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"It is a great factor in the administration of justice that we should have a fearless and independent Bar."
—Lord Hanworth.

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Appointment of a "Sole Agent" to Sell.

We believe it is a commonplace in this country for a person owning real estate which he desires to sell to place his property in the hands of an estate agent appointing him "sole agent" for its sale. Owing to the frequency of this practice the very recent decision of McCardie, J., in *Bentall, Horsley and Baldry v. Vicary*, 47 T.L.R. 99, is of considerable interest and importance. The defendant had appointed the plaintiffs, a firm of estate agents, as "*sole agents*" for a term of six months for the sale of a certain house property. He agreed to pay them a special commission of 5 per cent. on the price realised *if they introduced a purchaser*, and authorised them to expend on his behalf up to £100 in advertising the property on the understanding that if they sold they were to receive back the whole amount. Within the period the defendant himself sold the property to a purchaser, who was unknown to the plaintiff, for £5,000. The plaintiffs thereupon claimed: (1) £250, commission due under the agreement, together with the cost of their advertisements; (2) alternatively, damages for breach of contract; in the further alternative, a reasonable sum by way of *quantum meruit*. On all these claims McCardie, J., decided in favour of the defendant.

The first claim hardly admitted of any difficulty. As the plaintiffs did not introduce the purchaser to the defendant, which was the event upon which, under the contract, their right to commission depended, they were not entitled to commission. As to the third claim (the first having been decided against the plaintiffs) there was also little difficulty. The plaintiffs worked under a special contract and they had failed to do that which entitled them to commission thereunder; there was, therefore, no scope for the operation of the doctrine of *quantum meruit*.

The real interest and the importance of the case lies in the second claim—the claim for damages for breach of contract. The plaintiffs contended that their appointment as "*sole agents* for the sale of the property for a period of six months," gave to them and to them alone the right to sell the property, or, to put it in another way, that it was an implied term of the contract that the defendant should not himself sell the property and so deprive the plaintiffs of the commission that they might perhaps be able to earn; therefore, they contended, the defendant committed a breach of contract by himself disposing of it. As to these contentions McCardie, J., made, first of all, two observations: (1) that as the plaintiffs and not the defendant drafted the contract the *contra proferentem* rule must be remembered, and (2) that the Court ought not to introduce an implied term into the contract unless such implication was needed (which the learned Judge held was not the case) for giving "such business efficacy to the transaction as must have been intended at all events by both parties who are business men." At pp. 100, 101, the learned Judge said:

> "It is to be noted that the contract contains no express words at all indicating a prohibition against a sale by the defendant himself. If the parties intended such a prohibition, nothing would have been easier than to insert the appropriate words. It is also to be noted that the defendant does not say by the contract: 'I give you the sole right to sell.' He says only: 'I appoint you sole agents' for the sale, which is, in my opinion, quite a different thing. In such contracts as the present it is always important to observe the exact words used."

Two reported and two unreported decisions distinguished by the learned Judge in his judgment show how much will depend in such a case upon the precise contract between the principal and his agent and upon the precise act of the principal which is alleged to be a breach of the contract. In *Snelgrove v. Ellringham Colliery Co.*, 45 J.P. 408, the defendants, who were partners, appointed the plaintiff their sole agent for the sale of fireclay goods within a certain district. One of the partners, *acting as agent for the firm*, went into the district and sold goods behind the back of the plaintiff. Mathew, J., held this to be a breach of contract. McCardie, J., seems to have doubted this decision; but held that it depended at any rate upon the special fact that it was not the firm which sold, but one partner *acting as agent for the firm*. Similarly in *Milsom v. Bechstein*, 14 T.L.R. 159, where the plaintiff was appointed sole agent for the sale of the defendant's pianos in certain areas, the defendant expressly agreeing that he would not appoint any other agent for such areas, the breach was not in the defendant himself selling, but in his supplying pianos to a person within the areas in such manner and on such conditions as to make that person the defendant's agent. In the two unreported cases—both cases as to land agents and their right to commission or damages where the owner sold himself—the contracts were quite different. In the first of them, *Tredinnick v. Browne* (December, 1921), Swift, J., on the facts of the case, found the contract to be that the plaintiff should not only be appointed sole agent for the sale of the property, but also that he should receive a commission whether he introduced the purchaser or not. In the second, *Chamberlain and Willows v. Rose*, (December, 1924) one of the terms of the contract was: "The property *to be left solely in your hands for sale* from this date until, etc." A Divisional Court (Shearman and Salter, JJ.) held that upon the special wording of the contract the defendant had agreed that no one but the plaintiffs would have the right to sell the property, and that a sale by the owner himself during the currency of the contract was a breach.

So far as any principle of general application to cases of this class can be laid down, it appears in the following passage from the judgment of McCardie, J., at p. 102:

> "It is quite open to a property owner to agree that an estate agent shall have the sole right to dispose of the property and that no one else, whether an agent or the owner himself, shall deal with the property during the contract period. If, however, such a bargain is intended, then clear words must be used."

Supreme Court

Herdman, J. December 12, 1930; February 5, 1931.
Auckland.

NELSON v. WILSON & HORTON LTD. AND WILSON.

Practice—Costs—Agency Charges—Reasonable Agency Charges as Fixed by Registrar Certified for by Court—Charges for Agency Work done in Preparation for Trial Covered by Certificate—Agency Charges when Certified for Treated as Disbursements—Code of Civil Procedure, R. 240A; Table A. pars. 36, 37.

Motion to review certain orders for costs made by Herdman, J. in the abovenamed action. By an order made on 14th March, 1930, after the above action had been discontinued by the plaintiff, Herdman, J., allowed the defendants £210 for further costs in exercise of the power given by Rule 240A. of the Code. On 5th May, 1930, His Honour settled the costs of all interlocutory proceedings in which the defendants had been involved, the total sum allowed under all heads amounting to £73 10s. 0d., and under paragraph 35 of Table C. he ordered that the defendants be allowed reasonable agency charges in respect of legal work done at Samoa. The present application was for a review of the allowance for agency charges.

Leary and **Fiddes** for plaintiff.

Richmond for defendants.

HERDMAN, J., said that authority was given by Table C. to allow agency charges and he thought that those charges were to be treated as disbursements when it was ordered that they be paid by the litigant. Moreover, disbursements were not taken into account when a computation was made as to whether the limit of £300 named in paragraph 37 of Table C. had or had not been exceeded. The plaintiff admitted that certain of the agency charges made could not be challenged, but he asserted that certain of the items debited in the bill were for work done in preparing for trial and that, as an allowance had already been made for preparing for trial, the items challenged could not be recovered. In His Honour's order it was directed that the amount of reasonable agency charges should be settled by the Registrar. It therefore seemed to His Honour to be premature for him at present to consider whether in making that claim the plaintiff had duplicated charges. All agency work might, in a broad sense, be said to be work done in preparation for trial. Correspondence by an agent with his principals about witnesses, work done in serving papers abroad, arranging for the attendance of witnesses, were services which in a sense amounted to preparation for trial, but such work was nevertheless agency work. As His Honour interpreted paragraph 36 of Table C. a disbursement was an allowance made to a litigant which was separate and distinct from a sum allowed for preparation for trial. It represented something that a litigant had paid away and an agency charge if specially allowed became a disbursement. In the present case preparation for trial in Auckland involved long and laborious research, protracted conferences with witnesses and between counsel, the perusal of a mass of documents, the preparation of voluminous briefs and the instruction of agents in Samoa. That was the kind of work but by no means the whole of the work that His Honour had in mind when fixing a special fee and His Honour was, of course, aware that a great deal of work had to be done in Samoa by agents. When His Honour mentioned that agents were employed and instructed to collect material in Samoa in the judgment which he delivered earlier in the year, he had, of course, no intention of announcing that the sum fixed by him for additional costs covered charges which agents in Samoa made for work done. It covered charges made for work done in Auckland instructing agents, but not charges for work done pursuant to those instructions. The present litigation was not precipitated by the defendants. The plaintiff elected to make a large claim in Auckland which compelled the defendants to go abroad for material to conduct their defence. The defendants applied for a commission to take evidence in Samoa. The plaintiff opposed the application which for proper reasons was refused. Had the commission been granted, heavy expense would have been saved. The defendants had no alternative but to collect material in Samoa; hence the employment of agents at heavy cost was unavoidable. In some circumstances agency costs would be negligible. In other cases when difficult and responsible services had to be rendered a large bill was inevitable. It was not for His Honour to examine the bill, at any rate, at the present stage. That duty had been allotted to the Registrar. The important point to decide was whether agency charges properly incurred were disbursements. It had been held that agency costs incurred in taking evidence on commission were disbursements. Then again, paragraph 35 seemed to His Honour to make agency charges, if specially allowed, as much a disbursement as fees of Court, fees of officers and witnesses' expenses paid. In **Public Trustee v. Benjamin,** (1927) G.L.R. 499, MacGregor, J., disallowed a sum of £26 19s. 6d. claimed as a disbursement for agency charges but in that case the charges had not been specially allowed by the Judge. In the present case they were specially allowed. It might be that when the agent's bill to which exception was taken was being or had been reviewed by the Registrar, certain charges might be referred to His Honour to determine finally whether they were reasonable, but as matters stood His Honour could find no reason for interfering with the orders made. It was admitted that part of the agency bill was payable and it was contended that the balance could not be recovered. Whether specific disputed items could or could not be recovered it was not for His Honour to decide until the Registrar had reviewed the charges.

Motion dismissed.

Solicitors for plaintiff: **Bamford, Brown and Leary,** Auckland.

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

Adams, J. November 24, 25, 26, 27, 28, 29, 1930; January 23, 1931.
Christchurch.

RANSOMES SIMS AND JEFFERIES LTD. v. P. & D. DUNCAN LTD.

Trade-mark—Infringement—Passing Off—Plaintiff's Mark on Plough Shares Consisting of Combination of Three Registered Marks Including Letters "R.N.F."—Letters "R.N.F." Used as Pattern Mark—Defendant Selling Plough Shares Bearing its Trade Name and Letters "R.N.F."—No Infringement—No Passing Off—No Reasonable Probability of Deception—Question of Probability of Deception One for Court—Patents, Designs and Trade-marks Act, 1921-22, Ss. 2, 106, 109.

