New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"*Some for the Ermine of the Bench, and some*
*Sigh for the Leader's silken Robe to come;*
*Then save the Cash, nor let the Clients go,*
*To taste the Loaf you first must earn the Crumb.*"
—EVELYN UNDERHILL.

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# In the Spirit of the Season.

IN the spirit of the season, as is our wont, we dispense in this last issue of the JOURNAL to appear before the Christmas vacation with as much of the seriousness of our profession as we may; we spare our readers, however, any coloured Christmas supplement, leaving it to them to supplement the Yuletide fare we provide with such colouring as may to them seem meet.

The Christmas season casts an aura of goodwill about us all. "So hallowed and so gracious is the time" (Shakespeare) that Courts and counsel, and litigants as well, call a truce. Of course, as we have been recently reminded by Sir Cecil Hurst, at all times it is the litigants who want to fight, and counsel who try to make peace. Hence the legal profession guards against temptation at this season of peace and goodwill by declaring a long vacation.

To make absolutely certain that Christmas shall be celebrated, Courts and practitioners extend their holiday over January 6, which was Christmas Day according to the Old Style. There is good reason for this prevision. It is true that evidence of the custom of the country is admissible to show that by "Christmas Day" the parties mean Old Christmas Day (*i.e.*, January 6 of the Julian Calendar: 24 Geo. II, c. 23): *Doe d. Hall v. Benson*, (1821) 4 B. & Ald. 588, 106 E.R. 1051, and is also admissible to show, where a holiday is general from Christmas Day, whether the festive season shall be deemed to include New or Old Christmas Day: *Furley d. Canterbury Corporation v. Wood*, (1794) 1 Esp. 198, 170 E.R. 327. Yet, on the other hand, such a celebration cannot, however, be held *modo ac forma*: "No case can be found," says Tindal, C.J., in *Smith v. Walter*, (1832) 8 Bing. 235, 239, 131 E.R. 391, 393, "in which, where a party pleads upon the record that the taking [of the vacation] was from Christmas, he has been allowed to show that he meant by that pleading Christmas according to the Old Style." But, it must be remembered, that extrinsic evidence cannot be given to explain the time of the holding of the celebration of the festival, "since the Act of Parliament for altering the stile"; unless, as Lord Ellenborough observed, there had been any reference in the deed itself to the prior holding: *Doe d. Spicer v. Lee*, (1809) 11 East. 312, 314, 103 E.R. 1024, 1025. Consequently, in view of the present deplorable state of the law, the legal vacation is conditioned to begin before Christmas Day according to the New Style, and ends after the day on the old-style calendar on which it was formerly observed. The Judiciary, also in view of the state of the law, make no mistake about it, and see the month out.

The truce of Christmas extends to our law reports, which, in spite of their allegedly reporting too much, are particularly silent on anything pertaining to the season of merrymaking and rejoicing. There is, of course, in the French reports, the case of *Roy v. Villon and Others*, wherein it is related how the poet Villon and four companions burgled the College of Navarre in the University of Paris and stole 500 gold crowns on the eve of Christmas in the year 1456. And, also in the books of the criminal law, it is related that "on the eve of Twelfth Day, 1757, a gentleman approached the King of France, not to wish him the old, old wish nor yet to sing him a carol, but for the purpose of driving a dagger between the Royal ribs." And coming nearer to our own day, though the official reports are silent on the point, we learn from *The Gentleman's Magazine*, 1822, the following pleasing example of how the law never sleeps:

> "Charles Clapp, Benjamin Jackson, Denis Jelks, and Robert Prinset, were brought to Bow Street Office by O. Bond, the constable, charged with performing on several musical instruments in St. Martin's Lane, at half-past twelve o'clock on Christmas morning, by Mr. Munroe, the authorised principal Wait, appointed by the Court of Burgesses for the City and Liberty of Westminster, who alone considers himself entitled, by his appointment, to apply for Christmas Boxes. He also urged that the prisoners, acting as minstrels, came under the meaning of the Vagrant Act, alluded to in 17th Geo. II.; however, on reference to the last Vagrant Act of the present King, the word 'minstrels' is omitted; consequently they are no longer cognizable under that Act of Parliament; and in addition to that, Mr. Charles Clapp, one of the prisoners, produced his indenture of having served seven years as an apprentice to the profession of a musician to Mr. Clay, who held the same appointment as Mr. Munroe does under the Court of Burgesses. The prisoners were discharged, after receiving an admonition from Mr. Hall, the sitting magistrate, not to collect Christmas Boxes."

In fact, in Mr. Broom's pregnant sentence, *Vigilantibus et non dormientibus Lex succurit*. The only other case in point is *Hildesheimer and Faulkener v. Dunn and Co.*, (1891) 64 L.T. 452, in which Kekewich, J., characterized a Christmas card as a "work." He expressly stated in his judgment that he substituted that word for "picture or publication," because he did not want to decide whether it was the one or the other. Excellent authority for what we all know as "the Christmas feeling"!

It is characteristic of the non-contentious season that there has been no need for judicial interpretation of R. 601 (*a*) of the Code of Civil Procedure, which provides that the days from Christmas Eve to January 3, both inclusive, shall be holidays of the Court and the offices thereof; and R. 590, is a happy provision whereby if any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Christmas Day shall not be reckoned in the computation of such limited time.

Turning to statute-law: Why in such a season of carefree jollity, do licensed premises follow the example of the Supreme Court and close their doors on Christmas Day? Surely not in the spirit in which our forefathers made wassail was s. 189 (2) of the Licensing Act, 1908, enacted. For the good old English Christmas

celebrations, see *Reg. v. Schneider*, (1883) 11 Q.B.D. 71; and *Davis v. Harrison*, [1909] 2 K.B. 104. But the New Zealand prohibition of merry-making on licensed premises prevails even if Christmas Day falls on a Monday: s. 189 (2); *cf. Dew v. Ryan*, (1911) 30 N.Z.L.R. 704. Nor does it seem properly seasonable that by s. 190 of the Licensing Act, 1908, to which reference has been made, no one may disport himself "at billiards, bagatelle, or at any other game in such premises" on Christmas Day itself. There is, however, a sound statutory basis for such suppression of joy. Without taking our readers through a detailed historical examination of the evolution of the sections referred to and wearying them with the details of the intervening legislation of Great Britain or the Ordinances of the Crown-Colony period of New Zealand's constitutional development, suffice it to say that the Long Parliament abolished Christmas altogether, and enacted that the making of plum-pudding and mince-pies was thereafter to be a criminal offence. From the *Flying Eagle Gazette* (London), December 24, 1652, we take the following contemporary report:

> "The House spent much Time this Day about the business of the Navie, for settling the Affairs at Sea, and before they rose were presented with a terrible Remonstrance against Christmas-day. . . In consequence of which, Parliament spent some Time in Consultation about the Abolition of Christmas-day, pass'd Orders to that Effect, and resolved to sit on the following Day, which was commonly called Christmas-day."

So, you see, Government interference in business has somewhat ancient precedent; and the Long Parliament of a day earlier than 1932-35 was familiar with the use of Orders to curtail the liberty of the subject.

The Restoration of Christmas took place in 1661. For twelve years the Merry Monarch had fought hard to achieve this result. He said, as Henry V did before him, "The yearly course that brings this day about shall never see it but a holiday." So intent was he on this "Restoration" (a word which survives in our licensing legislation to this day) that he denied the people of his kingdom the pleasure of annual statutes until the twelfth year of his reign, the year in which Christmas was restored. But he could not restore the old-time levity of the season, when the jurisdiction of the Lord of Misrule extended beyond the hearth and the cloister and reached the very Inns of Court themselves. Two hundred years later, Charles Lamb records in a letter: "Old Christmas is a-coming to the confusion of the unwassailing crew. He cometh not with his wonted gait; he is shrunk nine inches in girth; but is yet a lusty fellow."

We pass on to the happier Christmas flavour of the Bills of Exchange Act, 1908, which, regarding the presentment of unwelcome bills for payment, declares Christmas Day a *dies non* for those so liable at the festive season, and allows Christmas joy to be unconfined. This is more cheery reading than a judicial pronouncement in the free and enlightened United States of America which held that a sale under execution levied on Christmas Day is not void: *Hadley v. Musselman*, 3 N.E. 122, 104 Ind. 459, a finding that must serve to cast a gloom over a day which is statutorily described in the land of the Blue Eagle as "a legal holiday."

Finally, to complete our survey of the law, there is the well-known English authority of *Haddock and Others v. Board of Inland Revenue*, an appeal from the decision of the Income-Tax Commissioners upon a case stated for the opinion of the High Court. In the course of his judgment, Mr. Justice Radish said that an editor cannot write about nothing; though, he added, one or two come very near to it. Happily the limitations of space do not interpose to prevent us refuting that *dictum* by showing that we have something to say before we conclude. And it is this: The JOURNAL wishes all its readers a happy respite from the cares of toil and the distractions of the Courts during the vacation now about to commence. With this wish, it expresses its cordial hopes that the members of the Judiciary, the Magistracy, and the profession generally may enjoy the happiest of Christmasses, and come back in the New Year refreshed to undertake the duties and the pleasures of an increasingly prosperous nineteen-thirty-five.

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# Summary of Recent Judgments.

SUPREME COURT
Napier.
1934.
Aug. 9, 10;
Sept. 26.
*Reed, J.*

**IN RE SIR DOUGLAS McLEAN (DECD.), CONWAY AND OTHERS v. FOUNTAINE AND OTHERS (No. 2).**

**Settlement—Satisfaction—On Daughter's Marriage, Settlor covenanting to make up Income during Daughter's Life to £2,500 per Annum if necessary—Will—Provisions for Share of such Daughter to be subject to Complete Indemnification of Trustees against Claims in respect of Deficiency of Income under Settlement—Whether Covenant void for uncertainty—Clause of Will in Satisfaction of Covenant of Settlement—Election—Rights of Daughter on electing to abide by Covenant.**

Originating summons for the interpretation of two documents, the will of the late Sir Douglas McLean and a settlement on the marriage of his daughter, Mrs. F., in which, *inter alia*, he covenanted with the trustees of the settlement that during his lifetime he would pay, during the joint lives of his daughter, Mrs. F., and her husband the sum of £2,500 per annum for the sole and separate use of Mrs. F.; and if the husband should first die then during the life of Mrs. F. and for her sole and separate use, and further covenanted as follows:

> "3. (1) The said Robert Donald Douglas McLean further covenants with the trustees other than and excepting himself that his executors or administrators will within six months after his death pay to the trustees (i) if the wife [*i.e.*, Mrs. Fountaine] shall survive him and there be issue of the said marriage living at his death the capital sum of £50,000 and will during the life of the wife [*i.e.*, Mrs. Fountaine] make up the income thereof to £2,500 per annum if necessary."

Mrs. F. had only a life interest subject to restraint on anticipation in the capital sum with remainder to her children. She covenanted to bring into the settlement all after-acquired property which was also made subject to the terms of the settlement.

