[TUESDAY, NOVEMBER 10, 1925.

Butterworth's Fortnightly Notes

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Butterworth's Fortnightly Notes.

"Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in Heaven and Earth do her homage, the very least as feeling her care and the greatest as not exempted from her power."

—Richard Hooker.

The Editor will be pleased to receive manuscripts of Articles for consideration and any suggestions with regard to the development of the Paper.

Address all communications:—The Editor,
Butterworth's Fortnightly Notes,
49-51 Ballance Street, Wellington.

TUESDAY, NOVEMBER 10, 1925.

EDITORIAL.

LONDON LETTER.

The London Letter which appeared in our last issue forecasted some penportraits of the leading English Judges and Counsel. It appeared to us that New Zealand lawyers who with the fewest exceptions have not seen and will not see or know their English contemporaries would welcome a description of the physical and mental idiosynerasics of the leading members of the English Bench and Bar. Inner Templar, than whom it would be difficult to imagine, lawyer and writer as he is, a man more fitted to supply the want, has undertaken the task of writing them up. Those of us who practise at the Bar can in a general way gather a fair idea of the mental calibre of those Judges whose written reasons we study but we know not whether they be old or young stout or lean, or in more general words, what kind of men they be. Of the Bar, until the happy arrival of Inner Templar through these columns we were compelled to imagine the like of its individual members from what we read from references in the London dailies. Thus while we heard much of Sir Edward Marshal Hall as he defended some murderer we never knew much of the great Equity leaders or even the leaders in the King's Bench. From the letters now in hand readers are assured of an exceptional opportunity of a "close up" view of the great men of our profession at Home.

From the candid manner Inner Templar deals with the various subjects we may rest assured that his vision of them is clear and through him we shall see clearly.

THE ATTORNEY GENERAL.

With the retirement of Sir Francis Bell, G.C.M.G., K.C., the high office of Attorney General falls vacant and already rumour has placed the mantle of office on many willing and a few unwilling shoulders. We expected to hear nothing until after the General Election as the appointment is a political one. When the oppointment is made we trust that a man high in the profession will be chosen. The profession needs in its Attorney General a man who will take care of its interest in Parliament and who will protect it from the foolish attacks which are frequently dangerous to which it is subjected. The Attorney General is the medium between the Bench and the Bar and any movement emanating from the latter should find in its leader a ready and willing Counsel. The profession loses nothing in our opinion from the fact that the Attorney General is not a member of the Lower House. On the contrary it seems to us that if the Government select the best man available and he probably would not be found in the Lower House then the Government, the public and the profession are the better served by his elevation to the Upper House whence he can perform his high office.

COURT SITTINGS.

COURT OF ARBITRATION.

The Court of Arbitration will sit in Wellington on 23rd November at 10 a.m.

COURT OF APPEAL.

Stout, C.J.
Sim, J.
Adams, J. October 10, 1925.
SURFDALE ESTATES LTD. v. PATERSON.

Court of Appeal—Practice—Rule 22—Security not given.

This was an application by respondent to dismiss an appeal for noncompliance with the rules inasmuch as security had not been given. On 26th May 1925 appellant gave notice of appeal. Attached to Notice of Motion filed was a letter from the Manager of the Sun Insurance Office as follows:—

Sun Insurance Office,
Head Office for New Zealand,
42 Shortland Street,
Auckland,
29th May, 1925.

The Registrar,
Supreme Court,
Auckland.

Dear Sir,—

Surfdale Estates Ltd. v. Patersons No. 8802/24.

We beg to inform you that this Company undertakes to execute and hand to you its bond in the sum of £300 . . . under Rule 22 of the Court of Appeal Rules as security for the costs of the above action and for the due performance of the judgment of the Court of Appeal.

Yours faithfully,
EVANS, per Manager for N.Z.

On 15th August 1925 a Bond was lodged with the Registrar as security.

Myers K.C. and **C. A. L. Treadwell** for respondent in support of the motion: The rule is mandatory. There is no concession available. **Official Assignee v. Holt** 1925/N.Z.L.R. 426. The Sun Insurance letter was not a security and was not intended as such. The letter was an imperfect obligation.

SIM J.: It was not a contract.

Tripe for appellant contra: The Sun Office letter was equivalent to a cover note. The Court has a discretion.

The Court unanimously dismissed the appeal in terms of the Motion.

STOUT C.J. said, the other members concurring, that no security had been given. There was no suggestion of waiver by agreement between the parties. £15 15s costs allowed respondent on the application.

Solicitors for respondent: **McGregor & Lowrie**, Auckland.
Solicitors for appellants: **Anderson & Snedden**, Auckland.

Stout, C.J.
Sim, J.
Reed, J.
Adams, J.
Ostler, J.
Sept. 29, Oct. 20, 1925.
Wellington.
THE KING v. McKECHNIE AND WIFE.

Criminal law—Sec. 219—Conspiracy—If applies to husband and wife.

The accused were husband and wife and were convicted of conspiring together to induce a woman to commit adultery. The question was stated by Sim J. for the consideration of the Court of Appeal was whether it was a defence to such a charge that the parties conspiring were husband and wife.

Fair K.C. (Solicitor-General) for the Crown.
White for prisoners.

The majority of the Court (Sim, Reed and Adams, JJ), Stout C.J. and Ostler J. dissenting, came to the conclusion that it was a defence and the accused were therefore acquitted.

REED J. delivered the judgment of the majority of the Court and cited **Russell in Crimes 8th Edn. Vol. 1 p. 162 R. v. McKenzie 75 J.P. 159, Hawkins Pleas of the Crown** Bk. 1 Ch. 72 Sec. 8, **Stephens Commentaries** 16th Edn. Vol 14, p. 213, 9 **Halsbury para. 544 Archbald's Criminal Pleadings** 26th Edn. 1417, **Roscoe's Criminal Evidence** 14th Edn. 520, **Reg. v. Brown** 15 N.Z.L.R. 32, **J. P. Bishop on Criminal Law (Ames)** Vol 2 para. 187, **R. v. Morris** 1 C.C.R. 90, **Attorney-General v. Sillern** 33 L.J. Sec. 92.

Stout, C.J.
Sim, J.
Reed, J.
Adams, J.
Ostler, J.

October 6, 8, 1925.

MAYOR ET AL OF CHRISTCHURCH v. CHRISTCHURCH DRAINAGE BOARD.

Drainage Board—City Council—Whether empowered to levy rate against unimproved value in respect of drainage.

This was an action in the form of an originating summons to determine the plaintiff's limitations in regard to the subject matter of its levy for drainage rates. The Court was unanimous and Ostler J. delivered the judgment. The facts and question are taken from his reasons:

The defendant Board was incorporated under the Christchurch District Drainage Act, 1875, which Act, with several amendments has been consolidated in the Christchurch District Drainage Act 1907. The defendant Board's district includes parts of the Counties of Waimiri and Heathcote, the whole of the Boroughs of Riccarton and New Brighton, and the whole of the City of Christchurch. In the Counties the system of rating in force is on the capital value, while in the Boroughs and the City the system in force is on the unimproved value, that system having been in force in Christchurch City ever since 1903. The defendant Board has raised five loans and part of a sixth loan, to provide funds for the extension of its sewerage system, which so far has been established only in the more central and urban part of the defendant Board's district. This extension is now in progress. The interest and sinking funds in connection with these various loans have been and are raised by rates imposed on parts only of the Board's district. The charges in connection with the last loan are met by rates imposed on a special rating area comprising the whole of Christchurch City, the whole of the Borough of Riccarton and parts of the two Counties named. For many years the rates levied by the Board have been levied on the capital value of the rateable property in the district. The security for the charges in connection with the last loan authorised is a rate of a farthing in the pound on the capital value of the rateable property in that part of the special district already provided with sewerage, and a rate of 1½d. in the pound on the capital value of the rateable property of that part of the special district which the Board proposes to provide with sewerage. The area already provided with sewerage comprises inter alia part of the City of Christchurch, and the area proposed to be so provided comprises inter alia nearly all the balance of the City. Of the total sum of £700,000 authorised to be borrowed under the latest loan only some £27,000 has so far been borrowed, and consequently only a small proportion of the rates struck to secure the interest etc. on that loan has had to be collected. But as more and more of the loan is being raised from year to year, the Board's demands in respect of rates are steadily increasing. The Board has no power to levy and collect its rates itself. The method provided by its special Act (Section 45) is that it shall each year by special order make and levy a rate sufficient to cover its charges, and a copy of this special order is sent to the Council of each local authority in its district which is empowered and directed by the Statute to make, levy and collect the rate, and to remit the proceeds to the Board. Apparently the Board under its special Act has no power to levy rates otherwise than on the capital value, and it has always so levied them. The latest loan was authorised on a proposal to secure it by rates on the capital value, and hitherto the Christchurch City Council, although for 22 years it has levied its own rates on the unimproved value, has always (with one unimportant exception) levied the rate which it had the statutory duty to levy and collect on behalf of the Board on the capital value. But the plaintiffs object to have to do this. They desire to levy this rate on the same system as that on which they levy their own rates, that is on the unimproved value; and the question the Court is called upon to decide in these proceedings is whether they have power to do so.

