New Zealand
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"*I* will *assert the freedom of an Englishman; I* will *maintain the dignity of man. I* will *vindicate and glory in the principles which raised this country to her present eminence among the nations of the earth.*"

—ERSKINE, *Defence of Horne Tooke.*

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An Opportunity Missed.

Before the circulation of the Judicature Amendment Bill on the resumption of the Parliamentary session, a persistent rumour was abroad that the Government had taken the opportunity to provide at last for the establishment of a Court of Criminal Appeal. The pending Motion for a new trial to be moved on behalf of one Tarrant, found guilty of murder and sentenced to death on November 25 last, made it necessary in the interests of justice that a Court should be constituted that could at the earliest possible date hear the Motion and adjudicate on the Case stated by the learned trial Judge. This necessity arose from the fact that the earliest sitting of the ordinarily constituted Court of Appeal could not take place before March 13.

However, as appears on another page, the Legislature contented itself with giving authority to the Governor-General in Council to appoint a special sitting of the Court of Appeal to deal with any urgent matter without disturbing the fixtures that may already have been made for ordinary sittings in pursuance of the provisions of s. 8 of the Judicature Amendment Act, 1913. On the certificate of the Chief Justice, given on the ground that it is not desirable or expedient that the hearing of any appeal or other proceeding should be deferred until the next ordinary sitting of the Court, the Governor-General by Order in Council published in the *N.Z. Gazette* may authorise the whole of the jurisdiction of the Court to be exercised by any three or more Judges, of whom the Chief Justice may be one, at any such special sitting.

We regret that the opportunity given by the preparation of this Bill, which has now become law, was lost. We are firmly convinced that there would have been no dissentient voice raised to the conferring upon the Judges of the Supreme Court jurisdiction similar to that exercised in relation to criminal appeals by the King's Bench Division of the High Court of Justice in England, and by several of the Dominion judiciaries.

A general consensus of opinion in favour of the establishment of a Court of Criminal Appeal, has been noticeable in recent years among those experienced in the administration of justice and in the practice of our Criminal Courts. His Honour the Chief Justice (the Rt. Hon. Sir Michael Myers, K.C.M.G.) has on more than one occasion expressed his views in this regard. No less on account of his extensive experience at the Bar, than by reason of the eminent judicial position he now occupies, his views should have received the respectful and practical consideration of Parliament. Similar opinions are shared by members of the profession. In anticipation of the expected provision being made in the recent Bill for the establishment of a Court of Criminal Appeal, we sought the views of several representative members of the Bar whose wide experience in the Criminal Courts is of general knowledge. It will be seen on another page that they are unanimously in favour of the constitution of such a Court.

Speaking generally, it would be a relief to Judges and to counsel if the circumstances were such that in discharging the responsibility which rests upon them in their respective spheres—grave enough in many Criminal cases—there was the possibility that any error into which they might lapse would be corrected by the more leisurely decision of a superior Court. As Lord Shaw has said: "Every human judgment is mingled with human error, and in the issues of life and death no one should be charged with an irrevocable doom."

To facilitate an understanding of the functions of an appellate Court of Criminal jurisdiction, we quote from Dr. Edward Jenks's *Short History of English Law*:

> "The most striking evidence of the sensitiveness of the public conscience [in England] in the administration of the Criminal law was the establishment, in the year 1907, of the Court of Criminal Appeal, consisting of the Lord Chief Justice and eight King's Bench Judges, of whom three, or any greater uneven number, constitute a quorum. Under the statute establishing this tribunal [7 Edw. VII, c. 23], any prisoner convicted on indictment, may, with the leave, either of the tribunal itself or the Court which tried him, appeal on grounds of fact, or mixed law and fact, or any other grounds, against his conviction; while, with the leave of the appellate tribunal, he may even appeal against the amount of his sentence, unless that is fixed by law [s. 3]. The Court of Criminal Appeal, on the hearing of an appeal, may totally quash the conviction, or alter the sentence (not necessarily in the appellant's favour) [s. 4]; but, if it thinks the appellant was rightly convicted, it is not bound to decide in his favour on a technical point, and, even though the appellant succeeds in upsetting the conviction on one charge in an indictment, or in showing that he has been found guilty of an offence which he did not commit, he may yet be made to serve a proportionate sentence in respect of the charge on which he was properly found guilty, and be sentenced as for a conviction on the offence which he really did commit [s. 5]. The Court of Criminal Appeal has, however, no power to direct a new trial. The statute affects neither the prerogative of mercy nor the former right of the accused to appeal on a point of law. But in the event of the latter being exercised, the appeal will be heard by the new tribunal, which has taken over the duties of the old Court for Crown Cases Reserved."

We shall return to this question, and we shall refer incidentally to certain improvements which could be introduced into a local Act of similar purport. Meanwhile, we content ourselves with observing that some of the functions affecting the liberty of the individual, which should be exercisable only by the learned and experienced members of our Judiciary, are now relegated to an unqualified lay tribunal in the persons of the rank and file of the Cabinet for the time being, upon whose advice and with whose consent the Governor-General must perforce act. Surely, if on no other grounds, this is an anomaly that cries out for removal.

Summary of Recent Judgments.

SUPREME COURT
Hamilton.
Sept. 6; Nov. 16.
Smith, J.

HARRIS v. McKINNON.

Negligence—Collision between Motor-car and Pedestrian—Rule of Road for Carriages not applicable with respect to a Carriage and Pedestrian—Common law rule as to Duty of Pedestrians not diminished by Statutory Rules for Regulation of Motor Traffic.

Motion for a new trial on the ground (*inter alia*) that judgment was against the weight of evidence.

Plaintiff on election day, in Leamington, a suburb of Cambridge, when there was some volume of traffic, was crossing a street without looking towards his left, where the volume of traffic was and whence the defendant's car was slowly approaching on the wrong side of the road according to the motor regulations for traffic. A collision took place in which plaintiff was injured. At the trial, the jury found that the defendant had been guilty of negligence but the plaintiff had not, and awarded the latter damages.

N. S. Johnson, for defendant; **J. F. Strang,** for plaintiff.

Held: That the statutory rules for the regulation for motor traffic have not diminished the common law rule with regard to the duty of pedestrians—viz., that a pedestrian who is run down when crossing a road cannot offer as evidence of negligence the fact that the vehicle was being driven on the wrong side of the road, but is under a duty to look to his right and to his left before crossing, for, as regards a foot-passenger, a carriage may go on either side of the road.

Cotterill v. Starkey (1839) 8 C. & P. 691; 173 E.R. 676, followed.

New trial was ordered on the ground that the jury's finding that the plaintiff was not negligent was, under the circumstances, against the weight of evidence.

Solicitors: Strang and Taylor, Hamilton, for the plaintiff; **Bell and Johnson,** Hamilton, for the defendant.

NOTE:—Refer to Robert and Gibbs on *Collisions on Land*, 3rd Edn., p. 120; *Halsbury's Laws of England*, Vol. 21, 416, para. 703.

SUPREME COURT
Wellington
Sep. 1, 2, 23, 1932.
Reed, J.
FULL COURT
Wellington.
Dec. 9, 1932.
Myers, C.J.
Reed, J.
MacGregor, J.

GRIFFIN AND OTHERS v. POLICE; AND IN RE GRIFFIN.

Criminal Law—Reformative Detention—Jurisdiction of Magistrate to impose sentence—Application of Crimes Amendment Act, 1910, to offences under War Regulations Acts and Regulations thereunder—Crimes Amendment Act, 1910, s. 4, as amended by War Regulations Amendment Act, 1915, No. 2, s. 12—War Regulations Continuance Act, 1920.

General appeals from convictions of three appellants (including Griffin) by E. Page, Esq., Stipendiary Magistrate; and, subsequently, Motion for order *nisi* for the issue of a writ of *habeas corpus*.

G. was convicted by a Stipendiary Magistrate of a breach of s. 4 of the War Regulations Act, 1914, the maximum punishment for which offence is imprisonment for a term not exceeding twelve months or a fine not exceeding £100. The Magistrate imposed a sentence of three years' reformative detention, relying on s. 4 of the Crimes Amendment Act, 1910.

On appeal: **Cornish** for appellants; **Evans-Scott** for the Crown.

On *habeas corpus* application: **L. K. Wilson and Rollings** in support; **Evans-Scott** to oppose.

Held, first by *Reed*, J. (who reduced the sentence to eighteen months' reformative detention on an appeal from the conviction), and then by the Full Court, *Myers*, C.J., *Reed* and *MacGregor*, JJ., on a motion for an order *nisi* for the issue of a writ of *habeas corpus* on the ground that the Magistrate had no jurisdiction to pass a sentence of reformative detention (the written judgment of *Reed*, J., on the appeal being repeated in his oral judgment on the motion), that the War Regulations Act, 1914, its amendments and the Regulations made thereunder, do not constitute a special code, conviction under which is punishable only by the punishment thereby prescribed, but that the Crimes Amendment Act, 1910, applies to offences under the War Regulations Acts and Regulations, and that, therefore, the Magistrate had jurisdiction to impose a sentence of reformative detention.

Solicitors: W. P. Rollings, Wellington, for applicant; **Crown Solicitor,** Wellington.

NOTE:—As to the Crimes Amendment Act, 1910, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Criminal Law*, Vol. 2, p. 335; the War Regulations Amendment Act, 1915 (No. 2), and the War Regulations Continuance Act, 1920, see *Ibid*, title *War Legislation*, Vol. 8, pp. 1039 and 1041, respectively. See also, Craies on *Statute Law*, 444.

