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Anyone who wants to understand the principles of our law, and still more the trend of modern legislation, must understand that both of them are in fact sentimental. The object of the great bulk of modern legislation is to relieve those who are oppressed and wretched. The same thing is true of international law. The foundations of law are based on Christian morality, and the very foundations of international law are based on inductions and deductions from the principles of morality. If, therefore, a Judge were said to be sentimental, it should be counted to his benefit and credit. There is no virtue in a Judge greater than sentiment.

—LORD ATKIN, at the dinner of the International Law Association in honour of Lord Blanesburgh.

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"Defamatory": An Extended Definition.

THERE have been several formulae for describing what is "defamation." Scrutton, L.J., in *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, (1934) T.L.R. 581, 584, described as "the stock formula" the words used in the Court below, by Avory, J., *viz.*, "calculated to bring into hatred and contempt." Scrutton, L.J.

"And because it has been clearly established some time ago that it is not exhaustive because there may be things which are not defamatory and have nothing to do with hatred, ridicule, or contempt, he [Avory, J.] adds the words 'or causes them to be shunned or avoided.'"

The learned Lord Justice added that it was difficult to improve upon the language used by Cave, J., in *Scott v. Sampson*, (1882) 8 Q.B.D. 491, 503,

"The law recognizes in every man a right to have the right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit."

In the most recent text-book, *Fraser on Libel and Slander*, 7th Ed., 4, "defamation" is defined as:

"A statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned, or avoided, or which has a tendency to injure him in his office, profession, or trade."

But, the learned editors add,

"There is no satisfactory definition of a defamatory statement. Exception has been taken upon the ground that it would include some statements which are not defamatory, but which have a tendency to injure the person against whom they are directed in his office, profession, trade, *e.g.*, a premature obituary notice of a medical practitioner, or a statement that a tradesman has retired from business: see *Ratcliffe v. Evans*, [1892] 2 Q.B. 524, 529.

"Whilst recognising, therefore, the imperfections of the definition, it is felt that for all practical purposes it is the best that can be devised, more especially if the concluding sentence is read as being qualified by the context in which it appears and as thus importing the words 'tendency to injure' some degree of loss of prestige as giving rise to the injury."

Notwithstanding the learned editors' hesitancy, it may be remembered that the definition, which appeared in previous editions of their work, was, four years before the learned author of the work was raised to the Bench, approved by McCardie, J., as he then was, in *Mycroft v. Sleight*, (1921) 37 T.L.R. 646, 647.

Recently, however, an extension of "the stock formula" for defining what is defamatory has been made by the House of Lords in *Sim v. Stretch*, [1936] 2 All E.R. 1237. The facts as stated in the speech of Lord Atkin, were as follow:

"The litigation arose out of a quarrel between neighbours residing at Cookham Dean, and concerned the vicissitudes of a domestic servant, Edith Saville, whose fortune it was to be employed at successive times by both plaintiff and defendant. When the story opens she was employed temporarily as general maid by the defendant at his house, 'Old Barton.' She had formerly been employed by a Mrs. Sterne at another house, 'The Twigs,' situate a short distance from 'Old Barton.' Early in 1934, the plaintiff bought 'The Twigs' from Mrs. Sterne. The plaintiff's wife met Edith Saville at 'The Twigs' in the course of taking over the house and arranged with her to come back as maid to 'The Twigs.' It appeared that this arrangement did not meet with the approval of the defendant's wife, but Edith took up service with the plaintiff and his wife at 'The Twigs' on March 15, 1934, as from March 8. On April 8, when a month's wages were due, they were paid to the servant, but the plaintiff suggested that she should put the money in the Post Office Savings Bank.

"On April 12, in the morning, the plaintiff and his wife went to Maidenhead, about three miles away, to shop, intending to deposit the money in the bank. Whether they had retained it or not for that purpose in the meantime did not appear. While they were away the defendant appeared in 'The Twigs' drive, called Edith out, walked back to 'Old Barton' with her, then took her with Mrs. Stretch in their car to 'Georgian House' in Maidenhead where the defendant's father lived. The party seemed to have stayed there till April 15, when they all returned to 'Old Barton.' Edith remained in the service of the defendant, and was there at the time of the trial. She gave evidence on behalf of the plaintiff. When she left 'The Twigs' on the 12th there was no other servant in it, and the plaintiff and his wife returned to find the house deserted and Edith missing. About one o'clock that day, the defendant dictated to the Post Office at Maidenhead the following telegram:

"Stretch, The Twigs, Cookham Dean. Edith has resumed her service with us to-day. Please send her possessions and the money you borrowed also her wages to Old Barton. Sim."

This was duly despatched to the Post Office, Cookham Dean, which is in a village shop, and was received by the plaintiff soon after despatch.

"On May 1 the plaintiff commenced the present action, alleging two causes of action: (1) that the plaintiff had maliciously enticed from his service Edith Saville; (2) libel contained in the telegram. The case was tried in February, 1935, before Talbot, J., and a common jury. On the first cause of action the jury found a verdict for the plaintiff for £25 damages. There was abundant evidence to justify the verdict, and there was no appeal from it. On the alleged libel, the jury found a verdict for the plaintiff for £250, and in this respect there was an appeal to the Court of Appeal (Greer and Roche, L.JJ., Slesser, L.J., dissenting) which affirmed the verdict and judgment for £250 damages. The defendant appealed to the House of Lords. As to the reference in the telegram to 'money borrowed,' it appeared that at the end of March, 'a week just before Easter,' which that year fell on April 1, Mrs. Sim had been away for a week. She had left money with Edith to pay the accounts, but had arranged on Edith's suggestion that Edith should pay anything over that sum out of her own money. Apparently Edith paid two small items amounting to 14s., which sum was outstanding on April 12, and was in fact paid on April 15."

The statement of claim, after alleging publication of the words of the telegram to the officials of the Post Office whose duty it was to transmit and deal with the telegram, alleged in para. 7:

"By the said words the defendant meant and was understood to mean that the plaintiff was in pecuniary difficulties,

> that by reason thereof he had been compelled to borrow and had in fact borrowed money from the said housemaid, that he had failed to pay the said housemaid her wages and that he was a person to whom no one ought to give any credit."

At the close of the plaintiff's case counsel for the defendant had submitted that the words were incapable either of the meaning alleged in the innuendo or of any defamatory meaning. The learned trial Judge rejected the submission, and counsel for the plaintiff urged the innuendo before the jury as he did later both in the Court of Appeal and in their Lordships' House.

Lord Atkin, in his speech, with which Lord Russell of Killowen and Lord Macmillan concurred, said that he was at a loss to understand why a person's character should be lowered in anyone's estimation if he or she had borrowed from a domestic servant. He would have thought it such a usual domestic occurrence for small sums to be advanced in such circumstances as those appearing above, and with the assent of everyone concerned to be left outstanding for some days, that the mere fact of borrowing from a servant bore not the slightest tinge of "meanness"—the imputation which the trial Judge and two members of the Court of Appeal had considered the words of the telegram were capable of conveying to anybody; though there might be special circumstances, and so large an amount might be borrowed or left so long unpaid that the facts when known would reflect on the character of the master.

In determining whether the words of the telegram in their ordinary signification were capable of being defamatory, Lord Atkin, after observing that Judges and text-book writers have alike found difficulty in defining with precision the word "defamatory," said that the conventional phrase, "exposing the plaintiff to hatred, ridicule, and contempt," was probably too narrow.

His Lordship went on to say that the question was complicated by having to consider the person or the class of persons whose reaction to the publication is the test of the wrongful character of the words used; and he did not intend to ask their Lordships to lay down a formal definition. But, after collating the opinions of many authorities, he proposed in the present case the test:

> "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

Assuming such to be the test, there was no dispute as to the relative functions of Judge and jury, of law and fact. His Lordship proceeded:

> "It is well settled that the Judge must decide whether the words are capable of bearing a defamatory meaning. That is a question of law: is there evidence of a tort. If they are so capable, then the jury is to decide whether they are in fact defamatory."

Applying his extension of the definition of "defamatory" to the facts, Lord Atkin said that there was no evidence that the words were published to anyone who had any knowledge at all of the facts as narrated above. There was no direct evidence that they were published to anyone who had ever heard of the plaintiff. He added that the Post-office officials might be presumed to know him, and he and his wife dealt with the shop in which the Post-office was situated, but there was no evidence, but a distinct improbability, that the shopkeeper was the telegraph clerk. Even if the publication of the telegram at Cookham Dean was to someone who knew the plaintiff, what would he or she learn by reading the telegram? That Edith Saville had been in the plaintiff's employment; that she had that day entered defendant's employment; and that the former employer was requested to send on to her new place of employment her possessions together with the money due to her for money borrowed and for wages. And he added,

> "How could perusal of that communication tend to lower the plaintiff in the estimation of the right-thinking peruser who knows nothing of the circumstances but what he or she derives from the telegram itself."

His Lordship concluded that the words were incapable of bearing a defamatory imputation; and, further, that to make an imputation which was based upon the existence of facts unknown and not to be inferred from the words attacked came under the ban of Brett, L.J. (as Lord Esher then was), in *The Capital and Counties Bank v. Henty and Sons*, (1880) 5 C.P.D. 514, 541, cited with approval by Lord Halsbury, L.C., in *Nevill v. Fine Art and General Insurance Co., Ltd.*, [1897] A.C. 68, 73:

> "It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document."

The appeal was allowed, and the order of the Court of Appeal set aside.

Although the case was, in Lord Atkin's words, "a trumpery affair," the judgment is important by reason of the test proposed by their Lordships in extension of the generally-accepted definition of "defamatory." As given in *Salmond's Law of Torts*, 8th Ed., 398, a defamatory statement is defined as one—

> "Which has a tendency to injure the reputation of the person to whom it refers, that is to say, to diminish the good opinion that other persons have of him, and to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem."

—"in the estimation of right-thinking members of society generally," we add in the words of the recent judgment of the House of Lords. The application of the definition, as so extended, would seem to be by or conditioned to a consideration of "the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used."

The Law Reform Act, 1936.

Practitioners are reminded that the Law Reform Act, 1936, received the Royal Assent on September 18, and is now in force.

The Act, on which the learned Attorney-General, Hon. H. G. R. Mason, is to be warmly congratulated, abolishes the *Actio personalis* rule, an alteration of the law for which we have waited over-long. By enacting the provisions of the Law Reform (Married Women and Tort-feasors) Act, 1935 (Eng.), the Married Women's Property Act has been brought up to date, and the rule that there could be no contribution between joint tort-feasors has been abolished, as has the defence of common employment in every case in which the relationship of master and servant exists. In addition, a section makes statutory the provision hitherto set out in leases as to lessors' consents not being arbitrarily or unreasonably withheld. A charge on all insurance-moneys payable as an indemnity for liability to pay damages or compensation is made to attach immediately on the happening of the event giving rise to the claim. Amendments to the Deaths by Accidents Compensation Act, 1908, are also made, and apply to every action pending at the passing of the Act or commenced thereafter, whether in respect of a death occurring before or after the passing of the Act.

Summary of Recent Judgments.

FULL COURT.
Wellington.
1936.
June 18, 19,
August 14.
Reed, A.C.J.
Blair, J.
Smith, J.
Johnston, J.
Fair, J.
Northcroft, J.

ROBERTSON v. LING SING.

Negligence—Road Collision—Trial—Issues—Last Opportunity—Whether Issue of Real and Substantial Cause should be put to Jury where there is no room for Doctrine of Last Opportunity.

