New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"Nature has not supplied men with eyes behind their heads, but has placed them in front in order that they shall look ahead of them and forward. We need leadership, guides, and personalties, and who better than the Bar can provide and supply those guides and personalities. . . . our profession has a greater opportunity to serve than at any other time in the history of the world. The men of the Bar recognise, more than any others, the necessity of an impartial association of facts and an appeal to reason."

—HON. ERNEST LAPOINTE, K.C., M.P.,
to the Canadian Bar Association.

Vol. VIII. Tuesday, December 20, 1932 No. 22

We Extend our Frontiers.

The tailors of Laputa, we are told, used to stand afar-off from their customers and measure them with a theodolite. Their example has not been imitated during the JOURNAL'S eight years of existence. During that period successive Editors have endeavoured to get closer and closer to the legal profession of the Dominion, in order to fit its members with a practical, efficient, and up-to-date organ of everyday use and of enduring value.

Now, upon the eve of another year, which brings with it a new Volume of the NEW ZEALAND LAW JOURNAL, we gladly record our desire to continue to be of assistance to all our professional brethren. Furthermore, we have a more practical use for a theodolite than had the tailors of Laputa. We desire to apply it to the remarking of our frontiers. In extending our territory, we enlarge our sphere of service; and, in doing so, we intend to apply to our task the most effective methods that are available to us. In this manner we trust to reach nearer to our heart's desire, which is to make it our continued endeavour to serve both branches of the profession by progressively increasing the measure of our usefulness to them.

The advent of a forward movement in the official reporting of the more important judgments of our superior Courts will bring in its train a change of the system hitherto adopted in these pages for supplying our readers with the earliest records of important judicial decisions. We think that we can rightly claim success during recent years in this direction. It is not, however, the JOURNAL'S way to rest upon successes of the past. Failure to progress implies retrogression. Consequently, commencing with our next issue, we propose giving an even speedier service in bringing to our readers' attention noteworthy judgments of the Court of Appeal, the Supreme Court, and the Court of Arbitration. In each future number of the JOURNAL we shall summarise in convenient form such decisions of importance as have been delivered during the immediately preceding fortnight, each with appropriate annotations. We shall also continue our series of Practice Precedents, with accompanying notes, which, as we are glad to learn from many quarters, are giving general satisfaction.

And, lest the Conveyancing branch of the profession may think that all the good things are being provided for their learned friends of the Common Law, we propose to still any lurking misgivings that their needs, too, are not clamant upon our attention. In each coming issue will be found a page devoted to Conveyancing matters: up-to-date notes and comments, and occasional precedents of value. This new feature will not be of mere academical interest, as is so frequently the case when conveyancing matters are under notice in legal periodicals, but it will give Conveyancers accurate and up-to-the-minute perspectives of the law relating to property, trusts, companies, and kindred subjects.

In addition we promise our readers an extended service in the provision of articles on important legal topics. With the highly appreciated co-operation of members of the profession—some already eminent, and others whose eminence is approaching—we trust to supplement the text-books with papers of current value. In these ways we hope to promote the continued efficiency of the profession as a whole.

In matters touching professional interests we shall continue to be vigilant, and, under the leadership of those in whom the trust of the profession is deservedly reposed, to champion fearlessly the rights and privileges of practitioners. This has been the JOURNAL'S policy in the past: long may it continue!

And, so, looking with hope towards the coming year, we trust to make these pages even more and more the practitioner's own. This brings us to the grateful duty of acknowledging the valued help and continued encouragement that have been extended to us by the members of our profession. No one is more conscious than we of the fact that this JOURNAL'S success is but the outward manifestation of a spirit of helpful co-operation that has inspired many minds to give of their individual best for the benefit of their fellow-practitioners in general. To ourselves, this is an ever-present realisation. We are mindful of the manner in which, by encouraging suggestions, by sustained friendliness and interest, and by blindness to our faults of omission and commission, our own task has been lightened. By the test of our increased endeavours in the future we trust that the extent of our gratitude shall be estimated.

Meanwhile, we take the opportunity of wishing all our readers the compliments of the Christmas season, a carefree and exhilarating vacation, and, in the New Year, increasing work and prosperity.

Congratulations.

We offer sincere fraternal greetings and congratulations to Mr. J. M. Lightwood, the Editor of our London contemporary, the *Law Journal*, on his appointment as one of the Conveyancing Counsel of the Supreme Court, in place of the late Mr. Cyprian Williams. Both gentlemen have been our valued contributors. Moreover, Mr. Lightwood, as co-author of *The Law of Mortgage*, is known and esteemed by the profession of the Dominion. The post of Conveyancing Counsel is an envied one, only six of such appointments being in force together, and its sets the seal on high professional attainments in Conveyancing and Equity Draftsmanship. We wish Mr. Lightwood many years of enjoyment of his distinguished office.

"This Day Will Pass."

In every age there have been found people who would be willing to set fire to their neighbour's house in order to roast their own meat; but, as we come to the end of a year of difficulty, it is well to record the fine spirit that has drawn our people together when the press of circumstance has been felt by all sections of the community. From the very nature of our profession, legal practitioners have exceptional opportunities for observing the reaction of citizens of all classes to the trying times through which the Dominion has been passing. A time of economic readjustment serves as a crucible in which everyone is tested, and the year now drawing to a conclusion has disclosed a wide range of interests in which we can all strive together for the common good. In this we of the Law have both our part and our opportunity. "It is a great thing to be a lawyer in days when material possessions dwindle and interior resources rise in value," said a leading member of the American Bar Association recently; "I doubt if any body of men have opportunities for service greater than ours."

It is no easy matter to preserve patience and balance in times of stress, nor amid untoward circumstances to maintain the even tenor of professional and other tasks with dignity and serenity. But if the prevailing depression has taught us the lesson of mutual forbearance; if it has shown that widely different political and economic opinions may be held with complete honesty and good faith; if it has demonstrated that we can stand together to resist what troubles may menace us, then the difficulties of our times are not altogether evil.

During the height of the horrors of the Reign of Terror of the time of the French Revolution, Queen Marie Antoinette was in prison, and the day of her execution had dawned. Calmly she said to her attendant: "Even this day will pass." So, too, the day of our present, and lesser, difficulties will pass. The speeding of the coming of a brighter to-morrow cannot, however, be left to be the burden of a pious hope, or to the unsupported efforts of those who guide our country's destinies. The spirit of confidence that brought our pioneers to the ends of the earth to commence lives afresh under wholly novel conditions; the spirit of courageous endurance and unquenchable hope with which our people faced the trying years of the World War; the patient reserve of civic and social strength that carried our citizens through the influenza epidemic, and, more recently, through earthquake disasters—these virtues, we feel, are still characteristic of New Zealanders generally.

Consequently, we look forward to the New Year with renewed hope. We feel certain that with the co-operation of all, the practical qualities which make for the highest citizenship soon will bring us to better times. All that we need is a recognition that the re-establishment of the prosperity and happiness of our people does not depend on the city alone, or on the rural community alone, on employer or on worker, but on the long pull, and the strong pull, and the pull all together of every section of the community. With this united effort "even this day will pass," and the duration of the term of its passing will be in inverse proportion to the exertion of all our citizens for the common good, each in his appointed sphere of endeavour, until the shadows fade away, and a new day dawns, and our goal is won.

Court of Appeal.

Myers, C.J.
MacGregor, J.
Ostler, J.
Smith, J.
Kennedy, J.

October 12, 13, 14; December 9.
Wellington.

DOMINION AIRLINES, LTD. (IN LIQDN.) v. STRAND.

Deaths by Accidents Compensation—Negligence—Aeroplane Accident—Passenger Killed—Whether Act and Regulations imposed Duty for Passenger's Benefit—Whether Breach conferred Right of Action on Injured Passenger—Whether Accident could be attributed to Breach of Statutory Duty—Aviation Act, 1918; Regulations, N.Z. Gazette, 1921, I, p. 731—Deaths by Accidents Compensation Act, 1908, s. 30.

Appeal from judgment of Reed, J., reported at p. 54, *ante*.

The principal questions argued on the appeal were these: (1) Whether the Aviation Act, 1918, and the Regulations made thereunder, imposed a duty for the benefit of a particular class, namely passengers by air, a breach of which conferred a right of action upon a passenger injured by reason of such breach? (2) Whether, on the facts adduced in evidence in the Court below, the accident to the respondent could be attributed to the breach of statutory duty?

Held: (1) Answering the first question, *per Myers*, C.J., and *Ostler* and *Kennedy*, JJ. (*MacGregor* and *Smith*, JJ. dissenting): That the Act and Regulations imposed such a duty and that a proved breach thereof gave a right of action for damages at the suit of an injured passenger.

Phillips v. The Britannia Hygienic Laundry Co. Ltd. [1923] 1 K.B. 539, and, on appeal, [1923] 2 K.B. 832, distinguished.

2. *per Myers*, C.J., and *MacGregor and Kennedy*, JJ. (*Ostler*, J. dissenting, and *Smith*, J., expressing no opinion), That, on the facts, the accident could not be attributed to the breach of statutory duty.

The effect of the several judgments is that the appeal was allowed, *Ostler*, J., dissenting.

The further question, as to whether the passenger had contracted out of any rights in his favour conferred on him by the Act or Regulations by his having signed an indemnity indorsed on the flight-ticket, was argued at the Bar, but, in view of their Honours' findings on the above question, it was not discussed in the judgments apart from that of *Ostler*, J.

Cooke, Watson and **James** for appellant.
Cleary and **Barnett** for respondent.

MYERS, C.J., said the first question in contest on this appeal was whether or not the case was covered by the decision in **Phillips v. Britannia Hygienic Laundry Co.** [1923] 1 K.B. 539: on app. [1923] 2 K.B. 832.

In the determination of this question it was important, His Honour thought, to consider the history and nature of the relevant legislation, which deals not only with a new method of commercial transport, but with a method of locomotion in a new sphere—a method of locomotion attended with difficulties and dangers different from those affecting transport on land or sea. When the Aviation Act, 1918, was passed, commercial aviation, which even now has not developed in New Zealand to any great extent, was entirely new. The Act is on much the same lines as the Air Navigation Act, 1919, of the Imperial Parliament. It was passed on December 10, 1918—the English Act on February 27, 1919—and was doubtless based upon a draft received from the English authorities. Regulations were made under the English Act, in April, 1919, and were known as the Air Navigation Regulations, 1919. The English Act of 1919 was repealed by the Air Navigation Act, 1920. A new Air Navigation Order was made in 1922 and this in turn was superseded by the Air Navigation (Consolidation) Order, 1923. No regulations were made in New Zealand until February, 1921, when regulations were made which as far as they go are for all material purposes the same as the English regulations of 1919.

His Honour, after quoting the Air Navigation Act, 1920, said that the learned trial Judge said that in England there are statutory provisions which negative the necessity of proving

negligence, and that no proof of negligence is required beyond the accident itself, and he suggested that it is probably due to this legislation that there is no reported case in England dealing with actions for negligence in relation to aircraft. It is s. 9, of course, that the learned Judge had in mind. But that section has no relation to a case like the present: it has no bearing on the position of a person who is injured while being carried as a passenger in an aircraft. It does, however, fully protect the public generally, that is to say any and every person on land or water—or the property of any such person—where damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft or by an article falling from such aircraft: and a cause of action is given without proof of negligence as though the damage or loss had been caused by the wilful act, neglect, or default of the owner of the aircraft.

It was difficult to see how the public generally could possibly be more adequately protected. The only persons and the only property not protected by the section are persons and property in the aircraft itself. It was not until November 9, 1931, long after the happening of the accident that had given rise to this litigation, that by the Air Navigation Act of that year the New Zealand Parliament passed an Act—the Air Navigation Act, 1931—on the lines of, and, as far as it goes, similar to, the English Act of 1920. Section 7 of the New Zealand Act is in the same terms as s. 9 of the English Act. In New Zealand therefore now, as in England, the fullest protection is given to the public, and the only persons and property not protected in terms by the statute are persons and property in the aircraft itself. His Honour thought it desirable to give the history of the legislation in New Zealand and to compare it with the history in England so that a concise statement of the position may be available in the event of the case proceeding further. He did not suggest that the New Zealand Act of 1931 could be used for the purpose of interpreting the previous Act and the regulations thereunder. But if that Act had been passed, as the English Act was, in 1920, it seemed to him that it would have been difficult to contend that a breach of any of the regulations which are authorised by the statute to be made, and are made, for the special protection and safety of passengers, could be interpreted otherwise than as conferring a right of action upon a person injured by such breach. It would seem strange that the Legislature has been at pains to provide protection for the general public and has left entirely without protection the persons who probably stand in need of it most.

The Aviation Act, 1918, is expressed to be an Act to control aviation in New Zealand. By s. 3 there is conferred upon the Governor-General in Council the power to make regulations for a number of purposes. The subparagraph of s. 3 (1) which is particularly relevant to the present case is subpara. (*f*) which confers power to make regulations for the issue and cancellation of licenses authorising the use of aircraft and prescribing the conditions subject to which such aircraft may be so used, including conditions as to the carriage of passengers and goods.

Regulations were then made as already stated in February, 1921, by cl. 6 of which "Passenger aircraft" and "Goods aircraft" were defined as meaning respectively aircraft intended for carrying passengers or goods (including mails) for hire or reward, and including respectively aircraft on which passengers or goods are actually carried. Clause 1 prescribes a number of "General Conditions of Flying." It provides *inter alia* that no aircraft shall fly within the limits of the Islands of New Zealand unless the conditions therein set out are complied with. These conditions include the following: (iii) The personnel of the aircraft shall be licensed in the prescribed manner: (vi) The provisions as to the general safety as set out in the regulations shall be duly complied with: (ix) Aircraft carrying passengers shall not use, as a place of departure or place of landing, any place other than a licensed aerodrome or such place or places as have been approved by the Air Board. Clauses 2 and 3 make certain provisions under the title "General Safety Provisions." Clause 11 under the title "Flying Certificates" divides the certificates for pilots into two classes: "A" (flying certificate for private pilots, not valid for flying passenger or goods aircraft) and "B" (pilot's flying certificate for flying passenger or goods aircraft). Then follow the requirements necessary to qualify a person for the "A" and "B" certificates respectively. Included in the requirements for a "B" certificate is the passing of a medical examination carried out under the control of the Air Board. The medical requirements are set out at some length. Schedule III provides for certificates of airworthiness for passenger aircraft and for the periodical overhaul and examination of such aircraft. *Inter alia* cl. 6 of Schedule III provides that no passenger aircraft carrying passengers shall on any day proceed on any journey unless it has previously been inspected at least once on that day by a competent person licensed for the purpose under the regulations who shall not be the pilot of the particular machine. No. 4 of the regulations under the title "Penalties" provides in subclause (3) that any person contravening or failing to comply with the regulations or any provision thereof is liable on summary conviction to a fine not exceeding £100. This provision is authorised by s. 3 (1) (i) of the Act of 1918, whereby power is given to the Governor-General in Council to prescribe fines for offences against any of the regulations not exceeding £100 for any such offence. Clause 8 of the regulations says that "*Nothing in these regulations shall be construed as . . . prejudicing the rights or remedies of any persons in respect of any injury to persons or property caused by any aircraft.*" There is a similar provision in the English regulations of both 1919 and 1923. It cannot be contended that the Governor-General has power by regulation to confer a new cause of action which is not authorised by the statute. It is difficult to see the object of this particular regulation unless it is inserted *ex abundante cautela*, or unless it is intended to imply, as far as the Governor-General could do so, that a uniform penalty is provided for any breach of the regulations, and that the imposition of the penalty was not intended to take away any private rights of action. It does not seem, however, that this particular regulation—or rather the portion of it that has been quoted—is of any assistance one way or another. His Honour referred to it particularly because it was much discussed at the Bar.

A large number—indeed the great majority—of the regulations are no doubt to be regarded as merely "police" regulations the breach of which as in the **Phillips** case confers no right of action upon a person injured. But, so far as any member of the public is concerned, this matter is not now of any importance because, irrespective of any regulations, every member of the public under all conceivable circumstances has under s. 7 of the Act of 1931, as in England under s. 9 of the Act of 1920, a cause of action for any injury or loss that he may suffer. In the **Phillips** case, *Atkin*, L.J., said that the question involved was an important one and he had felt some doubt upon it because it was clear that the motor regulations there under consideration were in part designed to promote the safety of the public using highways. The motor regulations, however, were a comprehensive set of regulations dealing with traffic generally and of course an existing class of traffic: and there is nothing in the regulation-making power conferred by the Acts under which they were made referring expressly to the carriage or safety of any particular class such as passengers. Here the Legislature is dealing with a new class of transport which at the time the Act was passed was regarded generally as involving special danger to passengers and risk of loss to owners of goods carried. In the **Phillips** case, *Atkin*, L.J., said that the question is whether the regulations were intended to be enforced only by the special penalty attached to them in the Act. He says: "In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends upon the intention of the Act. Was it intended to make the duty one which was owed to the party aggrieved as well as to the State or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates."

