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, AUGUST 31, 1926.

MORGAN V. WRIGHT.

We are indebted to the solicitors for the respondent in the Privy Council appeal for the note in this issue and for the copy of the reasons. We have deleted the reference to the facts which appear in the judgment of Lord Dunedin as the facts are fully related in the report of the proceedings in New Zealand, 1925 N.Z.L.R. 689.

MAGISTRATES COURT REFORM.

It is now too late in the present Session of Parliament to expect legislation for the reform of some of the sections relating to the Magistrate's Court. There is one provision, however, that should be amended and that relates to the present need of a defendant wishing to appeal to the Supreme Court of finding the whole of the money involved in the judgment and costs together with costs for the appeal. It is unfair that litigants in the Lower Court should be prohibited, for it virtually amounts to that in many cases, from appealing by reason of having to find the whole of the sum involved in the judgment against which he desires to appeal. A plaintiff appealing is of course in a better position. An appellant in the Supreme Court or the Court of Appeal is frequently in a better position. Yet we have this extremely heavy burden placed on an unsuccessful defendant in the Magistrates Court, who usually is a person of small means and to whom the adverse judgment is not unlikely working an injustice.

COURT HOUSES.

The writer of the Article of which we publish the first part in this Number and who wishes to remain anonymous, desires us to state in relation to the Article in question that it has been based upon the Chapter on "Court Rooms" in the American work "The Problem of Proof," by Osborn, and parts of it have been lifted from that work. This is a great book one of several great legal books published in the United States in the last five years. Primarily it is a treatise on disputed documents and writings but its scope is wide. No advocate should be without it. The Chapter on advocacy is the best account in the language of the advocate and his rights and duties.

The Article as a whole will appeal to all. It is well arranged, written in a most interesting style and is the type of Article that should interest all.

PRIVY COUNCIL.

Viscount Dunedin.
Lord Atkinson,
Lord Phillimore, June 10, 14; July 12, 1926.
Lord Carson,
Lord Merrivale.

WRIGHT *v.* MORGAN.

Trust—Trustee interest conflicting qua trustee and purchaser—Principle involved.

This was an appeal from the Court of Appeal to the Privy Council, and was in the main dismissed. To the respondents' solicitors we are indebted for the information that during the hearing of the appeal there was strong divergence of opinion, Lord Carson strongly supporting Mrs. Morgan's case, whilst Lord Phillimore supported the appellant's case. The appellant was Douglas Wright, and the respondents were the Honourable Mr. Nosworthy and Mrs. Wright, the trustees of the will of E. G. Wright, deceased, and D. G. Wright.

M. J. Gresson and **A. Andrewes Uthwatt** for appellant. **Myers, K.C.**, and **J. H. Stamp** for respondents.

THE JUDICIAL COMMITTEE gave the following judgment, which was delivered by Viscount Dunedin. We do not repeat the facts, as they have been reported before. After referring to the facts His Lordship said:

Appeal being taken to the Court of Appeal, that Court held that the option to Harry Herbert was not assignable to another trustee to the effect of enabling that trustee to buy the trust estate. They therefore set aside the sales and made the following order:—

"(1) That the defendant Douglas George Wright was not entitled to purchase either Surrey Hills or Windermere (including Chapman's Block), and he is liable to account for the purchase-money received by him from the sales made by him of parts of these estates, and he holds the balance of these estates upon the trusts of the will of the testator.

"(2) All accounts and enquiries necessary to afford relief on this basis shall be taken and made in accordance with directions to be given hereafter. AND IT IS FURTHER ORDERED that these directions be given by the Supreme Court on the Application of the Plaintiff; AND IT IS FURTHER ORDERED that the Appellants are entitled, *in lieu of the first enquiry directed by paragraph 6* of the said Judgment, to an enquiry as to the profits made by Douglas George Wright in his dealings with the live and dead stock on Surrey Hills and Windermere; AND IT IS FURTHER ORDERED that the Respondent Douglas George Wright pay the costs of this appeal on the highest scale as on a case from a distance."

From this judgment appeal has been taken, after leave allowed, to His Majesty in Council. The leading question accordingly is whether the option to purchase given by the will to Harry Herbert was assignable and assigned to Douglas Wright to the effect of making him entitled to purchase the trust estate, he himself being a trustee. Technically speaking, he was not a trustee at the time of the purchase of Windermere, but their Lordships have no hesitation in holding with the Court of Appeal that although he had actually resigned, the whole scheme had been arranged by him prior to his resignation, and that in law he must be treated as being a trustee at the time of the will.

Speaking generally, any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of assignability. Their Lordships do not doubt that Harry Herbert's option might have been assigned to a third person. There is nothing in the nature of the interest itself which points to non-assignability, nor are there any words in the will which would seem to forbid assignation. When, however, it is found that the assignation is in favour of the person who is himself a trustee, quite another question arises. The appellant argued that this right to purchase was property in the

person of Harry Herbert, who was a cestui que trust, and that it is well settled that a trustee may purchase the interest of a C.q.t. In one sense of the word "property" it is true that this option was the property of Harry Herbert, but the quality of the property was not like the property of land or of a chattel. It was only a right to enter into a contract. If the option had been exercised by Harry Herbert himself, and the property bought, then Harry Herbert might have transferred to a trustee just as well as to anyone else. The object of the sale would, in that case, have been no longer trust property. So also if the option had been transferred to a stranger, the resulting contract which would have been its sequel would have been between the trustees and, to use a colloquial expression, an outsider. But as it was, the option transferred to Douglas Wright only gave Douglas Wright a right to ask from the trustees a contract of sale, and that contract of sale was ex rei necessitate, a contract between the trustees and himself as a trustee, and that is what the law will not allow. It would be profitless to quote the many cases which have arisen to illustrate the doctrine. They may all be referred to the same root idea, that equity will not allow a person, who is in a position of trust, to cary out a transaction where there is a conflict between his duty and his interest. Accordingly, the real test to be applied to the circumstances is, assuming that Harry Herbert's option was validly assigned, so far as power to assign was concerned, to Douglas Wright, did a conflict of duty and interest arise which would prevent Douglas Wright from entering into a binding contract with the trustees? It was argued that no such conflict would arise, because by the terms of the will, which was the wish of the testator, the whole conditions of sale are regulated; valuers are to be appointed and their decision to be accepted as to the price to be payable. There was no possibility of the higgling of the market between vendor and purchaser. Nevertheless a conflict of duty and interest may arise, although there is no direct association between the two parties as vendor and purchaser. Probably no better illustration could be found than in the old case of the York Buildings Company v. Mackenzie, in the House of Lords (3 Pat. 378). It was a Scotch case, but the Scotch law is the same as the English in the matter, and was especially so stated to be in the subsequent case of Aberdeen Railway Company v. Blaikie (1 Macq. 461). In the former case the person who had bought, and whose purchase was set aside after eleven years of possession, was what is called the common agent. The case occurred in an old form of process for the realisation of the landed estates of a debtor, called a ranking and sale. The common agent was appointed by the Court to look after and carry into effect the sale. He arranged the date of the sale, fixed the upset price, and answered questions to enquirers, but the actual sale was not conducted by him. It was a public auction, and termed a judicial sale. The common agent, Mackenzie, bought at the judicial sale. It was not averred that the price was inadequate, but, although it was after eleven years, the House of Lords, reversing the judgment of the Court of Session, held that his position of common agent was a position of trust, and that his duty and interest so conflicted as to make it impossible that he should be a purchaser of the property sale. Now, applying the principals of that case to the present, their Lordships hold that the position of Douglas Wright as a trustee and as the assignee of the option to purchase was one which would involve a conflict of duty and interest. It was of moment when the sale should take place, because the option could only be exercised when the trustees had decided that now was the moment to sell. The best moment for the trust was the moment when prices generally were high. The best moment for a purchaser was when prices generally were low, and such prices would be naturally reflected in the value fixed by the valuers. So also as to the terms of payment, the best term for the trust was cash down; the best term for the purchaser was some easier arrangement. Their Lordships do not think it necessary to go into the actual terms of payment here, although it is perhaps startling to find that the whole transaction was carried out by the payment in cash of quite an infinitesimal sum. The criterion, however, is not what was done, but what might be done. Their Lordships, therefore, come to the conclusion that this case falls within the general rule, and that the sale being, as carried out, a sale of trust property to a trustee, cannot be allowed to stand, as in a question with infant beneficiaries who cannot be affected as the daughter might have been affected by the lapse of time since the transaction was effected to her knowledge but not to theirs.

So far, therefore, their Lordships agree with the result reached by the Court of Appeal. Two subsidiary questions, however, arise. The first point is as to Chapman's Block. This is not dealt with as a separate question by the Court of Appeal. They seem to have thought that it was enough to say that it had practically been treated as part of Windermere. Their Lordships think, however, that this is not so. This is not a case of improper employment by the trustees of trust funds for the purposes of their own business and speculation. It is the case of improper investment. Now, if a trustee has made an improper investment, the law is well settled. The cestuis que trustent as a whole have a right, if they chose, to adopt the investment and to hold it as trust property. But if there is not unanimity, then it is not trust property, but the trustee who has made it must keep the investment himself. He is debtor to the trust for the money which has been applied in its purchase. (Parker v. McKenna (L.R. 10, Ch. 96).) Now, it is admitted that there has been no unanimity on the beneficiaries' part to consider Chapman's Block as trust property. Further, it is admitted that the money used in the purchase of Chapman's Block has been refunded to the trust. The result is that the inquiry directed by the Court of Appeal must exclude enquiry as to Chapman's Block.