Sir D. McL. died on February 7, 1929, leaving a widow, and two daughters Mrs. F. and Miss B. McL. The position of the widow did not come in question. To Miss B. McL. testator left £50,000; the two daughters are the residuary legatees in equal shares. To the bequest to Mrs. F. of her share in the residuary estate there is an important proviso, which is as follows:—

> "17. . . . And provided further that any share or interest that my said daughter Constance Louisa Fountaine make take of or in my residuary estate as aforesaid shall be subject to the complete indemnification of my trustees by her (and to the satisfaction of my trustees in all respects) against any claims for or in respect of any deficiency of interest present or future under her said marriage settlement."

The £50,000 was duly made over to the settlement trustees on April 17, 1930, and, from that date up to August, 1932, there had been a total deficiency, in the income of £2,500 per annum, of £1,234, and further deficiencies were expected. No demand had been made by the settlement trustees upon the will trustees for this deficiency, and it had not been paid. It was stated that, if claims for annual deficiencies were made annually, it was probable that they could be settled out of the income of Mrs. F.'s share of residue; but, if such claims should be held back

until the amount was large, it was likely that capital would have to be resorted to in order to satisfy them.

In view of the provisions in the settlement (*a*) for Mrs. F. to settle after-acquired property, and (*b*) the ultimate trusts for the payment of the capital of the settled fund (including after-acquired property) to or amongst the children of Mrs. F., difficulties arose.

On originating summons for the interpretation of the said will and the said marriage settlement, and in respect of a series of questions submitted to resolve such difficulties.

**A. L. Martin** for the trustees of the will; **James,** for the infant and unborn children of Mrs. Fountaine; **P. B. Cooke,** for the trustees of the marriage settlement; **H. B. Lusk,** for Miss McLean.

**Held**. 1. That cl. 3 (1) of the settlement was not void for uncertainty.

2. That the gift of the share in the residuary estate to Mrs. Fountaine by cl. 7 of the will was in satisfaction of the covenant in cl. 3 (1) of the settlement; and that Mrs. F. was put to election.

3. That, in the event of Mrs. F. electing to abide by the covenant, her rights were as follows: (*a*) Her share of the residue should be available both as to capital and income to meet any deficiency in the income under the covenant; and (*b*) the trustees of the will were entitled to require that Mrs. Fountaine should execute a charge over her share in the residue, both as to capital and interest, to indemnify them against any claim in respect of deficiency of income under the covenant.

**Chichester (Lord) v. Coventry,** (1867) L.R. 2 H.L. 71, 95; **Thynne (Lady) v. Glengall (Earl),** (1848) 2 H.L. Cas. 131, 9 E.R. 1042; **In re Hall, Hope v. Hall,** [1918] 1 Ch. 562; **In re Tussaud's Estate, Tussaud v. Tussaud,** (1878) 9 Ch. D. 363, referred to.

Questions answered accordingly.

**Solicitors: Carlile, Maclean, Scannell, and Wood,** Napier, for the plaintiffs; **Sainsbury, Logan, and Williams,** Napier, for the first-named defendant; **Chapman, Tripp, Cooke and Watson,** Wellington, for the second-named defendants; **Kennedy, Lusk, and Morling,** Napier, for the third-named defendant.

**Case Annotation:** *Chichester (Lord) v. Coventry*, E. & E. Digest, Vol. 20, p. 449, para. 1744; *Thynne (Lady) v. Glengall (Earl)*, *ibid.* pp. 474, 475, para. 2010; *In re Hall, Hope v. Hall*, *ibid*, 485, 486, para. 2120; *In re Tussaud's Estate, Tussaud v. Tussaud*, *ibid.* 475, 476, para. 2016.

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SUPREME COURT
Wellington.
1934.
Nov. 16, 19;
Dec. 4.
*Reed, J.*

**ARCHER v. S. S. WILLIAMS, CO., LTD.**

**Master and Servant—Apprentice—Common-law Right on completion of Term to bring Action for Breach of Contract to train—Whether abrogated by Statute—Apprentices Act, 1923, ss. 2 (2), 5; Apprentices Amendment Act, 1930, s. 15.**

The Apprentices Act, 1923, and the Apprentices Amendment Act, 1930, have not abrogated the common-law right of an apprentice in a case, in which the award and order of the Arbitration Court are in force, to bring an action against his employer on the completion of the term of his apprenticeship for damages for the breach of a covenant deemed to be incorporated in the contract of apprenticeship by an order of the Arbitration Court to train and instruct the apprentice as a competent journeyman in the trade to which he is apprenticed.

**Burton v. Precision Engineering Co., Ltd.,** *ante.* p. 232, distinguished and the *dicta* therein as to the abrogation of common-law rights explained.

**Counsel: Foot,** for the plaintiff; **Stevenson,** for the defendant.

**Solicitors: Findlay and Foot,** Wellington, for the plaintiff; **Izard, Weston, Stevenson, and Castle,** Wellington, for the defendant.

NOTE:—For the Apprentices Act, 1923, and the Amendment Act, 1930, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Master and Servant*, pp. 576, 590.

SUPREME COURT
Hamilton.
Nov. 20, 28.
*Herdman, J.*

**ANDREW v. McINNES.**

**Practice—Interrogatories—Running-down Action—Defence a Denial of Negligence and Setting-up Contributory Negligence—Application by Defendant to deliver Interrogatories—Circumstances of Accident Considered—Order made.**

Where there was evidence that defendant, who denied negligence and set up contributory negligence on plaintiff's part, was unaware that there had been any actual collision and there was no evidence from which he could infer that it had taken place, on taking into consideration all circumstances available at the stage of the litigation when the application was made by defendant, an order was made granting leave to defendant to deliver interrogatories.

**Griebart v. Morris,** [1920] 1 K.B. 659, and **Marskell v. Metropolitan District Railway Co.,** (1890) 7 T.L.R. 49, referred to.

**Counsel: Strang,** for the defendant, in support; **P. J. O'Regan,** for the plaintiff, to oppose.

**Solicitors: P. J. O'Regan and Son,** Wellington, for the plaintiff; **Strang and Taylor,** Hamilton, for the defendant.

**Case Annotation:** *Griebart v. Morris*, E. & E. Digest, Vol. 18, p. 212; *Marskell v. Metropolitan District Railway Co.*, *ibid.* p. 213.

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SUPREME COURT
Wellington.
1934.
Nov. 30;
Dec. 6.
*Ostler, J.*

**LADY GRAY v. SLADDEN AND STEWART.**

**Partnership—Solicitors—Dissolution by Death—Sale of Goodwill—Conditions of Sale as to Custody of Deeds—Use of Name of Deceased Partner.**

Motion to discharge an injunction, arising out of the following facts:

A partnership between G., S., & S. was dissolved by the death of G. S. and S. continued thereafter to carry on business under the firm name. In an action by the administratrix of G., against S. and S., judgment was entered by consent appointing a receiver with power to sell assets, including goodwill, and reserving the right to the plaintiff to issue a writ of injunction restraining defendants until further order from using G.'s name as part of the firm name.

The receiver prepared conditions of sale, one of which provided that the purchaser of the goodwill of a solicitor should be entitled to the possession of the deeds, documents, and books of the partnership. As counsel for the parties could not agree upon the conditions, the receiver applied to the Court for directions.

The Court substituted for the said condition the following:—

"The purchaser of the goodwill (provided he is a solicitor of the Supreme Court) shall be entitled to inspect the register of deeds of the said firm of Gray Sladden and Stewart held for safe custody or otherwise held and lodged with the said firm at any time or times prior to 28th April, 1933, and to have made at his own expense a copy of such register and a list of the clients to whom such deeds belong and to issue circulars to such clients to ascertain whether such clients desire the said purchaser or the surviving partners of the said firm to have the custody thereof."

Tenders were called for the sale of the partnership assets, including goodwill. No offer was received for the goodwill other than an offer of £15 by S. and S., which was not accepted; but a solicitor of standing intimated his willingness to make an offer therefor if the purchaser were entitled to the custody of deeds and documents (subject to the right of the clients) and to the possession of the books of account and record, papers, accounts, drafts, copies of opinions, &c.

The circumstances indicated that the goodwill was of little value. S. and S. moved for an order dissolving the injunction on the ground that no sale of the goodwill had taken place.

**Macassey,** for the defendants, in support; **Plaintiff** in person, to oppose; **von Haast,** for the Receiver.

**Held,** 1. That it is illegal to sell the right to the custody of documents of clients held by a firm of solicitors.

**Arundell v. Bell,** (1883) 52 L.J. Ch. 537, followed.

2. That, under the circumstances set out in the judgment, S. and S. were not entitled to use G.'s name.

**Re David and Matthews,** [1899] 1 Ch. 378, referred to.

The motion was therefore dismissed.

**Solicitors:** **Sladden and Stewart,** Wellington, for the defendants; **H. F. von Haast,** Wellington, for the Receiver.

**Case Annotation:** For *Arundell v. Bell,* see E. & E. Digest, Vol. 42, p. 581, and for *David v. Matthews,* Vol. 36, p. 494, 495.

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SUPREME COURT
Wellington.
1934.
Nov. 27;
Dec. 3.
*Ostler, J.*

**WELLINGTON WOOLLEN MFG. CO., LTD.**
**v.**
**PATRICK AND ANOTHER.**

**Company — Debenture — Condition — Receiver — Application of Moneys received by him "firstly in payment of all moneys payable in respect of the undertaking and property thereby charged"—Sale of goods to Company while Receiver carrying on Company's Business—Priority of Vendor over Debenture-holder.**

The P.D. Co., Ltd., executed in favour of the defendant P. a debenture charging its undertaking and all the assets present and future with the payment of £750. The conditions of the debenture provided that if a receiver be appointed he should be the agent of the company, and the company should alone be responsible for his acts and omissions. They also provided, *inter alia,* that the receiver should have power to take possession of the property charged, to carry on the business of the company, to observe and perform any of the covenants expressed in the deed of covenant, and to settle the company's accounts. Clause 4 of the conditions provided that:

"All moneys received by such receiver shall be applied as follows: (*a*) Firstly in payment of all moneys payable in respect of the undertaking and property hereby charged . . ."

The P.D. Co., Ltd., covenanted under a deed of covenant (deemed to be incorporated in the debenture) to maintain a stock the cost price of which should not be less than £1,000 or the amount due under the debenture. While defendant N., appointed receiver by the defendant, P., was carrying on the business of the P.D. Co., Ltd., which never went into liquidation, plaintiff company sold to the P.D. Co., Ltd., goods which the defendants refused to pay.

**Sladden,** for the plaintiff; **Harding,** for the defendants.

**Held,** 1. That the sum due to the plaintiff company came within the words "moneys payable in respect of the property hereby charged" in cl. 4 (*a*) of the conditions, which could not be given the narrow construction so as to mean "because of the ownership or occupation of."

2. That the property of the company purchased after the appointment of the receiver in order to carry on the business became subject to a fixed charge and part of the property charged under the debenture the moment it became the property of the company.

The claim of the plaintiff company was therefore held entitled to priority over the claim of the debenture-holder.

**In re Lister, Ex parte Bradford Overseers and Bradford Corporation,** [1926] Ch. 149, distinguished.

**Solicitors:** **Sladden and Stewart,** Wellington, for the plaintiff; **Meek, Kirk, Harding, and Phillips,** Wellington, for the defendants.

**Case Annotation:** For *In re Lister, Ex. p. Bradford Overseers and Bradford Corporation,* see E. & E. Digest, Supplt. to Vol. 5, title *Bankruptcy,* para. 7764*a*.