Action by the plaintiff against the defendant for an injunction to restrain the defendant from infringing its trade-marks and in particular applying the marks "R.N.F." to any ploughs or parts of ploughs sold by it and from passing off any ploughs or parts of ploughs as goods of the plaintiff's manufacture. The plaintiff also claimed damages or an account of profits and delivery of any ploughs or parts of ploughs in the possession of the defendant which infringed the plaintiff's trade-marks. The plaintiff was on 15th June, 1889, registered in New Zealand as the proprietor of the trade-marks "R.N.F.", "Ransome" and "Ransome's Patent" for ploughs and parts of ploughs. These marks were used extensively on the plaintiff's goods, and it was alleged that the plaintiff's goods had become known to purchasers in New Zealand as "R.N.F." "Ransomes" or "Ransome's Patent" ploughs or heads or shares in the engineering or hardware trade in New Zealand. The defendant, while admitting that the plaintiff's marks were registered in New Zealand in June, 1889, and that subject to S. 106 of the Patents, Designs, and Trade-marks Act, 1921-22, such registration was and had been since June, 1896, valid and conclusive, said that it had never used the plaintiff's marks as trade-marks. The real defences were: (a) that the defendant had never used the plaintiff's marks as trade-marks; (b) that in May, 1889, when the plaintiff's trade-marks were registered in New Zealand, the letters R.N.F., when applied to the head or share of a plough, constituted a pattern mark, and merely indicated that the head would fit a share with a corresponding socket, or that the share would fit a corresponding head, and that at that date shares of the R.N.F. pattern had for many years been manufactured, advertised and sold by colonial manufacturers as fitting any plough with an R.N.F. head; (c) that the plaintiff, with knowledge of the defendant's action, had acquiesced in such action, and made no complaint until 1926; and (d) that in any case it had not at any time passed off or attempted to pass off its goods as goods manufactured by the plaintiff. The founder of the plaintiff's business, having discovered a process by which plough shares could be made with a surface of chilled steel, obtained a patent for the process in 1803. On the expiry of the patent the use of the process in the manufacture of plough shares became universal. The plaintiff's ploughs were probably first introduced into New Zealand in or about 1865 or not later than 1868, and had since been continuously imported until about 1897, but such importa-

tion then practically ceased. The plaintiff's shares were still imported in large numbers, and were used by farmers in Canterbury and other parts of the Dominion. The plaintiff which had a large number of trade-marks registered as old marks in England for ploughs and parts of ploughs, in 1889 obtained registration in New Zealand of six separate trade-marks. Those registrations had been renewed and were still in force. The mark on the plaintiff's shares exported to New Zealand was a combination of the New Zealand marks Nos. 2, 3, & 4, and consisted of a semi-circle joined at the base by a horizontal line, the word "Ransomes" within the curve, the word "Patent" above the line, and the capital letters R.N.F. below the line. The defendant and its predecessors had been engaged in the manufacture of ploughs in New Zealand since 1868, and had built up a large business in Canterbury and throughout New Zealand. In the earlier years the defendant's predecessors imported the plaintiff's shares, and used them in the construction of its ploughs, and of necessity adopted the same pattern for the head of the plough as that adopted by the plaintiff in the manufacture of the ploughs they sent to this country. It was necessary to adopt the same pattern because the head must fit the socket of the share, and no other pattern of head would have fitted the plaintiff's shares which the defendant was using. Those imported shares bore the plaintiff's mark. Having learned the process of making shares with a surface of chilled steel according to the expired patent of 1803, the defendant's predecessors commenced the manufacture of those shares, and adopted the same pattern of share as that which they had been using for many years, and also adopted the letters R.N.F. which were on the share. The defendant company continued that practice to the present time. The two other manufacturers of ploughs in New Zealand—Reid & Gray Ltd., and Booth Macdonald & Co. Ltd.—did the same thing, and there was no reason to doubt that in each case it was done in perfect good faith. From 1883 to 1915 the defendant's shares bore the trade-mark of the defendant "P. & D. Duncan" in capital letters, with the capital letters R.N.F. below the trade name. During that period those marks were cast on the upper side of the share, but in 1915 it was found that, when passing through clay, the share did not make a clean furrow, and that defect was remedied by placing the trade name and letters on other side of the share; but as there was not sufficient room on that side for the defendant's full trade name it was abbreviated to "P. & D.D." with the letters R.N.F. underneath as before. That practice had continued to the present time. The manufacture and sale of the shares with the letters R.N.F. had been carried on openly for upwards of forty-five years, and many thousands of the shares had been sold throughout New Zealand; but no complaint was made until April, 1926.

Peacock for plaintiff.

Upham and **E. W. White** for defendant.

ADAMS, J., said that in opening the plaintiff's case Mr. Peacock had contended that the defendant had infringed the plaintiff's registered trade-mark "R.N.F." by manufacturing and selling shares bearing that mark, but in his final argument he abandoned that and submitted, as his first proposition, that the defendant had never at any time used the letters as a trade-mark, and did not intend them to be a trade-mark, and therefore could not claim the protection given by S. 106 of the Trade-marks Act, 1921-22. The definition of the term "trade-mark" was given in S. 2 of the Trade-marks Act, 1921-22. It meant "a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of that trade-mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." The definition appeared for the first time in the Act of 1911, but was for all practical purposes the same as was applied in the early cases in England before the first statute relating to trade-marks was passed—see **Kerly on Trade Marks,** 6th edn., p. 1 *et seq.* His Honour had, therefore, to read that admission as meaning that the defendant had never at any time used the letters "R.N.F." as "a mark used, &c.," following the words of the definition. The proposition was an unqualified admission of the point taken by the counsel for the defendant. On the evidence, however, and without regard to the admission made by counsel, His Honour found as a fact that the defendant had never used, and never intended to use, the letters "R.N.F." as a trade-mark; but had always used them on its shares as a pattern mark only. On that subject Mr. Upham also contended that the plaintiff itself had used this letter mark and other letter marks as pattern marks, and the references in the plaintiff's catalogue referred to in support of this contention were, to His Honour's mind, obviously references to the marks on the shares as pattern marks. The trade-mark on the plaintiff's shares was a combination of three separate registered marks and was, therefore, not a registered trade-mark: *Re* **Spencer's Trade Mark,** 54 L.T. 659; **Perry Davis and Son v. Harbord,** (1890) 15 A.C. 316. Actual user of the plaintiff's trade-mark by the defendant as a trade-mark was, accordingly, not an issue in the case, and the question of passing off remained to be considered. That question was one of pure fact. It was not, and on the evidence could not be, pretended that the defendant had deliberately used the letters "R.N.F." for the purpose of capturing the plaintiff's trade, but it was submitted that the effect of its action had been to induce buyers of the defendant's plough shares to believe that its shares on which the letters appeared were made by the plaintiff. To succeed the plaintiff must show that there was a reasonable likelihood of deception, but when that was shown the Court would interfere. The question whether a mark was calculated to deceive must be decided by the Judge, and evidence by witnesses on that point was not admissible. If His Honour might say so, an excellent reason for the exclusion of such expert evidence was given by Farwell, J., in **Bourne v. Swan and Edgar Ltd.,** (1903) 1 Ch. 211, 224. His Honour said that he agreed with counsel, when he said that the judgment in that case showed that the Judge was entitled to consider the user of those trade-marks, and to draw all proper conclusions from that user. In **Claudius Ash, Sons and Co. Ltd. v. Invicta Manufacturing Co. Ltd.,** 28 R.P.C. 597, which was cited at some length by Mr. Upham, the plaintiff had a registered trade-mark which was applied to dental preparations. The defendant manufactured a similar commodity and used the same word on its goods. The plaintiff said that the use of that word by the defendant was calculated to deceive purchasers into the belief, contrary to fact, that his goods were goods of the plaintiff's manufacture. In the Court of Appeal Cozens-Hardy, M.R., said (p. 606): "But what evidence is there in the present case? This really stares one in the face. For thirteen years this sale has been going on. No person is called to say that, in fact, he has been deceived. A number of very distinguished dentists were called as witnesses by the plaintiffs, but no one of those dentists said that he had himself been deceived, or could be brought to the point of saying, if it were a question that could legitimately be asked of him, that the sale of the goods in this shape was calculated to deceive, and it does seem to me it is impossible, in the face of that evidence—or rather say want of evidence—for the learned Judge to say, and for this Court to say, that it has been established that what the defendants are doing and have been doing for thirteen years is calculated to deceive. . . . . With great respect to the learned Judge I do not think, in the absence of any evidence, the opinion of the Judge that there is a bare possibility of deceit is any ground for depriving the defendants of the right to carry on the business which, for thirteen years at least, they have been carrying on without, so far as the evidence goes, doing any damage to the plaintiffs." His Honour quoted also from the judgment of Buckley, L.J., at p. 608, and from the judgment of Kennedy, L.J., at p. 610. Kennedy, L.J.'s statement accorded with the language of Farwell, J., in **Lambert and Butler Ltd. v. Goodbody,** 19 R.P.C. 377, 383, "any reasonable chance of a reasonable person being deceived." The decision of the Court of Appeal was affirmed in the House of Lords—29 R.P.C. 465. Lord Loreburn, L.C., said, with regard to the question whether the defendant's use of the name was calculated to deceive, that no witness had said he had been deceived or that he would be deceived, and that, although it was not competent for a witness to be asked his opinion about the conclusion to which the Court was to arrive, it was competent to ask him whether he himself, being in the trade and familiar with the subject matter concerned, would be misled. The other Law Lords entirely agreed, Lord Macnaghten saying that, when a person came forward and asked the Court to interfere because somebody was stealing or was about to steal his trade, he must prove that persons had been deceived, or that what he was doing was calculated to deceive. He added that in that case the plaintiffs had not proved that any human being had been deceived. His Honour had not failed to observe that in the **Claudius case** the long user of the mark by the defendant was known to the plaintiffs, but the passages he had quoted clearly applied generally to the evidence required in all cases of passing off, except in cases where the whole mark had been copied or substantially copied, and the likelihood of deception was so obvious as to dispense with other evidence. On the question of deception His Honour adopted the definition given by Lord Justice Kennedy of the sense in which "deception" was to be understood to give a good cause of action, and considering the evidence His Honour said that to his apprehension no person of ordinary faculties applying his mind to the question and having ordinary eyesight would be deceived. That applied also to the shares marked "P. & D. Duncan" manufactured by the defendants in the early days and up to 1915. Further, no witness had come forward to say that anyone at any time has been deceived or would, by looking at the goods,

be deceived or induced to believe that the defendant's share was a share made or supplied by the plaintiff. The evidence showed that the letters on the defendant's shares was a pattern mark. **J. B. Stone and Co. Ltd. v. Steelace Manufacturing Co. Ltd.,** 46 R.P.C. 406, was very different from the present case. In that case the respondent was using the trade-mark for the purpose of indicating that he was the sole manufacturer of steelace belting. In the present case it was admitted and proved that the defendant had never used the letters R.N.F. as a trade-mark—to indicate the source or origin of its goods—but as a pattern mark. The plaintiff, while entitled to full protection in the legitimate use of his trade-marks, could not assert a right to the exclusive use of those three letters for any purpose other than to indicate such source or origin. In other words the plaintiff was entitled to the exclusive use of the letters in that combination as a trade-mark only, to indicate that the goods were the plaintiff's goods. It did not appear that the plaintiff had in a single case applied the letters R.N.F. alone for that or any other purpose.

On the view His Honour had taken there was no need to consider the questions of acquiescence, which were not pressed, or the meaning and application of Ss. 106 and 109 of the Act. His Honour observed that the facts in the present case were widely different from those in **Ransome v. Graham,** 51 L.J. Ch. 897, and that the accuracy of the Vice-Chancellor's decision in that case affirming the right of the plaintiff to register the word "patent" as a trade-mark was doubted in **Kerly on Trade Marks,** 6th edn., 493. For the reasons above stated His Honour held that the plaintiff had failed to make out his case on all grounds.

Judgment for defendant.

Solicitors for plaintiff: **Rhodes, Ross and Godby,** Christchurch, agents for **Hadfield and Peacock,** Wellington.

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

Blair, J. February 4; 18, 1931. Wellington.

HENDERSON v. BRICE (No. 2).

Practice—Estoppel—*Res Judicata*—Fresh Action in Respect of Matter Already Litigated Raising Questions which were Either Raised or Could have Been Raised in Previous Action—Duty of Plaintiff to Ask in One Action for All Relief Available on Cause of Action—Action Dismissed.