Finally, there is the question of stock. Now, if the stock could be looked on as a business, e.g., if the trustees had bought a public house with the funds of the trust, the direction of the Court of Appeal would be right, but in view of their Lordships that is not so. The stock is not a business. There is no identity between the stock as it now exists and the stock as it was bought from the trustees. The sale was not of a business. The sale was only of individual sheep and cattle. Consequently their Lordships think that in this matter the direction of the Trial Judge was right. It is proper to notice that though interest has been paid to the cestuis que trust, yet if the sum which might be found under the remit of Reed, J., was greater, the natural result would be that compound interest would have to be charged; but in as much as the sum due on interest would fall to be applied to the life interest of the daughters, and as Mrs. Morgan was fully aware of what was done, their Lordships do not think that compound interest should be charged, and, therefore, that the direction of Reed, J., was right.

Their Lordships will humbly advise His Majesty that the Judgment of the Court of Appeal should in the main be affirmed, but subject, as has been said, to the exclusion of Chapman's Block in the enquiries directed by that Court. The Judgment may also be varied by setting aside so much of it as reversed the judgment of Reed, J., as to the stock. The case should, therefore, be remitted to the Supreme Court in order that the enquiries directed may be proceeded with on the basis of this judgment.

The respondents will have two-thirds of the costs of the Appeal. The costs in the Courts below will remain as dealt with by the Court of Appeal so far as past costs are concerned, but the Supreme Court will deal with the costs of the enquiries directed after the result of those enquiries have been arrived at.

Solicitors for appellants: **Wynn, Williams, Brown & Gresson**, Christchurch.

Solicitors for respondents: **Wilding & Acland**, Christchurch.

COURT OF ARBITRATION.

The next sittings of this Court at Wellington will be held on Monday, 6th September, 1926, at 10 a.m.

SUPREME COURT.

Ostler, J. June, 1926.
New Plymouth.

RE GILBERT, A BANKRUPT, EX P. RUNDLE.

Bankruptcy—Bill of Sale—Whether certain cattle included—Meaning of Contract.

Motion by the Official Assignee for payment of certain proceeds of sale of bankrupt's stock. The facts which we take from the reasons of the learned Judge are as follows:

This is a motion under the Bankruptcy Act, 1908, for an order that Newton King, Ltd., do pay to Charles Thomas Rundle a portion of certain moneys, the proceeds of the sale of stock, claimed by Rundle to be included in a bill of sale given to him by the bankrupt. The facts of the case are as follows:—

In 1920, Alma Henry Gilbert purchased Section 27 on the Public Map of the Huirangi District, containing 50 acres, and on this land he carried on the occupation of a dairy farmer. Rundle advanced part of the purchase money, and as a security for the loan took from Gilbert a third mortgage over the land and a bill of sale over 22 cows and heifers, 2 bulls and 2 horses then depasturing on this section. The bill of sale is dated the 18th September, 1920, and is expressed to be a security for all the stock described in the schedule "and all stock that shall be here-"after acquired by the grantor and all increase thereof re-"spectively." There was a covenant to brand the stock described in the schedule "and all stock hereafter acquired "by the grantor and all increase thereof respectively" with a specified brand. On the 7th September, 1923, Gilbert took a lease for 5 years of Section 66, Huirangi District, containing 50 acres. This section is about 1¼ miles from Section 27. He grazed the original stock and the increase thereof upon both sections, but the milking was done on Section 27, where he had his milking shed and milking machine. The milk from his herd was supplied to the Lepperton Co-operative Dairy Factory Co., Ltd. After taking this lease Gilbert added more cows to his herd, these being purchased through the Farmers' Co-operative Organisation Society of N.Z., Ltd., and Newton King, Ltd. On the 17th November, 1924, Gilbert entered into an agreement with one Western. The agreement was to the effect that Gilbert should supply 50 cows and graze them on Western's land, Sections 41, 42, and 48, Huirangi District, paying Western a proportion of the proceeds of the sale of the milk of this herd. In order to procure the necessary cows, Gilbert made an arrangement with Frederick Samuel Butler, of New Plymouth, butter merchant, by which Butler was to find the money to buy 35 cows, as security for which he was to give Butler a bill of sale over 50 cows, and he was to supply the milk from the herd grazing on Western's land to Butler. Butler found the money and Gilbert purchased 35 cows from various places, taking about two weeks to buy them all. As the cows were purchased they were driven to Section 27, where he had his milking sheds, and they remained on that section until all the 35 had been procured. Gilbert then selected 15 cows from the herd grazing on Sections 27 and 66, thus making up a herd of 50 cows, which was then driven on to Western's farm. This was only a quarter of a mile from Section 27, and this herd was milked night and morning on Section 27, being driven backwards and forwards from one farm to the other for that purpose. The two herds, although they sometimes became mixed for a while, were generally kept apart, the milk from the herd depasturing on Western's farm being supplied to Butler, and that from the other herd being supplied to the Lepperton Company. A bill of sale over the 50 cows to Butler was prepared, and it was arranged that Gilbert should execute it on the 23rd December, 1924. On the 22nd December, 1924, however, Gilbert, no doubt under pressure, executed a bill of sale to the Farmers' Co-operative Organisation Society to secure past advances amounting to £394 18s. 8d. This security covered all his stock depasturing on Sections 27 and 66, subject to the bill of sale to Rundle. On the 20th January, 1925, Gilbert called on the solicitors who had prepared the bill of sale to Butler, and on that date executed that instrument. On the 26th January, 1925, Gilbert, through his solicitors, gave notice of a private meeting of creditors. The meeting was held on the 28th January, 1925, and at that meeting the following resolution was passed unanimously:—"That in the event of The "Farmers' Co-operative Organisation Society of New Zea-"land, Limited, refusing to withdraw its bill of sale, pro-"ceedings be taken against Gilbert to make him a bank-"rupt if he does not himself file his petition." The Farmers' Organisation Society refused to give up its security, and accordingly Gilbert was adjudicated bankrupt on his own petition on the 11th February, 1925. On the 6th February, five days before the adjudication, default having been made under Rundle's bill of sale, he seized all the stock on Section 27. He apparently effected his seizure at milking time, for on that section were 3 bulls, 87 cows, 5 two-year-old heifers, 14 calves, 4 horses, and 21 pigs, which were all seized and removed. Rundle, in conjunction with the Official Assignee, employed Newton King, Ltd., to sell the stock, and it was mostly sold by auction on the 23rd February, 1925. Out of the proceeds of this sale £640 was paid to Rundle, leaving still the sum of £160 due to him under his security. Under instructions from the Official Assignee, Newton King, Ltd., retained £260, the proceeds of the sale of the 50 cows which were grazed on Western's land. Rundle claims that all these cows were included in his security, and he claims to be paid the balance of £160 due to him by the bankrupt out of the proceds of the sale. The Official Assignee, on behalf of the unsecured creditors, claims that none of the 50 cows depasturing on Western's land were included in Rundle's security, and that the proceeds of their sale belongs to the estate.

Weston in support.
Bennett *contra.*

OSTLER, J., in discussing the facts and the law, said, inter alia:

This herd of 50 cows was made up, as has been stated, of 35 cows purchased with Butler's money, and 15 taken from the herd already mortgaged to Rundle. With regard to these 15 cows, I have no doubt that Rundle is entitled to the proceeds of their sale. It is not stated whether they were actually included in the schedule to Rundle's bill of sale, or whether they were part of the natural increase of the original herd, or whether they were after-acquired stock. For all the Court knows they were fifteen of the original cows described in the schedule to Rundle's instrument. In the absence of evidence to the contrary, I think the Court ought to assume that they were, in which case there could be no question about the matter. Nor could there be any question about it if they were part of the natural increase of the original herd. As the original bill of sale was given in September, 1920, and these 15 cows were not taken from the herd until after November, 1924, there was ample time for a natural increase in the herd of at least 20 cows. But even if these 15 cows were all after-acquired stock, I am still of opinion that they were included in Rundle's security. As has been said, the security was expressed to include after-acquired stock. It is not stated whether these 15 cows were branded with the brand specified in the instrument, but there was a covenant on the bankrupt's part to so brand them, and there can be no question that after the execution of the instrument they were depasturing on Section 27, the land described in the instrument. The evidence is that the after-acquired cows were added to the original herd, and that, although the herd grew so large that Gilbert had to acquire other land (Section 66) to accommodate them all, yet the after-acquired cows were not treated as a separate herd and kept apart on Section 66. The whole herd was treated as one, and no doubt it habitually depastured as one herd on Section 27. Therefore, by virtue of section 26 of the Chattels Transfer Act 1908, which both parties admit is applicable, they were included in the security. The fact that they were subsequently removed by Gilbert and placed with 35 other cows on Western's property without the knowledge or consent of Rundle, could have no legal effect in depriving Rundle of his rights over them. They had had, as it were, a status imposed upon them, which no mere removal by the grantor of the security could alter. In my opinion this was the law before the amendment enacted by section 3 of the Chattels Transfer Act, 1922. That section, indeed, makes the matter clear by adding to section 26 of the Act of 1908 the

words "whether or not such stock may afterwards be re-"moved therefrom." In my opinion, however, so far at any rate as regards removal by the grantor without the knowledge or consent of the grantee, this enactment is merely declaratory of the law.