(*Continued on p. 325.*)

# Obiter Dicta.

## Their Nature and Value.

By W. E. LEICESTER.

"In the language of the law, an *obiter dictum,*" says Augustine Birrell, on the title page of his *Obiter Dicta,* "is a gratuitous opinion, an individual impertinence which, whether it be wise or foolish, right or wrong, bindeth none—not even the lips that utter it." The bastard child of the judicial mind, liable to be disowned by its father, it pursues an unhappy hidden life until dragged forth by some enterprising counsel as a possible means of support. Judges frequently say, in dealing with a reported case—and this is the opinion of Lord Darling himself—"I happen to know that my learned brother lived to repent of that judgment. It does not express his later views."

The dangers of *obiter dicta* are more apparent than their worth. It is often remarked that learned Judges let fall expressions in the course of delivering a judgment which, although not intended to qualify the decision, are afterwards said to have the effect of taking away the greater part of its value: *Higgins v. Campbell and Harrison Ltd.,* (1904) 6 W.C.C. 1, C.A. A sentence relied upon may be "one of those incautious expressions which we are all liable to use and which, when taken from their context, may be applied in a sense which their author would have immediately repudiated": *Hewitson v. St. Helens Colliery Co. Ltd.,* (1924) 16 B.W.C.C. 230, H.L. No *dicta* of the individual members even of the House of Lords can alter the law or form any ground for extending the real decision beyond the established principles of the common law; and from time to time it has been urged that Judges, in dealing with cases on appeal in particular, should not be restricted to the facts of the case on which they have to adjudicate, but should be given opportunities of pronouncing upon or settling the principles of law which the case involves. This was the view of that great lawyer, Sir Samuel Romilly, who wrote in the *Edinburgh Review* in 1817:

"It would be a prudent part to provide, by one comprehensive rule, as well for those possible events as for the actual case that is in dispute, and, while terminating the existing litigation, to obviate and prevent all future contests. This, however, is to the judicial legislator strictly forbidden."

While this view may be pleasing to the profession it would seem likely to impose a heavy burden upon the litigant who, curiously enough, seems for the most part more anxious to obtain a verdict than to add his name to the law reports as a leading case. It has been considered, therefore, only fair and just to limit the effect of language used by Judges to the general nature of the facts to which their judgment is applied: *Moreton v. Reeve,* (1907) 9 W.C.C. 72.

All *dicta* are not to be dismissed as mere *obiter.* Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case and is not really present to the Judge's mind. Such *dicta,* though entitled to the respect due to the speaker, may fairly be disregarded by Judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some *dicta,* however, are of a different kind; they are, although not necessary for the decision of the case,

deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open no doubt to other Judges to give decisions contrary to such *dicta*, but much greater weight attaches to them than to the former class: *Slack v. Leeds Industrial Co-operative Society, Ltd.*, [1923] 1 Ch. 431, per Lord Sterndale, M.R., at p. 450. A proposition which the Court declares to be a distinct and sufficient ground for its decision is not to be treated as a mere *dictum*, simply because there is another ground stated upon which, standing alone, the case might have been determined: *New South Wales Taxation Commissioners v. Palmer*, [1907] A.C. 179. In the House of Lords, the test appears to be as to whether the *dicta* can be shown to express a legal proposition which is the necessary step to the judgment which the House pronounces in the case. In this tribunal, especially, it has been held that if a point does not arise for decision, it is not only not useful, but actually mischievous to express an opinion upon it. No doubt this viewpoint prevails in tribunals of lesser importance. "Dicta by Judges, however eminent," says Lord Haldane in *Cornelius v. Phillips*, [1918] A.C. 199, "ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding."

Nevertheless, a practice which follows on *dicta* ought not to be overruled although, as has been pointed out, it is the practice rather than the *dicta* which forms the binding authority. The Court will set itself against disturbing rights to property merely because, when historically traced through the reports, they rest upon a *dictum*. It would seem that an inferior Court is bound to follow *dicta* when pronounced by a Judge of a superior Court. However, the observations made by members of the House of Lords, beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities: *Attorney-General v. Dean of Windsor*, (1860) 8 H.L. Cas. 369. In New Zealand, the Court of Appeal has considered it is bound, not only by the actual decision of the House of Lords, but also by the expressions of opinion as to the *ratio decidendi* in the majority decisions: *The King v. Seaton*, [1933] N.Z.L.R. 549. Indeed, in the view of Mr. Justice Talbot, deliberate pronouncements made expressly as reasons for the decision to which an appellate Court has come, even if a Judge does not assent to them, should be regarded as authoritative: *Flower v. Ebbw Vale Steel Iron and Coal Company, Ltd.*, [1934] 2 K.B. 132, 154.

It will be seen that opinion is divided as to the value of these *dicta*. Sir George Jessel, while Master of the Rolls, stated that he distrusted *dicta* in all cases and especially *dicta* during argument. On the other hand, Lord Justice Atkin is reported to have said of a passage from a judgment of Lord Watson which the Divisional Court had treated as an *obiter dictum* that "an *obiter dictum* from Lord Watson is worth many judgments from other people." In so far as *obiter dicta* are, as the words literally signify, merely statements by the way, and altogether unnecessary for the judgment of the Court in the cases in which they appear, they may be taken to have very little value. That is not to say that they will pass unnoticed as Judge Foster found recently when, in a Melbourne Court, he declared that there was no Hell. But "no guidance," says Lord Sumner in *Sorrell v. Smith*, [1925] A.C. 700, "is more misleading, no 'kindly light' is more a will-o'-the-wisp than an *obiter dictum* sometimes contrives to be." No doubt here the reference is to something in the nature of an impromptu interjection rather than a considered utterance bearing evidence of reasoning upon matters incidental to the judgment. To declare *dicta* of the latter class worthless would be both to undermine the value of experience and to rob legal reports of much of their interest.

# The Country Solicitor.

*"How happy is the blameless Vestal's lot,*
*The world forgetting, by the world forgot."*

—ELOISA TO ABELARD—*Pope.*

Few happier men are found than he who cares
To build his practice in bucolic airs.
His nearest opposition let us say—
Some thirty-five to forty miles away.
Unquestioned lord of all the legal land,
He drafts his Bills of Sale with generous hand,
And here a will and there a mortgage draws;
Explains his skill and earns a just applause.
At every meeting will his face be bright,
Rising to points of order half the night.
He steers the chairman, and the concourse schools
With nice interpretations of the rules.
He judges races, baby shows, debates,
Advises swains and pacifies their mates;
Explains the latest quirk of Parliament,
Or straightens out the rogue on pleasure bent;
The only man in all the rural throng
Who knows enough to put the schoolmarm wrong.
Yet greater still his real claim to bliss
To his much harried brethren—it is this:
However wrong his grave opinions go,
There's no one else to tell his client so.

—P.H.W.N.

**An Authority Slips.**—The late Mr. Fred E. Weatherly, K.C., was the author of some hundreds of ballads and lyrics which have been sung all over the world. When he was a pupil in the chambers of the late Sir Henry Dickens, K.C., afterwards the Common Sergeant, he tells us in his reminiscences, *Piano and Gown*, that he made friends with Mr. Edward Cutler, Q.C., of the Chancery Bar. "He was drifting into music and had written several pretty songs and instrumental pieces. In collaboration with him and Eustace Smith, also on the Chancery side, I wrote a small handbook on *Musical and Dramatic Copyright*. Copinger, author of the monumental work on that subject, did us the honour, when issuing a new edition of his book, to 'lift' a long and important paragraph on a new point from our little work—without any request or even acknowledgment. Our remonstrances he did not take in the proper spirit, so we sued him; but he apologised and paid our costs, so that the curious comedy of an author of a book on copyright being sued for breach of copyright was never performed in open court."

Mr. Weatherly tells of various copyright actions in which he was engaged as counsel. In one, he says, the face of the learned Judge was a sight to behold when he told His Lordship that the song, the subject of the action, was entitled *Ta-ra-ra-boom-de-ay!*

# Ownership of Property as Affecting Dependency.

## Property-owners who are also "Workers."

By E. S. Smith, M.A., LL.B.

By statutory definition the "dependants" of a deceased worker are such of his "relatives" as were partially or totally dependent upon the worker's earnings at the date of the accident from which death resulted. Whether a person was or was not a dependant is (save in those cases where the statutory presumption applies) a question of fact, and a question the determination of which is rarely difficult when the full details can be ascertained. If at the date of the accident the relative claiming as a dependant was being maintained partly or wholly by contributions from the worker's earnings, the relative is a dependant quite irrespective of any separate income or property he possesses and of any sources of maintenance to which he could turn. Thus in *McFayden v. Gillooly and Brown*, [1925] G.L.R. 194, 195, it is stated that if the wife has funds of her own but does not use any for her own maintenance or other household expenses, but depends wholly on her husband's earnings, she is totally dependent. So also in *Casey v. Grey County Council*, [1929] N.Z.L.R. 125, the plaintiff acted as housekeeper for her brother and her niece; she received no wages, but was given a regular allowance by her brother for housekeeping purposes, and out of this she provided for clothing and other necessaries; she was held a total dependent though admittedly capable of earning her own living. While the statement of law cited from *McFayden's* case cannot completely be reconciled with certain relevant decisions of the English Court of Appeal and possibly requires some qualification in exceptional cases, it may with interest be compared with the earlier decision in *Williamson v. Lone Star Gold Dredging Co.*, (1906) 9 G.L.R. 114. In the last-mentioned case the deceased worker was survived by his father, who had been maintained by contributions from the worker's earnings but who was possessed of real property which, if sold, would yield sufficient to buy an annuity in amount just sufficient for his support; on these facts it was held that the father was not dependent either wholly or partially on the son. It is submitted that *Williamson's* case is wrong in law and would not now be followed.

It is, however, not proposed to discuss here in detail the consequences of the ownership of property by a dependant, but to consider the effect upon rights under the Workers' Compensation Act, first, of the ownership by a worker of income-producing property, and secondly, of the acquisition of property by the partial dependants of the worker in consequence of the latter's death.

When a worker is killed by accident arising out of and in the course of his employment, the first inquiry made by the employer or his insurer is to ascertain whether the worker left dependants, and, if so, whether their dependency was total or partial. Where total dependants survive, the compensation payable is assessed on the mathematical basis fixed by the Act, whereas if there are partial dependants only it is assessed having regard to the injury suffered by the dependants and cannot in any event exceed the amount payable as for total dependency; because of this difference in the mode of assessment, very close inquiry is made to discover whether alleged total dependants were in fact totally dependent upon the worker, or whether they possessed and relied in part upon other persons or means for their maintenance. What is invariably overlooked is the fact that a person wholly dependent upon a worker may not be wholly dependent upon that worker's *earnings*. Even where the worker left a very considerable estate to be enjoyed by his dependants, the employer, after making his inquiries as to the position of the dependants and ascertaining that they were totally dependent upon the deceased worker, reluctantly pays full compensation without inquiring from what sources the worker provided the maintenance for himself and his family. While the point does not appear to have been taken in any reported case concerning total dependants either in England or in New Zealand, it seems clear from principle that where a worker is possessed of income or property, which is utilised by him for normal maintenance purposes, his wife and children are in part dependent upon that income or property, and so cannot bring themselves within the statutory definition of total dependants. The point is mentioned by Collins, M.R., and Stirling, L.J., in *Pryce v. Penrikyber Navigation Colliery Co. Ltd.*, [1902] 1 K.B. 221, 224, where, in holding that the property acquired by a total dependant from the estate of a deceased worker should not be taken into account in assessing the compensation payable to that dependant, the learned Judges stated that there was no evidence that the funds possessed by the deceased worker had produced any income during his lifetime, and accordingly no evidence to negative total dependency.

