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, OCTOBER 12, 1926.

APOLOGY TO THE PUBLIC TRUSTEE.

The reference to the Public Trustee in a contributed article entitled "Court Houses and other Things and Persons," appearing on Page 473 of "Butterworths' Fortnightly Notes," conveying the imputation that the Public Trustee would use his official position and his statutory powers to unfairly discriminate against persons or clients of persons criticising his Department, was inserted in the Journal without the knowledge, authority or concurrence of Butterworth & Co. (Australia) Ltd., or any of its executive officers. Had the matter been brought to our notice the references in the article would never have been published.

The imputations hereinbefore referred to are deeply regretted and wholly and unreservedly withdrawn. No executive officer of this Company believes that the Public Trustee or his officers would be capable of victimising any person or the clients of any person who criticizes the administration of the Public Trust Office.

Personal apologies have been tendered to the Public Trustee and the generous manner in which they were accepted is sincerely appreciated.

HUGH C. JENKINS,
for and on behalf of
Butterworth & Co. (Australia) Ltd.
8th October, 1926.

APPEALS FROM ORAL JUDGMENTS.

In the course of the hearing in the Court of Appeal of the case of **Willcocks v. N.Z. Insurance Company** an important statement was made by the Chief Justice as to printing the reasons given for judgment under appeal. In that case Mr. Justice Ostler delivered an oral judgment, and Counsel agreed on a report of what they thought the learned Judge had said. They did not submit this report to Mr. Justice Ostler. The Chief Justice said that the Court did not approve of this practice, and that in future the Appellant must not print the report of an oral judgment without first submitting it to the Judge for his approval. The Chief Justice said also that the practice adopted in some cases recently of printing the case on appeal without any report of the oral judgment must be discontinued. In every case the appellant must print as part of the case a report of the oral judgment approved of by the Judge who delivered it.

BAUME'S RELEASE.

The release on license after seven or eight months' imprisonment of Baume, the young Law Clerk who had been sentenced to three years' reformative treatment, has created a good deal of comment from one journal circulating in New Zealand. Baume's release is not, however, the scandal it is alleged to be. In any case he is now on probation and for the slightest infraction of any of the terms of his license he would be liable to arrest and imprisonment. It will be remembered that he in conjunction with one Smith worked a fraud on the Post and Telegraph Department and obtained a fairly large sum of money in that way. The Jury found both prisoners guilty and recommended them each to clemency. The trial Judge in addressing Baume remarked that the most serious aspect of the case as regards him was not so much the theft but the perjury he committed in the witness box. Baume who was regarded as the instigator of the swindle received three years' reformative detention and Smith half as much. Now it is generally agreed that so far as a prisoner is concerned the three main considerations in punishment are the punitive reformative and deterrent effects. So far as the punitive effect is concerned Baume was severely punished. He was a law student having passed all or nearly all his examinations, a member of an honourable profession, associated with honourable men and people in good society, and with the ball of a successful career at his feet. He has now lost his reputation, his friends and his position. That in itself must be necessarily a severe punishment, and the imprisonment with that loss is a much severer punishment than is normally the case, and it must be remembered that this was his first offence.

So far as the reformative aspect is concerned, no doubt the Prisons Board could see that he was as likely to reform with seven months imprisonment as with five more months, because normally he would have been released at the expiration of half his sentence.

So far as the deterrent aspect is concerned, the conviction, the sentence, the imprisonment, the social degradation, all combined, must, if anything could, effect a certain deterrent for the future.

With or before the recommendation for Baume's release the recommendation for Smith's release was also agreed upon, and Smith was, in fact, released before Baume.

The responsibility for releasing these two prisoners rests with the Prisons Board. The Government could not interfere with the recommendation of this expert body of men. The suggestion that this Body had been improperly influenced on behalf of Baume will not be accepted by thoughtful people. While Baume has been released earlier than one might have expected surely it was open to the Prisons Board, with the experience they had, to regard this first offence of Baume's as already punished severely enough.

INTERNATIONAL PRISONS CONGRESS. MR. PAGE'S REPORT.

In this issue we conclude the report forwarded to the Minister of Justice by Mr. Page, S.M., as the New Zealand representative. We are indebted to the Minister of Justice for leave to publish the report. We think that it is a valuable contribution on the subject of modern criminology. The publication of the Report will, we trust, induce some of our readers to express their opinions with regard to this most important social problem.

COURT OF APPEAL.

Skerrett, C.J.
Herdman, J.
Reed, J.
Adams, J.
Ostler, J.

July 12, 13; September, 1926.
Wellington.

PEARCE v. PEARCE.

Will—Gift—Whether divisible—Whether one whole gift——Whether devisees may reject gift of realty and retain gift of personalty—Onerous gift—Intention of testator.

This was an originating summons removed into the Court of Appeal for argument. The question was whether the defendants, nephews of the deceased, could accept the gift of "all stock, implements, chattels and things in, on and "about the said lands at the date of my decease," and at the same time reject the land on which the personalty was comprising 9041 acres. The value of the land was estimated at about £6000, and it was subject to a mortgage of £47,000.

Innes for trustees.
W. J. Treadwell for Eric Cecil Pearce.
C. A. L. Treadwell for infant daughter of G. V. Pearce.
Izard for F. K. Pearce, one of the nephews.
Richmond for Alan Pearce, the other nephew.

The COURT decided that the nephews could not accept the personalty and reject the realty. REED, J., delivered the judgment of the Court. We publish extracts thereof, it being too long to publish at length. The matter was complicated to some extent on account of the number of previous decisions on the matter which did not harmonise. The learned Judge said:

The answer to this question depends on the intention of the testator to be gathered from the words he has used in his will: "a testator's intention is the 'pole star' by which "the Court must be guided." Tindell, C.J., in **Goddard v. Harris**, 5 M. & P. 122. In order to assist in ascertaining those intentions, "the Court is entitled to put itself in the "position of the testator and to consider all material facts "and circumstances known to the testator with refernce to "which he is to be taken to have used the words in the "will, and then to declare what is the intention evidenced "by the words used with reference to those facts and cir-"cumstances which were (or ought to have been) in the "mind of the testator when he used those words." Blackburn, J., in **Algood v. Blake**, L.R. 8 Ex. at 162.

The learned Judge then considered the form in which the will was framed, and added:—

The form of the will therefore indicates an intention on the part of the testator to definitely prescribe, in watertight compartments, the respective rights and liabilities of these recipients of his bounty, and negatives, therefore, any possibility of an interference of an intention on the part of the testator that a beneficiary, at his own election, should be permitted to enhance the value of his own bequest to the detriment of that of another.

After discussing further aspects of the facts the learned Judge then adverted to the law on the matter, as follows:—

The general principles applicable are thus stated in 2 Williams on Executors (11th ed.) 1187: "Where a testator "makes two distinct bequests in the same will to the same "person, one of which happens to be onerous and the other "beneficial, prima facie the legatee is entitled to disclaim "the onerous legacy and to take the other. But, in such "cases, it is a question of the intention of the testator to "be gathered from the will, whether the legatee must elect "to take all, or none, of the gifts in the will, or whether "he may accept the beneficial gifts, and repudiate that "which is burdensome. In cases, however, where onerous "and beneficial property are included in the same gift, "the legatee cannot disclaim the onerous and accept the "beneficial unless the will manifests a sufficient intention "of the testator to the contrary. The gifts may be in "substance distinct, though given by one sentence in the "will."

As will be shown later, we think this statement of the principles should be varied, but there is here enunciated no principle nor rule of construction which conflicts with the basic principle that the intention of the testator, as gathered from the words of the will and the relevant circumstances, is the true test in the interpretation of a will. Numerous cases have been cited, but in all of these it will be found that it is only the application of the principle that is in issue, and not the principle itself. It is difficult to understand the reasons for the conclusions arrived at in some of the judgments, but this is largely due to the fact that those reasons, if they were stated, are not reported.

The learned Judge then discussed the extreme cases of Talbot v. Earl Radnor, 3 My. & K. 252, and Re Lysons, 107 L.T. 146. The reporting of the former is very inaccurate and incomplete. In discussing Syer v. Gladstone, 30 Ch.D. 614, the learned Judge remarked that the case was a troublesome one and there had been much controversy as to what it had actually decided.

To Mr. Richmond's contention on the authority of Syer v. Gladstone, that the principle of Locke King's Act is that a mortgaged estate bears its own burden and therefore the gift was not onerous, the learned Judge said:—

The Court did not accept that contention, and it held that the decision in **Syer v. Gladstone** was based upon the fact that there were two separate gifts. Both Cotton, L.J., and Lindley, L.J., held that upon the proper construction of the will in that case there were two separate gifts. It would appear as if the latter part of this decision, that it was a proper construction of the will, savours of **obiter**, as not being necessary to the decision of the case before them.