SUPREME COURT
Auckland.
Nov. 28; Dec. 10, 1932.
Smith, J.

C. W. WAH JANG & CO. LTD. v. WEST.

Slander—Actionable *per se*—Trading Company Plaintiff—Principles on which Quantum of Presumptive Damages awarded—Evidence of other slanders—Aggravation considered.

Action for damages for slander concerning plaintiff company in relation to its business.

Plaintiff, a trading company, claimed £250 as damages in respect of each of two slanders which were proved. All defences failed and no special damage having been pleaded and no evidence of general loss of business was led by the plaintiff company. Argument was then heard on the question of the amount of presumptive damages to be awarded.

Singer, for plaintiff company; **Grant,** for defendant.

Held, that evidence of other slanders might be taken into account as showing the spirit and intention with which the slanders charged in the present action were made and that they showed the need for a punitive element in the damages to be awarded therein.

Judgment for plaintiff with amounts of £100 and £75 respectively awarded on the causes of action.

Solicitors: H. L. Rees, Auckland, for plaintiff; **R. M. Grant,** Auckland, for defendant.

NOTE:—See Spencer Bower's *Actionable Defamation*, 2nd Ed., 154 *et seq.*; Odgers on *Libel and Slander*, 6th Ed., 320.

SUPREME COURT
New Plymouth.
Nov. 24; Dec. 8.
Reed, J.

ANSFORD v. NEW PLYMOUTH FINANCE CO., LTD.

Money-lender—Registration—Securities in favour of unregistered money-lender—Invalidity—Declaratory order without imposition of terms—No claim for Ancillary Relief—Money-lenders Act, 1908, ss. 2, 4, 5—Declaratory Judgments Act, 1908, s. 2.

The effect of s. 4 (2) of the Money-lenders Act, 1908, is to make illegal and void a contract by a borrower with an unregistered money-lender for the repayment of money lent.

Action by a borrower against an unregistered money-lender, who had taken securities from the borrower to secure a loan, claiming a declaration that the securities were illegal and void under the Money-lenders Act, 1908, without claiming ancillary relief.

Croker for plaintiff; **Levi** for defendant company.

Held, that the Court had power to give a declaratory judgment as prayed, without conditions, under the Declaratory Judgments Act, 1908, as an action in this form is not a proceeding seeking equitable relief.

Bonnard v. Dolt [1918] A.C. 199; **Kerr v. Louisson** [1928] N.Z.L.R. 154; G.L.R. 90; **Chapman v. Michaelson** [1908] 2 Ch. 612, and on app. [1909] 1 Ch. 238, followed.

Solicitors: Croker and McCormick, New Plymouth, for plaintiff; **L. M. Moss,** New Plymouth, for defendant.

NOTE:—As to the Money-lenders Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Money and Money-lending*, Vol. 6, p. 5; and as to the Declaratory Judgments Act, 1908, see *Ibid.*, title *Courts*, Vol. 2, p. 51; refer also to Stone and Merton's *Law Relating to Money-lenders*, 2nd Ed.; *Halsbury's Laws of England*, Vol. 21, pp. 37, 48; Fisher and Lightwood on *Mortgages*, 6th Ed. 110.

SUPREME COURT
Christchurch.
Dec. 7, 9.
Ostler, J.

RE INGRAM (A BANKRUPT): OFFICIAL ASSIGNEE v. THE PUBLIC TRUSTEE.

Bankruptcy—Bankrupt's contingent interest under Will at Date of Adjudication—Bona fide payment by Executor of Will to Bankrupt in ignorance of Bankruptcy—Liability of Executor to refund to Assignee—Bankruptcy Act, 1908, s. 67.

Special case stated under R. 245 for the opinion of the Court, asking the Court whether, on the agreed facts, *infra*, the Public Trustee was liable to refund to the Official Assignee the sum of £750 or any part thereof.

I. was adjudicated a bankrupt on December 9, 1930, and notice of his adjudication was published in the *N.Z. Gazette* on December 18, 1930. At the date of his adjudication, the bankrupt was possessed of a contingent interest in the estate of his late father, who died on May 23, 1925, having by his last will appointed the Public Trustee to be his executor and trustee, to whom probate was granted on July 4, 1925. Under the terms of the will the bankrupt was entitled to share in the deceased's residuary estate upon the death of the widow of the deceased. Testator directed his Trustee to stand possessed of his residuary estate and the income arising therefrom "until the death of the survivor of my said wife and me and thereafter upon trust for each of my children as are then living and if more than one in equal shares."

The widow of the deceased died on May 27, 1931. The bankrupt did not disclose to the Official Assignee that he had any interest in the estate of the deceased, and the Official Assignee did not become aware of such interest until October, 1931. The Public Trustee, not knowing of the bankruptcy and in the *bona fide* belief that the bankrupt was entitled to receive the legacy, paid to the bankrupt on July 15, 1931, the sum of £400 as a payment on account of his share of the estate. The bankrupt obtained his order of discharge on July 31, 1931, and on the application of the Official Assignee the order of discharge was reversed on November 19, 1931.

Of the £400, only £30 was recovered from the bankrupt, the balance having been dissipated. The amount required to pay the bankrupt's creditors in full was approximately £250.

A. W. Brown for plaintiff; **M. J. Gresson** for defendant.

On the question as to whether on the above facts the Public Trustee was liable to refund the sum of £370 or any part thereof to the plaintiff,

Held, that on adjudication the Official Assignee obtains a complete title (to perfect which notice is not necessary) to the bankrupt's equitable choses in action, another the Public Trustee must refund sufficient of the £370 to enable the Official Assignee to pay the creditors in full and the expenses of the bankruptcy.

In re Bright's Settlement [1880] 13 Ch. D. 413, followed.

Solicitors: Raymond, Stringer, Hamilton, and Donnelly, Christchurch, for plaintiff; **Wynn Williams, Brown, and Gresson** for defendant.

NOTE:—As to the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Bankruptcy*, Vol. 1, p. 465.

SUPREME COURT
Wellington.
Dec. 8, 13.
Reed, J.

KIRKCALDIE AND ORS. v. THE COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duty—Duty paid on market value in New Zealand of stock on English Register of Company incorporated in England—Duty assessed in England on higher market value in England—Discovery that duty not fully assessed and paid—Death Duties Act, 1921, s. 72.

Appeal on a case stated under s. 62 of the Death Duties Act, 1921.

At the death of John Kirkcaldie who was domiciled in New Zealand, his estate included stock in a Company incorporated in England, having both English and New Zealand share-registers. This stock was registered on the English Register. The Commissioner accepted evidence as to the market value of the stock in New Zealand at the date of death; and death duties were assessed on that amount, and paid. Kirkcaldie's executors, having paid duty in England on the assessment of the stock there, applied to the Commissioner under s. 32 of the Death Duties Act, 1921. The Commissioner, then discovering that the market price of the stock in England at the date of Kirkcaldie's death was higher in England than in New Zealand, claimed that this was a discovery under s. 72 that duty payable had not been fully assessed and paid and that duty should be assessed on the value of the stock at the market price in England.

Kirkcaldie for appellants; **C. H. Taylor** for respondent.

Held, that the Commissioner's contention was justified.

Solicitors: Buddle, Anderson, Kirkcaldie, and Parry, Wellington, for appellants; **Crown Law Office,** Wellington, for respondent.

NOTE:—As to the Death Duties Act, 1921, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Public Revenue*, Vol. 7, p. 354.

SUPREME COURT
Full Court,
Wellington.
Dec. 16, 1932.
Myers, C.J.
Reed, J.
MacGregor, J.

TREADWELL v. HOLMES.

National Expenditure Adjustment—Application of Part III of Act to Native Land as well as to European Land—Native Purposes Act 1931, s. 115—Powers thereunder still exercisable—National Expenditure Adjustment Act, 1932, ss. 31, 32—Native Purposes Act, 1931, s. 115.

Originating Summons on the application of the trustee of the estate of Robert Bransfield, deceased, an aboriginal half-caste native within the meaning of the Native Land Act, 1931, for an order determining the following question arising out of the construction of s. 32 of the National Expenditure Adjustment Act, 1932, and of s. 115 of the Native Purposes Act, 1931:

"Whether the rights of the defendant to reduction of his rent are not limited to an application or applications under s. 115 of the Native Purposes Act, 1931."

C. A. L. Treadwell for plaintiff; **Hadfield** for defendant.

Held: The provisions of Part III of the National Expenditure Adjustment Act, 1932, apply to Native land as well as to European and the rights of tenants of Native land are not limited to applications under s. 115 of the Native Purposes Act, 1931.

Solicitors: Treadwell and Sons, Wellington, for plaintiff; **Hadfield and Peacock,** Wellington, for defendant.

NOTE:—As to the Native Purposes Act, 1931, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Natives and Native Land*, Vol. 6, p. 410; as to the National Expenditure Adjustment Act, 1932, see Kavanagh and Ball's *New Rent and Interest Reductions*, p. 42. Refer also to Maxwell on *Statutes*, 7th Ed., 157.

SUPREME COURT
In Divorce.
Wellington.
Nov. 21; Dec. 1.
Myers, C.J.

WINTER v. WINTER AND KINGSTON.

Divorce—Practice—Liability of Husband for Wife's costs—Effect of abandonment of Wife's Defence at hearing—Duty of Wife's Solicitor.

