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"The so-called uncertainty of the law is not in the main due to any defects in the law or in lawyers, but to the apparently inconquerable disability of laymen to express themselves with inevitable clearness. The Courts find from time to time that gentlemen of great position in the commercial world use contracts which date from the year One. When people use these old forms it is as though a man who desires to proceed on a long and important journey should use a vehicle compounded of a wheelbarrow, a Roman chariot, a stage-coach, and a Rolls-Royce."

—LORD ATKIN.

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Covenants in Restraint of Trade.

III.—The Modern Doctrine of Severability.

THE Court of Appeal in *Attwood v. Lamont*, [1920] 3 K.B. 571, made it clear that, since the decisions of the House of Lords in *Mason v. Provident Clothing and Supply Co., Ltd.*, [1913] A.C. 724, and *Herbert Morris, Ltd. v. Saxelby*, [1916] A.C. 688, the doctrine of severability requires careful and limited application, if not entire reconsideration, especially in contracts of service.

In *Attwood v. Lamont*, in the Court of Appeal, Lord Sterndale, M.R., in referring to the "blue-pencil rule," said that this was a figurative way of expressing the principle, and like most figurative expressions might quite possibly lead to misunderstanding. He preferred the principle of severability enunciated by Sargant, J., in *S. V. Nevanus and Co. v. Walker*, [1914] 1 Ch. 413, 423; and he thought it clear that, if the severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, the different parts of it cannot be said to be independent and, accordingly, the subject of severance. He considered that the severance effected by the Divisional Court did not come within that principle. It was left to the other members of the Court to state with more particularity the modern doctrine of severance in covenants in restraint of trade. Atkin, L.J., concurred with the judgment of Younger, L.J., as Lord Blanesburgh then was. Disagreeing with the view expressed in the Divisional Court that severance is always permissible when it can be effectively accomplished by the action of a blue pencil, Younger, L.J., expressed the modern view when, at p. 593, he said:

> "The doctrine of severance has not gone further than to make it permissible in a case where the covenant is not really a single covenant, but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word it is permissible. But in that case only."

Applying this to the covenant on which the blue pencil had been put into operation in the Court below, His Lordship said that there was but one covenant for the protection of the respondent's entire business, and not for the protection of his several businesses, and, as the respondent, on the evidence, was not carrying on several businesses but one business, the covenant must stand or fall on its unaltered form. He proceeded:

> "The necessary effect of the application of the principle on which *Mason's* case, [1913] A.C. 724, and *Morris v. Saxelby*, [1916] A.C. 688, had both been decided had been to render absolute the cases in which the Courts had severed these restrictive covenants when acting on the view that, being *prima facie* valid, it was their duty to bind the covenantor to them as far as was permissible. It may well be that these cases are still applicable to covenants between vendor and purchaser, for upon such covenants the effect of Lord Macnaghten's test upon the law as previously understood has been little more than a matter of words, and Lord Moulton's observations [*cit. ante*, p. 205] have no direct application to such covenants. But these authorities do not seem to me to be any longer of assistance in the case of a covenant between employer and employee. To such a covenant I think the statement of Lord Moulton in *Mason's* case necessarily applies."

His Lordship's view, later expressed, was that the principle which, in the view of the House of Lords rendered the closest scrutiny of service contracts essential, made it necessary, if that scrutiny when fruitful is to be operative, that severance where the covenant as a whole is invalid should not in the general case be allowed.

It follows that the principle of *Mason's* case was not directly applicable to the covenant in *Goldsoll v. Goldman*, [1915] 1 Ch. 292, the decision in which, like that of *S. V. Nevanus and Co. v. Walker* (*supra*), was given before the decision of *Herbert Morris, Ltd. v. Saxelby* (*supra*), strengthened and reinforced the distinction made in *Mason's* case between service contracts and vendor and purchaser ones.

It is interesting to observe Younger, L.J., fully shared the view of Sankey, J., that the Court should not lightly absolve parties from the performance of contracts solemnly entered into; but he noted the differentiation to be made. He said, at p. 597:

> "Lord Watson's words in the *Nordenfelt* case, [1894] A.C. 535, 552, must also command immediate assent: 'that the community has a material interest in maintaining the rules of fair dealing between man and man'; and that 'it suffers far greater injury from the infraction of these rules than from contracts in restraint of trade.' Even so, however, there has developed in late years in these employees' covenants a distinct tendency to make them penal rather than protective, and if that mischievous tendency can only be effectively checked by absolving in a few cases from their bargains employees who have no equity to claim release, the result is still not altogether regrettable."

A new approach to the question of the severance of good and bad independent parts of a covenant in restraint of trade was hinted at by McCardie, J., in *Express Dairy Co. v. Jackson*, (1929) 99 L.J.Q.B. 181. He looked at the covenant as a whole to see if there were any separate paragraphs, or sentences, or punctuation. And he came to the conclusion that its terms were not severable as the whole of the restrictive words appeared to constitute one clause of interconnected and interwoven words. The judgment is a valuable one, for its approval of the doctrine as expressed in *Attwood v. Lamont* (*supra*), after a carefully written examination of the decisions during the previous twenty years.

Where the Court finds that a contract in restraint of trade is unreasonable, and that no severability of terms is possible, such a contract is, in the words of Lord Halsbury, L.C., in *Mogul Steamship Co., Ltd. v. McGregor, Gow, and Co.*, [1892] A.C. 25, "void in restraint of trade: and contracts so tainted the law will not lend its aid to enforce."

In *Vincents of Reading v. Fogden*, (1932) 49 T.L.R. 613, a contract of service, Humphreys, J., was asked to consider whether the clause under notice could be severed so as to make it possible to enforce such part of it as was objectionable; but His Lordship held that this would involve the making of a new contract between the parties, and it was unenforceable and void because it was not reasonably necessary for the protection of the plaintiff's business.

A preference for the view expressed by Lord Sterndale, M.R., in *Attwood v. Lamont* (*supra*), to the statement of the law expressed by Younger, L.J., in that case, was shown by Salter and Talbot, JJ., sitting as a Divisional Court in *Putsman v. Taylor*, [1927] 1 K.B. 637, on appeal from a County Court. The defendant was employed by the plaintiff, a tailor carrying on business at three places in Birmingham, as manager and cutter; and, in consideration of the employment, he promised that he would not for five years, (*a*) set up as a tailor himself, (*b*) enter into the employment of a named neighbouring trade rival, and (*c*) be employed in any capacity with any tailor carrying on business in either of the named places. Without any discussion as to the reasonableness of the clause taken as a whole, Their Lordships held that the promise not to take service with any tailor in one of those places could be severed from the other promises and enforced, in that it did not affect the original effect and meaning of the agreement, but only limited the scope of its operation. These judgments, when examined, seem to effect a compromise between the blue-pencil rule and the doctrine as enunciated in *Attwood v. Lamont* (*supra*), and, in less degree, between Lord Sterndale's view and that of Younger and Atkin, L.JJ. On appeal, the Court of Appeal (Bankes and Sargant, L.JJ., and Avory, J.,) considered that the clause in the agreement under consideration, when read as a whole and properly construed, was limited as regards time and space, and, in the particular circumstances, was not an unreasonable protection by the employer to require; so the question of severability as raised in the Divisional Court was not dealt with by their Lordships: [1927] 1 K.B. 741.

In *Lambourne's Ltd. v. Cascelloid Ltd.* (which does not seem to have been reported except in the *Birmingham Post*, January 23, 1934), Maugham, L.J., as he then was, expressed some doubts, in the Court of Appeal, of the correctness of *Attwood v. Lamont* (*supra*); and he pointed out that certain more recent decisions appear to be to some extent in conflict with it. It is said, in reference to these remarks, in (*1934*) *77 Law Journal* (London), 75:

> "It has become the custom of recent years to regard Younger, L.J.'s, judgment in *Attwood v. Lamont* as the *locus classicus* on severance; the remarks, therefore, of Maugham, L.J., may serve as a reminder that in fact that case is to some extent in conflict not only with recent decisions, but also with the earlier Court of Appeal decision, *Goldsoll v. Goldman*, [1915] 1 Ch. 292. This point is, therefore, not yet settled, but still awaits the finality of a decision in the House of Lords."

Since the above was written, it does not appear that their Lordships have been given the opportunity, either in their Lordships' House or in the Judicial Committee, of saying the final word on the doctrine of severance. Consequently, we must turn to our own Court of Appeal for guidance as to the present state of the law as it affects ourselves.

The question arose in the Court of Appeal in *Shalfoon v. Cheddar Valley Co-operative Dairy Co., Ltd.*, [1924] N.Z.L.R. 561, where a clause in the articles of association of the defendant company was held to be invalid as being in unreasonable restraint of trade. This clause imposed upon the shareholder an obligation, so long as he remained a shareholder, to deliver at the company's factory, wherever it might be situated in the Dominion, all the milk produced on any farm or farms owned or occupied by the shareholder, wherever that farm or farms might be situated in New Zealand. Salmond, J., who delivered the principal judgment, said, at p. 583:

> "There is no permissible method of restrictive interpretation whereby this far-reaching obligation may be cut down to an obligation to deliver at the factory already established at Kutarere the milk produced by the shareholder on the farm actually owned or occupied by him at the time when he acquired the shares. Still less would the Court be justified in restricting the obligation to farmers situated within some reasonable distance of the company's factory.
>
> "Contracts in restraint of trade, unless clearly severable in terms, cannot be cut down by judicial interpretation to reasonable dimensions for the purpose of saving them from invalidation. They must be construed as they stand, and if, as so construed, they impose an unreasonable restriction on the liberty of trade and contract of the parties bound by them, they are wholly bad."

Mr. Justice Reed, after distinguishing the contract before the Court from that in *Price v. Green*, (1847) 16 M. & W. 346, 153 E.R. 1222, and applying *Baker v. Hedgecock*, (1888) 39 Ch.D. 520, said, at p. 588:

> "So in this case the clause, being, as already stated, unrestricted as to distance to which it applies, and not being divisible, could only be made reasonable by construing it as containing a limit, which would be making a new contract between the parties, and this the Court cannot do."

Another application of Younger, L.J.'s, judgment in *Attwood v. Lamont* (*supra*) is to be found in *Bridges v. Carson*, [1934] N.Z.L.R. 159, where the covenant in an agreement for the sale of a butchery business was as follows:

> "The vendor will undertake for himself or any member of his family not to commence the same or a similar business within a radius of four miles of the present place of business. . . . "

Herdman, J., severed the words "or any member of his family" from the clause, as he considered those words not only trivial but also useless, a mere empty form of no value to either party to the contract; and were, in effect, a separate and distinct undertaking in a combination of two covenants, thus applying those words of Younger, L.J., in *Attwood v. Lamont* (*cit. supra*):

> "The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case, and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case alone."

In the most recent New Zealand judgment respecting a covenant in restraint of trade, *Baldwin v. McIver*, [1937] N.Z.L.R. 265, it was provided by cl. 8 of a service agreement that

> " the employee shall not within a period of ten years from the time of his ceasing to be employed by the employer . . . and at any place in New Zealand or Australia . . . be employed in any business similar " [to that carried on by the employer].

Mr. Justice Callan held that the covenant was void, the plaintiffs having failed to establish that the attempted extension of the restriction to all New Zealand was necessary or reasonable. He said, at p. 273 :

> " It is impossible to reduce the contents of cl. 8 to limits that are reasonably necessary without rewriting the clause. On no view of the doctrine of severance can this be done. The clause is therefore void in its entirety, though it would in my opinion have been reasonable and proper for the employer to have subjected the defendant to some restraint."