Myers K.C. and **Loughnan** for City Council.
Sir John Findlay K.C. and **Cuthbert** for Drainage Board.

OSTLER J. said that if the Board so resolved the City Council was compelled to levy all rates which they levy on behalf of the Board on the capital value and they have no power to levy such rates on the unimproved value.

Solicitors for Council: **Izard and Loughnan**, Christchurch.
Solicitors for Board: **Garrick, Cowlishaw and Co.**, Christchurch.

Sim, J.
Reed, J.
Ostler, J.

Oct. 9, 20, 1925.

SHERRATT v. EAST COAST COMMISSIONER.

Lease—Right of renewal—Compensation for permanent improvements—Whether compensation to cover improvements effected in one or both terms of lease.

This was an originating summons to construe certain clauses in a lease between the parties. The lease was almost identical in terms with the lease construed by the Court of Appeal in **Kells v. East Coast Commissioner** (1924) N.Z.L.R. 76 with the exception of the additional words in black type in Clause 7 set out hereunder:

> "6. That at the expiration of the term hereby created should the lessee not elect to take a renewal of this least as is hereinafter provided, the lessor shall pay to the lessee the full value of all 'Substantial im-

provements of a permanent character' effected upon the said land from the commencement of the term of this demise." (Then follows a definition of such improvements.) "Provided always that the lessor shall in no case be liable to pay for such improvements a greater sum than £2 15s per acre computed upon the whole area hereby demised."

"7. The lessee shall be entitled at the end of the term of 21 years hereby created to a renewal for a further term of 21 years which lease shall contain all the covenants and conditions contained herein (except the right to a renewal for a further term) **but with the same right, limited to £2 15s per acre on the aggregate area of the lands demised, to compensation for 'substantial improvements of a permanent character' as is granted under the first term,** at a rental amounting to the then current rate of interest on the unimproved value of the land etc."

"10. At least three months before the expiration of the aforesaid term but not sooner than six months before the expiration of the aforesaid term a valuation shall be made of the then value of the fee simple of the lands then included in the lease and also a valuation of all substantial improvements of a permanent character made since the 26th day of January 1901 and then in existence on the said land." (Then follows provision for the method of making these valuations.) "A copy of the valuations made as aforesaid shall be served upon the lessors and on the lessee not later than two months before the expiry of the term for which the lessee then holds the lands."

"11. Should the lessee decide not to take a renewal of the lease for a further term of 21 years and of such his decision shall give the lessors notice not less than three months prior to the termination of the term hereby created (failure to give such notice shall for all purposes be deemed to be election to take the renewal as aforesaid) then at least one month before the expiry of the lease hereby granted a lease of the said land for a further term of 21 years shall be sold by auction to the highest bidder . . . upon the following terms and conditions." (Then follow certain conditions, including a condition that if any person other than the lessee shall be declared the purchaser, he will within thirty days and before being admitted into possession pay the amount of the value of the improvements fixed by valuation.)

"12. If such lease shall not be disposed of as abovementioned to some person other than the lessee . . . then the lessee may again within thirty days elect in manner aforesaid to accept a fresh lease as aforesaid, and if he do not elect to accept the same . . . then he shall continue as tenant for said land from year to year . . . until the lessors shall succeed in finding an applicant for the new lease, unless prior to the finding of such applicant he shall elect to accept a new lease for the said further term as aforesaid."

"16. The lessors shall not nor shall any of them be personally liable in the performance or observance of the covenants and conditions on their part herein contained or implied, but upon the breach or non-performance or non-observance on the part of the lessors herein contained or implied the right of the lessee to redress shall be limited strictly to the estate of the Corporation known as Mangatu No. 1."

Skerrett K.C. and **Johnston** for plaintiff.

D. S. Smith for defendant.

THE COURT unanimously decided, to adopt the language of Sim J.: "The question to be determined is as to the extent of the right thus conferred. It is clear, I think, that 'the same right . . . to compensation" referred to in Clause 7 is not a right to be paid compensation at the end of the first term, but a right to be paid compensation at the end of the second term for improvements effected during the first term. Clause 7 is thus the foundation on which the plaintiff's right to be paid any compensation rests. Once it has been established that the plaintiff is entitled to compensation then, in order to make the right to compensation effective, the new lease must contain Clauses 6 and 10. These clauses are in one sense machinery clauses, but, they are something more, for their introduction into the lease has the effect of making compensation payable at the end of the second term for improvements effected during th second term as well as during the first term.

Solicitors for plaintiff: **Chapman, Skerrett, Tripp & Blair,** Wellington.

Solicitors for defendant: **Morison, Smith & Morison,** Wellington.

MacGregor, J.
Ostler, J.
Alpers, J.

BANK OF NEW ZEALAND v. BAKER.

Mortgage—Given by defendant to secure accommodation to third party from plaintiff—Readjustment of mortgages between Plaintiff and third party without reference to defendant—Third party goes bankrupt—Whether defendant released as demand made for first time after bankruptcy.

This was a case heard by the Full Court on admitted facts. The case is an interesting and important one. We publish the facts, but for lack of space only the law point which disposed of the matter in the defendant's favour. Ostler J. delivered the judgment of the Court.

One, Sam Smith, was the owner of the equity of redemption in a leasehold estate containing 1068 acres, subject to two mortgages. The first mortgage was given in 1907 to the State Advances Office to secure the sum originally of £500, and it was reducible by instalments of principal and interest amounting to £15 half yearly. The second mortgage was given in 1913 to one, Fargie, to secure the sum originally of £4070. This mortgage was reducible by certain instalments amounting to £500, and the balance was repayable on the 1st July 1918. On the 4th July 1914 the principal due under this mortgage had been reduced to £3570.

On the 26th October 1916 Smith gave a third mortgage to the plaintiff to secure banking accomodation for himself by way of overdraft, and this third mortgage was duly registered as No. 35966 in the Taranaki Register. At the time this mortgage was given, as the case says, as part of the same transaction, it was arranged between Plaintiff Bank, defendant and Smith that this banking accomodation for Smith should be secured by a first mortgage given by defendant to plaintiff Bank of 117 acres of land owned by defendant in Ngaire Survey District; and on the 6th December 1916 defendant executed to plaintiff Bank a mortgage over this land, which was duly registered as No. 36125 Taranaki. Before registration Smith's and defendant's mortgages to plaintiff Bank were respectively endorsed as follows and stamped accordingly:—

"To be assessed for stamp duty purposes as a mortgage for £1600.

For the Bank of New Zealand,
F. Glasgow, Manager at Ohura."

"6/12/16. To be assessed for stamp duty purposes as a collateral security to mortgage No. 35966 dated 26/12/1916 securing an advance limit of £1600.

For the Bank of New Zealand,
F. Glasgow, Manager at Ohura."

On 5th June 1918 both Smith's and defendant's mortgages were stamped to cover a further charge of £1200.

In 1919 Smith's second mortgage to Fargie was overdue. Smith therefore arranged to borrow £4000 on a first mortgage of his land to pay off the first and second mortgages. Fargie's mortgage had been reduced to £3070 and the first mortgage to the State Advances Department had been reduced to £423-9-1, making a total sum due on the two mortgages of £3493-9-1. But Smith, with the consent of the plaintiff Bank, executed a new first mortgage to the Public Trustee on the 16th September 1919 for a term of five years to secure the sum of £4000, that is, £506-10-11 more than the amount due on the two mortgages which were paid off. The plaintiff Bank, on 16th September 1916, released Smith's third mortgage in order to enable this transaction to be carried through, and on 23rd September 1916 took a new second mortgage from Smith to secure past and future advances. It will thus be seen that by this transaction the Bank allowed Smith to reduce the value of its security by £508-10-11, by increasing the amount of the prior charges by that amount. The whole of this transaction was carried through by Smith and plaintiff Bank without informing defendant or referring to him in any way. Subsequently, on 23rd October 1920 plaintiff Bank took collateral security from Smith over the stock on his land, again without any reference to defendant.

On 26th September 1923 Smith was adjudicated a bankrupt on his own petition, and has not yet received his discharge. Meantime the amount of the advances he had received from plaintiff Bank had increased until at the date of his bankruptcy they amounted to more than £4800. On the 1st October 1923 plaintiff Bank sent a letter of demand to defendant demanding payment of the amount of Smith's overdraft amounting, with interest, to that date

to £4811-4-9. No previous demand of any kind had been made by plaintiff Bank on defendant, and apparently this was the first intimation he had received from the Bank relating to his mortgage since the date of its execution nearly seven years before. Defendant claimed that his mortgage had been discharged by the circumstances of the case, and accordingly on 1st December 1924 plaintiff Bank issued a writ against him in which it prayed for a declaration that defendant's mortgage was valid and subsisting and that the land comprised in it was charged with payment of the sum of £4887-9-9 with interest thereon from the 30th September 1924 to day of payment at the rate of 8 per cent. per annum. By the consent of the parties this special case has been stated asking the decision of the Court on certain questions of law.

Sir John Findlay K.C. and **Johnson** for plaintiff.
Skerrett K.C. and **Brown** for defendant.

OSTLER J. said after reciting the facts at length, on the decisive point of law.