As already pointed out, a relative, to be a dependant at all, must be dependent upon the *earnings* of the deceased worker. Thus in the case of *Arrol and Co., Ltd. v. Kelly*, (1905) 7 F. (Ct. of Sess.) 906, a worker who earned £1 4s. a week made in addition considerable sums by betting, and out of these allowed his father 10s. a week; the father himself earned £1 5s. a week; on the facts it was held that the father was not a dependant. Similarly, in *Griffith v. Williams and Portmadoc Urban District Council*, (1932) 26 B.W.C.C. 46, a worker had maintained his family wholly out of his earnings under his contract of service with his employer, and had maintained an illegitimate child wholly out of casual earnings not under a contract of service; the Court of Appeal upheld a finding that the illegitimate child was not a dependant. But the earnings to which dependency is referable are not necessarily earnings payable in money. Where a worker is remunerated partly in money and partly by way of allowances such as the free use of a house, free coal, milk, meat, or other supplies, the allowances obviously constitute part of the earnings upon which his family depends, and in the assessment of average weekly earnings and of compensation regard is had to their monetary value. Turning again to the case of a worker who possesses assets which yield income actually used by the worker for maintenance purposes, or which provide the worker with part of his living, as, for example, investments or other income-producing property, a small farm, or even a house free from encumbrance: Can it be said that the worker's family is totally dependent upon the worker's earnings when in fact it is maintained partly by the worker's earnings and partly by the income from, or the use of, the property owned by the worker? It is submitted that the family is dependent partly upon the worker's assets and partly upon his earnings. In the most common case—that

of a worker who possesses a house free from encumbrance, a few acres, a cow or two, and a few fruit trees, &c. —the worker's relatives would seem dependent in part upon the assets mentioned in precisely the same way as the relatives of a worker entitled to a free house and other allowances, as part of his earnings are dependent upon those benefits.

The importance to employers and insurers of establishing that dependency is partial rather than total is obvious—in the case of total dependency compensation is assessed upon a mathematical basis irrespective of the fact that the needs of the total dependants may not be great, but in the case of partial dependency compensation is assessed in accordance with the loss sustained. Where a worker dies possessed of property which passes to his dependants, the distinction is doubly important, as compensation payable for total dependency is not subject to any deduction in respect of property acquired by the total dependants, while the value of property rights (excepting always insurance moneys) acquired by partial dependants consequent upon the death of the worker must be taken into account in the assessment of the compensation payable to such dependants: *Goulds v. The King*, [1925] N.Z.L.R. 234; *Harbour v. Fergusson and Mitchell*, (1904) 7 G.L.R. 366; and *Egan and Another v. Egan*, (1914) 16 G.L.R. 516. These cases indicate that the correct method of taking into account the property rights acquired is by first ascertaining the compensation which, apart from other considerations, would be recoverable by the partial dependants, and then deducting from the sum so fixed the value of the property rights acquired; in this way the liability of the employer is assessed in the ordinary manner, but as against this liability credit is given him for the value of the property rights in question.

The difference in the compensation payable according as dependency is total or partial will be made more clear by examples. Suppose a worker possessed of a small unencumbered farm property or investments, valued at, say, £1,500, the produce or income from which he utilises, together with his earnings of £5 a week, for the maintenance of himself and of his wife, who depends solely on him; the worker is killed under circumstances giving rise to a claim for compensation, and his property passes to his wife under his will: if his wife is held to be totally dependent upon his earnings, the compensation payable will be the maximum—viz., £1,000: if, on the other hand, she is held partially dependent only upon such earnings (and it is submitted that this is the position), she can recover no compensation whatever because the value of the assets devolving upon her in consequence of the worker's death must be taken into account and deducted from the amount of compensation which might otherwise have been awarded. It is submitted that the same principle will apply in the more usual case of a worker possessed only of an unencumbered house property utilised by him as a home, assuming always that the rental value exceeded the outgoings payable by way of rates, insurance premiums, and repairs; the depreciation in value of the house property could not properly be included with these outgoings so as to off-set the rental value, as depreciation of an unencumbered house property used as a home amounts actually to the utilisation of capital for living expenses. Similarly the receipt and use by a worker of income which ceased upon his death and which was not in the nature of "earnings" such as, for example, an annuity, or weekly compensation payable for a prior injury, or earnings not under a contract of service, would preclude a finding of total dependency. It is, of course, clear that where partial dependants do not acquire assets upon the worker's death, it is quite open to the Court to award full compensation; where the partial dependants actually depended wholly upon the worker's property and earnings for their maintenance this course would probably be adopted.

Where a worker dies leaving assets of small value only, consideration for the dependants would doubtless in many cases cause those liable to pay compensation to hesitate before raising questions as to the extent of the dependency of persons who were relying solely upon the worker for their support; but consideration for the dependants cannot explain the fact that the point is not taken in the more or less frequent instances where the worker dies possessed of income-producing assets valued at many hundreds or possibly even several thousands of pounds, or where the only dependants are persons who, while they depended totally upon the deceased worker during his lifetime, are in a position to maintain themselves. A judgment upon the point would be of considerable interest, and of undoubted importance to insurers.

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# Words and Phrases.

COLLUSION: In divorce, the formal clause in an affidavit preceded by "There is no."

COMMISSION: Pecuniary reward for services rendered, not infrequently to the Government.

CONDONATION: The exercise of an interlocutary discretion by the injured spouse. When pleaded in bar, the missing proof.

CONJUGAL RIGHTS: Demand without intention of supply.

CRIME: The thing that does not pay.

DECREE NISI: That stage in the proceedings when the client loses interest in her costs.

DEPRESSION: The politician's name for eccentric legislation.

FINANCE ACT: The statutory "Where to find your law."

IN FORMA PAUPERIS: One of the old forms of procedure on appeal, known to the profession prior to *Boddie v. Armstrong and Springhall, Ltd.*

JUDGE ALONE: A jury guided by the Judge on a question of fact.

LUNACY: See *Nonsuit.*

NONSUIT: An uncertain gesture preceding an appeal *in forma pauperis.*

NOTES OF EVIDENCE: The parties' omissions.

OFFSIDE RULE: The one relied upon by the defendant in a jury case.

ORAL JUDGMENT: First impressions set to words.

PEDESTRIAN: A cross between the *homo insapiens* and a corpse; a person more runned against than running.

REGULATION: A rule conceived in utter darkness and sensitive to the light of Court.

SINE DIE: Legal limbo; a case's Eskimo winter.

STATEMENT: An account of what the detective said to the accused and his reactions thereto.

WITNESS: He who has faith in a case, "a belief in things unseen."

—WELEX.

# Some Strange Stories of Crime.

## With a Christmas Flavour.

By WILFRED BLACKET, K.C.

Christmas is near, and so it seems to me that in place of the ordinary Notes there should be some more or less lurid tales of crime appropriate to the season.

**A Roman Father.**—The first of these tales concerns the trial for murder of Dr. Chianti. That was not his real name, but I use it because I am going to state some things that did not come out in evidence, and, although these things happened and were done fifty years ago, there may be some relatives who will be glad and rejoice to know of the things that I will tell, but still would grieve to have an old scandal affecting the family revived.

Dr. Chianti practiced at Anthracite, a city in the West of New South Wales. One of his patients was a woman who died of peritonitis, or some other dreadful thing of that description. The Coroner was not at all pleased with what he heard about the cause of death, and his mental uneasiness on this point was frightfully confirmed by two very eminent practitioners from Plain City, who, after their postmortem examination, were able to swear positively that Dr. Chianti had attempted to bring about abortion, but had bungled it so that he caused peritonitis, and then had removed the uterus in order to conceal his crime. These facts would in New South Wales support an indictment for murder and the Coroner committed the doctor for trial on that charge accordingly. (I said that this was going to be a Christmassy story, didn't I ?)

The evidence reported in the Sydney morning papers was a terrible sensation, for the name of Chianti was held in high repute. All Sydney shuddered ; but the father of Dr. Chianti did more than shudder. He went to the nearest telegraph office and sent to his son the most awful message the Morse Code has ever transmitted. It was, "*If you are guilty, blow your brains out. If you are not guilty, I am behind you with all my fortune.*" The son was able to claim the assistance offered. From Adelaide an expert professor of anatomy was brought, and he upon investigation found that the uterus was quite all right and just in its proper place ; that it had never been impregnated ; had never been interfered with ; and that the doctors from the Plain City by reason of a small oversight on their postmortem had overlooked it and had thus involved in terrible jeopardy the graceful neck of an entirely innocent man.

He, of course, was acquitted and so father and son were made happy and this story was imbued with a genuine Christmassy flavour.

"The last drops of Chianti are bitter," says the Italian proverb, but the conclusion of this tale is sweet ; for Dr. Chianti did not have the "last drop" that had seemed imminent when his father sent that awful telegram.

**Wandering Jurors.**—He was last heard of in mid-November in Perth. The case was a very interesting page of drama too, for the accused was a Grecian lady who nourished and lodged one Carmel Montisano, and he one day, when her husband went out on his lawful occasions relating to steaks and oysters, made amorous advances to her with a razor. She successfully repelled with a reliable knife his attempts to flirt with her, and later stabbed him in a considerable number of places. The fact that the flirtation took place in the bathroom seems not to have been explained when the Court adjourned for lunch, still it was quite evidently a case that anyone would gate-crash to hear. But this juror, he was foreman too, did not know his luck, for when the Court adjourned he got away from the Sheriff's officer and went to an hotel. He took "his little porringer and ate his luncheon there," as Wordsworth says in pleasingly childish phrase. Then when the Court resumed its sitting the juror was told that he must "depart hence without delay," and the trial was sent over to next sittings. For the sake of the lady it is but fair to mention that upon a later trial she was the subject of a popular acquittal.

Fifty years ago there was a wandering juror at Lismore, N.S.W. The case was a felony ; the summing up concluded at 6.0 p.m. and the Judge said, "You will go out now and have your tea, and then you will consider your verdict." The foreman after tea and a smoke said he thought for a start that they ought to see how they stood, so they made careful count and found that there were seven for a conviction and *four* for an acquittal. They called the roll and ascertained the name of the missing colleague and then hunted vainly for him within the precincts of their quarters. There they called the Sheriff's officer to their aid and ultimately the much-wanted juror was found sitting on the entrance steps to the Court House. "The Judge said we were to go out and have our tea, and so I went out and had mine," he blandly explained. Then the officer and the jurors considered what they had better do and ultimately decided to ignore the incident utterly and for ever. Only three women, the juror's wife and his two daughters, knew that he had "been out to tea" that night, and three women could, of course, be implicitly trusted to keep a secret if they didn't know that it was one, and the jury then went on and convicted the accused. He served his two years and the tale was told to me by one of the jurors thirty-four years after its occurrence.