It is difficult to understand why Pearson, J., held that there were two separate gifts, and this doubt was evidently present to the mind of North, J., in the next case to be referred to, **Frewen v. Law Life Assurance Society**, where he says, in reference to **Syer v. Gladstone**: "The head-"note looks something like the present case; but I have "read the case carefully, and I cannot find anything to "justify that head-note," and later he says: "I may add "that, if the facts in **Syer v. Gladstone** had been such as to "justify the head-note, it is a case where the Judges of the "Court of Appeal in **In re Hotchkys** considered that there "were two distinct gifts; and if so, the case is no authority "as to the present case;" and later, after quoting the judgment of Lindley, L.J., that "according to the proper "construction of the will in that case (i.e., **Syer v. Glad-"stone**) there were two gifts," adds that the accuracy of the head-note was assumed. The learned Judge gives his own opinion as to the grounds of the decision as follows:— "I think that the decision really was that persons who had "received the benefit of the enjoyment of property left "them for life, which was subject to a mortgage paid off "by their testator's executors, were bound to indemnify "the estate in respect of the equivalent of interest on the "mortgage money to the extent of the benefit they had re-"ceived, but were not bound to put their hands in their "own pockets, and from their other resources pay the dif-"ference between the annual value of the property itself "and the total amount of interest upon the mortgage debt. "The subject of the head-note is not referred to in the "arguments or judgment, and does not appear to me to "have been decided, or to have arisen, in the case at all." There is then the case of **In re Kensington**. Farwell, J., in referring to **Syer v. Gladstone**, said, p. 120: "That case "when carefully considered is simply a decision on con-"struction, Pearson, J., coming to the conclusion that there "were two distinct gifts and not one aggregate gift. I "need hardly say that one will is of very little assistance "in the construction of another; but I can see the ground "upon which Pearson, J., proceeded."

After stating the facts, the learned Judge proceeded:— "Pearson, J., may have considered that, as the testator was "giving a house subject to a mortgage, and furniture, which "he contemplated the beneficiaries would probably enjoy in "specie, and which would produce no income, he did not in-"tend that the two should be treated as one aggregate gift "for the purpose of imposing on the furniture any liability "which subsisted in respect of the freehold house."

With the exception, therefore, of Joyce, J., there is a concensus of opinion that the decision of Pearson, J., was purely one of construction. What his reasons were for arriving at the conclusion that it was a case of separate gifts is open to doubt, but, in any event, the case is of no assistance in the interpretation of the present will. The reasons

suggested by Farwell, J., in **In re Kensington**, and by North, J., in **Frewen v. Law Life Assurance Society**, emphasise the distinction between the case and the present one. One point only need be mentioned—that is the difference between furniture in a house and stock on a farm. The probable intention of a testator, giving a house subject to a mortgage and the furniture therein, is well stated by Farwell, J., in the passage last quoted. Stock on a farm is in a totally different position. It is revenue-producing, and the means by which the liability on the mortgage is met.

The Court then discussed the matter from the true principle affecting the construction of the will. Reed, J., said:

But, apart altogether from authority, the principle is much broader than is contended for by Counsel. The only question in the interpretation of a will is, what was the intention of the testator? When two distinct bequests are given in the will, the question remains, what was the intention of the testator? Are they to be taken together, or may one be taken and the other left? It would be unlikely that if both were acceptable to the donee that he would take one and decline the other. If one be not acceptable to him it could be fairly assumed that it was not, in his opinion, advantageous, but was burdensome and onerous. Hence the distinction, that would generally apply, would be as between beneficial and burdensome or onerous gifts, and the use of those words, in the authorities, is simply a convenient way of distinguishing that which was acceptable to the donee and which he wished to retain and that which he wished to disclaim. Therefore it is not essential to prove, in order to apply the rule, that the gift is onerous, in the sense of entailing a financial burden. To do so would limit the application of the over-riding principle that the intention of the testator is the real question.

Bearing that in mind, the principle is clear and may be thus stated:—

> Where a testator gives two distinct properties in the same will to the same person, and one of these is not acceptable to the donee, prima facie he is entitled to disclaim it and take the other. But, in such cases, it is a question of the intention of the testator to be gathered from the will, whether the donee must elect to take all, or none, of the gifts in the will, or whether he may accept the one gift and repudiate the other. In cases, however, where both properties are included in the same gift, the donee cannot accept the one and disclaim the other unless the will manifests a sufficient intention of the testator to the contrary. The gifts may be in substance distinct though given by one sentence in the will.

This variation of the wording in the rule as stated in **Williams on Executors**, and quoted earlier in this judgment, is consistent with authority. Nowhere is it laid down, or implied, unless, perhaps, inferentially, in **In re Lysons**, that the rule is dependent upon a proved **financial** burden upon the legatee, but in all the cases the over-riding principle of the intention of the testator is appealed to. The rule, therefore, being a subsidiary one to assist in ascertaining such intention, cannot be restricted by limiting its application to any particular detrimental condition of the gift. If the testator's intention was that the two properties should be taken together or both rejected, he had good reason for so providing in the interest of all the beneficiaries, and no technicality, as to the nature of the objection that prompts a donee to desire to reject one, can affect an interpretation based on the testator's declared intention.

BENCH AND BAR.

Mr. Evan Sydney Parry was admitted as a Barrister and Solicitor by the Chief Justice on the 2nd October, 1926, on the motion of Mr. C. A. L. Treadwell. Mr. Parry practised for a few years in London as a Barrister, and has now settled down to practise in Wellington.

Messrs. Buddle, Anderson & Kirkcaldie, of Wellington, have admitted into partnership Mr. E. S. Parry, LL.B. Mr. Parry is the only son of Mr. Parry who was recently Chief Electrical Engineer to the New Zealand Government.

SUPREME COURT.

Sim, J. September 10, 14, 1926.
Dunedin.

REX v. POLWARTH & HARRIS.

Crime—Appeal from conviction—Application for new trial—Whether verdict against weight of evidence—Crimes Act, Sec. 446.

This was a very unusual application for a new trial after conviction before a jury on the ground that the verdict was against the weight of evidence. The application was dismissed. We do not publish the facts but merely the references to the law referred to by Sim, J., in his judgment.

C. J. L. White for prisoner.
F. B. Adams for Crown.

SIM, J., said with regard to the considerations to be applied on such applications:—

The prisoners have now moved for leave to apply to the Court of Appeal under section 446 of the Crimes Act 1908 for a new trial. The only ground on which under that section a new trial may be ordered is that the verdict is against the weight of evidence, and the principles on which the Court of Appeal should proceed in dealing with such an application were laid down in **Rex v. Stycho**, 20 N.Z.L.R. 744; 3 Gaz. L.R. 249.

It has been held that leave to apply to the Court of Appeal for a new trial should not be granted unless there is reasonable ground for contending that the verdict is against the weight of evidence: **Rex v. Bruges**, 26 N.Z.L.R. 389; 9 Gaz. L.R. 66; **Rex v. Christie**, (1922) N.Z.L.R. 982. The question to be determined then is whether or not such a reasonable ground has been established in either of these cases.

Solicitor for prisoner: **C. J. L. White**, Dunedin.
Solicitor for the Crown: **F. B. Adams**, Crown Solicitor, Dunedin.

Skerrett, C.J. August 8; September 18, 1926.
Ostler, J. Wellington.

THOMAS v. THOMAS.

Divorce—Sec. 4 of Amendment Act of 1920—Whether Essential for petitioner to be domiciled in New Zealand for two years.

This is a very important case in the form of an Act on Petition and we find it impossible to merely note it without detracting seriously from the usefulness of the decision. The facts were that petitioner, who was applying for a dissolution under Sec. 4 of the Amending Act of 1920, was domiciled in New Zealand but had not been domiciled for two years.

Sir John Findlay, K.C., and **Hanna** for petitioner.
Levi for respondent.

THE COURT found there was no jurisdiction to entertain the petitioner's suit. SKERRETT, C.J., delivered the judgment. He said:—

In his judgment as a member of the Court of Appeal in **Chapman v. Chapman** (1926, N.Z.L.R. at p. 295) Sim J. said: "That section" (Section 4 of the Act of 1920) "must be read as being in effect an amendment of Section "21 of the principal Act, so that a person would not be "entitled to a petition for a dissolution of marriage under "section 4 of the Act of 1920 until such person had been "domiciled in New Zealand for at least two years." This opinion was clearly **obiter**; and it has been deliberately challenged in the argument before us. After careful consideration, I have come to the conclusion that the opinion so expressed is correct; and it only remains to express my reasons for arriving at that view.

By our first Divorce Act of 1867, the grounds on which a dissolution of marriage could be granted by the Supreme Court were first laid down by the Legislature; and, following the English legislation, the grounds differed in cases

where the husband or the wife was petitioner. This legislation continued for thirty-one years. In the year 1898, by the Divorce Amendment Act of that year, a radical change was made in our Divorce law; and husband and wife were put on the same footing, so far as adultery formed a ground for dissolution of marriage. By Section 3 of the Act a number of grounds of divorce were laid down, available to either party to a marriage; but a preliminary condition was imposed on a petitioner seeking to take advantage of its provisions. That condition required the petitioner to be presented by a married person "who at the time of the "institution of the suit, or other proceeding, is domiciled "in New Zealand for two years"—meaning a consecutive period of two years immediately preceding the presentation of the petition.