He proceeds to say that one question to be considered is whether the Act contains reference to a remedy for breach of it, and that, while *prima facie*, if it does, that is the only remedy, it is not conclusive. He says that the intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals: and he gives as instances **Groves v. Ld. Wimborne** [1898] 2 Q.B. 402, and **Britannic Merthyr Coal Co. v. David** [1910] A.C. 74. In this case, there is an express power conferred by the statute upon the Governor-General in Council to prescribe not only the conditions subject to which aircraft may be used, but also "conditions as to the carriage of passengers and goods." In this respect the Aviation Act, 1918, goes further than s. 6 of the Locomotives on Highways Act, 1896, which fell for consideration in the **Phillips** case. His Honour said he could only regard this extra provision in the Aviation Act as contemplating and empowering the making of regulations to provide for the safe carriage of passengers and goods, and it seemed to him that any of the regulations made under the statute which are clearly referable to that portion of para. (*f*) of s. 3 (1) that he had just quoted must be regarded as made for the special protection of a class, that is to say passengers and owners of goods carried in an aircraft, being the particular class of persons as distinct from the general public who enter into contracts with the owners of aircraft for the service of carriage. If this is so, he could see no difference in principle between this case and such cases as **Groves v. Ld. Wimborne** and **Britannic Merthyr Coal Co. v. David.** The special provisions contained in para. (*f*) of s. 3 (1)

of the Act seem to me to distinguish this case from the **Phillips** case, as put by *Atkin*, L.J., where he says: "It is not likely that the Legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways."

It had been suggested on behalf of the appellant that there was no case in which the breach of a regulation as distinguished from an Act had been held to give a cause of action. His Honour did not think that anything turned on this suggestion. In any case, it was not correct, for **Britannic Merthyr Coal Co. v. David** [1910] A.C. 74 and **Butler v. Fife Coal Co.** [1912] A.C. 149 both turned in part upon rules or regulations made under statutory authority. Moreover **Scobie v. Mayor of Inglewood** [1926] N.Z.L.R. 769, is an instance in our own Courts of an action being successfully brought for injury caused by the breach of such a regulation. And in **Park v. The Minister of Education** [1922] N.Z.L.R. 1208, *Salmond*, J., pointed out at pp. 1217-1218 that the necessary effect of regulations made under statutory authority is that they have the force of law whether the statute expressly says so or not. In the **Phillips** case itself, the question arose upon a regulation made under a statute and there was no suggestion that, assuming the regulation to be validly made, it had not the same effect as if its terms had been expressly enacted in the statute.

It is true that the regulations provide for a penalty. That, however, is not conclusive. In **Butler v. Fife Coal Co.** (*supra*) Lord *Kinnear* at p. 165 said: "If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord *Cairns* in *Atkinson v. Newcastle Waterworks Co.* and by Lord *Herschell* in *Cowley v. Newmarket Local Board* solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to made due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the *prima facie* right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability." And in the **Phillips** case *Atkin*, L.J. said that the intention as it is disclosed by the scope and wording of the Act must still be regarded and it may still be that if the statute creates a duty and provides a penalty the duty is nevertheless owed to individuals. That in His Honour's opinion was this case. It might be added, on the question of penalty, that even if there had been no penalty authorised by the statute to be prescribed, a breach of the regulations would be a statutory offence punishable by imprisonment or fine. This is the effect of the Crimes Act, 1908, ss. 129 and 25 (4) and the interpretation of "Act" in the Acts Interpretation Act, 1924. On this point see **Simmonds v. Newport Abercarn Black Vein Steam Coal Co.** [1921] 1 K.B. 616 at pp. 624 and 625.

The question then is—what *nexus* is there (if any) between the breach of the regulation and the injury?—and for this the respondent relies upon the alleged negligence of the pilot Kight.

This is not a case where the question depends upon the credibility of witnesses in the ordinary sense. The learned trial Judge says that none of the witnesses can be said to have any interest, and he thinks that they all gave entirely unprejudiced evidence. That being so, this Court was in the same position as was the learned Judge himself to determine the essential question of fact.

The learned Judge's finding is that the accident was due to Kight's negligence in attempting to turn into the wind at too low an altitude at a low rate of speed thereby causing the machine to lose flying speed and nose dive. On a careful examination of the evidence, the learned Chief Justice said he had found himself unable to agree. With all respect, it seemed to him that the learned Judge did not direct his attention to the important question of engine failure, and the effect of such failure, if failure there was.

After a careful review of the evidence, the Chief Justice said that, in his opinion, the evidence was not such as to justify the inference of negligence drawn by the learned trial Judge.

Even if negligence on the part of Kight in the mere handling of the aircraft were proved, His Honour was inclined to think—though in the view he took it is not necessary to decide—that that would not in the circumstances be a sufficient *nexus*. He had an "A" certificate and, though he did not have a "B" certificate, it is not disputed that, so far as ability to pilot an aircraft is concerned—though he had not passed the necessary examination as to medical requirements—he had all the skill and experience requisite as qualifications for such a certificate. In this respect the case differs from **Jones v. Canadian Pacific Ry. Co.**, 83 L.P.C. 13, 110 L.T. 83, where, as here, the plaintiff's claim was based on the violation by the defendant of a statutory duty and where Lord *Atkinson* said that there was an entire absence in the case of all evidence to show that Weymark—the person whose alleged negligence was under discussion—was in fact fitted to discharge the duties he was put to discharge, or was ever considered so to be by any responsible officer of the Railway Company. "It is not at all the case" said His Lordship, "of a servant of proved and known efficiency for a particular work being selected to do that work without having passed a test which his employers knew, or *bona fide* and reasonably believed, he could pass." And towards the conclusion of the judgment, His Lordship says: "Their Lordships think that the reasonable conclusion to draw from the evidence is that the flagrant failure of Weymark to discharge his duty on this occasion was most probably due to his want of skill, knowledge, or experience, or to some physical incapacity or defect which the examination or test prescribed for him would have revealed. If so, this failure was but a natural consequence of the act of the company in setting him, such as he was, to do the work actually set him to do, and their action in that respect was either the sole effective cause of the accident or a cause materially contributing to it."

If evidence had been called from which it could properly have been inferred that the accident was associated with any cause that prevented Kight from obtaining a "B" certificate, the position as to *nexus* would be quite different. But there was in His Honour's opinion no such evidence, nor was that the case as declared in the Statement of Claim or as presented at the trial. In his opinion the appeal should be allowed, and it was unnecessary, in the view that he took of the case, to consider the effect of the conditions of the contract between the deceased and the appellant company or any of the other matters that were discussed during the argument.

MacGREGOR, J., said, until December 10, 1918, there was no statutory provision relating in terms to aviation in New Zealand. On that day was passed the Aviation Act, 1918, which is stated to be "An Act to control Aviation in New Zealand." By s. 3 the Governor-General was empowered from time to time by Order in Council to make Regulations under the Act for certain purposes. Regulations were made accordingly on February 21, 1921, and the Act and Regulations now come before this Court for the first time for judicial interpretation. It is obvious that the Act and Regulations together form in a real sense a new departure in legislation for this Dominion. In approaching their construction accordingly one must, His Honour thought, presume "that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express words or by clear implication, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed." (*Maxwell*, p. 71.)

In the present case it is in effect claimed for the respondent that there has by the Act and Regulations been created a statutory right of action, apart from any remedy at common law available to passengers by aircraft. That claim had been debated at length before the Court, and its validity must now be determined. In the end, His Honour had come to the conclusion that the respondent had failed to make good his claim, and accordingly that the present appeal must succeed. Before arriving at a final decision, he had the advantage of reading and considering the exhaustive judgment prepared by *Smith*, J., in which His Honour entirely concurred. In the result, it seemed to him that by the Act and Regulations the control of aviation in New Zealand was effectively attained, without of necessity imputing to the Legislature an intention to make the substantial alteration in the law involved in the suggested creation of the new right of action contended for by the Respondent. In the Act and Regulations, he could discover no explicit declaration of any intention to make such an alteration in the law, nor did he feel constrained to imply such a declaration from any of their terms. In other words, it seemed to him that the immediate scope and object of the statute may well be fulfilled, without imposing incidentally what is in effect a fresh statutory liability on carriers of passengers by air. Indeed, it would almost appear that the effect of imposing such an additional financial liability on owners of aircraft throughout New Zealand might well be not to control aviation, but put an end to it, for all practical commercial purposes. On

this branch of the case, he respectfully agreed with the language used by *Atkin*, L.J., in **Phillips v. Britannia Hygienic Laundry Co.** [1923] 2 K.B. at p. 842.

Assuming, however, in favour of the respondent here that he has a right of action for breach of a statutory duty, he must further in order to succeed in this action show some *nexus* between the alleged breach of duty and the accident itself. To establish this *nexus* the respondent led evidence at the trial to prove that the accident was due to the negligence of the appellant's pilot. The appellant called no evidence, the pilot having lost his life through the accident. The learned trial Judge found that the necessary negligence had been proved. The question now to be determined is whether that finding of negligence should be sustained in this Court upon the evidence before it. It is thus stated in precise terms in the judgment of *Reed*, J. (p. 31): "I find upon the evidence that the accident was due to the negligence of Ivan Louis Kight in attempting to turn into the wind at too low an altitude at a low rate of speed thereby causing the machine to lose flying speed and nose dive."

At the outset it is instructive to compare (or contrast) with this conclusion of fact by the learned Judge the finding of the Military Board (composed of experts in flying) that sat after the accident but before the trial. It is noteworthy also that the Military Court found that the engine failed, before the pilot attempted to make the fatal turn. *Reed*, J. does not find that the engine failed, but does refer to the discrepancies in the evidence of the respondent's witnesses on this important point (p. 31).

In the result, His Honour thought that all that the plaintiff had proved here is an injury which may or may not have been due to the breach of duty relied on by him. The cause of that injury is left in doubt on the evidence taken as a whole. That evidence established only that the accident was possibly due to the negligence to which the plaintiff seeks to assign it. In these circumstances, it is clear in His Honour's opinion that the plaintiff had failed to discharge the burden of proof incumbent on him. To take the most favourable view for the plaintiff of the conflicting evidence tendered by him, he had left the case in equilibrium, and the Court was not entitled to incline the balance one way or the other. As was said by Lord *Buckmaster* in **Craig v. Glasgow Corporation** [1919] S.C. (H.L.) at p. 7: "If a set of circumstances are equally consistent with a number of varying hypotheses, no one can be selected as the one that is true." That appeared to His Honour to be the position in the present case, and it is not surprising that it should be so. In the event of an aeroplane crash, where all the occupants are killed, it is in the nature of things almost hopeless to expect any clear or reliable explanation of why or how the mishap did really occur. This is especially so when, as here none of the eye witnesses on the ground are skilled observers. What in point of fact induced or compelled the pilot, Kight, to attempt the final turn is now a pure matter of conjecture. The only witnesses who could be expected to know what happened to the aeroplane at and after the dropping of the mails are all dead. Probably Kight himself alone understood what led up to his attempting to turn the plane; and his mouth is closed for ever. In the absence of some such first-hand evidence it was, in His Honour's opinion, the merest speculation to attempt to formulate the actual course of events leading up to the crash, and he for one could not concur in a finding of negligence which appeared to him based upon conjecture, and not upon reasonable inference from facts established by reliable testimony. The evidence now before the Court failed in his opinion to afford any sound basis in fact for relating the accident to any definite act of negligence on the part of the pilot.

For the foregoing reasons, His Honour was of opinion that the appeal should be allowed.

OSTLER, J., said the first question for consideration is whether a right of action is given by the Aviation Act, 1918, to a passenger in an aeroplane against its owner for damages caused by an accident arising from a breach by the owner of the Regulations made under that Act. That depends upon whether the Court can ascertain from the language of the Act that the purpose of the Legislature was to give such a right of action. There is no need to look beyond the judgments of the Court of Appeal in **Phillips v. Britannia Laundry Co.** [1923] 2 K.B. 832, to find all the law on the subject. The principles are well settled, and the authorities are referred to in that judgment. His Honour apprehended the principle to be that where a statute imposes a new duty, it depends upon the intention of the Act whether a correlative right of action for damages is given to a person who suffers damage by reason of a breach of that duty. The intention of the Act is ascertainable only from its language, which will indicate its scope and purpose. If the Act gives the remedy in plain terms, there can be no question about it. That was the case in **Jones v. Canadian Pacific Railway,** 110 L.T. 83. But generally the Legislature leaves its intention to be inferred from the language used. In such a case the general rule is that if a penalty has been imposed for the breach, then the intention is that the enforcement of the statutory penalty shall be the only remedy. But that is not conclusive. There is an exception to this rule. Even where a penalty has been imposed, if it can be ascertained from the language of the Act that its intention was in addition to confer a right of action for damages for the breach, then such an action will lie. One test for ascertaining whether this was the intention is to ascertain from the language whether the intention was to give protection against the consequences of a breach of the duty to a particular class of persons. If that can be ascertained every person belonging to that class while he remains in that class will have a right of action for damages caused by a breach of the duty. **Groves v. Lord Wimborne** [1898] 2 Q.B. 402, is an example of such a case, and there are many others. But even if the intention is not for the benefit of a class only, but for the benefit and protection of the public generally, it may be deduced from the language of the statute that its purpose was to give a right of action to any person injured by a breach of the duty. As was said by *Atkin*, L.J., in **Phillips v. Britannia Laundry Co.** [1923] 2 K.B. at 841: "It would be strange if a less important duty, which is owed to a section of the public, may be enforced by action, while a more important duty owed to the public at large cannot." An instance of such a duty imposed for the benefit of the general public, a breach of which is actionable at the suit of any member of the public injured thereby is mentioned by *Atkin*, L.J., where he refers to what was said by *Kelly*, C.B., in **Gorris v. Scott** [1874] L.R. 9 Ex. 125, *i.e.*, "it was never doubted that if a member of the public crossing the railway were injured by the railway company's breach of duty, either in not erecting a gate or in not keeping it closed, he would have a right of action." His Honour understood counsel for appellant company to contend that this dictum was not supported by the authorities; that a right of action by a member of the public against a railway company for a breach of a statutory duty by the company, if a penalty were provided for the breach, and there was no negligence, was unknown. They contended that in all the railway cases it would be found, either that the action was founded on negligence as in **Grand Trunk Railway v. McAlpine** [1913] A.C. 838, or that the duty was plainly imposed in favour of a class as in **Dixon v. Great Western Railway,** (1897) 1 Q.B. 300, or that there was no penalty provided for the breach of the duty. Upon looking into the authorities, however, His Honour found that contention could not be supported. There are cases where a duty has been created by the Railway Causes Consolidation Act, 1845, for the protection of the public, where a substantial penalty is provided in the Act for a breach of that duty, but in which a member of the public has succeeded in an action for damages against the railway company, the action being founded not on negligence, but wholly on the breach of the duty. The decision in the Court of Appeal in **Charman v. South Eastern Railway Company,** 21 Q.B.D. 524, is an example of such a case. That was a breach of section 47, the very section mentioned by *Kelly*, C.B. See also **Williams v. Great Western Railway Company,** L.R. 9 Ex. 157 at 162, the judgment of *Amphlett*, B. Another case is **Parminson v. Garstang and Knott End Railway Co.** [1910] 1 K.B. 615, which deals with a breach of s. 61. The statutory penalty for a breach of both these sections is to be found in s. 62. These cases show that it is not necessary in every case that the statute should be for the benefit of a class in order that a right of action for its breach should be given. There may be statutory duties imposed for the benefit of the public generally a breach of which, even if other penalties are provided, will give any member of the public injured thereby a right of action. In this case, however, it is claimed by respondent that the person whom he represents was a member of a class of persons for whose protection the statute was enacted, and therefore it conferred on him a right of action which is kept alive for the benefit of his dependents by Lord Campbell's Act. The class which it is claimed was intended to be protected was that of passengers in aeroplanes. It is necessary to examine the statute, to see whether this is so.

The first words of importance are those of the short title—"An Act to control Aviation in New Zealand." It is claimed by appellant company that these words indicate that the whole scope of the Act was merely to provide police measures for the control of aeroplanes, just as in **Phillips'** case it was held that the regulations in question were police measures for the control of motor-vehicles. In His Honour's opinion, however, little weight can be given to this argument. Statutes constantly provide for matters not referred to in their short titles, and it is impossible in the compressed language in which the short title of an Act is expressed to embody a compendious *precis* of the whole of its provisions. An example is the new Act of 1931, which

repealed the Aviation Act, 1918. The short title of the Air Navigation Act, 1931, is "An Act to enable effect to be given to a Convention for regulating air navigation, and to make further provision for the control and regulation of Aviation in New Zealand." A perusal of the Act shows that it goes far beyond these stated objects. A large part of the Act is devoted to the conferring of private rights of action for damage done by aeroplanes.