The first question of law is whether the release of Smith's third mortgage to the Bank and the taking by it of a new second mortgage without the knowledge or consent of defendant entitled defendant to require his mortgage to be released. Defendant contends that the contract between him and the Bank was one of guarantee; that his position in law is that of surety that he entered into his contract on the faith of an existing contract between the Bank and Smith for the express purpose of guaranteeing that contract, and that, as the contract between the Bank and Smith was rescinded by the Bank, and a new contract substituted without his consent, he is thereby discharged. The Bank, on the other hand, contends that the contract between it and defendant was expressly designed and intended to exclude defendant from the more favourable position of a surety, and to render him liable as a principal. It will thus be seen that this question of law really turns upon the construction of the contract between the Bank and Defendant, and it will be necessary in order to determine the question to closely examine the terms of the document.

The mortgage is on a printed Bank form, which is headed: "(To be used where a third party mortgages freehold land to secure the account of a customer)"

"Memorandum of Mortgage."

After reciting that defendant is the registered proprietor of an estate in fee simple of the land, and describing the land, it contains the following recital:—

> "And whereas Sam Smith keeps an account with the Bank of New Zealand and is now indebted to the Bank on such account in a certain sum of money and may hereafter become further indebted to the Bank in other sums of money, and whereas in consideration of the Bank accepting and acting on this security and of any loans advances discounts or other banking accomodation which may have been or may hereafter be made to the said Customer by the Bank and in consideration of the Bank's forbearing for one calendar month from the date hereof to press for payment of past advances. . . . I have agreed that I shall secure in manner hereinafter appearing the payment to the Bank on demand made on me of all and every sums and sum of money that may at the time of making such demand be due owing or payable by the said Customer to the Bank on any account whatsoever. . . . . but so nevertheless that I am not by these presents to be personally liable for such payments."

The document then proceeds: "Now therefore and in pursuance of such agreement, and in consideration of the premises I do hereby covenant with the Bank as follows;" Then follow the usual covenants in a mortgage to keep all buildings in repair, to insure, to pay rates and taxes, to ensure the Bank against all charges on the land imposed by the Workers' Compensation Acts, and not to further mortgage the land without the consent of the Bank. These covenants are all in the most drastic terms.

Then comes the default clause, in the following terms:—

> "That in case default shall be made in payment of any of the moneys hereby secured or any part thereof immediately upon demand as aforesaid or if breach or default shall be made in the performance or observance of any covenant or condition on my part hereon contained or implied (or contained or implied in the mortgage collateral herewith hereinafter referred to) then and in any or either of such cases it shall be lawful for the Bank forthwith or at any time thereafter to exercise such power of sale and incidental powers as are in that behalf vested in mortgagees by the Land Transfer Act," etc.

The other relevant provisions of the mortgage are clauses 6, 8, 11 and 12 and the concluding words creating the charge, which is as follows:—

> "6. That the relation constituted by virtue of these presents shall as between me and the Bank be deemed for all purposes that of a principal obligant and not that of a surety, and in particular the following provisions shall apply, namely,—(a) The Bank may grant time or other indulgence to or compound with the said Customer. . . .without discharging or affecting this security," etc.
>
> "8. That these presents shall be a running and continuing security so long as the relation of banker and customer shall subsist between the Bank and the said customer irrespective of any sums that may be paid to the credit of the account of the said customer with the Bank and notwithstanding any settlement of account or any other matter or thing whatsoever such security shall remain in full force and extend to cover any sum of money which may hereafter become owing from the said customer to the Bank until a final release of this security shall have been executed by the Bank."
>
> "11. That no personal liability for the payment of the money hereby secured shall attach to me and accordingly no covenant shall be raised or implied herein."
>
> "12. That the moneys hereby secured are the same moneys secured also by a Memorandum of Mortgage registered as number 135966 bearing date the 26th day of October 1916 over section 4 Block XIV Aria Survey District and made between the said customer as mortgagor of the one part and the Bank as mortgagee of the other part, and such Memorandum of Mortgage and this mortgage shall be read and construed together."
>
> "And for the better securing to the Bank the repayment in manner aforesaid of all moneys (including interest) which it is hereinbefore recited should be secured and also all moneys (including interest) which it is hereinbefore provided shall be included in this security I hereby mortgage to the Bank all my estate and interest in the said land above described."

The only other document which it is necessary to set out in full is the release of Smith's third mortgage by the Bank, which is in the following terms:—

> "Received from the within-named mortgagor this 16th day of September 1919 all moneys secured and intended to be secured by the within written obligation in full satisfaction and discharge of the within obligation so far as the same effects the land within described, but without releasing or discharging the mortgagor or any other person or persons or any other security or securities for the time being held by the mortgagee from payment of any moneys whatsoever remaining owing to it under the within obligation or any collateral instrument or otherwise."

It is clear from a persual of the relevant terms of the mortgage that it is not a guarantee and does not constitute defendant a surety in the ordinary sense, inasmuch as it is not a promise to answer for the debt default or miscarriage of another. Such a promise imparts a personal liability, and in this case it is expressly stipulated that defendant shall be under no personal liability. But nevertheless it is equally clear that it is a contract in the nature of suretyship, or quasi-suretyship as it was called in the argument, for the defendant owed no money to the Bank, but mortgaged his land to secure moneys advanced to Smith, and it is obvious that the legal advisers of the Bank were of this opinion because they strove by the wording of the mortgage, and especially by the insertion of clause 6 to provide that notwithstanding the nature of the contract defendant's relation with the Bank should be deemed that of a principal obligant and not that of surety.

His Honour held that the contract must be treated as one of suretyship with special clauses. He also held that the defendant's mortgage was to secure all advances made and to be made to Smith on any account.

It was further held that on the construction of the mortgage the release of Smith's mortgage and the taking of another in its place though without releasing the debt did not release defendant's mortgage. . . . . Defendant had contracted himself out of his rights against the Bank as surety.

Finally the Court decided that as at the date of the demand on the defendant Smith had gone bankrupt there were no moneys owing by Smith to the Bank and consequently defendant owed the plaintiff nothing.

Sim, J.
Herdman, J.
Alpers, J. July 14, 15, Oct. 15, 1925.

TREMAIN v. MANAWATU DRAINAGE BOARD.

Practice—New trial—Land Drainage Act—Liability of Board for delay in clearing drain.

This was an appeal from Stout C.J. who granted the respondent Board a new trial on the ground that the verdict of the jury in awarding the appellant £588 15s damages for negligence on the respondent's part in allowing a drain to become choked and the appellant's land to be flooded and damaged was both against the weight of evidence and also that the damages were excessive.

G. G. Watson for appellant.
Gray K.C. and **F. H. Cooke** for respondent.

HERDMAN and ALPERS JJ. agreed that the jury's verdict should stand. In their reasons both learned Judges agreed that the evidence was conflicting and under the well-known decisions of which **Metropolitan Railway Co. v. Wright** 11 A.C. 152 is one that the jury's decision should stand.

SIM J. dissented and came to the conclusion that the plaintiff (appellant) should have been nonsuited. This learned Judge made the following remarks with regard to the Board's liability in a case of this kind. "The duty of the Board in connection with the clearing of drains is defined by Section 25 of the Land Drainage Act 1908. That Section is as follows:

> "The Board shall cause all watercourses or drains from time to time vested in it or under its management to be constructed and kept so as not to be a nuisance or injurious to health and to be properly cleaned and cleansed and maintained in proper order; and in default shall be liable to the owners or occupiers of any land for damage done thereto in consequence of or through the disrepair of any such watercourse or drain."

It was decided by this Court in the case of **Pearce v. Manawatu Land Drainage Board** 31 N.Z.L.R. 985 that the duty imposed by this section was not absolute, and that a Board was liable in damages only where the failure to have the drains cleared and cleansed was caused by negligence on the part of the Board. A Board is liable, therefore, only where, to use the language of Brett J. in **Hammond v. St. Pancras Vestry**, L.R. 9 C.P. 316, 322, by the exercise of reasonable care and diligence the Board can and ought to know that the drains require clearing and cleansing, and where by the exercise of reasonable care and skill they can be kept cleared and cleansed. In **Beven on Negligence** (3rd Edn.) at p. 318 there is a quotation from the judgment in a Canadian case in which Cameron C.J. said that in order to establish liability for damage caused by an obstruction in a drain it must be shown that "the Corporation has negligently omitted to remove the obstruction within a reasonable time after knowledge or notice of the obstruction, and injury results to the plaintiff after such reasonable time for removal after such knowledge or notice has been had by the Corporation." That, then, is what the appellant had to prove in order to establish liability on the part of the Board."

By a subsequent application to the Court provisional leave has been granted to the respondent to appeal to the Privy Council.

Solicitors for appellant: **Chapman, Skerrett, Tripp & Blair**, Wellington.
Solicitor for respondent: **F. H. Cooke**, Palmerston North.

Sim, J.
Reed, J.
Adams, J. Oct. 8, 20, 1925.

CHAMBERLAIN v. MINISTER OF PUBLIC WORKS.

Public Works Act—Stop bank—Adjoining owner—Right to and measure of compensation for land injured.