In May, 1929, the plaintiff commenced an action against the defendant claiming that a transfer of property and an assignment of furniture made by the plaintiff to the defendant in July, 1926, were made in trust to pay the plaintiff's creditors and to pay the balance to her. The defendant denied any trust and alleged that the transfer and assignment were made in consideration of his discharging certain debts. The action was tried before Myers, C.J., in November, 1929. At the trial it was argued by the plaintiff (although the point was not pleaded) that the transaction was harsh and unconscionable, and it was also argued that the transaction was contrary to the policy of the bankruptcy laws. In February, 1930, Myers, C.J., delivered judgment holding that the trust alleged by the plaintiff had not been established and accepting the defendant's version of the transaction. As to the "harsh and unconscionable" point the Chief Justice decided against the plaintiff on the facts, and he disposed of the "bankruptcy" point by pointing out that bankruptcy had not occurred. The judgment of Myers, C.J. is reported in 6 N.Z.L.J. 18. The plaintiff appealed to the Court of Appeal *in forma pauperis*. On the appeal counsel for the plaintiff submitted that the document of the 15th July, 1927, did not confer any legal rights or obligations and alternatively that it was void for uncertainty. He further contended that there was no antecedent contract to support the transaction as carried out and no *consensus ad idem* of the parties. He further submitted that the transaction as carried out was so carried out in mutual mistake as to the existence of a contract which he submitted had no existence. Upon those submissions being made, counsel for the defendant (respondent on the appeal) objected that the points then raised had not been raised in the Court below and that the appellant was endeavouring to make a new case. The Court intimated to counsel for the appellant that he was bound by the statement of claim as filed. He was informed by the Court that he was entitled to contend that the agreement conferred no legal rights or obligations, that he was entitled to discuss the evidence, and that the onus was upon him of satisfying the Court of Appeal that the Court below was wrong in finding there was no trust. On the evidence, and in view of the lower Court's finding, counsel admitted that he could not argue that defendant had agreed to become a trustee and he agreed that the appeal must be dismissed. The Court refused to make any pronouncement upon the point as to whether or not the attitude of the lower Court to the "harsh and unconscionable bargain" point was *res judicata* between the parties. The appeal was dismissed.

The plaintiff then commenced a fresh action in respect of the identical circumstances which were the subject of the previous action. She alleged as a first cause of action that the transfer of the boardinghouse property was executed by mutual mistake, there being no agreement whereby she agreed to transfer the land and there being no *consensus ad idem* as to the terms upon which the land was to be transferred. Alternatively she alleged that if there was a contract between the parties then the transfer was executed by her and accepted by the defendant in mutual mistake as to the material terms of that contract. Alternatively she claimed that the transfer was executed pursuant to a contract void by reason of uncertainty as to all material terms. Alternatively she alleged that she was induced to enter into the transaction by the undue influence of the defendant. The defendant moved to dismiss the action upon the ground that the matter in dispute was *res judicata* and that the action was an abuse of the procedure of the Court.

Treadwell and **James** for defendant in support of motion.
Wilson for plaintiff to oppose.

BLAIR, J., said that all the matters raised in the new action were either raised or were certainly capable of being raised in the previous proceedings. All the points really centred round the proposition that the agreement, because it omitted all operative clauses, was destitute of legal effect. The Chief Justice in the judgment given by him interpreted the document as being operative as implying certain covenants and he detailed what those covenants were so far as the defendant was concerned. Moreover his judgment, although he might not have specifically said so, certainly treated the plaintiff as bound to the arrangement as embodied in the agreement as interpreted by him. The questions raised in the first alternative claim in the new action, viz.: whether there was any agreement between the parties to transfer the land, and whether there was *consensus ad idem*—had already been decided as between the same parties. The second alternative claim in the new action was that if there was a contract between the parties then the transfer executed by the plaintiff and accepted by the defendant was executed and accepted in mutual mistake as to the material terms of that contract. In the previous action she claimed that the arrangement between the parties was that the defendant was a trustee to sell the property, pay the debts, and account to her for the balance. The Chief Justice, in the previous action, accepted the defendant's version of the transaction. She now alleged that both parties were mutually mistaken as to their respective rights. It was probable that that claim also depended upon the construction which the plaintiff now sought to put upon the contract, but His Honour would assume in plaintiff's favour that she accepted (as she must in view of the Chief Justice's decision) that the contract had legal effect. The objection she raised in her former action was that the debts were not discharged in full. Her contentions on that head were fully discussed and a decision given upon the point. The next alternative claim was that the transfer executed by her was executed pursuant to a contract void by reason of uncertainty as to all material terms. His Honour repeated that the Chief Justice had already in the previous action interpreted the agreement. The Court of Appeal on the hearing of the appeal intimated to counsel for plaintiff that he was, on the appeal, entitled to contend that the agreement conferred no legal obligations. That was obvious, seeing that the Chief Justice had interpreted the document as conferring legal obligations and the appeal was from his judgment. That point was *res judicata* between the parties. The remaining claim raised was that the plaintiff was induced to enter into the transaction by the undue influence of the defendant. At the hearing of the previous action the plaintiff was permitted, although the matter was not pleaded, to raise the point that the transaction was invalid as oppressive or unfair. When discussing that claim the point was raised that the relationship of the parties was that of mortgagor and mortgagee and that she had no independent advice. That was discussed by the Chief Justice in his judgment. His Honour had serious doubt as to whether there was any substantial difference between the claim as now framed and the claim made and adjudicated upon in the first action; but even if there was any difference the position was that the point could have been pleaded in the

former proceedings and it seemed to His Honour that the decision of the Court of Appeal in **Dillon v. Macdonald,** 21 N.Z. L.R. 375, applied. In that case it was decided that every remedy which could be claimed in respect of the same cause of action must under the present procedure be claimed in one action and if a plaintiff chose to limit his claim for relief in one action he could not afterwards take a second proceeding claiming another remedy in respect of the same cause of action. The position in the present case was that the counsel who in the present case appeared for the plaintiff did not appear for the plaintiff at the hearing of the first action and he had evolved some points of law which, he thought, should have been raised in the former proceedings. If the plaintiff were entitled to re-open the present litigation between the parties it would be open to any unsuccessful litigant on discovering a point of law not raised in former proceedings to launch a new action for the purpose of raising it. As was said by the Court in **Dillon v. Macdonald** (*sup.*) adopting the words of Bowen, L.J., in **McGowan v. Middleton,** 11 Q.B.D. 464, 472, the cardinal principle of our present system of procedure was that all controversies arising out of a cause of action "should be swept away by one litigation."

Action dismissed.

Solicitor for plaintiff: **Alexander Dunn,** Wellington.
Solicitors for defendant: **Treadwell and Sons,** Wellington.

Blair, J. September 19; December 22, 1930. Wellington.

COLEMAN v. HOGG.

Negligence—Collision—Bylaw—Breach of Municipal Bylaw Designed to Prevent Collisions—Prima facie Evidence of Negligence.

Appeal from the decision of Mr. J. S. Barton, S.M., at Wellington, giving judgment for the plaintiff in an action by the plaintiff against the defendant for damages sustained as the result of a collision between two motor cars driven by the respective parties. The Magistrate found that the defendant was negligent in the control of his car, but that the plaintiff, notwithstanding his breach of a bylaw of the Wellington City Council providing for a speed of not more than 8 m.p.h. when crossing intersections, was not negligent. The defendant appealed. The defendant based his defence mainly on the admitted breach of the bylaw on the part of the plaintiff and the case is reported on that point only.

Cooke for appellant.
Evans-Scott for respondent.

BLAIR, J., said that the learned Magistrate upon that phase of the case said: "Mr. Shorland produces the bylaw which fixes the speed limit in crossing over intersections in the city at eight miles per hour, and says that the fact that the plaintiff was on his own evidence committing a breach of the bylaw is of itself evidence of negligence. I do not think that this is so. Facts that prove a breach of the bylaw may prove that and no more. They might in all the circumstances of the case be quite consistent with good and careful driving. I have to take the circumstances of this happening and, I think, examine them without reference to the bylaw." The learned Magistrate then said that it was a wet night, there was no evidence of there being much traffic at that point, and the plaintiff's car was driven across the bottom of Majoribanks Street where it ran into Courtenay Place at a speed of about fifteen miles per hour and that in his opinion that could not be described as negligence. With respect His Honour must disagree with the learned Magistrate in that conclusion. One would not expect at 11 p.m. much traffic, but it was clear that at that time there was enough traffic for a collision to occur. The bylaw limiting speed at intersections was designed to prevent collisions at intersections, and when there was an admitted breach of such a bylaw and that breach clearly touched the question of negligence, then, as His Honour understood the law, proof of defiance of a bylaw was *prima facie* proof of negligence. And when there was *prima facie* proof of negligence affecting the accident then unless the party against whom that *prima facie* proof lay rebutted that proof he must be deemed guilty of negligence. The case of **Canning v. The King,** (1924) N.Z.L.R. 118, was clear authority in support of that. In that case Salmond, J., notwithstanding the verdict of the jury, dismissed the petition, pointing out that if three conditions regarding breach of statutory duty were fulfilled, the suppliant could not succeed. These conditions were: (a) that the breach must be wilful or negligent and not the outcome of inevitable mistake or accident, (b) that the breach must have been the cause of the accident, and (c) the purpose of the statute must have been to prevent the kind of accident that actually happened. The breach of a bylaw having the force of statute was in the same category as a breach of statute. See **R. v. Broad,** (1915) A.C. 1110. Smith, J., in **Black v. Macfarlane,** (1929) G.L.R. 524, 527, adopted the rules laid down in **Canning v. The King** (*sup.*) as applicable to breach of the Motor Regulations. Applying the rules in **Canning v. The King** to the present case it was clear on examination of the respective speeds of the cars that but for the wilful breach of the bylaw no collision would have occurred. There was thus a clear case of contributory negligence on the plaintiff's part and no excuse was offered for it. The remaining requisite, viz., that the purpose of the bylaw must be to prevent the kind of accident that happened, was also fulfilled. It appeared to His Honour, therefore, that on the case presented to the Magistrate and on the admitted facts the plaintiff should have been non-suited.

Appeal allowed.

Solicitors for appellant: **Chapman, Tripp, Cooke and Watson,** Wellington.
Solicitors for respondent: **Menteath, Ward, Macassey and Evans-Scott,** Wellington.

Blair, J. December 6, 1930; January 13, 1931. Napier.

IN RE A VALUATION BY THOMSON.

Arbitration—Valuation—Valuer—Interest—Bias—Lease Providing for Renewal at Rent to Fixed by Valuation by Independent Valuer—Circumstance that Valuer a Lessee from Landlord with Similar Right of Renewal of Other Land Not in Circumstances Ground for Setting Aside Valuation—No Pecuniary Interest—No Possibility of Bias.

Motion by the Napier Harbour Board to set aside a valuation of rent made by one J. P. Thomson in respect of a lease to the Hawke's Bay Education Board of portion of a Harbour Reserve. The lease provided that a valuation was to be made by two independent persons to be appointed in writing by the lessor and lessee respectively. It also provided that if either party failed to appoint a valuer the other party's valuer was to act alone. The Harbour Board neglected to appoint an arbitrator and after due notice Mr. Thomson made his valuation alone. There was no suggestion in the case that Mr. Thomson's valuation was not a fair one, but his valuation was impeached upon the ground that he was not an indifferent person, the grounds being that he happened himself to be a lessee of a Harbour Board Reserve. He held a lease from the Harbour Board, for a term of twenty-one years from 27th September, 1920, of a piece of land situated at a place called Westshore, containing one rood and thirty-three perches, the ground rent being £7. There was provided for in his lease a right of renewal at a revaluation, but that was not due until 1941. Mr. Thomson's section was situated fully three miles from the land in question in the present proceedings. Westshore was separated from Napier South, where the land in question was situated, by what was known as the Inner Harbour and the whole of the City portion of Napier.

Grant in support of motion.
Lusk to oppose.