His Honour proceeded to say, *obiter*, that the width of the restraint sought to be imposed by cl. 8 and some passages in the plaintiff's evidence suggested that the object of the clause was to obtain protection against mere competition. On this point, he said :

> " Where that is perceived to be the purpose of an employer, the Courts should not be astute to aid the employer by means of severance. As to this I refer to the judgment of Younger, L.J., in *Attwood v. Lamont* ([1920] 3 K.B. 571, 591 *et seq.*). With this judgment Atkin, L.J., concurred ; and it should, I think, be accepted as an authoritative statement of the law as to severance in cases of restraint sought to be imposed on employees."

It may well be that, on closer examination, the two main modern judgments of the Court of Appeal in England are reconcilable as to the application of the doctrine of severability to contracts in restraint of trade generally.

In the covenant in *Goldsoll v. Goldman* (*supra*) the word " or " separated the different areas mentioned so as to render them separate covenants, one of which was good in that it was not unreasonable as to area ; and there was no sound objection (as Kennedy, L.J., said) in holding that on severing the countries representing the United Kingdom as distinguished from the foreign countries there was a reasonable covenant which ought to be enforced. Lord Cozens-Hardy, M.R., said such a covenant was severable in that respect, and this had been decided by authorities nearly two hundred years old.

In *Attwood v. Lamont* (*supra*), Younger, L.J., after saying that since the presumption in favour of the validity of employees' covenants had been displaced by the decisions of the House of Lords in *Mason v. Provident Clothing Co.*, [1913] A.C. 724, and in *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688, the older cases on this point must be considered obsolete, and, in His Lordship's judgment, a reference to the very principle which, in the view of the House of Lords, rendered the closest scrutiny of service contracts essential, makes it necessary, if that scrutiny when fruitful is to be operative, that " severance where the covenant as a whole is invalid should not in the general case be allowed." It appears, therefore, that both Court of Appeal judgments are reconcilable in so far as they relate to the general principle common to them both. The judgments of Younger and Atkin, L.JJ., in *Attwood v. Lamont* (*supra*), give that principle careful and limited application in relation to service contracts, for the same reasons as prompted the House of Lords to distinguish a stricter test of reasonableness as applicable to covenants in restraint of trade in contracts of service from the more liberal test be applied to covenants of the same nature in business contracts. In considering both classes of contracts, the Courts in New Zealand appear to have applied the respective tests of reasonableness, and, in proper circumstances, given a correlative application to the modern doctrine of severability.

Summary of Recent Judgments

SUPREME COURT. Hamilton. 1937. August 27, 31. *Callan, J.*

ANDERSON v. ANDREWS.

Industrial Conciliation and Arbitration Acts—Rates of Wages—Restoration of Rates in force prior to April 1, 1931—Claim by Worker—Employer and Worker not bound by Award—No Reduction of Rates of Remuneration by General Order—No " restoration "—Finance Act, 1936, s. 16.

A worker, who has not been employed under an award and has never received rates of remuneration which were rates of remuneration in respect of which there was in force an award or industrial agreement, cannot claim under s. 16 of the Finance Act, 1936, as he has suffered no reduction of his rate of remuneration by virtue of the General Order made by the Court of Arbitration on May 29, 1931 ; and the purpose of the statute is limited to the restoration of salaries, wages, and other emoluments which had been reduced by such General Order.

Counsel : Gillies, for the plaintiff ; **Leary and Alderton,** for the defendant.

Solicitors : Gillies, Tanner, and Fitzgerald, Hamilton, for the plaintiff ; **Bamford, Brown, and Leary,** Auckland, for the defendant.

SUPREME COURT. Wellington. 1937. June 17, 18, 21–25, 28–30 ; July 1, 2, 5–9, 12–16, 19–22, 29 ; August 3 ; September 7. *Smith, J.*

HUNTER v. HUNTER AND ANOTHER.

Trusts and Trustees — Removal of Trustees — Grounds for Removal—Removal of Executor retaining Office but not Assets—Grounds—" Misconduct "—" On Summary Application "—Probate and Administration—Power to revoke and grant Probate to another under Prayer for General Relief in Action for Removal of Executor—Administration Act, 1908, s. 37—Supreme Court Act, 1860, s. 6—Judicature Act, 1908, s. 16—Code of Civil Procedure, R. 531T.

The main principle upon which the Court's jurisdiction and discretion to remove trustees is exercised is the welfare of the beneficiaries of the trust estate. A ground for such removal may be that a trustee has put himself in a position in which a conflict of interest and duty arises. Another, that there exists an hostility between those beneficially interested and the trustees that prevents their working in harmony.

Therefore, an order should be made for the removal of trustees of a will where the evidence discloses slackness in management, unnecessary loss, failure to investigate a claim when their interest conflicted with their duty, and the existence of a state of hostility that prevents the life-tenant from working harmoniously with the trustees.

Where the executorship remains with one of the trustees but he no longer administers the assets, having transferred the assets, but remains personally liable to meet any claim for which he should have made provision before he ceased to hold the assets as executor, he may be removed for such misconduct in his office as renders his removal expedient under s. 37 of the Administration Act, 1908.

The Court, in the exercise of its discretion, may order the removal of the executor on the ground that he has acted so as to cause loss to the estate ; that he has failed to investigate

a claim where his interest conflicted with his duty, and it may also take into account the fact that the actions of the executor were viewed with hostility by the life-tenant.

Under the prayer for general relief in an action for the removal of an executor and the appointment of a new executor in his place, the Court has power to revoke probate to such executor and to grant it to another.

Letterstedt v. Broers, (1884) 9 App. Cas. 371; **Passingham v. Sherborn,** (1846) 9 Beav. 424, 50 E.R. 407; **Assets Realization Co. v. Trustees, Executors, and Securities Insurance Corporation,** (1895) 65 L.J. Ch. 74; **In re Watts,** [1917] N.Z.L.R. 791; and **Warren v. Milsom,** [1919] N.Z.L.R. 737, applied.

Counsel: **Willis** and **R. R. Scott,** for the plaintiff; **Weston,** K.C., and **Dunn,** for the defendants.

Solicitors: **Nielsen and Willis,** Wellington, for the plaintiff; **Alexander Dunn,** Wellington, for the defendants.

Case Annotation: *Letterstedt v. Broers,* E. & E. Digest, Vol. 43, p. 755, para. 1981; *Passingham v. Sherborn, ibid.,* para. 1985; *Assets Realisation Co. v. Trustees, Executors, and Securities Insurance Corporation, ibid.,* para. 1982.

SUPREME COURT. Whangarei. 1937. August 27. *Ostler, J.*

NELSON AND OTHERS v. NELSON AND OTHERS.

Practice—Guardian *ad litem*—Mother and Child Defendants—Both Minors—Separate Defences necessary—Jurisdiction—Separate Guardians appointed—Indemnification of such Guardians—Order as to Costs—Code of Civil Procedure, R. 74.

An action was brought for a declaration that a son of a widow was not the child of her deceased husband. The widow and the child, both of whom were minors, were named as defendants in the action.

On a motion for directions as to whether separate guardians *ad litem* should be appointed for the widow and the son, and as to how they should be indemnified,

Held, That although, if the son's defence failed, he would not be entitled to any of deceased's estate, as it was for the benefit of deceased's widow as well as for her son that a guardian *ad litem* should be appointed to represent him, the Court had jurisdiction to direct the trustees, if the son should be held not entitled to share in the estate, to pay the costs of the son's guardian *ad litem* out of the widow's share.

Counsel: **Trimmer,** in support of motion; **Turner,** for the proposed guardian; **P. J. Ryan,** for the Public Trustee, *ad litem,* and as *amicus curiae,* submitting to the judgment of the Court.

Solicitors: **Connell, Trimmer,** and **Lamb,** Whangarei, for the defendant, Ernest Severin Nelson; **Turner and Kensington,** Auckland, for the defendant, Jane Nelson.

SUPREME COURT. Auckland. 1937. Sept. 3. *Ostler, J.*

SHAW v. VALUER-GENERAL. AND ANOTHER.

Valuation of Land—Land-owner dissatisfied with Valuation—Notice to Valuer-General to reduce or find Purchaser at Owner's Value—No Right to withdraw Notice without Valuer-General's Consent—Valuer-General's Statutory Authority to sell irrevocable—Valuation of Land Amendment Act, 1933, s. 4.

When a property-owner has taken advantage of the provisions of s. 4 of the Valuation of Land Amendment Act, 1933, which provides in part—

> "If the owner of any land (other than the owner of a leasehold interest therein) is not satisfied with the value of such land as fixed by the Assessment Court, he may within fourteen days after the hearing by the Assessment Court give notice to the Valuer-General—
>
> "(*a*) That he requires the capital value to be reduced to an amount to be specified in the notice in that behalf (being the sum which in the opinion is the fair capital value, but being not less than the aggregate amount owing in respect of all mortgages and other charges, if any, to which the land is subject); or
>
> "(*b*) If the Valuer-General declines to make such reduction, then the land shall be acquired by His Majesty or sold in accordance with this section, at the sum specified in the notice. . . . ."

by giving the notice required by that section, the property-owner cannot, without the consent of the Valuer-General, withdraw his notice so as to prevent the Valuer-General from finding a purchaser for the land, or acquiring it on behalf of the Crown, as the notice creates a binding statutory contract between the land-owner and the Valuer-General as agent for the Crown; and, in so far as the Valuer-General is the agent of the land-owner, the agency is irrevocable.

On such sale, the Valuer-General has no power to agree to terms of payment other than cash.

Semble, Unreasonable delay on the part of the Valuer-General may give a remedy, such as mandamus, to the land-owner; and he may have an action under the Crown Suits Act, 1908, but not the remedy of rescission.

Counsel: **Churton,** for the plaintiff; **V. R. S. Meredith,** for the first defendant; **Leary,** for the second defendant.

Solicitors: **Melville and Churton,** Auckland, for the plaintiff; **Meredith, Hubble, and Meredith,** Auckland, for the first defendant; **Bamford, Brown, and Leary,** Auckland, for the second defendant.

SUPREME COURT. Auckland. 1937. Sept. 2. *Ostler, J.*

VALENTINE v. VALENTINE.

Destitute Persons—Separation and Maintenance—Evidence—Appeal from Dismissal of Wife's Complaint—Dismissal of Earlier Complaint—Proof of subsequent Cruelty—Revival of Acts of Cruelty prior to earlier Complaint—Evidence of Husband's Conduct during whole of Marital Life Admissible on Appeal from Dismissal of later Complaint—Destitute Persons Act, 1910, s. 77.

Although a wife's complaint on the grounds of persistent cruelty had been dismissed and no appeal was made against such dismissal, on an appeal from the dismissal of a subsequent complaint by her on similar grounds, the proof of acts of cruelty since the dismissal of the prior complaint enables evidence to be given as to the conduct of her husband towards her over the whole of their marital life.

Counsel: **Robinson,** for the appellant; **Slipper,** for the respondent.

Solicitors: **R. A. Singer,** Auckland, for the appellant; **T. B. Slipper,** Auckland, for the respondent.

SUPREME COURT. Wellington. 1937. Sept. 8. *Smith, J.*

HUNTER AND ANOTHER v. COMMISSIONER OF TAXES (No. 2).