Question of costs reserved at the trial of a defended divorce action.

At the hearing, counsel for respondent stated in his opening that he intended to call the respondent who would deny misconduct, and that other witnesses would support her testimony in certain respects. It was also stated that the co-respondent would be called by his counsel, and he would also deny misconduct. The first witness called by respondent's counsel was a little nine year old girl, daughter of respondent by a former marriage. Her answers to questions interposed from the Bench were quite inconsistent with counsel's opening. His Honour then suggested to counsel a conference with their clients. On resuming, both counsel said the answers given by the little girl had come as a complete surprise to them, and they were satisfied they could not further defend the suit.

Sievwright for petitioner; **A. J. Mazengarb** for respondent; **Willis** for co-respondent.

Held: Where a solicitor acted *bona fide*, and with reasonable care and propriety, in defending a petition for dissolution of marriage on the grounds of adultery, the fact that a witness deposed to facts elicited in answers to questions from the Bench and inconsistent with such defence, which was then abandoned, is not a bar to an order for payment of the costs of the guilty wife. The circumstances may be taken into consideration in fixing the amount of such costs.

Franklin v. Franklin and Minshall [1921] P. 407, 415, and **Burkardt v. Burkardt** [1907] N.Z.L.R. 940, considered.

Solicitors: A. B. Sievwright, Wellington, for petitioner; **Mazengarb, Hay, and Macalister,** Wellington, for respondent; **Willis and Nicholls,** Wellington, for co-respondent.

SUPREME COURT
New Plymouth.
Nov. 23; Dec. 7.
Reed, J.

IN RE GIBSON (Deceased): GIBSON AND OTHERS v. THE PUBLIC TRUSTEE.

Family Protection—Mortgage securities comprising greater part of Residue—Large Charitable bequest of Land and Cash—Income and *corpus* of Residue among Widow and Children—Consideration of conditions at Death differing from those when Will made—Family Protection Act, 1908, s. 33.

Originating summons claiming, on behalf of the widow and children of a testator, an increase in the amounts severally bequeathed to them.

G. left an estate of a net value of £26,000. After making certain provisions for members of his family, he bequeathed a farm property of a conservative value of £8,000 for charitable purposes, and a sum of £5,000 for the erection of an orphanage thereon. The farm was leased at the statutorily reduced annual rental of £512, and was charged with an allowance of £250 per annum for the lifetime support and maintenance of an imbecile son.

G.'s widow, aged 80 years, had a life-interest in the residue, and was thus provided with a house, furniture (her own), and an income of £612 per annum, subject to payment of outgoings amounting to £31 1s. 5d. each year. Her imbecile son and an unmarried daughter lived with her, the latter having £100 a year from the estate during the widow's lifetime will, on the widow's death, receive one-third (approximately £4,000) of the residue. A similar amount each will come to the married daughter and married son who meanwhile receives no benefit. A great part of the residue consists of mortgages.

Houston for plaintiff; **Bayley** for imbecile son of testator; **Moss** for charitable beneficiaries; **Sheat** for the Public Trustee.

Held, answering question asked, that after consideration of the possible fluctuations of income and the doubtful position of mortgages, however sound, that the Court is entitled to take into consideration the different conditions prevailing at the date of a testator's death from those when the will was made, whenever it appears that an estate consists largely of mortgage securities and both *corpus* and income of provisions made for a widow and children are likely thereby to be affected.

Solicitors: Welsh, McCarthy, Houston, and Coleman, Hawera, for plaintiffs; **G. J. Bayley,** Hawera, for John Gibson; **Peak, Kirker, and Newcombe,** Auckland, for the Methodist Church; **Public Trust Office Solicitor,** Wellington, for the Public Trustee.

NOTE:—As to the Family Protection Act, 1908, see REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, title *Family Protection*, Vol. 3, p. 292.

SUPREME COURT
Wanganui.
Nov. 9; Dec. 17, 1932.
Reed, J.

HARPER AND ANOTHER v. WELLS.

Mortgage—Transfer of mortgaged land subject to the mortgage—Acts of Mortgagees in Arrangements with Tenants and with Transferee—Estoppel—Novation—Continuing liability of Mortgagor.

Action by mortgagees against an original mortgagor upon his personal covenant, he having sold the mortgaged property and the purchaser being in default. The case is reported only on the two defences of estoppel and novation and not upon other defences raised.

Defendant, the owner of a house-property subject to a mortgage to two mortgagees sold the equity of redemption to M. who gave a second mortgage, which he subsequently paid off, financing by giving a second mortgage to D., on which a small sum was owing. M. having made default on the first mortgage, the first mortgagees entered into possession and collected rents from the tenants, rendered accounts to M. and not to the original Mortgagor and made arrangements with the tenants without consulting the latter. The first mortgagees installed electric light in the house in lieu of gas and their solicitor wrote to M.'s solicitor, enclosing an agreement to lease, from M. to a tenant of the house for execution by the former. The letter continued: "We should be glad if you would also get at the same time a consent from your client to the electric light installation which the mortgagees have just completed at a cost of £15." The agreement for lease and the following consent were delivered to the mortgagees' solicitor: "Mrs. C.L.W. Harper, (one of the mortgagees), Dear Madam,—I hereby consent to you as Mortgagee of the house known as No. 13 Purnell St., installing the electric light therein at a cost of £15, and sum to be added to the moneys owing under my Mortgage to you.—Yours faithfully, R. J. Masemann."

Currie for plaintiffs; **W. J. Treadwell** and **Haggitt** for defendant.

Held: 1. That (a) failure by a Mortgagee in possession to render accounts to an original mortgagor and (b) the act of such mortgagee in making arrangements with tenants without consulting such original mortgagor do not estop the mortgagee from alleging that the original mortgagor had not been released from his personal covenant under the Mortgage.

2. That the request for M.'s consent to the installation of the electric light, and that consent, did not amount to a novation, so as to discharge the mortgagor from his liability.

Nelson Diocesan Trust Board v. Hamilton [1926] N.Z.L.R. 342, and **Dennis v. Martin,** [1932] Argus L.R. 346, referred to.

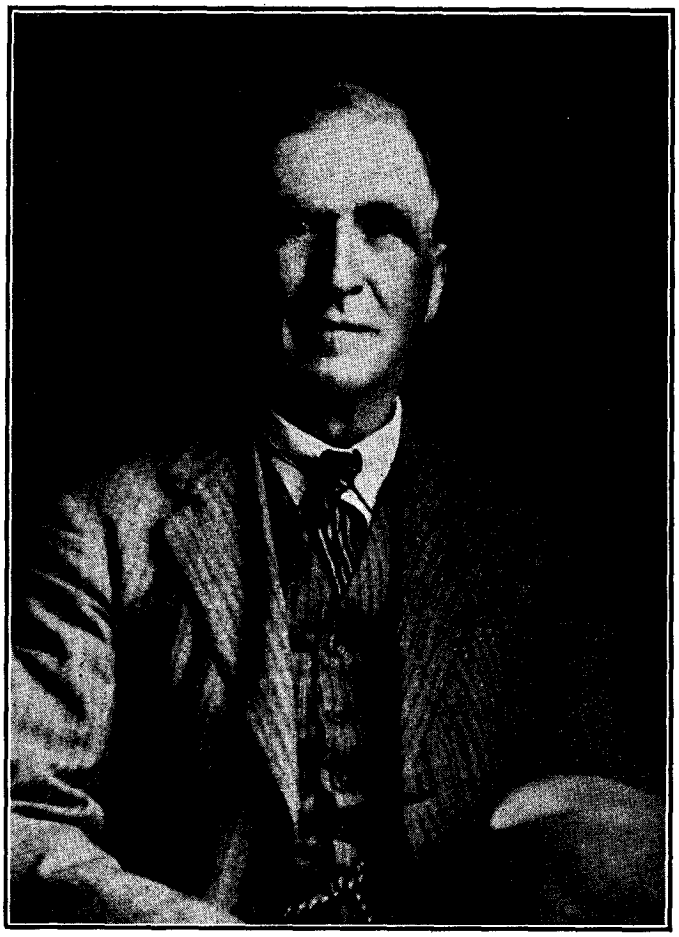
Solicitors: Watt, Currie, and Jack, Wanganui, for plaintiffs; **Treadwell, Gordon, Treadwell, and Haggitt,** Wanganui, for defendant.

An Interview with the Rt. Hon. Lord Salvesen.

Some important Legal Questions discussed.

Before concluding a visit to the Dominion of some two months' duration, the Rt. Hon. Lord Salvesen, a member of the Judicial Committee of His Majesty's Privy Council, kindly accorded an interview to a representative of the NEW ZEALAND LAW JOURNAL. His Lordship discussed at length several questions of great interest to members of the profession in this country.

When asked for some indication of his experience as a member of the highest Court in the British Empire, Lord Salvesen said that in June, 1922, he retired from the Scottish Bench, where he had been acting as a Judge for seventeen years. Very shortly afterwards, he received the honour, very unusual in the case of a Scots Judge, of being made a member of the Judicial Committee of the Privy Council. Owing to the changes in personnel of the Judicial Committee, which are due to deaths and retirements, Lord Salvesen is now the senior member of that body.



S. P. Andrew, photo.

THE RT. HON. LORD SALVESEN, LL.D.

