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.

TUESDAY, MARCH 2, 1926.

SUPREME COURT.

Ostler, J. Dec. 19, 1925.
Palmerston North.

HOPCROFT v. HORNER.

Bylaw—Heavy traffic—Whether superseded by regulations under Public Works Amendment Act 1924 and Motor Vehicles Act 1924.

On appeal from conviction under a heavy traffic bylaw appellant contended that at the time he was convicted he was the holder of a license issued under clause 10 of the Regulations as to the use of motor lorries made under the P.W. Amendment Act 1924 and the Motor Vehicles Act 1924. The license purported to allow appellant to engage in heavy traffic.

Gibbard for appellant.
Lloyd for respondent.

OSTLER J. dismissed the appeal and held that the regulations did not supersede the bylaw.

Solicitor for appellant: **E. Gibbard**, Dannevirke.
Solicitor for respondent: **T. H. G. Lloyd**, Dannevirke.

Herdman, J. Dec. 14, 17, 1925.
Hamilton.

HIGGINSON v. McKENZIE.

Bylaw—Motor lorry traffic—Effect of regulations under Motor Vehicles Act 1924—Whether bylaw necessarily repealed by regulations.

The appellant was convicted that on 30th July 1925 at Te Kuiti on a road under the care etc. of the Waitomo County Council and being a person in charge of a motor waggon did carry on such waggon a load of 2 tons 13½ cwt. contrary to bylaw of the said County Council. The bylaw made it an offence to engage or employ as owner or driver any four wheeled vehicle having a load greater than 1 ton to each pair of wheels. The facts were proved. The lorry was a motor lorry in respect of which no heavy traffic license could be issued under the motor lorry regulations made in pursuance of powers conferred by the Motor Vehicles Act 1925. On appeal from his conviction.

Vernon for appellant.
Mackersey for respondent.

HERDMAN J. in dismissing the appeal said: I think that the object of paragraph 12 of part 10 of the motor-lorry regulations was to authorize the owners of motor-lorries possessing heavy-traffic licenses issued by local authorities prior to the 1st. of April 1925 or having a right to licenses which they should have taken out before that date, to carry on under the terms of by-law licenses until they expired by effluxion of time. The paragraph reads as follows:—

"No heavy-traffic license fee other than that fixed by these regulations shall be made, levied, charged, or collected by any local authority having control of roads or streets in respect of any motor-lorry, but in any case in which any such local authority has already issued a heavy traffic license in respect of any motor-lorry, or in any case in which the owner of a motor-lorry or any other person is, prior to the coming into force of these regulations, liable to obtain a heavy-traffic license from any such local authority in respect of any motor-lorry, a license under these regulations shall not be issued until the expiration of the license issued by such local authority or the expiration of the license which any motor-lorry owner was liable to obtain on the date of which these regulations came into force. Nothing herein shall affect the liability of the owner of any motor-lorry to obtain any pay for a heavy traffic license under these regulations after the 31st day of December 1925."

Had the motor regulations of the 1st. of April 1925 not been passed no question would have arisen about the validity of the by-law under which the magistrate convicted or about the propriety of the conviction. As I understand the argument advanced on appellant's behalf it is contended that the by-law has been repealed and that he was therefore free to carry a load which exceeded 2 tons. To what extent then are the by-laws of the Waitomo County affected by the Motor Vehicles Act 1924? The by-laws of a local authority are not destroyed by that statute. On the contrary the Act recognises them as existing providing however, by sub-sec. 5 of s. 36, that if the by-laws of a local authority in force in a locality are inconsistent with or repugnant to regulations under the Act the by-laws shall be deemed subject to the regulations. Is there then anything inconsistent with or repugnant to the regulations of the 1st. of April 1925 if a by-law provides that during certain months of the year a motor vehicle shall carry only a limited load? I have searched the regulations and have failed to find that such a by-law is incompatible with any of the regulations which have become law. For instance such a by-law is not inconsistent with sub-para. 1 of para. 12 of the regulations which provides that no person shall operate a motor-lorry if the combined weight of the vehicle and load exceeds 10 tons and it is certainly not in conflict with sub-para. 6 of para. 3 which provides that no person shall operate any motor-lorry carrying a greater load than the maximum load it is licensed to carry.

If a by-law had provided that a person might operate a mtoor-lorry the weight of which, together with the load it carried, amounted to 20 tons there would have been ground for appellant's argument. But the by-law does not do this. The part of the by-law which affects appellant prohibits excessive weights during months of the year when roads are specially susceptible to damage and such a prohibition is not, in my opinion, in conflict with any of the regulations.

I emphasize this point. The new regulations have not repealed by-laws made by a local authority which do not run contrary to the regulations. A by-law may still be a good by-law despite the regulations. Further than that I think that paragraph 12 is an attempt to guard against the disturbance of conditions created by licenses issued and paid for or which should have been applied for and paid for under a local body by-law.

Sim, J. Dec. 10, 14, 1925.
Invercargill.

SMITH v. SMITH.

Debt—Partnership—St. Limitations—Acknowledgment of debt within period—what amounts to.

The plaintiff is the widow of Robert Smith and executrix of his will. The defendant is the widow of Walter Smith and the executrix of his will. Robert Smith and Walter Smith were brothers, and carried on business in partnership at Invercargill as builders and contractors. Walter died on or about the 22nd. of December 1920, and Robert on or about the 1st. of July 1923. The accounts of the partnership were never settled, and the plaintiff now seeks to have the accounts of the partnership taken between herself and the defendants.

The defendant has pleaded the Statute of Limitations as an answer to this claim. The learned Judge found as a fact that the partnership was one at will and came to an end more than six years before the commencement of the action.

The plaintiff relied on a letter in the following words from the defendant to the plaintiff's deceased husband who was one of the partners as sufficient to take the case out of the statute.

Clyde,
June 10th. 1922.

"Dear Bro.-in-law,—

Yours' with statement to hand last week. Would it put you to too much trouble to send me a list with dates of Wat's drawings and what he paid in. You say it won't be hard to understand, but when one does not expect such an amount to be owing, I feel I would like to see all the details.

I can't understand why you did not put your claim through the solicitors when they were putting Wat's estate through. I know Wat did not expect such an amount to be owing. You know he had that trouble, and yet you made no move to get a settlement in his life time.

Hoping I am not putting you to too much trouble, and trusting both Mrs. R. and yourself are in good health. With kind regards, I am, Yours truly,

E. SMITH."

J. Tait for plaintiff.
J. S. Sinclair for defendant.

SIM J. said The Statute Jac. I.c.16 s.3 and Lord Tenterden's Act 9 Geo. 4 c.14 are in force in New Zealand, and section 4 of the Mercantile Law Act 1880, reproduced in section 77 of the Judicature Act 1908, effected the same change in the law with regard to merchants' accounts as was made in England by section 9 of the Statute 19 and 20 Viet. c. 97. The Statute of Limitations begins to run from the date of the dissolution of the partnership, and at the end of six years from that date is a bar to an action for accounts, although one of the partners has continued the partnership business and got in outstanding assets within six years: **Lindley** (9th. ed.) p. 618; **Knox v. Gye,** L.R. 5 H.L. 656. The case of **Miller v. Miller,** L.R. 8 Eq. 499 on which Mr. Tait relied, if it is an authority for the view contended for by him, must be regarded as overruled by the decision of the House of Lords in **Knox v. Gye,** L.R. 5 H.L. 656. On this question I refer to the judgment of Malins V.C. in **Noyes v. Crawley,** 10 Ch.D. 31 and to **Lindley** (9th. ed.) p. 618 note (z). In connection with this subject **Lindley** (9th. ed.) at p. 619 quotes section 43 of the Partnership Act 1890, which is the same as section 46 of the New Zealand Act, and continues thus: "Hence it follows that in the absence of special circumstances the Statute of Limitations affords a good defence to an action for an account of the dealings and transactions of a partnership which has been dissolved more than six years before the commencement of the action."

I think, therefore, that the Statute of Limitations is a bar to the plaintiff's claim unless there has been within the last six years an acknowledgement in writing by the defendant or her testator of the right to an account. The plaintiff relies on the defendant's letter of the 10th. June 1922 to Robert Smith as being such an acknowledgement.

