1) and (2)) read as follows:

"(1.) The Court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the Judge for the opinion of the Court of Appeal in manner hereinafter provided.

"(2.) If the decision of the question may in the opinion of the Court depend on any questions of fact, *the Court may in its discretion ask the jury questions as to such facts separately,* and the Court shall make a note of such questions and the findings thereon."

When His Honour the Chief Justice stated the case for the opinion of the Court of Appeal one of the questions referred involved the right of a Judge on the trial of a criminal to submit issues to the jury and the Court of Appeal held that in the circumstances, as it was intended to reserve questions of law for that Court, the course adopted by the Chief Justice was a proper one. And it was held moreover that, when the discretion conferred by s. 442 is exercised, the specific questions can be asked either before or after the general verdict is taken—or be submitted together with the general issue. Myers, C.J. (Adams, J., concurring) said:

"I see no reason why the specific questions should not be asked either before, or after, the general verdict is taken, or submitted together with the general issue. In each case it seems to me that the specific questions would be asked 'separately' as provided by subsection (2)."

And Reed, J. (Smith, J., concurring) said:

"Subsection (2) then provides that if the decision by the Court of Appeal may depend on some questions of fact the Court may in its discretion ask the jury questions on such facts *separately,* that is separately from the general question. This does not necessarily mean that those questions are to be asked after the finding of guilty or not guilty, although that may be done. I think that it is allowable when asking the jury to find whether the prisoner be guilty or not guilty also to ask that they *separately* answer the questions of fact submitted."

But what of the position apart from S. 442 of the Crimes Act? Is there any right at common law to submit issues to a jury in a criminal case, and, if there is, can the jury be compelled to answer those issues as well as to return a general verdict? There are undoubtedly cases in England where issues have been put in criminal cases: see, for instance, *Reg. v. Jameson,* (1896) 2 Q.B. 425; *Reg. v. Morley,* 8 Q.B.D. 571; *Rex v. Hendrick,* 37 T.L.R. 447; 15 Cr.A.R. 149. In *Reg. v. Davies,* (1897) 2 Q.B. 199, also issues were put, and on a case stated as to the effect of the verdict of guilty upon the answers of the jury Lord Russell of Killowen, C.J., said:

"It is for the jury to determine whether a person is guilty or not guilty upon direction as to points of law by the Judge: here, however, they appear not to have pronounced a verdict of guilty or not guilty at all. It is true that it is still sometimes the practice to ask the jury to give special findings upon the facts, but it is ordinarily a safer and better course to get the opinion of the jury as to whether the accused is guilty or not guilty, the Judge directing them upon the law."

The questions raised in the last paragraph were discussed at length by the learned Judges in *Rex v. Storey.* Myers, C.J., in whose judgment Adams, J., concurred, after reviewing the English decisions cited above, said:

"In my opinion there is nothing to prevent the Judge putting specific questions to the jury, but the jury are not bound to answer them. In other words a jury may be invited but cannot be compelled to answer specific issues. As was said by the Lord Chief Justice in *Reg. v. Davies* it is better to leave the general issue to the jury, save, I would add, in exceptional circumstances where in the interests of justice it seems desirable that specific questions should be put. Even where they are put, however, the jury are entitled if they think fit to return a general verdict instead of answering the issues."

Herdman, J., after referring to subsection (2) of s. 442 of the Crimes Act, 1908, said:

"But it might be said in this case that the questions of law arising for decision do not depend on any questions asked of the jury. If that be so, I can still see no reason why questions should not be put in the form of issues. When a jury is directed it is frequently invited to address itself to certain questions. A jury need not answer questions unless it pleases and must ultimately decide whether an accused person is guilty or not guilty. At the Jameson trial in 1896 issues were put, so there exists one precedent for such a course being taken. I am not prepared to go the length of deciding that the trial was abortive because members of the jury were invited to answer specific questions."

Reed, J., (Smith, J., concurring) said:

"There would appear to be no doubt that a Judge has the power to request a jury to answer issues instead of giving a general verdict. There are difficulties in this proceeding: (1) the jury is entitled to decline to answer issues; (2) if issues are submitted and on the answers a verdict of guilty is *directed* the verdict cannot stand unless those answers cover every necessary ingredient of the offence: *R. v. Hendrick,* 37 T.L.R. 447.