CORRIGENDUM.

The summary of the reasons for the judgment of the Hon. Mr. Justice Smith in the report of this case appearing on p. 231, was not correct, and the following is substituted therefor:

Per *Smith*, J. 1. That where there is no room on the facts for the application of the doctrine illustrated in *Davies v. Mann*, or *Loach's* case, a proper direction to the jury would appear to be that negligence is a failure to take ordinary, but not a failure to take extraordinary, care, and that this test applies to all acts or omissions which the jury may regard as contributing in fact to the cause or causes of the collision. The true position is that if the defendant has failed to take ordinary care but the plaintiff has only failed to take extraordinary care, then the plaintiff will succeed because in law he is not negligent; but, if both have failed to take ordinary care, the plaintiff will not succeed because his negligence is contributory in law as well as in fact.

2. That the jury did not receive a direction, which, taken as a whole, was within the principles approved in *Swadling v. Cooper*, [1931] A.C. 1, for this class of case, and that the direction amounted to a misdirection upon material parts of the case which influenced and confused the jury; and, in justice to both parties, there should be a new trial.

SUPREME COURT.
Christchurch.
1936.
May 25; June 1.
Northcroft, J.

COURT OF APPEAL.
Wellington.
1936.
June 24, 25;
Aug. 14.
Reed, A.C.J.
Smith, J.
Johnston, J.
Fair, J.

GODFREY v. GILBERT.

Negligence—Road Collision—Contributory Negligence—Issues—Jury's Answers—Defendant negligent in driving Car at Excessive Speed—Plaintiff's deceased Husband negligent in failing to Stop in Time to avoid Collision—Defendant's Negligence Effective and Substantial Cause—Effect of Jury's Findings.

The collision occurred late upon a clear dark night on an intersection, both cars being lighted. Defendant had the right of way, and then noticing deceased's car, applied his brakes and endeavoured to swerve to his right, but the road-surface consisted of loose gravel and the car skidded for 105 feet up to the point of collision on the opposite side of the intersection. Plaintiff's deceased husband entered the intersection after the defendant, but according to a statement made by him to a bystander, he never saw respondent's car, and without deviating from his course, and without applying his brakes, he crossed the intersection and collided with the defendant's car. His speed from the time of entering the intersection until the collision took place was between 20 and 25 miles per hour. None of the facts were contradicted.

At the close of the case for the plaintiff, the learned trial Judge reserved the application of defendant's counsel for a nonsuit on the ground that the undisputed facts of the case disclosed the only rational inference that the plaintiff was guilty of contributory negligence.

In answer to issues, the jury found the defendant, the present respondent, to be negligent in driving his car at an excessive speed and in failing to stop his car in time to avoid the accident, and they negatived allegations of negligence in not having his car equipped with efficient and proper brakes, failing to give warning of his approach, failing to keep a proper look out, and any other negligence. They found the deceased negligent in failing to stop his car in time to avoid an accident, in failing to give right of way to a vehicle approaching from his right hand; and they negatived allegations of negligence in driving a car which was not equipped with efficient or proper brakes, driving at an excessive speed, failing to give warning of his approach, failing to keep a proper look out, and any other form of negligence.

In answer to the third issue, the jury found that, both being negligent, the effective and substantial cause of the accident was the negligence of the defendant.

On motion for judgment for plaintiff, and on motion for judgment for defendant or alternatively that the verdict of the jury was against the weight of evidence and their findings were so defective that judgment could not be given upon them, the learned trial Judge gave judgment for the defendant, for the reason that the negligence of the deceased had contributed to the accident.

On appeal from this decision,

Held, by the Court of Appeal (*Smith, Johnston*, and *Fair*, JJ., *Reed*, A.C.J., dissenting) allowing the appeal, That, upon the whole of the relevant facts it was open to the jury, as the lawfully constituted exponents of common-sense, to say that the negligence of the appellant's deceased husband was not so mixed up with the negligence of the respondent to make the negligence of the deceased contributory to the cause of the collision, and that judgment should be entered for plaintiff in accordance with the verdict of the jury.

Davies v. Mann, (1842) 10 M. & W. 546, 152 E.R. 588; **British Columbia Electric Railway Co., Ltd., v. Loach,** [1916] 1 A.C. 719; **Swadling v. Cooper,** [1931] A.C. 1; **Benson v. Kwong Chong,** [1934] G.L.R. 145; **Robertson v. Ling Sing,** *Ante*, p. 231; **Kenny v. Dunedin City Corporation,** [1920] N.Z.L.R. 513; **Williams v. Commissioner for Road Transport and Tramways (N.S.W.),** (1934) 50 C.L.R. 258; **Rickleben v. Baker and Cooke,** (1892) 15 N.Z.L.R. 262; **Algie v. D. & H. Brown and Son, Ltd.,** [1932] N.Z.L.R. 779; **Dublin, Wicklow, and Wexford Railway Co. v. Slattery,** (1878) 3 App. Cas. 1155, considered and applied.

Counsel: **Donnelly** and **Cavell,** for the appellant; **Thomas** and **Twyneham,** for the respondent.

Solicitors: **A. H. Cavell,** Christchurch, for the appellant; **C. S. Thomas,** Christchurch, for the respondent.

Case Annotation: For *Davies v. Mann*, see E. & E. Digest, Vol. 36, title *Negligence*, p. 113, para. 751; *British Columbia Electric Railway Co., Ltd. v. Loach, Ibid.*, Vol. 36, p. 117, para. 781; *Swadling v. Cooper*, E. & E. Digest, Supplement No. 11, title *Negligence*, para. 731*a*; *Benson v. Kwong Chong, Ibid.*, para. 565(*n*); *Dublin, Wicklow, and Wexford Railway Co. v. Slattery, Ibid.*, p. 74, para. 482.

SUPREME COURT.
Wellington.
1936.
Aug. 17; Sept. 2.
Reed, A.C.J.

TUTUA TEONE v. TIPENE.

Adoption—Order—Oral Pronouncement given but Order not drawn up—Whether sufficient to constitute Valid Adoption—Natives and Native Land—Constituents of Valid Marriage of Natives—Adoption of Children Act, 1895, ss. 4, 7 (Infants Act, 1908, ss. 17, 21).

Where no order of an option in the prescribed form has been drawn up, an oral pronouncement granting an application for adoption is not sufficient to constitute a valid adoption under the Adoption of Children Act, 1895.

Ely v. Moule, (1850) 5 Exch. 918, 155 E.R. 401, and **The Queen v. Hutchins,** (1880) 5 Q.B.D. 353, distinguished.

Semble: If an order in the prescribed form had been made, the maxim *Omnia praesumuntur rite et solemniter esse acta* would probably apply after the lapse of thirty years, and it would be

inferred that the fact of a legal marriage of the adopting parents, without proof of which the order could not have been made, was proved before the Magistrate.

Spieres v. Parker, (1786) 1 T.R. 141, 99 E.R. 1019, referred to.

Observations as to the legal marriage of Maoris (*a*) at common law and (*b*) in accordance with the provisions of the Marriage Act, 1880, are made in the judgment.

Counsel: **Spratt,** for the plaintiff; **Neal,** for the defendant.

Solicitors: **Morison, Spratt, Morison, and Taylor,** Wellington, for the plaintiff; **Levi, Yaldwyn, and Neal,** Wellington, for the defendant.

Case Annotation: For *Ely v. Moule*, see E. & E. Digest, Vol. 30, title *Juries*, p. 121, para. 2; *The Queen v. Hutchins, Ibid.*, Vol. 22, title *Evidence*, p. 297, para. 2854.

NOTE:—For the Infants Act, 1908, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, title *Infants and Children*, p. 1069.

SUPREME COURT.
Auckland.
Sept. 8, 12.
Callan, J.

**DOMINION MOTORS, LTD.
v.
GRIEVES.**

Sale of Goods—Sale of Motor-chassis as altered and equipped to Buyer's requirements—Purchase not completed—Action against Buyer—" Available Market "—Measure of Damages—Sale of Goods Act, 1908, s. 51 (2), (3).

In February, 1936, plaintiff company agreed to sell and the defendant to buy a motor chassis suitable for omnibus work and to alter and equip it in the manner specified, for an agreed price of £670. In April, 1936, defendant refused to perform the agreement or pay the price, plaintiff being ready and willing at all material times to perform its obligations.

Plaintiff, alleging no available market for the chassis as altered, claimed a loss of profit of £187 4s. 7d. or, alternatively, the difference between the contract price and the market price, viz., £187 4s. 7d., subsequently amended to £191 11s. 3d.

Liability was admitted, and the Court had to assess the damages, which depended on the question whether or not there was in April, 1936, when defendant's repudiation took place, an " available market " for the goods in question within the meaning of that expression in s. 51 (3) of the Sale of Goods Act, 1908.

Monro, for the plaintiff; **Haigh,** for the defendant.

Held, 1. That the question whether or not there was an " available market " is a question of fact.

Dicta of Viscount Cave in **Marshall v. Nicoll,** [1919] S.C. (H.L.) 129, 139; of James, L.J., in **Dunkirk Colliery Co. v. Lever,** (1879) L.R. 9 Ch. 20, 25, and of Murray, C.J., in **Cameron v. Campbell and Worthington, Ltd.,** (1930) S.A.S.R. 402, 405, adopted and applied.

2. That s. 51 (3) of the Sale of Goods Act, 1908, did not apply, as, on the evidence, it could not be said that there was, either in or around Auckland (where the sale took place) or elsewhere in New Zealand, a market where buyers of the combined article or of the two original combined articles might be found from day to day or within a reasonable time, at a then current or a fair price.

3. That, in the above-stated circumstances, s. 51 (2) of the Sale of Goods Act, 1908, applied, and the damages were the estimated loss directly and naturally resulting in the ordinary course of events from the purchaser's breach, viz., the loss of one profit.

Re Vic Mill, Ltd., [1913] 1 Ch. 183, affd. on app. [1913] 1 Ch. 465, applied.

Marshall and Co. v. Nicoll and Son, [1919] S.C. (H.L.) 129, **Edilson v. Joyce,** [1917] N.Z.L.R. 648, **Connolly Bros. v. Kahn and Huggins, Ltd.,** [1922] N.Z.L.R. 299, and **Weir v. Harwood,** [1918] G.L.R. 632, considered and distinguished.

Judgment was given for £191 11s. 3d. upon the basis of loss of profit, as claimed.

Solicitors: **Oliphant and Monro,** Auckland, for the plaintiff; **F. H. Haig,** Auckland, for the defendant.

Case Annotation: For *Marshall and Co. v. Nicoll and Son*, see E. & E. Digest, Vol. 39, title *Sale of Goods*, p. 674, para. 2600; *Dunkirk Colliery Co. v. Lever, Ibid.*, Vol. 17, title *Damages*, p. 126, para. 342; *Cameron v. Campbell and Worthington, Ltd., Ibid.*, title *Sale of Goods*, p. 39, para. 2501, *Re Vic Mill, Ltd., Ibid.*, Vol. 17, title *Damages*, p. 84, para. 34.

NOTE:—For the Sale of Goods Act, 1908, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, Vol. 8, title *Sale of Goods*, p. 93.

SUPREME COURT.
Auckland.
1936.
Sept. 3, 6.
Callan, J.

G. v. G.

Divorce and Matrimonial Causes—Petition—" Person of Unsound Mind . . . confined as such "—Respondent a Voluntary Boarder in Mental Institution—Decree refused—Divorce and Matrimonial Causes Act, 1928, s. 10 (*f*).