Revenue—Income-tax—"Premises"—Dwellinghouse on Sheep-station unoccupied during Tax-year—Whether Taxpayer entitled to Deduction for Depreciation in respect of such Dwellinghouse—Land and Income Tax Act, 1923, s. 80 (1) (*a*).

A dwellinghouse on a sheep-station was not occupied during the tax-years 1934–35 and 1935–36 by any person who took any part in the business of sheep-farming carried on upon the sheep-station, though it remained part of a deceased estate under the control of the trustees who carried on sheep-farming operations.

On case stated to ascertain whether the dwellinghouse constituted "premises" under the proviso to s. 80 (i) (*a*) of the Land and Income Tax Act, 1923, namely,—

> "Provided that in cases where depreciation of such premises, implements, utensils, or machinery, whether caused by fair wear-and-tear or by fact of such premises, implements, utensils, or machinery becoming obsolete or useless, cannot be made good by repair, the Commissioner may allow such deduction as he thinks just."

Held, 1. That the test to be applied to determine whether the dwellinghouse was entitled to an allowance for depreciation is whether, from a business standpoint, the house had remained during the years in question a part of the whole asset exclusively engaged in the production of an assessable income; or, put in

another way, as applied to the facts of this case, whether there had been, in a business sense, something more than temporary cessation of the actual use of the house for the purpose of producing assessable income.

2. That, applying such test, as the dwellinghouse had never been used since 1930 to house anyone engaged in sheep-farming operations, there was evidence from which the Commissioner could draw the conclusion that he did, which involves the view that the trustees were not holding the house during the tax-years in question for the purpose of using it in the ordinary course of the sheep-farming operations which they were carrying on.

Counsel: **Weston,** K.C., and **Dunn,** for the appellants; **C. H. Taylor,** for the respondent.

Solicitors: **Alexander Dunn,** Wellington, for the appellant; **Crown Law Office,** *Wellington,* for the respondent.

SUPREME COURT. Palmerston North. 1937. August 9, 31. *Myers, C.J.*

BROWN v. MANAWATU KNITTING MILLS, LIMITED.

Factories—Wages—Minimum Rate of Wages—Deductions therefrom owing to Temporary Slackness of Work—Exceptions—Factories Act, 1921-22, s. 32—Amendment Act, 1936, ss. 12 (1), 19.

Section 32 of the Factories Act, 1921-22, as amended by s. 12 (1) of the Factories Amendment Act, 1936, fixes a minimum rate of payment, such a rate of payment being subject, however, to proper deductions except so far as prohibited in the case of boys and women under eighteen years of age or generally under other provisions of the Act—*e.g.*, s. 35 of the principal Act, as amended by s. 13 of the Amendment Act, 1936—dealing with holidays.

Counsel: **Cooper,** for the appellant; **McGregor,** for the respondent.

Solicitors: **Cooper, Rapley, and Rutherford,** Palmerston North, for the appellant; **G. I. McGregor,** Palmerston North, for the respondent.

SUPREME COURT. Wellington. 1937. August 23, 25. *Myers, C.J.*

WELLINGTON DIOCESAN BOARD OF TRUSTEES v. ATTORNEY-GENERAL.

Charitable Trust—Trust Funds consisting partly of "Money raised" or "given by way of voluntary contribution"—"Property"—Moneys received for Specific Purpose—Failure of Purpose—Substitution of new Purpose—Procedure to be followed by Trustees—Religious, Charitable, and Educational Trusts Act, 1908, ss. 15, 32, 48, Parts III and IV.

Where trustees of a religious, charitable, or educational trust have in hand a large sum of money made up by contributions and bequests given for a certain purpose, and that original purpose has become impracticable or inexpedient, the position is governed by Part III of the Religious, Charitable, and Educational Trusts Act, 1908, in so far as it concerns the bequests, and by Part IV in so far as it concerns the other moneys which come within the term "voluntary contributions" as used in ordinary parlance.

The words in s. 32 of the Act, raised by way of voluntary contributions," cannot be limited to moneys obtained by such means as bazaars.

In re Takapuna Women's Progressive League, (1930) N.Z.L.R. 39, and **Re Butler (Deceased),** (1930) G.L.R. 145, applied.

The "*property*" contemplated by s. 15 of the Act is (at all events, in the main) property that has been conveyed, devised, or bequeathed to trustees, and is held by the trustees, for particular purposes of a charitable nature.

Thus, where a sum of money made up of contributions and bequests for the express purpose of erecting a cathedral on a particular site was held by cathedral fund trustees as a separate fund for the erection and equipment of such cathedral, and it became impracticable and inexpedient to erect the proposed cathedral on that site, and a new proposal was made for its erection on another site, it was held that there had been a change of purpose, and the position was governed by Part III of the Religious, Charitable, and Educational Trusts Act, 1908, so far as concerned the bequests, and by Part IV of that statute so far as concerned the voluntary contributions.

Counsel: **Hadfield,** for the plaintiffs; **Solicitor-General (Cornish,** K.C.), for the defendant.

Solicitors: **Hadfield and Peacock,** Wellington, for the plaintiff.

SUPREME COURT. Auckland. 1937. August 19, 20, 30. *Fair, J.*

FRASER v. JOHN FULLER AND SONS, LIMITED.

Practice—Evidence—Claim for Damages for Personal Injuries—Defendant Insured—Fact disclosed to Jury in Letters read without Objection—Reference to Insurance in Closing Address of Plaintiff's Counsel—No objection to latter taken until after Retirement of Jury—Discretion of Judge.

In an action by the plaintiff for damages caused by a fall on a terrazzo floor in a theatre, plaintiff's counsel, in opening, read two letters from an insurance company to plaintiff's solicitor in reply to a letter from the latter to the defendant. These letters, denying liability, showed that defendant was insured. No objection was taken to their being read to the jury.

In his closing address to the jury, plaintiff's counsel made the following statements: "Whether covered by insurance or for some other reason, the proprietors took no care to see whether that floor was not becoming dangerous" and "Some people may use terrazzo and cover themselves with insurance."

Defendant's counsel took no objection to these statements before the jury's retirement; but, on such retirement, he applied to the learned trial Judge to record that the words had been so used.

On motion for new trial upon the ground that the verdict was obtained by unfair and improper practice of the plaintiff to the prejudice of the defendant in making of the said statements by plaintiff's counsel,

Held, ordering a new trial, 1. That in actions for negligence the jury, without just cause, ought not to be informed that the defendant is insured against such risks; if it is so informed, such a statement is calculated to prejudice the jury, and it is in the discretion of the Judge to discharge it and order a new trial.

2. That the plaintiff was not entitled to emphasize or aggravate, particularly at the crucial stage of the closing address, the prejudice that had already been created by the letters.

3. That, in the circumstances, defendant's counsel was not bound to take the objection at an earlier stage than he did.

Quaere, Whether the reading of a letter, which referred to the defendant as insured and which is otherwise relevant and admissible, is improper so as to justify a new trial.

Grinham v. Davies, [1929] 2 K.B. 249, **Stewart v. Duncan,** [1921] S.C. 482, and **Gregg v. Grant and Horne,** (1919) 44 D.L.R. 359, applied.

Wilson v. Kent, [1928] N.Z.L.R. 166, and **Stewart v. Duncan,** [1921] S.C. 482, distinguished as to facts.

Case Annotation: *Stewart v. Duncan,* E. & E. Digest, Vol. 22, pp. 487-88, (*k.*)

SUPREME COURT. Invercargill. 1937. August 16, 17. *Kennedy, J.*

In re **TAYLOR.**

Justices—Jurisdiction—Previous Convictions of Accused—Magistrate's Personal Knowledge of same—Questions thereon put by Magistrate to accused—Whether disclosure of Bias.

The mere recollection of a judicial officer that he had dealt with an offender at an earlier date is not bias; and the putting of a question to an accused person as to a conviction in another Court is of itself inadequate to disclose bias disqualifying him from proceeding upon the inquiry and depriving him of all jurisdiction.

Counsel: **G. J. Reed,** in support; **H. J. Macalister,** to oppose.

Solicitors: **G. J. Reed,** Invercargill, for the applicant; **Crown Solicitor,** Invercargill, for the Crown.

SUPREME COURT. Auckland. 1937. July 8; August 5. *Reed, J.*

BUTLER v. THE POLICE.

Justices—Practice—Separate Informations against different Defendants—Similar Cases—Reservation of Decision until all Cases heard—Whether possibility of Magistrate having been influenced by Evidence in one Case not repeated in another sufficient to nullify Conviction in latter.

Where a Magistrate, in trying three separate cases arising out of the same incidents, postponed his decision until all three cases had been heard, and, on appeal being made from a conviction, admitted that he did not feel justified in saying that he was not influenced by evidence in one case, which had not been repeated in the case in which he had convicted, the possibility of his having been influenced is sufficient to nullify the conviction.

Reg. v. Fry, Ex parte Masters, (1898) 67 L.J. Q.B. 712, and **Loasby v. Main,** (1914) 33 N.Z.L.R. 974, applied.

Counsel: **Trimmer,** for the appellant; **Meredith,** for the respondent.

Solicitors: **Connell, Trimmer, and Lamb,** Whangarei, for the appellant; **Crown Solicitor,** Auckland, for the respondent.

COURT OF ARBITRATION. Wellington. 1937. September 10. *O'Regan, J.*

IN RE **WELLINGTON TIMBER YARDS AND SAWMILLS EMPLOYEES' AWARD.**

Industrial Conciliation and Arbitration—Wages—Forty-hour Week—Adjustment of Rates of Pay—Industrial Conciliation and Arbitration Amendment Act, 1936, s. 21 (3).

Clause 1 of the Wellington Industrial District (except Wellington, 25-miles radius) Timber Yards and Sawmills Employees' Award provides that

"The hours of work shall be those which have ordinarily been worked during the past twelve months, but, except as otherwise provided, the ordinary hours of work shall not exceed eight hours and forty-five minutes on any day of the week, provided the total hours do not exceed forty-eight hours in the week."

The Court of Arbitration made an order pursuant to s. 21 of the Industrial Conciliation and Arbitration Amendment Act, 1936, amending the award by ordering a forty-hour week and providing for the usual adjustment of the rates of pay prescribed therein.

Held, That s. 21 (3) of the Industrial Conciliation and Arbitration Amendment Act, 1936, requires that the rates of pay must be adjusted according to the working-week actually observed during the twelve months prior to the date of the award, and not to the maximum working-week of forty-eight hours.

COURT OF ARBITRATION. Nelson. 1937. July 28; August 23. *O'Regan, J.*

CURTAIN v. GRANT.

Workers' Compensation—Average Weekly Earnings—Worker employed in Sawmill, where he suffered Injury, and also as Share-milker by same Employer—Share-milking—Relationship of Parties—Earnings under Concurrent Contract of Service as Share-milker taken into Account in assessing Compensation.

Where a worker was employed by the same employer at his sawmill and also as a share-milker, and was injured by accident arising out of and in the course of his work at the mill, in the assessment of compensation for such injury he is entitled to the benefit of his earnings as a share-milker under what the evidence showed to be a concurrent contract of service, in addition to his earnings at the mill.

Simpson v. Geary, [1921] N.Z.L.R. 285, and **Davidson v. Daysh,** [1932] N.Z.L.R. 1122, distinguished.

Counsel: **J. R. Kerr,** for the plaintiff; **W. V. R. Fletcher,** for the defendant.