"It is more than ten years since I commenced to take a part as an unpaid member of the Privy Council in its judicial work," his Lordship remarked, "I have sat, during that period, for approximately three months every year, mainly on occasions when it was difficult to form the necessary quorum, which cannot be made up (when three tribunals are sitting) of the Lords of Appeal. These eminent judges function both in the House of Lords and in the Privy Council, there being, so far as I know, only eight Lords of Appeal exclusive of the Lord Chancellor. When three Courts are sitting, each consisting of five members, it becomes necessary to call upon retired Judges, like myself, of the Supreme Courts—and, at times, Chief Justices of the Dominions—to make up the necessary quorum. Several Judges who have retired from the English Bench sit on the Privy Council in the same way as I have done, and bring their long experience in judicial work to bear on the problems that have to be solved."

Lord Salvesen was questioned as to the necessity for there being occasionally three tribunals comprising members of the Judicial Committee.

"This," he replied, "arises from the fact that one tribunal in the Privy Council would be quite unable to cope with the mass of work which comes before it, especially from India. Hence, the Privy Council has to sit in two divisions; and, if the House of Lords is sitting at the same time, as many as four out of the eight Lords of Appeal may be sitting there. Then the tribunals of the Privy Council have to be made up by ex-Lord Chancellors and retired judges."

THE PART OF THE PRIVY COUNCIL IN THE ADMINISTRATION OF JUSTICE.

Our recent distinguished visitor believes very strongly in the retention of the Privy Council as an ultimate Court of Appeal from the decisions of the Dominions' judiciaries. He said he, personally, had no doubt of the great value of the Judicial Committee as such a tribunal of final appeal. The House of Lords plays the same part in connection with appeals from Scotland, and he had never heard any member of the profession there say that he desired that the judicial officers of the Supreme Courts of Scotland should be the final judges in all civil cases.

Speaking first of the value of the Imperial connection of the maintenance of a final tribunal to which could be referred the judgments of the several Courts of the Empire's component parts, Lord Salvesen said that, apart from the fact that all the nations which comprise the British Dominions owe allegiance to a common Sovereign, there is really no link between them with the Old Country and with one another, except the Privy Council. In legislation, he understood, the Dominions are entirely autonomous. Apart from the special conditions which apply to the Irish Free State wherein the Treaty provided that the right of appeal to the Privy Council should continue, the Statute of Westminster puts it within the power of any Dominion to abolish the right of appeal which at present exists to the Privy Council as the Empire's Court of ultimate decision. His Lordship added that, personally, he thought it would be a pity if any one of the Dominions abolished such a right of appeal. He was glad to note that there was no feeling in New Zealand in favour of such a change.

"The essential value of the Privy Council is the part it plays in the administration of justice, and I consider that aspect of its usefulness is by no means inconsiderable," Lord Salvesen observed. "It affords the losing litigant an opportunity of obtaining a final pronouncement as to the justice of his cause. This is strikingly apparent where, in some cases, he may actually have had the majority of available judicial opinion in his favour. If he succeeds, his opponent cannot justly complain of an error in his own favour being corrected. If he fails, the successful litigant is protected from the burden of additional cost by the security that has to be found before the appeal may proceed."

"So far as New Zealand is concerned, the number of appeals in late years has been very small; but that is no measure of the value of the Judicial Committee as a steadying influence on the decisions of the Dominion's Courts just as in the same way the House of Lords exercises a steadying influence on the decisions of the Supreme Courts of Scotland, England, and Northern Ireland."

Speaking generally, His Lordship added that, if any particular tribunal can pronounce final judgment in all cases brought before it, there is a temptation to become autocratic; whereas if the judgments may be reviewed by a higher Court, the Judges are careful that their decisions should be so expressed that they may not be subjected to too drastic criticism. Moreover, a Judge, feeling that his decision may be reviewed, is careful to found it upon reasons that appear *prima facie* to justify.

"Sometimes strong local prejudices may influence a judgment, and it is, consequently, of importance to the citizen, where he feels himself greatly aggrieved, to have the opportunity of submitting to an entirely impartial tribunal the merits of his case," Lord Salvesen continued. "In an appeal (not from New Zealand) in which I sat as a member of the Judicial Committee, a plaintiff who had been seriously libelled in a newspaper had failed to obtain any redress from a jury although there was no attempt to justify the particular defamatory statements, and the Court of Appeal of the plaintiff's Dominion had refused to set aside the verdict. The explanation of the verdict, which was obviously perverse as it could not be supported by any of the evidence led, lay in the fact that the plaintiff was a lawyer, and, owing to some recent disclosures of misconduct by other lawyers in the locality, a popular prejudice had arisen against all members of the profession. The Privy Council had, in the circumstances, no difficulty in redressing a wrong, which, if no right of appeal had existed, would have gone unredressed. Such cases, are fortunately rare; but the fact that they may occur is in itself a sufficient justification for the existence of an ultimate appeal tribunal composed of an exceptionally able and experienced body of Judges free from all possible local bias."

"We recognise how well our Dominion is served by having men of such legal eminence composing its Court of final appeal," Lord Salvensen was told.

"Yes," he replied: "there is at present no Dominion which can produce Judges of the same experience in dealing with litigations as those who sit on the Privy Council. The Lords of Appeal are chosen from lawyers who are at the very head of their profession, and who have had experience—such as no Colonial barrister can ever have—of conducting large numbers of litigations of importance and complexity. This is not the least of my reasons for thinking that, quite independently of the number of appeals which may come from any part of the Empire, the existence of the Privy Council as a possible Court of review is of the highest importance for the due administration of justice in the Supreme Courts of the various Dominions."

Our eminent visitor's attention was drawn to a recent article by Professor Foster in the *Law Quarterly* in which it was alleged that opinion in Canadian legal circles favoured the abolition of the right of appeal to the Privy Council from both the Dominion and the Provincial Courts of Appeal. His Lordship said he was not closely in touch with Canadian opinion in this regard; but there were always a number of appeals from Canada and its Provinces on the Privy Council list, and most of them were ably argued by members of the Canadian Bar. He had had to sit on several constitutional questions from Canada, and it seemed to him that the value of the Privy Council as an independent and unbiassed tribunal was generally appreciated by the Judges and litigants of Canada and of the provinces. He had thought its value in respect to the decision of constitutional appeals was unquestioned.

When the other British Dominions were mentioned, Lord Salvesen said he could speak with closer knowledge.

"I know more about the African feeling," he added, "When I was in Africa, I had occasion to sound the various Judges on the subject. As far as they were concerned, they were very much against the abolition of the right of appeal, and, indeed, they thought that the Privy Council itself had exercised its right of granting special leave to appeal too seldom.

In Africa, there is no absolute right of appeal on the part of the litigant; but special leave to appeal must first be given by the Privy Council.

The views of the Chief Justices that I interviewed were that the Privy Council had rather erred on the side of not taking advantage sufficiently of its right to grant special leave to appeal, and they deprecated the reluctance with which the Lords of the Privy Council exercised that right."

"As regards India, I believe the feeling amongst the Indians is they do not desire the abolition. The Privy Council is very frequently resorted to. The Indian is naturally a litigious person, and the values at stake in the litigations from India assume very large proportions. Often we have to sit, on occasions, to decide the succession to whole principalities and to adjudicate upon religious disputes between the various sects of the Moslem or Hindu religions. Cases have even occurred in which, where a dispute related to the custody of an idol, the Privy Council has had to appoint a person to appear on behalf of the idol as its next friend!"

Finally, His Lordship said, that, while occasionally one heard of suggested movements in legal circles to promote the abolition of the right of appeal, he knew that such opinions did not emanate from the Judges. So far from resenting an appeal in an appropriate case, he was aware that his judicial colleagues on the Bench are far more concerned that difficult questions of law should be authoritatively settled than that their own particular view should be sustained; although it is only human nature that they are gratified when their view is found to coincide with that of the highest judicial talent that the Empire can produce.

(*To be Concluded*).

Passengers by Aircraft.

The Dominion Air Lines Case Considered.

By Professor R. M. ALGIE, LL.M.

The decision of our Court of Appeal in the case of *Dominion Air Lines, Ltd. v. Strand* [1933] *N.Z. Law Reports* 1, is one of absorbing interest, and it is no surprise to learn from the columns of the *Law Journal* that copies of the report have been eagerly sought for perusal overseas. For my own part, I have read and re-read the judgments of the learned members of the Court, and I find it difficult to suppress a feeling of satisfaction over the fact that the learned Judges were not unanimous in the conclusion which was reached. Had such been the case, it is just possible that a little too much assistance would have been available for those who may in future find it expedient to base their actions upon other forms of statutory torts.

As the matter stands at present, the Court of Appeal by a majority of three to two has decided that the Aviation Act, 1918, and its Regulations have imposed a statutory duty in favour of passengers by air and that a breach of such duty confers a right of action upon a passenger who is injured by such breach. In arriving at this conclusion, the Court had to rely essentially upon general principles. It is true that the question as to whether a right of action had been created for the breach of a statutory duty had often been debated before; but the various cases in which this question had been discussed were decided upon the terms of particular statutes differing widely from one another in their language, scope, and purpose; but, as the learned author of *McNair's Law of the Air* says, "it is dangerous to argue from one statute to another," and the main value of such cases must lie in their declaration and exposition of the general principles applicable to this matter.