Before a decree of dissolution of marriage can be made on the ground set out in s. 10 (*f*) of the Divorce and Matrimonial Causes Act, 1928, which is as follows:

> " That the respondent is a person of unsound mind and is unlikely to recover, and has been confined as such in New Zealand in an institution within the meaning of the Mental Defectives Act, 1911, or in a like institution in any other country of the British dominions, for a period or periods not less in the aggregate than seven years within the period of ten years immediately preceding the filing of the petition,"

the petitioner has to establish not merely that the respondent is a person of unsound mind and is unlikely to recover, but also that the respondent has been confined *as such* in an institution for the required period, *i.e.*, confined as a person afflicted with unsoundness of mind to a degree that warrants the making of a committal order.

Consequently, it is not permissible under the above-quoted para. (*f*) to count any period of detention as a voluntary boarder in a mental institution which resulted in relief and temporary cure and discharge merely because the person ultimately became a person of so unsound a mind as to warrant and result in committal, or to treat a voluntary boarder as having been actually confined as a person of unsound mind merely because it is established by evidence that such respondent could have been lawfully confined as a person of unsound mind.

Johnson v. Johnson, [1921] N.Z.L.R. 1054.

Counsel: **A. A. Coates,** for the petitioner; **V. R. S. Meredith,** for the Solicitor-General as guardian *ad litem* of the respondent.

Solicitors: **Hanna and Coates,** Auckland, for the petitioner; **V. R. S. Meredith,** Crown Solicitor, for the respondent.

NOTE:—For the Divorce and Matrimonial Causes Act, 1928, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, title *Husband and Wife*, p. 865.

SUPREME COURT.
Wellington.
1936.
Aug. 24; Sept. 4.
Reed, A.C.J.

**PUBLIC TRUSTEE
v.
COMMISSIONER OF STAMP DUTIES.**

Public Revenue—Death Duties (Gift Duty)—Land Transferred by way of Gift—Gift Duty paid thereon—Mutual Rescission of Gift—Donor, at time of Death, Beneficial Owner of such Land—Whether Gift Duty as paid deductible from Amount of Death Duty assessed in respect of his Estate—Death Duties Act, 1921, ss. 5, 60.

In April, 1919, H. executed in favour of his nephews transfers by way of gift of two pieces of land, and paid gift duty thereon. Later, the gift was challenged by H. on the grounds of undue influence; and, on December 17, 1929, a deed of arrangement was executed in purported settlement of H.'s claims in connection with the transfers. In June, 1931, after H. had issued a writ claiming the setting aside of the deed of arrangement and for a declaration that the transfers by way of gift were

illegal and void, there was a settlement of the action by entry of judgment by consent, by which settlement the original donees agreed to transfer to H. the gift lands in exchange for certain other lands of H. to be transferred to them, and all allegations were unreservedly withdrawn.

When H. died, the lands affected by the gift were beneficially owned by him, and formed part of his dutiable estate. The Commissioner of Stamp Duties claimed the full estate duty in respect of the gift lands, without allowing credit for the amount paid as gift duty. From this decision H.'s executor appealed.

Carrad, for the Public Trustee ; **E. S. Smith,** for the Commissioner of Stamp Duties.

Held, That the case did not come with s. 5 (*a*), (*b*), or (*c*) of the Death Duties Act, 1921 ; and, as the property had ceased to be the subject of a gift and was assessable only as property beneficially owned, s. 60 of that statute had no application, and the amount paid as gift duty was not deductible from the amount otherwise payable in respect of deceased's estate by way of death duty.

Solicitors : The Solicitor, Public Trust Office, Wellington, for the appellant ; **The Crown Law Office,** Wellington, for the respondent.

NOTE :—For the Death Duties Act, 1921, see THE PUBLIC ACTS OF NEW ZEALAND. (REPRINT), 1908-1931, Vol. 7, title *Public Revenue and Expenditure*, p. 345.

SUPREME COURT.
Hamilton.
1936.
Aug. 20 ; Sept. 2.
Fair, J.

HEDLEY v. HALIM KALLIL.

Licensing—Offences—Sale in Prohibited Area—Purchase of Liquor—Vendor not convicted—Whether Purchaser liable to Conviction of Offence—Whether Purchaser liable to Conviction of aiding or procuring Commission of Offence—Licensing Act, 1908, ss. 272, 273—Justices of the Peace Act, 1927, s. 54.

A person aiding, abetting, or procuring the commission of an offence under s. 273 of the Licensing Act, 1908, may be proceeded against for the principal offence or for the offence of aiding, abetting, or procuring the commission of that offence, without a conviction of the principal offender for the principal offence.

Watford v. Miller, [1920] N.Z.L.R. 837, applied.

The omission from s. 273 (*a*) (ii) of the Licensing Act, 1908 (which is to be read in conjunction with s. 54 of the Justices of the Peace Act, 1927), of specific reference to a purchaser, does not justify the inference that purchasers or their agents were intended to be excluded from liability.

When the circumstances show that the vendor of liquor knows that an offence is being committed, a purchaser, who seeks him and asks him to sell, aids, abets, and procures the commission of that offence.

Fairburn v. Evans, [1916] 1 K.B. 218, followed.

It had been proved that the vendor of the liquor was not the defendant. Nevertheless, as the defendant, at the request of a constable, found a person willing to sell whisky, and brought him and the constable together in order that a sale might be effected, allowed his premises to be used as the place for delivery of the whisky, and received from the constable moneys to be paid to the vendor and inferentially received them on the vendor's account, he should have been convicted of an offence under s. 273 of the Licensing Act, 1908 ; and, in whatever form the charge had been laid against the defendant, either as a principal or for aiding and abetting, he should still have been deemed to have committed the principal act. He would, however, be entitled to the limitation of time imposed in respect of proceedings for the principal offence.

Appeal from the determination of a Stipendiary Magistrate, dismissing an information against respondent for selling liquor in a proclaimed area, dismissed.

Counsel : Fitzgerald, for the appellant ; **Strang,** for the respondent.

Solicitors : Gillies, Tanner, and Fitzgerald, Hamilton, for the appellant ; **Strang and Taylor,** Hamilton, agents for **Gordon, Nicholson, and Rennie,** Taumarunui, for the respondent.

SUPREME COURT.
Wellington.
1936.
July 6 ; Aug. 19.
Smith, J.

WRIGHT AND ANOTHER v. ANDERSON AND ANOTHER (No. 2).

Negligence—Road Collision—Motion for New Trial—Verdict against Weight of Evidence—Misdirection or wrongful Admission of Evidence not involved—Error of Judgment—Failure to take extraordinary Care—Principles applicable by Court in considering Motion.

If there is any evidence in support of the issue found by the jury, then in the absence of facts uncontroverted or uncontrovertible, such as those established by unimpeachable documentary evidence, *it is not to be readily expected that* a Court will find the jury's verdict to be perverse on the ground that it is against the weight of evidence.

Mechanical and General Inventions Co., Ltd., and Lehwess v. Austin and the Austin Motor Co., Ltd., [1935] A.C. 346, followed.

It is open to the jury, on the evidence before them, to suppose that the plaintiff has committed a mere error of judgment, and to find that, at the most, he failed only to take extraordinary care.

Williams v. Commissioner for Road Transport and Tramways (N.S.W.), (1935) C.L.R. 258, referred to.

As it is open to the jury to think that in relation to the acts or omission which contributed to *the cause* of the collision, the defendant was negligent in that he failed to take ordinary care while the plaintiff was not negligent in that, at the most, it had been proved that he failed to take extraordinary care, the jury were bound to find for the plaintiff, and their verdict cannot be disturbed.

Robertson v. Ling Sing, *ante* 231, referred to.

Counsel : Brodie, for defendants, in support of motion for new trial ; **O. C. Mazengarb,** for plaintiffs, to oppose.

Solicitors : Mazengarb, Hay, and Macalister, Wellington, for the plaintiffs ; **A. D. Brodie,** Wanganui, for the defendants.

Case Annotation : For *Mechanical and General Inventions Co., Ltd., and Lehwess v. Austin and Austin Motor Co., Ltd.,* see E. & E. Digest, Supplement No. 11, title *Pleading and Practice,* para. 2405a.

SUPREME COURT.
Wanganui.
1936.
June 1 ; Sept. 7.
Smith, J.

BROOKER v. JOHN FRIEND, LTD.

Copyright—Acquisition of Right to obtain Property in Copyright—Sale to Another before Completion of Purchase—Whether Implied or Constructive Trust in respect of Copyright enforceable—Copyright Act, 1913, ss. 4, 8 (2), 44.

An implied or constructive trust in respect of a copyright existing under the Copyright Act, 1913, may be enforced ; and enforced to the ultimate extent of the acquisition of the title to the copyright by the *cestui qui trust* who is entitled to get in the legal estate.

In re Clarke, Coombe v. Carter, (1887) 36 Ch.D. 348 ; **Tailby v. Official Receiver,** (1888) 3 App. Cas. 523, **In re Lind Industrials Finance Syndicate, Ltd. v. Lind,** [1915] 2 Ch. 345, and **Performing Right Society, Ltd. v. London Theatre of Varieties, Ltd.,** [1922] 2 K.B. 33, followed.

Section 44 of the Copyright Act, 1913, contemplates that any trust created in the manner which the law permits for personal property may exist in respect of copyright or of any right in copyright, whether the title to those rights is acquired by assignment, license, or transmission.

Once a parol transaction in respect of copyright has reached a stage when, by reason of the payment and receipt of the purchase price, the vendor becomes a mere trustee of the property of the purchaser, the only question will be, not whether the transaction is in writing or not, but the method of its enforcement.

Counsel : Parry, for the plaintiff ; **Blundell** and **D. G. Young,** for the defendant.

Solicitors : Buddle, Anderson, Kirkcaldie, and Parry, Wellington, for the plaintiff ; **Bell, Gully, Mackenzie, and Evans,** Wellington, for the defendant.

Case Annotation: For *Clarke, Coombe v. Carter*, see E. & E. Digest, Vol. 8, title *Choses in Action*, p. 431, para. 78; for *Tailby v. Official Receiver, Ibid.*, Vol. 5, title *Bankruptcy and Insolvency*, p. 697, para. 6128; *Lind Industrials Finance Syndicate, Ltd. v. Lind, Ibid.*, Vol. 4, title *Bankruptcy and Insolvency*, p. 310, para. 2902; *Performing Right Society, Ltd. v. London Theatre of Varieties, Ltd., Ibid.*, Vol. 9, title *Companies*, p. 76, para. 282.

NOTE:—For the Copyright Act, 1913, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, title *Copyright*, p. 2.

SUPREME COURT. New Plymouth. 1936. Aug. 21; Sept. 4. *Ostler, J.*

IN RE S.B.H. (DECD.), PUBLIC TRUSTEE v. B.F.H. AND OTHERS.

Will—Devisees and Legatees—Provision of Home for Testator's divorced (but bigamous) Wife on Son's Farm—Such Provision for her Maintenance "as the exigencies of the funds will permit"—Void for Uncertainty—Contingent Bequest to Illegitimate Son—Provision that no Beneficiary who is Undischarged Bankrupt at Testator's Death to Participate in Estate until discharge—Contingency performed in Testator's Lifetime—Son Undischarged Bankrupt at Testator's Death—"Children"—Destination of Bequest—Property Law Act, 1908, s. 24—Bankruptcy Act, s. 61.