Although the law placed husband and wife on substantially the same footing so far as concerns the right to divorce on the ground of adultery, Section (18) of the Act of 1867 was retained. That section is in the same language as Section 22 of the Act of 1908, with the exception of the prefatory words of the latter section to be presently referred to. Section (18) reads as follows:—

"It shall be lawful for any wife to present a petition to "the Supreme Court praying that her marriage may be dis-"solved on the ground that since the celebration thereof "her husband has been guilty of incestuous adultery, or of "bigamy with adultery, or of rape, or of sodomy, or of "bestiality, or of adultery coupled with such cruelty as "without adultery would have entitled her to a divorce "**a mensa et thoro** under the law heretofore existing in "England, or of adultery coupled with desertion without "reasonable cause for two years or upwards. And every "petition under this and the next preceding section shall "state as distinctly as the nature of the case permits the "facts on which the claim to have such marriage dissolved "is founded."

That section is in my opinion in a category by itself. The necessity and usefulness of its provisions were to some extent—perhaps to a great extent—superseded by the extension of the grounds on which a wife could obtain a divorce, and notably the right conferred on her to obtain a divorce on the ground of the adultery of the husband, unaccompanied by any circumstance of aggravation. By the retention of the Section it was intended to preserve rights which the wife possessed under the Act of 1867. For example, it was intended to preserve the right to the wife to obtain a divorce from her husband on the ground of the commission by him of sodomy, or of bestiality—matters which are not dealt with by the main provision (Section (3)) of the amend Act. This was effected by preserving intact the right of the wife to present a petition under section (18) of the Act of 1867—in respect of the matrimonial offences therein enumerated, quite independently of Section (3). thus a wife domiciled in New Zealand at the time of the passing of the Act of 1898 could present a petition on any of the grounds mentioned in Section (18) without complying with the requirement of being domiciled in New Zealand for two years. There is no foundation for any suggestion that the provision of Section 18 was a proviso or amendment of Section (3). It was a separate and independent provision creating a separate jurisdiction. The same observations apply to the Compilation Act of 1904. That statute by section (23) re-enacts Section (18) of the Act of 1867 and precedes it with the prefatory words "Irre-"spective of her right to petition under the last preceding "Section" (that is Section (22)). These words shew clearly that the provisions of Section (18) were regarded as distinct from the provisions of Section (3) of the amending Act of 1898, and Section (23) of the Act of 1904; and in no way dependent on them. The same scheme of legislation was adopted in the Consolidation Act of 1908. I therefore regard each of these sections (viz., Section 18 of the Act of 1867, Section 23 of the Compilation Act of 1904, and Section 22 of the Consolidation Act 1908) as standing by itself; and therefore quite distinguishable from the section of the amending Act of 1920 which I have now to consider and on which the question I have to decide directly turns.

Section (4) of the Amending Act of 1920, on which the petition in this suit is based, reads as follows:—

"It shall be lawful for the Court, in its discretion, on "the petition either of the parties to a decree of Judicial "separation, or to a separation order made by a Stipen-"diary Magistrate, or by a Resident Magistrate, or to a "deed of agreement of separation, or separation by mutual "consent, when such decree, order, deed, or agreement is "in full force and has so continued for not less than three "years, to pronounce a decree of dissolution of marriage "between the parties, and in making such decree, and in all "proceedings incidental thereto, the Court shall have the "same powers at it has in making a decree of dissolution "in the first instance."

"It is contended in answer to the Act on Petition that the jurisdiction conferred by the section is separate from and independent of the jurisdiction conferred by Section 21 of the Act of 1908. It is true that its mere form favours this view; but a deeper scrutiny not only of language but of the consequences and effect of the provision is necessary to ascertain its true meaning. In the first place it appears to me that the language contemplates that divorce under the section should be obtained only in accordance with the procedure prescribed for obtaining divorces generally. It incorporates that procedure. It provides that "in making "such decree and in all proceedings incidental thereto the "Court shall have the same powers as it has in making a decree of dissolution in the first instance." This language refers to a jurisdiction and procedure already conferred upon the Court to dissolve marriages. (See **Somerville v. Somerville,** 1921 N.Z.L.R. at p. 513.) The only jurisdiction and procedure to which it could appropriately refer are the general jurisdiction and procedure created and established under Section 21 of the principal Act. It could not appropriately refer to the special jurisdiction or procedure under Section 22.

There are reasons which lend support to this view, from considerations arising out of the substance of enactment. The new grounds of divorce are all in substance branches of the stututory offence of desertion. Desertion under Section 21 must have continued for at least three years; and constructive desertion may arise where a wife living separately from her husband has been left without reasonable maintenance—whether the separation has taken place or been continued by mutual consent, or by virtue of a judicial decree or order. This ground of dissolution can only be invoked by a wife who has been domiciled in New Zealand for two years before the institution of the suit. Is there any sound reason for imputing to the legislature the intention of insisting on domicil for two years in all cases of desertion and waiving that requirement where the ground of divorce is a separation of some kind for a period of at least three years. There are indeed many reasons why a married person should be precluded from obtaining a divorce on a separation obtained outside of New Zealand unless he or she has been there domiciled for at least two years. These considerations and the language of the section to which I have before referred justify me in holding that Section 4 must be read as a proviso to, or an amendment of, or addition to, Section 21; that the relief can only be obtained by the procedure contemplated by that section and only where the petitioner has been domiciled in New Zealand for at least two years. I think that this view is supported by Section 3. That section reads as follows:—

"If the respondent shall fail to comply with a decree of "the Court for restitution of conjugal rights, such re-"spondent shall thereupon be deemed to have been guilty "of desertion without reasonable cause, and a suit for dis-"solution of marriage may forthwith, or at any time there-"after be instituted, and a decree **nisi** for the dissolution "of the marriage may, in the discretion of the Court, be "pronounced on the ground of desertion, although the period "fixed by the principal Act in the case of desertion may "not have elapsed since the failure to comply with the de-"cree for restitution of conjugal rights."

I think it is clear that this section must be read as a proviso or amendment of Section 21, and this has been so held upon the construction of substantially the same statutory provisions, and the same arrangement of those provisions, by three judges in the State of New South Wales in the case of **Heupt v. Heupt** (12 N.S.W.St.R. 745).

The result therefore is that, upon the assumption made, the Court has no jurisdiction to hear the petition.

Solicitors for petitioner: **Findlay, Hoggard & Morrison,** Wellington.

Solicitors for respondent: **Wilford, Levi & Jackson,** Wellington.

Herdman, J. August 26; September 3, 1926.
Auckland.

MERSON v. QUINN.

Motor—Unregistered motor-car—Sec. 3—Meaning of words 'only for the purpose of sale.'

This was an appeal from a Magistrate. The facts were shortly that appellant was a dealer in motor-vehicles. He left Auckland on a business tour. He rode in a car bearing a number issued to him under Sec. 3 of the Motor Vehicles Act 1924. That section reads as follows:—

"Any manufacturer or dealer in motor-vehicles may use "any motor-vehicle on any road or street notwithstanding "that such motor-vehicle may not have been registered un- "der this Act, and notwithstanding that an annual license "to use the same may not have been issued, if—

" (a) The motor-vehicle is held only for the purposes of " sale; and

" (b) At all times while the motor-vehicle is in use there " is attached to it, in the prescribed manner, a regis- " tration plate, or a set of registration plates, issued " or authorised under this section and in respect of " which the annual fee has been paid."

He was charged and convicted of the offence of using an unregistered motor-car. He appealed from the conviction.

Grant for the appellant.
Meredith for the respondent.

HERDMAN, J., dismissed the appeal. He said, in discussing the meaning of the words "only for the purpose of sale":—

What does the phrase "for the purposes of sale only" mean? Does it mean that to gain exemption a car must be held in stock for sale and that it must be rigidly held there for that and for no other purpose, or is it sufficient to prove that it is held for the purposes of selling other cars? In other words, if it be proved that a man whose business it is to sell motor-cars holds a car as part of his equipment for selling cars, will that exempt him? Do the words "only for the purposes of sale" mean "only for the purpose of selling other cars?" If the latter construction of the phrase be sound, then it may be that a dealer could use one of his cars to go from his home to his place of business and back again. He may use it on business about the city, travelling from one warehouse to another. His travellers may use it all over the countryside. It may be employed to demonstrate the worth of other cars held for sale or it may be employed to carry members of his business staff to and from business. It might be used for any purpose related to the dealer's business of selling cars. I don't think that it was ever intended that such a wide interpretation should be given to the phrase. To so construe the section would be to let loose on the road and streets a fleet of cars which escaped the licensing and registration provisions contained in section 3 of the statute, a consequence which could never have been intended when section 18 was enacted.

I have one final observation to make. The section speaks of "motor-vehicles" held by a dealer or manufacturer. The plural number is used indicating, I think, that the Legislature had in mind some factory or store in which a number of vehicles were held for sale and for no other purpose.

Looking at the facts and circumstances proved in the case, I think that the judgment of the Stipendiary Magistrate was correct. The appeal will therefore be dismissed with costs £10 10s., together with witnesses' expenses and disbursements.

Solicitor for appellont: **R. M. Grant**, Auckland.
Solicitors for respondent: **Meredith & Patterson**, Auckland.

Stringer, J. September 9, 14, 1926.
Hamilton.

RAYMOND v. MAGNER.

Mortgage—Co-mortgagees—Action by one mortgagee to recover interest—Refusal of others to join—Duty of co-mortgagees—One out of jurisdiction—Rs. 90 and 93 as to joinder and dispensing with service.