Blair, J., seems, perhaps, not to have taken quite the same view on this point as his colleagues, although he dealt with the question not so much from the point of view of the propriety of putting issues as from that of compelling the jury to answer issues put; he said:

"In my view the only cases in which the jury may be required to answer issues are cases within s. 442 and not any other cases. The jury is sworn to try the question as to whether the accused be guilty or not guilty and '*to return a verdict accordingly.*' To say that a Judge may make a request to a jury to do something else and at the same time admit that it is his duty to advise the jury that they are not bound to comply with the request means in my view that there is no right to require a jury to answer issues except in cases mentioned in s. 442."

Kennedy, J., thus expressed his view on the matter:

"I agree that on the trial of a criminal case a Judge has power to submit issues to the jury, but that power is not in terms conferred by the statute but depends upon the inherent power of the Court. S. 442 of the Crimes Act, 1908, empowers the Court where, in its opinion, the decision of any question of law arising, depends upon any questions of fact, to ask the jury questions as to such facts separately. The use of the word 'separately' shows that these questions are put in addition to the general issue. S. 442 does alter the law to this extent, that the jury may not properly refuse to answer the issues put to them under that section, whereas they may refuse to give an answer to issues otherwise put to them and insist upon giving a general verdict only."

R. v. Storey then plainly establishes that, even apart from s. 442 of the Crimes Act, 1908, issues may be put in criminal cases. Probably, however, it will be found in practice that issues will be put only exceptionally in cases not coming within s. 442. Perhaps the course will be adopted in cases of crimes—and there are some—in respect of which juries show an obvious reluctance to convict; if so, it will be interesting to see the outcome, for counsel for the accused in such a case would be bound to urge the jury—as he could properly do—to disregard the issues and to return only a general verdict.

Dominion Legislation.

The Result of the Imperial Conference.

Following upon the "equality of status" formula introduced by Lord Balfour at the Imperial Conference of 1926, the Conference on the question of Dominion Legislation reported at the beginning of last year that the hitherto acknowledged legislative supremacy of the Mother Country must go. The Imperial Conference of 1930 has adopted this report.

The various clauses which were suggested in the Report for giving effect to legislative equality are all, with slight amendment, to be incorporated in an Imperial Statute to be known, it is understood, as the Statute of Westminster. This means:

(1) That no future Act of the Imperial Parliament is to extend to a Dominion as part of the law in force in that Dominion, unless it is expressly declared therein that the Dominion has requested and assented to the enactment thereof;

(2) That the Parliament of a Dominion has full power to make laws having extra-territorial operation;

(3) That the Colonial Laws Validity Act, 1865, shall not apply to any future law made by the Parliament of a Dominion; and

(4) That no future law made by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of an existing or future Act of the United Kingdom; and the Parliament of a Dominion may repeal or amend any such Act, so far as the same is part of the law of the Dominion.

It will be for the Constitutional lawyer of the future, and for future Constitutional practice, to develop the full meaning of these principles when they have received statutory effect. Shortly, the effect seems to be, first, positive, that a Dominion may legislate for itself, with regard to the law of England—the doctrine of repugnancy is abolished; secondly, negative, that the Imperial Parliament cannot legislate for a Dominion, save at its express request; and thirdly, extensive, that a Dominion may legislate beyond its own borders. How this is to work in the event of conflicting extra-territorial legislation does not appear. The repeal of the Colonial Laws Validity Act, 1865, is, of course, essential in order to give effect to the new legislative equality.

Audience in the Supreme Court.

Position of Companies.

In an article appearing in these columns some short time ago (*ante* p. 237), a valued contributor dealt with the right of audience in the Supreme Court on behalf of bodies corporate and criticized the course adopted in the recent case of *Wanganui Harbour Board v. Attorney-General*, 6 N.Z.L.J. 182, (1930) G.L.R. 282, where the county clerk of the Wanganui County Council was allowed to appear for his corporation. Since this article was written attention has been drawn in England to the same question. In *Faber v. Tyler Wilson and Co. Ltd.*, tried before Horridge, J., and a special jury, the defendant company was allowed to be represented at the trial by one of its directors. The "*Times*" report states: "It was arranged that Mr. Chignell should represent Tyler Wilson & Co. Ltd., of which he is a director." The course allowed by Horridge, J., has been the subject of criticism in the *Law Journal*; the learned contributor of the practice notes in our contemporary writes as follows:

"The report does not state whether Tyler, Wilson and Co., Ltd., had entered an appearance, but presumably it had, and if so, it must have done so through a solicitor. The fact that a writ has been issued or an appearance entered by a solicitor and that his name appears on the record does not, in the case of an individual, prevent the litigant from appearing in person at the trial. I have heard it suggested that the strictly proper course would be for a party proposing to appear personally at the trial to give notice of change intimating that he would act in person before the trial comes on; but it is not, in my experience, usual for this point to be raised, and, if it were raised and considered, I think it would be held that an individual litigant who has a solicitor on the record is entitled to be heard in person at the trial. It is true that this involves the rather anomalous position that in proceedings in Chambers the person having the right of audience is the solicitor and not the client, whereas when the case comes to trial the client can do what he could not do in Chambers—appear for himself; but I do not think that that makes any difference to the result. An individual can act in person throughout the proceedings if he so desires; and it would be rather hard, if being able to afford a solicitor, but not able to afford to brief counsel, he were not to be able to be heard at all unless he discarded the assistance which he could afford.

"But where the party concerned is a corporation, the position is quite different. A company cannot take proceedings or enter appearance except by a solicitor, and it would seem to follow that it cannot appear at the hearing except by counsel. And I find that there is a case which appears to decide the point expressly: *Scriven v. Jescott (Leeds), Ltd.*, (1908) 53 Sol. J. 101. That case is very shortly reported, but it appears that at the trial the managing director of the defendant company appeared in person to represent it. Mr. Justice Bray held that as a company could only be "represented" by an attorney, and was not in the position of a litigant in person, the managing director could not be heard. In the case before Mr. Justice Horridge the person who by arrangement represented the defendant company, Tyler,

Wilson and Co., Ltd., was himself a defendant appearing in person and entitled to audience as such. But I doubt if that makes any difference to the point of practice which is, of course, that the company will apparently be treated as having taken part in the trial, instead of being treated, as it seems to me it should have been, as a party not so taking part. Whether the result will be affected in any way I cannot, of course, tell—probably not; but it is obvious that in some cases great difficulty might arise if the rule that a company can only appear by solicitor and can only be heard in Court by counsel were departed from."

Bench and Bar.

We regret to record the death, as a result of an aeroplane accident at Wairoa, of Mr. Ivan L. Kight, of the firm of Robertshawe, Kight & Dunn, Dannevirke. Mr. Kight, who was thirty-five years of age, was born at Taradale, Napier, and was educated at the Napier Boys' High School and Auckland University College. He enlisted in 1915 and joined the Royal Flying Corps in England; in the next year he was invalided back to New Zealand. In 1917 Mr. Kight joined the staff of Messrs. Sainsbury, Logan & Williams, Napier, and in the following year he commenced practice at Hastings on his own account. Shortly afterwards he acquired the practice in Dannevirke of the late Mr. R. H. Robertshawe. Mr. Kight held at different times various offices in the Dannevirke Returned Soldiers' Association, being at one time President of that body. He was also President of the Dannevirke Club. He was keenly interested in aeronautics, being President of the recently formed Dannevirke Gliding Club, a foundation member of the Ruahine Aero Club, now incorporated with the Wairarapa Aero Club, and a director of Dominion Airways Ltd.

We regret to record the death, at the age of fifty-eight, of Mr. Kenelin Neave, of Christchurch. Mr. Neave was a son of the late Mr. F. D. S. Neave, an early settler in Canterbury. He was educated at Christ's College and at Canterbury University College where he took the degree of LL.B. in 1900. In the same year he was admitted as a barrister and solicitor and shortly afterwards commenced practice in Christchurch on his own account. About 1910 he entered into partnership with Mr. Beauchamp Lane, the firm being known then as Lane and Neave. Later Mr. Lane died and Mr. D. E. Wanklyn was taken into partnership, and the firm changed its name to Lane, Neave and Wanklyn. Mr. Neave devoted himself practically exclusively to the conveyancing side of the profession.

Mr. Neave saw service during the war in France and Belgium as a private. He was for a time President of the Canterbury District Law Society and represented Canterbury on the Council of the New Zealand Law Society. He was at one time an enthusiastic polo player and a keen member of the Christchurch Hunt Club. He was a director of the Christchurch Press Company Ltd. and of Ward & Co. Ltd.

Mr. L. G. H. Sinclair, formerly of Wellington and Nelson, has entered into partnership with Mr. A. J. McLeavey, of Palmerston North. The practice will be carried on under the style of "McLeavey & Sinclair."