Testator, an American citizen, was married in America in 1893, and, in 1896, while his wife was still living, he went through a form of marriage in Bermuda with another woman, C.M.H., whom he brought to New Zealand, where he lived with her until 1920, she bearing him eight children. He then obtained a decree of divorce against her. When he died in 1920, his lawful wife was alive in America and C.M.H. was alive in New Zealand. In his will he referred to the latter two places.

In his will, testator used these words:

"To C.M.H. divorced, I wish my trustees to make such "provision for her maintenance as the exigencies of the funds "will permit and requiring the beneficiaries to contribute "to her support."

When the testator made his will, one of his sons, B.F.H., was an undischarged bankrupt to his knowledge. In his will he provided:

"No one who would otherwise be a legal heir of mine who "is an undischarged bankrupt at the time of my death shall "participate in the division of the proceeds of my estate more "than to the extent of one pound until they be discharged "from bankruptcy."

In a later clause of the will, the following provision was made:

"After making these special bequests the balance of my "estate shall be divided equally among the following heirs "if they are qualified to participate."

He then named B.F.H., the undischarged bankrupt, and five other children.

B.F.H. was still an undischarged bankrupt at the time of the testator's death. He has since obtained his discharge.

On originating summons asking (*a*) what rights, if any, were conferred on C.M.H., and what duties, if any, were cast upon the administrator and the beneficiaries, and what powers, if any, conferred upon the administrator by the first of the quoted clauses of the will; and (*b*) whether B.F.H. acquired anything under the will by reason of the second clause above quoted, or whether his share went to the Official Assignee or to the other residuary legatees,

Counsel: **L. M. Moss,** for the Public Trustee; **C. H. Croker,** for B.F.H.; **T. P. Anderson,** for the Official Assignee; **L. A. Taylor,** for R.J.H., J.A.H., E.M.H., I.M.B., and M.M.A.; **R. J. O'Dea,** for Mrs. C.M.H., and **R. H. Quilliam,** for Mrs. A.W.H. and N.W.H.

Held, 1. That the bequest under the clauses of the will as first above quoted was void for uncertainty, and conferred no rights on C.M.H., and no liability on the administrator or the beneficiaries. *Aliter*, if the clause had merely provided for the maintenance of C.M.H.

Abraham v. Alman, (1826) 1 Russ. 509, 38 E.R. 196; **Broad v. Bevan,** (1823) 1 Russ. 517, 35 E.R. 198; **Jackson v. Hamilton,** (1846) 3 Jo. & Lat. 702; and **Batt v. Anns,** (1841) 11 L.J. Ch. 52, referred to.

2. That, as to the second above-quoted clause, the contingent bequest to B.F.H. took effect on testator's death, and became absolute when the contingency was performed before the period of distribution, which was the date upon which the youngest child attained her majority; upon that performance, the Official Assignee acquired the absolute interest, so that the whole of the bequest went to him.

Davidson v. Chalmers, (1864) 33 Beav. 653, 55 E.R. 522, applied.

3. That s. 24 of the Property Law Act, 1908, had no application, as the word "children" therein means only legitimate children.

E. v. E., (1915) 34 N.Z.L.R. 785, considered.

Solicitor: **Public Trust Office Solicitor,** Wellington, for the Public Trustee.

Case Annotation: For *Abraham v. Alman*, see E. & E. Digest, Vol. 43, title *Trusts and Trustees*, p. 576, para. 256; *Jackson v. Hamilton, Ibid.*, Vol. 39, title *Rent-charges and Annuities*, p. 163, para. 547i; *Batt v. Anns, Ibid.*, Vol. 28, title *Infants and Children*, p. 244, para. 1014; *Davidson v. Chalmers, Ibid.*, Vol. 5, title *Bankruptcy and Insolvency*, p. 651, para. 5821.

NOTE:—For the Property Law Act, 1908, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, Vol. 7, title *Real Property and Chattels Real*, p. 1077, and for the Bankruptcy Act, 1908, *Ibid.*, Vol. 1, title *Bankruptcy*, p. 482.

SUPREME COURT. Wellington. 1936. July 15, August, 12. *Johnston, J.*

COTTON v. FROST.

Copyright—Advertisement of Dental Plates—Principles for determining whether same an "original literary work"—Copyright Act, 1913, s. 3 (1).

An advertisement relating to the manufacture and sale of dental plates, which contains sufficient originality of expression and arrangement to entitle it to come within the meaning of the words, "original literary work," in s. 3 (1) of the Copyright Act, 1913, may be the subject of copyright.

Sinanide v. La Maison Kosmeo, (1928) 44 T.L.R. 574, and **University of London Press, Ltd., v. University Tutorial Press, Ltd.,** [1916] 2 Ch. 601, followed.

The fact that the claims of such an advertisement amount to no more than that certain standards to which every manufacturer of dental plates may work had been reached, is no defence to an action for an injunction for infringement of copyright when the presentation of those claims is novel and reached by a combination of skill, labour, and expenditure contributed by its author and owner.

Macmillan and Co., Ltd., v. Cooper, (1923) L.J.P.C. 113, followed.

Counsel: **Bowie,** for the plaintiffs; **E. C. Wiren,** for the defendant.

Solicitors: **E. S. Bowie,** Christchurch, for the plaintiff; **Luckie and Wiren,** Wellington, for the defendant.

Case Annotation: *University of London Press, Ltd. v. University Tutorial Press Ltd.*, E. & E. Digest, Vol. 13, title *Copyright and Literary Property*, p. 166, para. 42; *Sinanide v. La Maison Kosmeo*, Digest Supplement No. 11, title *Copyright*, para. 43b; *Macmillan and Co., Ltd., v. Cooper, Ibid.*, para. 92a.

NOTE:—For the Copyright Act, 1913, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, Vol. 2, title *Copyright*, p. 2.

Judicial Committee of the Privy Council.

BARON ATKIN OF ABERDOVEY.

Small in physical stature, gentle in voice and manner, Lord Atkin is and has amply proved himself to be a great Judge and a great lawyer. When, in February, 1928, he was promoted to the Lords as Lord of Appeal in Ordinary in succession to the venerable Lord Atkinson, it was a case of a youthful Irishman succeeding a very old one. Atkin was sixty-one and Atkinson eighty. Sixty-one, for a Lord of Appeal, is the dawn of judicial manhood, as ages go. Now, although Lord Atkin's people are of the County Cork, in the Irish Free State, he was in fact born in Brisbane, where his father was a member of the Queensland Legislative Assembly, and later Treasurer of the State. He was sent at an early age to England, or rather to Wales, and spent his school days at Christ College in Brecon. Then and thereafter the Principality was the country of his choice and it was a great day when the inhabitants of Aberdovey, of which he had been made Baron for life, welcomed him home with honour and acclamation.

Baron Atkin of Aberdovey.

He went from the Brecon school to Magdalen College, Oxford, took a "Second" in "Mods" and a "Second" in "Greats"; read law also; and after taking the Inns of Court examinations was called to the Bar at Gray's Inn in the year 1891. He then joined the South Wales and Chester Circuit and went into the Chambers of Mr. Scrutton (afterwards Scrutton, L.J.) as pupil. Scrutton was then, and for a long time in big practice in the Commercial Court, and it was in Commercial Cases and Courts that Atkin afterwards made his name and reputation. In chambers they recognized and used his great abilities as a lawyer and "pleader" in making notes of cases and drafting pleadings; but it was a long time before solicitors recognized his quality as an advocate. His quiet demeanour, his complete lack of the aggressive manner, and his low and gentle voice, did not accord with the general "Buzz-Fuzz" ideas of the "fighting" counsel. But in time Atkin had opportunities of showing that in the persuasion of Judges he was far more effective than his louder and less learned friends at the Bar; the clients he obtained, he held; and added to their number; and he was in very large practice as a junior in the Commercial Court when he took silk in 1906—fifteen years after his call. At that time it was written of him that he was the busiest junior in the Temple; and during the next seven years, as leader, he was as preeminent in the Commercial Court as Scrutton was before him and as Wright became in the years after the War.

Of his influence on the character and style of advocacy at the English Bar something must be said. There is nowadays an inclination to lament the brave days of old when the leading barristers were characters, full of individuality, personalities of great force. On examination of their history and record there is no doubt that they were peculiar and forceful; and that they captured the public imagination. They were in fact clever; somewhat unscrupulous in method, apt to browbeat witnesses, to fly into a fictitious forensic rage; to be loud and rude in pursuance of what they believed to be the art of advocacy; to impress solicitors and onlookers with the feeling that they were "fighting" men. Wholly opposed in method, temperament, and practice to the old school were such men as Sir Edward Clarke and, later, such men as Simon, Isaacs, and Atkin. It was in Atkin's time, which was also that of Simon and others, that the old style of advocacy was definitely and finally discredited. The rising generation of barristers observed with surprise and satisfaction that better results could be achieved by the quiet and courteous manner, and the conversational voice than by the roars and eruptions of the old school. More than perhaps any other, Atkin rendered this service to the art of advocacy in England. To a considerable extent, Marshall Hall was the last great exponent of the ancient style—although he was far from the rudeness and roughness of some of the earlier lions of the Bar—and it was of great interest to observe, how inferior in effect his style was as compared with that of a skilled practitioner of the subtler, gentler, and more modern school. The new style has proved itself better with Judges and as a rule it is more effective with juries; in criminal as well as civil actions.

So much for Atkin, his influence and his success at the Bar. He was appointed Judge of the King's Bench Division in 1913, at the early age of forty-five. Within a year the Great War broke out and he, like others of the best Judges, was in great demand as Chairman of Commissions and Committees. He demonstrated both then and since, exceptionally great judicial qualities combined always with a constant patience, dignity, and courtesy.

From 1916 to 1919 he presided over the Munitions Tribunal Appeals Court; from 1915 to 1919 was President of Naturalization of Aliens (Revocation) Committee; Chairman of the Cabinet Committee on Women in Industry, 1918-19; and also in 1918-19 member of a Committee on British and Foreign Legal Procedure. To enumerate one or two more of the important appointments he held or still holds. He was appointed Chairman of the Irish Deportees Compensation Tribunal in 1924—set up after the "trouble" and the Treaty, to consider the question of compensation which might be paid to "loyalist refugees" from the Free State. In the same year he was appointed Chairman of the Committee on Crime and Insanity; and he is still a member of the Councils of various Colleges; is President of the Medico-Legal Society and Chairman of the Council of Legal Education.

Most of his judgments, since his promotion to the Lordship of Appeal in 1928, as before, are models of learning and clear exposition. He is wholly free from mental or social snobbery; a man who is always learning.

Like Lord Birkenhead he is deeply attracted to his Inn (Gray's) of which he is now a most distinguished Bencher. He, like Lord Merrivale, lives there—and he takes a keen interest in all its activities. He appears as competitor in the various golfing events; he is or was recently a 6-handicap man, and he has not unfrequently won the Cup, Medal, or other Prize at meetings of the Gray's Inn and of the Bar Golfing Societies. Beyond all dispute Lord Atkin of Aberdovey is not only a great Judge and a profound lawyer, but a man and a sportsman.

Last month, at a dinner of the International Law Association in London, Sir Thomas Inskip, now Minister for Co-ordination of Defence, said of Lord Atkin, that he was not only one of the most learned Judges and one of the most acute in the performance of his great duties, but also one of the kindest, friendliest, and warmest-hearted members of the legal profession.

Doctors Fail in Word Test.