The facts involved were as follows:—

By Memorandum of Mortgage dated the 16th day of August, 1923, the two first named Defendants (who may be designated as the Mortgagor Defendants) mortgaged to the remaining Defendants, the Plaintiff and one Ambrose Magner (hereinafter referred to as the Co-mortgagees) certain property for the purpose of securing the repayment to the Co-mortgagees of the sum of £1942 15s. 3d., with interest thereon from the first day of August, 1923, at the rate of 7½ per cent., reducible on punctual payment to 6½ per cent. The Memorandum contains a covenant by the Mortgagor Defendants with the Co-mortgagees to pay interest at the rate aforesaid on the first days of February and August in every year. At the commencement of the action it was admitted that there was then due, owing and payable to the Co-mortgagees the sum of £364 5s. in respect of interest under the Mortgage. The Plaintiff, being desirous of recovering her share of the said interest, requested the Defendants (other than the Mortgagor Defendants) to join her in bringing an action to recover the interest due, offering them as indemnity against the Costs of the action, and as such Defendants refused or failed to comply, the Plaintiff thereupon commenced the present action in her own name, joining such Defendants as Defendants in the action.

Leicester for plaintiff.
Watts for defendants.

STRINGER, J., gave judgment for the plaintiff. He said:

That the course adopted by the Plaintiff was correct is clear from the case of **Cullen v. Knowles, 1898 2 Q.B. 380.** This is based upon the equitable principle as stated by Warrington, J., in **Ellis v. Kerr, 1910 1 Ch. 529,** that "if a "covenant to pay a sum of money is made with two jointly, "each of them is trustee for the two and for the other, and "if one as such trustee refused to join in the action which "in all honesty he is bound to bring for the benefit of his "co-covenantee, then his co-covenantee is entitled to make "him a party to the action in order that he may be bound, "and to recover the moneys secured by the covenant."

It was, however, objected by Counsel for the Mortgagor Defendants that all the co-mortgagees must be brought before the Court, and that as no steps had been taken to join one of the co-mortgagees, viz., David Ambrose Magner, who was, at the present time, admitted to be outside the jurisdiction of the Court, the present proceedings could not be maintained. I think this objection is probably correct, but, as I intimated at the trial, it being purely formal, devoid of merit, and obviously for the purpose merely of delay, I should make any amendment necessary to overcome such objection. In my opinion the proper course to adopt, in the circumstances, is to join David Ambrose Magner as a Defendant, which I accordingly do under Rule 90 of the Code.

I further order under Rule 93 that it shall not be necessary to serve on such added Defendant either a copy of the order joining him as a party or of the statement of claim in the action.

All the Co-mortgagees being thus before the Court and there being no defence to the action, I follow the course adopted in the case of **Cullen v. Knowles** and give Judgment in favour of all the Co-mortgagees against the Defendant Mortgagors for the amount claimed with costs as per scale, witnesses' expenses and disbursements.

Solicitors for plaintiff: **Leicester & Jowett**, Wellington.
Solicitors for defendants: **Watts & Armstrong**, Hamilton.

Stringer, J. September 8, 24, 1926.
Hamilton.

COOK v. G. L. INNES & CO., LTD.

Negligence—Master when responsible for servant's negligence.

Shortly the facts were that plaintiff was driven on a lorry to work for a day at Te Awamutu racecourse by one Davis, defendant's servant. He was returning in the same manner. En route they stopped for repairs, during which time Davis became intoxicated. On resuming, due to the negligence of Davis, the lorry has collision and plaintiff is severely injured. He sues defendant.

Gray for plaintiff.
Northcroft for defendant.

STRINGER, J., gave judgment for the defendant. He remarked:—

There was no evidence that Davis had any authority from the Defendant to invite the Plaintiff or other persons to ride upon the lorry, or that the Defendant consented to their so riding, or even know of their doing so.

The first question that arises is whether, in the circumstances above stated, the Defendant is liable for the negligence of its servant Davis.

The law is well settled that a master is not responsible for a wrongful or negligent act done by his servant unless it is done within the scope, and in the course, of his employment. "The limit of the rule (expressed in the widest "form by the phrase 'the course of the employment' or 'the "sphere of the employment') is when the servant so acts "as to be in effect a stranger in relation to his employer "with respect to the act he has committed so that the act "is in law the unauthorised act of a stranger." **Bugge v. Brown, 26 C.L.R. 118.** Applying these principles to the present case it seems to me clear that in inviting or permitting the Plaintiff to ride upon the lorry, Davis was not acting within the scope of his employment, or in furtherance of the Defendant's interests, and that his action in so doing was, in relation to the Defendant, that of a stranger. That being so there was no duty owing by the Defendant to the Plaintiff that Davis should, as regards the Plaintiff, exercise reasonable care and skill in the management and driving of the lorry on the occasion in question.

The present case appears to me to be indistinguishable from that of **Houghton v. Pilkington (1912), 3 K.B. 308.**

The learned Judge then distinguished Harris v. Perry, 1903 2 K.B. 219, in which case the defendant's superintendent had power to grant permission the acceptance of which caused damage and the giving of which was negligent.

In the present case the Defendant, according to the decision in **Houghton v. Pilkington** already cited, owed no duty to the Plaintiff, who was riding on the lorry by the invitation or permission of Davis, who, in that respect, was acting beyond the scope of his employment, and the Defendant therefore is not responsible for the injuries sustained by the Plaintiff by reason of his being thrown from the lorry by the negligent driving of Davis.

This, of course, is sufficient to dispose of the Plaintiff's case, but as my decision on the main point may be reviewed and found to be erroneous, and in order possibly to avoid a new trial, I think it right to state my feelings as regards the other questions raised in the action.

It was contended that the Plaintiff, with full knowledge of Davis being drunk, voluntarily took the risk of any accident which might be caused by reason of such drunkenness, and therefore that the maxim Volenti not fit injuria applied. It is now settled law that the fact that a person knows of a danger, and acquiesces in running the risk of an accident, does not, of itself, deprive such person of his right of action, but that such knowledge and acquiescence are merely evidence on the question whether or not he agreed to take such risks. **Smith v. Baker (1891), A.C. 325.** In the present case the uncontradicted evidence of the Plaintiff at the trial—although somewhat at variance with previous evidence which was given by him shortly after the accident, and while he was still suffering from the extremely serious injuries he had sustained, and which may therefore have been made without due consideration—satisfies me that although he knew that Davis was under the influence of liquor, he cannot be said to have voluntarily incurred, or to have agreed to accept, the risk of an accident.

It was further contended that the Plaintiff had been guilty of contributory negligence in riding on a lorry driven by a man who was drunk, especially as he had no very effective means of holding on in the event of the lurching of the lorry. I think this contention untenable, for two reasons: First, I do not think that the facts established any negligence on the part of the Plaintiff, and second, if any such negligence could be implied, it in no way contributed to the accident, which was caused solely by the negligent and improper driving of the lorry by Davis.

Solicitors for plaintiff: **McDiarmid, Mears & Gray,** Hamilton.
Solicitors for defendant: **Hopkins, Smith & Seymour,** Hamilton.

Sim, J. August 23-31, 1926.
Invercargill.

MAYOR ET AL OF SOUTH INVERCARGILL v. MAYOR ET AL OF INVERCARGILL.

Rates—Rating Act 1925, Sec. 2—Municipal Corporations Act 1920—Occupier—Owner.

The defendant is the registered proprietor under the Land Transfer Act of an estate in fee simple in a parcel of land which is held in trust as a public reserve for recreation. This parcel of land is situated in the Borough of South Invercargill, and the plaintiff claims to recover rates in respect thereof.

Tait for plaintiff.
Longuet for defendant.

SIM, J., said, inter alia:—
In my opinion Mr. Longuet's argument is disposed of completely by Mr. Justice Richmond's judgment in the case of **Kiwitea Highway Board v. Wanganui Harbour Board,** N.Z.L.R. 3 S.C., 278. That case was decided on the construction of the Rating Act, 1882, which defined the terms "owner" and "occupier" in the same way as does the Act of 1925. The decision is directly in point, therefore, in the present case. It was there held that the definition of "owner" of rateable property as the person entitled for the time being to receive the rack-rent thereof, meant the person who would be so entitled if the land were let at a rack-rent. "There can be no doubt," said Mr. Justice Richmond, "that the terms of the definition of owner in section 2 were meant to meet the case of successive estates; and the definition ought to have been expressly restricted in operation to that case, so as to make it indisputably clear that the term 'owner' is to have its proper force in other cases. Though this has not been done, I think that the Act must be construed in the same way as if it had been done. As unoccupied land is rateable, it is plain that the existence or non-existence of a rental is immaterial. It can never have been intended that the sole owner of land should escape rating, on the ground that the land is not let, or even cannot be let." This has always been accepted as a correct statement of the law on the subject, and disposes of the point in dispute. I think, therefore, that the defendant is the owner of the land within the terms of the definition, and, the land being unoccupied, the defendant is consequently the occupier thereof for the purposes of the Act.

Solicitors for plaintiff: **W. G. & J. Tait,** Invercargill.
Solicitors for defendant: **Longuet & Robertson,** Invercargill.

Stringer, J. July 22; August 6, 1926.
Auckland.

FINLAY v. PARKIN.

Will—Ambiguity—Special sums to legatees—Annuity to widow—Surplus of estate on widow's death—How distributable—Whether partial intestacy—Moulding language of will to give effect to testator's intention.