Forensic Fables.

Mrs. Sarah Stout, the Last Will of Mr. Buffin, and the Draft Affidavit.

When Mr. Buffin, of 1, Plum Tree Court, Temple, E.C.4, Passed Away in his Eighty-Ninth Year, his Last Will and Testament could not be Discovered. This Circumstance Annoyed his Nephews and Nieces Greatly; for Mr. Buffin was a Bachelor and the Nephews and Nieces had Expectations. And when, as the Result of a Diligent Search in a Glory-Hole Containing the Rubbish of Years, Mrs. Sarah Stout, the Laundress, Unearthed the Missing Document, the Anxieties of the Nephews and Nieces were not at an End. For, Owing

to the Attentions of a Mouse with a Morbid Appetite, the Name of the Second Attesting Witness had Disappeared, and the First Attesting Witness was Dead. What was to be Done? Mrs. Sarah Stout again Came to the Rescue, for she Well Remembered about Three Years ago Poor Mr. Buffin Saying Would she Come and Sign her Name Here Next his Clerk's Name, which the Clerk he Signed it Too the Same as What Mrs. Sarah Stout did, and it was a Damp, Foggy Day, and she Noticed Poor Mr. Buffin had a Nasty Cough and she Said to Herself, she Said, Well, she Said, she Hoped Mr. Buffin wasn't Really Ill, and he Got through the Winter Nicely After All, and that Poor Clerk he was the First to Go, and a Pleasant Man he was, though a Little Too Fond of a Quick One. While Mrs. Stout was Telling this Tale, the Solicitor in Charge of Mr.

Buffin's Affairs was Making a Careful Note of her Observations. In Due Course Mrs. Stout Received the Affidavit which she was to Swear. In Successive Paragraphs it Related that Mrs. Stout had Long been Acquainted with the Testator and his Clerk; that she Well Remembered the 4th November, 1927, as the Weather was Peculiarly Inclement; that on that Date the Testator Requested her to Witness his Last Will and Testament; that the Testator also Informed her that his said Clerk would be the First Attesting Witness; that she had thereupon Signed her Name in the Presence of the Testator and of his said Clerk, and that his said Clerk had Likewise Signed his Name in the Presence of herself and of the Testator; that she Recognised the Document (now Produced to her and Marked "S.S.1") as a Copy of the Document which she had so Signed together with the said Clerk of the Testator; that the Testator to the Best of her Belief was on the said Date of sound Mind and of Testamentary Capacity; and that she was Informed and Believed that the said Clerk of the Testator was now Deceased. Mrs. Sarah Stout was so Delighted by the Purity of her Language and the Perfection of her Style that she forthwith made up her Mind to Adopt a Literary Career.

MORAL: *Magna est Veritas.*

Admission in New South Wales.

New Zealand Solicitors.

Generally speaking a solicitor of any State in the Commonwealth of Australia is eligible for admission in any other State; but this privilege has not been extended to New Zealand solicitors. Apparently, however, a change has been made in this respect by New South Wales. According to our contemporary the *Australian Law Journal*—

> "A new rule has now been made by the Supreme Court of New South Wales whereby, provided that corresponding eligibility for the admission of Solicitors of that Court in New Zealand has been established, New Zealand Solicitors will become eligible for admission in New South Wales. Those qualified will be 'Attorneys or Solicitors of the Supreme Court of New Zealand who have practised as such for a period of five years, and who have resided in Australia or Tasmania for three months preceding the notice referred to in Rule 477.'"

Legal Conference.

Postponement until Next Year.

The New Zealand Law Society at a meeting of its Standing Committee held in Wellington on the 9th inst., unanimously resolved that the Legal Conference intended to be held at Dunedin next Easter be postponed until next year.

"There is one golden rule at the Bar: if your leader has made a good impression don't disturb it."

—Mr. Justice Langton.

Legal Literature.

Stout and Sim's Practice of Supreme Court and Court of Appeal.

Seventh Edition: By W. J. SIM, LL.B.
(pp. lxxxi; 630; lviii: Whitcombe & Tombs Ltd.)