The Aviation Act, 1918, was passed for the purpose of controlling aviation in New Zealand. It was the first Act of its kind in this country and it may well be regarded as somewhat of a skeleton statute. By s. 3 of the Act, the Governor-General in Council was authorised to make regulations covering the customary wide variety of subjects. In the light of this fact the Act becomes even more skeletonic, and so it remained for some three years until a Government Department clothed it with flesh and blood and breathed into it the spirit of life that was to give it vital force. Amongst the matters that could be dealt with by regulation were the "conditions subject to which such aircraft may be so used, including conditions as to the carriage of passengers and goods." Numerous regulations relating to the carriage of passengers and goods were duly gazetted, and, as already indicated, it has now been held that a breach of any of these regulations confers a right of action upon a person who can show that he has been injured by such breach.

The question as to whether this decision correctly interprets the Act and its Regulations might easily divide the profession into two distinct schools of thought. There can be no doubt, however, that a perusal of the various judgments serves to show how very indefinite may be the boundary line in such cases as the present; and in saying that I am inclined to adopt the reasoning of the exhaustive judgment of Smith, J., I must not be thought to have attached too little weight to the careful and persuasive opinions of the majority of the Court.

As is so common in cases of this kind, the principles applicable thereto are clear enough; it is their application that presents the difficulty. There are indeed very many instances of statutory torts; sometimes the right of action is expressly conferred by the statute; in other cases it arises by implication. We are here concerned only with the latter class. Where statutory duties are imposed, it cannot, of course, be stated as a general proposition that a breach of such duties confers a right of action upon any and every person who suffers particular damage in consequence of such breach. Upon what occasions then does such a right of action arise? It seems that the general principles have been well summarised in the case of *Phillips v. Britannia Hygienic Laundry Co., Ltd.* [1923] 2 K.B. 832. In New Zealand they are also very clearly stated in the judgment of Edwards and Sim, JJ., in *Fairbairn, Wright, and Co. v. Levin and Co.* (1915) 34 N.Z.L.R. 1 C.A. In the *Phillips* case, Bankes, L.J., distinguishes between two classes of cases, namely, those in which no remedy is provided by the statute, and those in which a remedy is expressly given. He quotes the following passage from the judgment of Kennedy, L.J., in *Dawson and Co. v. Bingley Urban Council* [1911] 2 K.B. 149, 159: "... Accordingly, where the statute is silent as to the remedy, the Legislature is to be taken as intending the ordinary result: and the proper remedy for a breach of the statute is an action for damages and, in a proper case, for an injunction." Bankes, L.J., goes on to say: "In these cases, *e.g.* where no remedy is provided, it may be material to consider whether the right conferred or the act prohibited is for the benefit of a particular class of persons or of the public generally." From this it might be argued that since the Aviation Act, 1918, has in fact provided its own penalties, our Court of Appeal has attached too much importance to the suggestion that the regulations made under it were intended to benefit a particular class, namely, passengers and the owners of goods carried in aircraft. The principle governing the second class of cases is stated in the judgment of Lord Tenterden in *Doe v. Bridges*: 1 B. and Ad. 847, 859: "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." The existence of a penalty is not, however, to be conclusive of the matter. This is clearly pointed out by Lord Macnaghten in *Pasmore v. Oswaldtwistle Urban Council* [1898] A.C. 397; he said: "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."

Now, if we carefully peruse the Aviation Act and its Regulations can we say that we are satisfied that the scope and language of these statutory provisions indicate that an exception to the general rule is to be admitted. Smith and MacGregor, JJ., answer this question in the negative. The majority of the Court, however, attach considerable importance to the fact that the duty imposed by the Legislature was intended for the protection of a special class of persons, namely, passengers and owners of goods carried in aircraft; indeed they appear to make this the vital distinction between this and the *Phillips* case. On the authorities,

it seems very doubtful whether such a matter should be made the essential factor in deciding whether a private right of action does or does not exist. Lord Atkin, in his judgment in the *Phillips* case, says: "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 anyone who can bring himself within the benefit of the Act." Moreover, is it quite correct to describe as a special class those who travel by aircraft and those who send their goods by such means?

It seems to me to be most difficult to argue that the Aviation Act and its Regulations were intended to create a private right of the kind indicated in this appeal. It was a new Act; it would be far broader in its scope and purpose than a Factory Act which provided for the fencing of machinery. There would need to be some fairly convincing language in the Act and Regulations before one could argue that the Legislature, in authorising the making of regulations, had intended to empower a Government Department to create new duties and to confer new rights upon private individuals, and this requirement would be of special importance when the Act under consideration was a new one and when it could be regarded as somewhat temporary, provisional or experimental. There must be widespread support for the view of Smith, J., when he says that he could not find in the language of the Act or its Regulations a sufficiently clear expression of an intention on the part of the Legislature to create individual rights of action in such cases as the present.

McNair, in his work on the *Law of the Air*, discusses this very question from the point of view of English legislation: he says, "I submit, therefore, the view that the Act of 1920 and the Orders in Council thereunder do not create new rights of action for damages in persons who may happen to be injured by contravention of or failure to comply with the provisions of these enactments." Although our legislation is somewhat different, I venture to think that the learned author would be inclined to adopt the view taken by Smith and MacGregor, JJ.

The whole question is certainly a highly interesting one. It is impossible to be at all dogmatic; but there can be no doubt that the decision in this case has covered a most interesting question of law, and that there is much to be said on either side.

Inferences from Changed Standards.

Recently, in Scotland, in the First Division of the Court of Session, Lord Sands deplored the modern standards of conduct: "One was constantly reminded that social conventions had changed and that the same inferences were not now to be drawn from freedom and familiarity in conduct as might have been drawn in former days. The cases disclosed a measure of vulgarity in conduct, a lack of any sense of social or personal dignity or of respect for marriage responsibilities"; and he declared that this sad change left one satisfied and content to be a Victorian. It is difficult not to agree with his Lordship.

A Court of Criminal Appeal.

Practitioners Stress its Advantages.

In our leading columns, reference is made to the disappointment felt at the loss of the opportunity offered by the preparation and passing of the Judicature Amendment Act, 1932-33, for the establishment of a Court of Criminal Appeal. It was generally rumoured that this desired tribunal was about to be set up by the Legislature, but the appearance of the Bill showed that this necessary complement to the present Court of Appeal was not yet to be provided.

In response to a request by the JOURNAL, the following gentlemen, whose work and experience entitle respect for their expressions of opinion on the need for a Court of Criminal Appeal, kindly sent us the views here reproduced.

Mr. F. B. Adams, Dunedin: Under existing legislation there are provisions, apparently adequate, for appeal to the Court of Appeal on questions of law, or against any sentence imposed by the Supreme Court; and, as far as I know, the present system has worked satisfactorily. If, as suggested, there is a proposal on foot to establish a Court of Criminal Appeal, the probabilities are that any changes contemplated will be of an administrative or procedural nature. If, on the other hand, it is proposed to enlarge the right of appeal, this would seem to mean that appeals would be allowed, to some extent at least, on questions of fact which had been properly left to the jury. This would be a considerable departure from recognised principles, and the cases in which it could be usefully or properly permitted would be few, and can already be dealt with under s. 447 of the Crimes Act, 1908, which authorises the Governor-General in Council to direct a new trial in cases where doubt is entertained as to whether the accused ought to have been convicted.

Mr. C. Richmond Fell, Nelson: In view of the difficulty over an early hearing of the appeal in a recent murder case some alteration is required to enable appeals in Criminal cases to be dealt with promptly, but in my opinion this could be best provided by giving the present Court of Appeal power to sit continuously or at any time the Chief Justice thinks proper. In some Criminal Appeals it should not be necessary for all the Judges on a division to sit, but some warrant a Court of more than three Judges. A number of the decisions of the English Court of Criminal Appeal have not been satisfactory or enjoyed the respect an Appellate Court's decisions should. Compare the decision of the Court of Criminal Appeal in *Denyer's* case, 95 L.J.K.B. 699, with the Court of Appeal decision in *Hardie and Lane v. Chiltern*, 97 L.J.K.B. 539, both "stop list" cases—the former a criminal one of obtaining money by threats, and the latter a civil one raising exactly the same point in which the Court of Appeal expressly said *Denyer's* case was wrongly decided. Yet the Lord Chief Justice has since stated that until *Denyer's* case is reversed by the House of Lords it will be followed by the Court of Criminal Appeal. Would a New Zealand Court of Criminal Appeal, if we had a separate one, be bound to follow a New Zealand Court of Appeal decision? When the time is opportune, the creation of a permanent Court of Appeal for both Civil and Criminal Appeals is worthy of serious consideration.

Mr. W. J. Hunter, Christchurch: If the establishment of a Court of Criminal Appeal in New Zealand would involve any considerable amount of expense, it does not seem at all likely that Parliament would sanction it under present conditions. If and when such a Court comes into existence, however, I think it would benefit the administration of justice in Criminal cases. It may be assumed that the Judges appointed would be those who have had special experience of the matters involved, and although the public generally have full confidence in the present conditions (guarded as they are by considerable rights of appeal to the Court of Appeal) occasionally very difficult cases arise which might with advantage be dealt with by a Court specially constituted for the purpose. The very difficult matter of appeals against sentence, moreover, seems to me to be one which could appropriately be dealt with by a permanent Court of Criminal Appeal. So far as one can judge from this distance, the establishment of such a Court in England has proved to be fully justified.