This was an originating summons to clear up certain difficuties in the will of William Holland Smith, deceased. The following are the relevant facts:—
By his will bearing date the 26th day of August, 1918, the Testator, William Holland Smith, after making certain specific gifts to his wife, devised and bequeathed all the residue of his real and personal estate to a Trustee upon trust to sell and convert the same and to invest the proceeds in authorised investments and to pay the income arising therefrom to his wife for life. The Will then proceeds as follows:—

"And after her death to divide the Corpus as directed "in the following manner. I desire that Clara Smith of "No. 2 Citadel Terrace, L Hoe, Plymouth, England, shall "receive £100; Herbert Smith of Durham House, 61 Borth- "wick Road, Leystone, London, £100; Harry Augusta Smith, "Tinsmith, Melbourne, £100; Mrs. Fanny Hamilton, 32 El- "gin Street, Grey Lynn, Auckland, £100. To my wife's "niece Nellie Parkin, daughter of Mrs. Herbert, Auckland, "£50. I give to my friend James Finlay, Jeweller, Thames, "£50." Then follows a power enabling the Trustee, in his discretion, in the event of the income of the corpus being insufficient for the maintenance and support of his wife, "to apply so much of the corpus of my estate as may be "necessary for the maintenance and support of my said "wife notwithstanding any directions herein contained."

The Testator died on the 1st day of November, 1921, and his widow died on the 20th day of July, 1924, leaving a will by which she bequeathed all her property to the Defendant Nellie Parkin absolutely.

It appears that after providing for payment of the legacies beforementioned there is a surplus in the hands of the Trustee amounting to £248 13s. 7d.

The questions asked the Court were: Are the beforementioned legatees "entitled to the sum of £248 13s. 7d. in "the proportion in which the sum specified as the legacy to "each of them bears to the aggregate sum so bequeathed?" or are the bequests to the said Legatees specific bequests entitling them only to the actual sum expressly and respectively bequeathed to them.

Finlay for plaintiff.
Northcroft for defendant.
McVeagh for beneficiaries.

STRINGER, J., said:

I was at first inclined to think that as the Testator had specified the amounts which he wished the respective legatees to receive, they were entitled to no more than such amounts, and that the surplus after payment of such amounts was undisposed of, and therefore that there was, to that extent, an intestacy.

The argument of Mr. McVeagh, on behalf of the legatees, has, however, convinced me that my first impression was erroneous, and that there is no intestacy. A careful consideration of the Will discloses, I think, a clear intention on the part of the Testator to dispose of the whole of his estate by his will. In the first place he speaks of dividing the "corpus" of his estate in the manner directed by his will, language which is only compatible with an intention to dispose of the whole of his estate. In the next place it seems unreasonable to suppose that the Testator, having special objects of his bounty in mind, should nevertheless have left a portion, and possibly the greater portion, of his estate as it stood on the death of his wife to go as the law should direct, which might mean to persons who not only had no claim upon his bounty, but of whose very existence he might be ignorant. As was said by the Master of the Rolls in **Booth v. Booth**, 4 Ves. at page 407: "Every in- "tendment is to be made against holding a man to be in- "testate who sits down to dispose of the residue of his pro- "perty."

It being, therefore, as I hold it is, a fair and reasonable construction of the will that the Testator intended to dispose of the whole of his estate and not to die partially intestate, I am entitled, as laid down in **Towns v. Wentworth**, 11 Moore P.C. at page 543, "to mould the language of the "Testator so as to carry into effect, so far as possible, the "intention which I am of opinion that the Testator has, on "the whole, sufficiently declared. The intention when legi- "timately established is competent not only to fix the sense "of **ambiguous** words, but to control the sense of even **clear** "words, and to supply the place of **express** words in cases "of difficulty or ambiguity." **Hawkins on Wills, 3rd Ed., p. 6.**

Applying these principles, I think that in the provision of the will reading as follows: "And after her death to "divide the corpus as directed in the following manner," the word "manner" should be read as synonymous with method or basis, and the specified amounts should be regarded as indicating the proportions in which the estate was to be divided between the legatees. In other words, that the Testator wished the corpus to be divided into five equal shares, and that each of the four first-mentioned legatees should receive one of such shares and that each of the two last-named legatees should receive one-half of a share. In this view, which I think gives effect to the intention of the Testator as manifested by his will, the surplus should be applied in proportionately augmenting the specified amounts of the various legacies, thus disposing of the whole estate and so avoiding a partial intestacy. The result is that the first branch of the question submitted is answered in the affirmative, and the second branch of the question is answered in the negative. In view of this finding it becomes unnecessary to answer the other question submitted.

The costs of all parties, which I fix at £10 10s. and disbursements for each of them, to be paid out of the estate.

Solicitors for plaintiff and beneficiaries in England: **G. P. Finlay**, Auckland.
Solicitors for Parkin: **Buchanan & Purnell**, Thames.

SUBORDINATE LEGISLATION

There has been a tendency manifested of late to make use of the subordinate legislation of Regulations where the proper method was by debate in open Parliament. The exercise of this power, or its misuse was recently before the public when the Government in avowed exercise of rights acquired by virtue of a Statute, called the Board of Trade Act, legislated for the control of public motor passenger transport. The regulations affected a large number of people and the amount of invested money was most considerable. A direct effect too, was the attempt to protect other means of passenger transport both of local bodies and the Government itself. The political wisdom of the attempt we do not concern ourselves with.

We are, however, interested when the law of our constitution is extended down byways along which it had never been led before, and where apparently there was no legal justification for going.

In France, the President issues his decrets with an ease, almost *sang froid*, that would never be tolerated in a British community. In France, however, the statutes are frequently drawn incomplete with the intention that the President shall complete the legislation with his decrets; thus lifting regulations almost out of the class of subordinate legislation. It is clear that we shall always and should jealously guard against such a dangerous method of legislating.

We Englishmen have no profound faith in the inherent wisdom of our officials. We feel no sense of security in their discretion. No matter what particular party be in power we cannot tolerate that party legislating on matters of serious controversy except through the constitutional way of open Parliament.

That a party should arrogate to itself such a method of making the laws must promptly bring on it public condemnation. Mr. Lowell in his book of "Governments and Parties in Continental Europe," says: "Every Anglo Saxon feels that a power so indefinite" (that of making regulations) "is in its nature arbitrary, and ought not to be extended any further than is absolutely necessary."

The restraints which are to be imposed on the actions of the British subject by the State should be imposed by his fellowmen openly after debate. The valuable assistance given to Parliament by referring statutes to a committee to hear evidence from outside is one of the things that gives confidence. The making of restraints secretly on the advice of officials is always a matter disturbing in our minds.

When the Board of Trade Act was passed it was never contemplated that the regulations which by that Act the Government was empowered to make would ever cover the manner of controlling a vast and unthought of thing as motor passenger transport. When, too, Regulations apparently of little relevance to the Act from which they spring appear when Parliament is not sitting, and when they can only be tackled through the public Press the public wonders whether it is really living in as democratic a country as the Government professes to be.

Sir Courtenay Ilbert in his " Legislative Methods and Forms," which he published at the beginning of this century says that the question whether a matter shall be within the four walls of an Act or a regulation is a matter of principle. The difficulty however is in formulating a satisfactory principle. The Act of Edward VI in repealing Henry VIII's famous Statute of Proclamations by which that audacious Sovereign had attempted to invest himself with the power of legislating without reference to Parliament was followed by a decision of the judges of that time which established the doctrine that Royal Proclamations have in no sense the force of law. They merely called attention to it.

Gradually the need of regulations, strictly for the mode of carrying out the Acts of Parliament became apparent. Sir Courtenay Ilbert tells us that an English statute could once have been said to have been drawn with such detail that every conceivable case that could arise was provided for. He doubted, when he wrote his book on " Legislative Methods and Forms," whether that could be said then. The tendency he noticed was towards placing in the body of an Act merely a few broad general rules or statements of principles and regulating details either to schedules or to statutory rules. To place these details in the Schedule to an Act is safe enough. The public in general and the legislators in particular have reasonable notice of them and can act accordingly. It is by no means so with the regulations. While he admits that it is a matter of principle, Sir Courtenay Ilbert is somewhat indefinite in his enunciation of the principle that should be applied in the making of regulations. In discussing the matter he said : " But, unless the temper of Parliament should materially change, attempts to give delegated powers in unduly wide terms, or to extend them beyond matters of minor importance, or to strain their exercise, would produce a reaction which would have a mischievous and embarrassing effect on the form of parliamentary legislation. If, however, the delegation of legislative powers is kept within due limits and accompanied by due safeguards, it facilitates both discussion and administration."

In modern parliamentary practice regulations play a large part. It ought not to be difficult then to find the proper limits for the work of regulations. They should be contemplated when the statute is under discussion. Leaving a general power to make regulations is analagous to leaving a signed open cheque about. It seems, as indeed the word indicates, that even to this day the proper scope of the Regulations is to regulate the operations of the statute affected. They should be the motive power revolving the machinery of the law. That they should not be new law or create new machinery itself to be revolved, is clear. Their role of subordination to the statute is the warning post. When they assume the role of new substantive law not clearly mere machinery of the statute then is their position being misused and the public misled.

C. A. L. T.

LONDON LETTER.