With regard to the 35 cows purchased by Gilbert with Butler's money, after careful consideration, I have come to the conclusion that Rundle is not entitled to the proceeds of these cows. I have come to this conclusion upon the construction of the words of the security. In my opinion, the true construction of the security is that the contract was to mortgage only after-acquired stock which was intended to be depastured on the land described in the instrument. The words used are: "being the owner of the stock "mentioned in the schedule hereto.....and which are now "on the grantor's freehold farm being," etc....."doth "hereby assign, etc.....all the said stock and all stock "that shall hereafter be acquired by the grantor and all "increase thereof respectively....." The form and collocation of the words all point to the conclusion that what was in the contemplation of the parties was a mortgage of (1) the stock then on the farm; (2) the stock that would thereafter be bought for the farm; (3) the natural increase of the original and subsequently-purchased stock. It could not have been in the contemplation of the parties that, if Gilbert decided to take up a dairy farm, say, in the North of Auckland, all the stock purchased for that run would automatically come under the security already given to Rundle. In **Silk v. Dalgety and Co. (1923), N.Z.L.R. 1065,** the words of the instrument were clear. The mortgage in that case was over all after-acquired stock **wherever depasturing.** Here no such words are used, and although I admit that the words "all stock which shall be hereafter ac-"quired by the grantor" are, taken by themselves, wide enough to include all stock wherever depasturing, yet the instrument must be read as a whole, and so read, in my opinion it becomes clear that the words were intended by the parties to apply to after-acquired stock which was to be added to the herd mortgaged. Clause 3 of the instrument helps this construction. In it the grantor covenants to properly care for the said stock and do all things necessary to keep his dairy herd healthy, etc. It is true that in this clause it is provided that all substituted stock "and all "other stock hereafter acquired by the grantor" shall be included in the security, but, in my opinion, the last words mean stock added to the grantor's herd. What the parties contemplated in the instrument was a mortgage of the grantor's dairy herd depasturing on Section 27, with all stock added to that herd, and the natural increase of the original and of the added stock. If that is the true construction of the instrument, then Rundle never acquired either a legal or equitable mortgage over the 35 cows, and is therefore not entitled to the proceeds of their sale.

Stringer, J. August 12, 16, 1926.
Auckland.

FLAX LANDS DEVELOPMENT, LTD., v. JOLL.

Contract—Personal service—Not to be employed in certain work—Breach—Remedy—Drunkenness as defence to contract.

By an agreement in writing, dated the 7th day of May, 1926, the Defendant and one Murch were appointed the sole agents of the Plaintiff Company for the sale of certain flax bonds within a specified area for a period of six months from the date of the agreement. One of the terms of this agreement was that the agents would not during the currency of the agreement interest themselves either directly or indirectly in the sale of any other flax or afforestation bonds, shares or debentures.

It was not disputed that after entering into this agreement the Defendant, contrary to the stipulation above mentioned, had accepted employment by an afforestation company, and was engaged in the sale of the bonds of that company. The present proceedings have been taken for the purpose of obtaining an injunction to restrain the Defendant from interesting himself in the sale of any flax or afforestation bonds than those of the Plaintiff Company.

West for plaintiff.
Hunt for defendant.

STRINGER, J., said:

The defences raised by the Defendant are:—

1st. That the agreement of the 7th May was not binding upon him, inasmuch as when he signed it he was drunk and did not understand its meaning and effect.

2nd. That in the exercise of its discretionary power the Court ought not to grant an injunction, but should leave the Plaintiff Company to its Common Law remedy, and

3rd. That the restriction as to the sale of bonds, etc., other than those of the Plaintiff Company was void as being an unreasonable restraint of trade.

In order to establish the first defence, the onus is upon the Defendant to show not only that at the time when he entered into the agreement he was so drunk as to be incapable of comprehending its meaning and effect, but also that the Plaintiff Company (or its agent who made the agreement on its behalf) was aware of his condition. I am satisfied that the Defendant failed to satisfy the onus which rested upon him in this respect. There is evidence that upon the day upon which the agreement was signed the Defendant had consumed a considerable quantity of liquor, but such evidence was, in my opinion, altogether insufficient to show that he was in such a condition as to be unable to understand and appreciate the nature and effect of the agreement when he signed it in the presence of Murch and Milburn.

The terms of the agreement had been discussed and agreed upon between himself, Murch and Milburn on the 6th May, when there was no suggestion that he was otherwise than perfectly sober, and the agreement itself merely embodied the terms already agreed upon, full notes of which had been taken. The signature of the Defendant to the agreement, and his initials on the six pages of the document, give not the least indication of unsteadiness, and his conduct subsequent to the 8th May, when, according to his own statement, he learnt for the first time of the terms of the agreement, are quite inconsistent with a genuine defence upon the grounds now set up.

With regard to the second defence, while it is true that, as a general rule, the Court will not interfere by way of injunction in contracts of personal service, it is well settled that it can and will do so in the cases of breaches of negative contracts such as those entered into in the present case. **Lumley v. Wagner, 21 L.J. Ch. 898; Grimston v. Cunningham, 1894 1 Q.B. 125.**

"If parties for valuable consideration, with their eyes "open, contract that a particular thing shall not be done, "all that a Court of Equity can do is to say way way of "injunction that the thing shall not be done. In such a "case the injunction does nothing more than give the sanc-"tion of proceedings of the Court to that which already is "in the contract of the parties." **Kerr on Injunctions,** 5th Edition, page 441.

Nevertheless, in the present case I should, in the exercise of my discretion, have refused to interfere by way of injunction, and should have left the Plaintiff Company to its Common Law remedy, but for the fact that it would be extremely difficult to ascertain what damages actually followed from the Defendant's breach of contract.

The Defendant was admitted to be an experienced, energetic, and capable salesman of a somewhat novel form of investment, and it is impossible to guage the effect, within the limited field of operations, of his competition with salesmen of the Plaintiff Company's bonds.

While, therefore, I cannot compel the Defendant to do what he ought to do in performance of his contract with the Plaintiff Company, I can, and I think it is just and proper that I should, restrain him from doing that which he expressly agreed not to do.

The contention that the agreement was void as being in restraint of trade was only faintly argued, and in view of the limited period of the currency of the agreement, and the restricted area over which it has effect, was plainly untenable.

In the result, therefore, it is ordered that the Defendant be, and he is hereby, restrained during the remainder of

the currency of the agreement, from interesting himself either directly or indirectly in the sale of any flax or afforestation bonds, shares, or debentures, other than those of the Plaintiff Company.

This disposes of the action, the costs of which the Plaintiff Company is entitled to recover from the Defendant. These costs I fix under Rule 568 as £21 and disbursements.

Ostler, J. June 22, 23, 24; July 13, 1926.
Nelson.

SAMSON v. BUTT.

Contract—Written—Rectification—Oral agreement—Evidence.

Claim for specific performance or damages or rectification. We do not publish the facts, which are quite immaterial for our purposes. The interesting question arose, however, of the value of the decision of the Court of Appeal in Stansell v. Easton (14 Gaz. L.R. 175).

Hay for plaintiff.
Blair & Churchward for defendant.

OSTLER, J., anent the matter of the law, said:

Consequently none of these acts can be said to be exclusively referable to the unconditional contract which plaintiff seeks to set up, and therefore, in accordance with the well-known leading case of **Maddison v. Alderson (8 App. Cas. 467)**, they cannot be set up as acts of part performance to let in evidence of the unconditional contract.

If the law stood to-day as it did in 1911, when the case of **Stansell v. Easton (14 G.L.R. 175)** was decided by our Court of Appeal, this consideration would decide the matter. The law, as laid down by Williams, J., and approved by Denniston and Sim, JJ., in that case, is that if there is a written contract for the sale of land, and the plaintiff wishes to set up a different contract or a further term not expressed in the contract, then if the Statute of Frauds is pleaded (as it was in this case), unless he can shew acts of part performance of the contract, which he sets up, so as to take the contract out of the Statute, he cannot set up a contract at variance with the written document, or give oral evidence of any such contract. Williams, J., says in that case:—

"Where there is a contract in writing for the sale of a "parcel of land A, and it is sought by the purchaser to "vary it on the ground of mistake by including a parcel "of land B, and to have the contract so varied specifically "performed, there is no case, at any rate, where the Statute "of Frauds is pleaded, that in the absence of part perform-"ance of the contract as varied the purchaser would be en-"titled to relief. The case of **Olley v. Fisher (34 Ch.D. "367)** only decides that the Court can now entertain a suit "for the reformation of a contract and for specific perform-"ance of the reformed contract in a case where the Statute "of Frauds does not create a bar. Where, however, there "is a parol contract for the sale of a parcel of land com-"prising land A and land B, and by mutual mistake the "subsequent written contract refers only to land A, then "**if there is a part performance** which can only be referable "to the parol contract for the sale of A plus B, the Statute "of Frauds ceases to apply, and the purchaser is, in my "opinion, entitled to have the real contract performed. I "do not think there is anything in principle, nor can I find "any authority which is inconsistent with this view."