After referring to the terms of the letter set out above the learned Judge concluded his reasons in the following words: "Where there is a simple acknowledgement of a debt a promise to pay is implied therefrom. Where the acknowledgement is coupled with other expressions, such as a promise to pay at a future time or on a condition, or an absolute refusal to pay, it is for the Court to say whether these other expressions are sufficient to qualify or negative the implied promise to pay: **Spencer v. Hemmerde,** (1922) 2 A.C. 507. If some debt is acknowledged it is immaterial that the correctness of the amount claimed is disputed in the acknowledgement: **19 Halsbury** p. 65 par. 108; **Sidwell v. Mason,** 2 H & N. 306 **Skeet v. Lindsay,** 2 Ex.D. 314, and where the claim is for an account it is enough if there is an acknowledgement that an account is pending: **19 Halsbury** p. 66 par. 108; **Prance v. Sympson,** Kay 678; **Langrish v. Watts,** (1903) 1 K.B. 636. Where there is an unqualified admission that there is an unsettled account pending between two parties, which has to be examined, a promise to pay the balance when ascertained may be inferred from such admission: **Banner v. Berridge,** 18 Ch.D. 254, 274; **French v. Young,** (1897) 2 Ch. p. 436. The letter from the defendant does contain, I think, an acknowledgement sufficient to bring the case within these authorities. Robert Smith had made a claim against his brother during his lifetime, and endeavoured, but without success, to get it settled in the year 1918. He sent a statement of his claim to the defendant, and her letter admits, in effect, that something is owing to Robert Smith, although the amount claimed by him is greater than Walter had thought to be owing. The letter thus clearly admits the existence of a claim by Robert against his brother's estate which has to be examined and settled. I think, therefore, that the plaintiff is entitled to have an account taken of the dealings and transactions of the business carried on by the two testators in partnership. The exact terms of the judgment will have to be settled in Chambers. It is difficult to see how, with the evidence she appears to have, the plaintiff can hope to prove her claim against Walter Smith's estate, but she is entitled, I suppose, to make the attempt, and to waste her money in what will prove, almost certainly, to be fruitless litigation.

Solicitors for Plaintiff: **W. & J. Tait,** Invercargill.
Solicitors for Defendant: **Solomon, Gascoigne, Sinclair & Solomon,** Dunedin.

Alpers, J. Dec. 1, 15, 1925.
Wellington.

BODERICK v. BODERICK.

Divorce—Petitioner guilty of adultery—Discretion of Court.

This was a successful application for a decree nisi under the following facts:

The parties were married on February 5th 1908 and six children were the issue of the marriage. Drunkenness, cruelty, and failure to maintain his wife and his children culminated several times in separation agreement; then the wife condoned the past. A final separation took place, however, on January 20th 1919 and in a deed of that date the Respondent covenanted inter alia to pay the sum of one pound ten shillings per week for the maintenance of the six children, of whom the oldest at that date was 12 and the youngest 2½ years old. In the past six to seven years the Respondent has paid only £60 altogether. The petitioner now seeks a divorce upon the ground of an agreement for separation in full force and effect for three years and upwards.

She informed the Court that since October 1922 she has been living with one Fisher on the footing of man and wife. He came to her first as a lodger, helped her to maintain the children, and the relationship admittedly existing developed not unnaturally in the circumstances. Petitioner had shown co-respondent kindness when he returned from the war, he went to lodge with her, and helped her to bring up and maintain her children. He said he would marry petitioner if she was divorced and take the responsibility of her children.

W. Perry for petitioner.

ALPERS J. after reciting the facts said: Both petitioner and Fisher assured me—and I believe them—that intimacy did not begin between them till October 1922—three years and nine months after the separation deed was entered into and therefore nine months after petitioner's right to seek a divorce had accrued. In these circumstances it is clear that the adultery of the petitioner could not have conduced to the continuance of the separation; the respondent has known of it for some years but has not taken steps to divorce his wife nor does he appear to take any interest in these proceedings. I felt some hesitation in this matter at the hearing: I was desirous, on the one hand, of granting the petition and enabling a marriage with Fisher to take place; on the other hand, I felt reluctant to make a decree that might appear to condone concubinage. I have, however, as the law stands, unfettered discretion in the matter, and I follow Mr. Justice Chapman in **Burgess v. Burgess** (1917 N.Z.L.R. 563), a case in which the circumstances were very similar, and grant the decree.

Decree Nisi, may be moved absolute in three months.

Solicitors for Petitioner: **Perry & Perry,** Wellington.

Stout, C.J. Dec. 1, 12, 1925.
Wellington.

IN RE HAM.

Mental Defective—Private committee—Sufficiency of grounds to appoint committee other than Public Trustee.

This was an application for the appointment of the patient's relations in lieu of the Public Trustee. The facts were as follows:

The mental defective has been in the mental hospital for over 18 years, his committal being dated 14th January, 1907. He is 48 years of age and is unmarried. His parents are both dead and three of his brothers ask to be appointed a Private Committee. His father died on 22nd. Jane, 1925,

and the three petitioners are administrators of their father's will. The estate is valued at £5662/15/0, and £900 is the share of the mental defective. The grounds urged for the appointment of a Private Committee are:—

(a) That your petitioners as representing the brothers and half-brother of the patient are the only persons who are likely to have any beneficial interest in the patient's estate, the patient being unmarried and having no prospect of recovery.

(b) In view thereof the said next-of-kin desire that the administration of the affairs of their brother the said patient should remain in the hands of your Petitioners, so that they may use and apply his share of his father's estate in such manner as may be deemed most fitting for his comfort and benefit.

(c) That our late father the said Job Ham in his lifetime regularly provided for the maintenance of the said patient by paying an agreed allowance to the Mental Hospitals Department in that behalf, and it was our father's desire that his sons should after his death continue that arrangement and themselves attend to their brother's affairs.

(d) That the patient's estate being wound up entirely with the estate of our late father, it will be a great convenience to your petitioners in dealing with the father's estate to be able to represent the patient, and so keep within the family itself the determination of any questions which arise as to the realization or administration of the father's estate.

(e) That the patient's interests cannot be prejudiced by the appointment of your petitioners as committee of his estate, as there is no likelihood whatever that any conflict will arise between the patient's estate and that of his said father, and the family is moreover a united one.

The family are unanimous in this application. The Doctor in charge of the patient says there is no prospect of the patient's recovering. The estate of the father consists principally of cash, shares, and some realty.

Hay in support.
Kelly for Public Trustee.

STOUT C.J. said it was not necessary to have two sets of administrators; that it was expedient to leave the family property to family management. There was, he said, ample reason for appointing the administration by the private committee.

Ostler, J. Dec. 9, 15, 1925.
New Plymouth.

MAY v. HALE.

Practice—Appeal to Court of Appeal—Original appeal from Magistrate—terms on which leave to appeal allowed.

Ostler J. held on an appeal from a Magistrate that the word 'occupier' under the Fencing Act 1908 did not include an owner who had leased her land for a term of three years. Respondent desired leave to appeal to the Court of Appeal from this decision.

Quilliam in support of application.
Grey contra.

OSTLER J. held that the appeal was one that would raise 'bona fide and serious argument' and was a matter of great public interest. He gave the necessary leave but on terms that respondent give security for 40 guineas costs within one month which sum was to be paid to the appellant if appeal unsuccessful. If respondent was to succeed he was not to claim costs in the Court of Appeal. Appeal to be prosecuted at next sittings. If terms not complied with then this motion was dismissed with costs.

Solicitors for respondents: **Govett, Quilliam & Hutchen,** New Plymouth.

Solicitors for appellant: **Grey & Grey,** New Plymouth.

Alpers,J. Aug. 20, Dec. 10, 1925.
New Plymouth.

STEWART v. REYNOLDS.

Sale of land—Specific performance—Material representation.

The defendant resisted an application for a decree of specific performance on, inter alia, the ground that he was justified in rescinding the contract by reason of the fact that a public road not apparent upon inspection intersects the farm and materially interferes with the use and enjoyment of the farm and also the plaintiff represented that the said road was a part of the plaintiff's property.

Coleman for Plaintiff.
Grey for Defendant.

ALPERS J. in making an order decreeing specific performance made the following observations on the law affecting the matter: I find as a fact that the plaintiff was not aware of the existence of these "paper" roads on the property at the time the contract was made; I find further that neither he nor the agent Jackson did or said anything, on the occasion when defendant viewed the farm, that could be construed into a misrepresentation, innocent or otherwise, as to the boundaries. There is no misdescription in the contract, no shortage in area and no defect in title. It is true that these "paper" roads are in the control and management of the County Council (**Snushall v. Chairman and ors. of the County of Kaikoura** 1921 G.L.R. 67). It is true also that there is a possibility that they might be re-opened. But in view of the fact that the deviated portion of Hurford Road is so close to and practically parallel with the unused "paper" road, and in view of the latter being laid out over difficult and all but impassable ground the possibility of interference or re-opening by the County or by the Crown is so remote as to be entirely negligible.

The contingency of interference, to constitute a ground for rescission, must be probable, and not merely distant, fanciful, and conjectural. "Are you to look at the land in its present state, or to consider in what state it may be in the future? If the latter, some possible nuisance may in every case be suggested. In these cases, I admit, difficulties must not be founded on speculative conjectures of what may never take place." (**Knatchbull v. Grueber** 56 E.R. 58 at p. 63).