(*7.7.1926. Concluded.*)

At this stage in my letter my attention has been called (I called it myself) to a lengthy article in the current number of the " Law Journal " (July 3) upon this case, to which I recommend your attention. Indeed, so apt are the comments of the Editor (by whose wide knowledge of legal affairs and historical and analytical gifts I am ever more and more impressed) upon all the topics which I had noted for this treatise, that I can best leave you to study them, so far as they interest you, in that journal :—the quarrel between Mr. Upjohn K.C. and the Bar Council ; the retirement from the House of Commons of Sir Patrick Hastings, K.C. and its bearing upon the political situation of the Labour Party, in its present quandaries and its future enterprises ; the letter to the " Times " of Sir Arthur Channel, that " fine, crusted " Judge whom, by the way, I saw recently at Falmouth in apparently good health though obviously of advancing years, and who takes up the cudgels to assist the Trade Unionists against their Trade Unions ; the activities of the Law Society, as to the new Real Property Law and the demand that Solicitors of Government Departments should be, in fact, solicitors ; and the cases, noted in preliminary, of **Cohen v. Roche** (McCardie J.) and **Republica de Guatemala v. Nunez** (Greer J.) of which the first deals with antique furniture sold at auction and affected by " knock out " measures, as well as with the essential elements and constitution of a good memorandum under Section 4 of the Sale of Goods Act, 1893, and the second, would hardly be suitable for comment here, even was it still matter of current gossip.

There are three other House of Lords judgments to be noted, and we may remark that out of the four to which I refer three resulted in the allowing of appeals. Are the House of Lords and the Judicial Committee of the Privy Council getting a little frisky, a little overlively and active in their upsetting of Courts of Appeal ? Our own appellate tribunals no doubt deserve correction ; is this true of them all, throughout the Empire ? Be that as it may, the cases are :—**Railway Clearing House v. Druce,** which restores the judgment of Fraser J. at first instance, upon a question as to whether, in calculating a promised benefit to defendants of men serving with the colours to be measured by " the salary or standard rate of pay when in the Clearing House Service," special war bonus was to be taken into account. Lords Dunedin, Sumner, Carson, Phillimore and Blanesburgh felt themselves free of **Sutton's** case and decided in favour of the Clearing House. The same tribunal restored the judgment of the President in **Admiralty Commissioners v. Owners of S.S. Chekiang,** the case in which H.M.S. Cairo was run into and damaged, the Admiralty seized the opportunity of the necessary repairs to effect various other refits and overhauls, and the question fell to be decided as to the measure of the admitted liability of the owners of the **Chekiang.** The judgment, at first instance, is reported in L.R. (1925) p. 80. The one case in which the Court of Appeal did not meet with a reverse was **Cunard Steamship Company v. Buerger,** previously mentioned in these letters, I think, and dealing with the appellants' attempt to absolve themselves from liability for a delay in shipment, by means of a clause in the Bill of Lading requiring the declaration of goods over a certain value and by means of respondents' omission to comply therewith. Lord Sumner commented upon the necessity of confining to its appropriate circumstances the

scope of a clause "framed so arbitrarily in the company's favour," though the decision of the Court of Appeal (reversing Rowlatt, J.) and of the House of Lords turned mainly upon another point.

I do not know whether you were interested, at first instance, or will be interested, on appeal, in the result of our Poor Law case, **Pontypridd Union Guardians v. Drew**? The Divisional Court, Salter and Acton JJ., had felt themselves bound by authority, notably **Birkenhead Guardians v. Brook** (95 L.T. 359) to hold that Guardians might recover from an able-bodied pauper the amount of ordinary poor relief granted by them to him. The Court of Appeal allowed an appeal, discounted the authority and held that neither by statute nor by principles of common law could they so recover. The Court of Appeal has further affirmed Horridge J., in his decision that an agreed reference to Tattersalls' of the question whether a bet was to be regarded as being made at starting price (100 to 1) or at a limit maintaining between the betters (33 to 1) did not involve such an agreement between the parties as to provide a fresh consideration and to oust the effect of the Gaming Act: **Hyde v. Tyler.** And the same Court upheld the Divisional Court again, in refusing aid to the Woolwich Corporation who sought, by *certiorari*, to eliminate a district auditor's certificate of disallowance and surcharge in respect of excess wages paid by them in disregard of the scale under the joint industrial scheme. The decisions of the other Court of Appeal in **Watson v. Bowles** (Revenue paper: question as to applicability of Schedule D. or Schedule E.) and **Constantinesco v. The King** (Petition of Right in revenue matter; question as to whether income tax should be deducted from sums awarded by Royal Commission on Awards to Inventors) are sufficiently dealt with, here, by being named.

There was rather a pretty case before Romer J. in the Chancery Division last week, **In re Quinton Dick deceased,** arising from the circumstances that a legatee was to be deprived of his legacy if he "refused or neglected" within three months after the decree of probate to adopt a certain name and that the three months had expired before the legatee, in question, heard of his good luck or of the requirements imposed, owing to absence in the wilds abroad. Romer J. managed to bring the word "neglect" under the same conditions as "refuse" and to ordain that the testator only intended forfeiture in the event of a legatee's knowing of the requirements and, notwithstanding such knowledge, omitting to comply within the three months. In **In re Shaer: ex parte Silverman,** the Court approved the principle of **Hawkins and Another v. Duche** (1921) 3 K.B. 226, that relief under section 8 subsection 1 of the Registration of Business Names Act 1916 may be granted by the Court after action is begun as well as before writ issued, and it extended this principle by declaring that relief might be given even after judgment signed. In **Lomax v. Sutton Heath Colliery Company Ltd.** the Court had to decide practically the same question, under the Workmen's Compensation Act, 1906 and as to loss of a second eye owing to supervening cause not connected with the accident causing loss of the first eye, as was decided in **Hargreave v. Haughead Coal Co., Ltd.,** and in its decision it took the same line and approved the earlier case: (see L.R. (1912) A.C. 319). And there ends my fairly heavy list of current decisions, for the moment, though there have been further decisions, as I write this letter actually, which should properly be added but, in concession to human weaknesses (mine, or your own, as you prefer) are held over till next letter.

It is said that Warrington L.J. is on the verge of going to the Lords and that Russell J., of our Chancery Division, is due to be promoted into his place in the Court of Appeal. I have this from my "devil," but "devils" will, as you know, say anything, except (in this instance) who the successor will, or would, be to Russell J. in the Chancery Division.

Yours ever,

INNER TEMPLAR.

INTERNATIONAL PRISONS CONGRESS.

(*Continued*)

The second important feature in the New Zealand Prison System is in the constitution and powers of our Prisons Board.

This Board which is a carefully selected expert body, largely controls the destiny of prisoners. It operates for the whole Dominion and by recent amendments of the Act it has jurisdiction to deal with the case, not only of habitual criminals and prisoners undergoing reformative detention, but also of ordinary prisoners sentenced te terms of hard labour.

In many countries, no similar Board or Committee exists. In others, the Advisory Board or Committee is usually a local one in respect of each prison, and consists of a body of voluntary social workers whom the administration consults. Such bodies are liable to suffer from the disadvantage that they are not experts in prison work and being separate bodies for each institution, uniformity in their outlook, their methods and their recommendations is not likely to obtain.

It is interesting in this connection to note that the Lord Chancellor of England, in his address while dealing with the question said that the authority which was to grant release should be carefully defined. He inclined to the view that the best authority would be a small body of experienced persons appointed for the whole country and giving their whole time to the work, for only from such a body could uniformity and skilled administration be expected.

The operations of the New Zealand Prisons Board coupled with the prison regime represent a real attempt to minimise the human wastage inevitable in any prisons systems, to sort out the useful from the useless, to train and make efficient in the struggle of life those who are fit to be given their liberty and to segregate and hold in safe keeping those whom it is unsafe to set at large. In our smll country where the number of prisoners is small, we are handicapped, by being unable to provide the varied classes of specialised institutions and the staff of specialists possible in a country where the number of prisoners is great. But, subject to this observation, from what I could see and learn of the prisons in America, England, and Scotland, and could learn of the prisons in other countries, I think that New Zealand Institutions compare with them, on the whole, not unfavourably.

Classification of Prisoners.

Some further extension is I think desirable, if it is practicable, in the classification of our prisoners. Habitual criminals and long sentence prisoners are at time working side by side with first offenders and prisoners undergoing reformative detention.

Institution for Female Habitual Offenders.

Provision should be made for an Institution where female habitual offenders, of the type before referred to, could be detained for lengthy periods or under indeterminate sentences. The Prisons Board, in drawing attention to this question, considered that the most suitable type of place would be a small farm or market garden where the women could be employed in light work in the open air.

Habitual Criminals.

"My mind," said the Home Secretary in his address to the Congress, "is definitely moving in the direction, while making prison difficult to enter, of making it in the case of confirmed criminals, still more difficult to leave. It is not right to let such men loose on society or to place the householder at their mercy."