**R. v. Bertrand.**—Angélique was a good little French girl at a convent school. While awaiting her first confession she was sorely troubled because she could not think of any sin that she had ever committed, and no one could remind her of any. There are some girls like that little girl. But as she couldn't go there without a sin, she had to buy one for an ell of Flemish elastic and a hair ribbon from another girl who had plenty. There was also a miner in Nevada who having been persuaded to make his confession went along at the appointed time with sandwiches for three weeks.

Henry Louis Bertrand was luckier than Angélique ; quite possibly he was as competently equipped for the confessional as the Nevada miner. He practised as a dentist in rooms in Wynyard Square, Sydney, in the early eighteen-sixties and had many patrons for he was thought to be handsome and was undoubtedly clever of tongue and brain, and made frequent use of chloroform—which was then coming into vogue—as a means of providing painless dentistry for his female patients, and so it became generally known that he was "a very nice man and *so* handsome." One of his clients was Mrs. Kinder, wife of the manager of the City Bank. She may have been the cynosure of Hunter Street in her time, but from her photos she does not seem to have been comparable with the girls who have come along since, and are with us now. Still one must remember that her beauty was grievously handicapped by a chignon enclosed by a thing like an onion bag. A man does not

realise the charm of bobs and shingles unless he is able to recall the grotesque hideousness of chignons; but lest it should be thought that crinolines prevented the ladies of mid-Victorian times from putting up speed records, I may mention that although Mrs. Kinder had her mother as a chaperon on her first visit to Bertrand, she and Bertrand on the second visit palmed very juicy little love letters to each other when shaking hands on the lady's arrival. Possibly mother was apt to be a little dozy, and therefore well-qualified to be a popular chaperon.

He must have loved her enormously and permanently, for as long as his freedom endured he wrote yards and yards of fervent and frank letters to her. Also in proof of his devotion he made diligent preparations to shoot her husband. I pause for a moment to mention that Bertrand was luckier than Angelique. We now return to the studio. He practised in the bush with a revolver the target being a sheep's skull similar to the one that has lately become familiar to Melbourne, features being painted on to make the face, not *kinder*, but more manlike. In further preparation for a life of "peace, perfect peace" with Mrs. Kinder, Bertrand endeavoured to get rid of his own wife. It is to his credit that he did not intend to murder her, but, so that he might divorce her, he tried to arrange that an acquaintance who seemed to have been brought into the world for the purpose of filling such a position should be the co-respondent. The scheme failed because Mrs. Bertrand greatly disliked her intended partner in guilt, and, in the pressure of more urgent duties, Bertrand had not time to obtain a more acceptable disturber of the sanctity of his home.

It was a hot summer night. Several guests were enjoying the hospitality of Mr. and Mrs. Kinder at their home on the North Shore. The French windows giving on to the veranda were open to admit the nor'-easter, and some of the guests were sitting there; the rest were in the drawing-room which was lighted by oil lamps. Mrs. Kinder was attending to her guests; her husband as was his habit was attending to his beer. He sat in a patriachal chair in one corner; Bertrand sat some yards away near the corner to the right of his host. One of the guests was singing "Wings," one or other of the silly songs that were regarded as soulful and uplifting in those days. Then there was the sound of a revolver shot, and Kinder collapsed. Bertrand was the first to reach him. A revolver with one discharged cartridge was found on the floor at the right of his chair, and there was a bullet wound just above his right ear. He was unconscious when taken to the hospital and so remained for many days. Then he died. Bertrand made daily visits to his friend at the hospital. For a time it seemed as though Kinder would recover, but the Fates or someone else ordered otherwise, for according to the nurse he did what the revolver did—"he went off pop." Bertrand was with him to the last. There was some evidence to show that poison had been administered while he was at the hospital, but no trace of poison was found in the body when exhumed two months after death.

At the inquest much evidence was taken and many witnesses examined, and the finding was *felo-de-se*. The facts as found were that Kinder, forgetful of his duties as host, had held his revolver near his coat-tail and had interrupted the course of "revelry by night" by trying to introduce another "corse"—see the *Burial of Sir John Moore* (*passim*)—to the company.

But after the Coroner's verdict and burial of the body all was not "quiet on the Potomac." It was noised abroad, very noisily, that Kinder could not have shot himself because the bullet entered his head at right angles and not from the direction of his hip. Also it became known that Bertrand and Mrs. Kinder were more—much more—than casual acquaintances, and that Kinder had no reason to commit suicide for no one wanted to deprive him of his proper and reasonable refreshment, and as to other matters he seemed to be quite unconcerned as to which horse won the boat-race, so to speak. (The marvel was that Bertrand should ever have gone to any trouble to kill him. Murder in this instance was quite unnecessary, and was therefore inexcusable. Such an expedient would never have occurred to Angelique.)

The body was exhumed and an analysis made. It was then clearly seen that the weapon which sent its bullet in search of Kinder's brain must have been yards away at the time it was fired, for it had struck the skull horizontally and not from below.

Bertrand was arrested and a charge of murder was heard at the Police Court. There was a committal and a trial at the Assizes but the first hearing was inconclusive. At a second trial depositions of witnesses called at the first trial were, by consent, admitted in evidence, and there was a conviction. Then the Privy Council was asked to say that this irregularity vitiated the proceedings and although their Lordships could not go as far as that they were able to suggest that considering all the circumstances it would be rather regrettable if Bertrand were hanged. It may be that the New South Wales authorities did not agree that hanging would not be an appropriate experience for Bertrand, but they yielded to Imperial authorities and imprisoned him for the term of his "natural." In New South Wales that sentence on the average means two years and three months, but in Bertrand's case it was different. Convicted in 1866 he was not released until 1894, when he had served twenty-eight Christmasses in gaol.

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**Oral and Written Judgments.**—In the Court of Appeal in England the other day, in the course of the hearing of an appeal from the judgment in the County Court, counsel drew attention to the fact that the verbal or "extempore judgment" delivered at the close of the case differed in certain respects from the written judgment which was subsequently prepared (*Weddel v. Clarke*, October 10, 11). Slesser, L.J., pointed out that this frequently happens, particularly in workmen's compensation cases, and Lord Wright stated that in such circumstances the writing is the "conclusive statement of his judgment." It "takes the place of the oral judgment." This would not, of course, prevent the Court from scrutinising both "recensions" if there were any "serious inconsistency." A judge, however, is entitled to reconsider his views (and even to polish or embellish them, it may be added). Unless the judge has before him a shorthand note of his *ipsissima verba* or is gifted with a very closely retentive memory, it is impossible that there should not be some differences, however slight. A judge is not bound to deliver a considered judgment; leading cases, in an earlier day, are sometimes to be found completely reported in the compass of one, two, or three pages, *e.g. Armory v. Delamirie*, (1722) 1 *Strange*, 505; *Birkmyr v. Darnell*, (1704) 1 Salkeld 27; *Davies v. Mann*, (1842) 10 M. & W. 546). A laconic is sometimes preferable to a lengthy judgment. The former is more suitable to the atmosphere of the County Court, although the Court of Appeal desires and requires to know the reasoning which there found favour.

# Illegal Opinions.

## In re Noah's Ark, Limited.

By IULIUS.

Noah's Ark, Limited, was the first known limited company. Its promoters had as their object the avoidance of liquidation, the reverse of the object of most modern companies.

Was Noah's Ark, Limited, a legally constituted company, and, if not, what are the consequences ?

From the manner in which these questions are stated, any of the competent examinees who are the main product of our University system, will know that the answer to the first question must be in the negative. And they will be right.

The facts of the case were these: Mr. Noah had received certain advice as to coming events which were to lead to the death by drowning of all mankind, and he took steps to avoid that consequence for himself. This he did by floating a limited company, the shareholders in which were all members of the family: they were Mr. Noah and his wife, and their sons, Messrs. Shem Noah, Ham Noah, and Japhet Noah, and the Mesdames S., H., and J. Noah. It was a holding company; the capital of the company was to be invested in a wooden ark designed to hold a quantity of assorted livestock. The stock was not to be watered although, paradoxically enough, the whole of the capital assets were to be floated on water. The ark was to be constructed of gopher, and its dimensions were such that it would be about one-tenth of the size necessary to hold all the animals taken into it; this would probably annoy the elephants, and sardines have never recovered from the habits then acquired.

The only human beings entitled to enter the ark were the members of the Noah family, and to their knowledge, all other human beings were to be drowned, whilst Noah's Ark, Limited, was successfully floated. Was this an illegal association ?

The Companies Act of the day (3 Adam & Eve, c. 13) enacted one principle still followed in some circles, namely, the rule that two's a quorum and three's a divorce action. Noah's Ark, Limited, was an association constituted in breach of this rule and to that extent illegal. But there was a more serious illegality; no company formed for other than a legal purpose is a lawful association; Noah's Ark, Limited, was formed with the express object of killing by drowning everybody but the Noah family, and wholesale murder is illegal unless, which was not the case here, it is called war. Consequently Noah's Ark, Limited, was an illegal association and its every act was tainted with illegality; in fact it could not legally act at all.

What is the result of this on the modern world ?

It is to be remembered that the whole of the human race of to-day is descended from the Noah family, and the Noahs were only kept alive by an illegal act,—in other words they were legally drowned and we are illegally alive. This means that every human being and every human institution and invention are legally non-existent. Men are illegal, women are illegal, politicians, luncheons, clubs, saxophones, publicans, educationalists, and the Ten Commandments are all illegal: in fact in the eyes of the law none of them exist—for most practical purposes the Ten Commandments don't.

But the consequences are possibly not as serious as they seem. On the contrary, legally non-existent Parliaments can enact nought but legally ineffective laws which legally non-existent judges cannot legally enforce, so that we may continue to park our cars anywhere and to buy beer after hours—and in fact to do what we like as we always have done. If then we are put in gaol, we have the satisfaction of knowing that, legally, such institutions cannot exist. It was upon these logical and illegal opinions that Lord Verulam (formerly Sir Francis Bacon) who, besides being Lord Chancellor, was the author of all Elizabethan poetry and drama, based his famous dictum reported by Lovelace, that stone walls do not a prison make. But that was before he spent two days in the Tower of London.

In brief, Noah, the first known Company promoter, was the promoter of nought but illegality; the most famous company promoters of modernity have followed closely in his footsteps.

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**Too Much Mutual.**—Mr. and Mrs. Christie of South Melbourne on December 1, 1930, instructed their solicitor to draw mutual wills for them in which all the property of each should be left to the other. This was duly done, and on December 3 they attended at the solicitor's office to complete the matter, and their signatures were made and properly attested; but by some small inadvertence each signed the will of the other. Perhaps this mutual mistake arose from the fact that these were mutual wills and that their mutual solicitor made a mutual mistake with regard to the mutual will of each. Recently Mrs. Christie having died, the Court has refused to grant probate of the will signed by her in which she left all her property to herself, and has also refused to grant probate in her estate of the will signed by her husband in which all his property is left to him. Where there's a will there's a way; but where there are two wills of this kind there's an intestacy.