BLAIR, J., said that if Mr. Thomson had been tenant of property in the vicinity of the land the subject matter of the lease there might have been something in the point, as a suggestion might have been made that it would be to Mr. Thomson's advantage to fix a low rental so as to keep the rentals in the vicinity of his lease at a low figure; but when the facts in the present case were examined it would be seen that there was not the remotest possibility of interest on the part of Mr. Thomson. There could be no possible relation in the valuations of the two properties. The above was not disputed, and the Harbour Board based its claim to set aside the award solely upon the question of the fact that the valuer was a tenant of the Board. Mr. Grant relied upon **Dimes v. Grand Junction Canal Co.,** L.R. 3 H.L. 759, and **Reg. v. Recorder of Cambridge,** 27 L.J. (Mag. Cas.) 160, claiming that an interest howsoever remote involved a disqualification. In **Dimes' case** the Lord Chancellor, who had granted an injunction, was a large shareholder in a public company on whose behalf the application for injunction was

made. The Court was of opinion that he had such an interest as to disqualify him from sitting as a Judge. **Reg. v. Recorder of Cambridge** really turned upon the provisions of a special statute, 16 Geo. III, c. 18, sec. 3, which forbade Justices acting in certain matters. In **The Queen v. Farrant,** 20 Q.B.D. 58, it was held that any pecuniary interest in the subject matter of litigation, however slight, would disqualify a magistrate from taking part in the decision of a case. The head note said further: "If a Magistrate has such a substantial interest, other than pecuniary, in the result of the hearing, as to make it likely that he will have a bias, he is disqualified." His Honour referred to the facts, and to a passage from the judgment of Stephens, J., in that case. Applying the principle of that case to the present case, it was clear that Mr. Thomson had no pecuniary interest, and it was equally clear that there was no possibility of bias under the circumstances.

Motion dismissed.

Solicitors for motion: **Sainsbury, Logan and Williams,** Napier.
Solicitors to oppose: **Kennedy, Lusk and Morling,** Napier.

Kennedy, J. November 17, 1930; January 21, 1931. Invercargill.

IN RE MUIR: PERPETUAL TRUSTEES ESTATE AND AGENCY CO. LTD. v. MUIR.

Will—Vesting—Provision for Division of Estate Upon Youngest Child Attaining Twenty-one Between Children—No Substantive Gift Apart From Direction to Divide—Substitutional Gift in Case of Previous Death of Any Child Leaving Issue of Share to which Child "Would have been Entitled had he lived until Youngest Surviving Child Attained Twenty-one"—Interests of Children Not Vesting Until Attainment of Twenty-one by Youngest Child.

Originating summons for the interpretation of the will of J. Muir, deceased. The testator in his will provided that the net annual income of his estate should be paid to his wife until his youngest child should attain 21, the wife to maintain and educate his children as should be necessary until their severally attaining 18. He directed that his trustees should not sell his interest in certain lands "until my youngest child shall attain the age of twenty-one years and that the said property shall be held by my trustees as a home for my said wife and such young children as shall require it, until the youngest shall have attained the age of twenty-one years." That provision was inapplicable because the testator had no interest in the lands at the date of his death. The will then further provided: "upon my youngest child attaining the age of twenty-one years I direct that my interest in the above-mentioned property shall be realised and turned into money and together with the other portion of my estate shall be divided between my wife and children *per capita* in equal shares but so that if any child or children of mine shall have previously died leaving issue such issue shall take the share to which his her or their parent would have been entitled had he or she lived until my youngest surviving child had attained the age of twenty-one (21) years and if more than one in equal shares."

Stout for plaintiff.
S. M. Macalister for widow.
Tait for infant children.

KENNEDY, J., said that the first question was as to the vesting of the share in the testator's estate bequeathed to the widow. There was scarcely any contest as to that. The answer was that it vested on the death of the testator: **Cooper v. Cooper,** 29 Beav. 229.

The other questions related to the vesting of the interests bequeathed to the children; and there were three possible views as to the time of vesting, viz.: on the death of the testator, on each child attaining the age of twenty-one years, or on the youngest child attaining the age of twenty-one years. The rule was clear that where there was a substantive gift, apart from the gift contained in the mere direction to distribute, immediate vesting would be presumed; but where the gift was a simple gift on a future event, or from or after a future event, or was contained wholly in the direction to pay, or to divide, or to transfer, at, or from, or after, a future event, so that there was no gift except in the direction to pay, divide or transfer, the vesting was *prima facie* postponed until that event happened, and consequently, if the legatee died before that event happened, his representatives were not entitled to payment: **28 Halsbury's Laws of England,** p. 811, par. 1463. A rule said to be established by **Leeming v. Sherratt,** 2 Hare 14, was referred to. In that case the Vice-Chancellor said: "The testator having postponed the division of the residue until the youngest child attained that age" (twenty one) "I think no child who did not attain that age could have been intended to take a share therein." That dictum was disapproved in **In re Lodwig,** (1916) 2 Ch. 26, although the actual decision in **Leeming v. Sherratt** was not impeached. That case had already been considered by the Court of Appeal in New Zealand in **Price v. St. Hill,** 33 N.Z.L.R. 1096, and more recently by Hosking, J., in **Craig v. Craig,** (1919) N.Z.L.R. 106, and **In re Curtis deceased,** (1920) N.Z.L.R. 178, and by Stout, C.J., in **Alley v. Public Trustee,** (1924) N.Z.L.R. 223. His Honour did not in any way rely upon that dictum. Numerous other cases were cited by counsel and His Honour had referred to and carefully considered them, but in the end he found in the will under consideration sufficient to indicate the testator's intention and nothing in any of the authorities cited, or disclosed by his own research, to prevent that intention being given effect to. *Prima facie* the gift was contingent, and there was no vesting until the youngest child attained the age of twenty-one years for there was no independent gift, the gift being contained merely in the direction to divide. In **Leeming v. Sherratt** (*sup.*) the Court, in holding that the vesting was not postponed until the youngest child attained the age of twenty-one years, was influenced by the terms of the substitutional gift. In the present will there was no corresponding provision but, on the contrary, there was a substitutional gift in terms which was not only consistent with, but strongly supported, the *prima facie* interpretation that the vesting was postponed until the youngest child attained the age of twenty-one years. There was as clear an indication of the testator's intention as to the postponement of the vesting until the youngest child attained the age of twenty-one years, as there was in **In re Hunter's Trusts,** L.R. 1 Eq. 295. His Honour accordingly held that the shares of testator's children vested upon testator's youngest child attaining twenty-one.

Solicitors for plaintiff: **Stout, Lillicrap and Hewat,** Invercargill.
Solicitors for widow: **Macalister Bros.,** Invercargill.
Solicitors for infant children: **Tait and Tait,** Invercargill.

Kennedy, J. May 20; November 17, 1930. Invercargill.

IN RE SOUTHLAND SEA PRODUCTS LTD: EX PARTE MACKRELL.

Company — Winding-up — List of Contributories — Powers of Liquidator—Agreement for Transfer of Shares to Director of Company as Trustee for Company—Transfer Executed by Transferor and Transferee but not Registered Because Transferee Regarded as Trustee for Company—Liquidator Purporting of Own Motion to Rectify Register by Substituting Name of Transferee—Quaere as to Power of Liquidator to Rectify Register without Application to Court—Power if Existing Improperly Exercised—Order for Removal from List of Contributories of Name of Transferee without Prejudice to Rights of Transferor—Companies Act 1908, S. 222.

Application by A. H. Mackrell to vary the list of contributories of Southland Sea Products Limited. Under a certain agreement dated 4th July, 1927, H. J. Roderique agreed to sell certain property to the company for £3,000, this amount to be satisfied as to part by the issue of 2,000 shares of £1 each in the capital of the company, paid up to 12s. 6d. in the £. These shares were allotted and registered in the name of H. J. Roderique. Owing to disputes concerning certain terms of the original agreement, another agreement was executed on 10th October, 1928. It was thereby agreed that Roderique should on the execution of the agreement transfer to Mackrell 1,000 shares in the company "and that the said Arthur Hume Mackrell shall account to the company for the said shares or the proceeds of the same when sold and shall not without the previous consent of the directors of the company sell or agree to sell or transfer the said shares or any of them or mortgage or pledge the same." Mackrell was at that time the chairman of directors of Southland Sea Products Ltd. A transfer of shares was executed by Roderique and Mackrell on 9th October, 1928, but that transfer was never registered. The company went into

voluntary liquidation on 17th September, 1929. On that date Roderique's name appeared in the register of members as the holder of the 1,000 shares in question. The liquidator in settling the list of contributories on 28th April, 1930, purporting to act upon the transfer above referred to, rectified the register by substituting the name of Mackrell for Roderique, and placed Mackrell's name in the list of A contributories. That was done by the liquidator upon his own motion. It did not appear that the transferor had taken any steps during the eleven months which had elapsed since the execution of the transfer to compel registration or to have his name removed from the register. It appeared from an affidavit filed by the secretary to the company that the reason why the transfer had not been registered was because an early sale of the shares was expected and because the company did not regard Mackrell as the real owner. There was no evidence that the transfer had ever been presented to the company by any person with a request for registration. Immediately before the commencement of the winding-up the directors passed a resolution purporting to bind the company to indemnify Mackrell, "It being the intention that the shares be held in trust by A. H. Mackrell." It appeared that any balance payable in respect of the 1,000 shares would be required to meet the claims of creditors of the company.

Stout for appellant.

H. J. Macalister for liquidator.

KENNEDY, J., said that had Mackrell been registered as the holder of the 1,000 shares his name must have been placed upon the list of contributories. The liability upon the 1,000 shares was not cancelled nor did the company ever itself purport to buy the shares, although the agreement contained provision for the division of the proceeds of the sale of the shares. The original arrangement evidenced by the agreement of 4th July, 1927, was not wholly cancelled but was merely varied in part. The liability upon the shares could not be reduced except by reduction of capital in the ordinary way: see **Stiebel's Company Law and Precedents,** 2nd ed., 68 and **British-American Trustee and Finance Corporation v. Couper,** (1894) A.C. 399. Persons who had accepted transfers of a company's shares as trustees for a company and whose names were entered in the register of members were personally liable to be placed on the list of contributories: **Cree v. Somervail,** 4 A.C. 648. See also **Chapman and Barker's case,** L.R. 3 Eq. 361: **Easum's case,** 15 Sol. J. 750. That rule applied even though the trustee might be liable to account to the company for the profits made: **Reynolds v. Atherton,** 125 L.T. 690. In the above case the trustee's name was actually upon the register when the company went into liquidation. In the present case, however, the person whose name it was sought by the liquidator, who represented the company, to place on the list of contributories, was one whose name was not upon the register at the commencement of the winding-up. He was chairman of directors of the company during all material times and presumably approved of non-registration. There was no evidence of a request to register or of any refusal or default, but according to the secretary a deliberate withholding of registration because Mackrell was not, as between him and the company, regarded as the beneficial owner of the shares. Mackrell, never having been on the register, was not held out to the creditors as a shareholder and there was no reason why the company as such by its liquidator should, of its own motion, endeavour to place upon the list of contributories one whom it was suggested was its trustee when the shares, in respect of which he was to be a contributory, were allotted and already standing in the name of a person who might be placed on the list: cf. **Saunder's case,** 2 DeG.J. & S. 101, and see the comments thereon of Bacon, V.C., in **Gray's case,** 1 Ch.D. 664, 669. But whether **Saunder's case** (*sup.*) applied or not, there was another reason which was conclusive. If it were assumed in favour of the liquidator that notwithstanding the contrary view expressed in **Lindley on Companies,** 6th ed. 1038, and the doubt indicated in **Buckley's Companies Acts,** 11th ed. 501, that a voluntary liquidator might himself, without application to the Court, rectify the register, yet that power should not have been exercised as it was in the present case. The power which a voluntary liquidator had under S. 222 of the Companies Act, 1908, of sanctioning a transfer necessarily included the power to alter the register of members: **In re National Bank of Wales,** (1897) 1 Ch. 298. But that section did not empower the liquidator to sanction the transfer produced in the present case, because it was not made after the commencement of the winding-up, but long before: see **Ward and Garfit's case,** L.R. 4 Eq. 189, 193: and if the transfer was not registered, then the applicant's name should not have been placed on the list of contributories. The liquidator should have placed the registered owner of the 1,000 shares upon the list of contributories and left him to make application, if he were so advised, to have his name removed from the register and that of some other person placed thereupon, when, both parties being before the Court, the matter might be judicially disposed of. Certainly, Roderique having been held out to the creditors as a shareholder and a transfer having been allowed to remain unregistered for approximately eleven months, there being no evidence of a request for registration or complaint of delay or steps taken to have his name removed from the register, the liquidator should not have taken upon himself to alter the register. If there was no default by the company or by the transferee then there was no reason for rectifying the register and if there was delay by the company then the case was indistinguishable from **Sichell's case,** L.R. 3 Ch. 119. His Honour referred at length to **Sichell's case** and said that the liquidator should have governed himself by the same considerations as those on which the Court itself acted and that he did not do so. His Honour proposed to make an order based on that made by Cairns, L.J., in **Sichell's case** (*sup.*) which would not prejudice an application by Roderique for the removal of his name from the list of contributories if placed therein. The following order would be made: "That the name of the plaintiff be removed from the list of contributories with costs £6 6s. 0d. and disbursements to be paid out of the assets of the company to the applicant but with leave to the liquidator to have these costs and his costs paid out of the assets of the company and that the register be restored to the state in which, as to these shares, it stood at the commencement of the winding-up. This order is to be without prejudice to any application which the said Henry John Roderique may make touching the rectification of the register as to these shares and without prejudice to the applicant's name, (in the event of the register being so rectified and the applicant's name being placed therein), being put in the list of A contributories by the liquidator." His Honour must not be understood as expressing any opinion either that an application for rectification by Roderique would succeed or that such an application was necessary to enable him to preserve or to enforce such rights of indemnity as he might have against Mackrell: cf. **Garrard v. James,** (1925) 1 Ch. 616.