Mr. J. R. Kerr, Nelson: In my view of the matter the rights of no one can be prejudiced by the establishment of a Court of Criminal Appeal, and from time to time cases are bound to arise in which the facilities for appeal provided by the Crimes Act are far too restricted. The limitations of the law as it stands at present in New Zealand and the powers of the Court of Criminal Appeal in England are set out by His Honour the Chief Justice, in *R. v. Dean* [1932] N.Z.L.R. 753, at pages 757 and 758. It seems to me that the powers conferred by s. 447 of the Crimes Act upon the Governor in Council should be conferred upon a Court of Criminal Appeal. Where the liberty of the subject is involved, every facility should be afforded a person to establish his innocence or obtain a new trial if *upon any ground* whatsoever there was a miscarriage of justice. I think, however, that the Court of Criminal Appeal should have the power to order a new trial if it thinks proper, and not be restricted to quashing a conviction as in England.

Mr. W. E. Leicester, Wellington: The best argument in support of the establishment in New Zealand of a Court of Criminal Appeal is the fact that such a tribunal has operated for more than a quarter of a century in England, finding favour with the profession and the public alike. The fears of those critics who saw in its creation a multiplicity of appeals, enormous working-cost, and the weakening of the jury system have not been justified despite Mr. Justice Avory's reference on more than one occasion to the number of frivolous appeals which of recent years the Court has sought to deter by manifesting a greater tendency to resort to s. 4 (3) of the Criminal Appeal Act, the appellant having his sentence increased and not diminished. Moreover, s. 14 (3) puts a brake on his sporting proclivities as his sentence does not run until the appeal is determined, and hence the section gives no encouragement to the short-term prisoner. Fortunately, in this country we are not troubled, as in England, with mistaken admissions and rejections of testimony by lay chairmen and recorders; but, even so, the scope of the tribunal on questions of fact, the statutory requisite of shorthand notes in jury trials, the provision for expert assistance and its wide supplemental powers must by adoption prove of signal service to the administration of our criminal law. An illustration of its operation is afforded by *R. v. Wallace*, 23 Cr. App. R. 32. The prisoner on April 25, 1931, was found guilty of the murder of his wife. Three weeks later this conviction was quashed by the Court of Criminal Appeal as being founded on mere suspicion.

In one respect, however, our proposed tribunal, if founded in constitution as well as title upon its predecessor, ought to avoid what appears a substantial criticism. In England, a new trial cannot be ordered: thus, occasionally, the public conscience is shocked by the spectacle of a dangerous ruffian being handed his freedom. "It is much to be regretted that Parliament has not given the Court power to order a new trial," said the Chief Justice in *R. v. Dyson*, 1 Cr. App. R. 13, "such a power may only be wanted in a few instances, but this is one of them."

Mr. J. Meltzer, Wellington: The proposal to establish a Court of Criminal Appeal in New Zealand is one in which all counsel, whose work lies partly in the Criminal Courts, as well as the public should be deeply interested. The position at present is far from satisfactory. In those cases provided for under the Crimes Act, 1908, where an appeal lies, we find that our present machinery suffers two disabilities—delay and inadequacy of remedy. Our present Court of Appeal, sitting as it does only three times a year, is unable to deal expeditiously with criminal appeals. An illustration of the inadequacy of our present system is seen at present, in that it has become necessary to set up a special sitting of the Court of Appeal by Act of Parliament. But the weakness of the present system lies, in my opinion, not only in the possibilities of delay, but equally because of the restriction on the powers of our Court of Appeal. In New Zealand, if a person found guilty of an indictable offence considers that the verdict is against the weight of evidence, he may, with the leave of the trial Judge, appeal not for his conviction to be quashed, but only for a new trial. This is unsatisfactory. Any Court of Criminal Appeal should have the power, as in England, to set aside the verdict of a jury if the Court considers that the verdict is unreasonable or cannot be supported having regard to the evidence. The constitution of the Court is a matter of importance. Three Judges would, in my opinion, be a satisfactory Bench for Criminal appeals in New Zealand, and we would be justified in taking, in the main, the English Criminal Appeal Act, 1907, as a precedent for New Zealand. I believe that the setting-up of a Court of Criminal Appeal in New Zealand is not only fully justified but is also urgently required.

Mr. H. F. O'Leary, Wellington: I welcome the proposal to establish a Court of Criminal Appeal in New Zealand. We have been too long without this Court and have indeed lagged behind England where it was established in 1907. One has only to peruse the English Criminal Appeal Reports from 1907 onwards to appreciate the necessity for the right of appeal in Criminal cases. It has saved from punishment many persons who had been unsatisfactorily or indeed unfairly tried. The provisions of our Crimes Act, giving the right to move for a new trial on the ground that the verdict was against the weight of evidence and the power to reserve questions of law, do not go far enough. Cases are tried where there has been a miscarriage of justice; but no question of law arises for reserving and on the principles applicable it is impossible to obtain a new trial on the ground that the verdict is against the weight of evidence. I trust that if legislation gives effect to the proposal, the right of appeal will be given on the same wide grounds as those contained in s. 3 of the English Act.

Mr. F. D. Sargent, Christchurch: 1. In my opinion, our present law on the subject of appeals in Criminal cases is not entirely satisfactory for the following reasons: (*a*) The Appellate Court has not in terms the same jurisdiction particularly on questions of fact as is given to the Court of Criminal Appeal in England. I do not think that any one will deny (for example) that s. 3 (*b*) of the English Act of 1907 is to be preferred to s. 446 of our statute of 1908; our statute should be altered. (*b*) Appeals on questions reserved for the Court of Appeal must wait for determination until the following sittings of the Court which has only three sittings in the year. 2. If it be thought desirable or proper to remedy this state of affairs, the amendments do not necessarily involve the creation of a new Appellate Court, a proposal which might be opposed on the ground of supposed expense, although no substantial administrative expense should be involved. If, therefore, it is desired to have legislation this session it may be politic to enlarge the powers of our present Court of Appeal.

Mr. C. S. Thomas, Christchurch: Until one knows more about the proposed Court of Criminal Appeal, one can hardly express any very definite opinion regarding the desirability of its establishment. If its constitution is to be upon the lines of the English Court of Criminal Appeal, then I am strongly in favour of the proposal. It must be admitted that there are some Judges who have an aptitude for handling criminal cases, whilst there are others who have not and who find the work distasteful. A Court of Criminal Appeal would ensure that difficult questions of evidence that so often arise in important criminal trials would be dealt with by Judges who are expert in this branch of law. It would act as a check upon misdirections by the trial Judge, and above all, it would make for a uniformity of sentences. One realises that a Court of Criminal Appeal is open to abuse, as is shown in Great Britain where appeals seem to be lodged as of course in all murder convictions. The advantages far outweigh the disadvantages, however. It is very doubtful if the names Beck and Slater would ever have been heard of if there had been a Court of Criminal Appeal in the days of their troubles.

Mr. C. A. L. Treadwell, Wellington: The fairest treatment possible is the only treatment to which a prisoner at a British trial should experience. The rulings that Judges are called on to make in the course of such trials are many, and frequently involve matters of grave legal difficulty. The fact that these rulings are almost invariably given immediately following their being argued enhances the risk of error. Error of this kind as well as misdirection on the summing up go to make unjust trials. Wrongful convictions call for swift remedy, not only in the prisoner's interest. I can see no possible justification for opposing the creation of a Court of Criminal Appeal in New Zealand. It will probably function at irregular intervals; now frequently, and then but occasionally. It might interfere too in private litigation a little. That, however, is no argument against it where the life or liberty of the individual is at stake. I see no reason why power should not be taken to increase the personnel to a full division of the Court of Appeal. Cases may arise, as they have before, of great difficulty and importance, and the full panel of Judges might be better than three only. Three should, I think, suffice on most occasions. The sittings of the Court of Criminal Appeal should be in the discretion of the Chief Justice, and the place of hearing not necessarily at Wellington. It would be usually the case that prisoners would be unable to send their Counsel to Wellington on appeal where the trial has been in another City. The selection of the Judges should, I think, be a matter for the Chief Justice. The grounds for appeal might well be those existing in England;

7 Ed. VII, c. 23, s. 3. With the creation of a Criminal Court of Appeal a substantial improvement will have been made in the administration of justice.

Mr. C. H. Weston, Auckland: The difference between the jurisdiction of the Court of Criminal Appeal in England and of our Court of Appeal, to review the verdicts of juries in criminal cases, is exemplified in *R. v. Johnston*, [1931] G.L.R. 565, and I think it would be a forward step if the latter's powers were widened. The establishment of a Special Court of Appeal, to deal merely with Criminal appeals as at present allowed under the Crimes Act, is hardly justified by the number of appeals that are made. In the past eight years, eighteen appeals have been reported. Certainly of these, thirteen have been heard in the last three years, but even those figures are not large. I assume that if a new Court were constituted, the number of Judges constituting it would be not less than three as in England. The most important Criminal appeals in New Zealand are in respect of murder trials, and counsel for appellant would doubtless be glad to have the benefit of the wisdom of a full Bench. If the suggested amendment were to include the establishment of a separate Court of Appeal in civil cases, other considerations would need to be debated.