The worst that could result to defendant would be that a portion of his farm—apparently quite a handy portion—would be cut off from the rest by a road and he would be put to the expense of erecting 27¾ chains of fencing without contribution from adjoining owners. This is not a case of a small suburban building site like that in **Disley v. O'Donnell** (15 G.L.R. 627) or of rural land saddled with a restrictive covenant like that in **Meikle v. Gibbons** (15 G.L.R. 250)—cases that were cited and relied upon by counsel for defendant. Where, as here, it is a term of the contract that errors of description shall not annul the sale but compensation may be made or allowed therefore the contract is enforceable even though there be a considerable discrepancy, provided that which is offered is not substantially different from that which the purchaser contracted to buy. The Court probably went as far as it has ever gone in this direction in **Re Brewer and Hankins's Contract** (80 L.T. 127) which both **Lindley M.R.** and **Rigby L.J.** agreed in regarding as a "border-line case". There, a villa with a garden at the back was the subject matter of the contract. In the course of investigation of the title it was discovered that there was a public sewer passing under the garden at the rear of and some distance from the house and a manhole used for obtaining access to the sewer. The vendor was entirely ignorant at the time of the sale of the existence of the sewer. Here was a derogation from the grant not remote and conjectural but immediate and actual. Yet it was held that the purchaser could not be heard to say "I do not get that which was intended to be sold to me" and he was ordered to complete his purchase, with, however, a right to compensation.

Ought the defendant in this case then to be allowed compensation? I have come to the conclusion that he ought not: the contingency of his beneficial enjoyment of the 1½ acres of "paper" roads included within his boundaries being interfered with is so remote that any compensation he might conceivably be entitled to would be trifling. The price paid for the 51 acres averages out at £40 or more per acre: the 1½ acres of "paper" road land added to his holding should be worth at least £50 to him if it were his freehold. The very great probability that he will never be

disturbed in his use of it ought to compensate him adequately for the technical defect in his purchase which his solicitors at the eleventh hour discovered.

Herdman, J. Nov. 5, 6, 17, Dec. 4, 1925.
Auckland.

FOX v. GOODFELLOW.

Slander—Innuendo—Whether words capable in ordinary sense of conveying alleged innuendo.

In an action for slander inter alia the following words were complained of by the plaintiff as slanderous of him which were spoken by defendant "Have you ever heard that Fox was reported twice as a spy". The jury found for the plaintiff in respect of this cause of action and awarded damages. On a motion to set the verdict aside.

Sir John Findlay K.C. and **Northcroft** for defendant in support.
D. G. Seymour and **McGregor** contra.

HERDMAN J. made the following observations on the law: I propose first of all to consider whether the words uttered, in their natural and ordinary sense, impute a crime to the plaintiff. The words are in the form of a question but a defamatory charge may be insinuated in a question. Again defendant apparently repeated something that had been said by someone else, but as **Odgers** points out at page 173 of his work, every repetition of a slander is a wilful publication of it rendering the speaker liable to an action. "Tale-bearers are as bad as tale-makers." To say of a soldier that he had been reported as a spy means that an imputation of spying had been made against him by someone to the authorities responsible for dealing with such an offence. A soldier may be reported for drunkenness or a constable may be reported for breach of a regulation or an officer in a bank may be reported to the manager for a breach of duty. In each case an imputation of some kind is made against another by someone. So in the present case when it is said that plaintiff was reported as a spy there is implied in the statement an allegation that he had committed an offence. I think, therefore, that the words used, although put interrogatively, are capable, in their ordinary and natural sense, of conveying a meaning which will sustain an action for slander.

The defendant's counsel in his argument relied upon the case of **Simmons v. Michel**, 2 A.C. 162, in which Sir Robert Collier delivered their Lordships' opinion to the effect that "the words in those counts convey in their natural and ordinary sense suspicion, and suspicion only, and, according to the law of this country, with respect to the policy of which we have nothing to do, would not support an action of slander."

In that case—an action for slander—the declaration contained four counts, two of which I shall cite for the purpose of indicating what the Privy Council decided did not in proceedings for slander amount to defamation. The first count contained these words:—

> "People who go to the Secretary of State had better see that their characters are clear, for your brother (meaning the plaintiff)—the words being addressed to the brother of the plaintiff—lies here (meaning the office or place of business of the Colonial Secretary of the said island and clerk of the Crown) under suspicion of having murdered a man named Emanuel Vancrossen at the Spout some years ago' "and this is the innuendo—meaning thereby that there was among the records of the said clerk of the Crown some documentary evidence or charge implicating the plaintiff with the murder of the said Emanuel Vancrossen at the Spout, and which warranted the defendant in saying so."

The third count alleged the speaking of these words:—

> "'Haven't you' (meaning the person with whom the defendant then conversed) 'heard that Charles Simmons' (meaning the plaintiff) 'is suspected of having murdered one Vancrossen, his brother-in-law? A proclamation offering a reward for the apprehension of the murderer is now in my office' (meaning the office of clerk of the Crown), 'and there is only one link wanting to complete the case' "—and the innuendo is in these terms, "meaning thereby that there was some evidence in the office of clerk of the Crown, and that there was required only one link in the chain of such evidence to put the plaintiff upon his trial for the alleged murder of the said Emanuel Vancrossen."

It was said by the Privy Council that the innuendos did not purport to enlarge the meaning of the words alleged to have been spoken and their Lordships held that there was no imputation that a crime had been committed by the plaintiff, the words used conveying no more than suspicion. In the above counts the words "suspicious" and "suspected" were used; but in this case, it seems to me that the words spoken by defendant amount to a repetition of a statement made by another that plaintiff had in fact committed a crime. The word "suspect" is not used. There is nothing in the words uttered to suggest that plaintiff had been suspected only. Correctly interpreted they mean that the matter had got past the stage of suspicion and had reached the length of a specific charge.

It is pointed out by **Gatley** in his work on **Libel and Slander** at page 128 that when a statement of claim contains a charge of defamation and an innuendo it will be considered as containing two counts—one with the innuendo, and one without the innuendo—and if the plaintiff can satisfy the jury that the words are defamatory either with or without the meaning ascribed to them in the innuendo he is entitled to recover.

As I have formed the opinion that the words relied upon do in their natural and ordinary sense impute something that is actionable it is really unnecessary for me to consider whether there were facts known to the person to whom the slander was published which would induce him to understand the words in the sense ascribed to them in the innuendo.

Solicitors for Plaintiff: **Hopkins Smith & Seymour**, Hamilton.
Solicitors for Defendant: **Earl, Kent, Massey & Northcroft**, Auckland.

Sim, J. Dec. 18, 22, 1925.
Dunedin.

MONDY ET AL v. GUTHRIE.

Will—Payment of annuity out of income—If income insufficient may be paid out of capital—Effect if income not sufficient and beneficiary does not insist on payment out capital—Effect on rights of beneficiary's executor with regard to deficiency.

We take the facts from the reasons of Sim J.:

Walter Guthrie the testator bequeathed an annuity to his wife in the following terms: "2. I bequeath to my wife Agnes Nicholson Guthrie during her life an annuity of One thousand two hundred pounds commencing from my death and to be payable by monthly instalments and the first payment to be made at the expiration of one calendar month from my death and to be charged upon and issuing and payable out of my trust estate hereinafter devised and bequeathed and I declare that if in any year the income from my said trust estate shall not amount to one thousand two hundred pounds my trustees may make up the deficiency out of the capital of my said trust estate". The testator then devised and bequeathed all his real and personal property "subject and charged as aforesaid" unto his trustees upon trusts for sale and conversion. The questions submitted for determination relate to the payment of this annuity. For the year ending 31st. March 1916 there was no income from the estate; for the year ending 31st March 1917 the income was £1/1/7 and for the year ending 31st. March 1919 the income was £349/11/9. In all other years since the death of the testator in the year 1902 the income from the estate has been more than sufficient to meet the annuity. The annuity was not paid wholly or regularly to the widow, but sums were paid to her from time to time as requested by her. The arrears at the date of her death in December 1920 amounted to £5999/15/7. In the year 1919 an agreement was made with the widow for the payment of interest on the arrears of the annuity, but no part of that interest has yet been paid. Since the death of the widow the arrears of annuity have been reduced to £2750 by payments to the executor of her will. In the affidavit sworn by Mr. W. H. Brent in connection with the present application it is stated that the Trustees have come to no determination as to whether the deficiency in the annuity should or should not be paid out of capital. The following are the questions submitted for determination:—

(a) Was it the duty of the Trustees in any year in which the income from the estate was not sufficient to provide for the annuity to pay the deficiency out of the capital of the estate?
(b) If the Trustees have a discretion as to payment of

such deficiency out of capital ought they to have exercised that discretion by paying or crediting the deficiency out of the capital?

(c) If the Trustees have a discretion as aforesaid ought they to exercise that discretion now by paying the deficiency out of capital?

Stephens for plaintiffs.
Hay for W. E. Guthrie.
Hanlon for defendant, M. W. Guthrie.
Barrowclough for other defendants.
Brent for B. B. Brent.
Callan for testator's grandchildren born and unborn.

SIM J. answered the questions as follows:

(a) It was the duty of the Trustees to provide for the deficiency out of capital, if requested to do so by the widow, but not otherwise.