Solicitors for applicant: **Stout, Lillicrap and Hewat,** Invercargill.

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

Court of Arbitration.

Frazer, J. December 19, 1930; February 4, 1931. Auckland.

McFETRIDGE v. McGILL.

Workers' Compensation—Casual Gardener Employed by Grocer to Trim Hedge Separating Shop from Residence—Employment Not "In and for the Purposes of Trade or Business" of Employer—Employment of Casual Gardener Not Domestic Service —"Employment or Engagement for a Period or Not Less Than Three Days"—Quaere as to Effect of Intervention of Sunday in Period of Employment—Workers' Compensation Act, 1922, S. 3 (2).

Claim for compensation under the Workers' Compensation Act, 1922. The defendant was a grocer at Northcote. His shop and private house were on the same allotment, the shop being on the right-hand corner, facing the allotment from Queen Street, and near the street frontage, and the dwelling-house on the left-hand corner, but well back from the street. Behind the shop was a yard used for the purposes of the shop, roughly opposite the dwelling and divided from it by a strip of lawn and a path. A creeper covered the side of the shop nearer to the dwellinghouse, and a hedge ran back from the rear of the shop on the same side and cut off the yard on that side from the lawn. The plaintiff was a jobbing gardener and was engaged by the defendant on 1st August, 1929, to do certain gardening work for him. There was a dispute between the parties as to the quantity of work which the plaintiff was engaged to do. The Court found that he was employed to plant some passion fruit vines, to prune two apple trees, and to cut the creeper covering the walls of the shop, which work occupied two days, the 2nd and 3rd August, and that he was then told to go on with the trimming of the hedge. He commenced work on the hedge on 5th August, a Monday, and at about 2 o'clock in the afternoon a box on which he was standing broke and caused him to fall and break his leg. The trimming of the hedge would, but for the accident, have been a third day's work. The plaintiff's wages were 14/- a day.

Fleming for plaintiff.
Richmond for defendant.

FRAZER, J., delivering the judgment of the Court, said that it was argued for the plaintiff that the case came within the provisions of either paragraph (a) or paragraph (b) of S. 3 (2) of the Workers' Compensation Act, 1922. Under paragraph (a) the Act applied to the employment of a worker "in and for the purposes of any trade or business carried on by the employer," and under paragraph (b) it applied (*inter alia*) to "domestic service in which the employment or engagement is for a period of not less than three days." Regarding the term "trade or business," it should be noted that the New Zealand Act contained a definition that did not appear in the English Act. S. 2 defined "trade or business" as including "any trade, business or work carried on temporarily or permanently by or on behalf of an employer." The meaning to be given to the word "work" was discussed in **Christie v. Will,** (1929) G.L.R. 262, but having regard to the circumstances of the present case, the extended definition could not have any effect on the consideration of the essential question, which was whether the trimming of the hedge referred to was properly regarded as part of the trade, business or work of a grocer If it were assumed, in the plaintiff's favour, that the trimming of the hedge was undertaken partly, at least, to benefit the defendant's grocery business, it did not follow that it was therefore part of the carrying on of his trade, business or work as a grocer. In **Alderman v. Warren,** 9 B.W.C.C. 507, it was held that a casual engagement for the work of taking down a stove and chimney in the bar of a public-house, though the work was for the benefit of the publican's business, was not employment for the purposes of that business. On the other hand, in **Boothby v. Patrick,** 11 B.W.C.C., 201, it was held that a worker engaged to assist in dismantling a crane that a firm of timber merchants had purchased, and intended to use in their business, was employed for the purposes of that business. Those two judgments were discussed and approved by the House of Lords in **Manton v. Cantwell,** (1920) A.C., 781, in which it was held that a worker engaged in thatching a farmhouse was employed for the purposes of the business of the farmer who employed him. A similar conclusion was reached in **Carr v. Guardian Assurance Co. Ltd.,** (1928) G.L.R. 84, in which it was held that making alterations to a farm building constituted part of the ordinary work of a farmer. A passage from the judgment of Viscount Finlay in **Manton v. Cantwell** (*cit. sup.*) made the distinction perfectly clear. He quoted with approval the refusal of the Master of the Rolls to adopt the principle that whatever was advantageous for improving a house or repairing a house used for the purposes of a business was an employment for the purposes of the trade or business; and he added: "It cannot be that work done on premises where business is carried on, either in the way of building or in the way of repairing, can be regarded as a part of the business itself; it is work done to make the premises fit for the purposes of the business, and it may be essential for the carrying on of the business, but it is not part of the carrying on of the business itself, and I think it would be extremely dangerous if any such principle were introduced into the law as has been contended for." **Manton v. Cantwell** was reported also in 13 B.W.C.C. 55, but in that report some essential words were omitted from the passage above quoted. In the present case, even if it were still assumed that the trimming of the hedge was to some extent connected with the defendant's grocery business, there was nothing in the evidence or in one's knowledge of the everyday affairs of life to justify a finding that the trimming of the hedge, though it might benefit the shop yard and render the premises more fit for the purposes of the defendant's grocery business, was part of the trade, business or work of a grocer. The plaintiff was employed by a grocer, but he was not employed in or for the purposes of the trade, business or work of a grocer.

The alternative argument submitted for the plaintiff was that if his employment in the work of trimming the hedge were held not to be employment in or for the purposes of the trade or business of a grocer, it was then domestic employment for a period of not less than three days, and therefore within the Act. For the purposes of that branch of the argument, it might be assumed that the trimming of the hedge was not in any way connected with the defendant's grocery business, but was done as part of the work of keeping the defendant's dwellinghouse and grounds in order. Though it was unnecessary to decide the question of fact, the Court was of the opinion that the work in question, though connected partly with the grocery business and partly with the defendant's dwellinghouse, was on the balance of fact more closely connected with the grocery premises than with the dwellinghouse and grounds. However, on the assumption that the work in question related solely to the dwellinghouse and grounds, there were two issues to be decided: Was the work domestic service, and was the employment or engagement for a period of not less than three days? Counsel for the plaintiff cited **Gough v. Chapman,** (1929) G.L.R. 419, as an authority for the contention that the plaintiff's employment at hedge-trimming constituted domestic service. In that case a worker who was permanently employed in and about the private house and garden of his employer was held to be employed in domestic service. He was one of the household staff, and was described as a handy man about the place. In the present case the Court was asked to deal with the status of a worker casually employed as a jobbing gardener, not as a permanent servant as in **Gough v. Chapman.** There was no authority for the proposition that the employment of a casual gardener was an employment in domestic service within the meaning of the Workers' Compensation Act. The present plaintiff was not a general handy man permanently employed in and about the defendant's house and grounds, but was a casual worker employed for a specified quantity of work about the allotment. The judgments in **Allison v. Milsom,** (1923) G.L.R. 57, and **Christie v. Will** (*cit. sup.*), were directly in point, and established that such a worker was not a domestic servant or a worker employed or engaged in domestic service.

In view of the conclusion at which the Court had arrived on the principal issues, it was unnecessary to decide the precise meaning to be given to the words "in which the employment or engagement is for a period of not less than three days." The word "engagement," used in contradistinction to "employment," was probably intended to cover a case in which a contract of employment for a specified term was entered into. The word "period" generally meant a space of time, with a fixed commencing point and a fixed finishing point. The plaintiff worked on a Friday, Saturday and Monday. It was probable that the intervention of Sunday did not break the continuity of the period, if it were assumed that the work of planting, pruning, cutting and trimming should be regarded as a single job; for it could not have been intended by the legislature that a worker would be required or expected to work for 72 hours without a break, or on a Sunday. In the circumstances, it was probable that the employment of the plaintiff was for a period of more than three days, Sunday and recognised intervals of suspension of work being included in the period. However, the point was not fully argued by counsel, and it was not necessary for the Court to decide it in the present case. It might well be left as a matter of academic interest until the necessity arose to go more thoroughly into it.

Judgment for defendant.

Solicitors for plaintiff: **McVeagh and Fleming,** Auckland.
Solicitors for defendant: **Buddle, Richmond and Buddle,** Auckland.

Rules and Regulations.

Board of Trade Act, 1919. Board of Trade Trading-Stamp Regulations, 1931.—Gazette No. 14, 20th February, 1931.

Post and Telegraph Act, 1928. Amended rates of postage.—Gazette No. 15, 26th February, 1931. Amended rates for telegrams.—Gazette No. 15, 26th February, 1931. Amendments to Telephone Regulations. Regulations re Business reply-cards, envelopes, and wrappers.—Gazette No. 16, 5th March, 1931.

Inspection of Machinery Act, 1928. Scale of fees to be paid for the inspection of machinery and boilers.—Gazette No. 16, 5th March, 1931. Fees to be paid in respect of the examination of drawings of boilers, lifts and cranes.—Gazette No. 16, 5th March, 1931.

Shipping and Seamen Act, 1908. Amended Rules for the examination of Engineers in the Mercantile Marine.—Gazette No. 16, 5th March, 1931.

Government Railways Act, 1926. Alterations to scale of charges upon the N.Z. Government Railways.—Gazette No. 16, 5th March, 1931.

"There is nothing disgraceful in coming to a Court of law that I know of—I have been doing it for thirty-five years."

—Mr. Justice Swift.

The Profession in Queensland.

Some Impressions.

By W. J. HUNTER, LL.B.

On a recent holiday visit to Queensland I was glad to take the opportunity of observing the work of the legal profession in a State where the professions of barrister and solicitor are separated. Queensland has a population of about 750,000 people, of whom 330,000 are in Brisbane. Its total population is therefore less than the population of New Zealand, but, unlike New Zealand, it has one large city instead of four cities of moderate size as is the position here. There is nothing in the law to prevent a man from practising both as barrister and solicitor and I was informed that it has been tried, but without success. The Judges frown on the man who does so, the public does not desire it, and the solicitors, of course, will not brief him. The result is that such a man languishes and is glad to return either to one fold or the other.

It is generally considered that lawyers flourish best in a highly individualistic state and suffer in a socialistic state. The experience of Queensland seems to show that this is not necessarily the case. In New Zealand the extension of State activity into Railways, Advances Departments (including Rural Credits), Public Trust and similar activities, has resulted in an enormous reduction of the quantity of work available for legal practitioners. But Queensland has, or had, State sheep and cattle stations, butchers' shops, fish shops, and mines, in addition to most of the State enterprises which we have here. Yet the profession in Queensland at the time of my visit was flourishing and cheerful, while in New Zealand there is not enough work to go round. Why is this ?