His Honour then set out ss. 2 and 3, and said that there is nothing in the rest of the Act which throws any light on the question. The intention of the Legislature must be gathered from the words he had quoted.

In His Honour's opinion, the fact that authority was given to make Regulations as to the conditions upon which passengers and goods might be carried in aeroplanes indicates that the intention of the Act was to provide for Regulations for the safety of passengers and goods while being so carried. When the Act was passed commercial flying was a new thing. There had been no such thing before the War, and when the War commenced the science of aeronautics was comparatively undeveloped. It was so advanced during the War that it became evident that a new method for the fast transport of passengers and goods had been evolved, and the purpose of the legislation was not only to provide for the public safety, but also for the protection of passengers and goods carried for profit. The Legislature had in mind the extra risk involved in so carrying passengers and goods, and contemplated Regulations which would minimise the risk by imposing more stringent conditions upon the owners and pilots of air machines used commercially for such transport. It is contended that, as goods are referred to as well as passengers, it could not have been the intention of Parliament to give protection to a special class of persons. But it is to be remembered that only valuable goods of small bulk can be economically transported by air, such goods as specie, precious stones, jewellery, and the like. Of this the Legislature was quite aware, and His Honour could, therefore, see no reason for thinking that they did not intend to give special protection both to passengers and to the owners of such goods.

The Regulations purport to impose special conditions upon the owners and pilots of aeroplanes carrying goods or passengers. Ordinary pilots must have an "A" flying certificate. Pilots flying passenger or goods aircraft must have a "B" certificate. A much higher standard of health, of skill, and of technical knowledge is required for a "B" than for an "A" certificate. Especially is this so with regard to the physical, mental, and moral or temperamental fitness of the pilot. There are also specially stringent provisions of overhaul and inspection imposed upon the owners of aircraft carrying passengers and goods. These are referred to in the judgment in the Court below. There is a penalty of not exceeding £100 imposed for a breach of any of the Regulations, including those dealing with passenger aircraft. It is contended that this penalty was intended to be the only remedy. It may well be that with regard to all the other provisions except those relating to aircraft carrying passengers and goods that this was the intention, though it is unnecessary to decide this point. But with regard to this class set apart for special protection, in my opinion it was not the intention that the penalty should be the only remedy. A test as to whether it was so is to consider whether the penalty provided is an adequate remedy, or commensurate with the importance of the duty: see **The King v. Poplar Borough Council** [1922] 1 K.B. 72 at 88. In this case, when it is considered what danger to life may be caused by a breach of the Regulations, it seems to me that the penalty is totally inadequate for the protection intended to be given to passengers by air, and therefore it was not the intention of the Act that passengers should not have a remedy in addition to the penalty.

It is further contended that, inasmuch as the statutory duty in this case is imposed, not by the Act itself, but only by Regulations made under the Act, no action for damages will lie for the breach, because the Governor-General in Council has no power to create rights of action. It is quite true that there is no such power, and if an attempt were made to create such a right of action by Order in Council without statutory authorisation that attempt would be futile. The Order in Council would be *ultra vires*. But if a statute authorises the Governor-General in Council to make Regulations for the protection of a particular class, it is the statute, and not the Regulations made under it, which creates the rights of action in members of that class. It has never been suggested in any of the cases, so far as His Honour could find, that the mere fact that the duty is created by Regulation instead of by Act is sufficient to show that there is no right of action for its breach. In **Phillips v. Britannia Laundry Co.** [1923] 2 K.B. 832, it was a Regulation that was being considered. The point was clearly present in the mind of *Atkin*, L.J., at p. 842. This passage shows that the learned Lord Justice saw no objection to a right of action being created by a breach of a statutory duty imposed by Regulations, so long as this was intended by the Act under which the Regulations were made. There are, moreover, cases in which the duty was imposed by Regulations and an action has been held to lie for its breach: see **Butler v. Fife Coal Co.** [1912] A.C. 149; **David v. Britannic Merthyr Co.** [1910] A.C. 74. It is said that the Regulations in these cases were incorporated in the statute, and thus were really part of it. An examination of the cases will show that this is only partly true. The breaches relied on were partly of Regulations not so incorporated. So long as the Regulations are *intra vires*, in His Honour's opinion it makes no difference whether they are incorporated or not. In either case the question is whether the right of action is given by the statute.

It is contended that the statute does not create a right of action for a breach of these Regulations because the only power given to the Governor-General in Council is to prescribe *conditions* upon which aircraft may be used for the carriage of passengers. To His Honour's mind the use of this word creates no difficulty. Why was power given to prescribe conditions? He could see no other reason than to provide for the safety of passengers, and the conditions contemplated by the Legislature must have been just such conditions as have been prescribed, *i.e.*, to provide for an aeroplane as fit for the purpose as frequent overhaul and regular inspection could make it, and for a pilot who had passed a high test of fitness and would therefore be less likely to be negligent or to fail in an emergency.

It is further contended that aeroplane passengers are not a class, but merely members of the public. In His Honour's opinion they are just as much a class as factory hands or coal-mine workers, who have been held to belong to a class. There is a distinction between the users of the King's highway (who were held not to be a class by *Bankes*, L.J. in **Phillips'** case) and passengers in an aeroplane. Every active member of the public uses the roads. Whatever may be the case in the future, at present only a very small section of the public travels by air, and all such travellers must enter into a contract just as the class of coal-miners or factory workers must do. The class of aeroplane passengers is, of course, a shifting one, just as the class of coal-miners; and just as statutory duties are imposed for the benefit of coal-miners only while they remain members of that class, and not after they become members of the public above ground, so these aeroplane passengers belong to the class only while so travelling.

The appellant company further relied on certain of the Regulations themselves as showing that their breach was not intended to confer any rights of action. Clause 7 provides that the Air Board constituted under the Regulations may itself supplement them. It is said that breach of a supplemental Regulation so made could not have been intended to confer a right of action. That may well be. The Governor-General in Council was the body authorised to make the Regulations, not the Air Board, and it may well be that any such supplemental Regulations would be *ultra vires*. The Court here is dealing only with Regulations made by an authorised body, and the question does not arise. Then it is claimed that clause 8 of the Regulations shows that no right of action was intended to be given for the breach. That clause provides that "nothing in these regulations shall be construed as prejudicing the rights or remedies of any persons in respect of any injury to persons or property caused by any aircraft." In His Honour's opinion, this provision has no effect one way or the other. The Governor-General in Council has no power either to give rights of action or to take away such rights already given. This Regulation does not purport to do either, but merely to leave rights of action *in statu quo ante*. It is really surplusage and can be ignored.

Further, it may well be that some of the Regulations were intended to be mere traffic Regulations, for the public safety or convenience, but that all the Regulations dealing with the conditions under which passengers and goods might be carried were intended for the protection of such passengers and the owners of such goods. Indeed His Honour thought this was the position. The Legislature was providing for the public safety, but it was also legislating to control a new class of transport business which had just been evolved—a class of business in which, if it were not regulated, great risk was involved to passengers and goods. It was this consideration which induced the Legislature to lessen that risk by authorising Regulations prescribing the conditions upon which that business could be carried on.

It is further contended that because the Regulations are stated to be provisional that is an indication that it was not intended to give a right of action for damages caused by their breach. But the statement that they are provisional does not

detract in any way from their full legal effect. It merely indicates that they may be amplified or amended later in the light of experience, but meantime are enacted as law.

Appellant company's main contention was that there was no distinction between the Regulations considered in **Phillips'** case and the Regulations under this Act, and it relies on **Phillips'** case to show that the judgment in the Court below was erroneous. The distinction is in His Honour's opinion that in that case the Act contemplated merely a set of rules for the regulation of motor traffic in the streets, a set of rules which in most cases were intended to be deviated from to meet particular emergencies, and which were not made under the authority of a statute which plainly indicated that its intention was to protect a particular class. Our motor regulations are of the same class as those considered in **Phillips'** case—merely police rules for the regulation of motor traffic: see **Black v. McFarlane** [1929] G.L.R. 524. But in this case, the Act contemplates conditions for the safety of passengers, and the Regulations provide absolute conditions as to the provision of safe machines and competent pilots, not intended to be departed from in any emergency.

There is no doubt that in this case there was a breach of a duty imposed by the Regulations, inasmuch as the pilot who flew the aeroplane was not the holder of a "B" flying certificate, and he was for that reason prohibited from flying an aeroplane carrying passengers. It is contended that, although he was not the holder of a "B" certificate, he was entitled to one at law, having passed all the requisite examinations. This contention was not borne out by the evidence, however (for the reasons which His Honour set out).

The pilot was managing director of the appellant company so there can be no doubt that the company was affected with notice through him that he was not qualified to fly the aeroplane while carrying passengers. The breach of duty was not only by the pilot but by the company.

The next question is whether the injury complained of was caused or contributed to by this breach of statutory duty. Was the injury *propter hoc*, and not merely *post hoc*? It is only in the former case that a right of action lies. There must be a *nexus* between the breach and the injury: see **Jones v. Canadian Pacific Railway,** 110 L.T. 83. If the accident happened through the negligence of the pilot, then, his Honour said, there was a sufficient connection between the breach and the injury, for the requirements for the "B" certificate were laid down in order that only a pilot who would not be likely to be negligent should fly passenger aircraft. Had such a pilot been employed the accident would not have been likely to happen. In other words, the unlawful employment of this pilot who was unfit for the job would be at least a contributing cause of the accident.

In His Honour's opinion there was evidence upon which the Court was justified in finding that the accident was caused by the pilot's negligence. Then, after a further consideration of the relative merits of the evidence, His Honour said he thought that in addition to the finding of the Court the evidence proved that the initial negligence started with an error of judgment in deciding to drop the parcel down wind. From the moment the parcel was dropped the pilot negligently continued to travel down wind at too low a speed considering his low altitude, and the negligence was continuous down to the moment when the machine stalled, by reason of still further losing speed, owing to the ill-judged and reckless turn which he tried to make while so close to the ground.

But it was contended that even if such negligence as this is proved, that is not a sufficient *nexus* between the breach of duty and the accident to give rise to a cause of action. It is urged that such negligence has nothing to do with the absence of a medical certificate, or with the pilot's medical unfitness. His Honour could not agree with this contention. The medical test that a pilot must pass to obtain a "B" certificate is a very high one. He must show *inter alia* a good family and personal history, "with particular reference to *nervous stability*, absence of mental, moral, or physical defect which will interfere with flying efficiency." He "must not suffer from any disability which renders him liable suddenly to become incompetent in the management of aircraft." Now this was exactly the respect in which the Director of Air Services, who knew him well, considered that he was unfit for a "B" certificate (as his evidence shows).

It may well be that had the pilot passed his medical examination the Director of Air Services would have had no discretion to refuse him a "B" certificate. In several respects the Director's evidence indicates that he was not quite familiar with the Regulations. But his evidence does indicate quite clearly that, well knowing this pilot's capabilities, and being an expert well able to judge of them, he considered that he was not fit for a "B" certificate, because he was not to be trusted in an emergency. The negligence of which the pilot was guilty of was just the kind of negligence which would be likely to be caused by his nervous instability. He first by negligence created an emergency, and then, when he found himself in a tight corner by his own failure, instead of opening up the engine and obtaining a safe air speed before turning, he tried to turn at too low a speed, and so caused the crash. In His Honour's opinion this Court is justified in holding that the accident was due to the nervous instability of the pilot, which rendered him unfit for a "B" certificate, and therefore the *nexus* between the breach of duty and the accident is complete.

The next question for decision is whether appellant company is exonerated from the consequences of its breach of statutory duty by the terms of the contract which was signed by the passenger. The conditions on which the ticket was issued was printed on its face and was as follows:—

"All flights are made at the discretion of the Pilot, whose decision as to conditions is final, and this Ticket is issued subject to weather and other conditions permitting flight, and in the event of conditions preventing flight, the passenger at his option may:—

"(a) Be flown through at the first opportunity.

"(b) Have his Fare refunded.

"It is also a condition that the company has no liability hereunder save as aforesaid and that the passenger *travels entirely at his own risk*, and the company or its servants shall not be liable to any person for any *loss or accident* or delay (*arising from any cause or negligence whatsoever*) suffered by the passenger or his luggage."

These conditions were brought to the passenger's knowledge, and he accepted them by signing the ticket, but he was quite ignorant of the fact that the pilot was not legally qualified to fly the machine, and that the appellant company was aware of this, and was committing a breach of a statutory duty in allowing it to be done. Whether the company could by appropriate words contract itself out of all consequences of a breach of such duty it is not necessary to decide in this case, for in His Honour's opinion they had not done so. The words of the contract apply only to exonerate the company from liability for loss or accident arising from any negligence or cause arising from the moment the flight commenced. The words are not apt to cover loss caused by a breach of a statutory duty antecedent to the commencement of the flight: see the "**West Cock**" [1911] P. 23, 208. The passenger was not asked by the company to indemnify the company against all consequences of a breach of its statutory duty. Although travel by aircraft is more risky than travel by coach, or ship, or railway, or motor, His Honour could see no good reason for placing the common law liability of carriers of passengers by air for hire on any higher level than that of common carriers of passengers by coach or ship or railway or motor. In each case the liability is to provide means of locomotion as safe as they can reasonably be made by care and skill. There is no absolute warranty of seaworthiness or roadworthiness or fitness for the purpose. All that is required by common law is reasonable fitness, but as was said in **Hyams v. Nye,** 6 Q.B.D. 685, there is no great difference between that requirement and absolute fitness, for a high degree of care and skill is required. The law as laid down in **Readhead v. Midland Ry. Co.,** L.R. 4 Q.B. 379, applies generally to common carriers of passengers, including in my opinion passengers by air. The liability must extend to providing not only suitable vehicles, but also to providing properly qualified men in charge of those vehicles. A common carrier can, however, lawfully contract himself out of his liability in this respect, and it will depend upon the terms of the contract whether he has done so: see **Grand Trunk Ry. v. Robinson** [1915] A.C. 740. Where, in addition to the common law liability, there are statutory duties laid on the common carrier for the protection of passengers, it may be that he can contract himself out of these also. But even if he can it would require explicit language. There is nothing in the language of this contract to indicate that this was the intention of the parties. Therefore in His Honour's opinion this breach of duty was not excused by the contract, and as it was a contributing cause of the damage, the contract is no defence.

In addition, His Honour thought the learned Judge was right in holding that the contract was entered into upon an implied condition that all statutory duties as to providing a safe machine and a qualified pilot had been or would be performed. That seems a reasonable condition to imply in the circumstances of the case in the absence of an express term negativing the condition; for no reasonable person would agree to indemnify the carrier against the consequences of his negligence except upon such a condition. If the indemnity was conditional, then,

as the condition was not performed, the indemnity never became effective.

In His Honour's opinion this action might, instead of on breach of statutory duty, have been founded equally well on negligence causing the death. To the plea that negligence was barred by the terms of the contract the plaintiff might well have demurred that the indemnity was void because the condition upon which it had been given had not been performed. By so framing the action the difficulty of finding a *nexus* between the breach of duty and the loss would have been avoided. Either the non-performance of the conditions rendered the contract void, in which case the contract was a new contract created by offer and acceptance without any indemnity for negligence; or else the non-performance of the conditions rendered the indemnity void. The action, however, was not founded on negligence, but solely on breach of statutory duty.

For these reasons in His Honour's opinion the judgment in the Court below was right, and the appeal should be dismissed with costs on the highest scale.

SMITH, J., said that the following judgment was written before the second argument of this case and he had not since found it necessary to alter its reasoning or conclusion. The need for the respondent to prove a breach of statutory duty giving rise to an individual cause of action was not in dispute at the second hearing.

It was common ground between the appellant company and the respondent before this Court that in order to succeed the respondent must show a breach of statutory duty on the part of the appellant company, giving rise to an individual right of action on the part of the respondent. If that is established, then the question of the *nexus* between the breach of duty and the injury alleged will arise for consideration.

After summarising the respondent's claim, His Honour said that the respondent alleged that in fact, the pilot of the aeroplane, Kight, who was the Managing Director of the appellant company, was not licensed in the prescribed manner to carry passengers for hire, that the appellant company has failed to show that such contravention or failure to comply with the regulations was due to stress of weather or other unavoidable cause and that there was, therefore, a breach of a statutory duty by the appellant company. The respondent further alleged that the statutory duty was imposed in the interests of a special class, namely, passengers for hire and accordingly that as the respondent is the representative of the deceased, William Charles Strand, who was a passenger for hire, he has an individual cause of action provided he can establish the *nexus* between the breach of the statutory duty and the death of William Charles Strand.