Solicitors: **J. R. Kerr,** Nelson, for the plaintiff; **Pitt and Moore,** Nelson, for the defendant.

Penalties for Minor Traffic Offences.

A Suggested Method of Enforcement.

Several times in the past few years the suggestion has been made that penalties for certain traffic offences might be more expeditiously enforced where liability is admitted. It has again been made, and it has the support of a number of motorists. In view of the projected consolidation and amendment of the statutes dealing with traffic, consideration of the proposal at the present time is opportune. To carry the matter into effect, legislation would have to be passed empowering those authorities, whose duty it is to enforce the traffic laws, to accept payment of an appropriate sum from an offender who admits responsibility for his act and who is desirous of the immediate ending of his liability.

If such a procedure be adopted, a number of cases will no longer come before the Courts. The functions of the Court, of course, are to ascertain whether an offence has been committed and, if so, to consider its seriousness and impose a penalty. The knowledge that a *prima facie* case at least has to be made out, and that any case may be defended on the facts or on technical grounds, ensures that the officer responsible will not take proceedings unless he believes he can establish the charge. The defendant is afforded a safeguard against victimization, and the officer against its imputation. The change would involve some interference with one function of the Court—the fixing of the penalty—and, unless the alternative procedure be carefully drafted, there might be a weakening of the present safeguards.

At this point it is well to consider generally the type of offence to which the suggested procedure should apply, for traffic offences cover a wide range from matters of minor importance to what is the equivalent of manslaughter. Some may be appropriately dealt with by summary trial; others only by indictment. Similarly, the practicability of dispensing with summary procedure, where there is the equivalent to a plea of guilty, depends on the nature of the offence committed. In the first place, an alternative should not be given to a defendant where he cannot be adequately punished by the infliction of a fine. Secondly, it should not be given where the act complained of is likely to constitute a serious danger, because it is important that a defendant should not look upon a fine as a license fee. For this reason a charge of speeding should always be brought before the Court. (It is curious, by the way, to note that a first or second charge of exceeding a speed limit is one of the very few traffic offences, whether constituted by statute, regulation, or by-law, for which one's license cannot be suspended under s. 22 of the Motor-vehicles Act, 1924.) Thirdly, it should not be available where the gravity of the offence will vary to any marked degree according to the circumstances or the manner in which it is committed. Into this category fall such offences as driving without due consideration for others and failing to comply with the directions of an officer.

There remain a large number of cases wherein it is exceptional to find any appreciable variation in the seriousness of an offence under a specific regulation or by-law. It is the practice of the Courts to impose a more or less standardized penalty, varying of course as between offences of a different nature, but not as

between offences of the same nature. It is not suggested that Magistrates do not take into account a plea of undue hardship or unusual circumstances, but these considerations arise only in a small minority of the cases. If an alternative is to be introduced, it should be available only in respect of offences of this class—*i.e.*, those in which a moderate fine of a fixed amount might reasonably be expected to act as a deterrent.

As far as the defendant—or prospective defendant—is concerned, there are two advantages to be gained by the adoption of the proposal. The first is its convenience. He does not spend half a day in Court in order to plead guilty. It may be said that the inconvenience is part of the price he has to pay. But this is not so, for the Courts do not impose a penalty upon a defendant for failing to appear. Many persons, however, are ignorant of this fact and believe that they are under an obligation to attend as directed by the summons. The loss occasioned to a man through absence from his business is an additional penalty of a capricious nature, greater, possibly, than that imposed by the Court. The second advantage is, perhaps, an indirect rather than a direct one and arises, as does the first, from an inadequate knowledge of the nature of various traffic offences and of the penalties that may ensue. A defendant not infrequently allows an information on some such charge as negligent driving to be heard in his absence, in the belief that he will suffer no more than a fine of ten shillings—or a pound if he is unlucky—only to find that a penalty of much greater severity, involving in some instances the suspension of his license, has been imposed upon him. He has, perhaps, twice previously appeared before the Court for parking breaches, and has noticed that his fine is of the same amount as those of others who do not appear. Or, perhaps, he has noticed in the newspapers other instances of negligent driving where small fines have been imposed, and he believes his offence will fall in the same category. These are no grounds upon which to base such an inference; but the fact is that it is made and the defendant then has, strictly speaking, only one means whereby he can tell his side of the story—by appeal to the Supreme Court—and that is available only where his license has been cancelled. In practice, the Magistrates have granted rehearings under s. 122 of the Justices of the Peace Act, 1927, in such instances; but this can be done only with the tacit consent of the informant in stating that he will not oppose the application, and will leave the matter to the Court's discretion, for the grounds upon which a rehearing may be granted are limited to those upon which a new trial may be ordered under the code.

The advantages in administration are important. The Magistrates, overloaded with work as they are at present, have to spend a considerable amount of time each week in dealing with undefended traffic offences of minor importance in which they are not called upon to do more than see that the formal evidence is sufficient to establish the charge and, if so, impose a small fine. The time and work, too, of the Court officials and the police involved in preparing the papers and serving the summons upon a man who admits committing an offence and who is prepared to pay a fine constitute an unduly heavy expense.

If the limitations previously suggested are observed, there should not be any undue interference with the functions of the Courts, far less any usurpation of their powers, provided that the defendant is not under any misapprehension as to his rights—*i.e.*, he knows that the immediate payment of a fine is not obligatory, but is an alternative procedure only and that he will not be penalized for exercising his right to go to Court.

Take the case of a person who is notified that he has committed an offence. He may know that he is guilty and that there are no mitigating circumstances, or he may be in doubt as to whether his act constitutes a breach of the law or as to whether the surrounding circumstances justify a plea of mitigation. In the former case there is no difficulty, but in the latter case he may not know of his right to have the matter determined before a Magistrate. He may not inquire into the point, or he may on so inquiring misunderstand or be misled by his informer, or he, misunderstanding, may believe he has been misled. It follows then that the only way of ensuring that the defendant is correctly informed of the position is by a notice, and, as the one paper he is bound to receive is the receipt for the fine, the notice should be printed upon it. The notice must, of course, be short and capable of being readily understood; otherwise it will defeat its intention.

There should not be any difficulty in this, however. Three sentences should be sufficient; the first to the effect that the Court has power to vary the amount of the fine; the second to the effect that, should he have any doubt as to his guilt or should his conduct have been influenced by exceptional circumstances, he should take the case to Court; and the third to the effect that, although he has paid the fine, he may within a certain time after the payment—say, one week—bring the matter before the Court. The third provision is necessary for two reasons: a defendant may not have realized the position until he had paid the fine, or, though aware of his right, he may on the spur of the moment, have paid in error.

Certain other provisions suggest themselves as being necessary. The more important are that the fine for each class of offence should be fixed throughout the Dominion as a definite amount subject only to variation by the Court, and that traffic authorities should have the right to bring any case before the Court.

Australian Legal Convention.

Invitation to New Zealand Practitioners.

The Law Council of Australia has notified the Secretary of the New Zealand Law Society that the Third Australian Legal Convention will be held in Sydney on January 27, 28, and 29, 1938. Papers on legal topics will be presented by members of the Bench and of the legal profession, and on Thursday, January 27, a dinner will be held.

The Australian Legal Convention will be one of the features of the Australian Sesqui-Centenary Celebrations, which will last from January 26 to April 25.

New Zealand practitioners who intend visiting Sydney for the Legal Convention or for other gatherings in connection with the Anniversary Celebrations are requested to get in touch with Mr. E. Newton Daly, Incorporated Law Institute of New South Wales, Royal Chambers, 3 Castlereagh Street, Sydney. It is hoped that the New Zealand Law Society will be officially represented at the Legal Convention.

Court of Review.

Summary of Decisions.*

By arrangement, the JOURNAL is able to publish reports of cases decided by the Court of Review. As decisions in this Court are ultimately determined by the varying facts of each case, it is not possible to give more than a note of the actual order and an outline of the factual position presented. Consequently, though cases are published as a guide and assistance to members of the profession, they must not be taken to be precedents.

CASE 76. Memorandum from a Commission requesting a direction as whether it should proceed to adjustment pending an appeal to the Privy Council in an action between the applicant and the stock mortgagee. The applicant is the owner of several large stations and some small properties.

The Court considered that the respective liabilities of the parties should be determined by the Privy Council before adjustment; although, if all parties agreed, adjustment could proceed with certain selected properties.

CASE 77. Appeal by a first mortgagee against an order of the Commission discharging a guarantor. In 1933 the guarantor (the original mortgagor) applied to the mortgagee for an extension of his mortgage to August 1, 1938, to enable him to sell to the present owner. The mortgagee agreed to this, upon condition that the mortgagor's liability as guarantor continued and that the agreed rate of interest would not be reduced below 5 per cent. notwithstanding any subsequent legislation in that behalf. It was admitted there was ample security for the first mortgage. On behalf of the guarantor it was submitted he should be discharged (*a*) owing to there being ample security, (*b*) because he was a second mortgagee for £2,000 and would have to protect his security, and (*c*) because his estate upon death could not be wound up until the guarantee had been satisfied.

Held, setting aside the order of the Commission discharging the guarantor from liability, That the rate of interest on the first mortgage be fixed at 4½ per cent. per annum.

CASE 78. Appeal by a mortgagee against an order of a Commission. Upon the appeal being called on for hearing, it was disclosed that the twenty-one days from the filing of the order of the Commission and the time within which appeals might be lodged had not expired.

The appeal was stood over pending the expiry of the time allowed for the appeal, to enable any parties who were not represented before the Commission to appear or appeal if they so desire.

CASE 79. Application for adjustment of liabilities by a mortgagor owning a factory in which machinery had been installed. The question arose, when the Commission attempted to fix the basic value of the premises, what parts of the machinery, if any, were fixtures, and so part of the freehold.

The Court adjourned the application pending determination by the Supreme Court, upon appropriate proceedings being brought, as to what were fixtures in the circumstances.

* Continued from p. 236.

CASE 80. Appeal by a mortgagee against an order of the Commission reducing the mortgage from £1,000 to £623 10s., and discharging an adjustable debt. On January 15, 1937, applicant filed through his solicitor, Mr. A., an application for adjustment of his liabilities and stated that he had no assets. On the following day applicant instructed another solicitor, Mr. B., to transfer a first mortgage of £500 from him to his (the applicant's) wife. At the hearing before the Commission, applicant swore that he had no assets and that his wife had no estate. Before the Commission made its order on that occasion, the mortgagee applied for, and obtained from the Commission, an order for a rehearing. At the rehearing not only was the transaction concerning the £500 mortgage established, but it was admitted that the wife was the holder of £600 worth of local body debentures. On these facts the Commission made the order appealed from.

Held, allowing the appeal, That the order of the Commission be set aside and the application be dismissed.

The Court stated that the utmost candour was required of applicants regarding the disclosure of assets, and that the conduct of the applicant in not disclosing such a substantial asset as the mortgage of £500 and his conduct at the hearing of the application precluded him from the right to relief.

CASE 81. Appeal by a second mortgagee (unpaid vendor) against an order of a Commission reducing the second mortgage from £5,495 to £3,300 and discharging balance as an adjustable debt, although the former mortgagor had £3,968 worth of unencumbered assets, mostly stock, over which the unpaid vendor had no security.

The Court, dismissing the appeal, said that its policy was not to hamper a farmer-mortgagor by giving an unpaid vendor security over the stock.