A perusal of subsequent cases, however, makes it clear that since that statement of the law was made, the law on this point has been decisively altered. It has now been established, first by the judgment of the English Court of Appeal in **Craddock Bros. v. Hunt (1923 2 Ch. 136)**, and more recently by that of the Privy Council in **United States v. Motor Trucks, Ltd. (1924), A.C. 196**, that in an action for rectification and specific performance of a written contract, even where the Statute of Frauds is pleaded, and where there have been no acts of part performance of the contract set up by the plaintiff so as to take it out of the Statute, oral evidence is admissible to prove what the real contract between the parties was, and a Court of Equity may reform the written contract in conformity with the evidence, and grant specific performance of the contract as so reformed. The effect of these decisions is to sweep away the old rule that specific performance cannot be granted of a written contract for the sale of land with a parol variation, and the cases **Woollam v. Hearn (7 Ves. 211)**, **Davies v. Fitton (2 D. & War. 232)**, **May v. Platt (1900) 1 Ch. 616**, and **Thompson v. Hickman (1907) 1 Ch. 550** must be taken to be now definitely overruled. The effect of these two recent authoritative decisions is that, notwithstanding there is a seemingly complete and clear contract for the sale of land, a purchaser can always set up in a Court of Equity a claim for rectification of the contract on the ground that by common mistake it does not express the true intention of the parties, and without proving any acts of part performance on his part exclusively referable to that which he alleged to be the true contract, and notwithstanding a plea of the Statute of Frauds, he can bring oral evidence to prove what the true contract was, even if that evidence contradicts or varies or adds to the written words of the contract. If the Court accepts the evidence as true, its duty is to rectify the written contract so as to make it conform with the real intention of the parties, and the contract as so rectified becomes the true contract between the parties **ab initio**. If as rectified it then conforms with the provisions of the Statute of Frauds, that Statute ceases to be a defence to specific performance.

The learned Judge found, after a discussion of the facts, for the defendant.

Solicitors for plaintiff: **Urwin & Urwin**, Dunedin.
Solicitors for defendant: **Burden, Churchward & Reid**, Blenheim.

Ostler, J. June 8, July 2, 16, 1926.
Blenheim.

PERANO v. PERANO.

Fisheries—Amendment Act of 1912, Sec. 4 (1), "such factory"—Meaning of—Whether whale factory.

The facts we take from the reasons of the learned Judge:

This is an action by a party of Tory Channel whalers against defendant, formerly a member of plaintiff's party, but now at the head of a rival venture. The relevant facts are that plaintiffs and defendant carried on the business of whaling in partnership during the seasons 1919 to 1922 inclusive, and during the partnership a whale factory was erected upon land leased from one Radcliffe, and a license was obtained under the Harbours Act 1908 to use the foreshore in front of the factory for a slipway. In 1923 defendant sold his interest in the partnership to plaintiffs, and from then onward ceased to have any interest in it. The license under the Harbours Act still remained in defendant's name, however, and he still nominally remained one of the lessees under the deed of lease from Radcliffe. The first claim made by plaintiffs is that defendant should be ordered to assign the Harbour Board license and his interest in the lease to plaintiffs, and that he be ordered to deliver to plaintiffs certain partnership books in his possession. Defendant's answer is that he has always been ready to assign the license and his interest in the lease, but has never been asked to do so; and that he had never been asked to hand over any partnership books but one, which he immediately handed over. I accept the evidence of defendant on this part of the case. The evidence of E. C. Perano, and of Heberley, both plaintiffs in the action (tendered to prove a demand and refusal on defendant's part), contains sharp contradictions, which render it unacceptable. Therefore plaintiffs have not proved that defendant ever refused to assign the license or his interest in the lease, or to hand over the partnership books.

This is, however, only a minor part of the case. In 1924 defendant established a whale factory on Crown land on the opposite side of Tory Channel, not more than a mile from plaintiffs' factory, and he entered into the business of whaling in active rivalry with plaintiffs. In 1926 defendant applied for and obtained a license for his whale factory under Section 4 of the Fisheries Amendment Act 1912. Plaintiffs also applied for a license for their factory under that section, but defendant's application was first in time, and therefore he was thought to have the better right to the license. By reason of the provisions of the section

the Crown, having granted a license to defendant, was precluded from granting a similar license to plaintiffs, because their factory was within 50 miles of that of defendant. Plaintiffs now claim a declaration that this license was illegally granted to defendant; that it is therefore void, and an injunction restraining defendant from carrying on a whale factory on the site on which his factory is erected.

C. H. Treadwell for plaintiffs.
Sir John Findlay, K.C., and **McNab**, for defendant.
Fair, K.C. (Solicitor-General), for Attorney-General.

OSTLER, J., gave judgment for the defendant. He said: The ground upon which this claim is based depends on the construction of certain words in section 4, sub-section 1, of the Fisheries Amendment Act 1918, which is as follows:—

"4. (1) The Governor in Council may from time to time "license and permit any part of the foreshore or other "Crown land adjacent thereto to be used or occupied as a "site for a whale factory (hereinafter referred to as a "shore factory) on such conditions as he thinks fit, but no "such site shall be within fifty miles of the site of another "such factory."

The contention on behalf of plaintiffs is that "such fac- "tory" in this sub-section means whale factory, and that therefore, by reason of the provision quoted, a license for a site for a whale factory on Crown land cannot be lawfully granted within 50 miles of the site of any other existing whale factory. It is contended on behalf of defendant that "such factory" means a factory, the site of which has been licensed, and that all the last words of the section were intended to accomplish was to prevent a license for a whale factory being granted within 50 miles of a factory site already licensed.

In my opinion the contention of defendant is the correct one. Grammatically this appears to be so. The last antecedent of the word "such" in the section is "shore fac- "tory," which expression is used as a compendious way of describing a factory, the site for which has been licensed. It is contended on behalf of plaintiffs, however, that the object of the section was purely economic, to prevent useless competition, and that, therefore, it is unreasonable to suppose that the Legislature intended to ignore existing factories. It is to be observed, however, that the section does not enact that no whale factory shall be established within 50 miles of another existing whale factory; it merely enacts that no license shall be granted for the establishment of a whale factory on **Crown land** within 50 miles of another such factory. The object of the section, in my opinion, is merely to regulate the establishment of factories on Crown lands, to provide that no whale factory shall be established on Crown lands without a license from the Crown; and that when such license is granted the license shall be protected to the extent that no other whale factory within 50 miles shall be allowed to be established on **Crown land.**

Assuming, however, that the construction I have put on the section to be wrong, and that upon the true construction of the section the license was illegally granted to defendant's factory in so far as it was within 50 miles of plaintiff's factory, I am clearly of opinion that that circumstance would not give plaintiffs the right to insist upon an injunction being granted to restrain defendant from carrying on the business of a whale factory. It is, however, unnecessary to discuss this aspect of the case. As I have held that the license was lawfully granted to defendant, plaintiffs' case must fail, and there must be judgment for defendant with costs as on a claim for £400 witnesses' expenses and disbursements. I certify for an extra half day at £7 7s., and I allow £3 3s. for second counsel for half a day. Plaintiff must pay the Attorney-General's costs, which I fix at £12 12s.

There will, of course, be an order by consent that defendant do, at the expense of plaintiffs, execute assignments of his interest in the lease and of the Harbour Board license, and also that defendant deliver up to plaintiffs such partnership books as they require, provided that they undertake to give him access to them whenever he may require it.

Solicitors for plaintiffs: **Treadwell & Sons**, Wellington.
Solicitor for defendant: **A. A. McNab**, Blenheim.

Ostler, J. July 9, 22, 1926.
Wellington.

KIRKLAND v. TREVOR BROS., LTD.

Practice—Motion for relief against forfeiture—Non-payment of rent—Whether evidence by affidavit permissible.

This was a motion for relief against forfeiture. The application was based on the fact that re-entry was wrongful and no rent was owing.

Kennedy in support.
Grant contra.

OSTLER, J., refused the application in its present form. He said:

It has been held in a line of authorities that such a question cannot be determined upon a motion for relief against forfeiture for non-payment of rent; that the filing of such motion is an admission that such forfeiture has been incurred: see **re Shaw (1918), G.L.R. 212; Shadroske v. Hadley (27 G.L.R. 705); Lock v. Pearce (1893), 2 Ch. 271.** Therefore I cannot determine the disputed question of fact as to whether any rent is in fact owing in these proceedings. I have nothing but conflicting affidavits to guide me, and it is impossible in most cases to determine from affidavits on which side the truth lies. The appropriate method of obtaining a judgment of the Court on the question raised as to whether the entry was wrongful is by bringing an action. The motion must be dismissed, with £5 5s. costs and disbursements.

Solicitors for motion: **Mason, Dunn & Tattersall**, Napier.
Solicitors to oppose: **Jacobs & Grant**, Palmerston North.