This was a case stated by Mr. Justice Herdman as President of a Compensation Court for the opinion of the Supreme Court under Section 68 of the Public Works Act 1908. The Claimant is the owner of certain freehold and leasehold land on the banks of the Ohinemuri River, and he alleged that his land has been injuriously affected by reason of the construction of a stop bank on one of the banks of the Ohinemuri River. This stop bank was constructed by the Minister of Public Works in exercise of the powers conferred on him by the Waihou and Ohinemuri Rivers Improvement Act 1910. The effect of the stop bank is to cause flood waters to expand across and upon the lands between the river bank and the stop bank and across and upon the lands not protected by a stop bank. The effect of the stop bank is also to prevent the overflow of flood waters across certain lands across which flood waters formerly escaped and to confine a greater volume of flood water within the river channels. The result is that the claimant's land, which is not protected by a stop bank, received flood waters which it would not otherwise have received and during floods is subject to greater damage than formerly. The question submitted for the opinion of this Court is whether or not any compensation is payable to the claimant for any injury or damage to his land as a result of the erection of the said stop bank by the respondent.

West for claimant.
Fair K.C. (Solicitor-General) for respondent.

THE COURT came to the conclusion after considering the cases cited that the claimant was entitled to compensation in certain respects, viz.: "The claimant is entitled to compensation for damage to his land arising from the construction and user of the stop banks, unless it is clear that the respondent has not done anything more than the landowners on whose lands the stop banks were erected would have been justified in doing for the protection of their land, in accordance with the law as laid down in **Gerrard v. Crowe** (1921) 1 A.C. 395, and unless it is clear that the damage to the claimant's land has not been caused by the obstruction by the stop banks of any watercourse, or flood channel, or any ancient and rightful course for the flood waters of the two rivers in question."

Solicitor for claimant: **E. W. Porritt**, Paeroa.
Solicitor for respondent: **Crown Solicitor**, Auckland.

SUPREME COURT.

MacGregor, J. Sept. 10, 1925.
Wellington.

INGLIS BROS. & CO., LTD. v. MASTER AND OWNERS "S.S. PORT STEPHEN."

Contract—Carriage by sea—Defective ship's tackle—Damaged cargo—Bill of Lading—Restrictive condition as to maximum amount of liability—Whether applicable—Whether ship unseaworthy.

This was an action to determine the measure of damages to be applied for damage to cargo arising from the following facts: It is admitted that why the truck fell on to the wharf was that portion of the ship's tackle—a cargo hook—gave way, and the reason why it gave way was that the steel of the cargo hook had become crystallised and was thus weakened, in consequence of which it fractured as a result of the strain on the hook through the unloading operations. The fracturing of this link was the result of causes which should have been discovered earlier. No care had been taken to make periodical examinations of the hook. The truck was valued at £629 5s 10d and, after the damage was worth only £150, the extent of the damage being therefore £479 5s 10d. The shipowner admits liability for the damage, and the only question was: What damages is the ship liable to pay? Three possible measures of damages are suggested, namely: (1) The full amount, £479 5s 10d (this is the view contended for by plaintiffs); (2) the sum of £200 being the amount mentioned in Clause 7 of the Bill of Lading; or (3) the sum of £50, being the said sum 'of £200 less the sum of £150, the value of the damaged truck. Clause 7 of the Bill of Lading reads as follows:

> "Unless otherwise expressly declared and stated, it is agreed that the value of each package hereunder does not exceed £10 pr cubic foot for measurement cargo or per 112lbs. for weight cargo or £200 for any one package, whichever is least, and the freight is adjusted on the basis of this limited valuation. The shipowners' liability shall in no case exceed the above values or the invoice value (including if paid and not returnable freight charges and duty). The above declaration must be in writing both on the broker's order which must be obtained before shipment and on the shipping note presented on shipment, and extra

ad valorem freight as may be agreed upon must be paid. Any partial loss or damage for which the shipowners may be liable shall be adjusted pro rata on the above basis."

Myers K.C. and **O'Leary** for plaintiffs: The clause in the Bill of Lading is inapplicable as the ship was unseaworthy.
Blair for defendants.

MacGREGOR J. gave judgment for the full amount claimed and in giving his reasons orally said: There are three questions to be determined: (1) Was the ship unseaworthy? (2) Did such unseaworthiness cause the damage? and (3) Is plaintiff bound by the express terms of Clause 7 of the Bill of Lading? I am satisfied on the cases cited that the state of the cargo hook which fractured constitutes "unseaworthiness," in the sense that that word has with reference to cargo. The principle is laid down in **Atlantic Shipping and Trading Company v. Dreyfus** (1922) 2 A.C. 250 at p. 260 per Lord Sumner:

> "The shipowners' general liability in respect of damage due to the ship's unseaworthiness, accordingly, remains where the law places it. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

Underlying the whole contract of affreightment there is thus implied the Common Law warranty of seaworthiness. If a ship is not seaworthy, then it is liable on this implied warranty, unless there is something in the contract to exclude the implied warranty. I am satisfied that the cause of damage was the unseaworthiness of the vessel in respect of the cargo hook. It failed, and thus caused the damage. Clause 7 of the Bill of Lading in my opinion does not form any part of the implied contract sued on, but it is suggested that, nevertheless, by reason of Clause 4 of the Bill of Lading, Clause 7 is applicable. Clause 4 of the Bill of Lading reads as follows:

> "It is expressly declared that the owners of the steamer are not liable for loss or damage occasioned by any latent or other defects whatsoever in the hull, machinery, or equipment of the ship, whether said defects existed before the commencement of or arose or developed during the voyage, or however otherwise caused, provided all reasonable means have been taken to make the ship seaworthy."

The first thing that strikes one in this case is that all reasonable means admittedly were not taken to make the ship seaworthy. It is impossible to say that Clause 4 here can negative the general rule of law established by the House of Lords in **Atlantic Shipping and Trading Co. v. Dreyfus.** A similar doctrine was laid down in "**Cristal Vinnen**" (1924) P. p. 208. The Court of Appeal at page 212 puts it this way:

> "The shipowner sued by the cargo owner for damage to the maize replies that he is protected by the exceptions: 'Damage occasioned by a latent defect in the hull . . . even where occasioned by the negligence of the servants of the shipowner.' It is clear law that exceptions do not apply to protect the shipowner who furnishes an unseaworthy ship where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness. **Owners of cargo on board s.s. Waikato v. New Zealand Shipping Company** (1899) 1 Q.B. 56, 58 is an instance of ambiguity defeating the shipowners' probable intention: see judgment of Collins L.J. in **The Cargo ex Laertes** (12 P.D. 187) the words which protected the shipowners were 'latent defects in machinery even existing at the time of shipment.' Such words are absent in the present case and latent defects may come into existence during the voyage. In my view the shipowner here had not clearly excluded or modified the implied warranty of seaworthiness, and consequently the exception does not apply to protect him when water entering through unseaworthiness causes the damage, as is undoubtedly the case as to half the damage here. The shipowners' appeal against the judgment below, holding him liable for half the damage, therefore fails."

I think that decision really governs the present case. The only exception which can be relied on is exception 4 in the Bill of Lading, and I am of opinion that it does not clearly vary or exclude the implied warranty of seaworthiness. I am satisfied that I must answer the question submitted in the special case as follows: The defendants are liable for the whole amount of the damage, namely, £479 5s 10d. All questions of costs are reserved, to be mentioned again if the parties are unable to agree.

Solicitors for the plaintiff: **Bell, Gully, Mackenzie & O'Leary,** Wellington.
Solicitors for the defendants: **Chapman, Skerrett, Tripp & Blair,** Wellington.

Sim, J. Sept. 22, 25, 1925.
Christchurch.

FULTON v. REAY.

Misrepresentation—Innocent or fraudulent—Representation as to title—Whether necessarily fraudulent if untrue—Damages or restitution—Replacing sheep sold with property—Whether price then or now to prevail.

Sim J. rescinded a contract for the sale of a farm property and certain live and dead stock on the ground of innocent misrepresentation. The form of the Judgment was settled by him in Chambers. He made the following remarks of interest and use to the profession.

Sargent for plaintiff.
M. J. Gresson for defendant.