(b) The Trustees, unless requested to do so by the widow, were not bound to exercise their discretion by paying or crediting the deficiency out of capital.

(c) The Trustees having exercised their discretion by electing not to raise the deficiency in any year out of capital cannot now alter that election. That election, however, does not affect the right of the trustee of the widow's will to have the arrears paid out of capital.

An order is made in terms of paragraph 2 of the Summons, and also directing the costs of all parties in connection with the Summons to be taxed by the Registrar as between solicitor and client and paid out of the capital of the estate.

THE HISTORY OF LAW REPORTING IN NEW ZEALAND.

by

HUGH C. JENKINS, Esq.

The Legal Practitioner turning daily to his LAW REPORTS takes them for granted. He accepts them as an established fact and has long since forgotten the many efforts which were made before the satisfactory position of to-day was reached. Beautifully bound and placed upon his library shelves they remain his guide counsellor and friend throughout his professional career. Their value increases with the years and constant use throughout the vicissitudes of practice endears them to the owner until they become old friends of his.

But these LAW REPORTS and especially the LAW REPORTS OF NEW ZEALAND have a story of their own which we think worth while the telling. So be it. You shall judge, for here it is.

The Supreme Court in New Zealand.

The first Statute creating a Supreme Court in New Zealand was passed on 22nd December 1841 being the first Ordinance of the Second Session of the Council. This court has been continued in existence by various Statutes and is the present Supreme Court of New Zealand. The New Zealand Government Act of 1846 divided New Zealand into provinces and established separate assemblies. The same Act empowered the General Assembly to establish "a General Supreme Court, to be the Court of original jurisdiction or of appeal from any of the superior Courts of the Provinces.

The Macassey Reports.

No attempt was made at Legal Reporting until the year 1861, when Mr. James Macassey, commenced the NEW ZEALAND REPORTS. This was a private venture. The reasons which prompted the establishment of the Provincial Councils namely the difficulties of inter-communication doubtless were also an effectual barrier to any attempt at selecting cases from all the judicial districts. Mr. James Macassey was practising in Dunedin, which was, at that time, the Colony's Mercantile Centre. The Gold Mining in Central Otago was also in full swing. This latter was so fruitful of litigation that Mr. Macassey deemed it desirable to issue a volume of Mining Cases.

Although the MACASSEY REPORTS as they are now named were confined to cases heard and determined in the Supreme Court in Otago and Southland and also of course in the Court of Appeal, the transactions in that centre in those days were so multifarious that the MACASSEY REPORTS quite naturally came to include many cases which have since become to be regarded as New Zealand leading Cases. Our Mining Law may quite reasonably be said to have been made in Otago, at least so some Dunedin men would say.

The MACASSEY REPORTS continued from 1861 to 1872 and is to be regarded as a meritorious enterprise.

The New Zealand Jurist Reports.

The year in which the MACASSEY REPORTS ceased to be brought out, the NEW ZEALAND JURIST REPORTS were launched again in Dunedin. Two volumes were published covering the years from 1873 to 1875 . The first was edited by Gerald Dyson Branson of the Middle Temple. The second volume, published in 1876, was edited by Frederick Revans Chapman, of the Middle Temple, afterwards Judge of the Supreme Court. In 1875, however, Mr. Branson ceased to edit the Jurist. A new series was then started under the Editorship of Mr. G. B. Barton also of the Middle Temple. Unlike the MACASSEY REPORTS the Jurist selected the judgments to be published from the decisions in all judicial districts, but after surviving for three years the Jurist New Series ceased publication in 1878. In the Jurist Series in volumes 1 and 2 there was a special section devoted to reporting the decisions of Wilson Grey, late District Judge of the Otago Goldfields. Mr. Wilson Grey was eminent authority on mining law and his decisions were of such importance to warrant their appearing in the series.

The Johnston Reports.

In 1867 the then Chief Justice Sir George Alfred Arney was absent from the Colony and Alexander James Johnston was Acting Chief Justice. His Honour the Acting Chief Justice commenced a series of Reports of the Cases determined in the Court of Appeal of New Zealand. These Reports contained argument of Counsel and interjections of Judges and the volumes were printed by the Government Printer Wellington. After a life of eleven years they ceased in 1877.

The Colonial Law Journal Reports.

During the period of the publication of the NEW ZEALAND JURIST, viz., 1873—1875, an opposition publication appeared under the title of THE COLONIAL LAW JOURNAL REPORTS. Few Practitioners to-day are aware of their having existed. The Cases reported were, however, digested by Mr. Maurice Richmond and are incorporated in the

NEW ZEALAND LAW REPORTS CONSOLIDATED DIGEST covering the years 1861—1902 prepared by Mr. P. Levi.

The O.B. and F. Reports.

In the same years as the JURIST REPORTS ceased publication in Dunedin the O.B. and F. REPORTS were started in Wellington. These Reports enjoyed a triumvirate of Editors:—F. M. Ollivier, H. D. Bell (now Sir Francis Bell, the Leader of the Upper House and until recently Attorney General) and W. Fitzgerald. The last mentioned gentleman had gained some previous experience in Legal Reporting, before joining this venture having been Reporter on the Court of Appeal for the JURIST. The O.B. and F. REPORTS lived for three years namely 1878—1880, but they achieved something more than mere publication. The foundation of the NEW ZEALAND LAW REPORTS was laid by the O.B. and F. REPORTS, which were taken over by the Council of Law Reporting.

The Council of Law Reporting.

The Council was formed in 1882, the first members being as follows:—Edward Tennyson Connolly, Attorney General, afterwards Judge of the Supreme Court; Walter Scott Reid, Solicitor General; Edwin Hesketh and A. E. T. Devore, Auckland; H. D. Bell and W. B. Edwards, Wellington; F. Joynt and G. Harper, Christchurch; W. D. Stewart and F. R. Chapman, Dunedin; Treasurer, H. D. Bell. Among the original members therefore were three future Judges and an Attorney General, and the father of the present Attorney General. Dr. F. Fitchett, a future Solicitor General and Public Trustee replaced F. R. Chapman in 1885.

The New Zealand Law Reports.

From their inception in 1883 the NEW ZEALAND LAW REPORTS were brought out under the auspices of the New Zealand Council of Law Reporting, they being printed by the now extinct firm of Edwards and Green in Brandon Street, Wellington. The first Editor was Williamm Fitzgerald who had reported for the JURIST and had been one of the Editors of the O.B. and F. REPORTS. He, with Mr. Martin Chapman, also reported in the Wellington Court and in the Court of Appeal. The Reporters in the other centres were—Auckland: Edwin Hesketh, A. E. T. Devore, John M. Alexander; Christchurch: William P. Reeves (who subsequently attained Cabinet Rank, was New Zealand High Commissioner in London, and subsequently resigned to become Director of the London School of Economics and is now chairman of the National Bank of New Zealand. In Dunedin, Mr. Joseph Wood reported. The Judges of this period were Sir James Prendergast Chief Justice, Alexander James Johnston, Christopher William Richmond, Thomas Bannatyne Gillies and Joshua Strange Williams late of the Judicial Committee of the Privy Council.

Sir James Prendergast had a delightful sense of humour as is revealed by the following incident. In those days applicants for admission as Solicitors were examined viva voce by the Judges. Sir James placed the circumstances before the candidate and asked how he would advise. The candidate gave his answer whereupon Sir James replied: "Probably you are right Sir, but the Court of Appeal has decided against you. You are admitted".

Sir Robert Stout, Sir James Prendergast's successor, was practising in Dunedin and his most formidable opponent was Denniston. We may assume that when reading their cases reported in the first volume of the NEW ZEALAND LAW REPORTS neither Stout nor Denniston dreamed that they would eventually become Brothers of the Bench.

The Editors.

The NEW ZEALAND LAW REPORTS have been particularly fortunate in regard to their Editors. The first Editor, as has been said, was William Fitzgerald and he carried on until 1887. Mr. Martin Chapman's Editorship commenced in 1888 and Mr. Maurice Richmond became associated with him as a Law Reporter in Wellington. The REPORTS were conducted by Mr. Martin Chapman right down to July 1906 when Mr. H. H. Ostler (Now Mr. Justice Ostler) who had been assisting Messrs. Chapman and Richmond with the reporting, was appointed to the Editorship. Mr. Ostler resigned in June 1910 and Mr. J. Logan Stout (now a Magistrate) was appointed in his stead. In 1915 Mr. Stout shared the duties of editorship with Mr. A. R. Atkinson who took over the whole of the work in the following year.

In 1920 Mr. W. F. Ward relieved Mr. Atkinson and has continued the duties of Editor down to the present time. During 1925 Mr. Ward was absent on a tour in Europe and Mr. H. H. Cornish filled the breach meanwhile. The Council are to be congratulated in that throughout the life of the Reports they have always obtained the services of such able men to carry out the duties of Editor.

Reporting Argument.