The first question is whether a statutory duty was imposed upon the appellant company in the manner alleged by the respondent. The imposition of the duty depends upon the penalty clause in Reg. 4, viz.: "Where any aircraft flies in contravention of or fails to comply with these regulations or any provision thereof, the owner of the aircraft and also the pilot or commander shall be deemed to have contravened or, as the case may be, failed to comply with these regulations." It is clear from the form of the statutory rules dealt with in **Groves v. Wimborne** [1898] 2 Q.B. 402, and in **David v. Britannic Merthyr Coal Co.** [1909] 2 K.B. 146, that a statutory duty may be imposed in this manner. The mere fact that under Reg. 4 the owner is "deemed" to have contravened the regulations cannot alter this conclusion. Furthermore, as the statute authorised the Governor-General in Council to make the regulations, the regulations must be regarded as having statutory authority. His Honour concluded, therefore, that the regulations invoked by the respondent must be regarded as imposing a statutory duty upon the appellant company to see that its aircraft did not fly within the territorial limits specified unless the personnel of the aircraft was licensed in the prescribed manner.

The next question is whether there was in fact a breach of this statutory duty by the appellant company. It was contended for the appellant company that there was not. It was submitted that Kight had passed all the tests required for a "B" license which would permit him to carry passengers for hire and that he could have compelled the grant of a "B" license by mandamus if necessary. His Honour thought, however, that it has not been shown on the facts that Kight had passed the necessary medical test. The Medical Board at Palmerston North had drawn the attention of the Director of Medical Services to Kight's history of neurasthenia and Kight had been required to submit himself to a further examination by Dr. Bowerbank. His Honour thought he must regard Kight as a pilot with an "A" certificate who had not passed all the tests required for a "B" certificate which would have enabled him to pilot an aeroplane carrying passengers for hire. He did pilot an aeroplane carrying Strand as a passenger for hire. The onus of proving any justification, permitted by the penalty clause, for this breach of the regulation rests upon the appellant company—**Britannic Merthyr Coal Co. v. David** (1910) A.C. 74—but the appellant company called no evidence. Accordingly, the learned Judge held that in fact the appellant company did commit a breach of its statutory duty.

The next matter for consideration is whether this breach of statutory duty is a tort for which Strand's representative may bring an action for damages or whether it is not such a tort but only *prima facie* evidence of negligence in an action for damages based upon negligence. If it is the latter, then upon the common ground upon which the argument before this Court proceeded, the respondent must fail, because the action for negligence is excluded by the conditions of the ticket issued to the deceased, Strand. In His Honour's opinion, the breach of the statutory duty alleged by the respondent under the Aviation Act, 1918, does not constitute a tort giving rise to an individual action for damages.

The principles upon which the Courts will act were thus summarised by *Sim*, J., when delivering the judgment of *Edwards* and *Sim*, JJ. (the majority of the Court), in **Fairburn Wright and Co. v. Levin and Co.**, 34 N.Z.L.R. 1, at 24 and 25. Since that decision, the case of **Phillips v. Britannic Hygienic Laundry** [1923] 1 K.B. 539 and [1923] 2 K.B. 832, has been decided. The Court was there dealing with Clause 6 of Article 2 of the Motor-cars (Use and Construction) Order 1904, made under the Locomotives on Highways Act, 1896, and Lord Justice *Atkin* (as he then was), after stating the law generally, formulated the question for decision in these words (p. 842): "Therefore the question is whether these regulations, viewed in the circumstances in which they were made and to which they relate, were intended to impose a duty which is a public duty only, or whether they were intended in addition to the public duty, to impose a duty enforceable by an individual aggrieved." In applying these tests, which His Honour adopted with respect to the present regulations, he added this observation, having regard to the argument for the respondent, that the cases show that if the intention of the Legislature was to protect a special class of persons, that is a consideration of weight leading to the conclusion that the Legislature intended to confer an individual right of action upon members of that class, even though the Legislature had imposed a penalty for the breach of the statutory duty; and, it may be, even though the Legislature has provided that the penalty or a part of the penalty may be paid to the injured party by way of compensation. But the intention indicated by such a circumstance must yield to the true intention of the Legislature as it is to be gathered from all the relevant circumstances.

In His Honour's opinion, the circumstances under which the Aviation Act, 1918, was passed and to which it relates do not indicate that the Legislature intended to create individual rights of action by reason of the breach of the duties imposed by the regulations made under the Act. Prior to the passing of the Aviation Act, 1918, there was no statutory regulation of aviation in New Zealand. Indeed aviation as a means of transport was at that time practically unknown in New Zealand. Although the Act was passed on December 10, 1918, the Regulations were not made until February 21, 1921. The Act was, therefore, a new Act imposing new duties and in this respect it is to be distinguished from the statute which was dealt with in **Groves v. Wimborne** (*supra*), where the Court was dealing with the Factory and Workshop Act of 1878, the first Factory Act having been passed in 1844. In an old case **Stevens v. Evans** (1761) 2 Burrow 1152, 97 E.R. 761, it was said: "It is a rule, 'that upon a new statute which prescribes a particular remedy; no remedy can be taken, but the particular remedy prescribed by the Statute.'" This view was approved by the House of Lords in **Passmore v. Oswaldtwistle Urban Council** [1898] A.C. 387, 398, where Lord *Macnaghten*, in dealing with the Public Health Act of 1875, spoke of the earlier legislation as tentative and experimental and of the Act of 1875 as sweeping away all the previous legislation and making a fresh start. In the same case, Lord *Halsbury* applied the same rule. His Honour thought, therefore, that where an Act is a new one and imposes a penalty for the breach thereof, the Court ought to find clear evidence of an intention to create an individual right of action, in addition to the remedies provided by the Statute and in addition to the remedies existing at Common Law, before holding that such an individual right of action exists. He could find no evidence of such an intention in the circumstances in which the Aviation Act of 1918 was passed and to which it relates. At that time the Armistice had just been concluded but Peace had not been signed. The Legislature had in mind, he thought, the control of aircraft both military and civil. In this respect, it may be noted that the Regulations made in 1921 defined the term "military aircraft" although that term is not used in the Regula-

tions themselves. The term "Government aircraft" is used in Paragraph 9 of Sched. 2, where Government aircraft are exempted from paying landing fees. His Honour's opinion is that at the conclusion of the War, the Legislature was content to pass an experimental Act leaving practically the whole control of aviation in New Zealand to the Governor-General in Council, who might make and alter regulations from time to time, as he thought fit, with power to impose the sanction of such fines as he thought fit, not exceeding £100 for any offence against any of such regulations. Under these circumstances, he could not find any indication that Parliament intended to add an individual right of action to the right of action at Common Law, based upon the principles of negligence, trespass, and nuisance. At the most, in his opinion, the breach of any such regulation might be tendered as *prima facie* evidence of negligence.

The language of the Act itself does not indicate that the Legislature intended to create individual rights of action for a breach of the regulations. As indicated by Lord *Cairns* in **Atkinson v. Newcastle and Gateshead Waterworks Co.,** 2 Ex. D. 441, and by Mr. Justice *Sim* in **Fairburn Wright and Co. v. Levin and Co.** (*supra*) p. 27, the intention of the Legislature in this respect under any particular section of the Act may be gauged to some extent by the intention in the like respect manifested in other sections of the Act. Referring to the Commercial Trusts Act, 1910, Mr. Justice *Sim* said, (page 27): "The fact that of the six sections of the Act devoted to creating offences, five admittedly do not give any private rights appears to be a strong reason for thinking that the sixth section in which the form of language is the same, does not give any such rights." In His Honour's opinion, this argument applies to the Aviation Act, 1918. After a detailed examination of the Act and the relevant Regulations, he said he was of opinion the remedy of a passenger who was injured was left by the Legislature to the principles of the Common Law, subject, however, to the use of a breach of the regulations as *prima facie* evidence of negligence. The whole statute was passed in the public interest and no part of it in the interest of any special class; and the only remedies created by the statute were the remedies specifically authorised by it.

In His Honour's opinion, the regulations which were in fact made in February, 1921, do not indicate that they were made with the intention of creating private rights of action. The penalty clause which creates the statutory duty, imposes it not only upon the owner but also upon the pilot or commander of the aeroplane. It is difficult to think that the Legislature intended that an individual right of action for damages should be created against each of them by this new statute. Again, the Order in Council did prescribe by Reg. 1 as part of the general conditions of flying that no aircraft should fly unless the personnel of the aircraft was licensed in the prescribed manner. The word "prescribed" is defined by Reg. 6 to mean "prescribed by these regulations or by directions of the Air Board thereunder." A perusal of the regulations shows that the whole control of the licensing of aircraft and of the personnel of aircraft and the cancellation and suspension of licenses is confided to the Air Board. (See Reg. 7 and the Schedule and Reg. 5). The Air Board is thus defined: "'Air Board' means such Board as may be constituted by the New Zealand Government for the promotion and control of aviation, and includes, in relation to any purpose of these regulations, any person authorised by the Air Board for that purpose." At the time, then, that the regulations were made, the Governor-General in Council was confiding the whole control of the licensing of aeroplanes and personnel to a Board not then set up, and which when set up might delegate its authority to one person. A perusal of the regulations shows, in His Honour's opinion, that in these circumstances the Governor-General in Council did not contemplate that he was making regulations which would create individual rights of action. Furthermore, Reg. 8 indicates, in my opinion, that they were not intended so to do. Reg. 8 provides: "Nothing in these regulations shall be construed as conferring any right to land in any place as against the owner of the land or other persons interested therein, or as prejudicing the rights or remedies of any persons in respect of any injury to persons or property caused by any aircraft."

(The learned Judge in the Court below regards the latter part of this regulation as conserving to any person injured, whether one of a particular class or not, the right to damages for injury caused by an aeroplane improperly handled.) His Honour said that Regulation 8 shows that the regulations are not intended to add to or to subtract from private civil rights of action. "... the rights or remedies of any persons in respect of any injury to persons or property caused by any aircraft," seem to me to be regarded as the separate body of law existing apart from the statute and its regulations which is available for cases of individual injury and the regulation ensures that such body of law shall not be prejudiced by the regulations. If that be so, then the regulations must be regulative measures of a police character imposed in the public interest; and that was His Honour's view of them. They are of the same type as the regulations made under the Motor-vehicles Act, 1924: **Black v. Macfarlane** (1929) G.L.R. 524.

For the foregoing reasons, His Honour concluded: (1) that the Legislature did not intend that new individual rights of action should be created by reason of a breach of any of the regulations made under the Act and in particular, as affecting the present case, by regulations made pursuant to s. 3 (1) (*f*) of the Act; and (2) that the regulations themselves were not intended to create and did not create duties the breach of which would give rise to individual causes of action. It follows, in his opinion, that the respondent is unable to rely upon any individual right of action based upon a breach of statutory duty.

Any other ground of action must be based on negligence. An action on this ground appears to be met by the conditions of the ticket and the respondent's advisers seem to have taken this view. In any event, this ground is not raised by the Statement of Claim. (See pars. 8 and 9 of the amended Statement of Claim.) Moreover, as His Honour had said, the case was dealt with throughout the argument before this Court, upon the basis that the respondent must establish an individual cause of action arising out of a breach of statutory duty. Accordingly, it was not necessary for him to deal with the facts either as constituting a *nexus* between a breach of statutory duty and the injury or as affording a ground for relief based on negligence.

In His Honour's opinion, the appeal should be allowed.

KENNEDY, J., said that the plaintiff's case was based, not upon an allegation of negligence but upon an allegation that there had been a breach of a statutory obligation imposed on the defendant company whereby William Charles Strand, the deceased, met his death. It became necessary, therefore, to consider in the first place whether there was breach of a statutory duty and secondly, if so, whether the breach gave rise to a cause of action. There is no doubt that the regulations made pursuant to the authority conferred by the Aviation Act, 1918, imposed a duty upon the defendant company not to carry passengers for reward unless the pilot of the aircraft was licensed in the prescribed manner, that is unless he held a "B" Pilot's Flying certificate for flying passenger aircraft. In fact, the deceased pilot did not possess such a license although there was evidence that he had the requisite experience and flying qualifications to satisfy the practical tests and technical requirements of the regulations for a "B" License, but, although he had passed the medical examination with certain doctors, he had not submitted himself to another medical examination before an examiner nominated by the Director of Medical Services. The Aviation Act, 1918, empowered the Governor-General to make regulations prescribing the physical requirements of candidates for and holders of flying-certificates and for the issue and cancellation of licenses authorising the use of aircraft, and prescribing the conditions subject to which such aircraft may be so used, including conditions as to the carriage of passengers and goods. A penalty is imposed for breach of any of the regulations and the question arising, therefore, was whether there is a duty owed to passengers, for breach of which, notwithstanding the enforcement of the public duty by penalty, an action will lie. Whether such an action lies depends, in the last analysis, upon the intention of the Legislature. The question must be as was said in **Vallance v. Falle** [1884] 13 Q.B.D. 109, whether it was intended to confer a general right which might be the subject of an action, or to create a duty sanctioned only by a particular penalty, in which case the only remedy for the breach of the duty would be by proceedings for the penalty. The rule applicable, as subsequent authority has clearly shown, is that stated by Lord *Tenterden* in **Rochester** (Bishop) **v. Bridges** (1831) 1 B. & Ad. 847, when he said: "And where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." This rule has the approval of both Lord *Halsbury* and Lord *Macnaghten* in the House of Lords in **Passmore v. Oswaldtwistle Urban District Council** [1898] A.C. 387. In that case Lord *Macnaghten* at p. 397 said: "The law is stated nowhere more clearly or, I think, more accurately, than by Lord Tenterden in the passage cited by my noble and learned friend on the woolsack. Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience." The latter statement amplified the observations of *Cairns*, L.C., in **Atkinson v. The Newcastle and Gateshead Waterworks Co.** (1877) 2 Ex. D. 441, by the addition of the words "considerations of policy and convenience." In **Wolverhampton New Water-**

works Co. v. Hawkesford (1859) 6 C.B.N.S. 336, Mr. Justice *Willes* classified the cases in which a liability might be imposed by statute. His second class consisted of those cases in which the statute had created a liability, but had given no special remedy for it and the third class of cases where the statute created a liability not existing at Common Law, but gave also a particular remedy for enforcing it. He observed that in the second class a person aggrieved might adopt an action of debt or the other remedy at Common Law to enforce it but in the third class the party complaining must adopt the form of remedy given by the statute. Since the decision in **Atkinson v. Newcastle and Gateshead Waterworks Co.** (*supra*) it would appear in both the second and third classes that the answer to the question whether an individual has a right of action must depend on what the particular statute is, and what the purview of the Legislature, especially when the Act is not one of public general policy but more in the nature of a kind of legislative bargain: see the observations of Lord *Macnaghten* in **Johnston and Toronto Type Foundry Co. Ltd. v. Consumers' Gas Co. of Toronto** [1898] A.C. 447. In ascertaining the intention of the Legislature from the language of the statute regard must be had to the circumstances with reference to which the words were used and what was the object, appearing from these circumstances, which the person using them had in view: **The River Wear Commissioners v. Adamson and Ors.** [1877] 2 A.C. 743 *per* Lord *Blackburn* at p. 762, and **Butterley Co. Ltd. v. New Hucknall Colliery Co. Ltd.** [1910] A.C. 381.

The next case which should be mentioned is **Groves v. Wimborne** [1898] 2 Q.B. 402. There the Court of Appeal decided that a cause of action lay where a workman was injured through the breach of the statutory duty to fence. In the course of his judgment, *Vaughan Williams*, L.J., said at p. 415: "It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has failed to perform the duty." The decision in **Groves v. Wimborne** (*supra*) was referred to with approval by Lord *Kinnear* in **Butler (or Black) v. Fife Coal Co. Ltd.** [1912] A.C. 149, and the decisions in **Pursell v. Clement Talbot Ltd.** (1914) 111 L.T. 827; **Mackey v. J. H. Monks (Preston) Ltd.** [1918] A.C. 59, and **Davies v. Owen (Thomas) and Co.** [1919] 2 K.B. 39, are all in accord with **Groves v. Wimborne** (*supra*). A statutory duty may, however, be owed to the public and there may nevertheless be rights on the part of individuals suffering danger by reason of the breach of statute. Thus in **Phillips v. Britannia Hygienic Laundry Co. Ltd.** [1923] 2 K.B. 832, *Atkin*, L.J., said: "To my mind, and in this respect I differ from McCardie, J., the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot. The right of action does not depend on whether a statutory commandment or prohibition is pronounced for the benefit of the public or for the benefit of a class. It may be conferred on any one who can bring himself within the benefit of the Act, including one who cannot be otherwise specified than as a person using the highway." **Charman v. South-eastern Railway Co.**, 21 Q.B.D. 524; **Williams v. The Great Western Railway Co.**, L.R. 9, Exch. 157, and **Parkinson v. Garstang and Knott End Railway Co.** [1910] 1 K.B. 615 afford illustrations of liability to individuals where there was also a duty to the public.