In the first place the number of practising solicitors in Queensland is very much less in proportion to the population than it is in New Zealand. The fact that articles are still a compulsory part of training prior to admission has a considerable effect in keeping the number in due proportion to the population and is, no doubt, of benefit to the public in ensuring practical training before admission. Nevertheless, it seems to be more by good luck than by good management that the solicitors' profession in Queensland has escaped the "reforming" hand of the Legislature for it is only recently that an Incorporated Law Society has been formed. This Society, however, has profited by our mistake in that its Discipline Committee deals with complaints and applications to strike off the Roll in private, and the profession is saved the undesirable publicity of an application to the Supreme Court to strike off the offender, with the further publicity of an application to the Court of Appeal for an order absolute.

It may be because the profession in Queensland understands better than we do how to manage the politicians that its members have been allowed to pursue their way in peace and quietness. The writer was informed by solicitors that the State Departments work in harmony with the profession. Moreover practically the whole of the conveyancing and land transfer work of the State is done by qualified solicitors as there are no land brokers and only a few conveyancers, the last-named having to be admitted by the Court.

Probably the separation of the professions always results in more work and higher fees. The writer was informed, for instance, that an undefended divorce never costs the client less than £50 to £60 and may cost more. Apart from this, it seems to work out to the benefit of both branches of the profession, for the solicitor is able to devote himself exclusively to office work without the distractions incidental to preparation and frequent appearances in the Courts, while the barrister is freed from the multiplicity of details which the management of an office entails. So far as incomes are concerned, the information given to the writer satisfied him that neither branch of the profession in Queensland can complain of inadequate payment for services rendered. Whether the political strife of the past six months has seriously affected the position the writer is unable to say.

The question arises: "Will New Zealand have a separate Bar ?" The present Chief Justice was the first, or at any rate the first King's Counsel, to put the question to the touch. Now there is the nucleus of a separate Bar in Wellington, but it seems to the writer that in view of the distribution of the urban population into four cities, and a number of not inconsiderable towns, in all of which there are practitioners capable of adequately preparing and presenting a case to the Courts, it will be a very long time before the description "Barrister and Solicitor" will disappear from the brass plates which adorn so many of our office buildings.

Passing over the M.P.

The Appointment of Law Officers.

In England the Attorney-General and Solicitor-General are always members of the House of Commons and members of the party for the time being in office. Sometimes, owing to an insufficiency, or supposed insufficiency, of legal talent or ability, difficulty is found in satisfactorily filling the positions. In 1875, for instance, after the promotion of Sir Richard Baggalay from the Attorney-Generalship to the Court of Appeal, Mr. Disraeli had to seek a new Solicitor-General outside of the House: Mr. Hardinge Giffard, Q.C., (afterwards, of course, Lord Halsbury) was the choice, and a seat had to be provided for him. M.P.'s passed over were Lopes (afterwards a Judge and Lord Justice) and Marten (afterwards a County Court Judge). In 1885, notwithstanding the fact that Macnaghten, Q.C., Grantham, Q.C., and Edward Clarke, Q.C., were all available, they were passed over in favour of an outsider, Webster, Q.C., (afterwards Lord Alverstone, L.C.J.). This appointment to the Attorney-Generalship was probably justified by its result; but the same team were at the same time passed over also for the Solicitor-Generalship, Gorst, Q.C., being appointed to the post, amid great public amazement. So little known was Gorst in the Courts that when he appeared for the first time as Solicitor-General the usher asked for his name.

This process of passing over the sitting members has now been again repeated by the Labour Government. Sir Stafford Cripps, K.C., son of Lord Parmoor, fills the vacant Solicitor-Generalship, and a seat has been found for him.

Hamilton Court.

Opening of New Building.

The new Court of Justice at Hamilton was officially opened by the Minister of Justice (Hon. J. G. Cobbe) on Saturday 21st ult.

The building is an exceptionally handsome one and stands on an eminence at the rear of the Anglican Cathedral. The entrance is between Roman columns into a spacious hall, on the left of which is the public office. To the left also are rooms for witnesses of both sexes, and the retiring room for the grand jury. Facing the main door, across the hall, are the entrances to the two court-rooms, the Supreme Court on the right and the Magistrate's Court on the left. These are not, perhaps, as large as one might have expected, each measuring only 55 feet by 30 feet. The Courts themselves stand as an island within the building, being surrounded by passages. Along the left passage are rooms for the registrar, the Judge's associate, and the Judge, as well as a large jury room. Along the right passage are situated a room for the Crown solicitor, two consulting rooms for the use of counsel and clients, a robing room and the law library. The latter is a well-lighted, pleasantly situated room well furnished with book-shelves. Along the rear passage are situated a storeroom, a room for the sheriff, and two cells for prisoners awaiting trial and sentence. The interior of the whole building is finished in white plaster, with fibrous plaster roofs. The Supreme Court room is panelled in oak, and on the wall above the judge's seat is the usual canopy with carved insignia of the realm. Artificial lighting has been designed on modern principles to approach daylight conditions as nearly as is possible. The cost of the building, complete with furnishings, will be in the vicinity of £29,000. The Hamilton District Law Society has borne the cost of furnishing the library and the robing and consulting rooms. All the shelving in the library and the lockers in the robing room are steel, installed by the Precision Engineering Co. Ltd., Wellington. The grounds, which are now being put in order, will eventually be handed over to the local Beautifying Society to lay out and plant.

The Official Opening.

His Worship the Mayor (Mr. J. R. Fow) presided at the ceremony, and briefly welcomed the Minister of Justice and Mr. Justice Herdman and Mr. Justice Smith. His Worship read a telegram from Sir Walter Stringer who, when a Judge of the Supreme Court, presided for many years over the Hamilton sessions, in which he expressed regret at being unable to attend the opening of the new Courthouse, the erection of which, he said, had been much striven for by him during several years of his judicial office.

The Minister of Justice (Hon. J. G. Cobbe) remarked that the building being opened that day was the fourth courthouse that had been erected in Hamilton. The Department had no record of the first courthouse, but the second was built in 1874—57 years ago—on a one-acre section in Collingwood Street, and consisted of three rooms. Just after it was completed the then Clerk of the Court asked that an additional room, ten feet square, to cost £45, be added for his sleeping accommodation, as it was so difficult to get accommodation in Hamilton. The cost of the extra room was considered exorbitant and the application was refused. (Laughter). Times had changed since those days, both with regard to building costs and the amount of accommodation available at Hamilton. As the town grew the work increased to such an extent that a larger building was required, and in 1906 the courthouse in Victoria Street was built.

The Minister gave an interesting comparison of the court business at Hamilton then and now. In 1906 there were 264 civil cases and 260 criminal cases, as against 2,356 civil cases and 1,398 criminal cases in 1930. In addition there was no Supreme Court work in Hamilton in 1906. At present there was a very considerable volume of such work. The large increase in the work had necessitated the building of a still larger courthouse, which had been erected on a less valuable and less noisy site than that in Victoria Street. The new building was unquestionably the finest courthouse outside the four centres, and was the best designed and would be the best equipped in the Dominion. It was confidently anticipated that it would meet all requirements for a very long time. It had been said that "the place of Justice is a hallowed place," and if that were true it followed that the building in which justice was administered should be worthy of the high purpose for which it was set apart. "The British nation has many institutions of which it has reason to be proud and I assert that in the fearless, upright, honest, and unprejudiced administration of Justice, it occupies a position second to no nation upon earth, and I am proud to say that the high standard of British Justice has been maintained without spot or tarnish in our own Dominion. (Applause). It has been said that 'there is no virtue so great and Godlike as Justice,' and I trust that within these walls the scales of Justice shall ever be fairly held; that without fear or favour, without regard to rank or station, to race or colour, that justice, which is the pride of our Empire and the bulwark of our constitution, shall ever be fearlessly and honestly administered." (Applause). The Minister then placed in position the marble memorial plate.

New Courthouse at Hamilton.

His Honour Mr. Justice Herdman said it had given Mr. Justice Smith and himself great pleasure to come down from Auckland that morning to attend the opening

ceremony. His Honour congratulated the Justice Department, the architect, and all who had anything to do with the erection of that dignified structure. It was a dignified structure. One had only to look at it to see that. It looked like a Court of Justice. When the grass appeared and the trees grew up, they would have in Hamilton Court premises perhaps more beautiful than in any other part of New Zealand.

His Honour remarked that His Worship the Mayor, in his address, had commented on the close proximity of the Courthouse to the Cathedral. As he did so, certain lines of Dean Swift ran through His Honour's mind:

"Wherever God erects a house of prayer,
The Devil is sure to build a temple there,
And it will be found on examination
The latter has the larger congregation."

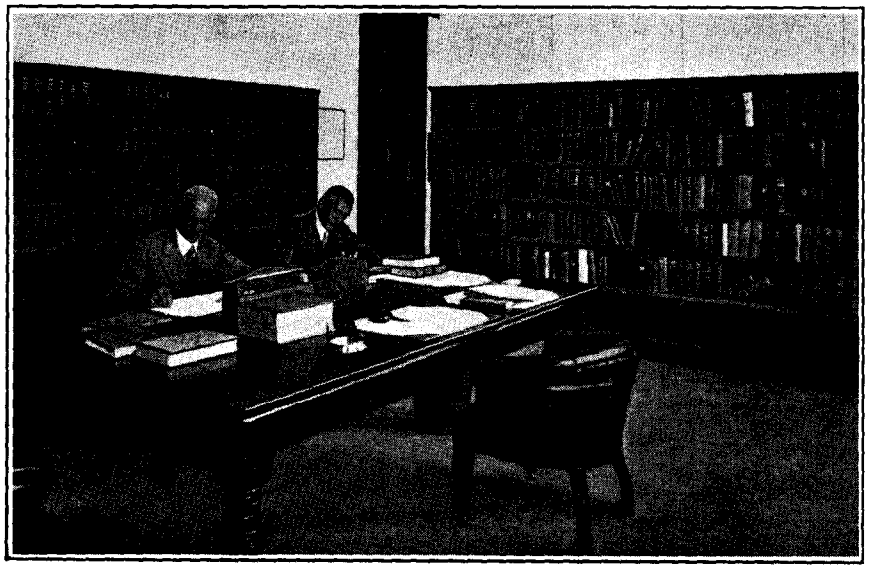
(Laughter). His Honour felt sure, had Dean Swift been present at that ceremony and seen that structure, he would never have written those lines. (Laughter). The old Courthouse was inconvenient, uninspiring, and unsavoury. The building was situated in a thickly-populated area, and if the music to be heard from it was not classical, it was at least not unplentiful. A Judge might be at work dealing with the interpretation of a deceased testator's will, when the words of "The Lost Chord" would float through the windows. A Judge might be hearing a motor collision case when the tunes of "Three o'clock in the morning," would be heard. (Laughter). His Honour recalled having to pass through a Magistrate's Court on his way to his own room at a time when a licensing case was being heard. Many of those in the room had been palpably connected with a licensing matter. His Honour agreed that in these chaotic days there was left one thing of which the members of the community might be proud, and that was the traditional principles on which British justice was administered. That system of justice was founded through a certain man who had suffered from injustice during the Stuart dynasty. The settlement of rights became law in 1700, and since then the judiciary was given independence. This law had been re-enacted in New Zealand, and His Majesty's Judges were entirely free and independent, and all they were concerned about was to do their duty fearlessly and impartially. That state of affairs was something to be proud of. The British system of administering justice was the finest feat the intellect and wit of man could devise. His Honour concluded by congratulating the people of Hamilton on their fine new Courthouse.