CASE 82. Motion by a mortgagor for leave to lease mortgaged premises. The mortgagees, who desired that the property should be sold, submitted the mortgagor had no authority to make such an application; that s. 58 did not apply; and that if a lease were granted, the Commission would be hampered in making its determination.

Motion dismissed.

CASE 83. Appeal by second mortgagee who also held a collateral stock mortgage. The Commission found that the farmer applicant was entitled to retain the use and occupation of his farm as an efficient producer. It was submitted on behalf of the appellant that the mortgagor was inefficient and incompetent, and had no prospect of being able to carry on and work the property in the future. The appellant did not dispute the basic value of the land as fixed by the Commission, which resulted in the second mortgage being wholly discharged. The Commission also reduced the collateral mortgage over the stock to £130, being the ascertained value of the stock.

Held, dismissing the appeal, That the evidence did not disclose applicant to be inefficient or incompetent, although it was a border-line case. The Court considered, having regard to the provisions of the Act, it should give the benefit of the doubt to the mortgagor; and, if the mortgagor was eventually unable to carry on and made default under the mortgage, then the mortgagee would have an unfettered right to exercise his remedies.

The Grand Jury.

A Defence.

By C. A. L. Treadwell.

The strong article appearing recently in the New Zealand Law Journal against the retention of the Grand Jury is just another of those attempts that appear from time to time to abolish an ancient institution. Perhaps, in these somewhat revolutionary times, it is not surprising to see such an attack reappearing. There is no doubt that the legal profession is in its nature conservative, disliking change for change sake, and being induced on strong grounds only to alter any part of the judicial system of which every Englishman is justly proud. It is a well-justified pride that we all feel with regard to the form of administration of justice employed in the various units that go to make up the British Empire.

There are, I think, strong grounds for the retention of the Grand Jury, and there is weighty opinion in favour of its retention. There have been many attempts, going back hundreds of years, to abolish the Grand Jury, but every attempt was unsuccessful in England until very recent years. When the Grand Jury was suspended in England during the Great War, one would have thought that, had it been regarded as an anachronism, it would not have been restored.

Lord Birkenhead, writing in 1925, referred to the pamphlet, *The Security of Englishmen's Lives*, which was written in defence of the system in 1681 when some criticism was made at the action of the Grand Jury in rejecting the Bill for the indictment at the first Earl of Shaftesbury, on a charge of treason. As this great Lord Chancellor said: "The feeling that, even now, a Grand Jury may be called upon to perform a similar service contributed, as I have reason to know, to the retention of the Grand Jury system after its recent suspension during the Great War."

Even in matters of much less importance, the Grand Jury has not infrequently been called on to exercise a salutary check on an ill-founded decision of a Magistrate or Justices of the Peace in sending an accused for trial. There is every reason to prevent an innocent person from having to stand trial on a criminal charge. In these censorious days, the mere fact of a judicial trial leaves the prisoner likely to have to bear for many years the unfair reputation of having escaped from the clutches of the law, or justice.

That aspect of the matter is not, however, I think, of as great moment as is the importance of responsible laymen being kept in close touch with the administration of justice. In his well-known report on the reorganization of the American Code, the American lawyer, D. D. Field, wisely remarked that "Justice is the great end of civil society." It behoves those who depend on the even administration of justice to take some hand towards understanding *modus operandi*, and sharing, even to the slightest degree, in its operation.

There never has, perhaps, been unanimity on the virtue of retaining the Grand Jury, and at the beginning of this century Lord Alverstone, when he was Lord Chief Justice of England, said: "During "the last few years an agitation has been revived to "abolish the long-established practice of an indict-"ment being presented to the Grand Jury, who must "find a true bill before the case goes to trial. There "has been an extraordinary difference of opinion "among Judges, members of the Bar, and grand jury-"men themselves as to whether the existing practice "should be continued; I have the strongest opinion "that it should. No doubt, as a rule, as the cases "have been investigated before a Magistrate, further "preliminary inquiry is not necessary; but I have "known many cases in which the jury have thrown out "a bill which was sent up for their consideration, where, "in my opinion, they were perfectly justified in doing so. "The Grand Jury is, in fact, a great protection in "certain classes of cases where persons are charged "with criminal offences to which there attaches no "real criminality."

Those weighty words may not be lightly brushed aside. As a junior counsel and later as King's Counsel, Sir Richard Webster enjoyed an enormous practice and spoke from his vast experience. There is something very stable about British justice, and the chief reason for that has been that changes have come slowly and only when manifestly necessary. Sudden changes in established customs may easily have far-reaching and unexpected results.

It certainly is not true in the law that the newest is the best, and many of your readers will have enjoyed that profound essay of Sir Frederick Pollock on *Archaism in Modern Law*, wherein he attacks the threat upon the continuance of the Grand Jury. In his article, that learned author remarked that it is one of the very oldest pieces of Germanic procedure, transformed and recast in the great constructive period of the common law. One extract from that delightful piece of literature reads as follows: "The "Grand Jury is still an indispensable part of our "system, though now scarcely more than a ceremonial "one. Sometimes, in the case of a vexatious or "hastily undertaken prosecution, it saves an innocent "person the pain of a public trial. On rare occasions "it may assume a semi-political office and ease off "impending friction between the law and public "opinion."

Sir Frederick then referred to the Jamaican riots as a case in point. In that case, the Lord Chief Justice (Cockburn) had charged the Grand Jury in a style "more forensic than judicial." Sir Frederick then remarked: "I heard the charge, and very impressive "it was. . . . In point of law I believe he was "right. But the Grand Jury threw out the bill, and "in point of fact I believe they were right too, for "such was the prevalent feeling, whether right or "wrong, that a petty jury certainly would not have "convicted, and the trial would only have prolonged "a bitter controversy without vindicating any "principle of justice. As a rule, however, the Grand "Jury looks nowadays rather like a fifth wheel on "a coach, and grave and learned persons have in the "course of late years proposed more than once or "twice to abolish it. For my own part, I am inclined "to think that such a measure would do no real good, "would do some, though not much harm, and would "offend a far greater number of people than it pleased. "At all events one would be sorry to lose, without "strong reasons, so venerable a link with antiquity. "For the Grand Jury may be said to represent, in

"substance, though hardly by direct succession, tha "accusation by the common report of the country "which in the early Germanic plan of criminal justice "was no mere ornament or safeguard, but a main-"spring of the machine."

We ought to be slow to abolish any part of our system, unless it is quite certain that the system is to be improved by the change.

It has always been the custom of the Grand Jury to draw the attention of the country by their report to the trial Judge any special tendencies that have become manifest in the locality touching either crime or the administration of justice. Such references are always of importance, and remind the general public through their lay representatives that they are actively represented in maintaining that "great end of civil society."

At present we are submitting to great changes in our social order, and with those changes are appearing changed outlooks with regard to verdicts of common juries. We all know of verdicts, especially when a motor collision moves the litigation, that cannot be justified in the light of the oath taken by a juryman. Juries are not facing their responsibilities in some of the criminal charges placed before them through some mistaken sense. The solution of this defection from plain duty may be found some day through the mouth of a Grand Jury. He more nearly understands the motives that explain perverse verdicts, and he may reasonably reveal the best method of rectifying this perversity.

I suggest that the Grand Jury is well worth while retaining, for the reason that it reminds the layman of our judicial system. That close acquaintance makes for even justice. Changes may originate in the mind of the Grand Jury, and when they do, they will probably be justified. Judicial errors of single Magistrates or ill-equipped Justices may be rectified by the Grand Jury, as has already been expressed. Let us, who follow the law, be slow to change old customs and institutions. Let us keep our course steady, even though the winds of minor revolutions whistle in our ears.

The Popular View of the Bar.—At the recent Lord Mayor's Banquet for His Majesty's Judges, the Solicitor-General, Sir Terence O'Connor, K.C., said that the order that he should wear levée dress with a sword at the Banquet was characteristic of the popular view of his profession. "It is as combatants," he said, "that the public like to think of us advocates; it is as combatants that they hire us, and it is from those who wish to do battle that we gain our bread and our butter, and the more they wish to fight the more butter we get. I should bore many of you by reminding you of the Indian case where one Indian was suing another for the trespass of the second Indian's cow on his field. It was discovered for the first time in the Privy Council that the one Indian had no cow and the other Indian had no field. Among others who provide fodder for the Bar are those who insist upon their rights. Sir Philip Game, the Commissloner of Police, in connection with Belisha crossings, referred to

> " . . . poor Will Jay,
> Who died defending the right of way.
> He was right, dead right, as he strode along,
> But he's just as dead as if he'd been wrong!"

If it were not for the Will Jays and the Indian temperament we should have a poor time as practising barristers!

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Memorandum of Lease of Part of a Public Domain for the Purposes of a Golf-links.

Under the Land Transfer Act, 1915, and Under Part II of the Public Reserves, Domains, and National Parks Act, 1928.

Memorandum of Lease.

Whereas His Majesty The King (who and whose successors and assigns are unless the context requires a different construction hereinafter referred to as and included in the term "the Lessor") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT piece of land situated in the Land Registration District of [*Auckland*] containing acres more or less being the [*North-western*] part of Allotment of the Parish of as the same is more particularly delineated in the plan thereof endorsed hereon and is therein in outline coloured green and being part of the land comprised in Certificate of Title Volume Folio [*Auckland*] Registry

And whereas the said land is part of the Domain subject to the provisions of Part II of the Public Reserves Domains and National Parks Act 1928 and is under the control of the Domain Board (who and whose successors are hereinafter termed "the Board")

And whereas the Board has requested the Lessor to lease the said land to The Golf Club (Incorporated) a Society duly registered under the Incorporated Societies Act 1908 and having its registered office at (who and whose successors and permitted assigns are unless the context requires a different construction hereinafter referred to as and included in the term "the Lessee") at the rent and upon the terms and conditions hereinafter contained

Now therefore in consideration of the rent hereby reserved and of the covenants on the part of the Lessee hereinafter contained the Lessor in exercise of the powers in him vested by the said Part II of the Public Reserves Domains and National Parks Act 1928 and with the written consent of the Board doth hereby lease to the Lessee ALL THAT the said land to be held by the Lessee as tenant for the space of [*twenty-one*] years as from and inclusive of the day of one thousand nine hundred and thirty-(193) at the yearly rental of pounds (£) payable by half-yearly payments of £ each in advance on the days of and in each year the first thereof having been paid on or before the execution hereof (as is hereby acknowledged) subject to the following covenants conditions and restrictions:—

I. The Lessee doth hereby covenant with the Lessor as follows:—

1. The Lessee will duly and punctually pay the rent hereinbefore reserved on the days and in the manner herein mentioned without any deduction whatsoever.

2. The Lessee shall not nor will assign sublet or part with possession or control of the said land or any part thereof during the said term save and except with the

consent in writing of the Lessor and upon the terms hereinafter provided.

3. The Lessee will at all times during the said term maintain the said land and the golf-links thereon as a golf-links or ground for playing the game of golf and for no other purpose save and except as follows :—

(*a*) The Lessee may use a portion of the said golf-links not exceeding [*five*] acres thereof for other games or outdoor sports provided that such use shall not prevent or interfere with the use of the said golf-links for the purpose of playing the game of golf thereon.