Prima facie then the penalty is the only remedy for the breach by the defendant company of a regulation made under the Aviation Act, 1918 (Provisional), but whether it is so or not, must finally be ascertained from the purview of the legislation and the general scope of the statute. Very many considerations at once occur which are not conclusive but which possess some weight such as the short title: "An Act to control Aviation in New Zealand"; the fact that the statute is provisional; that offences may be deemed to be committed by the owner as well as by the pilot and the commander and the application of certain provisions to aircraft carrying goods for reward as well as to aircraft carrying passengers. His Honour thought that while some of these circumstances may be disregarded, what does determine the matter is a consideration of the nature of the statutory duty imposed and the circumstances in which the regulations show that the duty arises. Transport by air is a new method of transport in which, in the present state of the art, there is certain danger to the lives of the passengers if the pilot is not skilful or if his aircraft is defective. Although the consequences of neglect may well be fatal, a passenger who is about to travel obviously has no effective opportunity of guarding against the dangers arising either from the personnel of the aircraft or from the nature of the equipment. The requirement of a "B" License and of special inspection and overhaul are, in my view, intended primarily to secure, so far as reasonably may be, the safety of the passenger rather than the general safety. The regulation does occur amongst provisions of a regulative character, but nevertheless the requirement of a "B" License for pilots engaged in public transport, cannot be said to be directed, as was said of the regulation specially considered in **Phillips v. Britannia Hygienic Laundry Co. Ltd.** (*supra*) to the police or traffic aspects. On the contrary, His Honour thought it was directed to securing the safety of the individual passenger just as certain other regulations are explicitly stated to be for the general safety. He thought that only upon this ground may the higher requirements for pilots engaged in public transport be rationalised. The special requirements for aircraft carrying passengers for reward can have no object unless to afford protection to passengers. Moreover, unlike the regulation considered in **Phillips v. Britannia Hygienic Laundry Co. Ltd.** (*supra*), the regulation, now under consideration, does not relate to matters in which the rights of passengers are already well provided for by the Common Law. Regulation 1 (iii) is always to be observed and may not be departed from in any circumstances. Thus the regulation operates, in His Honour's opinion, for the protection of a class which may be defined as consisting of those who have for reward entered into contractual relations with the carrier and who are thus marked off from the general public, and each member of this class has correlative rights. The duty, although imposed by regulation, must be treated as imposed by the statute under the authority of which the regulation was made: see **Britannic Merthyr Coal Co. Ltd. v. David** [1910] A.C. 74; **Butler (or Black) v. Fife Coal Co. Ltd.** (*supra*); **Mackey v. J. H. Monks (Preston) Ltd.** (*supra*), and **Phillips v. Britannia Hygienic Laundry Co. Ltd.** (*supra*). From these considerations, His Honour concluded that the breach of the regulation requiring the pilot to have a "B" certificate may give rise to a cause of action.

A passenger claiming damages for breach of this duty must, if he is to succeed, prove that the damage suffered was caused by the breach of duty. The company is not under an absolute liability to a passenger if by or during the flight a regulation is broken. The passenger may claim damages for breach of the statutory duty then, only if he proves that through such breach he suffered damage. It is not sufficient to show that a breach of the regulations was a *sine qua non* or in this case that no damage would have been suffered if a pilot, not holding a "B" License, had not taken the passenger into the air. While in the air it is conceivable that aircraft might be struck by lightning or, without negligence, by another machine and no action would lie merely on proof that the pilot did not hold the required license. The pilot may, even though unlicensed, have qualifications both of skill and of nervous stability which are higher than those required for a "B" License. In such a case no action would lie because it could not be proved that the injury was due to the lack of some qualification which would have been required to obtain a "B" License and damage could not be attributed to the breach of the regulation. This rule was much discussed in **Jones v. Canadian Pacific Railway Co.**, 110 L.T. 83, and the conclusion may be taken to be that "the violation by the defendants of their statutory duty would not entitle the plaintiff to recover unless the injury to the plaintiff followed from that breach—that is, that the breach of the statutory duty was either the sole effective cause of the injury, or was so connected with it as to have materially contributed to it."

His Honour then analysed the evidence tendered by the plaintiff in the Court below, and concluded that the circumstances afford some support to the observation of Pomfret and Stewart that the engine stopped prior to the shed being reached and for the view that the final turn was not a negligent manoeuvre, the engine being stopped immediately prior to landing, but that a finding of negligence was not warranted merely from the turn into the wind immediately before the aircraft stalled.

The final question was whether it had been proved that the breach of regulation caused, or materially contributed to, the casualty. From the observations already quoted from **Jones v. Canadian Pacific Railway Co.** (*supra*) it appears that even though a breach of regulation is proved, a *nexus* must still be established and a *nexus* is not presumed. If it be that pilots holding "B" Licenses are absolutely safe, then the mere occurrence of the accident would be proof that the damage was due to the breach of regulation. But notwithstanding certain answers given by the Director of Air Services who treats "B" pilots as absolutely safe, His Honour was unable to take that

view. Whether or not a causal connection is proved must be considered in the light of the negligence proved and of the technical ability to be possessed and the medical requirements of the regulations and of the ability and medical history of the deceased. He did not think that the plaintiff has established a causal connection between the casualty and the pilot's want of some medical requirement for the "B" License. In his view the appeal should be allowed.

Solicitors for appellant: **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitor for respondent: **M. O. Barnett,** Wellington.

Supreme Court

Smith, J. September 27; October 21, 1932. Auckland.

VINCENT v. TAURANGA ELECTRIC POWER BOARD.

Electric-power Board—Injury received by worker as Board's employee—Whether claim barred by time-limit imposed by statute—Alternative causes of action—Breach of implied contract—Employment incorporating duty on Board's part to comply with Regulations—Breach by Board of absolute statutory duty—Effect on proceedings for recovery of damages—Electric-power Boards Act, 1925, s. 127—Electrical Supply Regulations, 1925, R. 178—Public Works Act, 1928, s. 319.

Questions of law argued before trial.

An order was obtained by the consent of both parties to this action that the following question of law should be argued before trial, namely: "Whether s. 127 of the Electric Power Boards Act, 1925, is applicable to the plaintiff's cause of action and an effective bar to the proceedings instituted by him."

The plaintiff's cause of action arose out of an injury suffered by him on June 6, 1930, but the writ claiming relief was not issued until April 1, 1932, a period much in excess of six months. The Amended Statement of Claim set up two causes of action: (1) That under the implied terms of the contract of employment of the plaintiff with the defendant Board, the latter was under a duty to provide for the security of the plaintiff and the necessary safeguards against accident, and to provide safe plant upon which he had to work, and generally to comply with the several regulations known as "The Electric Supply Regulations, 1927," and that, particularly in violation of Reg. 178 thereof, the plaintiff was not provided with the necessary safety apparatus, nor was the transformer on which he was ordered to work in a safe condition or effectively rendered safe as required by such regulations.

Alternatively, (2), that the Board was under an absolute statutory duty to the plaintiff to comply with each and all of the said Regulations, and had not done so, in consequence whereof the plaintiff had received injury and had suffered damages.

Section 127 of the Electric-power Boards Act, 1925, is as follows:—

"127. (1) No action shall be commenced against the Board or any member thereof, or other person acting under the authority, or in the execution or intended execution, or in pursuance of this Act, for any alleged irregularity, or trespass, or nuisance, or negligence, or for any act or omission whatever, until the expiry of one month after notice in writing specifying the cause of action, the Court in which the action is intended to be commenced, and the name and residence of the plaintiff and of his solicitor or agent in the matter has been given by the plaintiff to the defendant.

"(2) Every such action shall be commenced within six months next after the cause of action first arose, whether the cause of action is continuing or not."

It was claimed that this section effectively barred the proceedings as the action was not commenced until twenty-two months after the accident.

Held: (1) That the Board, though operating its lines pursuant to a license issued under the Public Works Act, 1928, was incorporated under the Electric-power Boards Act, 1925, and, for the purposes of s. 127 of the latter statute, must be regarded as acting pursuant to it. (2) That if at the trial the implied contract as pleaded could be established, then s. 127 would not apply to bar his action, as the plaintiff, in committing a breach of such implied contract, would not be acting in the execution or intended execution or in pursuance of the Act, but in the execution or intended execution or in pursuance of the contract. (3) That, in so far as the plaintiff's claim rests upon the Board's omission to perform a statutory duty, while it was engaged upon work in the intended execution of the Electric-power Boards Act, 1925, or in pursuance thereof, s. 127 is a bar to the action.

Cooney and **Manning** for the plaintiff.

Meredith and **McCarthy** for the defendant Board.

SMITH, J., said that with regard to the first cause of action, the various paragraphs read together show that that cause of action was based upon an implied contract of employment between the plaintiff and the defendant Board, incorporating, as terms of such contract, not only an obligation by the defendant Board to provide safe plant on which to work and to provide the necessary safeguards against accident, but also an obligation to comply with each and all of the Electrical Supply Regulations, 1927, one of which is Regulation 178. With regard to the second and alternative cause of action, the pleading showed that it was based upon the breach of an absolute statutory duty giving rise to an individual cause of action on the part of the plaintiff against the defendant Board.

His Honour then set out s. 127 of the Electric Power Boards Act, 1925.

The most general ground taken by Mr. *Cooney* for the plaintiff for submitting that this section does not bar the plaintiff's action was that the defendant Board was not acting under the authority of the Electric-power Boards Act, 1925, when it was carrying out the work on the transformer at the time that the plaintiff was injured; but was, on the contrary, acting under the authority or in pursuance of the Public Works Act, 1928. The grounds for this submission were that by s. 79 of the Electric Power Boards Act, 1925, the generating works and other undertakings of the Board constructed under the Electric-power Boards Act are made subject to the provisions, *inter alia*, of the Public Works Amendment Act, 1911, now contained in s. 319 of the Public Works Act, 1928; that an Electric-power Board requires two licenses, namely, one under s. 76 of the Electric-power Boards Act, 1925, enabling the Board to purchase or construct its works and the other under s. 319 of the Public Works Act, 1928, permitting the Board to use its electric lines—see **Waitemata County Council v. Waitemata Electric Power Board** [1932] N.Z.L.R. 971, 979 and 986, [1932] G.L.R. 491, 494 and 497—and that the injury to the plaintiff occurred in connection with the user of the Board's lines. The action was, however, against a Board constituted under the Electric-power Boards Act. The object of s. 127 is to protect such a Board from stale actions. As was said by Lord *Shaw* in **Bradford Corporation v. Myers** [1916] 1 A.C. 242, 260, with reference to s. 1 of the English Public Authorities Protection Act, 1893: "By the limitation which it imposes it prevents belated and in many cases unfounded actions. In this way it, *pro tanto*, allows a safer periodical budget, prevents one generation of ratepayers from being saddled with the obligations of another, and secures steadiness in municipal and local accounting."

In His Honour's opinion, the Legislature must have intended s. 127 to protect the Board in respect of such acts or omissions as are within the section, whether they occur in connection with the construction of the works or the user of the lines. In respect of such acts or omissions, the Board as a corporate body must be regarded as acting in pursuance of the Act under which it was incorporated and from which, ultimately, it derived its powers, even though operating its lines under a license provided for by the Public Works Act. That license was, itself, required pursuant to the obligations imposed upon the Board by the Electric-power Boards Act, 1925. To hold that actions for damages arising out of the user of the lines were outside the protection of the section would largely nullify the obvious purpose of the section, as such actions would, in general, be the only kind of actions, based upon injuries, to which the Board would be subject once the works of the Board had been constructed. In His Honour's opinion, it is clear that, for the purposes of s. 127, the Board as a corporate body must be regarded as acting pursuant to the Electric-power Boards Act, whether it is constructing its works or operating its lines. He thought, therefore, that Mr. *Cooney's* submission on this ground failed.

The next question was whether the causes of action were within the protection afforded by the section. The first cause of action was, as explained above, based upon an implied contract between the plaintiff and the defendant Board incorporating not only an obligation to provide safe plant on which to work and to provide the necessary safeguards against accident, but also an obligation to comply with each and all of the Electrical

Supply Regulations, 1927. This was a very special type of implied contract to allege, but at the present stage of the proceedings it must, His Honour thought, be accepted as pleaded. Under ordinary circumstances, one would think that no such contractual relationship could be implied between the Board and one of its linesmen. In the ordinary course, the plaintiff would be employed at a certain wage, with certain terms as to notice of termination of employment and the like; but the statutory regulations would not, he thought, be embodied as contractual terms in the contract of service. The plaintiff would be entitled, of course, to use the regulations in an action against the Board for personal injuries either as statutory regulations enacted for the benefit of the class to which he belonged, the breach of which gave rise to an individual cause of action in him, or as statutory regulations, the breach of which was evidence of negligence on the part of the Board. But His Honour did not know the terms of any industrial award applying to the circumstances of the present case or the evidence which the plaintiff proposed to adduce in support of his allegation of such a special implied contract, and he, therefore, must accept it at the present stage as pleaded. If the plaintiff could, at the hearing, show circumstances from which such a special contract between the plaintiff and the defendant Board could be implied, then, His Honour thought, s. 127 would not apply to protect the Board. In committing a breach of such a contract with the plaintiff, the Board would not, in his opinion, be acting in the execution or intended execution or in pursuance of the Act, but in the execution or intended execution or in pursuance of the special contract. The mere fact that such a contract was not pleaded as an express contract did not alter this conclusion. The contract alleged was of such a special nature that he could not think that the Board could be regarded as acting otherwise than in pursuance of the contract, and not of the statute, if it committed a breach thereof. The fact that notice of action was not necessarily required in the case of an implied contract was pointed out by Lord *Esher* in **Midland Railway Co. v. Withington Local Board,** (1883) 11 Q.B.D. 788; and also by Mr. Justice *Cooper* in **Motueka Harbour Board v. Rankin,** 29 N.Z.L.R. 485, 488. He thought, therefore, that if the plaintiff could, at the hearing, show circumstances from which the special contract alleged was to be implied, s. 127 would not bar his action. It was too early, at the present stage, to say whether the plaintiff could prove such a contract or not.

The next question was whether the section applied to the claim based upon a breach of statutory duty. The answer to this question seemed to His Honour to be self-evident. If the Board were under an absolute statutory duty to the plaintiff to do the act which it failed to do, and thereby injured him, the fact that the duty was statutory meant that it was imposed by the Act itself, and the failure to do it was clearly, he thought, an omission which occurred in the intended execution of the duty—assuming, of course, that the Board did not wilfully or maliciously injure the plaintiff. Upon this assumption, what occurred was a failure to perform the duty properly. The Board adopted an improper mode of working on the transformer. As pointed out by *Bowen*, L.J., in **Chapman, Morsons and Co. v. The Guardians of the Auckland Union,** (1889) 23 Q.B.D. 294, 303, upon the terms of s. 264 of the Public Health Act, 1875, the words "anything done or intended to be done" mean, "not a thing intended to be done in the future, but which, at the time of doing it, is supposed to be done under the provisions of the Act." In **Jolliffe and Ors. v. Wallasey Local Board,** (1873) L.R. 9 C.P. 62, it was held upon a similar section, namely, s. 139 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), that an omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave such a duty unperformed, amounts to "an act done or intended to be done." See also: **Newton v. Ellis,** (1845) 5 E. & B. 115, and **Wilson v. Mayor, etc., of Halifax,** (1868) L.R. 3 Ex. 114. These cases which His Honour had cited were much more applicable to s. 127 of the Electric-power Boards Act, 1925, than the authorities on s. 1 of the Public Authorities Protection Act, 1893 (England), which were referred to in argument and which depend largely upon questions relating to whether the duty was a public duty or not within the meaning of that Act. His Honour was, therefore, of opinion that in so far as the plaintiff's claim rested upon the Board's omission to fulfil a statutory duty while it was engaged upon work upon the transformer in the intended execution of the Electric-power Boards Act, 1925, or in pursuance thereof, s. 127 was a bar to the action.

Question answered accordingly.

Solicitor for the plaintiff: **H. O. Cooney,** Te Puke.

Solicitors for the defendant Board: **Meredith and Hubble,** Auckland.