SIM J. said: In dealing with the question of the terms on which rescission is to take place the case must be treated, I think, as one of innocent misrepresentation. Mr. Sargent relied on the case of **Swaine v. Hart** 7 Ch. D. 42 as an authority for saying that the misrepresentation made by the defendant as to his title must be treated as fraudulent. It is true that Fry J. in the course of his judgment said that a misrepresentation which had been made honestly amounted to legal fraud. But since the decision in **Derry v. Peek** 14 A.C. 337 it is clear that a misrepresentation is not fraudulent unless it is made knowingly, or without any belief in its truth, or recklessly without caring whether it be true or false. I am not satisfied that the misrepresentations in the present case were fraudulent in this sense, and the case must be dealt with, therefore, as one of innocent misrepresentation. In such a case damages cannot be given for any loss incurred by reason of the contract: **Bedgrave v. Hurd** 20 Ch. D. 1; **Newbigging v. Adam** 34 Ch. D. 582, but in decreeing rescissions the Court has to provide for the undoing of the past on both sides by mutual restoration in specie of all benefits received by each party under the contract: **Spencer-Bower on Actionable Misrepresentation** p. 250 par. 274. That means, according to the view taken by Bowen L.J. in **Newbigging v. Adam** 34 Ch. D. p. 592, and adopted and applied by Farwell J. in **Whittington v. Seale Hayne** 82 L.T. 49, that the parties are to be replaced in their position so far as regards the rights and obligations which have been created by the contract, and they are to be relieved from the consequences and obligations which are the result of the contract. The first question in dispute between the parties is as to the stock and implements on the Flat Creek property which were delivered to the plaintiffs when they took possession of that property on the 16th of June 1923. It is impossible to return all these in specie, and the plaintiffs offer to pay for what they cannot restore at the market price prevailing at the date when possession was given. The defendant declines to accept this offer, and contends that, so far at any rate as the sheep are concerned, the plaintiffs ought to pay for them at the present market price for similar sheep. This would result in the plaintiffs having to pay considerably more than the market value of the sheep at the date when they got possession of them. I think that the plaintiffs are right in their contention. The object of the Court in exercising this jurisdiction is to do what is practically just, as Lord Blackburn said in **Erlanger v. New Sombrero Phosphate Company** 3 A.C. at p. 1278. To accept the defendant's contention would be to work injustice to one side or the other in every case where a change had taken place in the market value of the property in question. If in the present case the market price of sheep had gone down instead of up, it would have been unfair to the defendant to give him only the present market value of the sheep or to allow the plaintiffs to replace the sheep that have gone with sheep purchased to-day. I think, therefore, that the plaintiffs are bound to pay for the property they cannot restore in specie at the fair market price prevailing at the date when possession was given. The next question in dispute is as to the account asked for by the plaintiffs of all costs charges commission and expenses incurred by the plaintiffs in consequence of and incidental to the purchase. It is clear that the plaintiffs are not entitled to any indemnity against losses arising out of the contract: **Whittington v. Seale Hayne** 82 L.T. 49, but they are entitled, I think, to an account

such as was ordered in **Edwards v. McLeay**, 2 Sw. 287 namely an account of all costs charges and expenses which they had been properly put to in consequence of, or which have been incident, to the contract which has been rescinded. After the account has been taken the question of what part of these costs charges and expenses the plaintiffs are entitled to recover can be determined on the further consideration of the action, and the direction in the draft judgment to pay the amount certified to be due is to be struck out. As indicated during the argument the plaintiffs are not entitled to have an account taken of the profit or loss made by them while carrying on the Flat Creek property.

Solicitor for plaintiffs: **L. J. O'Connell**, Timaru.
Solicitors for defendant: **Wilding & Acland**, Christchurch.

PROFESSIONAL ETHICS

(Concluded.)

33. **Right of Attorney to Control the Incidental Matters of the Trial.**—As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, cross interrogatories, and the like; the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honour and propriety; and if such a course is insisted on, the attorney should retire from the cause.
34. Where an attorney has more than one regular client, the oldest client in the absence of some agreement should have the preference of retaining the attorney, as against his other clients in litigation between them.
35. Making Bold Assurances to Clients.—The miscarriages to which justice is subject, and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.
36. **Promptness and Punctuality.**—Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.
37. **Disclosing Adverse Influences.**—An attorney is in honour bound to disclose to the client at the time of retainer, all the circumstances of his relation to the parties, or interest or connection with the controversy, which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite parties will hinder or seriously embarass the full and fearless discharge of all his duties.
38. **Expressing a Candid Opinion as to the Merits of a Client's Cause.**—An attorney should endeavour to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it, he ought to seek to adjust it without litigation, if practicable.
39. Where an attorney, during the existence of a relation, has lawfully made an agreement which binds his client, he can not honourably refuse to give the opposite party evidence of the agreement, because of his subsequent discharge or instructions to that effect by his former client.
40. **Dealing with Trust Property.**—Money or other trust property coming into the possession of the attorney should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.
41. **Business Dealings with the Clients.**—Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject matter of their litigation so long as the relation of attorney and client continues.
42. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but after admising frankly with the client, it should be left to his determination.
43. **Keeping Agreements with the Client.**—Important agreements, affecting the rights of clients, should, as far as possible, be reduced to writing; but it is dishonourable to avoid performance of an agreement fairly made, because not reduced to writing, as required by rules of Court.
44. An attorney should use his best efforts to prevent his clients from doing those things which the attorney himself will not do particularly with reference to their conduct towards Courts, officers, jurors, witnesses and suitors.
45. **Taking Advantage of Opposite Counsel without Notice to Him.**—An attorney should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving opposing counsel timely notice.
46. An attorney should not attempt to compromise with the opposite party, without notifying his attorney, if practicable.
47. In any matter, controversy or action, where the opposite parties are represented by attorneys, the attorneys of the respective parties shall confer and negotiate with each other and not with the clients.
48. When attorneys jointly associated in a cause can not agree as to any matter vital to the interest of the client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively; in which event, it is his duty to be asked to be discharged.
49. **When Association with Other Attorneys is Objectionable.**—An attorney coming into a cause in which others are employed, should give notice as soon as practicable, and ask for a conference, and if the association is objectionable to the attorney already in the cause, the other attorney should decline to take part, unless the first attorney is relieved.
50. When an attorney has been employed in a cause, no other attorney should accept employment as his associate, without previously ascertaining that his employment is agreeable to the attorney first employed.
51. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party, without notice to his client.
52. **Explicit Understanding as to Compensation.**—Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset, as to the amount of the attorney's compensation; and where it is possible this should always be agreed on in advance.
53. **Suing a Client for a Fee.**—In general it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud.
54. **Fixing the Amount of the Fee.**—Men, as a rule overestimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in many instances, and sometimes none at all.
55. An attorney may charge a regular client, who entrusts him with all his business, less for a particular service than he would charge a casual client for like services. The element of uncertainty of compensation where a contingent fee is agreed on, justifies higher charges than where compensation is assured.
56. **Elements to be considered in Fixing the Fee.**—In fixing fees the following elements should be considered: (1) The time and labour required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. (2) Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. (3) The customary charges of the Bar for similar services. (4) The real amount involved and the benefits resulting from the services. (5) Whether the compensation be contingent

or assured. (6) Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

57. **Contingent Fees.**—Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred.

58. **Compensation for Services rendered to Another Attorney.**—Casual and slight services should be rendered without charge by one attorney to another in his personal cause; but when the service goes beyond this, an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney should be rendered without charge in most instances; and where the circumstances make it proper to charge, the fees should generally be less than in cases of other clients.

59. **Treatment of Witnesses and Parties to the Cause.**—Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony, it should be done without vilification or unnecessary harshness. Fierceness of manner and uncivil behaviour can add nothing to the truthful dissection of a false witness' testimony and often rob deserved strictures of proper weight.

60. **Attitude toward Jury.**—It is the duty of the Court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort, and volunteering to ask favours for them, while they are present—such as frequest motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue, or hunger, and uncomfortableness of their seats, or the Court room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the Court, whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury towards the Court of opposite counsel, if such requests are denied. For like reasons, one attorney should never ask another in the presence of the jury, to consent to its discharge or dispersion; and when such a request is made by the Court, the attorneys, without indicating their preference, should ask to be heard after the jury withdraws.

61. All propositions from counsel to dispense with argument should be made and discussed out of the hearing of the jury.

62. Treating jurors after the rendition of a verdict in favour of one client is disreputable. All like practices are disreputable, and should be scrupulously avoided.

63. **Conversing privately with Jurors.**—An attorney ought never to converse privately with jurors about the case; and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives colour to the imputing (of) evil designs and often leads to scandal in the administration of justice.

64. An attorney assibned as counsel for an indigent prisoner ought not to ask to be excused for any light cause, and should always be a friend to the defenceless and oppressed.

65. The lawyer should study the law with the constant purpose to do what he can to amend and protect it.

66. Except upon the ground that a moral principle is involved, an attorney ought never to counsel or approve the infraction or evasion of a valid law. The fact that the end to be gained is a political one will not justify any departure from this rule.

67. While an attorney should speak respectfully of the judiciary and of all lawfully constituted authorities; and in the trial of causes and in all his dealings with the Court should demean himself towards it with deference and respect, he has, on the other hand, a right to expect and exact from the Court the same demeanour towards himself. It is unfortunate for the cause of justice when the judge forgets his dependence on the Bar and forgets to pay it the deference and respect which is its due.

68. The qualities desirable in a judge are courtesy, affability, even temper, patience, conscientiousness, legal learning, sound sense and judgment, the moral courage to meet an issue squarely, and an impartial mind.

69. The Bar should never permit political considerations to outweigh judicial fitness in selecting material for the Bench, and it should earnestly and actively protest against the appointment or election of those who, in the general estimation of the Bar, are unsuitable for the Bench.

70. The enumeration of the foregoing duties shall not be construed to deny the existence of other duties equally imperative, though not specifically mentioned herein.

LONDON LETTER.

The Temple, London,
August 19th, 1925.