Ostler, J. June 17, 1926.
Wellington.

SEMELOFF v. CURTIS.

War Legislation—Housing legislation—Whether dwelling-house within Part I of Act—Standard rent.

This was an originating summons asking for an order that a certain dwelling-house was not within Part I of the War Legislation Act 1916, and its amendments. The agreed facts were:

(1) The Plaintiff is the owner of a dwelling-house situated at No. 148, Molesworth Street, in the City of Wellington, having purchased the said dwelling-house from the Public Trustee on or about the 26th day of March, 1925.

(2) The Defendant was for 30 years prior to the 26th day of March, 1925, in occupation of the said dwelling-house as the tenant of the Public Trustee, and after the said 26th day of March, 1925, remained in occupation of the said dwelling-house as a tenant of the Plaintiff.

(3) On or about the 6th day of April, 1925, the Plaintiff gave to the Defendant written notice purporting to raise the rental payable in respect of the said premises to the sum of £5 per week.

(4) The Defendant refused to pay rent at the rate of £5 per wek, but tendered rent to the plaintiff at a lower rate.

(5) The Plaintiff took action in the Magistrate's Court holden at Wellington to recover from the Defendant rent at the rate of £5 per week.

(6) On the hearing of the said summons the Defendant applied under The War Legislation Act 1916 and the Housing Amendment Act 1920, to have the capital value of the said premises determined and fixed by the Magistrate.

(7) On or about the 7th day of July, 1925, the Magistrate gave Judgment fixing the capital value of the said premises at the sum of £1264, and by virtue of Section (4) Sub-section (1) of the Rent Restriction Act 1924, the standard rental payable in respect of the said premises was limited to 8 per cent. of the capital value as fixed by the Magistrate, i.e., the sum of £101 2s. 5d. per annum.

(8) On the hearing of the said Summons, and upon the Defendant applying to have the capital value of the said premises fixed, the Plaintiff applied under Section (17) of the Housing Amendment Act 1920 for relief from the pro-

visions of Part I of the War Legislation Amendment Act 1916 and its amendments, upon the grounds that the standard rent as therein defined was insufficient to return to the Plaintiff (the Landlord) a net average income of 7 per cent. on the capital value of the said premises.

(9) On or about the 7th day of July, 1925, the Magistrate delivered Judgment on the Plaintiff's said application and granted relief to the Plaintiff from the provisions of Part I of The War Legislation Amendment Act 1916 and its amendments, and increased the standard rental payable in respect of the said premises to the sum of £174 15s. 6d. per annum.

(10) Section (8) of The War Legislation Amendment Act 1916, as amended by section (21) of the War Legislation Act 1917, provides—

"(1) This Part of this Act shall apply to a house or any "part of a house let as a separate dwelling where such let- "ting does not include any land other than the site of the "dwelling-house and the garden or other premises in con- "nection therewith, and where the annual amount of the "standard rent of the house does not exceed one hundred "and four pounds per annum and every such house or part "of such house shall be deemed to be a dwelling-house to "which this Part of this Act applies:

"Provided that this Part of this Act shall not apply "to a dwelling-house let at a rent which includes pay- "ments in respect of board or attendance.

"(2) Where this Part of this Act has become applicable "to any dwelling-house it shall continue to apply thereto "whether or not the dwelling-house continues to be a dwell- "ing-house to which it would but for the provisions of this "sub-section apply."

(11) The Plaintiff claims that as the standard rental of the said premises has been increased to £174 15s. 6d. per annum, the said dwelling-house is not a dwelling-house to which The War Legislation Amendment Act 1916 and the various rent restriction Acts apply.

A further fact was agreed on at the hearing, viz., that on the 3rd August, 1914, this dwelling-house was let at less than £104 per annum.

Blair for plaintiff.
O'Donovan for defendant.

OSTLER, J., held that the house was subject to Part I of the Act. Inter alia, he said:

The expression "standard rent" as used in section (8) appearing above is defined in section 6 of the Act of 1916. For the purposes of this case I need quote only that part of the definition applicable to the facts of this case:—"The "expression 'standard rent' means the rent at which the "dwelling-house was let on the 3rd day of August, 1914." There was a proviso to the definition to the effect that if the standard rent computed for one year were less than 8 per cent. of the capital value of the dwelling-house, the standard rent computed for the same period should, in lieu of the standard rent as so defined, be deemed to be an amount equal to 8 per cent. of such capital value. By section 7, the capital value, unless agreed on, could be determined by the Magistrate.

Now in this case the rent being charged on the 3rd August, 1914, was under £104 per annum. The then landlord of the house took no steps right down to 1925, when the house was sold to plaintiff, to have the rent computed in the alternative way provided. Consequently, in my opinion,, had the law not been altered the standard rent must have been deemed in this case to be under £104 per annum, and therefore it would have been a house to which Part I of the Act of 1916 applied. The proviso to section 6 of the Act was, however, repealed by the Rent Restriction Act 1924, section 4, and a new proviso substituted in the following words:—

"Provided that in the case of a dwelling-house let on or "before the third day of August, 1914, the standard rent "may, at **the option of the landlord**, be either the standard "rent as hereinbefore defined, or an amount which, com- "puted for a period of one year, is equal to 8 per cent. "of the capital value of the dwelling-house, as such, imme- "diately before the date."

This proviso was in force when plaintiff purchased this dwelling-house. It is claimed that when he so purchased the standard rent had not been fixed, because no option had been exercised by the landlord. This may be so, although I doubt it. It is, however, unnecessary for me to determine this question, because the option was exercised, and the Magistrate fixed the rent on the basis of 8 per cent. of the capital value, at less than £104 per annum. As soon as that was done, at any rate the standard rent was fixed for this dwelling-house, and, it being fixed at less than £104 per annum, Part I of the Act of 1916 applied to it.

But by section 17 of the Housing Amendment Act 1920 a provision was made by the Legislature whereby a landlord could apply to a Magistrate for relief from the hardships that might be imposed upon him by the Act of 1916, if he could show that the standard rent was not sufficient to give a nett return of 7 per cent. upon his capital, and under that section the Magistrate could increase the standard rent. Upon the standard rent being fixed at less than £104 per annum, plaintiff in this case applied under the provisions of the 1920 Act, and the Magistrate increased the standard rent to more than £104 per annum. Plaintiff claims that this fact automatically releases the dwelling-house from being subject to Part I of the Act of 1916.

In my opinion this is not so. The wording of sub-section 2 of section 8 of the Act of 1916 is somewhat unfortunate, but in my opinion it means that once that part of the Act applies to a dwelling-house it shall continue to apply to it. This is admitted by Counsel for plaintiff, but he contends that, notwithstanding this sub-section, it must be read as necessarily limited to the cases that could have arisen at the time. At that time, by the landlord expending money in improvements, he could in some cases have increased the standard rent to more than £104 per annum. In that case it is admitted that Part I of the Act would still apply to that dwelling-house. In 1920 the Legislature provided another manner in which the standard rent could be increased above £104 per annum, but it left sub-section 2 of section 8 of the Act of 1916 untouched. Therefore, in my opinion it must be presumed to have intended that provision to apply to the new case it had created.

The Magistrate having, with the consent of plaintiff, fixed the standard rent of this house at less than £104 per annum, it then became (even if it was not already) subject to Part I of the Act of 1916.

By virtue of sub-section 2 of section 8 of the same Act, it remain subject to Part I thereof, notwithstanding that the standard rent has been increased to more than £104 per annum. There will be a declaratory order to this effect. I allow defendant £6 6s. costs.

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

Solicitors for defendant: **Barker & O'Donovan**, Wellington.

COURT HOUSES AND OTHER THINGS AND PERSONS.

The comfort, cleanliness, ventilation and lighting of factories and workshops affect materially the quality and quantity of goods manufactured by workmen. All are agreed that the workman as a human being is apart from the interests of his employer entitled as of right to decent working conditions. Statutes define the working conditions of the workers of the country and officials and inspectors make certain that the statutes are obeyed. Occasionally negligent or recalcitrant employers are punished by the Courts.

The administration of justice is so we are told one of the few profitable departments of the State. Magna Charta lays it down that the King *inter alia* will not sell Justice to any man. The Government of this country apart from the ordinary maintenance of public order sells justice to its citizens at reasonable but nevertheless profitable rates.

It sells justice in places and under conditions which would bring a private employer into collision with the health or factory authorities. The physical working conditions of those who administer justice must occasionally produce justice. Indeed, and by the way,

justice is one of the sweated industries of this country. All persons connected with its administration are underpaid, Judges, Magistrates, Jurymen, Witnesses, Registrars and other responsible though subordinate officers. Counsel fortunately can still make their own bargains.

The interests of justice require that trials should be held where every piece of visible evidence can be clearly seen, where every word spoken can be distinctly heard and where every witness can be closely scrutinized by Court, Counsel and Jurymen. When these requirements are specified, it will at once be seen that all the Supreme Court Houses in New Zealand and most of the Magistrates Court Houses, except a few modern ones are not suitable places for trials at all. There is no doubt that among the allies of fraud and crime can be numbered unsuitable Court Houses.