Mr. C. J. L. White, Dunedin: In the absence of a full knowledge of any proposal to establish a Court of Criminal Appeal in this Dominion, it is very difficult to express an opinion on the subject at all. Two obvious arguments in its favour are: First, that presumably sittings of such a Court would be held much more frequently than is the case with the Court of Appeal, thus preventing much delay in some criminal cases; secondly, that such a Court could be presided over exclusively by Judges who had had exceptional experience in criminal matters. Apart from the question of delay which admittedly is unfortunate in criminal cases I think the existing system has proved satisfactory, and if the present proposal is one which is likely to involve the country in further expense I should be opposed to it. It seems to me that if legislation could be introduced to enable the Court of Appeal to sit for the consideration of urgent Criminal appeals at any convenient time it would be sufficient for the Dominion's present needs. A further increase in the already large number of tribunals in this country at its present stage of development is in my opinion unnecessary. Furthermore, the present time is most inopportune for any innovation which may prove an additional burden to the taxpayer.

Recent Legislation.

Judicature Amendment Act, 1932-33, s. 2 (1). In addition to the sittings of the Court of Appeal fixed pursuant to s. 8 of the Judicature Amendment Act, 1913, the Governor-General may fix special sittings of the Court of Appeal. (2) The authority so conferred on the Governor-General shall be exercised only on the certificate of the Chief Justice, given on the ground that it is not desirable or expedient that the hearing of any appeal or other proceeding, specified in the certificate, should be deferred until the next ordinary sitting of the Court of Appeal. (3) In any appeal or other proceeding to be heard at a special sitting of the Court of Appeal, the whole jurisdiction of that Court may be exercised by any three or more Judges of the Supreme Court (whether of the same Division of the Court of Appeal or not), who shall be called together for the purpose by the Chief Justice, and of whom the Chief Justice may be one. (4) The holding of a special sitting of the Court of Appeal shall not in any way affect the holding of any sitting of that Court fixed or to be fixed under s. 8 of the Judicature Amendment Act, 1913, or the validity of anything done thereat, or the Division of that Court by which any such sitting shall be held, nor shall any sitting as aforesaid be regarded as a sitting of the Court of Appeal for any purpose other than the hearing and determination of the appeal or other proceeding in respect of which a certificate is given by the Chief Justice in accordance with subsection (2) *supra*. [*Assent date*: *January* 31, 1933.]

Consents by Mortgagees.

To Leases of Mortgaged Premises.

By Henry Cotterill.

The practice with regard to the giving of consents by mortgagees has been brought before the profession prominently by the decision of the Supreme Court in the case of *Tattley v. Wagstaff* [1924] N.Z.L.R. 813, G.L.R. 402, under which it is made clear that a mortgagee cannot preserve his rights by adding in a consent to a lease words of reservation such as "without prejudice to my rights under the said memorandum of mortgage."

It is contended that a mortgagee cannot be properly protected save by an adherence to the old English practice, adapted to the different position of the title under our Land Transfer Act. This protection is more than ever necessary under present circumstances when unhappily the general values of land have come down substantially and the mortgagees' interests are in consequence abnormally jeopardised.

Under the English system of conveyancing, the legal estate in the land became vested by the mortgage in the mortgagee and it was therefore a matter of necessity for the mortgagor, when letting land, to come to the mortgagee and obtain his consent by joining in the lease as one of the contracting parties.

A precedent for a lease by mortgagee and mortgagor may be seen in *Davidson's Precedents*, Second Edition, Vol. V, pt. 1, Leases, p. 144. Under this form the lease is made by the mortgagee with the consent of the mortgagor: the rent is made payable to the mortgagee, with a proviso that the rent may be paid to the mortgagor till notice by the mortgagee. A power to distrain is given to the mortgagor until the notice is given—the covenants by the lessee are made with the mortgagor and separately with the mortgagee: the power of re-entry is given to the mortgagee or to the mortgagor till the notice is given. Power to enter and give notice to the lessee to repair are given to the mortgagee as well as to the mortgagor. Alteration of the premises must only be made with the consent of the mortgagee as well as the mortgagor: the written consent of the mortgagee as well as mortgagor is made requisite in the case of an assignment or sub-lease, and the rights of the mortgagee are expressly protected in the case of insurances or in the terms of a purchasing clause.

It is only necessary to read the terms of an ordinary lease to see how dangerous it is for a mortgagee to give a simple consent to such a lease, and no alteration of the terms of the consent can properly protect the mortgagee if he is not made a party to the document.

It is contended, therefore, that the proper practice for a mortgagee's adviser to adopt is to insist that instead of giving a bald consent to the Memorandum of Lease, the mortgagee should join in the instrument as a contracting party. The legal estate is not vested in him, his mortgage being a creature of the Land Transfer Act. Power to distrain and power of re-entry must therefore be given to the mortgagee and separate covenants entered into with him by the lessee. In effect the respective powers of the mortgagee and the mortgagor under the lease will be made identical with the powers given to them respectively under the English system.

Although this practice has always been adopted by the writer of this article, who was brought up under an old English Conveyancer at a time when the English system was still in force in New Zealand, and although it is in his opinion necessary for the protection of the mortgagee, the purpose of it is not generally understood in the profession, and an outline of the English practice and a statement of the substantial reasons for its adoption may be of advantage to conveyancers generally in New Zealand. The powers given to mortgagees under Sections 105 and 106 of the Land Transfer Act are quite inadequate for his protection.

It may be contended that the added expense to the landlord of joining the mortgagee as a party would create a difficulty in itself, but with this view I cannot agree. When the form of the document is understood, the perusal of it by the mortgagee's solicitor will practically be no more troublesome than is necessary in any case.

The matter seems to me of so much importance that I should be glad if this article should produce some discussion in the LAW JOURNAL on the question. An article on Leases by Mortgagors does indeed appear in the NEW ZEALAND LAW JOURNAL, Vol. 8, p. 114, by Mr. C. E. H. Ball, LL.M., which contains interesting matter on the subject and should be studied; but I submit that the mere alteration of the terms of the lease will not give the mortgagee the protection to which he is entitled and which he receives under the English practice.

Bench and Bar.

Mr. Gordon J. Reed, Invercargill, is spending a holiday at the New Hebrides Islands.

Mr. E. G. Layburn, late of the Public Trust Office, Christchurch, has recently commenced practice on his own account.

Dr. E. E. Bailey, the 1928 Rhodes Scholar, has left for London, where he proposes to go to the English Bar.

Mr. R. L. A. Cresswell, Barrister and Solicitor, late of the staff of Messrs. Treadwell and Sons, has commenced the practice of his profession in Wellington.

Sir Alexander Gray, K.C., and Mr. E. M. Sladden, have taken Mr. J. L. Stewart into partnership. The new firm will be known as Gray, Sladden, and Stewart.

Mr. Alan M. Spence, as his many friends will be pleased to hear, has returned to New Zealand fully recovered in health. He has recommenced practice in Auckland as a barrister and solicitor.

Recent Auckland admissions as barristers and solicitors are Mr. H. W. Youren, of Messrs. Earl, Kent, Massey, and Northcroft's office, and Mr. S. G. White, of Messrs. McGregor, Lowrie, Inder, and Metcalfe's office.

Mr. Herbert Taylor has been admitted into partnership in the firm of Messrs. Morison, Spratt, and Morison, Wellington. The practice will in future be carried on under the style of Morison, Spratt, Morison, and Taylor, at Bethune's Buildings, Featherston Street.

London Letter.

Temple, London,
My dear N.Z., 30th November, 1932.

The New Procedure.—Our New Procedure continues to be the subject of spasmodic remark; and the High Court has just expressed itself as being highly delighted to note that a case set down in mid-September was tried not much after mid-November. We old enthusiasts for the Circuit system (*laudatores temporis acti*) are highly amused that such a poor result is the best that can be put forward to warrant the never-to-be-sufficiently-advertised innovation.

I had a case on circuit, on November 9, which was set down for trial in the same month of November: and the process is one which can be repeated as often as you please! I repeat that the whole New Procedure outburst is the poorest thing that has happened, even in these days of new circumstances which call for Big Conceptions to remedy them and which receive only the meanest little measures of the most meagre imagination. McNaghten, J., meanwhile, has formally removed the existing doubt as to whether the New Procedure admits of trial by Jury. It does.

Compulsory Evidence.—Swift, J., was very interesting (he always is) upon the law of compulsory evidence at the Old Bailey, earlier this month. I refer to the principle that "No one is bound to answer questions having a tendency to expose him to criminal charges, or to penalties, or to forfeitures." The case, in which he considered the matter is *Rex v. Pearce*, and I think it is fairly certain to be reported, at least in the current reports of the several Law Journals if not in the *Law Reports* themselves. If Old Bailey origin forbids this privilege, even, then you may rely upon finding it mentioned in the comment-columns of the journals themselves. The upshot of it is a reminder that it all depends upon the opinion of the Judge, as to whether the answer is incriminating, or not; and in a case where the Judge was of opinion that no penal consequences could ensue, he was warranted in compelling such questions to be answered.

Their own Counsel.—Litigants in Person, on the grand scale, have been formidably prominent during the period of our review: in the Privy Council a lady occupied many hours and days of the time of the Judicial Committee, to the exclusion (at least upon one side of the case) of a most deserving Bar, and starving! In *Lever Brothers, Ltd. v. Kneale* the odious example was followed in the High Court, and Sir Patrick Hastings was reduced to scowling more ferociously and more loudly than ever by the inequality upon which this always puts the professional "mouth-piece." Branson, J., lumped it out upon the gentleman in much heavier and hotter bricks than were dealt out to the lady, who more often needed to be revived with a glass of water, at Downing Street where the J.C. of the P.C. in its various divisions, as you recall, performs. We can only hope that it may never leak out, what an immense advantage litigation, conducted in person, has; let it rather be hoped that the irritations (entirely warranted and only let loose after the exercise of inordinate patience) of the mild Puisne Judge have produced a wholly wrong impression upon potential L-in-P.'s; and that this dangerous class is being rapidly depleted by the mistaken notion that nothing but a rough passage awaits the plaintiff or defendant who puts out to sea, in law, without a pilot.