A charge of being drunk in charge of a motor-car at Ripley was dismissed at Woking yesterday, after a two hours' hearing, against Frank Basil Canning-Cooke, aged 29, a merchant of Calcutta and Burma, staying with his parents at The Poplars, Sandy Lane End, near Woking, says the *Daily Telegraph* (London) of August 8.

The police doctor and his own doctor admitted he made no mistakes in the word tests, "British Constitution" and "The Leith police conveneth us" and "The Leith police dismisseth us," but they frankly acknowledged that they failed over the test which he set them. It was the first two lines in Lewis Carroll's "Jabberwocky" in "Alice in Wonderland":—

'Twas brillig, and the slithy toves
 Did gyre and gimble in the wabe;
All mimsy were the Borogoves
 And the mome raths outgrabe.

Canning-Cooke repeated it in Court, though his counsel, Mr. Wilfred Bennett, reading from his brief, stumbled over it when cross-examining one of the doctors.

Rescuers at Law.

The Full Implications of Haynes v. Harwood.

By T. A. Gresson, B.A. (Cantab.)

"When constabulary duty's to be done" . . . you can usually rely on the London policeman doing it, but it is seldom that his action receives full recognition in the Law Reports.

The facts in *Haynes v. Harwood*, [1935] 1 K.B. 146, were as follows: A two-horse van was left unattended for a few minutes by the defendant's servant. The horses bolted, and were proceeding at a furious pace along the street, in which were a number of school-children, when the plaintiff, a police constable, who was on duty inside a police station, rushed out, pushed a woman aside to safety, and stopped the horses. In doing so he was considerably injured. Finlay, J., gave judgment in favour of the constable for £350, and this decision was affirmed by a strong Court of Appeal (Greer, Maugham, and Roche, L.JJ.), whose judgments have done much towards simplifying a most controversial branch of the law.

The position of a rescuer at law has always been one of difficulty: see Professor Goodhart's article, "Rescue and Voluntary Assumption of Risk," *5 Cambridge Law Journal*, 192. According to some authorities, the rescuer, in order to succeed against the original wrongdoer, must have acted on impulse. There must have been no time for reflection. In *Salmond's Law of Torts*, 8th Ed. 472, it is said:

> "The danger must be imminent and the plaintiff must have had but a short interval in which to grasp the situation. He must not have time to think. If his action was deliberate, even though rapid, it will be a *novus actus interveniens* and his error not that of the defendant will be held to be the cause of the accident."

The plaintiff's act of intervention will be a *novus actus* unless he took "instant action on the first alarm": *per* Lord Sumner, in *Singleton Abbey v. Paludina*, [1927] A.C. 16. "If what Mrs. Brandon did was done instinctively," *per* Swift, J., in *Brandon v. Osborne, Garrett, and Co.*, [1924] 1 K.B. 548, 552.

Other authorities considered that there must be a special relationship between the rescuer and the rescued giving rise to a duty to intervene:

Swift, J., in *Brandon v. Osborne, Garrett, and Co.*, [1924] 1 K.B. 548, at p. 554, said:

> "I do not say that there is a legal duty to risk one's own life to save that of a stranger: I should unhesitatingly say there was not but there may be a nearer approach to such a duty to save the life of one's child or wife or husband."

Slesser, L.J., in *Cutler v. United Dairies*, [1933] 2 K.B. 297, at p. 306, said:

> "There may be cases, where, for example, a man sees his child in great peril in the street and moved by paternal affection dashes out and holds a runaway horse's head in order to save his child and is injured; there there is no *novus actus interveniens*."

The relationship necessary here would seem to be the same as that required by some authorities before granting an action for nervous shock caused by witnessing an accident. And, at p. 303 of the same case, Scrutton, L.J., said:

> "A horse bolts along a highway and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances? On those facts it

seems to me that he is not . . . a man is under no duty to run out and stop another person's horse."

In the absence of a duty to intervene, Scrutton, L.J., considered that a third party effects a rescue at his peril.

Counsel for the defence in *Haynes v. Harwood* therefore contended :

(*a*) That the Defendant's servant had not been negligent ;

(*b*) That the act of the plaintiff in going to the rescue was a *novus actus interveniens* in that (i) he did not act on the spur of the moment, and (ii) he was under no duty to intervene.

(*c*) That the plaintiff had voluntarily assumed the risk and was within the maxim *Volenti non fit injuria.*

The following principles can be deduced from the judgments of the Court of Appeal in the case under notice :—

1. That, where horses are left unattended in a busy street and they bolt, this raises a presumption of negligence.

2. That the negligence consisted of a failure to use reasonable care for the safety of those who were lawfully using the highway, and that the policeman was a person within this category.

3. That the doctrine of *novus actus interveniens* has no application where the *novus actus* relied upon is the very kind of thing which is likely to happen if the want of care which is alleged takes place : Greer, L.J., p. 156 : " The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue." *Pollock on Torts*, 13th Ed. 498 ; Maugham, L.J., p. 163.

4. That the doctrine of *Volenti non fit injuria* " does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person is one to whom he owes a duty of protection as a member of his family or is a mere stranger to whom he owes no such special duty." It is quite immaterial whether he acted on impulse or whether he acted from a sense of moral duty : Greer, L.J., at p. 158.

Lord Justice Scrutton's *dictum* in *Cutler v. United Dairies*, [1933] 2 K.B., p. 303, was distinguished as having been made with reference to the particular facts in that case, and Greer, L.J., Maugham, L.J., and Roche, L.J., all agree that it is not an accurate statement of general principle. They are careful, however, to add that the mere fact of a spectator running out into a road to stop a runaway horse does not necessarily entitle him to recover damages for any injuries he may thereby sustain.

Principles 3 and 4 above represent a considerable extension of the law, and it is sometimes thought that they apply only to policemen effecting rescues. It is submitted that this is not so : " I am not expressing the opinion that if the plaintiff here had been a layman instead of a policeman the result would necessarily have been otherwise " : Maugham, L.J., at p. 164. And, speaking of principle 4 above, Greer, L.J., says, at p. 157, " It is of course all the more applicable to this case because the man injured was a policeman who might readily be anticipated to do the very thing which he did."

This decision is a welcome extension of liability. It would be a little surprising if a rational system of law in these circumstances denied a remedy to a brave man who had received his injuries through the original default of the defendant's servant. It would also be absurd to hold that if a man deliberately incurs a risk he is entitled to less protection than if he acts on sudden impulse : Greer, L.J., at pp. 152, 159. He is clearly the braver man who fully appreciates the risk and yet nevertheless attempts a rescue : Maugham, L.J., at p. 164. The law should not penalize him for his bravery.

As Cockburn, C.J., said in *Scaramanga and Co. v. Stamp*, (1880) 5 C.P.D. 295, 304 :

" The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity . . . the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences."

" Taking one consideration with another," a policeman's life should from now on be a happier one.

New Zealand Law Society.

Council Meeting.

(*Concluded from p. 235*).

Audit Regulations—Suggested Joint Committee.—The Accountants Society forwarded the following letter :—

" My Council has received from Branches and from individual members requests for interpretations arising out of the Regulations for the Auditing of Solicitors' Trust Accounts, and at a Council Meeting held on Friday last a resolution was passed suggesting that a joint committee should be set up from the New Zealand Law Society and from our Society.

" Any requests from members of either body or from District Societies for interpretations of the Regulations should be referred to the joint committee whose pronouncements would be circulated to District Branches so that uniformity could be obtained throughout the Dominion.

" I shall be pleased if you will bring this suggestion under notice of your Council and advise me whether it meets with their approval."

The Secretary suggested that it would be advisable to revise and clarify the Audit Regulations rather than interpret them, and it was resolved to inform the Accountants Society that a revision of Regulations was being undertaken by the Audit Committee, which would be pleased to confer with them on any necessary matters.

Motor-vehicles Insurance (Third-party Risks) Act, 1928.—The Hawke's Bay Society wrote :—

" I am directed by my Council to ask that the New Zealand Law Society take up with the Minister of Transport the matter of the classification of private motor-vehicles owned by law practitioners for the purposes of the above Act.

" Under the present classification, if a solicitor insures under Class 4 as is usually done, he pays a premium of 17/- and obtains cover limited to the use of the car for the purposes of pleasure or for private or domestic purposes or for his own carriage in relation to his profession. It appears that this leaves him unprotected if he uses his car occasionally for the conveyance of clients on matters relating to their business with him, in which case he may become liable to the serious penalties imposed by section 17 of the Act, a grave risk to be run. The alternative is to insure under Class 5 at an annual

cost of £2/1/-, and there seems to be no sound reason why a solicitor should have to pay the higher premium while a medical practitioner need only pay the lower one for full cover.

"It is therefore submitted that it is reasonable that the classification of motor-vehicles within Class 4 should be amended to include private cars used by a law practitioner for the purposes of his profession.

"It is hoped that favourable consideration will be given to this submission and that your Council will take action on the lines suggested in due course."

It was resolved to refer the matter to Mr. P. B. Cooke, K.C., for his professional opinion and to act in accordance therewith.

Liability of Hospital Boards for Negligence.—The following letter was forwarded by a District Society :—

"I shall be glad if you will take the necessary steps to bring the following matter before the New Zealand Law Society.

"A client of mine suffered an injury to his eye and was admitted to a General Hospital for treatment. In the course of such treatment he had to undergo a minor operation to his right arm following which the wound turned septic and developed an abscess which required to be lanced. He alleges that this was carried out so unskilfully and negligently by one of the house surgeons that a nerve in his right arm was severed, resulting in the total loss of the use of the first finger and the first joint of the right thumb and also in the partial loss of the use of the second and third fingers. Subsequently the first finger was amputated by the Hospital Superintendent as it was useless. He was an inmate of the Hospital for approximately two years.

"The particular house surgeon is not now in New Zealand and as far as could be ascertained was not worth taking action against. No claim for Workers' Compensation could be made and I have had to advise my client that he has no action against the Hospital Board.

"My client has presented a petition to Parliament seeking redress and it has received very favourable consideration from the Health Committee but is not yet concluded.

"My reason for asking you to bring this matter before the New Zealand Law Society is the unsatisfactory state of the law as exemplified by a comparison of the above case with *Logan* v. *The Waitaki Hospital Board*, [1935] N.Z.L.R. 385. My client was unable to recover damages because he was injured by the negligence of a doctor. Logan, who was injured by the negligence of a nurse, was successful in his claim for damages. There seems no doubt that the rights of patients who may be negligently injured in Public Hospitals should be uniform whether the negligence be that of a nurse or of a doctor. The need for legislative reform was pointed out 43 years ago by Mr. Justice Williams in delivering the judgment of the Court of Appeal in *District of Auckland Hospital Board* v. *Lovett*, (1892) 10 N.Z.L.R. 597, and again by Sir Michael Myers, C.J., in his judgment in *Logan's* case at p. 421."

It was decided to send a copy of the letter to the Minister of Justice for his consideration.

Agency Costs : Request for Ruling.—The following letter was received from the Auckland Society :—

"I enclose a statement setting out the facts in connection with a conveyancing transaction out of which there arose a dispute concerning the payment of certain agency costs. The matter was referred to my Council for a ruling, but the members were of opinion that in order to secure uniformity of practice it was desirable that the facts should be placed before your Council. I should be glad, therefore, if you would kindly place this matter on the agenda for the forthcoming meeting of your Council."