(*b*) The Lessee may graze live stock on any part of the said golf-links for the purpose of eating down the grass thereon but so that such grazing shall not prevent or interfere with the use of the said golf-links for playing golf thereon at all proper times and seasons and provided that before any grazing takes place all plantations of trees shall be properly fenced by the Lessee as and where required by the Board and the Lessee will not graze (or permit to be grazed or allowed at large) upon the demised premises any bull or other dangerous animal of any kind.

(*c*) The Lessee may with the written consent of the Board use and occupy the said golf-links for the purpose of holding games sports or entertainments other than golf thereon on not more than [*seven*] days in any year and on such days the Lessee shall have the exclusive use of the said golf-links for the purposes aforesaid.

(*d*) The general public shall for all time and from time to time have full free and uninterrupted right liberty and license of ingress egress and regress on foot in over and upon the said golf-links provided that such public shall neither interfere with the putting-greens or any part of the fairways temporarily closed for top-dressing nor prevent nor interfere with the use of the said golf-links for playing golf.

4. The Lessee will at all times during the said term maintain and at the expiration thereof deliver up the said golf-links and all buildings fences greens bunkers and other works and improvements now or at any time hereafter erected or made upon the said golf-links in good and clean order and condition as a golf-links of the first class and will keep the same free from furze briers and noxious weeds PROVIDED HOWEVER that the Lessee if the terms of this lease have been fully complied with shall have the right at the end of the said term to remove any buildings which the Lessee may have erected on the said land and save that the Board shall have the right to purchase the same or any of them at a price to be fixed by agreement or arbitration.

5. Subject to the provisions and exceptions herein contained and to any rules lawfully made hereunder all persons shall have the right to use the said golf-links for the purposes of playing golf thereon at all times that the said golf-links are open for playing golf thereon subject to the payment of fees hereinafter mentioned.

6. The said golf-links shall be open for playing golf on all days save and except as follows :—

(*a*) The said golf-links shall not be open to the public for playing golf on such days not exceeding [*fourteen*] in any year as the Lessee shall by notice as hereinafter provided reserve the said golf-links for the exclusive use of the persons named in such notice.

(*b*) The Lessee may with the consent of the Board close all or any part of the said golf-links during such period as may be necessary for the purpose of planting cultivating or improving the same.

(*c*) The Lessee may by notice published in some paper circulating in [*Auckland*] grant or reserve the exclusive use of the said golf-links to such persons who are named in such notice for the day or days mentioned in such notice PROVIDED ALWAYS that the total number of days on which the said golf-links are so reserved shall not exceed [*fourteen*] days in any year PROVIDED ALSO that the said notice shall be published at least twice not less than one week or more than two weeks before the first day so reserved.

(*To be continued.*)

Bench and Bar.

Mr. W. L. Wiseman, Auckland, has been joined in partnership by Mr. J. S. Wiseman, under the firm-name of Wiseman Bros.

Mr. A. A. Wilson, of Westport, has taken into partnership his son, Mr. J. A. Wilson, LL.B., and the firm-name will be "A. A. Wilson and Son."

Mr. G. G. Briggs has joined Mr. W. Tudhope, of Hamilton, in partnership. The firm will practise under the name of Messrs. Tudhope and Briggs.

Mr. Robert Stout has relinquished his association with the firm of Messrs. Stout, Lillicrap, and Hewat, Invercargill, and has acquired the practice previously carried on by Mr. James Emslie at 172, Stafford Street, Timaru.

Mr. C. N. Armstrong, recently Managing Clerk of Messrs. Treadwells, Wellington, has been taken into partnership by Messrs. Armstrong and Barton, Wanganui. The firm will in future carry on business at the same address under the name of Messrs. Armstrong, Barton, and Armstrong.

The following recent admissions as barristers and solicitors have been made by His Honour, Mr. Justice Northcroft: Mr. D. A. Buchanan, on the motion of Mr. J. H. Upham; Mr. I. M. Godby on the motion of Mr. M. J. Gresson; and Mr. I. W. Taylor, on the motion of Mr. A. S. Taylor.

The Council of Legal Education, appointed by the Governor-General, in pursuance of s. 2 (2) of the New Zealand University Amendment Act, 1930, consists of the Rt. Hon. the Chief Justice, Sir Michael Myers, G.C.M.G., and His Honour Mr. Justice Ostler, representing the Judiciary; Messrs. P. Levi and A. H. Johnstone, representing the Council of the New Zealand Law Society; and Professors Adamson and Algie, representing the University Senate.

Australian Letter.

By JUSTICIAR.

The Hamburger Business.—In the Workers' Compensation Commission recently, a painter, who had received an injury to his spine and fractured his heels in a fall from a ladder, was granted a lump sum. He said he wished to buy a hamburger business. He said the present owner of the hamburger business was making a profit of £15 a week.

Judge Perdriau: I think £15 a week is all moonshine. I suppose the actual profit is £5 or £6 a week. What is a hamburger?

Counsel: A species of rissole with salad. I have visited a few of them, but usually in the early morning and they tasted good.

Judge Perdriau: I have stopped staying out late at night for the past twenty years.

Notice of Action.—A curious case, which was decided recently by the Full Court of New South Wales on demurrer and reversed by the High Court, may be of interest to you. Mrs. Harding had claimed £3,000 damages from the Lithgow Municipal Council in connection with the death of her husband, Walter Edward Harding, a relief worker, who was injured by a fall of earth at Lithgow and died two days later. She claimed that his death was due to negligence on the part of the Council.

The Council demurred to her claim on the ground that notice in writing of the claim had not been served by or on behalf of the deceased within his lifetime. The Council submitted that, because the deceased had failed during his lifetime to give this notice as required by the Local Government Act, he could not at the time of his death have maintained the action. The action was based upon the Compensation to Relatives Act, which corresponds with the Fatal Accidents Act. Notice had been given by the widow before beginning proceedings. The cause of action and the right to maintain the action depended upon the existence of the fact of death consequent on injuries caused by negligence. Section 580 of the Local Government Act provided that a writ in respect of any damage or injury to a person should not be sued out or served upon the Council for anything done, &c., until the expiration of one month after notice in writing has been served upon the Council. The Chief Justice, in the course of his judgment, said that it was clear that s. 580 of the Local Government Act provided a condition precedent to the maintenance of an action for negligence against the municipality, but, he thought, that it was also clear that satisfaction of a condition precedent to bringing an action could not itself be regarded as part of the cause of action. The words of s. 3 of the Compensation to Relatives Act were "entitled to maintain an action and recover damages." A person could not maintain an action without issuing a writ, and he plainly could not recover damages in an action without both issuing a writ and obtaining judgment in his favour in an action. It could not be disputed, however, that the section could not mean that the deceased person must have issued a writ and obtained a judgment in his favour for damages before his relatives could sue under the Act. Upon the view which he took of the relevant statutes, he was of the opinion that the appeal should be allowed, and that judgment should be entered for the plaintiff in demurrer. The other Justices delivered separate judgments to the same effect.

Broadcasting Race Meetings.—The High Court, by a majority, dismissed with costs the appeal of the Victoria Park Racing and Recreation Grounds Co., Ltd., from a judgment in the Supreme Court of New South Wales by Nicholas, J., who had dismissed with costs a suit by the appellant seeking to prohibit the broadcasting of races at Victoria Park.

The question, in effect, was whether the broadcasting of races infringed legal rights. The defendants in the case, which the company as plaintiff brought, were George Taylor, Cyril Angles, and the Commonwealth Broadcasting Corporation, Ltd. (Station 2UW), now respondents on appeal. The company had unsuccessfully asked His Honour for perpetual injunctions against each of the defendants, restraining Taylor from allowing his land adjacent to Victoria Park Racecourse to be used for broadcasting any race meeting held on the course; Angles, a broadcast announcer, from taking any part in broadcasting race meetings held there, and the Commonwealth Broadcasting Corporation from making any such broadcast. During the proceedings before Nicholas, J., it was stated that Taylor was the owner of a cottage and land opposite the racecourse, and on the land a platform had been erected giving a view of the racing-tracks, judge's box, and notice-boards. With Taylor's permission, Angles observed race meetings from this platform, and described races for 2UW. It was from His Honour's judgment, in which he held that the defendants had infringed no legal rights of the company, that the company appealed to the High Court.

The Chief Justice said that, in his opinion, the defendants had not interfered in any way with the use and enjoyment of plaintiff's land. The effect of their actions was to make the business carried on by the plaintiff less profitable by providing competitive entertainment, but mere competition was not a cause of action. The racecourse was as suitable as ever it was for use as a racecourse. The only alleged effect of the broadcast was an effect in relation to people who were not upon the land; that was, people who listened-in, and who therefore stayed away from the land. In his opinion, the defendants had not in any way interfered with the plaintiff's land or the enjoyment thereof. His Honour said that he could not see that any right of the plaintiff had been violated or any wrong done to him. Any person was entitled to look over the plaintiff's fences and to see what went on in the plaintiff's land. If the plaintiff desired to prevent this, the plaintiff could erect a higher fence. The law could not, by any injunction, erect fences which the plaintiff was not prepared to provide.

It was argued that by the expenditure of money the plaintiff had created a spectacle, and that he therefore had what was a quasi-property in the spectacle which the law would protect, the Chief Justice continued. "What it really means is that there is some principle (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and then describing what they see." He found difficulty in attaching any precise meaning to the phrase "property in a spectacle." A "spectacle" could not be "owned" in the ordinary

sense of the word. Even if a spectacle could be said to exist as a subject-matter of property, it would still be necessary, in order to provide the plaintiff in the case with a remedy, to show that the description of such property was wrongful, or that such description was wrongful when widely disseminated. No authority had been cited to support such a proposition.

Rich, J., said that it did not follow that because no precedent can be found a principle does not exist to support the plaintiff's right. Nuisance covers so wide a field that no general definition of nuisance has been attempted, but only a classification of the various kinds of nuisance. He also said the case presented the peculiar feature that by means of broadcasting the knowledge obtained by overlooking the plaintiff's racecourse was used to impair the value of the plaintiff's occupation of the land and diverted a legitimate source of profit from its business into the pockets of the defendants. An improper or non-natural use, or a use in excess of a man's rights, which curtailed or impaired his neighbour's legitimate enjoyment of his property, constituted a nuisance.

It appeared to His Honour that the real point was that the right of view or observation from an adjacent land had never been held to be an absolute and complete right of property, exerciseable at all hazards, notwithstanding its destructive effect upon the enjoyment of the land overlooked. He held, in the absence of any authority to the contrary, that there was a limit to this right of overlooking, and that the limit must be found in an attempt to reconcile the right of free prospect from one piece of land with the right of profitable enjoyment of another. Rich, J., added that the prospects of television made the Court's present decision a very important one. He ventured to think that the advance of that art might force the Courts to recognize that protection against the complete exposure of the doings of the individual might be a right indispensable to the enjoyment of life. For those reasons, he was of opinion that the plaintiff's grievance, although of an unprecedented character, fell within the settled principles upon which the action for nuisance depended. Holding that opinion, it was unnecessary for him to discuss the question of copyright raised in the case.

The judgment of Dixon, J., is substantially in agreement with that of the Chief Justice.