MacGregor, J. October 17, 1932.
Wellington.

R. v. MAXWELL.

Criminal Law—Trial—Change of Venue—Alleged Bookmaker committed for trial at Nelson where he carried on business—Question of Impartiality of Jury discussed—Crimes Act, 1908, s 370.

Motion for the change of place of trial from Nelson to Wellington. The accused was a person named Maxwell who was charged with carrying on the business of bookmaking. He had been committed for trial, and in the ordinary course of events would come up for trial at the next sessions of the Supreme Court at Nelson. The Crown asked under section 370 of the Crimes Act, 1908, that he should be tried at Wellington.

The motion was supported by the affidavit of a constable at Nelson (who himself was not to be a witness at the trial) and this affidavit set out various facts and beliefs of his as follows: "That on the Sixteenth day of June, 1925, the said Maurice Vyvyan Richard Sterling Maxwell was tried at the Supreme Court, Nelson, on the charge of carrying on the business of a bookmaker when the jury disagreed and a second trial was ordered.

"That on the sixteenth day of June, 1925, such second trial took place at Nelson when the jury again disagreed.

"That on the ninth day of July, 1925, a *nolle prosequi* was entered in the Supreme Court at Nelson.

"That on the third day of February, 1931, the said Maurice Vyvyan Richard Sterling Maxwell was convicted at the Magistrate's Court, Nelson, on two charges of street betting and was fined seventy-five pounds on each charge.

"That any Nelson jury is likely to contain a proportion of betting persons amongst its members and it is likely that all betting people in Nelson have done business with the said Maurice Vyvyan Richard Sterling Maxwell.

"That it will be impossible to obtain for the trial of the said Maurice Vyvyan Richard Sterling Maxwell at Nelson an impartial jury."

Held: Refusing Crown's application: The Court could not assume that accused would not have fair trial at Nelson or that it was expedient for the ends of justice that the venue should be changed. *Reg. v. Legatt,* 19 N.Z.L.R. 317 applied.

Evans-Scott in support.

Kerr to oppose.

MacGREGOR, J., orally, said that the Crown made the suggestion that, if the trial took place at Nelson, it would be difficult or impossible to obtain an impartial jury at the trial. In the result he could not say that he was at all convinced that an impartial jury could not be obtained in the present case. In **Regina v. Leggatt,** 19 N.Z.L.R. 317, in a motion for a change of venue from Nelson on an abortion charge, *Stout,* C.J., said (*inter alia*) at p. 318: "I cannot assume that the people of Nelson hold different views regarding the crime from those held by the people in other parts of the colony, or that they will allow their opinions, whatever they may be, to sway them in the discharge of their judicial duty. . . . Unless, therefore, I am to hold that no small place is a proper place for the trial of a crime, the jury-panel being so limited, I see no ground for changing the venue. I must assume that a jury of Nelson people are capable of respecting their oaths and of doing justice."

It seemed to His Honour that those judicial remarks were of some cogency in the present case. There was nothing to satisfy him here that the accused may not have a fair trial. It was quite possible when the case went to trial that he may be convicted by a Nelson jury. If so, the matter would end there. If the jury disagreed, and there was any reason to suppose from the strength of the evidence against him, of which His Honour knew nothing, that he should have been convicted, then an application for change of venue might be successful. In the meantime he was not satisfied that it was expedient for the ends of justice that the venue should be changed. That being so, the present motion was refused, without costs.

Motion refused.

Solicitor for the Crown: **C. Richmond Fell,** Crown Solicitor, Nelson.

Solicitor for the accused: **J. R. Kerr,** Nelson.

Identification in Accident Cases.

A Consideration of the Doctrine.

By W. E. Leicester, LL.B.

It is customary to declare that the doctrine of identification set up in *Thorogood v. Bryan*, 8 C.B. 115, and based upon some personal obligation of selective bewareness has been "swept away" by *The Bernina*, 13 A.C. 1; and the expression is not inapt in these days of modern transport when the tide of injured passenger claims seems to be taken at the flood. At all events, this relic of tribal unity, as Mr. Justice Chapman describes the doctrine in *Galloway v. Anderson* [1920] N.Z.L.R. 8, has now disappeared from our system. Blood or family relationship is in itself no bar. Thus, a mother is not identified with the negligence of her son: *Terry v. Gould*, 69 Sol. J. 212; nor a son with that of his father, *Black v. Macfarlane* [1929] G.L.R. 524. A wife can recover despite her husband's contributory negligence: *Bruce v. Murray* [1926] Sc. L.T. 236. Provided he neither owns nor seeks to control the vehicle in which he is travelling, the passenger, injured by the negligence of both drivers, can pursue his remedies against the two tort-feasors and anyone else vicariously liable for them. In *Terry v. Gould* (*supra*), the father was also being conveyed, but he failed because, being owner of the car, his son was held to be his agent. The fact that the passenger almost invariably selects the driver of the other vehicle as his legal target may be due to sentiment or to an unconscious bias in the matter of blame, but in New Zealand a stronger reason is to be found in the fact that the one driver has compulsory third-party cover while the other's liability is excepted under the comprehensive cover as well as the Statute.

For some time past, certain writers have accepted the view that a child taken for a drive by his father and injured in a collision to which the father has contributed by his negligence cannot recover damages: *Welford on Accident Insurance*, 2nd Ed. p. 510. In such circumstances, the defendant is apparently absolved, not merely where he is charged with a breach of contractual duty to take care, but also where he is an independent wrong-doer: *Clerk and Lindsell on Torts*, 8th Ed. p. 464. These expressions of opinion arise, it would seem, from the view of Cockburn, C.J., in the Exchequer Chamber in *Waite v. North Eastern Railway Co.* [1859] E.B. & E. at p. 733, that when a child of tender age is brought to any conveyance for the purpose of being conveyed and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. But eliminate the contractual condition, and no reason appears why the child should not have an action against the joint tort-feasor, nor be disentitled by reason of the parent's negligence in placing it or permitting it to be placed in a position in which it has sustained injury: *Beven on Negligence*, 4th Ed. p. 232.

Waite's case was not expressly over-ruled by *The Bernina*. In the Court of Appeal, Lord Justice Lindley (as he then was) thought it materially different from *Thorogood v. Bryan* and regarded it as decided on perfectly sound principle. In the House of Lords no disapproval of the result of *Waite's case* was voiced either by Lord Watson or by Lord Hershell. The late Sir John Salmond ranged himself on the side of Lord Bramwell who found it indistinguishable from *Thorogood v. Bryan* and thought it shared the same fate. On the other hand, the editor of *Salmond on Torts*, 7th Ed. at p. 54, seeks to justify the decision on the ground that the grandmother's negligence was the *sole* cause of the accident—a contention that a reading of the facts does not support and one that the jury quite properly rejected. In 1909, opinion was divided in Australia as to whether an infant of ten years was identified with the negligent navigation of a boat by his father with whom he was travelling. Simpson, A.C.J., considered that no distinction could be drawn between an adult and a child passenger, but Cohen and Pring, JJ., preferred to follow *Waite's* case and found for the defendant: *Russell v. Jorgensen*, 9 S.R. (N.S.W.) 164. In a later case, Ferguson, J., confessed himself unable to see how *Waite's case* could logically stand side by side with the *Bernina* decision: *Blackler v. McElhone*, [1913] S.R. (N.S.W.) at p. 498.

In the meantime, such doubts have been set at rest by the Divisional Court in *Oliver and Anor. v. Birmingham and Midland Motor Omnibus Co. Ltd.*, 48 T.L.R. 540. Here the infant plaintiff, aged four, was walking without taking proper precautions to see that nothing dangerous was coming. Suddenly becoming aware of the approach of the motor omnibus, the grandfather let go the child's hand and jumped back to safety, but the child was hit and received substantial injury. The jury found the driver of the omnibus guilty of negligence and the grandfather guilty of contributory negligence. On appeal from the refusal of Judge Ruegg to apply *Waite's case*, Mr. Justice Swift said that an infant a day old had rights and that nobody had any right to injure it by negligence; he could see no difference between such an infant and a man of fifty, and he supported the view of the County Court Judge. "After all," said Mr. Justice Macnaghten whose judgment is similar, "children of tender years are not only persons who are incapable of taking care of themselves. There comes a time in life when a second childhood supervenes and the aged may be quite as incapable of taking care of themselves on a public highway as the very young, and even between the extremes of youth and age there are the halt, the maimed and the blind. All those persons, by reason of their infirmities, have to go out into the public highway under the care of somebody else. Are they also to be debarred from recovering compensation if they are injured by an accident brought about by the combined negligence of the person in whose care they are and a third person?"

It is submitted, nevertheless, that there may be cases where the doctrine of identification can properly be considered. Suppose, for example, the pillion-rider on a motor-cycle elects to continue his journey with a driver who is perceptibly influenced by liquor or upon a vehicle that is unlighted. On the happening of an accident contributed to by one or the other of these factors, both drivers being held jointly responsible, what injustice would be done to the pillion-rider by refusing to regard his legal position as more favourable than that of his driver? In *Huskisson v. Fulton* [1922] N.Z.L.R. 524, the failure of the deceased passenger, to leave the unlighted gig was raised in argument, but Mr. Justice Sim considered that it should have been raised at the trial and put as an issue to the jury. Although we seem to have little authority on the point,

a number of decisions supporting this view are to be found reported in America. In *Minnich v. Easton Transit Company*, 110 Atl. 273, it was held that when dangers which are reasonably manifest, or known to a passenger, confront the driver of a vehicle, and the passenger has an adequate and proper opportunity to control or influence the situation for safety, if he sits by without warning or protest and permits himself to be driven carelessly to his injury, this is negligence which will bar recovery. In many States this proposition prevails: that a person riding in an automobile driven by another, even though not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable or ordinary care to avoid injury. The adoption and application of some such principle would perhaps render life less exciting but it would make for safety and allow a greater peace to descend upon the soul of the pedestrian.

Honana's Head.

The Story of a Maori Libel Case.

By James Cowan.

One of the first and most necessary lessons a journalist learns, in the interests of his paper and himself, is to avoid entangling his employers in an action for libel. No matter how truthful and justifiable the libel, however trivial or ridiculous the pretext for action at law, the certain result is a bill of costs for the newspaper proprietors, whichever way the case casts. So, in my youthful days on a Northern daily paper, the necessity for caution and discretion, conjoined to accuracy, was impressed on us all. In course of time that salutary working rule becomes second nature to the professional writer. Even in the field of fiction, an author often deems it prudent to write a prefatory disclaimer, disarming those who might profess to find themselves portrayed slanderously in his pages. But, with the best intentions in the world, I once found myself involved in a threatened action for damages of which I was the cause. The error of judgment was threefold: (1) a taste—since severely restrained—for the facetious par.; (2) the notion that one could write anything about a Maori of the older generation, because he didn't read the papers; (3) I didn't wait until Honana was dead before telling the story of his life.

* * * * *

Honana te Maioha and his venerable elder brother Patara te Tuhi were old acquaintances of mine who lived at Mangere, on the shore of Manukau Harbour. They were first cousins of Tawhiao, the Maori King—the period of this incident was some forty years ago—and were chiefs of high rank in the Ngati-Mahuta tribe. Both had taken a leading part in the establishment of the Maori Kingdom in Waikato, and both indeed had been newspaper craftsmen themselves, for Patara and Honana were the men who in 1862-63 printed the Kingite Gazette "Hokioi," at Ngaruawahia on the press presented by the Emperor Franz Josef of Austria to two Waikato chiefs who visited Vienna at the end of the Fifties. Patara was the editor of this organ of the Maori party. He was in long after years the subject of some fine portraits and studies in tattoo by the artist Charles Goldie; and I remember Honana, who was a sharp business-like fellow, for all his Maori ways, scolding his elder brother for sitting to Goldie for five shillings an hour when the artist was making "thousands of pounds" out of his *moko*'d face. Patara was an easy-going benevolent patriarch; Honana was more shrewd and calculating. Both the old men drew comfortable rentals from their lands leased to pakeha farmers at Mangere.

Knowing something of Honana's history, I chanced one day, in quest of topics for "copy," to write up his career in brief, mentioning the fact that he was at one time one of the trusty political travelling delegates of the first Maori King, the old warrior Potatau te Wherowhero, his uncle; also that he once eloped down the Waikato River with Potatau's youngest and prettiest wife, and made a voyage with her to Rarotonga in Paul Tuhaere's schooner to avoid pursuit; and that, moreover, the aged King had threatened to chop off the head of the young Don Juan, his nephew, and set it up on his palisades as a warning to other interlopers who might set roving eyes on the ladies of the royal household.

This story, and more in the same deplorable vein, appeared in a *causerie* column in the Saturday supplement of the paper. Four days later, when I had forgotten all about it, Nemesis called in.

Loud voices below, then up the office stairs came a very angry-looking Honana, his white moustache bristling against his blue tattooed face, a long carved walking-staff in one hand, a copy of the newspaper in the other. He was followed by one of his young relatives, who also carried a paper. Honana was in a fighting mood. He stalked into one room after another, until he found me. Bang went his stick on the floor, as he threw the paper on the table.

"Why, Honana, what is the trouble?" I asked.

"Trouble! Big trouble, very great trouble!" he said, in Maori, trembling with anger. "I thought you were my friend, and now see this terrible thing you have written about me, this falsehood in your paper, this curse you have put on me!"

"Curse, Old Man? We don't curse people in the newspapers, and we don't print false statements."

The old man was not to be pacified. We looked over the offending article together, and took it clause by clause.

"Now, first of all," I said, "we wrote that you were a great chief of Ngati-Mahuta and that you had a high place in the Maori King's party before and after the War. Is that not true?"

"*Ae*," assented Honana; "that is quite correct. I was in the King's Council. And I stood on the crosstrees of the King's great flagstaff when it was set up at Ngaruawahia."

"Next, this article says that you loved one of the young wives of King Potatau and that you ran away with her. I suppose that is the trouble, is it?"

"No, no," said the old man, "I do not find fault with that, it is quite true. Do you not know the proverb of our people, 'To steal a man's clothes is the act of a low common fellow, but only a chief can take a man's wife away from him'? We felt love for each other and my uncle was far too old for her. He died in the next year. That was all right."

We passed on to the next sentences. The article had been translated to Honana by his young people, and he knew it by heart.

"That's it!" he exclaimed when we came to the statement that Potatau had cursed with a great curse his runaway wife and her lover, and had threatened to decapitate Honana and impale his head on the Pa stockade. "That's it, the curse, and the part about chopping off my head! My head! My head is sacred—every big chief's head is sacred. It is a grievous curse to talk about sticking it up on a fence, for all the people to revile and jeer at! When my grandson read and explained that to me I felt very sorrowful indeed. I shed tears over it. Your paper has cursed me, I must have redress for this great, this enormous injury."

The old man would not be appeased. The infraction of his personal *tapu* was grave indeed. He burst out again about his sacred head. King Potatau, he said, would never have uttered such a *kanga* (curse). It was a very serious offence indeed to treat a Chief's *upoko tapu* with contumely or levity. Why, did I not know that he had put away his wife—that same young woman with whom he had eloped down the Waikato—because she was unmindful of the law of *tapu*? I did not know, so he told me. One morning when the cooking-ovens were being opened, he saw his wife (who was a high chieftainess of Waikato) standing so close to the *haangi* that the thick steam rising from it actually enveloped her head. The steam from a cooking oven is especially to be avoided by persons of chiefly rank, who have their sacred heads to consider, and here was his wife in the midst of it, a place that was only fit for the *tutua* women, the servants, the *taurekareka* and she was lowering herself to the level of a slave. So angry was Honana, as he related, that he divorced her there and then; he told her that she was henceforth no wife of his, as she had so degraded herself. (I suspected, though, that Honana by that time had wearied somewhat of the lady, and had another young woman in view).

"Now," said Honana, as he took up stick and newspaper, "now I am going to see my lawyer, Te Tuwha. I know all about these newspapers. I know that when they put the curse on people they have to pay for it. I want *utu*, I want fifty pounds—no, I want a thousand pounds! Yes, a thousand pounds! Remain you there, my friend, I go."

Two days later our proprietors received a note from Honana's solicitor. He was the late Mr. E. T. Dufaur, who did considerable native business. He spoke and wrote the Maori language well.

Honana had consulted him, he said, concerning the article and would we call on him at our convenience.

The Editor deputed me to try to smooth it over, seeing that I had started the trouble. I was relieved to find that Mr. Dufaur had tactfully talked his client out of his fit of indignation. The young people, it seemed, had teased Honana about the elopement and the royal curse and the threatened decapitation until he was wellnigh frantic, and had set him seeking *utu*. But thanks to wise old "Te Tuwha," all ended well. It was settled out of Court, so to say. Honana was content with his demonstration; he had vindicated his personal *mana tapu*, and the fact that he was the only one who had to pay a lawyer's fee did not trouble him. We were very good friends ever afterwards, and I heard from the two venerable brothers many stories of Maori life. But, by silent consent, not a word more about that *cause célèbre* of Honana's ardent youth. The tomahawk was buried.