Many years ago there was an estimable and wealthy citizen of Sydney who for very sufficient reasons was for the time being resident in a lunatic asylum. To him as a visitor one evening came a journalist who brought out some whisky in a bottle, and a good deal more that had quite recently been in a similar receptacle. And the citizen presently conceived the idea that he wanted to make a will, leaving all his property to his kindly visitor and the Dago cook at the asylum in equal shares. No foolscap being available, the cook took an almanac from the kitchen wall and the journalist wrote out the will as best he could in the terms directed, and it was then signed by the wealthy citizen, his signature being witnessed by the two legatees, the journalist and the cook! This whole proceeding may possibly recall the pathetically fatuous foolishness of "the blind man who looked in a dark room for a black cat that wasn't there."—W.B.

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**Gratitude.**—The young counsel assigned to the prisoner who was being tried for murder made such a touching appeal that, on the conclusion of his address to the jury, the Judge had his handkerchief out and the jurymen were all shedding tears. As counsel resumed his seat, the prisoner turned to the warder with the query, "Who's that bloke that's been talking ?" "That's your counsel," was the reply; "he has been pleading for your life." "Ain't he a dismal bounder ?" was the prisoner's comment.

# The Inspector.

## A Police Force Vignette.

By James Cowan.

It is a rather curious paradox that Irishmen, who are popularly supposed by the English and other foreigners to be the most pugnacious and rebellious of races, make the best policemen in the world. They take to constabulary duty naturally, as to the beat and the baton born. The high *mana* of the New Zealand police owes much to the excellent Irish officers and men who, in the years of the past, constituted the great majority of the force. Perhaps the Hibernian element is not so marked to-day; but forty years ago or so, the period of this story, there was scarcely a man in the force who was not of Irish blood—unless he was a Scot—which was almost as good.

The Inspector I have in my mind at the moment was a type of the old brigade. Let me introduce him on one of those little excursions and alarms which were rather numerous in the Nineties, a "Maori trouble" expedition. A certain sturdy patriot by the name of Kerei Kaihau, was amusing himself and his Kingite tribe, on the Lower Waikato, by obstructing surveys and pulling up road-survey pegs, and generally annoying the Pakeha Government. The scene of this particular argument was the Onewhero–Opuatia bush country, on the west side of the Waikato; and there were we, on a certain moonlight midnight, crossing ourselves and our horses by the ricketty old ferry-punt at Tuakau, over the broad river, an armed party of police, a Government road-surveyor, a Native interpreter, and myself to chronicle the expedition's deeds in the Maori forest. There was the Inspector, with his five-foot sword, at the head of a dozen of his picked sergeants and constables, each with his Colt revolver holstered at his hip.

The duty of the force was to protect the surveyor in his road laying-out through a disputed block of land.

We rode up into the Onewhero bush. About daylight we brought up in a clearing where a lone-handed bushman was pioneering his section—the very first of the settlers of a region now covered with fine farms. A billy of tea, and we rode on through a twilight land, along a narrow, rough track, under a huge old puriri and rimu and rata trees; single file, the surveyor ahead as guide.

The Inspector detested these uncomfortable bush expeditions, and particularly the horseback work. Yet he had been a gallant figure on a troop-horse in his day, the perfect model of a dashing constable all of the olden gold-diggings time. "I'm wan of Branigan's Min," was his one boast. "Branigan's Men," indeed, were something to brag about. The Inspector had been one of the splendid fellows, most of them once of the Royal Irish Constabulary, brought over to Otago from Victoria in the Sixties by Mr. Commissioner St. John Branigan, who reorganised the New Zealand police force, and gave the best jobs to his troopers of the gold-escort days. Six-foot-two, broad and portly, as befitted that height, with a soldierly, erect bearing, his long Dundreary whiskers, snow white, floating in the breeze; his fine blue eyes like windows from which a chivalrous, kindly Irish soul looked out—there was the Inspector. Nothing slack about the old chief. He wore his sword with pride. He could use it too.

But that sword was a joke on this expedition. The undergrowth tilted the scabbard and it fell out; it was clutched by the sharp-hooked bush-lawyer; it fell foul of every loop of supplejack.

"Why the divil can't the Ould Man be lavin' it in the office?" plaintively enquired Constable O'Carroll. "Does he think he'll have to cut down Kerry Kahoo? What in the name of the divil an' all the saints does he want to be stravagin' around this bush with it for at all, at all?"

An opening in the eternal bush; a slow, dark stream coiling its way through the jungly valley; the Opuatia Creek, the scene of action. There was the head of the road; just a survey track as yet; that was where the sacred road-line pegs had been torn out by "Kerry Kahoo"—as the Force with one voice called the Hauhau Chief when the Old Man had set the fashion.

"Halt!" rang the Inspector's vibrant voice. "Dismount!" We obeyed and stood by our horses. "Mr. Johnson, where are the Mowrees?"

Dunbar Johnson, the Government Native interpreter, couldn't see any Maoris any more than the Force could. They must be lurking in ambush.

Very still and hot in that open space on the creek bank, tall dense forest all around. And the Inspector keeled over. "Cramps, Mr. Johnson! Oh dear, oh dear!" The long, hard ride had been too much for him. He lay on the ferny ground in agony.

The whisky flask gave no relief. "Rub me thighs, lads, rub me thighs!" Two stalwarts of the Force, one to each leg, rubbed and massaged and kneaded the chief.

"Mother o' God!" groaned the suffering old hero. "Me lying here in this condition an' the Mowrees in the bush! Harder, ye divils, harder! Ah, Mac, me boy, I'll have ye made a sergeant for that! Och, that's better, that's the thing!"

"Maoris coming up the track!"—a shout from the surveyor, who was busy with the road-level pegs.

The Inspector was on his feet, pale and suffering, but undaunted, an arm round his orderly's neck, another constable supporting him in the rear.

"Load, men!" were his first words.

Revolvers were unholstered and loaded, and the Force waited the next order with silent, grim resolution. "Keep silence, men!"—but the order was not needed.

"Mr. Johnson! Go forward, please, and reconnoithre!"

Dunbar Johnson was already forward on the look-out for the Hauhaus. He walked along the track, where the surveyor was hammering in his pegs. He soon returned. A cavalcade of Maoris suddenly appeared among the trees, that tall grey-moustached old battler Kerei Kaihau at the head of them. The long line of horsemen, jogging in single file along the narrow trail, wheeled off the track two hundred yards from us on the opposite side of the Opuatia. A great puriri tree stood there, a patriarch with a wide spread of thickly foliaged branches. They dismounted and we lost sight of their movements.

Presently Mr. Johnson appeared, hurriedly, from his brief conference with Kerei. Was it peace or war?

"Be ready, men!" ordered the Inspector as the interpreter approached. It was a tense moment. I though of Dibdin's song of the old heroic years:

*" Stand to your guns, me hearts of oak,*
*Let not a word on board be spoke—*
*Steady, boys, steady ! "*

The Inspector, stern, statuesque, stood forth, one hand on the faithful Mac's shoulder, the other on his sword-hilt.

" What does Kerry Kahoo say ? Does he still defy the law ? "

" Kerei's reply, sir," said the interpreter, " is that he will not obstruct the road survey further. He says he is a man of peace, that he loves the Government very much, and that he will be very glad if the Chief of Police and all his men will join him at tea !"'

What a sigh of relief went up ! The Inspector's gallant chest heaved under its braided blue ; Mac's exhalation of breath was like his horse's when he loosed the girths.

" Unload ! " was the Inspector's first order. Cartridges were dropped into pouches again.

" Mount, men ! " We mounted and forded the creek and rode over to the glade in the forest where the Maoris were assembled under the old puriri tree. Fifty or sixty men and a dozen big and buxom tattooed women, the chief dames of Kerei's tribe, squatted there in a half-circle. Two billies were boiling on the fire ; the smoke rose like a peace-pipe column through the branches.

" Haere mai ! Haere mai ! Nau mai ! Nau mai ! Kia ora koutou ! Haere mai ! " We were all greeted like brothers as we dismounted and tied up our horses. " Come to tea, come to tea—plenty tea, plenty potatoes, kumara, pork, everything ! "

The Inspector advanced like an emperor toward Kerei Kaihau, who rose to meet him.

" Good-day, Kerry," he said, as he took the old Chief's outstretched hand. " Is it peace, Kerry ? "

" Ae ! " said Kerei. " Ka pai te maunga-rongo ! Peace, peace ! No more fight te Gov'mint ! "

" Have a taste, then ! " said the White Chief as he drew out his battered flask, and handed it to Kerei.

Kerei had a nip, a second-mate's nip—enough for two second mates. He drew a long breath of delight. " Ka pai, ka pai ! " The Inspector always carried the very best. It was the one solace in the field.

Tea and korero, korero and tea, and kaikai. " Och, the divil an' all," said Mac, as he loosened his belt, " if this is bush-fightin', boys, give me lashin's of it ! "

Orations and translations ; Dunbar Johnson was kept hard at it between the two chiefs until the deepening bush shadows told us it was time to go, and we were under way again for Onewhero and the punt-ferry, well dined and police revolver barrels clean.

* * * * *

It is a pity, perhaps, to have to record that a few weeks later the police had a less peaceful encounter with Kerry on the west bank of the Waikato, opposite Mercer, and hauled him off to gaol with a score of his followers, women as well as men. In that scrimage, which I witnessed, a supporting squad of Permanent Force soldiers, from the Auckland forts, fixed bayonets by way of overawing the frantic mob wrestling with the policemen all over the green. We left the stately war-canoe *Taheretikitiki*, all in its carved and painted and be-feathered glory, moored there by Waikato's banks without a crew to move it.

In the maddest moment of the melee, a shawl-kilted Maori appeared through the flax-bushes near the Inspector, who stood with flashing eyes surveying the scene and calling sharp orders to his men which they were too busy to hear. The Maori wore a sheath-knife at his belt. The Inspector's hand flew to his sword-hilt. " Tell that man," he ordered the interpreter, with measured crescendo boom, " if he attempts to draw his knife I'll *cut—him—down* ! "

The Maori's eyes goggled, his complexion paled, his jaw dropped, before the Inspector's fear-inspiring mien. He hadn't had the least intention of drawing his knife. He stood paralysed. Then he moved backward, eyes fixed fascinated on the white chief and his sword. He faded into the flax-clump ; one moment he was there, the next only a quiver of the tall blades marked his rapid retreat. We saw him no more that day. He at least escaped the Government handcuffs and calaboose. And the Inspector's sword remained in its sheath, unbloodied but victorious.

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**The Widow's Might.**—Mr. and Mrs. Wahleberg were married in 1887. A child occurred in 1889, and the doctor attending Mrs. Wahleberg advised that she must live apart from her husband for twelve months. The husband said " Pooh, nonsense," or words to that effect, but in February 1889 a separation was agreed to and a deed of separation executed providing for payment to her of £78 per annum. She received £6 upon execution of the deed but nothing more was ever paid, and she never saw her husband again. He died in June, 1934, leaving all his property valued at £2,712 to a friend, C. L. Kyle, whom he appointed sole executor. She made a claim for twenty years' arrears under the deed but was advised that, as the original could not be traced and as her copy did not show a signature by the trustee, she could not recover. She is sixty-six and not in good health. Upon application under the Testator's Family Maintenance Act an order was made that she should receive a pecuniary legacy of £150 and that £1,250 should be paid into Court to be used for providing her with £1 10s. per week with resort to capital so far as necessary to supply this amount. Sometimes I wonder whether testators now in the world beyond read about the things that are done under the Testator's Family Maintenance Act, and, if so, what their considered opinions of and concerning the orders of the Courts may be, and what words they may be tempted to utter regarding our man-made laws.