From the very first the Council wisely decided to publish a note of the Argument of Counsel and this policy has always been adhered to and to-day is the distinctive feature of the NEW ZEALAND LAW REPORTS. It has been urged in some quarters that the argument being of no authority should not be included. This surely is a narrow view. When argument is reported three aspects of the case are available to the reader. Judges hearing cases in nisi prius have on occasion been proved to be wrong by the Court of Appeal, and in turn the Court of Appeal has sometimes bowed to the Privy Council. But all cases cannot go to Appeal and there is some satisfaction to Counsel to have his argument reported. As Sir James Prendergast said "You may be right."

Finance.

The financial affairs of the Council's activities, however, were sometimes a matter for grave concern. The position arose thus. The stock of printed copies of the NEW ZEALAND LAW REPORTS was warehoused in Wellington. A considerable portion of this stock was either destroyed or damaged by fires which occurred in the year 1912. The result was that there was considerable difficulty in obtaining past volumes of the Reports. This resulted in many Practitioners preferring to look elsewhere. The subscription list to the NEW ZEALAND LAW REPORTS diminished considerably and the Treasurer found almost empty coffers when the printer presented his account. From this unhappy state of affairs it is to the credit of Mr. C. H. Treadwell, the present Treasurer, that the Society has been piloted to its affluent position to-day.

In 1915 the Council arranged for Butterworth and Company to undertake the publishing and since

that date the subscription list has shown a steady advance.

Reprinting.

It was still found, however, that the absence of complete sets of the NEW ZEALAND LAW REPORTS was a barrier blocking the way to the fullness of popularity which the Council had a right to expect for the NEW ZEALAND LAW REPORTS. The REPORTS were authoritative, they covered the longest period of any Reports in New Zealand, they alone reported argument of Counsel in the Supreme Court Cases; they belonged to the profession: the Bench preferred citations from the NEW ZEALAND LAW REPORTS: "What is the NEW ZEALAND LAW REPORTS reference please" was, and is, so frequently heard from the Bench that naturally Counsel preferred to work from them. The Council thereupon determined upon a wise course. They realised that the attitude of the Profession was "If we can get complete sets we want the NEW ZEALAND LAW REPORTS". In consequence of this attitude the Council made arrangements with Butterworth and Co. (Australia) Ltd., to reprint the complete sets of the NEW ZEALAND LAW REPORTS, making definite arrangements that the price to be charged to the Practitioners should be a reasonable one. In doing this the Council protected the members of the Profession in this respect. There can be no gainsaying that the move was a wise one which has already reflected and is reflecting in the continued advances of the Subscription List of the NEW ZEALAND LAW REPORTS.

The Digests.

The NEW ZEALAND LAW REPORTS DIGESTS have been ever popular. The first three DIGESTS were compiled by Mr. Maurice Richmond. These were consolidated by Mr. P. Levi. Mr. Richmond was a remarkably accurate worker and Mr. Levi did not find it necessary to alter any of Mr. Richmond's work when he went over it to effect the consolidation. Mr. Levi when he compiled the Consolidated Digest of the years 1861—1902 himself digested six years cases. He read each Judgment completely through, rising at 5 a.m. each morning to carry out this work which took him four and a-half months. The Government Printer undertook the production of the volume and after printing the first eight pages delayed the remainder for twelve months. A similar experience is meeting the second Consolidated volume prepared by Messrs. Ward and Cornish.

It is interesting to note that Mr. Levi's Consolidated Digest was the first job set up in monotype in New Zealand. There are now forty-five volumes and two Digests in the series. They stand, memorials of the labours of the years; faithful records of faithful advocacy, reflecting not only the excellence of the work of the compilers, but furnishing also undisputed evidence of the high standard of New Zealand's Bench and Bar.

There is an idea abroad among moral people that they should make their neighbours good. One person I have to make good; myself. But my duty to my neighbour is much more nearly expressed by saying that I have to make him happy if I may.—R. L. Stevenson.

THE CASE OF RUSSELL v. RUSSELL

A.C. 687, 40 T.L.R. 713.

A DISCUSSION

—by—

W. A. Beattie, Esq.

This case, argued before the House of Lords, created a great deal of discussion in social and legal circles. The newspapers amply, perhaps even more than amply, dealt with the former, but the latter alone concerns the profession. It is proposed to show that the case is not applicable apparently to our system of jurisprudence, and for that purpose it will be necessary to traverse in some measure a criticism of the case which was published in the Cambridge Law Journal Valume 11, No. 11 by me, and which met with the support of, amongst others, the editor of the Law Quarterly Review. The matter is one of great importance, as it affects confessions of adultery, and a great deal of the evidence brought before the Courts in cases of Divorce.

The facts of the case are briefly as follows: On the 7th of November 1921, the respondent presented a petition for the dissolution of his marriage with the appellant on the ground of her adultery with certain co-respondents including a man unknown, in consequence whereof a child was born on the 15th of October 1921. The jury eventually found the appellant guilty of adultery with the man unknown, and the learned Judge, Mr. Justice Hill, pronounced a decree nisi. At the hearing the respondent (the then petitioner) gave evidence of non-access at such time as in the ordinary course the child born would have been conceived. The appellant contending that (inter alia) such evidence was inadmissible, the case came before the Court of Appeal, but the appeal was dismissed. On appeal to the House of Lords, where the case turned upon the question of the admissibility of evidence of non-access in proceedings for divorce, tendered by a spouse, with the object or possible result of bastardizing a child of the marriage (per Lord Berkenhead 40 T.L.R. at page 716) the appeal was allowed by a majority of three (Lord Birkenhead, Viscount Finlay and Lord Dunedin) to two (Lord Sumner and Lord Carson) the Court professing to decide the question on legal and logical grounds, but in effect laying down a rule of debatable public policy (1924 L.Q.R. 388, and dissenting judgment of Lord Sumner). Although the three learned Lords arrived at the same result, there is some confusion in the ratio decidendi, but it will no doubt be considered that that of Lord Bikrenhead is the real ratio in the passage where he says: "This evidence, we are told, is admissible in divorce; being therefore so received, it bastardizes the child. But if and when the child, as in this case he certainly will do, becoming of age, applies for a writ in this House, and proceedings follow, the evidence will not be admissible, and he will be pronounced legitimate. . . . . Nothing but absolute necessity, founded on decisions binding upon me, would drive me to a conclusion so ludicrous and incongruous." The logical absurdity of the rule in Peerage Claims, to which Lord Birkenhead was referring, has had to be justified by a further one which affects the whole

community, and not a limited class. As Peerage claims do not enter into our jurisprudence, our Courts are saved from the necessity of arriving at a conclusion 'ludicrous and incongruous' and therefor the reasoning being inapplicable, it is submitted that the law as it was, previously to this decision, should hold in New Zealand.

The first reported case on the question seems to be St. Andrews v. St. Brides (Parishes) 1717, 1 Sess. Cas.K.B. 117. 'If a woman take a second husband and live with him, why should not the law look upon the issue as his. . . .? The presumption (of access) only holds till the contrary is proved'. Per Parker C.J. In Pendrell v. Pendrell (1732) 2 Stra. 925, the mother's evidence on this point was admitted.

In Rex v. St. Peters (Parishes) 1735, 1 Burr. Sett. Cas. 25, Lord Hardwicke admitted the evidence of the husband to prove non-access.

In Clerk v. Wright 1717, cited in Rex v. Reading, (infra) Eyre C.J. said concerning the wife, 'If she had been here she might have been examined as to the fact'.

In Rex v. Inhabitants of Bedell (or Bedel) Lee Cas. Temp. Hard. 79 the wife (be it noted that she is the guilty party) was allowed to prove non-access.

In Rex v. Reading 1734, Lee cas temp. Hardwicke 79, the law underwent a slight change, it being laid down that evidence of non-access was admissible in affiliation cases but required corroboration, a very beneficial change considering the effect of a decision on the future of the unfortunate child.

This case was followed in Rex v. Luffe 1807, 8 East 193, where Ellenborough C.J. allowed a wife to give evidence of criminal conversation, thus bastardizing her child, the evidence being corroborated.

In Rex v. Bramley, 1795, 6TR. 330, Kenyon L.C.J. said: "Parents may be called with respect to the legitimacy of their issue; and if they may be called to prove that they are legitimate children, there is no reason why they should be considered as incompetent when called to prove that the children are illegitimate."

The cases of In re Rideout's Trusts 1870, L.R. 10 Eq. 41, and In re Yearwood's Trusts L.R. 5 Ch. D 545, follow the rulings in the above cases.

In 1918 the case of Boulton v. Boulton 87 L.J.P. 112 was decided. On the evidence of the petitioner that he had not had access, and on evidence aliunde of the birth of a child, Horridge J. granted a decree nisi of divorce.

This line of cases is seemingly complete, and the law therefor definite, but unfortunately for the clearness of our case law, the phenomenon is met with of another line of cases, quite distinct, in which the law, based on an obiter dictum of Lord Mansfield, is exactly the opposite. How the pleaders allowed these two growths of case law is remarkable.