The total number of criminals declared to be Habitual Criminals in New Zealand since the passing of the Act (I quote from the report of 31st July, 1924) is 371, of these 313 have been released; 158, or slightly more than half of those released have again offended and been re-committed to prison; 34 were still on probation, and 45 have not again offended. Of the remainder, 24 have absconded and not been traced, and 40 have left the Dominion. There is no knowledge as to how these two classes have fared. A few others have died or been trans-

ferred to institutions. Of those therefore who have been free and whose movements are known, 158 have been re-committed to prison, and 79 have not as yet again offended. It must be remembered that this 79 includes many who have been recently released (34 of them were still on probation) so that their rehabitation cannot so soon be said to have been affirmatively established. Some of them may swell the numbers of those who again offend.

These figures seem to me to show that the large majority of habitual criminals are unfit to be at liberty.

"With the best system in the world," says a writer, in discussing recidivists of this type," "successes are not likely to amount to more than ten to fifteen per cent."

The conditions under which a habitual criminal is released, might be made to include one requiring that he obtain a definite and satisfactory offer of employment from a proposed employer and obtain also a surety or undertaking from some responsible person to look after and superintend the prisoner for a reasonable period from the date of this release.

Indeterminate Sentences.

New Zealand is one of the few countries in the world in which an indeterminate sentence, **without limit to its duration** can be imposed. This is done by a declaration that an offender is an habitual criminal or an habitual offender.

We have a class of sentence which in a measure is an indeterminate sentence but with a maximum limit, namely a sentence or reformative detention.

Many countries have no provision at all for indeterminate sentences. In England and in most of the States of America the indeterminate sentence is subject to statutory maximum and minimum limits. But the value and importance of the indeterminate sentence is being widely recognised. It enables the judicial and prison authorities to keep in custody those criminals who are unfit to be at large. It imparts to the criminal an incentive to apply himself to habits of industry and zeal, of loyalty and co-operation. By that road alone he can regain his freedom. His future is to that extent in his own hands and, if the effort is in him, the indeterminate sentence is the one most calculated to stimulate such effort.

I think that the principle of the indeterminate sentence should be extended so as to allow Judges in certain cases to award indeterminate sentences even where the offender has no previous conviction. A recommendation to this effect in the case of sexual offenders appears overleaf.

Sexual Offenders.

Sexual offences are increasing in this country. The numbers committed to prison for the last four years are: 48 in 1920, 67 in 1921, 73 in 1922, and 81 in 1923; 18% of all our male prisoners are sexual offenders.

Experience seems to show that there is a type of sexual offender who, no matter how severe his punishment may be, is liable to again offend.

Such a man is a menace to the community and should not be given his liberty.

I think that the Crimes Act should be amended so as to enable a Judge, on conviction of such a man, if he is of the opinion that the offender is likely to repeat such an offence, to pass an indeterminate sentence without fixing any maximum limit.

Criminal Lunatics.

I think that provision should be made for the custody in one institution of criminal lunatics. These are at present kept in the various mental hospitals.

It is, I think, not in the interest of ordinary patients in Mental Hospitals that Criminal Lunatics should be housed with them.

Mental Defectives.

Many cases occur every year in which it is desirable that an alleged mental defective, sometimes one who is on remand in custody, concerning whom an application for a reception order has been made, should be placed under skilled medical observation for a reasonable period.

The relatively short examination which it is possible for the Magistrate and the two medical advisers to make is sometimes insufficient to enable an accurate and confident opinion to be formed.

At present our statute, while enabling a Magistrate to adjourn the matter appears to limit the period of such adjournment to a maximum of seven days. This period is often quite inadequate.

I think that definite power should be given, in cases where the Magistrate and one or both of the medical advisers think such a course desirable, to adjourn the matter and place the patient under observation for a period not exceeding say two months.

There are adequate safeguards in the Act to prevent the power being abused.

Borstal Institutions.

(1.) The view was expressed by the Lord Chancellor that in order that the Borstal Institutions might have a fair chance of success a sentence of one year was of little value, and that a sentence for the full term (in England) of three years reducible by the offender's own exertions afforded the best prospect of the conversion of a budding criminal into a useful member of society.

(2.) In some of the Borstal Institutions in America the working day is divided into two parts, one half being devoted to work and the other half to education.

It is considered that an inmate who has worked for say eight hours during the day is not in the best condition to benefit by studies or education which may be given to him in the evening.

The principle might be applicable in New Zealand to some of the younger inmates whose education has been neglected.

I mention the matter here as one on which the Department might obtain the view of those qualified to express a definite opinion thereon.

Industrial Schools Act.

By Section 25 of the Industrial Schools Act, 1908, a young person between the age of 16 and 19 may be sent to an Industrial School, but the section can only be invoked **after a term of imprisonment has been imposed.**

I think that the Act should be amended so as to enable the Court to send such a person to an Industrial School without the necessity of first imposing a sentence of imprisonment.

Children's Courts.

I note that by the Child Welfare Act passed in New Zealand during the past session, power is given to the Governor-General to establish special tribunals to act as Children's Courts.

In London the Children's Court consists of a Magistrate and two lay members, one of whom must be a woman. The cases are heard in a building away from the ordinary Police Court.

Under the Children's Act, 1908 (English) Section 99, power is given to the Court to order that the fine, damages, or costs which it thinks should be imposed in any charge against a young person shall be paid by the parent or guardian of the young person unless the Court is satisfied that he has not conduced to the commission of the offence by neglecting to exercise due care of the young person, and the Court may order the parent or guardian to give security for the good behaviour of the young person.

Our own statute limits the order that may be made to the costs or damages incurred by or through the offence.

Birching of Young Offenders.

Occasionally the Court considers that a refractory boy should upon proof of the offence with which he is charged receive some strokes with a birch.

In such cases, I think the Court should have power to order this without the necessity of entering a conviction in the crim inal records.

Identification Parades.

Provision recently brought into force, exists in England, whereby a person who is in custody and is about to put up for identification in what is known as an identification parade, is advised beforehand that, if he chooses, he may have his solicitor or friend present at the parade.

This is a beneficial provision, a safeguard alike for the accused and for the Police, and it could I think, with advantage, be introduced into our Police practice.

After-Care Organisations.

The New Zealand Prisons Board has drawn attention to the need of after-care organisations into whose superintendence prisoners, on their discharge or release on license, would be placed. Prisoners on being released from gaol are liable to experience difficulty in obtaining employment, and unless they are given some encouragement and assistance they may be impelled by circumstances to give up the struggle and revert to criminal or dishonest acts.

In England and in some European countries all prisoners released on license are placed in the care of such societies, and not of probation officers. Such societies are as a rule voluntary, but are subsidised by Government and are subject to Government control.

In Switzerland and in certain other European countries discharged prisoner camps are maintained by the Prison authorities. In these a prisoner, if he is unable to obtain work elsewhere, may live and work. He is given his keep and a small amount by way of wages.

CONGRESS RESOLUTIONS.

Dealing now with the individual motions passed by the Congress which seem to call for comment and are not already covered by the foregoing remarks:—

The granting to the prosecuting authority of a discretion whether or not to proceed.

I am opposed to the granting of such a power. It is, I think, unnecessary in practice and wrong in principle. The prosecuting authority at present has to decide, in his discretion, whether the facts which can be proved are sufficient to justify a charge being laid—that is, whether there is a reasonable chance of establishing the charge. To say that he should have also the power of suppressing a prosecution, though the facts show that an offence has been committed, is to introduce an element of danger to the pure and impartial administration of the criminal law. If an offence has been committed it should be left I think, to the judicial tribunal to decide, in open Court, whether any punishment or what punishment is to be imposed.

Scientific study of criminals.

(1.) The Prisons Board in New Zealand has on more than one occasion called attention to this question. In its report of the 31st July, 1924, the Board, in referring to sexual cases, says: "Provision should be made for the Board to be advised by a skilled psychiatrist with special training in modern psychology, or by some general medical practitioner qualified to examine the offenders scientifically and to recommend treatment in suitable cases." In the report also of the Prisons Department of the 31st July, 1924, reference is made to this matter. "There is," it is there stated, "ample scope for the services of trained psychologists and psychiatrists in connection with the mental hospitals, the prisons, and the Department entrusted with the care of feeble-minded and deficient children."

I do not think that, as suggested in the resolution of the Congress, a staff of specialists to examine and study all prisoners psychologically is necessary nor practicable. There are, however, special cases in which the services of a skilled psychiatrist seem to be required. His services would be available to the Prisons Board, to Judges, in cases where, prior to sentence, they desire special inquiry to be made into the mentality of a prisoner, and to the Prisons Department in examining and treating prisoners of doubtful or subnormal mentality.

(2.) The resolution recommends that accused persons as well as convicted prisoners should be physically and mentally examined by specially qualified medical practitioners.

In our system of criminal law I do not think that such an examination is desirable in the case of accused persons who have not yet stood their trial, unless their mentality may be in question.

Wages for prisoners.

(1.) The systems in force in the various countries of the world relating to the payment of wages to prisoners vary considerably, from those wherein a prisoner can earn the full wages that he would be able to earn if he were a free man to those wherein he earns nothing. In those countries wherein he can earn a substantial amount he is debited with a reasonable sum for the cost of his keep, and some portion of the money is applied for the maintenance of his dependants (if any), and in some cases for payment of his civil liabilities.

The majority of countries appear to pay to prisoners by way of wages only a nominal amount.

In New Zealand a prisoner may earn for his own use a sum of 4s. per week. If he has dependants he may also earn for the use of his dependants a sum up to 22s. per week for them. My opinion is that under present conditions the amounts should not be increased.