**A Melbourne Mishap.**—Miss Pearl White recovered £75 damages from the Melbourne Tramway Board in respect of an unusual happening. She was a passenger in a tram-car approaching an intersection when a drunken man lurched against the lever controlling the points at the cross-over so that the car was thrown off the rails with consequent injury to the plaintiff. The Board relied in its defence upon the fact that the accident was caused by the unauthorised act of a third party, and that it could not be expected to foresee the possibility of interference with the lever by a drunken man, thereby paying high tribute to the sobriety of the citizens of Melbourne ; but the jury found negligence in the fact that no safety catch or other guard or protection had been provided and therefore they recompensed the plaintiff.—W.B.

# New Zealand Conveyancing.

By S. I. Goodall, LL.M.

## Party Walls.

The *locus classicus* with regard to the meaning of the term party wall is the statement of Mr. Justice Fry in *Watson v. Gray*, (1880) 14 Ch.D. 192. According to that statement the term may mean :

1. A wall of which the adjoining owners are tenants in common : *Wiltshire v. Sidford*, (1827) 1 Man. & Ry. 404 ; 108 E.R. 1040.

2. A wall divided longitudinally by a vertical plane into two strips, one belonging to each of the neighbouring owners : *Watson v. Gray* (*supra*).

3. A wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements : see *Waddington v. Naylor*, (1889) 60 L.T. 480.

4. A wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the other moiety : *Jones v. Pritchard*, [1908] 1 Ch. 630.

It was also stated—*Watson v. Gray*, (1880) 14 Ch.D. 192, 194—that the wall of the first kind was the most common, that is to say, one of which the two parties were co-owners. If that form of arrangement be adopted as the basis of a transfer and grant in respect of land under the Land Transfer Act, apparently a separate certificate of title (or separate certificates) would have to issue in respect thereof. For that purpose the necessary deposited surveys would have to delineate the elevations of the wall as well as the ground plan. This method is open to the further objection that partition may lie : *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

In the case of the second kind of party wall neither owner may build on top of the other's half without that other's consent, and, if he does so, the other may pull down the part so built : *Matts v. Hawkins* (1813) 5 Taunt. 20, 128 E.R. 593. The same may be said of the first class of wall also, but the second kind is open to an even greater objection, namely that either owner can cut away that part of the wall of which he is owner to the detriment of the owner of the other part adjoining : *Cubitt v. Porter* (1828) 8 B. & C. 257 ; 108 E.R. 1039.

The third kind of wall is applicable where the structure stands entirely on the land of one of the adjoining owners, and the other is dependent for his rights wholly upon the terms of the grant of easement which should provide for that other's right of support, and the parties' mutual rights and liabilities in respect of repairs to and re-erection of the wall if necessary.

But the form of party wall arrangement which now seems to find most favour is the fourth kind above mentioned, in which each adjoining parcel is subject to and takes the benefit of the cross easements, thus being not only a dominant but also a servient tenement. The easements of this kind may even be implied : *Jones v. Pritchard*, [1908] 1 Ch. 630 ; *Sack v. Jones* [1925] 1 Ch. 235.

"Subject to the easements . . . the grantor and grantee, being respectively absolute owners of their respective moieties of the wall, may respectively deal with such moieties in such manner as they please. Thus, if, for example, it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build upon that moiety of the wall . . . comprised in the grant, the other moiety . . . will be subject to an easement of lateral support for the benefit of the roof when erected ; and similarly the grantee's moiety . . . will pass to him subject to the easement of lateral support for the benefit of the grantor's roof, if supported by his half of the wall . . ." : *per* Parker, J., in *Jones v. Pritchard* [1908] 1 Ch. 630, 636. " . . . Apart from any special local custom or express contract, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement" : *Ibid.* 637.

A wall on or near the boundary of a parcel of land may be a party wall throughout the whole or part only of its length or height.

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## Summary of Recent Judgments.

(*Concluded from p. 316.*)

Supreme Court
Wellington.
1934.
Nov. 30 ;
Dec. 7.
*Reed, J.*

**MILLER v. MILLWARD.**

**Negligence—Treatment by Unqualified Practitioner of Patient voluntarily submitting himself with Knowledge of Nature of Treatment—No Benefit and No Injury to Patient—Weight of Evidence that Treatment could have No Beneficial Effect on Complaint for which Patient treated—Whether Treatment unskilful to such a Degree as to entitle Patient to Damages.**

An unqualified practitioner, whose patient is aware of the lack of qualification, is liable only for the lack of diligence and skill belonging to an ordinary unprofessional person of common sense.

Plaintiff, who suffered from constipation, on the advice of a friend from whom he learned the nature of the treatment, voluntarily submitted himself by external treatment by acid and hot fomentations by defendant, a health specialist without medical qualification. Plaintiff, who derived no benefit but suffered no injury from the treatment, sued defendant for recovery of the fees paid and damages for, *inter alia*, unskilfulness in treatment. At the hearing two medical men gave evidence that the treatment could have no beneficial effect on constipation, while witnesses for defendant, only one of whom was treated directly for constipation, testified as to the success of the treatment. There was no evidence that the treatment was carried out negligently. The learned Magistrate, finding that the weight of evidence was that the treatment could have no possible beneficial effect as a cure or an alleviation of constipation, decided that in consequence the defendant did not possess or exercise reasonable skill and knowledge in the treatment of the plaintiff and awarded the latter damages.

On appeal from the Magistrate's judgment,

**Leicester** and **T. P. McCarthy,** for the appellant ; **F. W. Ongley,** for the defendant.

**Held,** allowing the appeal from that judgment, that a person who knowingly placed himself in the hands of an unqualified practitioner is not entitled to expect any more skill than appellant showed.

**Solicitors : Leicester, Jowitt, and Rainey,** Wellington, for the appellant ; **Ongley, O'Donovan,** and **Arndt,** Wellington, for the respondent.

# Legal Levities.

By F. J. Cox.

At the Criminal Sessions held at the Supreme Court, Auckland, some years ago, three Dalmatian prisoners appeared together upon charges of theft and receiving. The Crown Prosecutor at that time was past the prime of life, and was experiencing grave difficulty in identifying the accused and had several times credited one or other of the prisoners with the wrong crime. This, however, was almost pardonable as the names of the accused were very similar, each ending with the suffix "vich." After several lapses by the Crown Prosecutor, counsel for the defence rose, and, addressing the Judge, said: "Your Honour, my learned friend does not appear to know vich 'vich' is vich!" As counsel for the defence was of Semitic origin, the remarks were doubly appreciated by those present in Court.

Sir Theophilus Cooper, for many years resident Judge at Auckland, was wont to tell the following story against himself. It will be remembered that the learned Judge affected a beard, and for the most part was not over punctilious in the matter of his personal appearance. One evening he was travelling home in a tram-car, when a wharf labourer, bearing evidence of the day's work, boarded the car, and sat alongside His Honour. Later, a smartly-dressed man joined the car, and before sitting down, commenced to search through his pockets for the price of his fare. As his search proved abortive, he handed his card—upon which was his address, to the conductor—who accepted the same with a courteous, "Thank you, Sir." At the conclusion of the incident, the wharf-labourer nudged the Judge and said: "Did yer see that? Dirty old blighters like me and you couldn't get away with that sort of thing!"

In a recent divorce suit heard in the Supreme Court at Auckland the petitioner cited as co-respondent a sailor whose age was given as twenty. Counsel for the nautical man endeavoured to impress upon the Judge and jury the fact that his much-maligned client was an unsophisticated youth who had simply called upon the respondent, who was his friend, on the evening in question to listen in to a wireless programme. In cross-examination, counsel for the petitioner elicited the information that the unsophisticated sailor had been in every country in the civilized and uncivilized world. After taking him the length and breadth of North and South America and the Islands of the Eastern and Southern Pacific counsel left it at that, and sat down. Rising to re-examine his client, counsel for the co-respondent said: "Your Honour, and gentlemen of the jury, my learned friend has endeavoured to prove to you that my client is Barnacle Bill the Sailor!" Although the Judge, true to the traditions of the Bench, professed ignorance of the identity of the gentleman referred to, the jury did not take long to come to the conclusion that the relationship that existed between the respondent and the co-respondent was more than platonic friendship, and recommended a decree *nisi*.

In the dim distant days when people lent money on mortgage, my firm received instructions by letter from a mortgagee client to prepare an extension of the term of his mortgage. These were in the following words:

> Dear Sirs,
> I have agreed to give Mr.——— three years to pay off advance. Could the written promise which I have given him be annexed as a codicil to the mortgage?
> Yours faithfully ———.

# London Letter.

Temple, London,
29th October, 1934.

My dear N.Z.,

The new term has seen quite a lot of changes among the holders of judicial offices both in the High Court and at the Old Bailey. The vacancy among the Lords Justices of Appeal created by the death of Lord Justice Scrutton has been filled by the appointment of Roche, J., so it seems that the suggestion to abolish the office of Lord Justices of Appeal has been definitely dropped. It is unlikely that any further Lords Justices of Appeal will be created, as was at one time suggested, although it may be necessary on occasions for the Court of Appeal to sit in three divisions as they did at the beginning of this term. On this occasion, however, they dealt with appeals from the County Courts so expeditiously that after a little over a fortnight the third Court was found to be unnecessary.

This is all very satisfactory so far as the Court of Appeal is concerned, but the position in the King's Bench Division may be called serious. It was bad enough at the beginning of the term when the appointment of Mr. Justice Roche depleted the number of Judges available to deal with an already congested list of causes, but it was made worse about ten days after the commencement of the term by the retirement of Acton, J., who is nearly seventy years of age, and had been a Judge of the King's Bench Division since 1920. Mr. Justice Acton, by the way, has the distinction of having been the only High Court Judge who had previously been a County Court Judge. Fortunately Lord Wright has lent his valuable assistance, first as president of the third Court of Appeal, and afterwards as a Judge of first instance, in which position he is still sitting.

**New Appointments.**—I have already mentioned the appointment of Mr. Justice Roche as Lord Justice of Appeal. The new Lord Justice's long experience in mercantile matters should prove a considerable asset to the Court of Appeal in King's Bench appeals. Born in 1871, he was called to the Bar by the Inner Temple in 1896, took silk in 1912, and was appointed a Judge of the King's Bench Division in 1917. He has always specialized in commercial matters and was frequently to be seen trying one of those cases which, to the uninitiated, seem to consist of a bewildering mass of contracts, charter-parties, bills of lading, and bundles of correspondence several inches thick. On the Bench Lord Justice Roche has a courteous manner—I have heard it described as paternal—and one has the impression that as far as he is concerned things will go smoothly.