Stout and Sim's Practice of the Supreme Court and Court of Appeal, more familiarly known as *Stout and Sim's Code*, must be ranked as New Zealand's most distinguished and most successful legal treatise. The work's distinction lies in the fact that both of its authors became members of the Supreme Court Bench—Sir Robert Stout was appointed to the Chief Justiceship in 1899, and Sir William Sim a Judge of the Supreme Court in 1911—thus giving to the work, especially as it was one dealing with the practice of the Court, a degree of authoritativeness rivalled, this reviewer believes, by only one other legal publication produced in this country—Sir William Sim's work on Divorce. The work's success is evident from the number of its editions. The book appeared for the first time in 1892. The second edition appeared in 1902; it was then, it is believed, the only New Zealand legal treatise that had run into more than one edition. Then came the third edition in 1909, the fourth in 1913, the fifth in 1919, the sixth in 1922; for all editions other than the first Sir William Sim was solely responsible. On August 29th, 1928, the learned Judge and author unexpectedly died; but his son, Mr. W. J. Sim, of Christchurch, has carried on his father's work in the realm of legal authorship, and now we are favoured at his hands with the seventh edition of the *Code*.

In the preparation of this new edition Mr. Sim has had no light task. Since the last edition of the work there have been passed, as well as two amendments to the Judicature Act, the Administration of Justice Act, 1922, and the Guardianship of Infants Acts of 1926 and 1927, and the Magistrates' Courts Act has been consolidated. In addition very many alterations to the rules under the Judicature Act and other special statutes have been made. Some of the alterations to the rules are comparatively unimportant, but some of them—e.g., the new jury rules and the new Privy Council rules—are of such importance as in themselves ro make a new edition necessary; all of them will be found dealt with by Mr. Sim. Further, very many cases have been decided in the interim, and many of them of very considerable importance; over three hundred decisions, decided since 1922, are included in this new edition. A new section which should be useful has been added to the work dealing with references to arbitration; the notes in it will be found in keeping with those in the rest of the work—brief but to the point. The whole of this work of bringing up to date the editor has done accurately and well. This reviewer can give Mr. Sim no higher praise than this—that the work can have lost at his hands none of its special authoritativeness to which reference has already been made, and none of its individuality; after all, that is the acid test of good editorship of a good book.

New Books and Publications.

Salmond's Jurisprudence. Eighth Edition. By C. A. W. Manning. Price 24/-.

Sovereignty and Paramountcy in India. By Julian Palmer. Price 6/6.

Law of Contracts in a Nutshell. By A. J. Conyers. Price 5/-.

Fisher and Lightwood's Law of Mortgages. Seventh Edition. By J. M. Lightwood, M.A. Thick Paper Edition, 80/-; Thin Paper Edition, 84/-. (Butterworth & Co. (Pub.) Ltd.)

Bell's Sale of Food and Drugs. Eighth Edition. By R. A. Robinson. (Butterworth & Co. (Pub.) Ltd.). Price 19/-.

Rules and Regulations.

Inspection of Machinery Act, 1928. Amended regulation prescribing fees to be paid for the inspection of machinery and boilers.—Gazette No. 7, 23rd January, 1931.

Convention between the United Kingdom and Spain respecting legal proceedings in Civil and Commercial matters. Extension to the Dominion of New Zealand.—Gazette No. 7, 23rd January, 1931.

Land and Income Tax (Annual) Act, 1930. Income Tax payable in one sum on 9th February, 1931, at office of Commissioner of Taxes, Wellington, and penalty tax to accrue if tax not paid on or before 2nd March, 1931.—Gazette No. 7, 23rd January, 1931.

Two Recent Cases on Wills.

In re Walker, Walker v. Walker, (1930) 1 Ch. 469, deals with the much litigated words "shall die." The Court of Appeal laid it down that the primary meaning of "shall die" in a will is "shall hereafter die." In the absence of some context to indicate a contrary intention it cannot be construed as equivalent to "shall have died" or "shall be dead" so as, in an original or substitutional gift to the issue of a child or other person who "shall die," to let in the issue of one who was already dead at the date of the will.

In re Hagger, Freeman v. Arscott, (1930) 2 Ch. 190, deals with the subject of a joint will and the vesting of interests thereunder. A husband and wife made a joint will, whereby they left everything they possessed at the time of the death of the spouse first dying, to the survivor for life with certain absolute remainders over, and they agreed that the will should not be revoked without their mutual consent. The wife died first, and as from her death the husband received the income from the whole estate until his death. Clauson, J., held that from the death of the wife the property of which the husband was then possessed was subject to a trust under which the legatees in absolute remainder took vested interests subject to the life interest of the husband; and that the death of such a legatee after the death of the wife but before the death of the husband did not occasion a lapse.