Statement of Facts enclosed :

"The clients of an Auckland firm of solicitors purchased a house and land situated in Auckland from an incorporated company having its registered office and carrying on business out of Auckland. The agreement for sale and purchase was prepared by an Auckland land agent, and was executed by the purchasers in Auckland and by the vendor company in Taumarunui, the purchasers signing first. The agreement provided for a cash deposit and for the balance of the purchase money to be secured by a first mortgage to the vendor company over the land sold. The agreement contained no provision as to the place for settling the transaction.

"The solicitors for the vendor company, a Taumarunui firm, require the purchasers to pay their Auckland agents' charges amounting to £1/10/- for the stamping and registration of the transfer and mortgage at Auckland.

"The solicitors for the purchasers oppose payment of this amount, contending that Rule 116 and supplementary Ruling 25 of the Council of the New Zealand Law Society fix the place for settlement at Auckland and that each party should bear his own expenses of arranging settlement there. They further claim that the Conveyancing Scale makes no provision for a purchaser mortgagor to be held liable for such agency charges as are claimed, and further that the vendor's solicitors could have forwarded the documents direct to the stamp office for stamping.

"The solicitors for the vendor company contend that Ruling 25 does not apply, and that this being a mortgage transaction, all proper mortgage costs are payable by the purchaser mortgagors, and that the agency costs in question are proper mortgage costs.

It was decided to refer the matter to the Otago Committee which had reported on the Conveyancing Scale.

Mortgagee's Sale : Sale being held in town different from that in which land situated.—The Wanganui Society forwarded the following letter from a practitioner :—

"I should like to bring before the Society a matter which has just come to my notice in which a mortgagee residing in Wellington of land situate in Wanganui has made application to the Registrar of the Supreme Court at Wellington to conduct a sale of the property. 'Particulars and Conditions of Sale' are available in Wellington only, but the sale has been advertised in a Wanganui newspaper. The sale is to be held in Wellington.

"It appears to me that in a matter like this the sale should take place as near as possible to the mortgaged land and 'Particulars and Conditions of Sale' should also be available wherever there are likely to be buyers, in this instance in Wanganui."

It was decided that no action should be taken.

Inquiries for Wills.

Wellington Law Society's New Scheme.

The Council of the Wellington District Law Society has decided to adopt a scheme which will assist solicitors acting in deceased estates in tracing any wills which may have been executed.

On payment of the sum of £1 1s. to cover disbursements, the Secretary will send to each legal firm and to each trustee corporation in the Wellington District a card requesting that search be made to ascertain whether there is held or has been held by such firm or corporation a will of the person in question, and, in the event of such will being held, that the Secretary be notified accordingly.

If it is desired that such cards should be sent only to firms and trustee corporations in the City and Hutt Valley, the charge for disbursements will be 15s.

In order that the scheme may prove of real assistance to practitioners, it is necessary that each firm should make careful search of its records ; and it is requested that particular care should be taken to see that this is done.

The Council, in adopting this scheme, is acting solely with a view to meeting the convenience of practitioners, and can accept no responsibility for any oversight or mistake that may occur.

It is understood that a similar scheme has been put into operation by the Auckland District Law Society.

Australian Notes.

By W. Blacket, K.C.

Harmless Arms.—J. A. Little, 33, at Kogarah, N.S.W., Police Court, was sent along for one month's imprisonment for assault. His wife had been at a dance, and A. J. Bowry, aged sixty, had given her his arm on the way home. Then Little came behind the pair and hit Bowry heavily. Sheridan, S.M., said that Bowry had done nothing wrong and that he himself had often done that same thing. So the law has been affirmed that

This courtesy may now be paid
To ladies without qualm.
There is (and so the Beak has said),
No harm in arm and arm.

Like the Fly in Amber.—Mrs. Cameron, of Newtown, N.S.W., bought a loaf from Moran Ltd., and in it she found a lizard. Like the girl's baby, it was "only a very little one," but Mrs. Cameron was "sick of the sight of it" and sued for damages. Moran Ltd. proved that the meshes of their machinery were so fine that the flour could hardly get through, but the Magistrate, believing the plaintiff's evidence, gave her a verdict for £10, and wisely remarked that accidents will happen in the best regulated machinery.

A Beauty without Paint.—Herbert Kopit, 23, who has since confessed, with great wealth of detail, to the murder of two passengers in the Brisbane Mail, got through to Sydney after the happening and on to Melbourne. There he disguised himself as a girl. He shaved his face, of course, and also his arms and legs—was this necessary? I don't know—and walked down Collins Street very nicely dressed in very fashionable garments, but, as he had not put on any powder or paint, the detective saw at once that he was not really a Melbourne girl, and arrested him on sight.

The Proper Name.—J. J. O'Shaughnessy, of South Yarra, Victoria, had pride in the fact that the bellow of the loud-speaker of his wireless set at its worst was fierce enough to annoy any neighbour within a radius of 200 yards. Therefore on one night he "normally tuned" it in, and retired to rest, or listen—his evidence on that point is quite devoid of details. Then Mr. Holt, a neighbour who apparently thought that the stilly night was designed to enable men and women to sleep—perchance to snore—broke into the Chateau O'Shaughnessy and said that Mr. O'S. was "a prawn." He was fined 5s., but the question still remains whether he ought not to have called him "a shrimp" for the same money.

"Wife" is not a Husband.—In *Automobile H.G. Insurance Co., Ltd. v. Davey*, before the High Court of Australia, the facts were that Mrs. Davey had taken out a policy providing for payments if "the insured or his wife" sustained injury. The husband died from injuries sustained in an accident covered by the policy. The insurance company thought that "wife" did not include "husband," and denied liability. The arbitrator also said that the company was not liable. The Supreme Court of Victoria said that it was. The High Court of Australia reversed this decision, and unanimously said that to read the word "wife" as "husband" would be to alter the words of the policy, and this indeed seems to be a wise statement. Words of commendation for the company that took this point may appear in a later issue. Or may not.

The Licensee's Right to Transfer.—An exceedingly interesting conflict of judicial opinion is the subject of controversy at Sydney. John Barry applied to the local Licensing Court for transfer of his wine license to other premises. The executors of McMurtrie, owners of the freehold, objected. The Court held that they had an interest in the license which made valid their objection, and refused the transfer. On appeal, Judge Curlewis held that, in the absence of any agreement with the licensee limiting his rights to apply for transfer, his lessor had no right to object, and allowed the appeal. Barry then made a new application, and the Court again refused it on the same ground. And now, "with parted lips and straining eyes," we are awaiting the third act of the drama. It is said that the Licensing Courts have always required the consent of the landlord to an application for transfer, but on the other hand Judge Curlewis has always been accustomed to speak in clear and forceful terms.

A Home-made Will.—R. S. Andrews, of Carnegie, Victoria, made his will on October 13, 1921, and used one of the ordinary printed forms. The will as completed read: "I hereby appoint Ormond Andrews, hardware manager, Newcombs, Warrnambool, executor of this my will. I give, devise and bequeath all my real and personal estate." There the body part of the document stopped; but the form was properly signed by testator opposite the attestation clause, and it was properly witnessed.

Ormond Andrews was a nephew, and had had nothing to do with the making of the will, and for him it was contended that the testator probably intended to give him the whole estate, which was worth about £3,000. Mr. Justice Gavan Duffy is reported to have said "that on the construction of the will he did not think that testator intended to make a farce of the matter, but to dispose of all his property. The will could be reasonably read to the effect that testator intended to give the property to his executor. Just adding the word 'him' or 'to him' would have put everything right. There was no mention anywhere in the will that the executor was to hold the estate in trust," and therefore held that the executor was beneficially entitled.

In Bankruptcy. (*a*) *A Passive Resister.* James Bray, of New South Wales, the Land of Wondrous Happenings, was made bankrupt in September, 1929, by a creditor to whom he owed £200. There were no other debts; and the assets realized amounted to forty times as much as this amount, and there is in addition a sum of £7,000 in the Equity Court awaiting his application. Recently the Official Receiver applied for annulment of the sequestration, and was thus relieved of the estate. The bankrupt has for years past refused to make this application. His only address was a G.P.O. box. He had refused to furnish a statement of affairs, and had been imprisoned for thirty days in consequence, and from this it would appear that there are some persons who take their pleasures very sadly. I think I mentioned that bankrupt is named James Bray.

(*b*) *Faith.*—E. J. McCristal, of Sydney, at his public examination in Bankruptcy made an offer to pay £100 to his creditors in respect of their claims, but at a later meeting had to say that he could not do this because the State Lottery in which he had held a ticket had been drawn and all the prizes had gone to other persons. It was an English visitor who said that an Australian thought he had amply provided for the future when he had taken a ticket in Tattersall's Sweep.

Wellington's First Crown Prosecutor.

Mr. R. D. Hanson.

By N. A. Foden, M.A., LL.M.

The Public Records Office in Chancery Lane, London, contains volume upon volume of papers relating to the origin and history of the British Dominions. Included among these are the official records concerning New Zealand. The many volumes of matter regarding the New Zealand Company form a large part of the New Zealand section. It is in these latter records that one officially meets with the name of Richard Davies Hanson, the first Crown Prosecutor at Wellington. A complete volume could be written about the career of this remarkable man. The part he played in the first and principal settlement of the New Zealand Company was no small one and for this alone his name deserves to be remembered. But his career after leaving this country to reside in South Australia was more remarkable still.

Hanson, when about thirty-five years of age, was appointed Land Purchase Officer to the New Zealand Company and sailed for this country in the *Cuba*, survey vessel of that enterprising corporation, arriving at Port Nicholson on January 3, 1840. The negotiation of the purchase of the " Bay, Harbour, and District of Port Nicholson " had been concluded by Colonel Wakefield prior to the arrival of the *Cuba*, but the Land Purchase Officer was soon engaged in treating for the purchase of other tracts of land in various parts of the country on behalf of the Company. The most notable of these was the purchase of the Chatham Islands.

The important part of Hanson's activities, however, from the point of view of legal history was that associated with the establishment of the Council of the Colonists and the scheme of Self-Government which the first settlers were determined to bring into operation consequent upon the similarly determined attitude of the Home Government not to recognise officially the attempt of private individuals to found a Colony in a country inhabited by " sovereign chiefs and tribes." This, however, is a separate story.

The account of the trial *Regina v. Pakowai*, the first jury trial in Wellington in the Court of Quarter Session, October 5, 1841, in which Hanson made his debut in the official role, is likewise an event of great interest.

Hanson's stay in New Zealand was all too short. In 1846 he left for South Australia, a Colony in which he had displayed an interest even before his appointment to the position in the New Zealand Company. In the land of his new endeavour he reached the two highest offices open to a lawyer and a statesman, those of Chief Justice and Prime Minister, and a third one, possibly no less distinguished, that of Chancellor of the University of Adelaide.

New Zealand's loss was South Australia's gain, but R. D. Hanson remained long enough in this country to leave an indelible mark on the front page of New Zealand's legal history—a page beginning with the Provisional Constitution of the Port Nicholson Settlers. The hand, or rather the head, of this clever lawyer, was very much in the picture in the critical months between the landing of the intrepid settlers in January, 1840, and the Proclamation of final Sovereignty by Lieut-Governor Hobson in May of the same year.

The son of a nonconformist fruit merchant and importer, Hanson was born in St. Botolph's Lane, London, on December 6, 1805, and was educated at the private school of a minister of the same persuasion. In 1822, at the age of seventeen, he was articled to John Wilks who became M.P. for Boston. After being admitted as an attorney in 1828 he practised for a time in London. From 1830 to 1834 he took part in promoting the scheme for the colonisation of South Australia on the principles first expounded by Edward Gibbon Wakefield. He was even then regarded as a man of unusual ability and was selected to address a meeting at Exeter Hall to popularise the new scheme. Journalistic work also occupied his time and he edited the *Globe* and was also connected with the *Morning Chronicle*, one of the then leading papers.