The obiter dictum occurs in the case of Goodright v. Moss, 1777, 2 Cowp. 591, and is as follows: "The law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . It is a rule founded in decency, morality and policy, that they shall not be permitted to say after marriage that they have had no connection, and that therefor the offspring is spurious." As his authority Lord Mansfield referred to a decision of the Court of Delegates, but no record of this case can be found. No pleader seems to have been struck with the difference between the terms 'father and mother' and 'alleged father and mother'. The first line of cases referred to was seemingly not before the House of Lords when this appeal was heard, and this, it is submitted is of great importance to our Courts. Lord Sumner says with regard to the obiter dictum of Lord Mansfield: "If it had been feasible for the petitioner to have given evidence of non-access by the mouth of some third person, some chambermaid or spy, or, it may be, by the wife's written confession, that the child was not his, and that nothing had taken place between the spouses to make it his, he could have taken his proceedings and called his evidence, and if he failed to obtain his decree, it would not have been decency or morality or the bastardizing of the child that would have defeated him, but the incredulity of the jury. If on the other hand, the evidence which has case required was merely something 'tending to prove non-access', as, for example, absence from home, then a well-to-do man able to afford the search for and the production of the evidence of third persons to prove it, would get his decree, but a labourer who had wandered in search of work and could only prove his absence from home by his own evidence, would find his mouth closed on a vital point, and would remain tied to an unfaithful wife and bound to maintain another's child in the name of a rule founded on Public Policy".

The obiter dictum found support however in the cases of Rex v. Inhabitants of Sourton 1836, 5A. and E. 180, Rex v. Inhabitants of Kea 1809, 11 East 132, Poulett Peerage Case, 1903, A.C. 395, Atchley v. Sprigg 1864, 33 L.J. Ch. 345, and other cases. It is most important that up to 1857, the civil courts did not enquire into matrimonial offences.

With the Statute 20 and 21 Vict. c. 85, a new field of enquiry being opened, new evidentiary facts became relevant, and, one would expect, admissible, therefor it is submitted that in actual fact only the case of Boulton v. Boulton (supra) is really in point, and Goodright v. Moss and the cases following the obiter dictum therein should not enter into the argument. This matter does not seem to have been argued in the House of Lords, but Lord Sumner touches on the question when he says: "I am afraid that the sanctity of married intercourse passed into the limbo of lost causes and impossible loyalties in 1857".

One of the great aims in a system of law is to render it intelligible, as far as possible, to those who are subject to it. Richmond J. rather anticipated this state when he said in Pearson v. Clark, Mac. 136; "Happily in our day, the law, if not exactly the perfection of reason, will generally warrant the conclusions of an accurate thinker." Logical errors should be reduced to a minimum, and therefore it is submitted that as there are no Peerage Cases in our legal system, the need for reconciliation of conflicting cases in this matter does not arise. The ratio decidendi of the House of Lords does not apply, and therefore evidence of non-access in proceedings for divorce may, perhaps with the added requirement of corroboration, be admitted in New Zealand Courts at least if tendered by the innocent party.

LONDON LETTER.

The Temple, London, 25th November 1925.

My dear N.Z.,—

H.M. Judges and King's Counsel are seen these days in Court in their official mourning, and I feel little doubt that you, over-seas, are in fellow-feeling with your professional brothers over here in the tribute to the memory of our gracious Queen Mother. As Mr. Justice Roche briefly and reverently said, at our Assizes on the morning when the sad news was received, it is in accordance with the wishes of His Majesty, as well as in the interests of the State, that, always paying our tribute to that splendid memory, we should continue in our business of the Law.

The attacks on that deservedly popular, and eminently tolerant and just, Judge were as fantastic as they were scurrilous, as futile as they were persistent. I need hardly trouble you with the details as they transpired in the contempt proceedings in the Divisional Court a week ago. He was going the Oxford Circuit, during the period of their continuance, and my friend, Lloyd, the learned Clerk of Assize, had every reason for complaint as to the work put upon him of dealing with the voluminous and incessant correspondence in which the vituperation was contained. For the curious,, there is some enlightenment as to the nature and penalties of this unusual form of Contempt, but there is little of technical interest in the matter for the lawyer. Someone has recalled a similar incident of the past. Hawkins J. was the victim of the attack, and it was necessary for him to give evidence as a witness in the proceedings which were the sequel. It is noted that on that occasion the counsel, who had the examining of his Lordship, suffered under the difficulty that the learned Judge, in the witness box, could not be got to confine himself to answering the questions put to him, but would insist upon making statements. Is this comforting or appalling to us, who all suffer such agonies from that utterance of the witness:—"May I make a statement, my Lord"?

Of the fortnight' proceedings, I venture to think that the appeal from the War Compensation Court's decision, in Netherlands American Steam Navigation Co. v. Owners of the s.s. "Sommelsdijk", is of the most moment. As a report of them appears in "Weekly Notes", we may rest assured that the proceedings will be eventually and fully reported in the Law Reports. It is a matter in which a short, curtailed report might be misleading: "A little knowledge is a dangerous thing". An epitome will here be most apt: the decision turned upon the detention during the war, of a neutral ship, by our Admiralty authorities, for search for contraband, and it declared the jurisdiction of the Prize Court to be exclusive in such cases and it categorically negatived the assertion of right to deal with them, made by the War Compensation Court. It is an issue of high Constitutional import, and very many other cases of very considerable substance waited upon its decision. No doubt the matter will go to the Lords. For my part I find also no little constitutional interest in the little case of Rex v. Bushby and Others, of Nov. 10. Lest it be that I did not mention this in my last letter, I think it well to put on record the decision (from which I should have dissented had I been a Judge of the Divisional Court) that where, on a Preliminary Enquiry before a Bench of Justices, the Justices were equally divided as to whether the accused should be committed or discharged, the proper course is not to give the accused the benefit of the doubt but to adjourn for a re-hearing before a reconstituted Bench.

Our Criminal Law Amendment Act, 1922, contains a peculiar provision as to the defences open to persons charged with offences involving carnal knowledge, when the age of the girl victim is under 16. No doubt our difficulties with this section are, so far as you are concerned, our own, but you may have others upon which their solution will throw some light. We begin with the principle that the consent of a girl of such tender age is no defence in itself, and we go on to consider the position of the accused when the girl has appeared to be of a greater age. It is a dismal and sordid experience that there are at least enough of young sirens about, whose lusts are fully developed and whose approach is thoroughly determined though in years they are themselves immature, to warrant attention to the matter. More than one Judge, having sentenced the man who has tampered with her, has expressed a wish that he could have confined the girl who has invited the tampering. The proviso of our section 2 reads: "In the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of 16 years shall be a valid defence on the first occasion on which he is charged with an offence under this section." A question which has agitated many circuit Judges is upon whom lies the onus of proof, as to the clean sheet of the accused in this respect? It seems to be against all principle that an accused person should be compelled to assert his own good character in a criminal proceeding, with all the risks which attend that process. But the issue is purely a defence, and why should the prosecution be put to the elimination of it any more than to the proof that each accused is not insane? In an unreported circuit case, Avory J. held that the onus was on the defendant to prove the absence of previous charges; in a recent case at Liverpool MacKinnon J. (as he himself informed me) was inclined to put the onus on the prosecution, to shew a previous charge if the matter was disputed. Furthermore, in Rex v. Madeley ("Morning Post Legal Digest" of November 16th) Roche J. held that a man born in January, 1902, was "a man of twenty-three years of age or under" in April 1925. This is certainly in accordance with common parlance, but he took some persuading that it was in accordance with legal interpretations. He compromised, upon a moot point, by saying that where a penal statute is ambiguous, the person penalised must be given the advantage of the ambiguity. There is yet a third point being discussed, currently, in this context. Rex v. Forde sometime ago decided that, in any case, the defence of misleading age does not apply to the minor charge of indecent assault. If the girl, to whose solicitations surrender is made, is under sixteen, there is the indecent assault, whatever reason her victim may have had to suppose she was of that age but she was free to give, and he was free to accept, her favours. It comes about then that there is always a count added for the minor charge. Note, however, that our Judges are still making our law to some extent in this country. In a carnal knowledge case, Avory J. has instituted

(and Roche J. applied, in Rex v. Madeley) the practice of ignoring, at the inception, the count for indecent assault, and trying the matter out on the major charge. If upon such count the defendant shews he is entitled to the benefit of the proviso, based on an appearance misleading as to age, then the Judge advises the prosecution to offer no evidence on the minor charge with such emphasis that the advice is accepted. I have gone at some length into what is, no doubt, a topic of very limited importance from every other point of view than this, that it is one of the few subjects really at large, these modern days, and really calling for the light of an authoritative decision in the darkness of decentralised and not always consistent rulings. You will not be wrong in supposing, from the prominence given by me in this letter to criminal matters, that the pre-eminent occupation of the moment is the Autumn Circuits and Assizes. Moreover, it is a too prevalent idea that a commercial case, in London, involving ten thousand pounds or so, is of an importance, in litigation, such as to reduce to insignificance the questions of a man's liberty in a distant, rural Shire. I have had particular opportunity of studying Roche J. this circuit. I can believe that, coming from the Commercial Court, he began upon crime under this misapprehension; I can see for myself that he has the more true sense of proportion now.