My Dear N.Z.,

Let us now, "according to plan," be personal. It would be permissible in caricature, but in caricature only, to depict the Lord Chancellor and the Lord Chief Justice respectively as the Long and the Short of it; and a disappointed litigant might neatly, but not aptly, say of the Lord Chancellor "This is a bit thin," and of the Lord Chief Justice "This is a bit thick." In the matter of dimensions, Lord Cave is certainly slim and Lord Hewart is as certainly sturdy; in the matter of politics the former is my conception of Tory excellence and the latter is the perfection of Liberal thought. In neither man, however, is the physical or the political character of great moment; the judicial temperament and the intellectual type are the characteristics of the two widely different personalities which call for comment. Observing, in preface, that both are veritable giants and that in both are forces of such momentum as must inevitably have carried them to the highest peak in any profession, let us take them one by one.

I suppose there are people who still think effectionately of the Lord Chancellor as "George Cave," but I feel almost blasphemous in even re-echoing the familiarity. Though I remember him well as an advocate and at a political crisis of the last decade, was in singularly intimate touch with him for a brief moment, I have always looked upon him as something of a god; a very beneficent and invariably kindly deity, invested with such superhuman powers of mind that he need make no display of any powers at all to effect his impression. In the now unbelievably calm and trivial days of the past, when our bones of contention as a political people were nothing more exciting than Education and Licensing, it fell to Lord Cave's lot to be advocate of "the Trade." Can you recall Mr. Punch's parliamentary sketch of him in a bacchic character, and the draughtsman's clever but naughty touch by which his essentially genial smile was made excessively jovial and the face of a fatherly angel was made the face of a friendly publican? For all its misleading but legitimate perversion, it was and remains for me the best portrait of him ever published; and it survives, not for its ephemeral point of parliamentary bearing, but for its essential humour in as much as humour consists of the apt but violent juxtaposition of absurdities. Association with the beer business leaves few people intrinsically and utterly respectable; but nothing, not even malt and hops, has failed to derive a definite respectability from an association with Lord Cave. To his allies he is so perfectly, to his opponents he is so damnably, honest; and by the final tribunal at the day of judgment I have no doubt whatever that he will be pronounced to be the complete rea-

lisation of what Matthew Arnold so highly appraised, under the title of "sweet reasonableness."

He speaks quietly and he argues still more quietly. I should thus condense his formula: "Now my contention is that two and two make four, but I should like you to be quite certain about it before you take it from me. It may be that I am wrong, and that two and two make five. You find by the process of addition that this is not so? Then let us be very careful to see whether, perhaps, the truth lies with those who argue with conviction that two and two make three. Should we be forced to the conclusion that this view also is erroneous then, I incline to suggest, it does rather look as though the view for which I contend is the right one." He has no gestures, except upon passing from one point to the next to put his glasses to his eyes and study his notes: as if to say, "there seems to be little room for doubt upon that point; I wonder if there is more room for doubt upon the next?" I am sorry to have to resort to the hackneyed and now distorted term, but in attitude and manner Lord Cave is, inevitably, "the perfect gentleman." To see him in the House of Lords is, you can but feel, to see him at home, head of the family with all his relatives and friends gathered round him, sunning themselves in the benevolent atmosphere which he exudes, comforting themselves in invariable wisdom which he presents, avoiding bothers by reason of the same peace which he bespeaks but sheltering themselves behind the formidable strength which he modestly contains. This being the personality, I need hardly tell you that in his days at the Bar, spent though they were on the Chancery side, he was, when occasion demanded, at once the least impressive and the most destructive cross-examiner whom liars had, for their sins, to answer. For the rest, if I had to choose a father, and my present one was not available, I should without a moment's hesitation choose Lord Cave. I doubt if he would refuse me the boon, because I doubt if he is capable of refusing any claim upon himself alone.

If Lord Hewart was looking about for an adopted son and chose me, I should be terrified. Indeed, when his friends asked to see this newly acquired son of his, the Lord Chief Justice would with truth and point reply: "Excessit, evasit, erupit." So markedly does he assimilate and concentrate in himself, and upon you, all the dynamic forces in the room, Court or vicinity, that you feel empty, an anaemic weakling, utterly without confidence. My merely imaginary contact with him has, at this moment, upset me to the extent that I am confused as to the order of Cicero's three verbs and have very possibly failed to re-arrange them in the right sequence. It is in the matter of words and in the department of language that Lord Hewart is so formidably, drastically perfect. In matters of conduct and in all affairs and relations of life, I have no doubt he would be least alarming and most acceptable; his sympathy is as engaging as his utterance is intimidating. Some dozen years ago, when he was of no known account at the Bar, he led me in the defence of a very anxious case: our lay client, a man of high professional and social standing in Manchester, stood in the dock at Stafford Assizes upon a charge of corruption in reference to the selection of contractors to execute a very valuable and enviable contract. There was one hope only, and with that judgment, which helped to make Lord Hewart once the backbone of a government, he elected to rely upon it alone, burning all other boats. But it was not by that mere election that he secured the acquittal; it was by his final speech which was a short one upon what had become a short issue. Every word was the right word, and there was not a word too many. Together the words combined into one symmetrical and graceful form, but each carried its separate, individual force and each drew the hearer one degree further into sympathy with the advocate and his cause; and at the very moment when I, and no doubt the Judge and the Jury, began to ask ourselves whether the effect upon us of the argument might not possible result from the arguer's own conviction and possibly blind conviction, the advocate suddenly passed from the man in the dock to a reference to himself. I believe it is only the sweeping events of the war, intervening, which have brought me to forget what I then felt to be unforgettable phrases; the paraphrase is, "if I have allowed my personal sympathies, stirred by nothing else than the reasonings which I have recapitulated, to over-colour my language or to over-emphasise my arguments, I pray you not to let that be any disadvantage to the man in the dock. An advocate should, it is true, be at heart dispassionate: but in the preparation of this case I have felt so overwhelmingly the pressure of the indications of innocence and, correspondingly, the tragedy which a conviction would entail, that it may well be that I have expressed the arguments in my client's favour less forcibly than I have explained my personal impression or their strength and effect." Conceive that observation, put in the briefest but least resistible words, inserted at the critical moment of a masterpiece of advocacy, and you will not be surprised that a slight doubt, in the accused's favour, became a "reasonable doubt" for all the practical purposes of a direction to a jury and the jury's verdict.

If the foregoing account is a little ponderous, a trifle too exact, and wanting in simplicity and naturalness . . . well, so is Lord Hewart in Court. He is a man of tremendous weight, and he cannot ever quite shake it off, he is a man of the very nicest humour, innate, but as a Judge he is too impregnated with the lawyer's art, acquired, to be able to let the humour have its full play in humanising him. Indeed, I incline to fear that his self-teaching and his self-discipline in his profession may have eliminated from his natural humour all but the wit of its expression. If this be so, and if it be the fact that he produced in himself so thorough an advocate that nothing else can produce in him a thoroughly judicial Judge, he is pre-eminently the victim of his own astounding virtues! It is probably true to say that, in his deliberate measures of long years to achieve the heights, he has incidentally eliminated from his constitution and style by grim determination and laborious effort much that would have served him well now he is at the heights. But a man cannot put his incidental qualities on deposit at a bank, to be drawn upon when they may be more suitably laid out; if he is set upon a public career, they must either be such qualities as forward it or else be jettisoned.

Lord Hewart is, in physique, bulky without being stout, as he is, in demeanour, fierce without being furious. His after-dinner speeches are gems of perfection, and he loves making them. He has a penchant for medical matters, and he always looks very concentrated when, at the adjournment, he is seen hurrying to his lunch in the Benchers' quarters at the Inner Temple. If, as is emphatically not the

case, there was malice in him, he could and would be positively diabolical. It is a very fortunate thing that his tendencies are all in favour of abstract justice; if he goes wrong on this score, it is not often and it is because he has not listened long enough. patiently enough and tolerantly enough, to hear both sides of a case and know enough about them to be sure of the right one. He is a very great man, with a few marked but not very dangerous faults. He may quite probably come himself to recognise his shortcomings as a Judge; if and when he does, he will set about to remedy them and he will undoubtedly succeed. He will then be great, even among Lords Chief Justice. He has a genius, if genius be accurately defined as the infinite capacity for taking pains and achieving a brilliant result.

Let us turn to a man more like ourselves, more typical of all our own faults and virtues. The Master of the Rolls is regarded by all as a familiar friend, and his case illustrates the truth of that dismal maxim that "familiarity breeds contempt." The name of Pollock carries its own distinction amongst men of the law, but I think it may have been more embarrassing in his career than helpful to the present Master of the Rolls who is said not to be of the first flight among lawyers. He is of a fine, ascetic appearance and of a profound courtesy; he has individual gifts as well, which, though they are taken for granted in a Pollock, must have aroused immediate interest and admiration in a Jones. He is devoid of genius or any other Olympian quality; but he has all those human virtues which are required of a good man, a good neighbour, a good squire and (as his critics are beginning to discover with some consternation, having regard to the degree of their criticism) a good Judge. He has had his struggles, like the least distinguished of us, and has suffered his share of failures, like the most ordinary of us. His promotion to his high office was subject of much hostile remark, notably in the London "Times"; there has been no recurrence of this antipathy because he has given no occasion for it. Indeed, while other Lord Justices of Appeal, feeling secure in their reputations, have taken things too easily and have even fallen, on occasion, to somewhat distracting and inconvenient dissension with Judges of First Instance and also among themselves, the Master of the Rolls has been so actively and persistently devoted to justifying his appointment and confounding his critics that we come to think he may prove, after all, to be actually as well as formally the foremost of the Appellate Judges. These are, you will remember, Lords Justices Bankes, Scrutton, Warrington, Atkin and Sargant, with whom is associated also and also will come under review in the next of these personal letters, the President of the Probate, Divorce and Admiralty Division. Duke, that was, and Lord Merrivale, that is, is the most suitable of them to be coupled with our Master of the Rolls, for sheer manliness, upstanding calibre, very level-headed normality; he was a greater advocate, of course, and, at date, stands upon the record of professional opinion as the greater Judge. We will deal with him in a fortnight's time; enough for the moment to say that Lord Merrivale and Sir Ernest Pollock are fine men and great gentlemen, but that, if a comparison could be made which was in no way odious, Sir Ernest Pollock might just win on this issue.—Yours ever,

INNER TEMPLAR.