Evatt, J., said that the attempt of the defendants to justify their conduct by arguing that the broadcasting company was a competitor of the plaintiff in the business of entertainment broke down because, in effect, the plaintiff was expending labour and capital to provide its entertainment, and the broadcasting company was "contributing nothing and taking everything." The plaintiff relied upon the surrounding circumstances in its plea that the defendants were guilty of the tort of nuisance. Its use and occupation of the land was interfered with, its profits lessened, and the value of the land diminished or jeopardized by the conduct of the defendants, which, in principle, was like that of a landowner who erected a special stand outside a cricket-ground to enable the public to witness play at an admission price lower than that charged by the owners of the cricket-ground. His Honour then made the following statement of principle which he said may require either extension or qualification, but which in essence he thought was in accordance with the common law of England :—

(1) Although there is no general right of privacy recognized by the common law, neither is there an absolute and unrestricted right to spy on or to overlook the property of another person :

(2) A person who creates or uses devices for the purpose of enabling the public generally to overlook or spy upon the premises of another person will generally become liable to an action of nuisance, providing appreciable damage, discomfort, or annoyance is caused :

(3) As in all cases of private nuisance, all the surrounding circumstances will require examination :

(4) The fact that in such cases the defendant's conduct is openly pursued, or that his motive is merely that of profit-making, or that he makes no direct charge for the privilege of overlooking or spying will provide no answer to an action.

"Only an insufficiently disciplined desire for business profit and an almost reckless disregard, not so much of the legal rights as of the ordinary decencies and conventions which must be observed as between neighbours, could have induced the broadcasting company to cause the loss to the plaintiff which has been proved in this case," His Honour said. The plaintiff was entitled to maintain an action for damages for private nuisance, and was consequently entitled to an injunction against all three defendants.

McTiernan, J., said that to broadcast a lawful description of what happened on premises could not be an actionable nuisance unless it caused substantial interference with the use and enjoyment of the premises. In his opinion, there was no legal principles which the Court could apply to protect the plaintiff against the acts of the defendants of which it complained.

It is not certain that this case will proceed to the Privy Council. The plaintiff was represented at the original hearing by several King's counsel, but the appeal was argued by junior counsel only. With great respect to the majority in the High Court, we would like to see the matter proceed further, for a broader outlook seems desirable. To quote Rich, J., who has said with respect to one of the constitutional problems in connection with Federation: "After many years of exploration into the dark recesses of this subject, I am content to take the decided cases as sailing directions upon which I may set some course, however unexpected may be the destination to which it brings me, and await with a patience not entirely hopeless the powerful beacon light of complete authoritative exposition from those who can speak with finality."

Two New Doctors of Law.

Mr. Norman Foden, M.A., LL.M., of the Crown Law Office, Wellington, has had conferred on him by the Senate of the University of New Zealand the degree of Doctor of Laws for his thesis on "The Genesis of New Zealand Legal History."

Mr. Ross Hepburn, LL.M., B.Com., A.R.A.N.Z., Barrister and Solicitor, of Christchurch, has been awarded the Degree of Doctor of Laws by the Senate of the University of New Zealand for a thesis on "The Extra-territorial Powers of the New Zealand Legislature."

Practice Precedents.

Leave to serve Attorney or Agent with Writ of Summons.

Rule 47 of the Code of Civil Procedure provides that where a defendant is beyond New Zealand, and has in New Zealand an attorney or agent authorized to transact his affairs generally and to defend actions on his behalf, the writ may, by leave of the Court, be served upon such attorney or agent, subject to such terms as the Court thinks right to impose. There does not appear to be any rule in England equivalent to R. 47 of our Code. In certain circumstances an agent in England may be served, but see *1937 Yearly Practice*, 69 (O. 9, r. 8A). In New Zealand there are few reported cases, but there have been numerous unreported ones.

Care must be taken to supply sufficient evidence in the affidavit to justify the order being made, otherwise the mode of service is by way of substituted service as distinct from service on an attorney: note R. 48 of the Code of Civil Procedure as to when the Writ of Summons may be served out of New Zealand.

In *New Zealand Mortgage and Investment Co., Ltd. v. Campbell*, (1883) N.Z.L.R. 3 S.C. 296, where an attorney, whose principal was beyond the Colony, had power to sue and to transact his principal's affairs in the Colony generally, but had no express power to defend actions, an order was made under R. 47 for the service of process upon the attorney.

The following forms provide for service on a New Zealand representative of a firm when the partners are non-resident in New Zealand.

The application, according to the rule, is to the Court; but the motion is usually directed to a Judge in Chambers, and is *ex parte*, but the order is drawn as a Court order.

MOTION FOR LEAVE TO SERVE ATTORNEY.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District. No.
.....Registry.

BETWEEN A.B. &c. Plaintiff

AND

C.D. and E.F. &c. trading as &c. Defendant.

Mr. of Counsel for the plaintiff to move in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court House at on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard for an order for leave to serve the writ of summons and statement of claim herein on the attorney or agent of the above-named defendant firm UPON THE GROUNDS that the members of the said firm are resident beyond New Zealand and the said is the attorney agent or representative of the said firm in New Zealand AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein and for an order that the costs of this application be reserved.

Dated at this day of 19 .

Solicitor for plaintiff.

Certified pursuant to the rules of Court to be correct.

Counsel for plaintiff.

REFERENCE.—His Honour is respectfully referred to R. 47 of the Code of Civil Procedure.

Counsel for plaintiff.

AFFIDAVIT IN SUPPORT.

(*Same heading.*)

I A.B. &c. make oath and say as follows:—

1. That I am the plaintiff in the above-named action.
2. That I have a good cause of action herein.
3. That the defendant firm carries on operations in New Zealand and has its offices at .
4. That I am informed and verily believe that G. H. under power of attorney acted for the said defendant company in an action by the said firm against one heard at .
5. That in correspondence to me by the said defendant firm received by me this year several passages in the said letters mention the said G. H. and indicate that he is their New Zealand representative.
6. That in the heading of letters sent out by the said defendant firm in New Zealand the following words are printed " and Co. representative for the Dominions."
7. That during my employment in the said firm (which terminated on the day of) I had opportunity to observe the position of the said G. H. and his relationship to the said firm and I verily believe that he is still their attorney.
8. That no member of the said defendant firm is residing in New Zealand.
9. That I believe of and of are the only members of the firm of " and Co."

Sworn &c.

ORDER.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion and the affidavit filed herein, and upon hearing Mr. of Counsel for the plaintiff IT IS HEREBY ORDERED that the plaintiff have leave to serve the writ of summons and the statement of claim herein on G. H. the attorney or agent in New Zealand of the above-mentioned firm and that the costs of this motion be costs in the cause.

By the Court.

Registrar.

Bills Before Parliament.

Industrial Conciliation and Arbitration Amendment.—Cl. 2 (1) extends the definition of "industry" for the purposes of the principal Act, by enacting that the term "industry" includes:

(*a*) any business, trade, manufacture, undertaking, or calling of employers; and

(*b*) any calling, service, employment, handicraft, or occupation of workers.

(This follows the corresponding clauses of s. 3 of the amendment of the Commonwealth Conciliation and Arbitration Act, 1911, passed as the result of the decision of the High Court of Australia in *Federated Engine-drivers and Firemen's Association of Australasia v. Broken Hill Pty. Co., Ltd.*, (1911) 12 C.L.R. 398, followed in *In re Otago Clerical Workers Award*, [1937] N.Z.L.R. 578, in order to nullify the last-mentioned decision.)

Cl. 2 also validates retrospectively the registration of vocational unions, and awards and industrial agreements made or entered into in relation to vocational unions, and all matters and proceedings in relation to them pending or in progress at the time of the passing of this Amendment Bill. Section 2 (1) of the principal Act is consequentially amended by repealing the definition of the term "industry."

Cl. 3 is a declaratory provision as to the authority of the Registrar of Industrial Unions to register the alteration of the name of a union or, where the rules of a union have been altered to provide for a change in the limits of the locality in respect of which the union has been registered, and the admission to membership of the union of the employers or workers engaged in any industry or industries related to the industry in respect of which the union was registered.

Cl. 4. Section 145 (*e*) of the principal Act is amended by inserting at the beginning of the paragraph the words "Except with the authority of the Minister," to permit the Minister of Labour to authorize the issue of under-rate permits in certain cases.

New Zealand Institute of Clerks of Works (Mr. Chapman).

LOCAL BILLS.

Borough of Ngaruawahia Empowering.
Dunedin City Empowering.
New Plymouth Airport.
New Plymouth Borough Council Empowering.
Timaru Harbour Board Loan Amendment.
Wanganui Harbour District and Empowering Amendment.
Whangarei Airport.

Recent English Cases.

Noter-up Service.

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

AGENCY.

Mercantile Agent—Pledge of Documents—Surrender of Documents to Pledgor or upon Trust for Sale—Pledge to Third Party.

Where the pledgee of documents surrenders them to the pledgor upon trust for sale, the pledgee is the "owner" and the pledgor a mercantile agent within the Factors Act, 1889.

LLOYDS BANK LTD. *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, **[1937] 3 All E.R. 312. K.B.D.**

As to pledge of documents of title with bank: see HALSBURY, Hailsham edn., 1, par. 1400; DIGEST 3, pp. 277-282.

Sale of Property—Vendor Withdrawing from Contract—Bargain Too Favourable to Purchaser.

The fact that a bargain is found to be altogether one-sided is not a "just excuse" for a vendor's withdrawal from a contract of sale.

RONALD BAMPTON AND PARTNERS *v.* D. GARNER AND SONS, LTD., **[1937] 3 All E.R. 438. K.B.D.**

As to right to remuneration: see HALSBURY, Hailsham edn., 1, par. 433; DIGEST 1, pp. 508-512.

BANKRUPTCY.

Preference—Relation Back—Protection of *Bona Fide* Transaction Without Notice—Discharge of Overdraft at Bank After Presentation of Petition but Before Receiving Order.

A bona fide *transaction without notice of a bankruptcy petition after the latter is presented is protected, and is not affected by the doctrine of relation back of the trustee's title.*

Re SEYMOUR; THE TRUSTEE *v.* BARCLAYS BANK, LTD., **[1937] 3 All E.R. 499. Ch.D.**

As to transactions unaffected by the relation back of the trustee's title: see HALSBURY, Hailsham edn., 2, pars. 508-515; DIGEST 5, pp. 907-918.

CHARITIES.

Gift to Holder of Office—Whether Holder of Office for Time Being.

A gift to the "Mayor of L." for a charitable purpose was held to refer to the holder of the office for the time being, and not to the holder of the office at a particular time.

Re PIPE; LEDGER *v.* MOBBS, **[1937] 3 All E.R. 536. Ch.D.**

As to gift to holder of an office: see HALSBURY, Hailsham edn., 4, par. 220; DIGEST 8, pp. 317, 318.

CONTRACT.

Constructive Contract—Money Paid—Implied Request.

A request to pay money may be implied even though the payment was not made under legal compulsion.

Re CHETWYND'S ESTATE; DUNN TRUST, LTD. *v.* BROWN, **[1937] 3 All E.R. 530. C.A.**

As to recovery of voluntary payments: see HALSBURY, Hailsham edn., 7, par. 368; DIGEST 12, pp. 522-524.

COPYRIGHT.

Ownership—Newspaper Articles—Information Supplied by One Person, Articles Written by Another.

Where a celebrity supplies the material for a biography of or an article upon himself, and a journalist or other person puts the material into literary shape, the celebrity is neither the owner nor the joint owner of the copyright in the biography or article.

DONOGHUE *v.* ALLIED NEWSPAPERS, LTD., **[1937] 3 All E.R. 503. Ch.D.**

As to subject-matter of copyright: see HALSBURY, Hailsham edn., 7, par. 822; DIGEST 13, pp. 164, 165.