**At the Old Bailey.**—Other new appointments have been made at the Old Bailey in consequence of the death of Sir Ernest Wild, K.C. The choice of a new Recorder of London has fallen upon Judge Holman Gregory, formerly Common Serjeant. The new Recorder, who is seventy years of age, was a solicitor before he was called to the Bar in 1897, and has had a noteworthy career. He has been a Member of Parliament, and has held the posts of Recorder of Bath, Recorder of Bristol, and Judge of the Mayor's and City of London Court, before his appointment as Common Serjeant in 1932. He has also been a Bencher of the Middle Temple since 1920, and was elected Master

Treasurer last year. His place as Common Serjeant has been taken by Judge Cecil Whiteley, K.C., who was previously Chairman of the London Quarter Sessions and then Judge of the Mayor's and City of London Court; and the vacant judgeship of the Mayor's and City of London Court has been filled by the appointment of Gerald Dodson, third senior prosecuting counsel to the Crown at the Central Criminal Court. You will notice how closely these three offices are associated, and this is so because under the statute regulating the Central Criminal Court the Common Serjeant and the Judge of the Mayor's and City of London Court are *ex officio* Commissioners of the Central Criminal Court.

**New Appointmnts to Come.**—There is little doubt that Parliament, as soon as it meets, will give sanction to the appointment of two more Judges in the King's Bench Division, and rumour is now busy with the names of possible candidates. One of the favourites is Malcolm Hilberry, K.C., who, I think, would not mind being described as a fashionable silk with a large common-law practice. Others are Singleton, K.C., and Croom Johnson, K.C., while I have also heard the name of Henn Collins, K.C., mentioned as being in the running. But what is the use of speculating? Probably you will have heard who has been appointed before this letter appears in print.

While we are talking of appointments, however, maybe you have not heard the story of the unkind comment once made on the appointment of a certain Judge, who shall be nameless, "Well," was the remark, "he has all the qualifications of a Judge. He is a Member of Parliament, and the son of a Law Lord, he has no practice to speak of and he is slightly deaf."

**More about Road Traffic.**—I think I told you in my last letter of the proposal to erect yellow globes on posts at pedestrian crossing places. No time has been wasted and these erections—familiarly known as Belisha Beacons—are now to be seen in their thousands all over London. It is still too early to say how effective they are, but they are certainly easier to see than the steel studs in the roadway. Meanwhile new regulations have been issued with respect to the use of these crossings. The general effect of the regulations is that at crossings where traffic is controlled by police or signals, a pedestrian has no right of way unless the traffic is stopped, but, at crossings where traffic is not controlled, a pedestrian wishing to cross the road has an absolute right of way and the traffic must give way to him. But the pedestrian must go straight across, and if he lingers longer than reasonably necessary he is liable to a fine of £2. Motorists who disregard the regulations are liable to a similar penalty. Meanwhile the weekly figures of the killed and injured on our roads remain much about the same.

**Conclusion.**—It is somewhat remarkable that in spite of the congested state of the Courts and the fact that this term is now almost a month old, there has not been, to my knowledge, a single case which I think would be of much interest to you. So much of our litigations nowadays seem to consist of "running-down" actions, which, however, important they may be to the participants, are in nine cases out of ten as dull as ditch-water to an outsider.

It only remains therefore for me to wish you all a very happy Christmas and a good holiday.

Yours ever,

H. A. P.

# Practice Precedents.

## Charging Orders—(concluded).

### Application to Discharge.

Rule 327 of the Code of Civil Procedure (*Stout and Sim's Supreme Court Practice*, 7th Edition, 242) provides:—

> "Any person alleging that he is prejudically affected by the order may, on the motion to make the order absolute, or at any time previously by independent motion, claim to have the order set aside or varied: and the Court, with a view to deciding such claim, may order that any question or issue necessary for determining the matters in controversy be tried or determined in any manner in which an action may be tried or determined."

Before a charging order *nisi* is made prior to judgment, under Rule 314 proof is required that the party against whom the order is sought is making away with his property or is absent from New Zealand or about to quit New Zealand, with intent to defeat his creditors. The authorities show that a surmise or opinion, even a very positive opinion, is not sufficient. What is required is reasonable proof that the defendant is acting with intent to defeat his creditors: see *Pond v. Glover*, [1933] G.L.R. 358, where the order was made upon affidavit whereby it was stated:

> "I am informed by the plaintiff and believe same to be true that the defendant is absent from New Zealand and that he left New Zealand and is remaining absent from New Zealand with the intention to evade his responsibilities for the maintenance of his infant child as set out in the statement of claim."

There was nothing to suggest that defendant left New Zealand with intent to defeat his creditors.

The applicant is not entitled to have a charging order *nisi* made absolute as of right. The Court is entitled to use its discretion: *Martin v. Nadel*, [1906] 2 K.B. 26.

On an application to the Court on the facts set out hereunder the charging order *nisi* was discharged.

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MOTION TO DISCHARGE CHARGING ORDER NISI.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

Between A.B. plaintiff and
C.D. respondent.

TAKE NOTICE that Mr. of counsel for the defendant WILL MOVE this Honourable Court on day the day of 19 at 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard for an order discharging the charging order *nisi* made herein on the day of 19 UPON THE GROUNDS that the defendant is prejudically affected by such charging order *nisi* and that the affidavit upon which such charging order *nisi* was obtained fails to disclose any ground in law entitling the plaintiff to a charging order *nisi* AND for a further order that the costs of and incidental to this application be paid by the above-named plaintiff.

Dated at this day of 19 .

Solicitors for defendant.

To the above-named plaintiff A.B. and her Solicitors Messrs.

This notice of motion is issued by of solicitor whose address for service is at the office of Messrs. of solicitors Street .

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I of : make oath and say as follows:—

1. That I am a solicitor in the employ of Messrs. solicitors for the defendant herein.

2. That the charging order *nisi* herein was issued on the day of 19 .

3. That the above-named plaintiff was formerly the wife of the defendant.

4. That the said plaintiff obtained a divorce from the defendant by decree of this Honourable Court granted at on the day of on the grounds of mutual separation.

5. That at the time of the marriage of the said plaintiff and the defendant it appears from the documents filed in the suit for divorce that both the said plaintiff and the defendant were resident at and domiciled in New Zealand.

6. That on the filing of the petition for divorce the plaintiff was resident in England.

7. That leave was granted by this Honourable Court for the plaintiff to adduce her evidence on affidavit in support of her petition and the said plaintiff did not appear personally at the hearing of the said petition.

8. That the defendant left New Zealand on the day of 19 for in the Commonwealth of Australia for an indefinite term to follow his calling of .

9. That I am informed by the defendant that his residence in Australia is merely temporary and that he expects to return and take up his permanent residence in New Zealand within the next six months.

10. That I am informed and verily believe as appears from the letter annexed hereto and marked "A" that defendant did not leave New Zealand with the intention of evading payment of maintenance as set forth in the statement of claim filed herein.

11. That it appears from the statement of claim filed in this action that maintenance was in fact paid up to and including the day of 19 which date is six months subsequent to the departure of the defendant for Australia.

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ORDER DISCHARGING ORDER NISI.

(*Same heading.*)

day the day of 19 .

Before the Hon. Mr. Justice .

UPON READING the charging order *nisi* made herein on the day of 19 and the notice of motion filed herein and the affidavit of filed in support of the said motion AND UPON HEARING Mr. of counsel for the plaintiff and Mr. of counsel for the defendant IT IS ORDERED that the said charging order *nisi* be and the same is hereby discharged AND IT IS FURTHER ORDERED that the plaintiff do pay to the defendant the sum of £ for costs of and incidental to this application.

By the Court,

Registrar.

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# Rules and Regulations.

**Transport Licensing (Commercial Aircraft Services) Act, 1934.** Regulations relating to Aircraft Services.—*Gazette* No. 86, November 26, 1934.

**Naval Defence Act, 1913.** Regulations under the Act amended.—*Gazette* No. 87, November 29, 1934.

**Defence Act, 1909.** Regulations for the New Zealand Military Forces, 1927, amended.—*Gazette* No. 87, November 29, 1934.

**Post and Telegraph Department Act, 1918.** Amendment to the Regulations.—*Gazette* No. 90, December 6, 1934.

**Trade Arrangement (New Zealand and Belgium) Ratification Act, 1933.** Duties modified.—*Gazette* No. 90, December 6, 1934.

**Defence Act, 1909.** Financial and Allowance Regulations for the New Zealand Military Forces, amended.—*Gazette* No. 90, December 6, 1934.

**Naval Defence Act, 1913.** Regulations under the Act amended. *Gazette* No. 87, November 29, 1934.

**Defence Act, 1909.** Regulations for the New Zealand Military Forces, 1927, amended. *Gazette* No. 87, November 29, 1934.

# Recent English Cases.

## Noter-up Service
FOR
## Halsbury's "Laws of England."
AND
## The English and Empire Digest.

HUSBAND AND WIFE.

Divorce—Discretion—Husband's Statement on His Petition—Use in Other Proceedings—BEVIS *v.* BEVIS (P.D.A.).

*Admissions made in a "discretion statement" in matrimonial proceedings are not evidence on which the other party to the marriage can claim a decree of divorce.*

As to "discretion statements": see HALSBURY, 2nd Edn., 10, para. 1024; DIGEST Supp.

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MASTER AND SERVANT.

Workmen's Compensation—Payment into Court—Widow's Share—Widow's Death—ROBNER SHIPPING CO. *v.* MORGAN (C.A.).

*Where money is paid into Court under the Workmen's Compensation Act and one of the dependants in respect of whom such payment is made dies before the amount payable to the dependants is apportioned, the employer is entitled to have the amount ultimately apportioned in respect of that dependant paid out to him.*

As to sec. 2 (3) of the Workmen's Compensation Act, 1925, see HALSBURY 20, para. 415; Supplement for 1934 *ibid.* p. 51; DIGEST 34, p. 253.

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MEDICINE AND PHARMACY.

Negligence—Hospital—Approved Practice—VANCOUVER GENERAL HOSPITAL *v.* MCDANIEL (P.C.)

*Where a hospital treats a patient according to approved medical practice, it is not guilty of negligence because that treatment results in a patient contracting an infectious disease.*

As to the liability of hospitals, etc., for negligence: see HALSBURY 20, para. 818; DIGEST 34, p. 545 *et seq.*

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MORTGAGE.

Mortgage—Discharge of—Tenant for Life in Remainder—Merger—CHESTERS, *In re*; WHITTINGHAM *v.* CHESTERS (Ch. D.)

*When a tenant for life in remainder pays off a mortgage on the settled property the charge is* prima facie *kept alive for his benefit.*

As to merger on the discharge of mortgages: see HALSBURY, Vol. 21, para. 568; DIGEST 20, p. 511.

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SOLICITORS.

Solicitor—Trustee—Profit Costs—Partner—*Re* HILL; CLAREMONT *v.* HILL (C.A.).

*Where a solicitor trustee is in such a position that his judgment might be influenced by his interest being in conflict with his duty, profit costs should not be allowed to him or his firm even though his judgment and conduct has not in fact been influenced.*

As to a solicitor trustee's profit costs, see HALSBURY 26, para. 1248; DIGEST 42, p. 117.

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# New Books and Publications.

**The Permanent Court of International Justice, 1934.** Professor M. O. Hudson. (Macmillan & Co.) Price 28/-.

**Taylor's Principles and Practice of Medical Jurisprudence.** 9th Edition. By Sydney Smith and W. G. H. Cook. 2 volumes. (Churchill). Price 83/-.