In 1838, Hanson was appointed Assistant-Commissioner of Inquiry into Canadian Crown Lands and Immigration, and he conducted a special investigation and delivered a Report which was regarded at the time as a very able State Paper. At the end of 1839, not long after the completion of this work, he was appointed to the position in which we first meet him in New Zealand. In due course these labours came to an end, and Hanson commenced the practice of the profession in Wellington. His ability was again soon recognised by his being selected as Crown Prosecutor upon the establishment of the Court of Quarter Session for the Southern District.

After a few years, in 1846, his fancy and the persuasion of a friend induced him to remove to South Australia. Soon after arriving he identified himself with political movements in the Colony, and, in September, 1846, he acted as Secretary of a League to resist State grants in aid of religion. The practice of his profession and work for the Press filled in the next few years until 1851, when he was elected to the partially elective Council which was inaugurated in South Australia in that year. A petition based on a technicality was lodged against him ; but the situation was satisfactorily settled by the appointment of Hanson as Advocate-General, which gave him an *ex officio* seat on the Council.

From 1851 to 1856 as the chief legal adviser of the Government the Advocate-General, Hanson, introduced and carried a large number of valuable measures through the Legislature. When the new Constitution came into force in the latter year the Advocate-General became Attorney-General ; and, shortly after, at the General Election he was returned as member for the City of Adelaide. The new Parliament met in April, 1857 ; but the Ministry resigned early in August, and, after Torrens had tried to form a Cabinet, Hanson was called upon to assume the Leadership of the House. The Ministry which he formed lasted longer than any subsequent Ministry. He conducted the business of the House through three sessions, but was defeated in the new election in May, 1860. In 1861, Hanson who had long been the acknowledged leader of the South Australian Bar, accepted the appointment of Chief Justice. After an absence from England of thirty years he visited the Old Country in 1869 where, on July 9, he was knighted.

One of the very first members of the New Zealand Bar, Sir Richard Hanson's association with the profession in the infancy of the Colony, should not be allowed to slip into oblivion. He passed to his long rest on March 4, 1876, " the able statesman, the powerful advocate, the upright Judge."

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Agreement between Afforestation Company and Contractor for planting of Company's Lands with Trees.

(*Concluded from p. 238.*)

7. The price to be paid by the Company to the Contractor is the sum of £ and shall be payable as follows :—

(1) When the Contractor shall have wholly planted the said lands to the satisfaction of the Company he shall be entitled to a progress payment of an amount to be agreed upon between the parties according to the value of the work done but if any dispute shall arise as to the amount payable then the same shall be referred to and settled by arbitration in accordance with the provision in that behalf hereinafter contained.

(2) The Contractor having duly performed and observed all his obligations hereunder and having in a good and husbandlike manner and to the satisfaction of the Company wholly planted the said land and maintained the same for afforestation he shall at the end of one year from the date hereof be entitled to a payment of seventy-five per centum of the total price less any payment theretofore made under the last preceding subclause.

(3) The balance namely twenty-five per centum of the price payable shall be paid at the expiration of the term of this agreement provided that the Contractor shall have duly observed performed and kept all the provisions herein contained and implied.

(4) The last preceding subclause shall be read and construed subject to s. 59 (2) of the Wages Protection and Contractors' Liens Act 1908.

8. (1) The Contractor shall not assign or sublet this contract or any part thereof without the consent in writing of the Company first had and obtained.

(2) The Contractor will duly and punctually pay all wages and subcontract prices (if any) payable by him to any person whomsoever in respect of any part of the said work done or performed by workers or subcontractors (if permitted by the Company).

9. The Contractor will during the currency hereof take out and keep on foot and pay all premiums and other sums of money in respect of an adequate policy of insurance covering claims for compensation for accidents under the Workers' Compensation Act 1922 and liability of the Contractor to employees at common law for the purpose of covering all persons who may be employed on the said lands during the term of this agreement and will if requested so to do produce to the Company the policy or policies of such insurance and the receipts for payment of such premiums and other sums of money necessary for keeping the same on foot and in default thereof the Company may take out such a policy or policies and the amounts of premium or premiums and other sums of money thereon from time to time shall be a debt due by the Contractor to the Company and shall bear interest from the date of disbursement by the Company at the rate of £8 per centum per annum until repayment.

10. The Contractor will upon completion of the planting hereinbefore mentioned cause to be prepared and will supply to the Company a subdivisional survey plan of the said lands compiled in accordance with the customary methods of afforestation survey showing the areas of the said land which have been duly planted the intervening fire breaks and roadways and the respective positions thereof.

11. The Contractor will in respect of all the said work take reasonable care by himself and his agents servants and subcontractors (where permitted) but will not be responsible for any loss or damage caused by any act or circumstance beyond his own control.

12. (1) All materials machinery tools and workmen to be used and employed in carrying out the work under this contract shall be supplied by the Contractor at his own sole expense inclusive of all trees and seedlings to be planted.

(2) All such trees and seedlings shall prior to the planting thereof be first inspected and approved by a representative of the Company and no tree or seedling shall be so planted without such prior inspection and approval provided however that the replacement of weak unhealthy diseased or dead trees as hereinbefore provided shall not be a breach of this provision.

(3) All such trees and seedlings shall be of the first grade strong healthy properly wrenched and true to the species in accordance with the above specification and shall be planted in accordance with the best forestry methods.

13. (1) The Contractor and the Company may at any time and from time to time during the progress of the work by memorandum in writing under the hand of the Managing Director or General Manager of the Company make or cause to be made any alteration in the specification of the work or the class of tree or trees to be planted by way of addition substitution omission or otherwise and the said works as so added to substituted or omitted shall be executed in the like manner as if the same had been included in this agreement.

(2) No variation of this agreement will be recognized by the Company nor will any claim for extra or further work done or materials supplied by the Contractor under any such variation be admitted or paid unless such variation is in writing signed on behalf of the Company as aforesaid.

14. The Contractor shall on completion of the work under this agreement at his own sole cost and expense remove and clear away all unused materials and rubbish from the said land and leave the said lands in clean and proper state.

15. In the event of any dispute or difference arising between the parties hereto regarding any matter or thing arising out of this agreement or the interpretation of any clause matter or thing herein contained or hereby contemplated such dispute or difference shall be referred to and settled by arbitration in the manner provided by the Arbitration Act 1908 and any statutory amendment or enactment thereof.

16. All notices required to be given under this agreement shall be sent by letter duly addressed and by prepaid registered post and in the case of the Company shall be directed to the registered office of the Company and in the case of the Contractor directed to the said lands during the term of this agreement and thereafter to the Contractor's last known place of residence.

As witness &c.

SCHEDULE.

First all that &c. Secondly all that &c.
Thirdly all that &c.

The common seal &c. Signed &c.

Legal Literature.

Sir Ernest Wild, K.C. By Robert J. Blackham, Barrister at Law. An Under-Sheriff of the City of London. With a foreword by Lady Wild. pp. 271 (including Index). Illustrated. Rich and Cowan, Ltd.

The life of the late Sir Ernest Wild, K.C., Recorder of London, who is described as poet, politician, orator, advocate, and judge, offers splendid material for the biographer, and Mr. Blackham has certainly performed his task with great sympathy and understanding. Suitable reference has also been made to Mr. Dennis Cave, who faithfully served Wild during his entire forensic and judicial career.

Sir Ernest Wild had a remarkably successful career at the Bar, being an exceptionally eloquent pleader. It is said that he appeared for thirty alleged murderers, and that only three of them were hanged. He had the distinction also of appearing for a young man who recovered the sum of £100 as damages in a breach of promise action brought by him against a woman old enough to be his mother.

His career at the Bar was meteoric, and in 1922, though much to the surprise of the legal profession, he succeeded Sir Forrest Fulton in the Recordership of London. Sir Edward Marshall Hall was also a candidate, but withdrew in favour of Sir Henry Dickens, who had been Common Serjeant since 1917. Wild was at his best in performing the duties of his high office. He possessed great dignity of bearing and was outstanding in his ability to marshal evidence clearly for the benefit of a jury. A great orator, he revelled in pomp and ceremony. He had a proper appreciation of the majesty of the law and proved himself a most humane Judge. Although he was very favourably disposed towards the Police force, he had strong views as to police witnesses. " Police officers are not entitled to any more respect in a Court of Law than any other witnesses, although they sometimes think they are ! " He added : " Counsel would be lacking in their duty if they did not cross-examine them just as much as other witnesses."

A devout High Churchman, he was nevertheless a *bon-vivant* and a " magnificent mixer." It is only to be expected that some good stories would be found in the book. The Bar Golfing Society meets every third year at Rye, and Wild said he inquired the correct name of the water which had to be crossed at the first hole. " Some calls it by one name and some another," said the caddie, " it depends on the drive. There's one of you legal gentlemen, when he clears it, he says he has carried the brook, and when he tops into it he says, ' Pick my ball out of that ruddy sewer ! ' " Wild's favourite Irish story was about De Valera, who, chatting with the jarvey on a jaunting car, said in answer to a question as to whether he was Irish, " I have a certain amount of Spanish blood and a certain amount of French blood in my veins ; but, thank God, my mother was Irish." Which drew the remark from the jarvey, " She must have been a queer traveller ! "

Wild's last request was typical of him. It was that instead of sending flowers, his friends should send donations to the Sheriffs' and Recorders' Fund, a charitable fund at the Old Bailey to help prisoners and their dependants.

After the Memorial Service at St. Lawrence Jewry, " the fine old Wren church, which is specially associated with the Corporation of London," and after the great company of mourners had departed, a sad forlorn figure entered and paid on his knees a solitary tribute. He was an " old lag " who had found in Wild a friend and a benefactor. Surely as fitting and adequate a tribute as any to a great man and a humane Judge. And there is another and earlier dramatic scene described. Brady, the old convict, who had spent forty years in prison, is dying in hospital, and Wild, the great Judge, who was his first friend, comes to comfort him in his last hours. Soon after that memorable visit, the " old lag " dies with a prayer of gratitude to Sir Ernest Wild on his lips. Incidents such as these make one feel that Mr. Blackham has but done justice to a great and lovable personality.

Guesswork in a Murder Trial.

Conflicting Expert Evidence.

Another justification for the retention of the right to appeal to the Judicial Committee of the Privy Council is found in a recent appeal from Ceylon, where their Lordships, last month, gave their reasons for allowing the appeal of Stephen Senevirantne, barrister, who appealed from a decision of the Supreme Court of Ceylon finding him guilty of murdering his wife in June, 1934. Mrs. Senevirantne's death was due to chloroform.

The appeal was heard by Lord Maugham, Lord Roche, and Sir George Rankin, whose decision, that the conviction and sentence be quashed, was announced recently.

Giving their reasons, Lord Roche stated that there was no evidence of any kind justifying a conviction. Hearsay evidence was admitted which was inadmissible, and the jury were not properly directed as to how to discount the conflicting and inconclusive medical evidence.

" The expert evidence was so conflicting where it was not hesitating and doubtful that the Judge should not have invited the jury, on matters involving medical knowledge and skill, to come to a conclusion for themselves to which the medical men could not point the way, either with certainty or with even an approach to agreement among themselves," said Lord Roche.