The Hon. T. W. Hislop, M.L.C.

The late Mr. Hislop who died on October 2, 1925, in his seventy-sixth year, has been an outstanding figure in New Zealand in law and politics since 1871.

Mr. Hislop was a son of the late John Hislop, LL.D., who came out to Otago in the early fifties as a primary school teacher and finally became Secretary of Education.

As a practising lawyer Mr. Hislop was first associated with Sievwright and Stout. His career as a politician and lawyer was definitely launched in the decade 1870—1880 when the foundation of New Zealand's present financial and political institutions were made. In politics he was one of those who always had great faith in the possibilities of New Zealand. In the early seventies the great questions which were agitating the public mind were:—

1. The immigration and public works policy.
2. The abolition of the Provinces.
3. The establishment of the education system.
4. The development of local government.

In all these matters Mr. Hislop as a young man was greatly interested and as a lawyer-politician he took part in the shaping and development of the movement that arose in consequence of these political activities. The political trend of life that he then acquired, influenced partly by Sir George Grey, partly by Sir Julius Vogel and Sir Robert Stout, and finally by the late Sir Harry Atkinson, were the mainsprings that actuated him throughout his whole political career. His work as a politician and a Minister are only known to his contemporaries and his official activities as a politician in Parliament ceased in 1890.

Mr. Hislop's actions in Parliamentary life though called socialistic by many people were really the result of the development in a generous mind of the social policy that has characterised the best aspects of Conservatism in England. The legislation for the removal of social evils which was initiated in England by Lord Shaftsbury was followed up by Sir Harry Atkinson and others in New Zealand.

As a young man Mr. Hislop was largely influenced by the hopefulness of the leaders of thought in Otago, eminent amongst whom was the late Dr. McGregor. These men had great hopes and great confidence in the worth of man as man and relied strongly on the development of the good instincts of humanity if proper conditions of environment were provided for the people as a whole, but they looked to people to help themselves.

In later years Mr. Hislop's activities in official circles were confined to local politics. In this realm he was absolutely against centralisation. His view was that the strengthening of local bodies was the true basis on which to secure British liberty.

When Mayor of the City of Wellington there was a question of who was to receive the Governor. The late Richard Seddon, then at the zenith of his power, demanded that he should obtain the Town Hall for this purpose. Mr. Hislop told Mr. Seddon that he was the person who was entitled to the honour. A dead-lock ensued. Mr. Hislop finally settled the question. He locked up the Town Hall and put the key in his pocket, and so carried his point. His point was that the Mayor of the day was the first man in Wellington in local affairs.

During Mr. Hislop's Mayoralty many public works were carried out or originated. To him is due primarily the fact that we have constructed on our Town Belt Anderson Park, Kelburn Park and Wakefield Park. He also obtained from the Crawford Estate the nucleus of the recreation ground at Kilbirnie and obtained statutory authority to carry out the reclamation in that area. His outstanding feat was the purchase of the electric light undertaking. That undertaking was acquired for the sum of £165,000 in 1906. At that time it was thought that it was a very risky and venturesome speculation. To-day Mr. Hislop's action has proved to be of the greatest benefit to the City.

To those who knew him intimately, the keynote to Mr. Hislop's character was his kindliness and generosity.

In private life he helped many people to his own financial detriment. As an administrator he was like all strong confident men, autocratic to a degree, but he never on any occasion did anything unfair to any subordinate. On one occasion as Mayor he protected a prominent sanitary official from a passing indignation of the Council which had become merciless in its attitude towards him. His speech on that occasion, delivered in Committee, was a masterpiece of conciliation and a unique manifestation of dignity and power. He showed himself a master of men and he taught them how to temper justice with mercy.

Mr. Hislop was a great student in politics and economics. In fact, his leanings in this direction to a certain extent

marred his success as an advocate. In 1890, on leaving Oamaru disgusted with politics he threw himself almost with abandon into the active prosecution of his profession as a lawyer and for years he met with great success at the Bar.

Like many of our early lawyers he had a great knowledge of legal principles and was a master of conveyancing. His greatest success at the Bar was in an historic fight against Sir Francis Bell in **Barre Johnston & Company v. Oldham** 12 N.Z.L.R. page 747. This was a very difficult case that arose out of the interpretation of a business contract. It was a battle of giants and Sir Francis Bell fought it with all his skill and ability. Mr. Hislop, however, won in the Supreme Court before Richmond J. and in the Court of Appeal Judgment was given in his favour by Prendergast C.J., Williams and Denniston JJ. Connolly J. dissented. This was a great forensic triumph and in it Mr. Hislop was supported by four Judges of the highest eminence. The case is now forgotten except by his contemporaries and those who are familiar with the whole of our law reports, but it set the seal on Mr. Hislop's great ability as a lawyer. If he had maintained his unswerving loyalty to law that he at that time exhibited he would assuredly have reached a great height in our profession. However, the allurements of politics were too great. His zeal for public service caused him to slacken in his zeal for law. The law is a jealous mistress who requires from her servants single-minded devotion. What the public lost in Mr. Hislop's services as an advocate it gained in his public work. He was not successful in many cases in Parliamentary Elections in later years, but that was due to the fact that he was unable to sink his individuality or to sacrifice his principles to the exigencies of political party strife.

His greatest asset was his intellectual energy, combined with fixity of purpose. These, strengthened by his natural generosity and his kindliness, made him an eminent public man.

SUMMARY OF WORK OF COURT OF APPEAL AND FULL COURT.

The Court of Appeal finished its last sittings for the year 1925 on the 23rd October, and we publish below a summary of the work disposed of at that sittings and also of the causes tried before the Full Court during the sittings of the Court of Appeal.

COURT OF APPEAL.

REX v. McKECHNIE:

Cor: Stout, C.J., Sim, Reed, Adams, Ostler, JJ. Solicitor-General (A. Fair, K.C.) for the Crown. C. J. L. White for the accused. Case stated by Sim J. for the opinion of the Court of Appeal under Section 442 of the Crimes Act 1908. Held (Stout C.J. and Ostler J. dissenting) that husband and wife cannot be guilty of the offence created by Section 219 of the Crimes Act 1908—and female accused directed to be discharged.

PILKINGTON v. PLATTS:

Cor: Stout C.J., Sim, Reed, Adams, JJ. Skerrett K.C. and Swarbrick for appellant. Gray K.C. and Johnson for respondents. Appeal from a decision of Herdman J. on a motion to set aside as being illegal and a nullity an order for the payment of costs made by a commission appointed under the Commissions of Inquiry Act 1908, or, in the alternative, for a Writ of Prohibition prohibiting the defendants from enforcing such order for costs as a final judgment of the Magistrate's Court. Held allowing the appeal, and reversing Herdman J., that the order was bad and a Writ of Prohibition must issue.

SURFDALE ESTATES LIMITED v. PATERSON:

Cor: Stout C.J., Sim, and Adams, JJ. J. A. Tripe for appellant. M. Myers K.C. and C. A. L. Treadwell for respondents. Respondents moved to strike out the appeal on the ground that it must be deemed abandoned because appellant had failed to give due security for costs as required by Rule 22 of the Court of Appeal Rules. Held due security had not been given and appeal dismissed.

IN RE BUICK SALES LIMITED:

Cor: Stout C.J., Sim, Adams, Ostler JJ. Myers K.C. and M. J. Gresson for appellants. Donnelly for respondent. Appeal from the judgment of Reed J. on a summons under Section 254 of the Companies Act 1908. Held (reversing Reed J.) that claims against directors for moneys of the company misapplied or retained by them, or for which they have become liable or accountable, are legal or equitable debts due to the company, and are not obnoxious to the rule against assignments of bare rights of action or mere rights to litigate; but are property to which the right of assignment is incident.

HIRAWANU v. GARDNER:

Cor: Stout C.J., Sim, Reed, Adams, Ostler JJ. Finlay and Simpson for plaintiff. Hampson and Marsack for defendant. Case removed into the Court of Appeal for argument. The questions raised for determination were whether or not, under a certain lease, the defendant had the right, for the purpose of obtaining the profitable enjoyment of the land, to cut and sell the timber trees growing on the land and, if he had such right, whether or not what was done by the defendant in the present case could be treated as having been done in exercise of that right. Held (Ostler J. dissenting) that the tenant had no right to cut and sell the timber trees.