Mr. F. A. Swarbrick, President of the Hamilton Law Society, thanked the Department of Justice for the splendid accommodation that had been provided. They had waited for it for a very long time, and now the legal profession had, from their point of view, the best equipped Court in New Zealand. They had a splendid room for the law library, an adequate robing room, and three consulting rooms for the convenience of the practitioners and the general public. The burden of furnishing the library and those rooms had fallen on the District Law Society, and they had endeavoured, as far as possible, to make those furnishings conform to the high standard which the Government had adopted in the rest of the building. While they were deeply indebted to the Justice Department, they felt the time was now ripe for the people of the Hamilton district to tackle the Lands Department in the matter of providing a lands registration office, a lands and survey office, and a stamps office for the district. The volume of business conducted in the Supreme Court and the Hamilton Magistrate's Court followed closely behind that of the four main cities, and in some respects was ahead of Dunedin. If the offices he had mentioned were established in Hamilton, he thought the Government would find that the volume of business transacted in Hamilton would adequately repay the expenditure. He asserted that the extra cost to the people of Hamilton and district, in having to send their documents to Auckland to be stamped and registered, must run into thousands of pounds annually. Added to the increased expense of land transactions was also the great inconvenience and delay of having to do business through Auckland.

Opening of Sessions.

There was a large attendance of the Bar in the new Supreme Court when the sessions opened on the 23rd ult. On behalf of the profession, Mr. F. A. Swarbrick (President of the Hamilton District Law Society) expressed to His Honour Mr. Justice Smith, who was on the Bench, their pleasure at being able to assemble in a building worthy of the Court.

His Honour Mr. Justice Smith said that it was a great pleasure to him to be there on that occasion. It was a matter for great congratulation that the Bench and Bar could meet together and express their satisfaction at the opening of that noble building. The work of the Supreme Court was the administration of justice in all matters of the highest importance in the country. That was recognised not only by the Bar but by the citizens of the city in which the Court sat and by the people of the country at large. It was of paramount importance that the people of the Dominion and the citizens of each city should be satisfied that the offences against the law would be fairly dealt with, and that disputes between individuals should be impartially adjusted according to the law. The official opening on Saturday served for the expres-



Corner of Library.

sion and emphasis of that feeling. The legal profession had, of course, the same interest in the administration of justice as the general public, but they had a more official interest. The legal profession and the jurors were the servants used by the State in the administration of justice. Because of its high calling, the profession had its standards of conduct. They were enshrined in the etiquette of the profession. The interests of the client came first. That was the professional attitude, though the lawyer strove for his client *per fas* and not *per nefas*. When he strove, as Lord Cockburn said, he weilded the weapons of a warrior, not of an assassin. Again, through the etiquette of the profession no member sought another's client. He treated other members of the profession with the courtesy due to a professional brother. Professional standards had their effect upon each member of the profession and it was fitting, where possible, that those standards should be represented in the outward forms and ceremonies employed in the administration of the law. It was fitting also that the work of the Courts should be done in noble buildings. The influence of the ivy-clad walls of England upon the professional life nurtured within them must be of incalculable value. The walls of that Court were not ivy clad, but they were noble in their proportions, dignified and impressive. It was fitting, too, that the legal profession should have buildings which were not only noble and dignified but efficiently planned. He believed that that building had been efficiently planned. Time would tell more surely. He felt sure that it was efficiently manned. Both the Judges and the members of the profession owed much to the work of the official staff. His experience of the Supreme Court staffs was that they were a credit to their country. The staff at Hamilton had had a heavy task in effecting the transfer of the records to the new building and in carrying on at the same time the work of the Courts. But he had no doubt it had been cheerfully undertaken and efficiently carried out. Let them hope, then, that in that new white building they who had entrance there would feel dedicated anew to the fulfilment of purposes of justice. Their motto should be the old Roman words: "*Fiat Justitia Ruat Coelum.*"

Bench and Bar.

Messrs. C. P. and C. S. Brown, Wanganui, have extended their practice to Wellington in association with Mr. D. C. D'Arcy, who will be the resident partner there. The Wellington practice will be carried on under the style of "C. P. and C. S. Brown and D'Arcy."

The practice of Mr. W. N. Matthews, LL.B., Wellington, will be carried on during his illness by Messrs. Duncan and Hanna, Wellington.

Mr. R. Hardie Boys, of Wellington, has admitted Mr. W. Fortune into partnership. The practice will be carried on under the name of "Hardie Boys and Fortune."

"It is difficult to know what judges are allowed to know, though they are ridiculed if they pretend not to know."

—Lord Justice Scrutton.

Privileged Communications.

Wife's Admission of Adultery to Husband's Solicitor Regarded by her as Solicitor for both Spouses.

A most interesting question as to the privilege of professional communications was raised in the very recent case of *Harris v. Harris*, 95 J.P. 1.

A wife summoned her husband for wilful neglect to provide reasonable maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging that they had not lived together since 1918. The husband made a countercharge of adultery, which the wife denied, and called a solicitor, who had acted as the common adviser of both parties in 1919, in respect of their matrimonial differences, to prove that the wife had admitted the alleged adultery to the solicitor in his presence. The solicitor's evidence was as follows: In 1918 he was consulted by the wife. In 1919 he was consulted by the husband with a view to getting a divorce. He (the solicitor) was constantly in touch with both, and the wife probably regarded him as her solicitor all the time. He thought he saw them in different rooms. He acted for the husband from August to November, 1919, when the matter fizzled out. The husband paid his fees.

The City of Birmingham Justices held that the alleged statement by the wife to the solicitor was privileged and could not be admitted and that the defence of adultery was not proved; a maintenance order was made against the husband, who appealed principally on the ground that the justices were wrong in refusing to admit the evidence.

Lord Merrivale and Bateson, J., held that the justices were right; Lord Merrivale said (p. 2): "The question is whether the justices were right in holding that this was a privileged occasion. The matter is capable of close discussion in a very ample measure. The kind of difficulties which arise is illustrated in a variety of cases, and in a judgment of the highest authority to which reference has been made (*Minter v. Priest* (1930), 99 L.J.K.B. 391). First, you have to find what is the relationship of the lay person and the professional man when the lay person confides in him; whether it is the relationship of people who are on opposite sides, or whether it is merely a friendly relationship where there may be a breach of personal confidence but there is not a sealed privilege, or whether it is a relationship in which the solicitor is receiving the confidences of an actual or potential client, and receiving these confidences under the seal of professional privilege. I have considered the evidence here, and I think that the question whether the solicitor received the confidences of the present respondent in the manner which I have last described ought to be answered in the affirmative, and the magistrates were right in answering it in the affirmative. It is a narrow question, but on the other hand it is one of the safeguards of life and one of the securities of lay persons to be able to approach a solicitor knowing that he will not be compelled to disclose what, in that relationship, has been confided to him."

"Nobody knows what goes on in Parliament; our laws are reformed in the dead of night, in silence and obscurity." —Mr. Augustine Birrell.

The Police and Witnesses.*

The Duty of the Police as to Evidence.

In a case which occurred towards the latter end of last year it was made matter of complaint by a solicitor defending a client upon a charge of dangerous driving, that the police did not call all available witnesses. In the particular case in question the facts are said to be as follows, and for the purpose of our discussion we can treat the press account as authentic. A witness in the defendant's car was a police officer of a force other than that to which the prosecuting constable belonged. He was, naturally, a witness who could have been called for the defence, but, when asked to attend, he said that he had given his statement to the prosecution. Of course, the defence could have proceeded to call him as their witness, but it is not to be expected of any legal adviser that he should take such a leap in the dark, and it was only when it was found that the witness was not called for the prosecution that they realised his more than probable usefulness to the defence. An adjournment was granted and the witness was called, for the defendant. The defendant suggested that there was another witness whom he could not trace, and the police, who it was supposed, had or might have, taken a statement from that witness, refused, when approached, to give any information or afford any assistance to discover him.

Our own experience is that the police are usually helpful. It is common form, in the police courts in London, for the defendant who tells the court he has witnesses, to be there and then asked if he would like to give their names and addresses, and for the police officer in charge of the case to be asked to furnish help in getting them to the court. The help is invariably furnished, we believe, honestly and impartially. In one case we remember, where there was a brutal assault on several policemen, and their feeling was hot against the accused, an officer not connected with the case undertook an inquiry into what looked like a very doubtful *alibi* set up by one of the prisoners. The officer traced and produced several unimpeachable witnesses to the truth of the prisoner's story and he was acquitted. It is fair to mention that the constables charging the assault had been misled by a truly remarkable resemblance between two men to mistake one for the other in a bad light and the hurry of the fray. This action of the police in thus procuring witnesses, is in accord with the instructions given a considerable time ago and is now developing into an honourable tradition, that it is the duty of the police to lay before the court all the materials possible for the doing of justice.

It has always been the attitude of counsel appearing on behalf of the Director of Public Prosecutions to take the attitude, " We are here to help elucidate this matter and we shall lay the facts before the court, whether they tell for or against the Crown." If there are witnesses available, whom it would be idle to call for the prosecution, their existence and the substance of the evidence they can give is usually conveyed to the other side. In the trial of Harold Greenwood in 1920 it was made a matter of severe comment by Sir Edward Marshall Hall, defending the accused, that a witness who was present at the meal when it was suggested the fatal dose of poison might have been administered, who was with the deceased woman at various times later on the same day and beside her bed when she was dying, had not been called upon by the police to make a statement. He said, correctly, " It has been laid down again and again by administrators of the law that it was the bounden duty of the police to make inquiries that would tend in favour of the accused person as well as inquiries that would tend to incriminate him." The duty to make inquiry is linked with the further duty to make the results of the inquiry available. Public prosecutors—and the police, of course, undertake most public prosecutions—are not to seek conviction, but to bring before the courts cases proper for judicial inquiry, and then to assist that inquiry to attain its proper end, the doing of justice.

This duty we have so strongly insisted upon has, of course, its reasonable limits. We have heard it made matter of complaint by the defence that they were not supplied with the names and addresses of witnesses for the prosecution. In a world entirely composed of honourable men this would be a safe and proper thing to be done, though in such a world there would be, one would suppose, very few prosecutions at all. But there is such a thing as witnesses being " got at." . . . . The very seeking of justice we have been urging as the prime duty of the police, requires that they should guard their witnesses from being tampered with.

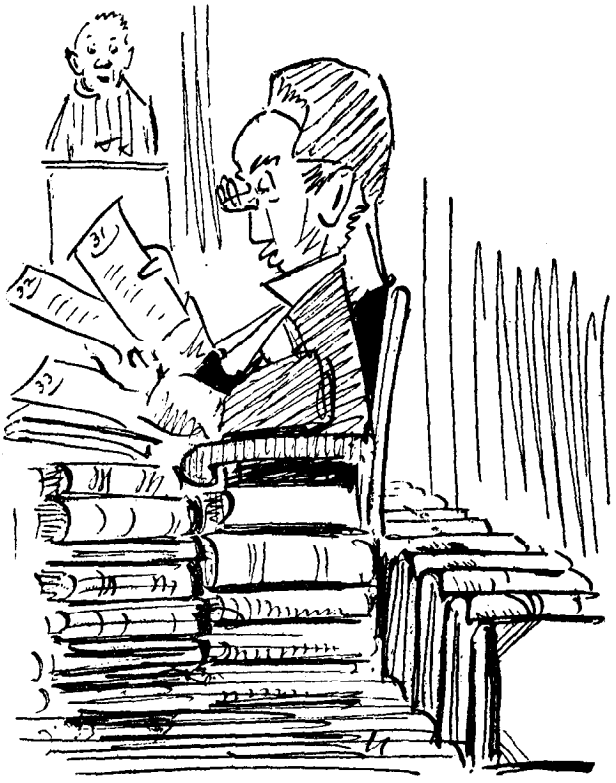
This matter is, like all other human affairs, one for give and take. Reasonable men can always ensure reasonable action. The unreasonable must be dealt with by authority, and courts should always defeat any attempt at the suppression of evidence, by the granting of adjournments, and if necessary, the imposition of costs

* Reprinted by permission from the *Justice of the Peace.*

Forensic Fables.