Legal Literature.

The Statute of Frauds—Section Four, by JAMES WILLIAMS, LL.M. (N.Z.), Ph. D. (Cantab.), with a Foreword by DR. H. D. HAZELTINE, Litt. D., F. B. A., Downing Professor of the Laws of England in the University of Cambridge: pp. 299 (including Index) xxxii.

A REVIEW BY A. H. JOHNSTONE, B.A., LL.B.

This is a book of outstanding merit. It will be of especial interest to the profession in New Zealand inasmuch as its author is himself a young New Zealander. In 1930, after winning the Senior Scholarship in Roman Law and the Travelling Scholarship in Law in our University and after graduating in law with first-class honours, Dr. Williams entered the University of Cambridge with the intention of proceeding to the degree of Ph. D. His book was written after two years' research study at Cambridge, primarily as a thesis for the purpose of his degree, a purpose which it served admirably. But it is no mere essay. Dr. Williams has wisely departed from the traditional form of academic thesis and has produced a treatise which will prove of permanent value both to the student and to the practitioner.

Viewing the book as a study in legal history Dr. Hazeltine in his appreciative foreword says:

> "It is not surprising to find, therefore, that under several of the main headings of the present work the treatment of the subject matter is essentially historical . . . From this point of view, Dr. Williams' book is a contribution to English legal history; and, in truth, nowhere else in our legal literature will the reader find the historical development of this branch of our system set out in greater fulness or with equal illumination."

and again:

> "It is not unimportant to observe that this treatise on the Statute of Frauds, written by a practising lawyer who is also in close touch with academic life, is of value as a text book in the schools of law. The improvement of legal education, both academic and professional, is one of the outstanding features of the intellectual life alike of England and the British Empire and of the United States of America during the last half century. In the future work of students and teachers of the law, Dr. Williams' book, treating as it does of a vital feature of legal history and of our present-day system, should hold a special place."

A careful perusal of the book will show that these observations are fully justified. The practising members of the profession will, it is thought, gladly welcome the work as a lucidly expressed text book on a very obscure and bewildering branch of the law. The Statute, passed in 1677, was enacted "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury or subornation of perjury." Accordingly it went on to provide that no action should be brought on certain specified classes of contract "unless the agreement upon which such action should be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." This seems all very clear; but every practitioner knows or will find to his clients' cost that many an action may be brought and enforced on agreements apparently within the Statute where there is no signature in the ordinarily understood sense and indeed where there is no writing. For the Courts in their zeal to uphold contracts have during the two-and-a-half centuries which have elapsed since 1677 so whittled away the original enactment that, as Lord Moulton said in *Hanau v. Ehrlich* [1911] 2 K.B.

1056, 1066 "little of it is left." In this connection it will be remembered that the Court of Appeal of New Zealand in *Mountain v. Styak* [1922] N.Z.L.R. 131 held, notwithstanding the apparently definite provisions of s. 7 of the Statute which require a declaration of trust to be made in writing by the party who is by law enabled to declare such trust, that a writing signed by a trustee admitting the trust was sufficient. It follows that an authoritative exposition of the law as it stands to-day cannot fail to be valuable.

The first part of the book is devoted to a consideration of the kinds of contract which are within and those which are outside the Statute. In this part is discussed the application of *Rann v. Hughes*, 7 T.R. 340n. to the contract by an executor to answer damages out of his own estate; of *Birkmyr v. Darnell* (1704) 1 Salk. 27 to guarantees and of *Cork v. Baker* (1717) 1 Strange 34 to contracts in consideration of marriage. The author has also dealt most helpfully with contracts "not to be performed within the space of one year from the making thereof" and has not hesitated to pronounce the judgments of Mr. Justice Bray and Mr. Justice Coleridge in *Reeve v. Jennings* [1910] 2 K.B. 522 to be wrong. The true principle, he thinks, is that "if all that one party has to do may by possibility (conformably with the terms of the contract) be performed within the year the contract is outside the Statute."

Part II is concerned with the kinds of writing which will satisfy the Statute, the matters which must be contained in a valid memorandum, the kind of *signature* which will be accepted by the Court as sufficient, agency in relation to the signature, and the rules which apply when the memorandum is contained in several documents.

In Part III the author deals exhaustively with rules as to the admissibility of extrinsic evidence where a contract is by the Statute required to be in writing and where a contract which complies with the Statute in regard to writing is subsequently varied or rescinded. There are also illuminating chapters on the equitable doctrine of fraud: the doctrine of part performance and the equitable jurisdiction of the Court to rectify contracts.

Since the book deals only with the law as it stands to-day in England where the Statute was amended in 1925, it contains no special reference to the statutory requirements still in force in New Zealand in regard to contracts for the sale of land. This is unfortunate for us, but in the circumstances unavoidable. This subject is, however, necessarily dealt with to some extent in the chapter on part performance and elsewhere in the book. Dr. Williams concludes by making out a strong case for the repeal of the Statute on the ground that it has outlived its usefulness.

For the rest it may be said that the book, which contains 283 pages, is well written, well printed, and well bound.

—A. H. JOHNSTONE.

The Airlines Case.

In response to many requests, an extended report of the judgment of the Full Bench in *Dominion Airlines v. Strand* is included in this enlarged issue, as this appeal has given rise to considerable interest in the Dominion, and elsewhere. The NEW ZEALAND LAW JOURNAL has been asked to send full reports of this important decision to a number of overseas authorities, including the Air Forces of the United States, of Germany, and of the Australian Commonwealth.

Over the Nuts and the Wine.

At the English Law Society's Meeting.

The Law Society of England held its forty-eighth provincial meeting at Bristol recently, under the presidency of Mr. C. E. Barry. The Lord Mayor of Bristol, Mr. J. H. Inskip, who is a solicitor, is a brother of the Attorney-General. He gave a civic welcome to the members, and attended the banquet which concluded the meeting. Among the distinguished guests at the latter function were Lord Merrivale, Mr. Justice Hawke, Mr. Justice Eve, and Mr. Justice du Parc, who had all been members of the Western Circuit; and Mr. H. R. Wansbrough, president of the Bristol Incorporated Law Society, was in the chair. The speeches were of a high order, and some very witty remarks were made.

Sir Reginald Poole, vice-president of the Law Society, in proposing the toast, "Bench and Bar," said that the Bar possessed an historical and fine record. They subsisted on the meagre contributions meted out to them by solicitors. Sir John Simon and Sir Patrick Hastings would certainly admit that they had difficulty in making both ends meet. Sir John Simon had, in fact, discarded the Bar in order to save money; he had gone to Geneva to establish a foreign domicile, intending to reside there for a period exceeding six months in the year, preaching the gospel of peace entirely contrary to the best interests of his profession.

Mr. Justice du Parc recounted how, when a party of English barristers and solicitors had arrived in New York on the recent visit to the United States and Canadian Bars, they had found outside their hotel a notice saying, "Canvassers, hawkers, and solicitors are not admitted to this hotel." He invited the company to picture the feelings of their friends and the expression on the face of the President of the Law Society, who, even in the agony of the moment, did not show the slightest dismay.

The Lord Mayor of Bristol recalled that the city's charters dated back to 1155 and its mayors and lord mayors to 1216, only one year later than the City of London. It had many claims to historical renown. Even its University had to be congratulated on finding itself able to confer the degree of Doctor of Laws on a man who was in fact a lawyer, in the person of Mr. Barry.

Mr. E. Stanley Gange, the Sheriff of Bristol, in proposing the toast of "The Chairman," said that the Bristol Law Society's president had come to Bristol with a smattering of law, and had taken an office over a public-house with the object both of mitigating the dryness of the law and of impressing people with the large number of his clients. During the visit of the four or five hundred solicitors to the City, the University Library had displayed some old law books. Some of these volumes were said to be bound in human skin. This had probably belonged to some of Mr. Wansbrough's clients, their bodies having been sold to the students at the hospital for what he could get. He could tell several stories about his friend, but there was no one in Bristol more esteemed in the opinion of everybody than Mr. Wansbrough.

Our Serial.

A Conveyancer Looks at "The Reprint of Statutes."

A SCENARIO IN 810 ACTS.*

(*Concluded from p.* 337).

SYNOPSIS OF PREVIOUS INSTALMENTS.

PARCHMENT AND POUNCE, two scriveners and conveyancers, have a pretty typist,

MISS AMNESIA TOUCHKEYS, whose ambition is to become a Barrister. She is in love with

MAFEKING MONTMORENCY, a dirty dog, whose aged and infirm mother,

MRS. WANDA ROUND is charlady at Parchment and Pounce's office. The wave-lengths of her Alsatian hounds had caused much commotion in the immediate neighbourhood.

The action disclosed in the preceding chapters ended at the exciting moment when Peregrinus, a Traveller employed by a well-known firm of legal publishers, had but recently departed from the office of the named firm; and when in the distance a client as yet out of sight, but not of mind, is slowly approaching to consult his family solicitors. The narrative proceeds:

"O, yeah?" I said, thus registering incredulity in the approved manner.

Then, with trepidation, I opened the volume that had been placed before me by our old friend. I was soon, however, reassured. It had been recommended for adult audiences by no less an authority than the Attorney-General himself. I felt certain that any work bearing a foreword by the Chief Justice and the *imprimatur* of the Hon. Mr. Downie Stewart must be well worth while. I rubbed my eyes in astonishment; for, on the very next page, I saw that the work had been supervised by an Editorial Board comprising the eminent Chief Justice of New Zealand (the Rt. Hon. Sir Michael Myers, K.C.M.G.); the Attorney-General aforesaid; and the versatile but erudite Parliamentary Law Draftsman, my old and esteemed fellow-Collegian, Mr. James Christie, LL.M., himself. And the Editor, Mr. H. Alleyn Palmer (I discovered) was a son of Oxford and had been acclimatized in New Zealand, after experience as a member of the English Bar, by his entry into the ranks of our New Zealand counsel. "This," said I, feelingly (as Dominie Sampson had said before me): "This is prodigious!" For gadzooks, I felt that here indeed was a good thing!

And then I thought, as I stood by the shelf of the former Statutes, of all the practical defects of that ponderous work, I thought of the career of the puce, but unlasting, cover of that necessary but bewildering series. I thought of the widows and the orphans it had made, of the tears shed for its deficiencies by the busy practitioner, and of the only counsel who ever loved it silenced by the cold voice of authority. I saw its volumes in Court; I saw them when, on a sad day in a burst of confidence I had said that I could show my client the very section that dealt with the dismissal of married teachers, and I remembered that it took the Supreme Court itself to find that section in a Finance Act. I thought I would rather have been a poor French peasant and worn wooden shoes . . . but I digress! In fine, I decided to sign along the dotted line; later to display the learning of the eminent Editorial Board upon mine own shelves.

[INTERVAL.]

Yesterday morning, the eight volumes of the *Reprint* were delivered at my office, all in their overcoats of serviceable legal buckram. The whole of the current statute-law of New Zealand in eight tidy tomes, any one of which may be carried pleasantly to and fro as need arises. I thought of the words of Peregrinus that the *Reprint* would answer any test; and, smiling to myself, I said (to myself), "I'll just see whether this is not another straw to raise the pecker of the Common Law chappie, and put another feather in his wig." Just then, a client came in. Resisting the urge to lock him in the strong-room, and report his presence to the Museum authorities, respectfully I invited him to approach.

He had a little matter concerning some young children, on which he wanted my advice.

"Yes," said I, "certainly." And† I took down Volume 3 of my compendium of newly-acquired knowledge.

"Ha! Ha!" said I (to myself), "Now we shall see what we shall see!" And (to my client), "Now we shall not be long!"

"Sir," I began, for that always pleases 'em. "Sir, there is a considerable amount of legislation relating to infants. Infants are persons under the age of twenty-one years; and it has been held that a person attains the age of twenty-one years on the day preceding the twenty-first anniversary of his birthday. The disabilities of infancy may, however, be extended in the case of persons over twenty-one by an order under s. 22 of the Child Welfare Act, 1925; see subs. (5) of that section" (which I read, after turning to p. 1101, *post*).

"Infants have always been protected by law and have only a limited legal capacity, and the common law in this respect has been extended from time to time by statute," I continued, learnedly. "Much of the law of England as to infants is applicable to, or has its counterpart in, New Zealand, and some assistance may be derived, therefore, from a consideration thereof. For the English statutes on the subject, we shall refer to *Halsbury's Statutes of England*, Volume 9, pp. 771 *et seq.*, and, for the general law, to *Halsbury's Laws of England*, title Infants, and to the cases in the *English and Empire Digest*, Volume 28, pp. 121 *et seq.*" I had it all off pat, since looking at the *Reprint* before me.

After pausing for breath, I went on to say that provisions dealing generally with the guardianship of infants are contained in Part I of the Infants Act, 1908; the Guardianship of Infants Act, 1926, and the Guardianship of Infants Amendment Act, 1927. "All of which enactments must be read together," I remarked with a knowing smile.

"This," I said, "is the discovery of a century."

I then discussed learnedly on a father's exclusive rights in Common Law to the custody of his children, and his sole authority to appoint testamentary guardians. But, I reminded my client brightly, this rule has been modified by various statutes, and now, under the Acts which I had mentioned, the father and mother have equal rights, while the Court is given a wide discretion in the making of orders for custody and guardianship. Airing my extensive knowledge of the Statutes (thanks to the *Reprint*, Vol. 3, p. 1064), I held forth on the interesting fact that the Court in this case includes a Magistrates' Court. If, on the other hand, the jurisdiction of the Supreme Court must needs be invoked, the matter is to be found in s. 17 of the Judicature Act, 1908, (see title Courts, Volume 2 at p. 65), where the Supreme Court's control over infants, idiots, lunatics, etc., may be discovered.

I learnedly continued: "The rules of equity prevail in questions relating to the custody and education of infants, as may be learned by a pleasant visit to s. 98 of the Judicature Act itself."

Of course, I added something about a Magistrate's jurisdiction to make guardianship orders and orders for the custody of children during the currency of maintenance orders; for having reached for Volume 2, I was inevitably able to read out to my now almost stupified client ss. 18 and 32 of the Destitute Persons Act, 1910, which I found under the title of that designation.

My client's eyes were now wide open in astonishment. Suppressing with a gesture any interruption on his part, I said that there is in force in New Zealand a statute of that merry monarch King Charles II of the 12th year of his interesting reign; and that Cap. 24, in its ss. 8 and 9, empowers a father

* With Annotations.

† More or less surreptitiously.

to appoint a guardian by deed or will, and provides for the custody by guardians of the lands and goods of their wards, respectively. "But," said I, "the first of these sections, in my opinion‡ appears to be superseded by s. 5 of the Guardianship of Infants Act, 1926, which provides that either father or mother may appoint a guardian by deed or will."

I added at this stage of our interesting conversation, as it no doubt affected the matter on which my client had sought my advice, that for enlightenment as to orders for custody in the case of divorce or judicial separation, it is necessary to turn to s. 38 of the Divorce and Matrimonial Causes Act, 1928 (see title Husband and Wife); and that as to guardianship, when a child has been committed to the care of the Superintendent of the Child Welfare Branch of the Department of Education there are some really interesting provisions to be learnt: see ss. 16-18 of the Child Welfare Act, 1925. If my client were ever to be persuaded into insuring the lives of his children or grandchildren, there was (of course) s. 67 of the Life Insurance Act, 1908, to take into consideration; it is most entertainingly discussed in the title, Insurance. And should he be concerned with their dealings with Friendly Societies, the title of that name would disclose the provisions of s. 59 of the Friendly Societies Act, 1909, to be distinctly in point.

At this point, my client gave tongue. He quoted to me:

"You certainly have an extraordinary grasp of the subject. 'Myself, when young, did eagerly frequent the local Courts, and heard great argument about this point and that: but evermore came out as ignorant as in I went.'"

"Quite so," I replied. "You have said a mouthful."

Realising at once that my client was of a humanitarian disposition, I told him something about the adoption of children: "This," I went on, "generally is regulated by Part III of the Infants Act, 1908," [and refreshed my memory by reference to p. 1073, *post*] "but as to the registration of adoption orders we must go further afield. The title Registration of Births, Marriages, and Deaths tells us all about it in s. 27 of the Births and Deaths Registration Act, 1924."