The problem of proof is often affected by various conditions surrounding the presentation of evidence. Evidence must be distinctly heard, must be clearly seen and above all must be properly understood to have full effect upon the tribunal before whom it is adduced.

Let us consider certain of the plainer defects of the Courthouses in this country.

None is so arranged, furnished and lighted that comfort, clear seeing and distinct hearing can be achieved at once. Artistic and architectural considerations have determined their arrangement, design and lighting. These buildings look quite well on picture postcards and in Christmas Numbers of the illustrated papers, but they are not good places for the trial of law-suits. Decisions affecting the liberty, reputation or property of a citizen are determined in places where a private employer would be prohibited from making the same citizens' shirts, suits, or boots.

It is a shameful fact that our Courthouses standing out as they do on the best sites in our cities, in open squares, in the full sunlight are so designed that it is necessary to use artificial light in them on a summer's day. The impractical architects of half a century ago should not be allowed to punish the citizens of this country for all time by their incompetent design of a building intended for public use.

The artificial lights used in our Court-rooms are generally defective. It is only in few and recent instances that any system of indirect lighting has come into use. The electric lights are often bare bulbs with no shades at all. When shades are used these are of poor and cheap quality and the lights are so situated as to cause the maximum of inconvenience and irritation both to Court and Counsel. In some Courts the lights are placed between the Counsel's seat and the bench so that Counsel are staring into the open lights all day long. In one of the most important commercial cases of recent years, which lasted many days, business men made the journey to hear the case. In the Court where the trial was held naked electric lights in continuous use dazzled the eyes of the spectators in the benches immediately behind Counsel. From these benches it was impossible for the spectators to hear anything at all. Their case was a dumb show to them. The public at a football match get as a rule a fair view and a fair hearing for their shillings. The spectators at this trial got a poor view and no hearing, and as many learned and eminent Counsel were briefed they were paying rather more than a shilling for their useless privilege of a public trial in open Court. On or about the third morning one of the parties was detected leaving an hotel, happily and healthily situated adjacent to the Court. When reproved for his desertion he said : " Well I came down here to see our money going west, but I can't hear, I can't see and I was very dry. I am not as dry as I was but I suppose I will be blind and deaf when I go back."

Related to the question of lighting is the matter of ventilation. Most of our Courts were built, by enemies of the fresh air and sunlight, before there was any notion that ventilation of a working place is necessary for mental and physical health. Most of our Courts have no doors admitting on the open air. The doors lead generally to long, narrow, lightless passages which serve as funnels for draughts of mouldy, stagnant air to mingle with the stale and fetid atmosphere of the Court-room proper. There are one or two windows usually lost in the roof or near it. Some of these windows were never made to open, the cords and pulleys for operating the remainder are generally out of order and they are few, small, grimy, and so useless for practical ventilation.

The evil results of bad air and no ventilation are uncertain but must be substantial. These conditions have no constant relation to the number of persons in the Court-room. Judges, counsel, and spectators in the highest Court of the land rarely number more than a dozen yet in that Court there never seems enough fresh air to go round. In spectacular criminal or civil trials however the stuffiness and foulness of the Court-rooms are noticed at once by any observer. The atmosphere is as bad as in a smoker on a limited express, yet in this atmosphere difficult, delicate and responsible work is done, not only by Judges and Counsel who are somewhat hardened to it, but also by Juries who require every assistance because the Juryman works under great strain in unfamiliar surroundings. Late in the afternoon it is a common experience that the brains of all persons connected with the trial are fagged and numb, and this condition is due to the faulty construction of the Court. A private employer who made the ordinary citizens' boots in an atmosphere where the same citizen is tried for his life or his liberty, would soon find himself in conflict with the health authorities. Lack of ventilation beyond doubt tends to make the occupants of Court-rooms sleepy, irritable and quarrelsome. Bad air has made for many a bad decision not only on fact but possibly also on law.

There is a particular phase of the matter that may be mentioned. Counsel even the busiest leave the Courts for long intervals. Lawyers even those with no practice at the Bar must pass some portion of their time in the lawyer's workshop—the law library. Most law libraries are under the same roof as the Court-room and suffer though in a lesser degree from the same defects. Practically none are equipped with modern lights. These defects are less serious in the law libraries because the lawyer can escape therefrom, though he cannot from the Courts until his case is finished.

Judges are less happily situated. The office of Judge is by common consent the most responsible, dignified and vital in the service of the State. Judges pass their working lives in the Court-room, in their Chambers and the Libraries under the same roof. The Court-rooms, Chambers, and Libraries all are defective in the same respects. The Judges' private rooms in Wellington for example, all open on to dark and narrow passages, of a type once familiar in our gaols but now abolished by modern science and humanity, in the mental and physical interests of our criminals. No criminal after conviction is allowed to live in as unhealthy surroundings as the Judge who sentenced him. The office of Judge it may be said, with due apologies to the holders thereof and merely for the purpose of pointing an argument, is at least as important as that

of any Minister of the Crown. Lawyers who have met both Judges and Ministers of the Crown will remember, there is some dissimilarity between the design, furnishings and comforts of the private official apartment of a Judge and that of a Minister of the Crown. Parliament has even considered it necessary to surround the private member with a certain luxury to soften the rigour and severity of his service to the State.

(To be concluded)

LONDON LETTER.

Temple, London,
8th June, 1926.

My Dear N.Z.,—

The new term, the Trinity Term, started on Wednesday last in a prevailing atmosphere of gloom by reason of the noticeable, and noticeably increasing, dearth of work. I have, however, harped so much on this theme that I will harp no more. Rather than brag about the accuracy of my forecasts, I will do some more forecasting. Things will get worse, possibly much worse, before they get better, for the reason that the battle has now at last been engaged on the issue, long overdue, between the employer and the employed in the industrial world and it will be an expensive and temporarily impoverishing process, for both sides, to reduce wages or increase effort to a practical and economic basis. The revolutionary element has been fought and quickly and not very expensively beaten; there remains the element, in the "sheltered trades" for the most part, which has for long been forcing methods of high pay and short hours upon industry and which has to be brought to reason. The issue is being fought over the coal mines; but, whether it is decided to-day or to-morrow, the effects must be two: at first a general financial strain, with a concomitant tendency to severe economy, and later (I hope and am sure) an era of a not luxurious, but a more stable prosperity than we have known since 1913. This general economizing must necessarily be reflected as much on litigation as upon anything; persons, firms and corporations will not readily go to law for some time yet. Incidentally it may be remarked that the law itself, or at least the lawyers, still require to learn the lesson that litigation must not become, or remain, a process so expensive as to be extravagant; but this lesson will be quickly inculcated by a little starvation diet, if it is not already learnt. I should say that it will be little, if anything, before the end of the Long Vacation of 1927 that the Courts and Chambers entirely recover normal pressure. But I sincerely hope that never after that date shall I worry you again with this melancholy subject.

I had thought of inserting some Stop-press news in this letter about the first two New Zealand Appeals which we are just about to open before the Judicial Committee of the Privy Council. **Wright v. Morgan,** in which I am not concerned, is actually coming before their Lordships; **Bissett v. Wilkinson** follows it immediately. I think, however, that any expediting of my report of these cases to you could only be inspired by a journalist's haste, and it would be hardly fair to Myers or Gresson to elaborate their postprandial *obiter dicta* as to their several hopes and beliefs. I will deal with both appeals at length, in my next letter. I think I have already told you that these are the only two of your Appeals which are to be heard this term, so that the others will not come on before October at the earliest.

I broke off, a fortnight ago, in the middle of **Noble v. Harrison,** a little appeal from the Brighton County Court involving no very substantial sum of money but dealing with a nice point which, I suspect, must be of interest to you. Anything to do with the principle of **Rylands v. Fletcher,** and adding to the essentially important legal intelligence which is contained in the notes to that case in **Smith's Leading Cases,** must be grist to the mill of any of our brotherhood, in whatever part of the British Empire practising. The defendant's beech tree bore a large branch, overhanging the highway. Into a fissure, at the junction of the branch with the trunk, the water penetrated, causing such a serious but latent defect as eventually to cause the branch to collapse. The plaintiffs' motor vehicle was passing along the road at the moment of the collapse and was damaged. The County Court Judge acquitted the defendant of any negligence, but held him liable in nuisance. The Divisional Court, upon this part of the judgment, took the view that the justifiable ignorance, on the part of the defendant, as to the dangerous state of the branch not only acquitted him of negligence but also eliminated the element of nuisance. That a branch of my tree overhangs the road is not of itself enough to constitute a nuisance. But the County Court Judge had gone further and had held that the owning, on my land, of such a tree, so overhanging, imposes the absolute obligation which produces a liability, in case of accidents, even in the absence of any negligence: this is **Fletcher v. Rylands,** of course, as you will not need me to tell you. The Divisional Court allowed the appeal on this point: the growing of trees is, they held, a natural use of the soil and has none of that abnormality corresponding to the containing of reservoirs, artificially accumulated, or corresponding to the keeping of wild beasts which must not be permitted to escape. It had been contended that, as with reservoirs one is bound to provide containing walls or as with wild beasts one is bound to provide effective obstacles to escape, so with an overhanging branch one is bound at one's peril, to provide support and thus prevent the sort of collapse which occurred. This contention Rowlatt J. and his former pupil, Wright J., rejected and, as we shall all agree, properly rejected. The importance of the case, however, seems to me to lie not in the comparatively obvious rules of law laid down as to overhanging branches (though these are common enough here and, I suppose, with you) but in the very much needed exposition of the limitations of the "absolute obligation" principle of **Fletcher v. Rylands.** You may say that these limitations have been made abundantly clear long enough ago, by the long series of reported cases. For my part, I think the pro's and con's of the matter have been so much refined, that this readily memorable illustration of the broad line is very timely.