ATTORNEY-GENERAL v. DAVIDSON:
ATTORNEY-GENERAL v. DUNKLEY:
ATTORNEY-GENERAL v. ROBSON:

Cor: Stout C.J., Sim, Reed, Adams, Ostler JJ. Attorney-General (Sir Francis Bell, K.C.) and with him the Solicitor-General (A. Fair K.C.). M. J. Gresson and Hutchison for Davidson and Dunkley. Upham for Robson. Held (Stout C.J. and Ostler J. dissenting) that Davidson and Dunkley had been guilty of contempt of Court in respect of the publication in the "Sun" newspaper, Christchurch; but that Robson had not been guilty of contempt in respect of the publication in the "Star" newspaper, Christchurch. Davidson and Dunkley ordered to pay the costs of the proceedings.

SHERRATT v. EAST COAST COMMISSIONER:

Cor: Sim, Reed, Ostler JJ. Skerrett K.C. and Johnston for plaintiff. Smith for defendant. Case removed into the Court of Appeal to obtain the opinion of the Court upon the construction of certain clauses in a lease.

The First Division of the Court of Appeal also delivered judgment in the following cases heard at the previous sittings:

CASEY v. MAYOR ETC. OF PALMERSTON NORTH:

Cor: Stout C.J., Sim, Herdman, MacGregor, Alpers JJ. Gray K.C. and F. H. Cooke for appellant. H. R. Cooper for respondent. Appeal from the judgment of Reed J. Held (dismissing the appeal) that when an owner subdivides his land for the purpose of sale and provides and dedicates a public street to give access thereto, the local authority has no legal right to insist on the roadway of such street being tarred and sanded, either under Section 116 of the Public Works Act 1908 or under Section 335 of the Municipal Corporations Act 1920.

TREMAIN v. MANAWATU DRAINAGE BOARD:

Cor: Sim, Herdman and Alpers JJ. Watson for appellant. Gray K.C. and F. H. Cooke for respondent. Appeal from the decision of Stout C.J. ordering a new trial. Held that a new trial ought not to be had, but that judgment ought to be entered for the plaintiff in accordance with the verdict of the jury.

FULL COURT.

PUBLIC TRUSTEE v. A.:

Cor: Stout C.J., Sim, Reed, Adams, Ostler JJ. Kelly for the Public Trustee. Smith as guardian ad litem of daughter. Hoggard as guardian ad litem of son of deceased. Originating summons removed into the Full Court for argument. Held a child born out of lawful wedlock and who, after the death of its father, intestate, is legitimated under the provisions of the Legitimation Amendment Act 1921, is entitled to participate in the distribution of its father's estate equally with a legitimate child, notwithstanding that the father died before that Act was passed.

MAYOR ETC. OF CHRISTCHURCH v. CHRISTCHURCH DRAINAGE BOARD:

Cor: Stout C.J., Sim, Reed, Adams, Ostler JJ. Myers K.C. and Loughnan for plaintiff. Sir John Findlay K.C. and Cuthbert for defendant. Originating summons taken before the Full Court for argument. The question raised was the construction of certain sections of the Christchurch District Drainage Act 1907 and the Rating Amendment Act 1913.

OFFICIAL ASSIGNEE OF BOWEN v. WATT & LOWRY:

Cor: Stout C.J., Sim, Reed, Adams, Ostler JJ. Myers K.C. and Buxton for plaintiff. Gray K.C. and Sladden for defendants. Case taken before the Full Court for argument as to the validity of an alienation under which native land was acquired in breach of Section 72 (1) of the Native Land Amendment Act 1913. Held that the validity of such an alienation is not affected by breach of Section 72 (1) of the Native Land Amendment Act 1913.

THE NATIVE TRUSTEE AND OTHERS v. YOUNG:
Cor: Stout C.J., Ostler and Alpers JJ. Myers K.C. and Smith for plaintiffs. Skerrett K.C. and Moss for defendant. Case referred to the Full Court for argument of questions of law arising under a lease under "The West Coast Settlement Reserves Act 1913." During the course of the argument, the Court adjourned to enable counsel to discuss a settlement, and a settlment was afterwards announced.

CHAMBERLAIN v. MINISTER OF PUBLIC WORKS:
Cor: Sim, Reed, Adams JJ. West for claimant. Fair K.C. (Solicitor-General) for respondent. Case stated by Herdman J., as President of a Compensation Court, for the opinion of the Full Court under Section 68 of "The Public Works Act 1908."

CONTEMPT OF COURT.

(Contributed)

The recent decision of the Court of Appeal in the "Sun" Contempt Cases will have a far-reaching effect in the Newspaper world. By a majority of three to two the Court of Appeal has held that it is contempt for a Newspaper to publish in its report of a trial the following paragraph:

> "From under her brown hat the witness spared many quick smiles for the accused."

The first point to be noted is that the Crown admitted that the statement was literally true in that the witness did wear a brown hat and she did smile frequently at the prisoner—presumably there was nothing noxious per se in the combination of the brown hat and the smiles.

The real point of divergence between the learned Judges is that the Judgment of the minority asserts the principle that any true statement of fact is permissible in a report of Judicial proceedings, even though that true statement leads to an irresistible inference of bias on the part of the witness whose evidence is reported. That of the majority as appears in the Judgment of Mr. Justice Sim asserts the principle that if a statement of fact is made in such a way as to insinuate a reflection on the character and conduct of a witness it is not permissible.

It is obvious that the principle enunciated by the majority of the Court of Appeal must place reporters and sub-editors on the horns of a dilemma. Assume for the moment that a witness points a finger at the prisoner and shouts "that he always was a rogue," is not that a statement of fact, but does it not also in the words of Mr. Justice Sim "reflect on the conduct" of the witness as showing that he is actuated by bias towards the prisoner. The case has often happened when a witness in the box makes some gesture of contempt towards the prisoner. Is that fact not to be reported, because inferentially "it reflects on the conduct of the witness" by irresistibly leading to influence of bias.

It is submitted that the true principle is that laid down by Mr. Justice Ostler—any statement of fact is permissible even though that statement leads to an irresistible inference of bias on the part of the witness.

With all deference it is submitted that some peculiarity of thought pervades the minds of the majority of the Court of Appeal as to what is a statement of fact as distinguished from comment. This is strikingly exemplified in the following passage in the Judgment of Mr. Justice Sim: "A statement that the witness when giving her evidence appeared to be biased in favour of the accused would be only a statement of fact." This passage surely ignores the difference between a statement of fact and a statement of an inference drawn from proved facts. To say that a witness smiled at the prisoner is to state a fact, to say the witness appeared to be biased towards the prisoner is to draw an inference from a proved fact, namely from the fact that she smiled at the prisoner. The right to draw the inference rests solely with the Jury. Because the witness smiled at the prisoner she is not necessarily biased in his favour. The smile may be due to a mere nervous habit, or may on the other hand indicate friendship. It is because of this that a newspaper must always confine its report to mere statements of fact and not extend the report to inferences from those facts. Bias can never be a matter of proved fact, it is always a matter of inference from proved facts.

The Judgment of Mr. Justice Sim even proceeds further. It states that if the report suggests to the intelligent reader that the witness displayed a bias in favour of the accused, this would interfere with a fair trial, and (inferentially) is therefore contempt. What is to happen, however, to the unfortunate reporter if in the course of the proceedings a witness pulls out a pistol and attemps to shoot the prisoner or spits at him in the dock? Although every member of the Jury sees these actions they are to be veiled in secrecy. The general public must not know them because to an intelligent reader they may suggest bias. This situation is truly Gilbertian when one realises that the report would only state for the information of the general public what every Juryman must have seen with his own eyes.

Is it not a true principle in law as well as in life that the truth is the best policy. So long as the report is a true and accurate one of facts which the Jury must have seen, should it not be privileged? Indeed, as Mr. Justice Ostler observed "in such a case a fair trial is not prejudiced because Judge and Jury have already themselves observed the facts stated."

No Barrister in New Zealand with any sense of responsibility would countenance with any approval what has been termed "trial by newspaper," and in justice to New Zealand newspapers it must be stated that very few have ever attempted to bring about such a state of affairs. Nevertheless, to use the words of Mr. Justice Ostler "it is so important in the public interest that there should be no restriction on the right to publish a report of all the facts that took place during the course of trial," that it must be a matter of alarm to the legal community when the Court of Appeal (by a slender majority) attributes to itself such a drastic power. The law of contempt is Judge made and the Judges alone decide how far they will extend it. In such a case the mere fact that two Judges dissent from the views of the majority would raise the gravest doubts as to the wisdom and expediency of the ultimate decision of the Court, especially when it is borne in mind that no appeal lies from that decision.

Amidst all this divergence of judicial opinion it must be borne in mind that a basic principle of English jurisprudence enacts that Courts of Justice shall sit with open doors and hence the public has a right to expect a true and accurate account of what takes place therein. It is submitted with respect that the Judgment of the majority of the Court of Appeal tends to ignore this basic principle and constitutes a real danger in attempting to circumscribe the liberty of the Press.

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