It is amusing that after all this fuss and bother, knowing predictions and copious explanations (such as I have inflicted upon you, by the way in my turn!) the Grand Jury is to be retained at Quarter Sessions, after all. It appears that we have still a strong, unbending conservative fibre in us, notwithstanding the progressive character which we claim. The "Daily Herald" hardly knows what to do about it, upon realizing that some misguided Labour M.P.'s were deceived into a co-operation with the many mischievous Tories in the abominable act. For my part, I shall do nothing about it, since I do not think it matters one way or the other.

I think that all four cases in this week's brief Digest ("Morning Post," November 23rd) should have your attention. Whatever is your equivalent of our Factory and Workshop Act, 1901, it no doubt provides for the fencing off of dangerous machinery and penalises those who fail to afford their employees this protection. Note that the Divisional Court held Justices to be in error, who dismissed a charge against employers of failing to fence off such machinery, running at a height of 13 feet from the ground, merely because the Justices thought that any fencing must have been useless. (Atkinson v. London and North Eastern Railway Company). As to the other cases, I have nothing to add which is not contained or intimated in the "Digest" and I know no more of them than there appears: Batchelor v. Murphy is, you will see, a House of Lords confirmation of a reported decision of the Court of Appeal (1925) 1 Ch. 220. You will see a reference to the case of Short v. Borough of Poole, deciding the much canvassed question of an education authority's right to conclude the services of a female teacher on the sole grounds that the female teacher is married. A friend of mine is in the similar case, which began to be heard and to be reported but stood adjourned pending the decision, in the Court of Appeal, of Short v. Poole. He tells me that the latter is fairly sure to go to the House of Lords; and I left him to-day at lunch trying to look perfectly satisfied that his clients' litigation should be settled by the fate of another's case and without his having to make any further appearances, at first instance, in the Court of Appeal or in the House of Lords.

As for Sneyd v. Sneyd and Burgess (The King's proctor Showing Cause) the reports do not, probably, disguise from you the startling nature of the facts involved, but they fail, I expect, to give you a true conception of the excitement as to points of law for those whom such matters concern. If you look at Cramp v. Cramp and Freeman (1920) p. 158., you will find a very lucid explanation by McCardie J. of the nature, origin, antecedents and reasons of the principle that to resume intercourse with an adulterous wife is, if the husband knows of the past adultery in resuming the present intercourse, inevitably a condonation. Next, if you look at Roberts v. Roberts 117 L.T. 157 you will find that Hill J. had qualified this rule by holding that where the adulterous wife obtained the resumption of intercourse by a fraud, but for which it would never have been resumed, then the condonation was more apparent than real and the husband might still have his divorce. In Sneyd v. Sneyd, the wife, after the husband's petition had obtained the decree nisi, admittedly devises a scheme with a threatrical manager to secure an interview with her husband, and undeniably the husband, though tricked into the interview, waives the trick and forgives the past and condones by deed and by a full, subsequent correspondence. Upon the King's Proctor intervening, he pleads quite simply "There was no condonation". . . At the hearing of the intervention, his cross-examination of his wife (called by the King's Proctor) goes to shew that his case is not that there was no act, but that the condonation was more apparent than real, he being induced to dispense it by the false representations of his wife that, to put it shortly, she had been a loyal wife in the past, was being a loyal wife in the present and would be a loyal wife in the future. The "whereas, in truth and fact" clause of the plea, amended by the order of the Court and with the benefit of an adjournment for the King's Proctor to consider it, is to the effect that, contrary to her recent denials and consistently with the Petitioner's former beliefs, she has committed adultery with the co-respondent, was committing up to the date of the condonation adultery with the theatrical manager and had in the future every intention of committing adultery if and as she wished hereinafter. Now that is a sordid case, in point of fact; but it is a highly intriguing case in point of law, whether you would know for certain what is condonation and how conclusive a proof of it is, in truth, the resumption of intercourse, or whether you would what is the function of the King's Proctor in so extraordinary an affair. For, note this: if we assume the truth of the Petitioner's allegations, we know now that the wife is trifling with her husband and the husband has been trifling with the Court. If the King's Proctor moves in the matter, it must automatically be to assist the wife; if he sits still and does nothing, it must automatically be to assist the husband. I feel fairly confident in suggesting that this is going to be a leading case, at least in so far as concerns the defining of the King's Proctor's position and not improbably also with regard to a development, reconciliation and elucidation of the principles expounded in Roberts v. Roberts and

Cramp v. Cramp. Whether or not Sir Patrick Hastings' preoccupation, defending the anthracite miners in South Wales, will cause its postponement till the other side of Christmas is another matter. Talking of which, I suppose that I shall be wanting in my duty to you, if I omit to mention the Communist Trials, before Swift J. Sir Henry Slesser K.C. and his young henchmen are plugging along stoutly as I write, and for all I know they may win. The general feeling among us at the Temple is that it is a stupid business, on everybody's part, and hardly worth the time and energy required to talk about it. Yours ever,

—INNER TEMPLAR.

WELLINGTON LAW SOCIETY.

ANNUAL MEETING.

The annual general meeting of the Wellington District Law Society was held at the Supreme Court library on Monday, 2nd February. There was a very large attendance, Mr. Robert Kennedy, the retiring president, took the chair.

The following officers of the society were elected:—President, Mr. A. W. Blair; vice-president, Mr. H. H. Cornish; council, Mr. H. F. Johnston. Mr. R. Kennedy, Mr. P. Levi, Mr. H. F. O'Leary, Mr. C. A. L. Treadwell, Mr. C. G. White; treasurer, Mr. Wm. Perry; auditor, Mr. J. S. Hanna; representatives to New Zealand Law Society, Mr. A. W. Blair (president Wellington District Law Society), Mr. A. Gray, K.C. (vice-president New Zealand Law Society), and Mr. C. H. Treadwell, treasurer council of law reporting; Council of law reporting, Mr. C. H. Treadwell, Mr. M. Myers, K.C.

The annual report and balance-sheet were adopted. The report shows that in the whole of the Wellington judicial district there are 326 practitioners. Of these 237 practise in the city, and the remaining 89 practise in the country districts. The society recorded the loss it had suffered by the deaths of the Hon. Oliver Samuel, K.C., M.L.C., the Hon. C. H. Izard, M.L.C., and the Hon. T. W. Hislop, M.L.C. In order to encourage the Law Students' Society, recently formed, in the study of law and practice, the council made available to students the library books for use in the holding of mock trials and legal arguments. The Government has lent to the society the Canadian Law Reports and the annual report of the society expresses its appreciation for this and its indebtedness to the Hon. John MacGregor, M.L.C., for interesting himself in approaching the Government on the matter. Mr. F. Harrison, who for over forty years has occupied the position of secretary to the Wellington District Law Society, and a similar position to the New Zealand Law Society since its inception 28 years ago, retired during the year, and the society recorded its appreciation of his long and faithful service in a special resolution. Mr. Harrison's place was taken by Mr. W. A. Hawkins, who held the position of Registrar of the Supreme Court and other important positions. During the year a portrait of the late Mr. Justice Johnston was presented to the society by Mr. Douglas McLean of Napier and hung in the library.

At the meeting various matters of interest to the profession were discussed. The following resolution was unanimously passed: "This council is strongly of opinion that, in order to maintain the bench at the necessary high standard, the position of the Judges of the Supreme Court needs revision in regard to salary and pension."

The proceedings terminated on the motion of Mr. R. Kennedy with a vote of thanks to the staff.

CORRESPONDENCE.

(The Editor, "Butterworth's Fortnightly Notes.")

Dear Sir,—

I have followed with some interest the articles on Legal Education published in your Journal, with special reference to those by Professor Algie, Mr. Von Haast and Mr. J. C. Stephens. It appears to me that Professor Algie is wrong when he bases his article on the basis of the present course being a two years' course. It may be possible that very few students take the course in two years, but they are the exception. The course in actual practice is taken in not under three years, but in saying this I refer to the Law Professional examination. The Professor says "My point here is that we ask too much of our students in the time they have available and we necessarily force them to cram by memory what will suffice for an examination." When we glance at the proposed course of study formulated by him, we find that the students in order to be relieved of the present excessive strain on their mental powers, are to take in all 20 different subjects inside four years. Some of these may be branches of other subjects, but the temptation of the examiners would be to specialise and thus extend these minor subjects. The point concerning the study of statute law seems a worthy one. The Statutes are for perusal, and it is absurd to set questions in statute law to the detriment of the study of principles of law. No lawyer relies on his memory for statute law. He looks up the Act and finds the exact wording.