In any case, there has been no waste of valuable space in dealing at length with this decision, for there is none other to report. **Booth v. Amalgamated Marine Workers' Union,** decided last week by Tomlin J. serves rather to disclose the abuses of trades union administration than to expose any new principle of law. It is indeed enlightening, if not shocking, to discover how far removed from a proper, let alone a secret ballot the taking of a union's vote may be. Apparently voting papers were sent out in parcels to branch secretaries, with no check or record of the members for whose votes they were intended or whose votes they ultimately purported to register; in one instance,

the official, to whom the papers were sent, filled in some two hundred himself with a proportion of five to one in favour of the project of amalgamation which the executive was proposing to its constituents! "This case," remarks a legal contemporary, "will no doubt be carefully borne in mind when amendment of trades union law comes up for consideration." I do not think I can improve upon that. That astonishing case, before Greer J., **Republica de Gautemala v. Nunez** afforded entertainment, of the nicest humour, but had to be heard to be believed! It would require the pen of an "O. Henry" to convey the comedy of it. The appeal in **G. W. K. Ltd. v. Dunlop Rubber Company Ltd.,** having served its purpose of enabling the appellant defendants to remove some of the opprobrium of the Lord Chief's strictures at first instance, was settled and not prosecuted. In **Newman v. Slade** a Divisional Court (Salter and Fraser JJ.) held that, in the absence of any express stipulation, the week's notice, necessary to terminate a weekly tenancy, may be one which, if given on a Monday, expires on the following Monday.

The death of Sir Thomas Erskine Holland, at the age of 90, removes a figure as familiar as famous in academic discussions of jurisprudence, international and other. Of this distinguished Chichele Professor we have all a personal recollection, though many of us may never have seen him. In times past we have, as practical lawyers, been a little inclined to smile tolerantly upon the entity known as International Law, thinking to ourselves that there is only one ultimate law, governing the relations between nations, and that is Force or the power of applying force. The experience of the War and the continuing phenomenon of Geneva have done much to change this point of view and to give to the studies and expositions of Sir Thomas a greater reality than the subject earlier seemed to permit. His distinction in other realms of jurisprudence is not to be forgotten; you will find a very admirable appreciation of them in that historically-minded authority, the **Law Journal,** whose learned Editor has always seemed to me to be the inexhaustible fount of information. You will also see, in the same journal (numbers of May 29 and June 5) an epitome of the career of the late Sir Charles Walpole, who held judicial office in Cyprus, Gibraltar, and the Bahamas as well as being the Attorney General, at one time, of the Crown Colony of the Leeward Islands. We knew him as Chairman of the Surrey Quarter Sessions, and we pay a tribute, in respecting his memory, to the very many lawyers who have gone out into the Empire in their young days and done service, as invaluable as impersonal, to the **Pax Britannica.** It is curious how little is known of such men, on the whole, at the English Bar, the home of their origin. I often think the charge of insularity, so frequently levelled at our good selves (and I include you, my brethren?) is entirely unfounded so far as the foreigner is concerned. Amongst peoples of other nationality and language, we are the most broadminded. But so far as we are concerned amongst ourselves, in our various groups wherever situated, I think the degree of our insularity is even understated. Superficially, there is about as much sympathy between us as there is between four railway passengers who travel in an English express from Newcastle to London, in the four corners of the same small compartment; that is to say, none.

But I must not occupy your professional time with these illegal speculations. Let me commend to your notice the Report, just published, of the Committee appointed to consider the necessity and details of the reform of Company Law; remind you that our new administration of criminal justice began for the most part last Tuesday with the coming into operation of the new Act; and subscribe myself:

Yours uninsularily,

INNER TEMPLAR.

REPORT OF THE PRISONS DEPARTMENT.

We have before us Mr. B. L. Dallard's first report as Controller-General of Prisons to which is annexed Mr. E. Page's report as the New Zealand Representative at the International Prisons Conference which was held in August last year.

The report shews that there was an increase in the number of persons committed to prison in 1925 over the preceding year though the increase is largely due to the fact that a number of seamen on strike were committed to prison. Apart from these the increase was small. In all 4,713 persons found their way into prison in 1925 as against 3,957 in 1924. In referring to the persons committed the report says:—

> The number of receptions recorded above includes a number of prisoners who were received more than once into prison during the year, and amongst these is to be found a class of individual—the petty recidivist—who presents one of the most difficult problems in the treatment of crime, for it is out of this class that the confirmed criminal usually develops. It is quite evident that short sentences for the criminally inclined—particularly now that prison conditions have been so much ameliorated— have practically no deterrent effect and serve little purpose as a protection to society. The extent to which recidivism figures in the annual statistics may to some degree be gauged from the fact that although there were 4,713 separate admissions during the year these represent only 2,890 distinct persons. Of these, 197 had been convicted twice, 121 three times, 78 four times, and 719 over four times.

We do not agree with this in all respects. It is inaccurate to say that the confirmed criminal usually develops from the petty recidivist. The petty recidivist is a confirmed criminal with usually a particular inclination for one class of offence. For him we think there is next to no hope of reclamation. He is a social pest as well as a danger. He contaminates young men through his lazy habits and the apparent ease of living. The indeterminate sentence is the only sentence seemingly that will be of any benefit, and that benefit will be only for the public.

Mr. Dallard draws our attention to the interesting fact that 76% of the sentences imposed were for under 3 months. He cites the following comment from the latest report of the English Commissioners: "Every Governor confirms our views that prison is most deterrent to those who have never been there, and that the short sentences can do nothing but lessen the deterrent effect. The terror of the unknown is gone and the disgrace of imprisonment is incurred. A second conviction will bring nothing new. And so the man leaves prison with less fear of breaking the law than before. The time has been too short to train him, and he has merely hindered the training of others.

For any offence except some of the minor Police Offences and Mischief we confess we agree that short terms of imprisonment for first offenders are worse than useless. They are dangerous. They do the offender no good. The term is not long enough to break him into a new habit. The association of prison life shews him no terrors in it. If through drink or bad

habits, laziness or evil associations he has been led into crime the short term has no other good result than that for the period of his incarceration he is not a danger to society. Short terms breed criminals. Once a young man, a first offender, finds out that a short term of imprisonment has been his punishment he is as bad as when he entered the prison, his habits are not materially affected. He has not received the inducement to go straight. He will probably not do so. And after two convictions the hope of reclaiming him is not worth considering.

It is with the young first offender and with him alone that reformation is possible. For the others we confess we think the attempts at reformation constitute an economic waste.

The Department is certainly doing all it can to reform the first offender. The Report says with regard to the institutions set up for this class of offender.:—

BORSTAL INSTITUTIONS.

The Prevention of Crime Act, 1924, now commonly known as the Borstal Institutions Act, came into operation late in 1924, and 62 lads and 16 girls were committed direct to Borstal institutions by the Courts during 1925. Under the provisions of the Act, 161 youths and 39 young women were transferred from other penal institutions to the Borstal institutions for reformatory detention.

The Point Halswell Institution for girls has not been going sufficiently long to enable any definite data of results to be stated, but of the 1,363 youths who passed through the Invercargill Borstal Institution during the five years ended December, 1925, only 95, or 6.96 per cent., have been re-convicted after discharge.

Equally satisfactory results have been achieved at Waikeria, and, judging from local experience as well as from experience in England, it is evident that in connection with the work of the Borstal institution the prospects of judicious treatment of crime in the incipient stage are most hopeful. The fact of separating youthful offenders from the more hardened criminals alone should have beneficial results; but the system of Borstal training aims at the all-round intellectual, physical, and moral development of each inmate, and by such means it is hoped to arrest criminal tendencies and to instil in each youthful delinquent a proper sense of social responsibility.

Of this class the women present the most trouble. The origin of their wrongdoing is very different from that of the male offenders. Female prisoners seem to find it more difficult to shake off bad habits than men, perhaps it is that the bad habits affect their mentality more deeply.

Mr. Dallard refers to the well known statement that nowadays the duty of the State really begins and not ends with the commital of the prison. We think that the responsibility of the State is overemphasised when the report says that on the arrest of the offender the State "has undertaken a new responsibility of the very gravest kind—namely, that of the treatment and training of the offender during the period of incarceration."