As I am nothing if not thorough, I humorously remarked, that, if the children concerned were about to be adopted by Maoris, Part IX of the Native Land Act, 1931 (see title Natives and Native Land), or if they should seek as foster parents our neighbours the Cook Islanders, then Part XV of the Cook Islands Act, 1915 (in the title, Dependencies), would respectively be of distinct value in disclosing the position of our Statute Law in those circumstances.

Then, very quickly but deftly, I ran through the questions of the legal capacity of Infants and the old doctrines of the Common Law as to their contracts, and gave it as my considered opinion§ that the present statutory provisions thereon were ss. 12 and 13 of the Infants Act, 1908. Next, I briefly outlined the law as regards the wills of Infants and their settlements, as well as the capacity of Infants to marry, to deal with settled property, to hold land under the Land Act, to acquire Native land, to deposit moneys in Savings Bank and withdraw same, to insure life, to sue and to be sued, to give evidence, and to commit criminal offences. Next, having suggested that (at the slightest provocation) I would discuss the health and protection of Infants, I brightly but sympathetically pointed out the duties of parents, in regard to maintenance of children, and the statutory provision for the grant of allowances towards their maintenance by parents with limited incomes.

The punishments for ill-treatment or neglect of children, for the abduction of children, and for infanticide were all given with zest and goodwill with the appropriate references. And, lastly, I considered the employment of children and apprentices; the licensing of foster-homes and the boarding-out of children; and, showing the large amount of interest taken by our Legislature in Child Welfare as disclosed in several statutes, I disclosed the heinous offences of betting with infants, smoking by youths, and supplying liquor to young persons, or equipping them with firearms. This was merely a preliminary to my discussion in detail of the statutory provisions relating to Children's Courts and the registration of births; with the many Acts (and Finance Acts) relating to the education of children.

LECTOR: What's the big idea; are you going to read the whole nine volumes?

AUCTOR: You poor sap! I have not exhausted one Preliminary Note so far. But to resume: By this time, I admit, my unfortunate client was in a state of coma. After supplying the usual restoratives (no, you misunderstood me: it was a burnt feather), he struggled to his feet and said that he wanted to know how he could get an order for guardianship of his charlady's granddaughter whose parents were not all that they might be.

I nonchalently turned over a page.

‡LECTOR: Or the *Reprint's*? AUCTOR: Hush! not a word!!

§ See previous footnote.

I thereupon advised him that the Supreme Court, after taking into account the various considerations mentioned in s. 6 of the Infants Act, has full jurisdiction, and, so on, accordingly: as I had one eye on the annotations to that section.

I was about to reach for a volume of the *English and Empire Digest* (Vol. 27, to be precise) to open it at p. 461, and air further my legal erudition, when my client thanked me profusely, and instructed me to act for him in regard to the wills of several of his own grandchildren (see p. 1073, *post*) and to prepare (for all the years yet to be) the various agreements for the adoption of the children—black, white, brown, and mottled—in the several charitable institutions in which he was interested.

And I had not got any further than the Preliminary Note to one title of the *Reprint*!

It seemed a shame to take the money. But my client could afford it better, perhaps, than the young lady of Cirencester who went to consult her solicitor; when he asked for his fee, she said: "Fiddle-de-dee, I only looked in as a visitor." The *Reprint*, after all, had been represented to me as a gilt-edged investment!

Full of pep over my initial success, I reflected that Providence will supply all your need, but not all your greed (*Pinero*). You see, I still thought that I would find the *Reprint* deficient in regard to conveyancing matters. Priding myself on my knowledge of the Property Law Act, I turned to Volume 7, title Real

"I gathered my clerks around me."

Property and Chattels Real. I scanned it carefully for a few moments, ** and then, after violently ringing my bell (*Sapper*), I bade my clerks hence; I gathered them around me; I pointed to the page. Eureka! I had found a comparative table showing our Property Law Act, 1908, paralleled with the Law of Property Act, 1925 (Imperial), and *vice versa*.

Parrot-fashion, we had oft repeated one to another in the secluded recesses of those quiet haunts wherein we Solicitors foregather after office hours (and our clerks foregather during them), that the recent English property-legislation had so completely changed the law that no forms prepared in Great Britain, and no cases on those Acts decided there, were any longer of use to us. Consequently, I felt like that stout fellow who with eagle eyes stared at the something or other and all his men with wild surmise, silent on a peak in thinggumy-jig. That's just how my clerks and I regarded our newly-discovered "Conveyancer's treasure." "This," I said, sticking out the ultimate residue of what was once a chest, "is the discovery of a century." "My boys," I added: "since ignorance does not bring in costs, 'tis folly to be uninformed about things."

"O.K., Big Boy!" said they in chorus.

I looked up the Trustee Act, and there I found a similar table of comparison of the sections of our Act (with Amendments and Finance Act complete). I read the notes to the several sections and I found that even the place on the page where the apposite forms were to be found had been indicated.

** Gyro-shot (here) of practitioner in deep study.

The absolute completeness of the work, to a Conveyancer, is shown on p. 1082, of Vol. 7, where, after treating with the well-known section of the Property Law Act dealing with tenancies of uncertain duration, the underwritten notes show the object of the provision itself; its application to various sets of circumstances; references to other convenient statutes; the meaning of a "month"; when the notice to quit should be given, and when it may not be; and the time when it should be sent, and the termination of its period of usefulness. All these, be it said, with a solid backing of judicial authority. But, last of all, as if to put jam on it, there is a reference to where in the *Encyclopaedia of Forms and Precedents*, one may find the forms of notices to quit! (And in case you want to know, see Vol. 8 of that work, pp. 674 *et seq.*)

What could be more useful! What more complete!

Well, I am more than satisfied with the value of the *Reprint* to the busy conveyancing man. My neighbour across the passage who toys with Common Law, maintains that the *Reprint* is of greater value to him and his ilk. After much futile discussion on the point, we have decided to call it a draw.

I feel very safe, and most learned in the law, whenever I look at my eight volumes. I look forward to the day when its precocious youngest brother shall join the party. In fact, I feel like saying, in regard to Mr. Butterworth's bright young traveller, in the words of the Queen of Sheba: "He did not tell me the half of it!"

And so I take off my metaphorical *potai* to the Editorial Board who supervised the *Reprint* (respectfully); to the Government which fathered it (dutifully); and to the publishers who so completely anticipated our needs (enthusiastically), and wish them each a very happy Christmas, and all that.

Victoria University College Law Faculty Club.

The Year's Activities.

The Club opened this year's activities with its Annual General Meeting at Victoria College on June 13. There was a goodly attendance, and the Chairman's motion for the discontinuance of the Club—prompted by the lack of interest on the part of both office-holders and members of the faculty generally—was met with hearty opposition. So another year was commenced with a stronger following than the Club had since it was founded a few years ago.

Officers were elected as follows: Patron: The Rt. Hon. Sir Michael Myers, K.C.M.G., Chief Justice; President: Professor H. H. Cornish; Vice-Presidents: Professor James Adamson, Messrs. W. Perry, A. M. Cousins, P. J. O'Regan, P. Levi, G. G. G. Watson, S. E. Eichelbaum, A. R. Atkinson. Chairman: Mr. G. Crossley; Treasurer: Mr. R. K. Styche; Committee: Miss M. A. Spence-Sales, Messrs. Larkin, Fitzgerald, and Shanahan; and Secretary: Miss G. A. Gallagher.

Mr. J. H. B. Scholefield arranged a "Mock Trial of Fact," which took place in the Gymnasium on July 4, with an audience of about one hundred students, who took keen interest and active parts in the proceedings. Mr. W. H. Cunningham ably and well performed the duties of Judge for the occasion.

The following was the *dramatis personae*: Judge: Mr. W. H. Cunningham; Registrar: Mr. G. Crossley; Court Crier: Mr. J. H. B. Scholefield; Accused: Mr. M. Willis; Counsel for the Defence: Messrs. J. C. Fabian and K. N. Struthers; Crown Prosecutor: Mr. R. O'Brien (with him Mr. L. Charters); Witnesses: Messrs. Fitzgerald, Jackson, McNaught, Arcus, Cain, Naylor, Chadwick, Kirkcaldie, Scott, Kent, Kennard, Birks, and Winkel; Police: Messrs. Sainsbury and Williams; and Jury: Misses D. Souter, M. A. Spence-Sales, K. Muir, and G. A. Gallagher, and Messrs. Phillips (foreman), Kemp, Buist, Raskin, Marshall, White, Wilson, and Heenan.

The hearing was somewhat protracted, but the jury had only a short retirement and brought a verdict of "Not Guilty," to the entire satisfaction of the accused and the other members of the "Cast."

On July 20, Mr. G. G. G. Watson, President of the Wellington District Law Society, addressed members of the Club. He spoke on the etiquette of the profession, and the general outlook and prospects at the present time. Those who were present heard an extremely interesting talk.

The Annual Law Ball, which the Law Faculty Club runs in conjunction with the Wellington Law Students' Society, was held in St. Francis' Hall on September 2, and by far outshone the brilliance of this function of previous years.

London Letter.

Temple, London,
1st November, 1932.

My dear N.Z.,

I have the fear that rather a long interval has occurred in this correspondence; but whatever slackness or slumps may prevail the month of October is necessarily a busy one with us. And well it ought to be, following as it does upon a Long Vacation of twelve weeks and more! As to this, there has been the perennial antagonistic agitation, conducted this year (however) in a minor key. The world is beginning to see that there is some substance and reason in our apparently insane policy of compulsory restriction of labour; if all the trades thus restrained the heated activities, or greed, of their employed, there would be less unemployed; and there is some sense in the suggestion that this method of meeting or ameliorating the difficulties might be adopted, the State and the Employer and the Employed jointly contributing to make up the loss of the employed in cash and this contribution taking the place of and not being additional to the present cost on the three parties of Unemployment. The subject is not irrelevant; at this moment the Unemployed batter rather formidably at the gates of our conscience and, by their less genuine representatives, upon the heads of our police.

The Motor Bandit: Crimes of violence occupy our special attention, the motor bandit being a real menace these days. The essence of the question for us is the limits to which people may go, to violence, themselves in their own protection: the essence of the question for the lay public is when and how will people start going to those limits. There should be some excitement upon our roads by night, if the menace develops and the Youth which constitutes so large a part of the Motorist Public takes the law into its own hands; and some interesting problems and discussions in our courts by day, criminal and (notably upon matters touching insurance) civil. Talking of motorists reminds me that the utility or the futility of the Amber Light is coming under discussion; and there is another question of modern interest to us of the law and one as to which answers differ geographically and so do decisions in inferior courts—what does the Amber Light produce, as effective prohibition in law?

Simplifying Appeals: A question being officially canvassed (I can give you advance news as to this) is that of an extended and simplified right and means of appeal from any sentence or order of an inferior, summary jurisdiction court to Quarter Sessions. A committee is sitting and there is not unanimity, or clarification, of opinion as yet, I am led to understand. I incline to think that the mischief, sought to be remedied, is exaggerated and that even lay Justices in remote country districts hardly deserve the criticism, certainly not the anxious criticism, which is directed at them. The existing method, or procedure, of appeal to Quarter Sessions might certainly be lubricated and the sticky bits cut out; but I venture strongly to doubt if there is any real case for the wholesale extension of the right of appeal itself. There is enough, by the two alternative means—appeal to Quarter Sessions or Case Stated—already.

The Press and the Stiffkey Case: I said I would not worry you any more about Ecclesiastical matters, but a word in passing is inevitable, now that, at long last, we are at the end of the Stiffkey case. What on earth it has to do with the merits or demerits of Ecclesiastical Law, this question as to the overreporting of that salacious and unsavoury case, no fairminded man is able even to speculate! The London *Times* not a startlingly brilliant paper these days, and tending to nauseate its oldest and most conservative adherents by its gaucheries (witness a fortnight of announcements, daily on the leading pages, that the Laws of Bridge are going to be reviewed and that the *Times* is going to comment, as it did, in its first leader on Monday!), the London *Times* really did go the limit and past it when, in an ebullition of ponderous prose, heavy even for it, it laid at the door of the Ecclesiastical Lawyers the blame for its own publication, day after day, of all the infinite detail of the sexual appeal of the proceeding! Read the leader, immediately following the decision of the second appeal to the Privy Council I think, and see if this is not the point, the childishly ostrich point of it!

The truth is, of course, that all the papers (with an occasional and honourable exception or two) revelled in the filth, the selling filth of the case, and the *Times* went with the stream. The reason was obvious; the *Times*, in its heart enjoyed it no more than did the ecclesiastical lawyers, but there was the fear, the timid and foolish fear, that, if the *Times* did not print it readers of the *Times* would go elsewhere for it. Brothers of New Zealand, I do assure you without hypocrisy and without humbug: we, in England, did not want, of our own mere motion, to read the details of that case. It hurt, and the details hurt: the most hardened church-deserters of us felt that something was being broken, or being attempted to be broken: something respected and something valuable in times of doubt and stress. The Press, however, thrust it upon us; they made a stunt of it; they let forth the dogs upon it, who now are otherwise chained up by the statutory prohibitions and restrictions as to the publication of divorce-court, and similar, matter. Altogether, it is a sordid episode which should now be at an end but is not; the Press made a miscalculation and now knows it; the supply met no pre-existing demand, and the Public, even the least priggish part of it, is annoyed; so on to the Law and the Church the blame is being attempted to be put, and either to persuade us or because they have now persuaded themselves the Press will carry its defensive offensive further yet and, if it has any power left in this matter, will not rest until the matter has been agitated to a conclusion.

Think it out as you may, why was the actual tribunal so very inappropriate for the purpose? Neither appeal succeeded or made the slightest dint upon the judgment or the conduct of the trial. And if you have a litigant of that kind (witness the subsequent business in the barrel) and a subject of such gravity in litigation, what court on earth can curtail the length or, given the Press in that reckless mood, curb the publicity?

Maitland and Kenny: I see that our Lord Chancellor has gone out of his way to pay homage to the memory of Maitland and Kenny, always likely to be associated in mention though of such very different calibre and direction as legal masters. It was borne in on me what a privilege was ours, of my academic generation at Cambridge, in attending the lectures, at Downing College, of both these Eminents. Kenny was a jolly, spectacled Don, and his jollity was robust; and he was such that you were not tempted to be precociously jolly with him, until and unless you were invited. Maitland was of a more delicate texture, but of very, very, very attractive personality: a Fellow and Professor must indeed be blest with something very remarkable in character and distinction if he is to impress himself upon those casual and not very interested judges, the Undergraduates. It is less Lord Sankey, than one of your own sons of New Zealand, who impressed upon me the extent of the privilege which was ours in that remote past; as I told you, I took him up to Cambridge and installed him there, and he told me how, before he left New Zealand, the point of it had occurred to him and been rubbed into him, that he was going to learn on the very ground where these men taught, and indeed learnt themselves. It was at the opening of the new buildings at Downing that Lord Sankey paid his tribute, about, I suppose, a month ago.

The Cost of Litigation: The Law Societies' seasonal outpourings, in assembly, will interest you, may be, and are reported at length in the law journals of England. Much was said, but not a great deal done I fancy, as to the cheapening of litigation; the fault is almost entirely with the solicitors themselves, or the avaricious minority of them. That this is so was always obvious to those who know and feel the facts; but it is now proved, to demonstration, by a very simple and patent phenomenon though the Bar is on its uppers and ready to work for the skinniest living wage, the cost of litigating has not diminished by a fraction per cent or by "a penny piece." It is all an illusion that the Big Fee has anything to do, at any rate with the Cause. It is possibly an effect. The big fee is only paid to a very tiny and non-representative circle: first-class men are now, and probably always were, available for quite moderate fees. It is said, and I am afraid with truth, that in a large number of cases the Extortionate Fee-master is only briefed, so that the solicitor may be able compulsorily to incur a disbursement which will enable them to charge the costs, which are not disbursements, on a more magnificent and corresponding scale. War to the death is impending some day or other between the Bar and the Solicitors on this matter; the Bar is getting to the stage where it must fight or die. The Solicitors incidentally, are also working the false point, as to the Big Fee and its effects, as a means of acquiring the barristers' business. The Bar would welcome an even contest on this issue: let them take our work, if they can get it and do it, provided we may take their work when it is offered to us! Observe the haste and anger of the answer, when this suggestion is even whispered.

In any case, neither the Law Societies nor Bar Council ever touch upon the real matter of interest in the profession: the acute want, ever increasing. We begin to hear of terrible cases among the solicitors, equal to the cases, as striking but less terrible, at the Bar: less terrible, because most men on being "called" realise that they may find it impossible to make any income at all and so do not come to the Bar unless they can subsist without it.

And there, for the moment, I must end, resuming, where I left off after (if I can manage it) a rather shorter interval. I hope things show some small glimmering signs of getting better with you; even in these days of universal slump we feel that "you do have a time!"

Yours ever, INNER TEMPLAR.