THE ERUDITE JUDGE AND THE QUESTION OF DOUBTFUL ADMISSIBILITY.

There Lived in the Past an Erudite Judge who Considered that he was Rather Hot Stuff. Nor was his Good Opinion of himself without Justification; for he had the Law at his Finger Ends and he Expounded it in Language which was both Elegant and Precise. When Opportunity Offered the Erudite Judge would Enrich the Law Reports with a Judgment in which he Discussed all the Authorities, Exposed the Fallacies of Deceased Members of the Bench, Corrected the Errors of Legal Writers, and Generally Cleared Things Up for Posterity. One Fine Day, while the Erudite Judge was Trying a Case in the Common Jury List, Counsel for the Plaintiff Asked the Witness What the Charwoman had Said when the Witness Told her that the Plaintiff had Fallen Over the Pail on the Stairs. The Erudite Judge Directed the Witness not to Answer



the Question, and Ordered the Jury to Withdraw. After a Protracted Argument as to the Admissibility of the Question the Erudite Judge Adjourned the Hearing so that he might Consider the Matter Fully.

The Next Day the Erudite Judge Loosed Off a Splendid Bit of Work. No Aspect of the Law of Evidence was Left Untouched. Beginning with the Pandects of Justinian, the Erudite Judge Took his Hearers through the Canon Law and the Year-Books, and thus Traced to its Source the Doctrine of the Inadmissibility of Hearsay Evidence. By Eleven Forty-Five the Erudite Judge had Got to the Line of Cases about Declarations by Deceased Persons, Inscriptions on Tombstones, and the Facts Properly to be Regarded as *Res Gestæ*. At Long Last, when the Stenographers were Shewing Signs of Exhaustion, the Erudite Judge Reached the Conclusion that the Question was Admissible.

The Witness having Returned to the Box Counsel for the Plaintiff Once More Enquired: "What did the Charwoman Say when you Told her that the Plaintiff had Fallen Over the Pail on the Stairs?"

The Witness Replied that the Charwoman hadn't said Nothing. He added that he wasn't Surprised, since the Charwoman was as Deaf as a Post.

MORAL: *Reserve Judgment.*

A Jury's Rider.

Rex v. Greenwood.

It is a commonplace in our Courts for juries to append riders to their verdicts, and every such rider is, so far as we are aware, announced when the foreman informs the Court of the terms of the verdict. We can recall no case where the presiding Judge has directed that any particular rider announced in open Court should not be published. It has just been made known, however, that such a course of conduct was adopted in a celebrated murder trial in England some ten years ago.

Harold Greenwood, a solicitor, was indicted for the murder of his wife. The Crown case was that he administered arsenic to his wife by means of some wine which she drank at lunch on the last day of her life. The defence called a daughter of the accused who gave evidence that she drank wine from the same bottle at the same time as her mother and suffered no ill effects, and but for this evidence it seems probable that the jury would have found the accused guilty. After Miss Greenwood had given evidence counsel for the Crown suggested that the poison might have been contained in medicine, tea or brandy, but the Crown had theretofore so clearly based its case on the administration of the poison by means of wine that Mr. Justice Shearman in his summing-up told the jury in effect that if the daughter partook of the wine there was an end of the case. In the result a verdict of "not guilty" followed, and much criticism was directed at the conduct of the case by the prosecution. It is now for the first time revealed in the recently published *Trial of Harold Greenwood* by Miss Winifred Duke (*Notable British Trials* series) that the jury appended a rider to their verdict which was handed in writing to the Judge who refused to allow it to be made public. In this rider the jury stated that they were satisfied on the evidence that a dangerous dose of arsenic was administered to Mrs. Greenwood on the day in question but that they were not satisfied that it was the immediate cause of death; and they added: "The evidence before us is insufficient and does not conclusively satisfy us as to how, and by whom, the arsenic was administered: We, therefore, return a verdict of 'not guilty.'" Mr. Justice Shearman refused to allow the rider to be published and, although one cannot say with certainty why he so refused, one supposes that the learned Judge took the view that, English law not countenancing a verdict of "not proven," the reasons of the jury for their verdict as stated in the rider were entirely irrelevant in that they could not affect the verdict.

Auckland District Law Society.

Annual Meeting.

The annual meeting of the Auckland District Law Society was held in the Magistrate's Court, Auckland, on Friday, 27th February, 1931. Mr. R. P. Towle (the President) was in the chair and about 120 members were present. Fifty-one proxies were received.

The annual report showed that the following practising certificates were issued during the year 1930, the figures for 1929 appearing in brackets: Barristers 241 (229); Solicitors 533 (519). Six gentlemen were admitted in the district as barristers and solicitors, sixteen as solicitors only, and thirteen solicitors were admitted as barristers.

The Council since the date of its last report had to record the death of the late Chief Justice, the Right Honourable Sir Robert Stout, P.C., K.C.M.G., and at a special gathering of members at the Supreme Court references were made by the President to the long and distinguished services rendered to the Dominion over a large number of years by the late Chief Justice. It was also with deep regret that the Council had to record the death of several members of the Society in the persons of Dr. F. Fitchett, C.M.G., Messrs. J. E. S. Bailey, A. Hanna, Geo. Hutchinson and R. C. Schnauer. Dr. Giles, who at one time occupied the Magistrate's Court Bench, also died during the year.

Fidelity Guarantee Fund.—Probably the most important event during the year was the inauguration of the Solicitors' Fidelity Guarantee Fund, which became operative as from 1st January, 1930. The principles of the Act establishing this Fund had already commended themselves to practitioners abroad, and it was interesting to learn that legislation both in Great Britain and Australia was being considered upon the basis set out in the New Zealand Act.

Hugh Campbell Scholarship.—The Council was pleased to be able to state that it had certain funds in hand which, with other amounts to be received, would enable the scholarship to be awarded in the year 1931 as contemplated in the last report. All arrangements with the Auckland University College Council had been completed in connection with this matter.

Circulating Library.—In compliance with a resolution passed at the last annual meeting, the Council had inaugurated a circulating library of text books in general use amongst practitioners.

Legal Conference.—The Conference arranged for last Easter was attended by practitioners resident in various parts of the Dominion, and proved most successful. Papers on various subjects were contributed, and a full programme of social events was carried out. After the Conference was concluded the Council passed a special vote of thanks to the President and Mrs. Towle for their help throughout.

Library Building.—It was with regret that the Council had to announce that, notwithstanding its offer of monetary assistance extended to the Government in connection with the proposed new library, no step had been taken towards relieving the unfortunate congestion which had existed for so many years. The accommodation for the books had reached such a stage that it had become extremely difficult to find space for new works, which were increasing at a quicker rate each year. The Council lately ordered a full set of Canadian Reports, comprising about 250 volumes, and proper housing of these books was causing the Council considerable anxiety.

New Zealand Law Society.—Regular meetings of the New Zealand Law Society were held throughout the year and the agenda was carefully considered by the Council, and at least one of the delegates of the Society attended personally at each meeting in Wellington.

Boundaries of Judicial Districts.—During the year communications were received from the Department of Justice relative to proposed alterations in the Northern Judicial District. Such alterations would have had the effect of substantially reducing the present Northern District. Your Council gave much attention to the matter and also communicated with practitioners in each of the towns affected, all of whom were in agreement in opposing the change. Your Council accordingly made representations to the Justice Department on the matter, and the proposal was abandoned.

The following Officers were elected for the ensuing year: President, Mr. R. P. Towle (re-elected); Vice-President, Mr. J. H. Reyburn; Treasurer, Mr. A. M. Goulding. There were twelve nominations for the election of six members of the Council, the result of ballot being the election of Messrs. G. P. Finlay, J. B. Johnston, A. H. Johnstone, R. McVeagh, L. K. Munro and F. L. G. West.

The President and Messrs. A. H. Johnstone and F. L. G. West were elected the Society's representatives on the Council of the New Zealand Law Society, and Messrs. R. McVeagh and H. P. Richmond were appointed members of the New Zealand Council of Law Reporting.

The President referred to the recent Hawke's Bay earthquake stating that he had conveyed to the President of the Hawke's Bay Law Society, the Society's sympathy and proffering assistance. It was considered that any assistance should, as far as possible, be in the direction of helping the members of the Hawke's Bay Law Society who had suffered. The following resolution was carried unanimously: "That this meeting empower the incoming Council to spend out of the Society's funds a sum not exceeding £1,000 towards earthquake relief, the method of applying same to be left to the Council to determine."

It was decided to increase the number of members of the Council from nine to eleven, the incoming Council to take the necessary steps for amendment of the rules accordingly. Other matters of interest to the profession were discussed and the meeting concluded with a vote of thanks to the Council and of appreciation of its efforts throughout the year.

Counsel appearing before the Recorder of London (Sir Ernest Wild) drew the attention of the Court to the fact that the arrest, committal for trial, conviction and sentence of the prisoner had all been accomplished within a few days. "I must tell the Americans about this," was the learned Recorder's reply.

"The Attorney-General receives more kicks than halfpence."

—Sir John Simon, K.C.

Legal Literature.

Underhill's Principles of the Law of Partnership.

Fourth Edition: By MILNER HOLLAND, B.C.L., M.A. (pp. xxvii; 180; xxvii: Butterworth & Co. (Pub.) Ltd.)

Of the treatises on the law of partnership Lord Lindley's work undoubtedly holds pride of place and so much so indeed that it would now be an almost impossible task for any author to attempt to outrival it. *Underhill*, however, does not attempt to rival the *magnum opus* but is intended to give a broad sketch supplying the salient features of the subject. All who are familiar with *Underhill on Trusts* and *Underhill on Wills and Settlements* know how ably and concisely Sir Arthur Underhill can state and expound the law.

Since the appearance of the last edition of the work in 1919 many cases of an important bearing upon the law of partnership have been decided, and these unquestionably warrant a new edition. One may mention, to select a few, *Steinberg v. Scala (Leeds) Ltd.*, (1923) 2 Ch. 452 (as to the avoidance of a contract of partnership by an infant); *Kingston, Miller and Co. Ltd. v. Thomas Kingston and Co. Ltd.*, (1921) 1 Ch. 575, and *Dorman v. Meadows*, (1922) 2 Ch. 332 (as to the firm name and confusion); *Vulcan Motor Co. v. Hampson*, (1921) 3 K.B. 597, and *Hall and Co. v. Inland Revenue Commissioners*, (1921) 3 K.B. 152 (as to the ascertainment of profits); *Re Pennington and Owen Ltd.*, (1925) Ch. 825 (as to set off); *Goldfarb v. Bartlett*, (1920) 1 K.B. 639, and *Public Trustee v. Elder*, (1926) Ch. 776 (as to authority of partners after dissolution); *Boorne v. Wicker*, (1927) 1 Ch. 667 (as to goodwill); *Marley v. Sartori*, (1927) 1 Ch. 157 (ascertainment of share of outgoing partner). All these decisions are noted in the new edition; here and there an old case has been dropped; but in other respects the present editor has preserved the words of the original author with the least possible alteration.

Underhill is one of those English publications that are of full value to the New Zealand practitioner, for there is but little difference between the English law of partnership and our own.

New Books and Publications.

A Digest of Law re Bankruptcy and Deeds of Arrangement. By N. Hobson and H. Withers Payne, LL.B. (Solicitors' Law Stationery Society). Price 5/-.

The Law Relating to Reconstruction and Amalgamation of Joint Stock Companies. By P. F. Simonson. Fourth Edition. (Effingham Wilson and Sweet & Maxwell, Ltd.). Price 25/-.

Foreign Law Series No. 1, Taxation as it affects the doing of business in England, France and Germany. (Sweet & Maxwell Ltd.). Price 9/6.