(2.) The resolution recommends that on discharge the money earned by a prisoner should not be handed to him to deal with as he chooses.

In our country I think that the amount might with advantage be paid to the Probation Officer, to be expended for the benefit of the prisoner or his dependants.

International Criminals.

Our Police already have power to communicate direct with the Police authorities of Australia and Fiji.

This appears at present to be adequate.

Film Censorship.

There is a widely held view that the display in the Cinemas of unsuitable films is responsible for many crimes and offences amongst Juveniles.

I think that the censorship in New Zealand of films, to the showing of which young people are to be admitted, should be made more strict.

I have the honour to be, etc.,

E. PAGE.

WELLINGTON,
25th November, 1925.

FORENSIC FABLES

No. 23.

MR. WHITEWIG AND THE RASH QUESTION.

Mr. Whitewig was Greatly Gratified when the Judge of Assize Invited him to Defend a Prisoner who was Charged with Having Stolen a Pair of Boots, a Mouse-Trap and Fifteen Packets of Gold Flakes. It was his First Case and he Meant to Make a Good Show. Mr. Whitewig Studied the Depositions Carefully and Came to the Conclusion that a Skilful Cross-Examination of the Witnesses and a Tactful Speech would Do the Trick. When the Prisoner (an Ill-Looking Person) was Placed in the Dock, Mr. Whitewig Approached that Receptacle and Informed the Prisoner that he Might, if he Wished, Give Evidence on Oath. From the Prisoner's Reply (in which he Alluded to Grandmothers and Eggs) Mr. Whitewig Gathered that he did not Propose to Avail Himself of this Privilege. The Case Began. At First All Went Well. The Prosecutor

Admitted to Mr. Whitewig that he Could not be Sure that the Man he had Seen Lurking in the Neighbourhood of his Emporium was the Prisoner; and the Prosecutor's Assistant Completely Failed to Identify the Boots, the Mouse-Trap or the Gold Flakes. By the Time the Police Inspector Entered the Witness-Box Mr. Whitewig Felt that the Case was Won. Mr. Whitewig Cunningly Extracted from the Inspector the Fact that the Prisoner had Joined Up in 1914, and that the Prisoner's Wife was Expecting an Addition to her Family. He was about to Sit Down when a Final Question Occurred to him. "Having Regard to this Man's Record" he Sternly Asked, "How Came You to Arrest him?" The Inspector Drew a Bundle of Blue Documents from the Recesses of his Uniform, and, Moistening his Thumb, Read Therefrom. Mr. Whitewig Learned in Silent Horror that the Prisoner's Record Included Nine Previous Convictions. When the Prisoner was Asked Whether he had Anything to Say Why Sentence should not be Passed Upon him, he said some Very Disagreeable Things about the Mug who had Defended him.

Moral: Leave Well Alone.

CORRESPONDENCE.

THE ENGLISH OF THE JUDGMENTS.

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

Sir,—Mr. A. de B. Brandon, in discussing "The Chattels Transfer Act, 1924" (B.F.N. vol. 1, page 28), says:—"In Statutes most particularly, the language should be literary English and exact." I wonder whether Mr. Brandon would require the same standard in the judgments solemnly pronounced by our Judges? If he were to do so, he would be grievously disappointed. I confess to a great admiration for judgments couched in exact literary English, but I protest to our Judges that there is very little to admire in some of the judgments now being promulgated. As I propose to use a pen-name, I desire to opine that literary excellence seems to go hand in hand with legal acumen,—that the Judge who takes time to discern the legal principles involved will take care to clothe his findings in neat and appropriate English.

I desire to append some comments with illustrations; the references to the illustrations may be given to anyone disposed to refer to them.

The subjunctive mood troubles our Judges considerably. The indicative or the subjunctive is used haphazardly; mostly it is the indicative. The subjunctive gets a turn only by accident, as 'twere; and yet legal judgments should be rich in examples of the subjunctive mood, for that mood, says Sweet, is the "thought *mood*." Piele says that "in the subjunctive mood the action is stated *not* as a fact, though it may be one, but as a conception of the mind." Legal judgments abound in assumptions, for the sake of argument of which the "reductio ad absurdum" holds no mean place, and according to the rules mentioned above, such assumptions should be stated in the subjunctive mood. Innumerable instances will occur to your readers, but let me mention two. The verb "was" in "If the plaintiff 'was' an ordinary debtor" (which he was not), ought plainly to be in the subjunctive form "were." It would, I suggest, sound more euphonious, too. In another judgment the words, "If the Board proceed to make a selection," which would appear to be a correct use of the subjunctive mood, are followed, three lines lower down, by the indicative: "If the Board proceeds to make a selection." Perhaps the explanation is that the linotype operator dropped an "s" out of the former verb, and the proof-reader did not notice the error.

If I were a conjunctive "that" instead of an independent Scotsman, I would tell some of our Judges to use we consistently or not at all. "I do not think the rule applies," "I think no order can be made," "Assuming it was his fault," would all be much improved in clarity and euphony if conjunctive "thats" were inserted in the proper places. My plaint is that the conjunctive "that" is used or disregarded not according to rule but according to caprice. For a delightful example of inconsistency, consider the following:—"We cannot think this result was intended or that the necessity," etc. Why not use a "that" after "think," or omit the "that" after "or?"

Sometimes the "thats" are dropped overboard, but one of the Judges who cannot be worried by these humble words uses two when only one is necessary in this gem: "I am not prepared to hold that when, etc., that the acquisition, etc."

J. C. Nesfield, Esq., M.A., lays it down that "few" and "fewer" refer to number; "little" or "less" to quantity. In a judgment written not long ago, appear these words: "the form 'and/or' is repeated no **less** than seven times." Who is right? Nesfield or ——— *J.*?

I assume that it would be impertinent on my part to suggest that our Judges should be expected to parse some of their words. When I commenced attending lectures at the University, our English professor informed us that it was assumed that we knew all the rules relating to syntax, parsing, structure of sentences, and so on. Ought we not to be able to make the same assumption concerning our Judges? or is it that they are "Supra grammaticam?" I would, however, immensely enjoy asking a Judge how he would parse the words in inverted commas in the following question: "Why should it not be entitled 'to try and prevent' the mischievous results?" "Try" is a transitive verb—the object being mischievous results. "Try" here means attempt. Using this latter word, the sentence would read "entitled to attempt the mischievous results"—which is absurd. "And" should plainly be "to," and this word being inserted, sense is obtained. To try to prevent—to attempt to prevent, the noun-infinitive "to prevent" being the object of the verb.

"In," with the accusative case in Latin, denotes motion towards, and is translated by the English preposition "into." With the ablative "in" simply means "in." "Ire in hortum"—"To walk into the garden." "Ire in horto"—"To walk in the garden." A due appreciation of these rules would have prevented one of our Judges from using the phrase "to put the Board in any such position." Curiously enough, in the same volume of reports, an extract from an English judgment was lifted bodily into a report, and the Judge adopted these words: "to put into a perilous position." The New Zealand judgment dealt with motor-cars, the English one with ships; but the rule must be the same.

My understanding of the rule governing "only" is that this word is placed immediately before the word, or group of words, which it qualifies. Errors in relation hereto are legion, and they are confined not only to the Judges. But there can be no doubt that such phrases as "that damages are only given," "only necesssary to prove, etc.," and "can only obtain a good title to such monies," to be correct, must be "that only damages are given," "necessary to prove only that, etc.," and "can obtain a good title only to such monies," respectively.

The "gerund" apparently gives our Judges a heap of trouble. On page 5 of a report which I read, a judgment contains these words: "There was no contract unless the transaction could be made legal by the plaintiff being placed, etc." "Plaintiff" ought clearly to be the possessive "plaintiff's." On page 6 of the same report I was delighted to read the expression "despite **his** having taken part." An application of the rule which produced the former would produce "despite him having taken part," but the sound of it warned the learned writer.

Sir, I could point out dozens of other errors, but I desist. Perhaps I shall regale you later with some examples of innovations in accepted rules and principles governing composition and elegance of diction. For the legal attainments of our Judges I have the utmost respect, but of their grammar I am ashamed. Some may say that errors of grammar are inconsequential. Not so: the matter is of more than academic interest. We take no oath to maintain the purity of the King's English, but I submit that such an obligation is implied.—I am, etc.,

"MARTINET."

September 21st, 1926.

COURT OF APPEAL

The following cases were set down for hearing at the sittings of the Court of Appeal on Tuesday, 21*st September*. The fixtures were made as under:—

Public Trustee v. Bank of New Zealand: September 29th.
Willcocks v. N.Z. Insurance Co.: October 1st.
Peter & Ors. v. Mayor, etc., of Borough of Cambridge: October 4th.
Mayor, etc., of Inglewood v. Scobie: October 5th.
Perano v. Perano: October 6th.
Craythorne v. Jenkins & Ors.: Octebor 7th.
Milliken & Ors. v. Public Trustee: October 8th.
Haggitt & Ors. v. Watson: October 13th.

Fixtures have still to be made in the following cases:—
Akel v. Turner.
Collins & Hickey v. Bird.
Rex v. Grigg.
Commissioner Stamp Duties v. Thomson.

Applications under the Law Practitioners Act 1908:—
Re Emanuel.
Re Woodleigh.
Re Field.
Re Black.