" Any conclusion on the available materials would be, and is, mere conjecture or guess, which are not in law or justice permissible grounds on which to base a verdict."

Counsel had pleaded that, in view of Mrs. Senevirantne's statement that she was " tired of life," her death might have been the result of suicide or misadventure.

An All-fours Case.—At Mildura, N.S.W., a man was fined £3 for having taken his horse into an hotel bar. The defence that the horse was " a bona fide traveller " seems not to have been raised.—W.B.

Correspondence.

[It is to be understood that the views expressed by correspondents are not necessarily shared by the Editor.]

Was it a Wrong Decision?

The Editor,
N.Z. LAW JOURNAL,
Wellington.

Sir,

I have much pleasure in associating myself with the views expressed by Mr. A. K. Turner, of Auckland, in his letter to you published in the last issue of the N.Z. LAW JOURNAL.

With the greatest respect to the Council of the N.Z. Law Society and to its Secretary, I cannot see how the ruling of which Mr. Turner writes can be read or regarded as a decision on the point mentioned by the Secretary, and I think practitioners generally would appreciate a real and firm ruling in the light of the criticism expressed in Mr. Turner's letter.

Yours, &c.,
H. D. ANDREWS.

Christchurch,
September 10, 1936.

The Limitations of Prosecutions.

A CORRESPONDENT writes as follows:—

Section 50 of the Justices of the Peace Act, 1927, provides that every information is to be laid within six months from the time when the matter of such information arose, except as otherwise provided. The exceptions since the date of the statute are so numerous that the subject is worth considering.

The Post and Telegraph Act, 1928, contains a limitation of three years: this is a repetition of a previous statute. The Electrical Wiremen's Registration Act of the same year fixes twelve months; this was extended in 1934 to three years.

In 1932 a period of two years was fixed for penalties on Investment Societies failing to forward quarterly returns. Penalties under the Sales Tax Act are recoverable within five years.

In 1933 Parliament decreed that penalties under the Scenery Preservation Act could be recovered within four years, and under the Companies Act five years. There was a similar period under s. 81 of the Act of 1908, but the provision is now general. Under the Motor Spirits (Regulation of Prices) Act the period is three years.

In 1934, under the Poisons Act there is no limit: the Unemployment Act provides for four years, the Cinematograph Act two years.

There are two extensions in the 1935 statutes. The Whaling Industry Act has a limit of six months from the date of landing in New Zealand, and our own Law Practitioners Act extends the period to two years.

The statutes referred to all deal with offences against the public and it is obvious that the Crown finds the original period too short. It is questionable whether it is not too short in all cases.

Practice Precedents.

Application for Special Leave to Appeal to the Court of Appeal.

Rule 19 of the Court of Appeal Rules states:

> "No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-eight days; and no other appeal shall, except by such leave, be brought after the expiration of four months. The said respective periods shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or in the case of the refusal of an application from the date of such refusal."

"The rule applicable to an application for special leave to appeal is that the Court has power to give special leave, and in exercising its judicial discretion is bound to give the special leave if justice requires that that leave should be given: *In re Manchester Economic Building Society*, ((1883) 24 Ch.D. 488, 497); *In re J. Wigfull and Sons' Trade-marks* ([1919] 1 Ch. 52); *West v. Dillicar*, ([1921] N.Z.L.R. 617, G.L.R. 359)," *per* Myers, C.J., in *Attorney-General v. Mayor, &c., of Christchurch*, [1930] N.Z.L.R. 931, 932.

Leave may be given upon conditions: *Fox v. McDowell*, [1920] N.Z.L.R. 668, G.L.R. 157.

The fact that a solicitor miscalculated the time for appeal is not a sufficient reason for granting special leave: *Pitcher v. Dimock*, (1913) 32 N.Z.L.R. 1127, 16 G.L.R. 57, C.A.

It is required that the documents be on demy quarto paper, and, although they are headed in the Court of Appeal, the parties are shown as Plaintiffs and Defendants. The documents are usually typed, one original and six copies (if legible) of each document are adequate in these kind of applications. The size of the paper used is similar to that referred to in R. 15 of the Court of Appeal Rules. This precedent is not in respect of a case on appeal: see R. 13 of the said rules.

It is to be noted that the application is not *ex parte*, and in the event of non-appearance of the opposite party an affidavit of service is required.

In the forms hereunder it is assumed a period considerably more than the four months has elapsed and that there are merits in the delay and the matter is of public importance. Judgment is assumed to have been obtained by way of injunction restraining the erection of certain public rest-rooms and conveniences, &c., in the City of .

NOTICE OF MOTION FOR SPECIAL LEAVE TO APPEAL.

IN THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN His Majesty's Attorney-General for the Dominion of New Zealand *ex Relatione* A.A. of Accountant
Plaintiff

AND The Mayor Councillors and Citizens of the City of
Defendants.

TAKE NOTICE that Counsel on behalf of the above-named Defendant Corporation will move this Honourable Court at on day the day of 19 at 11 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER granting special leave to appeal against the whole of the judgment of the Supreme Court of New Zealand at in this action dated the day of 19 UPON THE GROUNDS:

1. That since the date of judgment certain persons representing public bodies in the City of , the Defendant

Corporation, and the Relator with the object of settling a scheme for the modernizing and improvement of certain public conveniences and land in Courtenay Place in the City of and of promoting a local Bill for perfecting any such scheme that might be come to formed themselves into a Committee.

2. That the said Committee has failed to agree upon any satisfactory scheme although the Committee discussed various and numerous schemes at numerous meetings.

3. That more than six months have elapsed since the judgment in the action was sealed.

4. That the matters involved in the litigation related to public rights affecting every citizen of the City of and that there were merits in the reasons for not commencing an appeal within the proper time.

5. That no damage has been done to the Plaintiff in this action or his Relator which cannot be compensated for by costs or otherwise.

AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein.

Dated at Wellington this day of 19 .

Counsel moving.

This notice of motion is filed by &c.
TO The Registrar
AND TO the Plaintiff
AND his Solicitors .

AFFIDAVIT IN SUPPORT OF MOTION.
(Same heading.)

I A.B. of the City of Barrister and Solicitor make oath and say as follows:—

1. That I am the Mayor of the City of .

2. That following the delivery of the judgment of this action on the day of 19 a conference was convened by me with the object of arriving at a scheme to be subsequently confirmed by legislation involving the modernizing and improvement of certain public conveniences and land in Courtenay Place in the said city as would be agreeable to the Relator and those citizens supporting him the Defendant Corporation and all local bodies concerned.

3. That as a result of such conference a Committee representative of all parties aforesaid was formed with the object aforesaid.

4. That I presided at every meeting of the said Committee which met on many occasions.

5. That the deliberations of the Committee resulted in several schemes being agreed to but each scheme involved exchange of land or the taking of certain lands adjacent thereto.

6. That although the various schemes were discussed with all concerned no definite arrangement to perfect any one of the schemes could be arrived at and the Committee therefore on the day of 19 decided to disband and cease to function forthwith.

7. That it is desirable that modern rest-rooms and conveniences for women and a children's play area and the replacement of the present old buildings in Courtenay Place aforesaid be undertaken as a matter of public importance to the said City.

Sworn &c.

AFFIDAVIT OF IN OPPOSITION TO MOTION.
(Same heading.)

I C.D. of the City of Solicitor make oath and say as follows:—

1. That I am a member of the firm of Solicitors which firm acts as Solicitor for the above-named Plaintiff in this action.

2. That on the day of 1935 a draft judgment in this action duly approved by the Solicitor for the Defendant Corporation was returned to me.

3. That the Solicitor for the Defendant Corporation informed me shortly after the receipt by me of the said judgment that no appeal was contemplated though the question of appeal had been discussed.

4. That some time after judgment in the action was given conferences were held between the local bodies and others interested with a view to devising some scheme for modernizing and improving certain public conveniences and land in Courtenay Place in the City of .

5. That as Solicitor for the Plaintiff I attended the conferences when numerous schemes were suggested but at no time was it suggested that I was present for any purpose other than to safeguard the Judgment already had and obtained.

6. That at no conference was it suggested that if any scheme was not agreed to the Defendant Corporation would appeal against the said judgment.

7. That on the day of 1936 I received a letter from the Solicitor to the Defendant Corporation advising me that he had been instructed to apply for leave to appeal against the judgment in the action and further advising me of the date of hearing in the Court of Appeal at Wellington of a motion for special leave to appeal against the said judgment.

8. That no other advice than aforesaid was given me that an appeal against the judgment would be brought.

Sworn &c.

ORDER GRANTING SPECIAL LEAVE TO APPEAL.
(Same heading.)

Before The Right Honourable the Chief Justice.
The Honourable Mr. Justice
The Honourable Mr. Justice
day the day of 1936.

UPON READING the Notice of Motion and the affidavit of filed in support thereof and the affidavit of filed in opposition thereto AND UPON HEARING Mr. of Counsel for the Defendant Corporation and Mr. of Counsel for the Plaintiff IT IS ORDERED that the Defendant Corporation DO HAVE LEAVE TO APPEAL from the whole of the Judgment of the Supreme Court of New Zealand sealed in the action at on day the day of 19 subject to the following conditions:—

1. The Defendant Corporation must whatever the result of the appeal pay the full costs of the Plaintiff and the Relator as between Solicitor and Client in both the Supreme Court and this Court.

2. The order must be taken out and sealed within fourteen days from the date of this order.

3. The appeal must be proceeded with and brought to trial at the next sittings of this Court to commence on the day of 1936.

By the Court.
Registrar.

NOTE.—An undertaking as to costs pursuant to the aforesaid order must be filed before or at the time of perfecting the order granting leave.

Rules and Regulations.

Fisheries Act, 1908. Trout-fishing in the Waimarino Acclimatization District: Regulations amended.—*Gazette* No. 54, August 13, 1936.

Factories Act, 1921-22. Extension and Modification under s. 47 of the Finance Act, 1936.—*Gazette*, No. 54, August 13, 1936.

Customs Act, 1913. Prohibition of exportation of Potatoes.—*Gazette* No. 54, August 13, 1936.

Victoria University College Act, 1933. By-laws for conduct of Election of Members of College Council.—*Gazette*, No. 56, August 13, 1936.

Land and Income Tax Amendment Act, 1935. Exemption of Traders resident in or Nationals of Switzerland.—*Gazette* No. 55, August 20, 1936.

Christchurch Tramway District Act, 1920. Amending Regulations.—*Gazette*, No. 55, August 20, 1936.

Customs Act, 1913. Importation of Fruit-case Timber Prohibited.—*Gazette* No. 5, August 27, 1936.

Education Act, 1914. Intermediate Examinations Regulations, 1932, Amendment No. 1.—*Gazette*, No. 57, August 27, 1936.

Board of Trade Act, 1919. Board of Trade (Bread-price) Regulations, 1936. *Gazette* No. 57, August 27, 1936.

Customs Acts Amendment Act, 1931. Exemption of certain Goods from Primage Duty.—*Gazette* No. 56, August 27, 1936.

Trade Arrangement (New Zealand and Belgium) Ratification Act, 1933. Modification of Trade Arrangement between New Zealand and the Economic Union of Belgium and Luxemburg.—*Gazette* No. 56, August 27, 1936.

Finance Act, 1936.—Factories Act, 1921-22. Amending Extension and Modification of the Factories Act.—*Gazette* No. 59, September 3, 1936.

Customs Act, 1913. Customs (Tariff Preference and General) Regulations, 1936.—*Gazette* No. 59, September 3, 1936.