At the best this language could only apply to the first offender. To apply it to the recidivist is the grossest exaggeration. The treatment and training of the recidivist should consist of hard work long hours and at a useful trade. Too much attention to his social comfort is we think a mistake. The chief duty of the Government to the confirmed criminal is to keep him safe and secure. Society is the main consideration. The reformation of this type of criminal is next to hopeless. Perhaps someday we shall have to thank medicine for discovering the true reason for the inclinations of the recidivist. Meantime, however, we know we have a man, dangerous to the community, with no intention of being honest. The reports adopt the language of Sir W. Joynson Hicks with regard to the State's responsibility: "The State will not have done its duty if it releases him after his period of imprisonment is over, and, in consequence of such imprisonment, in such a condition of mind and body that he is no longer fit to take his part in society as a citizen." This may be a confusion of thought. It certainly seems to be. The prisoner on admittance is not in a condition to take his part in society and it is impossible to assign to prison treatment, no matter what sort, the fact that on his release he is not reclaimed. No Prison System can hope to comply with the requirements of Sir W. Joynson Hick's idea of State responsibility.

It is very gratifying to see that the Prisons are now being run on sound business lines. In many respects they are self-supporting. Many trades are taught and all classes are kept in useful work of some sort or other.

The Prison Camps where prisoners are very much on their honour—or more correctly—are not always within sight of warders, are very successful. We rather think that the few escapes from these Camps are as much due to the fact that there sentences are less arduously served, general conditions more pleasant and the chance of permanent escape very small as to the fact that the men are actually reforming.

We have not dealt with many features of the Report. On the whole it is excellent giving us a good view of the various prisons in New Zealand. That they are up-to-date is we think unquestionably true.

The important matter of classification of prisoners is dealt with in the Report as follows:—

CLASSIFICATION OF PRISONERS.

Sir Ruggles-Brise, an eminent English authority, has stated that "It has become more and more recognized in recent years that the personality of the offender must enter into the legal conception of the degree of guilt." Dealing with this matter, the suggestion has frequently been made that a psychiatrist should be associated with the Courts administering criminal justice, but this would involve many practical administrative difficulties. The Courts fn New Zealand are scrupulously careful in giving due attention to any allegation of impaired responsibility arising from mental defect, and it is by no means infrequent for the machinery of the Mental Defectives Act, 1911, to be invoked to enable an offender to be placed under special observation. There are, however, many offenders who cannot be certified as insane, but whose mentality is such that their power of inhibition is below normal. These are included in the group of recidivists already referred to. It is desirable that some means should be devised whereby the uncertifiable weak-minded can be located in a separate institution, as these cases are entirely unsuited to the discipline and organization of the ordinary prison.

In dealing with the separation of the normal from the sub-normal the Medical Officer of the Brixton Prison recently stated that "these border-line cases are most unsatisfactory. One feels that the short term of imprisonment which are all that most of them receive do little good to the prisoners and provide very short respite to the public. This is so particularly in cases of sexual perverts, many of whom are slightly defective. It is certain that punishment, as a rule, is impotent to deter them. They apparently cannot resist their disordered impulses, and so far are to be pitied, but they constitute a nuisance and a danger from which the public ought to be protected. Sooner or later the question of their permanent segregation will have to be faced."

Apart from the question of the separate treatment of the mentally abnormal the actual classification of the more normal prisoners within the prison is a matter of considerable importance. It is recognized that the classification of prisoners should be based on a personal study of the offender according to age and character irrespective of the nature of the offence. In England and America classification is based largely on mental tests. Experience has shown that many evil consequences follow the herding-together of offenders regardless of age, antecedents, and habits.

In New Zealand the classification of prisoners is based principally on age and the extent of criminal experience. The youthful offenders in the incipient stage of delinquency are transferred to the Borstal institutions, and are thus kept apart from the contaminating influences of associations with older criminals. The sexual perverts are segregated at New Plymouth, but little further attempt at classification is made, except with the more desperate criminals, who are detained at Mount Eden, where there is a greater degree of security from escape. There is still room for further classification, as at present in many prisons habitual criminals are associated in the same prison with first offenders who are too old for admission to Borstal institutions. Many of this latter class are what may be termed "accidental criminals," and it would lessen the possibility of the corrupting influence of this association if some means could be devised whereby first offenders could be kept apart from "old-timers." The question of the proper classification of offenders is one that presents a greater measure of administrative difficulty in New Zealand, with its comparatively small and scattered population, than is likely to be experienced in Great Britain or America. However, as the question is regarded as one of the most important preliminaries to the successful treatment of criminality it is one that should receive careful consideration, but as the present staffs are not competent to undertake character studies or to appreciate the psychological significance of a prisoner's behaviour, it is evident that if classification is to be attempted on a scientific basis the question of the appointment of competent officers will require to be faced.

With respect to the education of the prisoner we take the following from the Report:—

In addition to the ordinary school curriculum an attempt has recently been made to introduce classes in civics, elementary economics, history, and certain science subjects with the object of developing thought along social lines. Such topics are helpful for the debating classes which are regularly held, and combined with suitable lectures, which are also frequently given, provide healthy food for thought during solitary hours and so tend to prevent morbid introspection.

It does not appear to us that these additional subjects are worth while teaching to criminals. With the fewest possible exceptions the effect on their minds will be negligible. We think that the criminal mind to which these subjects will appeal will reform with the ordinary treatment meted out in the prisons. There is a tendency to overdo the appeal to the mental side of the prisoner. That appeal should, we think, be made through the man's body, that is, by hard work. The education should not exceed the ordinary subjects necessary to place the man in possession of the subjects in the ordinary school curriculum. While we think that something might be done to assist the first offender to reform himself and as a part of that aid he should have an educational grounding, yet we cannot see the need of leading him into fields which he will abandon as soon as he is released. His age, his mode of living, his home life are, with few exceptions, not adapted to that extra education.

In our next issue we hope to discuss Mr. Page's report and the annual report of the Chief Probation Officer. With regard to the report of the Prison's Department, Mr. Dallard has brought down a comprehensive report on our prisons and with most of his comments we are in accord. It is with the different aspects of the system in vogue that we now and then disagree.

C. A. L. T.

CORRESPONDENCE.

The Editor,
"Butterworth's Fortnightly Notes," Wellington.

OUR JUDICIAL SYSTEM.

Sir—There can be no doubt that our present judicial system needs to be recast, and there can be equally no doubt that the main cause of the present dissatisfaction with our judicial system is on account of the poor remuneration paid to our Judges and Magistrates. This is the real cause of the present dissatisfaction.

Take the position of our Judges. The salary that is being paid to them is quite inadequate for the amount of responsibility and work they have to do, and, as a result, there is no doubt that the Judges being appointed nowadays do not represent the best men in the profession. The best barristers are refusing to take the positions of Judges because, as one puts it: "I really cannot afford to do so." I notice that you mention in your issue of the 3rd instant that County Court Judges in England receive a salary of £2000 per year. The Judges of the High Court of England receive a salary of £5000 per year, and they are entitled to receive a superannuation allowance up to £3500 per year. I do not know that their responsibilities are any greater than those of our Judges here, and certainly the cost of living is not as dear in England as it is in this country. The way Judges are treated in the way of remuneration leaves much to be desired in the matter of remuneration. The Government seems to be timid in approaching this issue, but unless it does so very soon, the effect must be to reduce the efficacy and standing of our judiciary. Everything is high in this country, except the salaries of professional men.

. . . . . .

I do not think that the Magistrate's jurisdiction should be extended for the present, until there is a more efficient Magisterial bench. It is simply impossible to advise a litigant as to the probable result of any action launched in the Magistrate's Court. One Magistrate recently stated that he would not take notice of what the law was—he was going to give what decision he saw fit—no matter what the law on it was. This leads to the position in connection with appeals. Our Judges have decided that before a Magistrate's decision can be upset on appeal, it must be "demonstrably" wrong. Judges have, in many cases, expressed the opinion that the Magistrate's decision was wrong, but refused to upset it. That is to say, the litigant gets law, but not justice. Such appeals should be by way of rehearing with permission to the parties to call evidence. Our Judges have made a Magistrate's decision on a question of facts, almost sacrasanct, and it would appear to be much easier to upset a Judge's decision on appeal than that of a Magistrate.

Was it not a great mistake to destroy practically the trial by jury in civil actions? In my humble opinion, it is in the interests of the community that it should be kept in touch with our judicial system, and, as one juryman put it to me, it was to him an education to watch at close quarters the working of our law courts. I do not think the Judges were entitled, nor had they a Mandate from Parliament or the people (eventually the final Court of Appeal), to abolish a system that has really formed part of our system for many years. In any case, the jury system is a great safeguard against what might result if a venal Judge obtained appointment. If I may summarise my views:—

(a) As a condition precedent, the salaries and pensions of Judges and Magistrates should be raised.

(b) If the Magistrate's Court jurisdiction is raised, there should be a differentiation in the salaries of (1) Country Magistrates, (2) Magistrates exercising extended jurisdiction, (3) Ordinary City Magistrates.

(c) Appeals on law and fact from Magistrates should be by way of rehearing.

—Yours truly,

J. F. W. DICKSON.

August 12th, 1926.

[We have deleted a portion of our correspondent's letter, as it was not impossible that personal allusion might have been inferred. The learned contributor is wrong when he says that Judges have decided that before a Magistrate's decision can be upset it must be "demonstrably" wrong. Such a remark, if made by a Judge, could only refer to a finding of fact.—Editor.]