Included in the list of evils given by Mr. Von Haast we find I. The Illiteracy of a large proportion of our law candidates. "At every meeting of the law examiners there is the same complaint, that a large proportion of the candidates cannot write, spell, or express themselves in decent English". May I suggest a remedy for this, viz., to give more attention to essay writing in the English paper for the Entrance, and less attention to Latin, which owing to its difficulties, monopolises a large amount of the pupils' time which could be better spent in learning to write and talk good English. I believe Mr. Caughley subscribes to this view and it is supported by the Headmasters of a number of our leading colleges. Latin is given a place in our examinations which is not warranted by the results. It is being realised that considering its reputation as a time-absorber, it is not worth while. There is talk in England of cutting it out of the Medical Preliminary Examination, and the chances are that it has already been cut out.

While the Law teachers who have written these articles in your Journal have been generous in criticism, perhaps it would not be out of place to offer a little in their direction. Two or three years ago I saw a Contracts paper set by Mr. Von Haast. I doubt very much if Mr. Von Haast could have answered all the questions within the time limit of three hours. The number was in the vicinity of ten but the sub-questions considerably exceeded this total, and it is little wonder that many candidates made a Marathon of the paper with disastrous results. This may explain the reference in the article to "a large proportion of the candidates cannot write, spell or express themselves in decent English". It seems imperative that examiners should make a proper test of the time taken by their papers, or if they wish to include any questions to allow a choice of questions. I have noted the article by Mr. Stephens in which he mentions he has always given both "book questions and practical problems." I suggest, having perused many of the papers set by Mr. Stephens that the "problems" are too intricate for the great majority of law students, for on being referred to practising solicitors, few of them could be answered within the time available in an examination room, while some of them are still "problems". In this connection it may be suggested that "model answers" prepared by the examiner could be made available at a date following the examination. As it stands candidates must rely on the "book questions" to pull them through.

A word of warning might be mentioned here, namely than an excessive tightening up of the law examinations, in which the New Zealand Law Society is taking a leading part, will give the public the "close corporation" idea. Certainly the recent Regulations published are extremely harsh in their effect on students who have commenced their law course, and the fact that the whole question of law examinations is to be thrashed out on the floor of the House, indicates that but scant regard has been afforded to those who have taken the law course prior to the entrance examination. The Regulations would be less harsh in effect if they applied to the future only, and are not made to affect those who have already passed in some of their law subjects, and are now past the college stage when Latin to degree standard can be taken up.

Yours etc.,

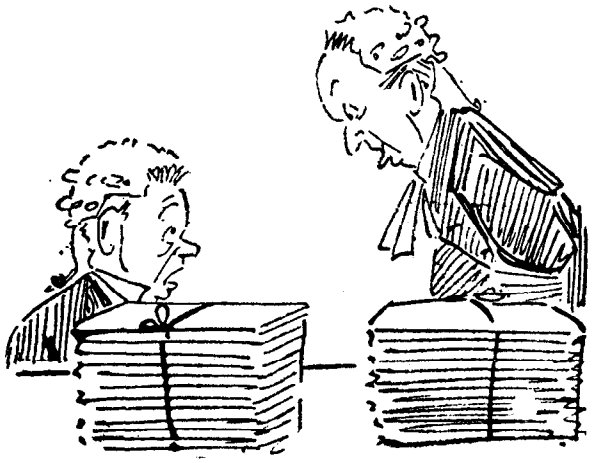
X-RAY.

FORENSIC FABLES.

—No. 15.—

THE SOCIETY SUIT AND THE UNEXPECTED SETTLEMENT.

The case of **Potte v. Kettle** was about to be heard. It was a Society Suit in the Best Sense of the Term. The Countess of Potte (married woman) was Suing Lady Cleopatra Kettle (spinster) for damages for slander under the Slander of Women Act 1891. Lady Cleopatra Kettle (spinster) was Counter-claiming damages for Slander from the Countess of Potte (married woman) under the Slander of Women Act, 1891. If the Alleged Observations of Both Ladies were True Neither of Them was, or ever could be, Fit to Move in Respectable Circles. The Defence of Both Parties (Settled by Very Experienced Pleaders) was that the Words had not been Spoken and/or that the Words were Spoken on a Privileged Occasion and/or that the Words were True in Substance and in Fact. Counsel of the First Magnitude had been Briefed. Sir Nathaniel (with Another Leader and Two Juniors) was for the Plaintiff, and Sir Peregrine (with An-



other Leader and Two Juniors) was for the Defendant. The Representatives of the Press were Sharpening their Pencils. Fashionable Folk in the Gallery were Telling Each Other to Keep Quiet. The Judge, in a Pair of Clean Bands, was Glancing at "Fraser on Libel." The Jury was being Sworn. One of Sir Nathaniel's Juniors was Clearing his Throat Preparatory to Opening the Pleadings. The Air was Charged with Electricity. You could have Heard a Pin Drop. When Eleven Jurors had been Sworn the Associate Whispered to the Judge that One Special Juror had not Turned Up. The Judge, who was a Scholar and an Antiquarian, rejoiced in Archaic Terminology. "Sir Nathaniel and Sir Peregrine," he said, "An Event has Occurred which Makes it Necessary, if I am not mistaken, for One or Both of You to Pray a **Tales**." Counsel Conferred. Sir Nathaniel asked Sir Peregrine Whether he Knew what the Dickens the Old Boy was Talking About, and what the Blazes was the Thing he Wanted them to Pray for. Sir Peregrine Replied that he hadn't a Notion, and Didn't Sir Nathaniel Think they had Better Settle? Sir Nathaniel Cordially Agreed. And so, to the Fury of the Countess of Potte, Lady Cleopatra Kettle, and the Public, the Case of **Potte v. Kettle** was Settled on Terms Indorsed on Counsels' Briefs, Judge's Order if Necessary.

Moral: Talk English

Court Sittings for 1926.

SUPREME COURT.

AUCKLAND.
At 10 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 27th July; Tuesday, 26th October.

HAMILTON.
At 10 a.m. on Tuesday, 23rd February; Tuesday, 8th June; Tuesday, 31st August; Tuesday, 23rd November.

NEW PLYMOUTH.
At 10.30 a.m. on Tuesday, 16th February; Tuesday, 18th May; Tuesday, 10th August; Tuesday, 23rd November.

GISBORNE.
At 10.30 a.m. on Monday, 8th March; Monday, 14th June; Monday, 23rd August; Monday, 15th November.

WANGANUI.
At 10.30 a.m. on Tuesday, 9th February; Tuesday, 11th May; Tuesday, 17th August; Tuesday, 16th November.

WELLINGTON.
At 10.30 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 27th July; Tuesday, 26th October.

PALMERSTON NORTH.
At 10.30 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 3rd August; Tuesday, 9th November.

NAPIER.
At 10.30 a.m. on Tuesday, 23rd February; Tuesday 8th June; Tuesday, 17th August; Tuesday, 9th November.

MASTERTON.
At 10.30 a.m. on Tuesday, 23rd February; Tuesday, 15th June; Tuesday, 23rd November.

BLENHEIM.
At 10.30 a.m. on Tuesday, 9th March; Tuesday, 7th September.

NELSON.
At 10.30 a.m. on Tuesday, 16th February; Tuesday, 8th June; Tuesday, 16th November.

CHRISTCHURCH.
At 10.30 a.m. on Tuesday, 9th February; Tuesday, 11th May; Tuesday, 17th August; Tuesday, 16th November.

TIMARU.
At 10.30 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 3rd August; Tuesday, 2nd November.

OAMARU.
At 10 a.m. on Wednesday, 3rd February; Wednesday, 1st September.

HOKITIKA.
At 10.30 a.m. on Wednesday, 3rd March; Wednesday, 16th June; Wednesday, 15th September.

GREYMOUTH.
At 10.30 a.m. on Wednesday, 3rd March; Wednesday, 16th June; Wednesday, 15th September.

WESTPORT.
At 10.30 a.m. on Wednesday, 3rd March; Wednesday, 16th June; Wednesday, 15th September.

DUNEDIN.
At 10.30 a.m. on Tuesday, 9th February; Tuesday, 4th May; Tuesday, 3rd August; Tuesday, 2nd November.

INVERCARGILL.
At 10.30 a.m. on Tuesday, 3rd February; Tuesday, 18th May; Tuesday, 24th August; Tuesday, 16th November.

COURT OF ARBITRATION.

WELLINGTON.
At 10 a.m. on Monday, 8th March.

GREYMOUTH.
At 10 a.m. on Wednesday, 17th March.

WESTPORT.
At 10 a.m. on Friday, 19th March.

NELSON.
At 10 a.m. on Monday 22nd March.

COURT OF APPEAL.

THE 1st DIVISION.
Sits at Wellington on Monday, 15th March, at 11 a.m., and on Tuesday, 28th September, at 11 a.m.

THE 2nd DIVISION.
Sits at Wellington on Monday, 28th June, at 11 a.m.