COSTS.

Taxation of Costs—Application to Registrar by an Insurer to Apportion Costs as Between Himself and a Party to an Action—County Courts Act, 1888, sec. 118—County Court Rules, 1903-1935, Ord. 53, r. 46.

Only the parties to an action are entitled to apply to the Registrar to make an apportionment of the costs.

Re TAXATION OF COSTS; *Re* T.A.M., A SOLICITOR, **[1937] 3 All E.R. 113. C.A.**

As to apportionment of costs: see HASLBURY, 1st edn., 23, par. 329; DIGEST Practice, pp. 917-922.

CRIMINAL LAW.

Criminal Law—Indictment—Joinder of Offences—Two Counts of Murder.

Although the joinder of two murders in one indictment is undesirable it does not invalidate the indictment.

R. *v.* DAVIS, **[1937] 3 All E.R. 537. C.C.A.**

As to joinder of offences: see HALSBURY, Hailsham edn., 9, pars. 178, 180; DIGEST 14, pp. 226-231.

HUSBAND AND WIFE.

Marriage—Presumption of Marriage.

The presumption in favour of marriage will not be rebutted by reason of there being no entry in the register of marriages in respect of a marriage of known date and place celebrated in an area where registration of marriages was compulsory.

Re TAPLIN; WATSON *v.* TATE, **[1937] 3 All E.R. 105. Ch.D.**

As to presumption of marriage: see HALSBURY, Hailsham edn., 16, par. 931; DIGEST 27, pp. 70, 71.

Breach of Promise—Promise by Married Man After Decree *Nisi* but Before Decree Absolute.

The rule that a promise to marry by a person already married is against public policy, and will not support an action, does not apply to a promise made between decree nisi *and decree absolute of divorce.*

FENDER *v.* MILDMAY, **[1937] 3 All E.R. 402. H.L.**

As to promise by person already married: see HALSBURY, Hailsham edn., 16, par. 816; DIGEST 12, pp. 267, 268.

Policy Taken Out by Husband for Benefit of Wife—Death of Wife—Husband Continuing to Pay Premiums—Lien on Policy Money.

A husband who continues after his wife's death to pay the premiums in respect of a policy taken out by him for the benefit of his wife is entitled to a lien on the policy money for the premiums paid after the wife's death.

Re SMITH; BILHAM *v.* SMITH, **[1937] 3 All E.R. 472. Ch.D.**

As to policies effected under the Married Women's Property Act, 1882; see HALSBURY, Hailsham edn., 16, pars. 1069-1071; DIGEST 27, pp. 149-152.

INSURANCE.

Third Party Insurance—Passenger Carried by Reason of or in Pursuance of a Contract of Employment.

The words "Passengers carried by reason of or in pursuance of a contract of employment" in the Road Traffic Act, 1930, *sec.* 36 (1) (*b*) (*ii*), *are not limited to contracts of employment with the insured person.*

IZZARD *v.* UNIVERSAL INSURANCE CO., LTD., **[1937] 3 All E.R. 79. H.L.**

As to the Road Traffic Act, 1930, sec. 36: see HALSBURY, Hailsham edn., 18, par. 909.

INCOME TAX.

Profits from Trade — Deduction — Deficiency in Rent — Computation—Brewers—Leasehold Premises Let to Tied Tenant —Premium Paid By Brewers on Grant or Purchase of Lease—

In calculating for income tax purposes the loss sustained in the letting of tied houses account cannot be taken of a premium paid by the brewer on the grant or purchase of the lease.

COLLYER (INSPECTOR OF TAXES) *v.* HOARE AND CO., LTD., **[1937] 3 All E.R. 491. K.B.D.**

As to allowances in case of tied houses: see HALSBURY, Hailsham edn., 17, par. 246; DIGEST 28, pp. 56, 57.

Annual Payment—Guarantee of Fixed Dividend Payable by Company.

Payments made under a gurantee of dividend are annual payments, although they may not have to be made every year, and, in any case, are of uncertain amount.

Moss' Empires, Ltd. *v.* Inland Revenue Commissioners, **[1937] 3 All E.R. 381. H.L.**

As to annual payments: see HALSBURY, Hailsham edn., 17, par. 471; DIGEST 28, pp. 50, 51.

Trade Receipts—Overpayments for Wages Due to Fraud of Servants—Reimbursement by Auditors.

An amount received to replace the defalcations of employees is a trade receipt for income tax purposes.

Gray (Inspector of Taxes) *v.* Penrhyn (Lord)., **[1937] 3 All E.R. 468. K.B.D.**

As to damages and compensation: see HALSBURY, Hailsham edn., 17, pars. 235-240; DIGEST 28, pp. 62-64.

LIMITATIONS OF ACTIONS.

Acknowledgment—By Agent of Person by Whom Sums Secured are Payable—Mortgage of Interest Under Will Comprising Realty and Personalty—Estate Accounts and Distribution Statement Sent by Trustees of Will to Mortgagee.

Trustees winding up an estate, who have had notice of the mortgage of a reversionary interest are not persons bound as between themselves and the mortgayor to pay the debt, and therefore cannot make an acknowledgment of the debt to the mortgagee, within the Real Property Limitation Act, 1874, sec. 8.

Re Edwards' Will Trusts; Brewer *v.* Gething, **[1937] 3 All E.R. 58. Ch.D.**

As to acknowledgments: see HALSBURY, Hailsham edn., 20, par. 830; DIGEST 32, pp. 397, 398.

Debt—Acknowledgment—Arrangement in Lieu of Payment of Interest—Creditor Living Rent Free on Debtor's Farm and Receiving Free Farm Produce.

Where by arrangement, in lieu of payment of interest, a creditor lives rent free on a farm belonging to the debtor and receives free farm produce, the services rendered to the creditor constitute a continuous acknowledgment of the debt.

Re Wilson; Wilson *v.* Bland, **[1937] 3 All E.R. 297. Ch.D.**

As to sufficiency of acknowledgment: see HALSBURY, Hailsham edn., 20, pars. 800-805; DIGEST 32, pp 357-377.

MASTER AND SERVANT.

Master's Duty—Provision of Safe System of Working—Coal Mine—Delegation of Duty—Common Employment.

An employer is not absolved from his duty to take due care in the provision of a reasonably safe system of working by the appointment of a competent person to perform that duty.

Wilsons and Clyde Coal Co., Ltd. *v.* English, **[1937] 3 All E.R. 628. H.L.**

As to appointment of manager of mine: see HALSBURY, Hailsham edn., 22, par. 1605; DIGEST 34, pp. 211-214.

Coal Mine—Statutory Duty—Fencing of Machinery.

The owner of a mine will not be liable to an action for damages as for breach of his statutory duty to fence dangerous machinery if he can show that it was not reasonably practicable to avoid or prevent the breach.

Coltness Iron Co., Ltd. *v.* Sharp, **[1937] 3 All E.R. 593. H.L.**

As to breach of duty to fence: see HALSBURY, Hailsham edn., 22, par. 1650; DIGEST 24, pp. 908-911.

MISTAKE.

Money Paid Under Mistake of Fact—Contract—Modification of Terms of Payment—Payment upon Old Terms—Account Passed by Agent Ignorant of New Terms—Effect of Knowledge of Another Agent.

Where one agent, who is ignorant of a new agreement entered into by another agent on behalf of the same principal, pays money under the terms of an old agreement, the principal is not precluded from bringing an action for money paid under a mistake of fact by the fact that the other agent knew of the new agreement so long as he did not know that it was not being acted upon.

Anglo-Scottish Beet Sugar Corporation, Ltd. *v.* Spalding U.D.C., **[1937] 3 All E.R. 335. K.B.D.**

As to possession of knowledge or means of knowledge: see HALSBURY, Hailsham edn., 23, par. 235; DIGEST 35, pp. 151-153.

NEGLIGENCE.

Invitee or Licensee—Child—Paddling Pool Maintained by Local Authority.

A child who uses a paddling pool maintained by a local authority is a licensee and not an invitee.

Ellis *v.* Fulham Borough Council, **[1937] 3 All E.R. 454. C.A.**

As to invitees: see HALSBURY, Hailsham edn., 23, par. 852; DIGEST 36, pp. 35-41.

Negligence Causing Death—Damages—Survival of Action—Claim by Administrator for Benefit of Deceased Person's Estate—Shortened Expectation of Life.

Where a person dies as the result of the actionable negligence of another, damages may be recovered by his personal representative for the loss of expectation of life.

Rose *v.* Ford, **[1937] 3 All E.R. 359. H.L.**

As to damages recoverable in cases of negligence causing death: see HALSBURY, Hailsham edn., 23, pars. 975, 976; DIGEST Supp., Negligence, Nos. 953*b*-953*e*.

PRACTICE.

Interrogatories—libel Action—Publication in Newspaper—Action Against Contributor—Interrogatory as to Identity of Informant.

The rule of practice, which confers upon the owner or publisher of a newspaper an indenmnity from interrogation as to the identity of his informants, does not extend to a contributor to a newspaper.

South Surburban Co-operative Society, Ltd. *v.* Orum and Croydon Advertiser, Ltd., **[1937] 3 All E.R. 133. C.A.**

As to interrogatories as to malice: see HALSBURY, Hailsham edn., 10, par. 510; DIGEST 18, pp. 208-210.

TRADE.

Covenant in Restraint of Trade—Accountant.

A covenant in restraint of trade must be reasonable in the sense that the restraint must be no more than is necessary for the protection of the person in whose favour it is imposed.

D. Bates and Co. *v.* Dale, **[1937] 3 All E.R. 650. Ch.D.**

As to covenants restraining competition: see HALSBURY, Hailsham edn., 22, par. 229; DIGEST 43, p. 57.

WILL.

Construction—Legacy—Person in Testator's Service at Date of His Death.

The gift of a legacy to all persons in the testator's service at the date of his death may include persons employed in a business carried on by the testator in partnership with others.

Re Howell's Trusts, Barclay's Bank, Ltd. *v.* Simmons, **1937] 3 All E.R. 647. Ch.D.**

As to legacies to servants: see HALSBURY, 1st edn., 28, par. 1393; DIGEST 44, pp. 299-908.

Rules and Regulations.

Samoa Act, 1921. Samoa High Court Amendment Rules, 1937. August 4, 1937. No. 211/1937.

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Stock-remedies Act, 1934. The Stock-remedies Registration Regulations, 1935, Amendment No. 1. August 18, 1937. No. 214/1937.

Health Act, 1920. Hairdressers (Health) Regulations Extension, 1937, No. 4. August 18, 1937. No. 215/1937.

Customs Act, 1913. Customs Export Prohibition Order, 1937, No. 4. August 18, 1937. No. 216/1937.

Hawke's Bay Earthquake Act, 1931. Hawke's Bay Land Transfer Regulations, 1937. August 18, 1937. No. 217/1937.

Primary Products Marketing Act, 1936.—Agriculture (Emergency Powers) Act, 1934. The Butter (Wellington District) Marketing Regulations, 1937, Amendment No. 1. September 3, 1937. No. 218/1937.

Primary Products Marketing Act, 1936. Butter Local Prices Order, 1937. September 3, 1937. No. 219/1937.

Primary Products Marketing Act, 1936. Dairy-produce Export Prices Order (No. 2), 1937. September 3, 1937. No. 220/1937.

Shipping and Seamen Act, 1908. Shipping Casualty Rules, 1937. September 2, 1937. No. 221/1937.