The Origins of Crime.—McCardie, J., has made Further Pronouncements upon Abstract Considerations of, or Touching, the Administration of Justice. Nowadays, when a friend calls your attention to the fact that this has happened and you have not read it, your only answer is, "What, again?" Perhaps this was no pronouncement, this thesis upon the Origins of Crime, but was merely a routine chat, between Judge and Grand Jury, headlined only as emanating from a Judge who is now so famous for utterances that there follows him, ever, a gang of masked reporters and, if he wishes not to be reported as Pronouncing, then he must forever keep silence.

The Gambling Spirit.—Betting (that form of notorious and open evil living of which I feel comfortably confident that not a single reader of this JOURNAL is ever, was ever or ever will be, guilty?) has been the subject of judicial review, while the lucubrations of Sir Sidney Rowlatt and his Committee diligently continue elsewhere. Astounding figures were disclosed, as to the proceeds of one bookmaker in an industrial area (Barnsley: 65,000 bets taken a week!) and there was an interesting discussion of the "ready-money bet," under the Ready-money Football Betting Act, 1920.

The Divisional Court, in the Crown Paper, had to consider the question; but only Hawke, J., was bold enough to express an opinion, confirming the most extensive claims of the police authorities as to the scope of the definition. This is a mid-November case, also: and you will find it undoubtedly reported, or recorded, as above mentioned. I have the misfortune not to know or be associated with any person, firm, or company who or which controls the selection of cases for reporting (or even recording). As more occupied in practising than in writing, I am afraid I have to collect my news as best I can; and, as the selection is either not made or is not publicly known at the time I write, I am not able to give better assistance than to tell you what we, in business here, know as at this stage.

Tithes.—The battle as to Tithes continues and resumes heat every now and then. "Q.A.B." (Queen Anne's Bounty, that is—one of the Church Administrative Authorities, and distinct from or supplementary to the Ecclesiastical Commissioners) is not willing again to come into conference, but is justifiably content to limit itself to defence of the 1925 Act, which constituted the process of agreed composition.

It is curious that so momentous and so hot a controversy could be so continuously waged in almost complete ignorance of what the Tithe exactly is! As you know, it was in origin a free-will offering by way of endowment, and was never in any way queer or abnormal but was according to the only method of "investment" known in the pre-Parliament days of its beginning. They existed, these gifts, long before there was a civil law to enforce the implementing of agreements; and the Canons of the Church, which deal with them, were not creative enactments but merely the authentication, according to (then) modern ideas and progress, of a system long before continuing. The edicts of the Anglo-Saxon Kings as to Tithe, later on, were also recognition and not innovation: and the interest of the very first Parliaments (1265 first created, and 1295 first completed) merely gave force of law to a duly existing charge. Why this particular charge, as distinct from many another among laymen and affairs, should be singled out as deserving to be given the wholly illegal "go-by," no one, not even the keenest enthusiast, has attempted to explain! It is as good contractually and as legitimate *in rem* and as much a matter of duly recognised and duly discounted property as any other: indeed, rather better.

But I must desist: I tend to become hectic when I find these modern, imitation-American heresies being seriously canvassed, and English things being blackguarded for no other reason than that they are of long establishment and were not conceived by the luminous minds of contemporary politicians or trade-unions. I always think that England will last much longer as English, than it would as a Province of the U.S.A.: a thought which is not wholly irrelevant to topical considerations, since, as I write, the question of the American Debt is obscuring all other issues.

Personalities.—Lastly, as to McKinnon, J., and as to Sir William Edward Hansell, K.C.: McKinnon, J., has been letting loose at the Circuit System, but we will not answer his arguments, since ours are so well known as to become tedious upon repetition. He is an able and amiable Judge, very much beloved by his friends and deserving so to be. But, really, there are times when he goes too far: and in his utter boredom, at being taken out of London from the pleasant and interesting and (in more profound truth) not too heavily and anxiously responsible pleasances of the Commercial List, this most occurs. He dislikes circuit; and, kindest and least arrogant or socially ambitious of men though he is, he has and can develop no interest whatever in the smaller Causes. He will yawn without shame, as he is addressed in such matters; and, this being said, you may be persuaded to discount heavily the arguments which he puts forward for further centralisation still, though any sane person must see herein Cause and Effect: the lazy lawyers' tendency to centralise, over the last decade or two, is undoubtedly responsible for the inordinate delays and the incredible increase in cost of litigation, and for the inevitable and disastrous decline in popularity of our Judicial system and (be it said wholly impersonally and entirely with reference to their post and not their personality) the Judges.

As to dear old Hansell, another universally liked Prominent of our profession, there are two things to record only: he is now Treasurer of the Inner Temple, an honour which lasts for a year and comes to all good men, in their turn and if they be really good; and, for all his sensible determination to retire from the quasi-Bench (he was till recently an Official Referee) while still in good form, just as he retired from the Bar, long before his business showed any signs of retiring from him, he has apparently been unable to keep away from it, and has been going the North Eastern Circuit as Commissioner of Assize. I wish he would cover ours.

Yours ever,

INNER TEMPLAR.

Rules and Regulations.

Slaughtering and Inspection Act, 1908. Amended Regulations —*Gazette* No. 2, January 12, 1933.

Mortgagors and Tenants Relief Act, 1932. Extension of provisions of section 6 of the Act to apply to licenses in respect of timber, flax, and coal.—*Gazette* No. 2, January 12, 1933.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

The Rating Assurance—Precedents.

1. MEMORANDUM OF TRANSFER.
2. CERTIFICATE OF REGISTRAR.
3. DECLARATION OF TOWN CLERK.

1. Transfer in Fee-simple by Registrar of Supreme Court to a Purchaser upon a Sale for non-payment of Rates.

Under the Land Transfer Act, 1915.

MEMORANDUM OF TRANSFER.

WHEREAS A.B. of etc. (hereinafter called "the Owner") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT etc., situated in the of containing BE the same a little more or less being etc., SUBJECT etc.

AND WHEREAS the said land is rateable property situate in the of and within the rating district of the Council (hereinafter called "the Local Authority").

AND WHEREAS the Local Authority having duly struck rates for the year(s) 19 (and 19) upon all rateable property within its district and having duly made and served demand upon the Owner for the amount of rates due to the Local Authority in respect of the said land did recover judgment in the name of the Body Corporate called the of the of in the Magistrate's Court (*or* the Supreme Court of New Zealand) at on the day of 19 for the sum of £ against the Owner as such owner of the said land being arrears of rates (and additional charge of ten per centum lawfully added thereto) and costs due in respect of such land.

AND WHEREAS such judgment then remaining and still remaining at the day of the hereinafter recited sale by auction unsatisfied the Local Authority did on the day of 19 forward to the Registrar of the Supreme Court of New Zealand at in the Judicial District (hereinafter called "the Registrar") a certificate as in such case prescribed by the Rating Act, 1925.

AND WHEREAS the Registrar on the day of 19 duly gave notice to all persons whom he believed to have any interest in the said land that such land would be sold or leased after six months from the day of the date of such notice unless the amount of such judgment and costs be paid in the meanwhile.

AND WHEREAS the Registrar on the day of 19 did cause the said land to be offered for sale by public auction at by Messieurs duly licensed auctioneers and at such sale C.D. of etc. (hereinafter called "the Purchaser") was the highest bidder for and became the purchaser of the said land at the price of £ .

NOW THEREFORE in consideration of the sum of £ paid to the Registrar by the Purchaser (the receipt whereof is hereby acknowledged) and in pursuance of such sale the Owner DOTH HEREBY TRANSFER unto the Purchaser ALL THAT the said land for an estate in fee-simple free from encumbrance (save and except the hereinbefore recited fencing covenant).

IN WITNESS WHEREOF this Transfer has been executed this day of 19 .

.....
L.S.

SIGNED SEALED AND EXECUTED on behalf of the above-named A.B. the Owner by the Registrar of the Supreme Court of New Zealand at in the Judicial District and sealed with the latter's seal of office under the Rating Act 1925 in the presence of:

Registrar of the Supreme Court of New Zealand at in the Judicial District under the Rating Act 1925.

.....

....., ...

2. Certificate of Registrar of Supreme Court (Endorsed on Transfer).

I HEREBY CERTIFY AND DECLARE that I have not in my possession the within-mentioned Certificate of Title relating to the within-described land AND that I am unable to produce the same.

DATED this day of 19 .

.....
Registrar.

3. Declaration of Town Clerk in Proof of Facts enabling Sale for Non-payment of Rates (Endorsed on or annexed to Transfer).

I, E.F. of etc. do solemnly and sincerely declare as follows:

1. I am the Town Clerk (and Collector of Rates) employed by the Council (hereinafter called "the Local Authority").

2. THE Local Authority did on the day of 19 (and the day of 19) duly strike rates for the year(s) 19 (and 19 respectively) upon all rateable property within its district that is to say the of .

3. ON the day of 19 I did duly make and serve demand upon the within named Owner or Owners of the land described in the within written Transfer for the sum of £ for the amount of rates then due to the Local Authority in respect of the said land.

4. THE Local Authority did recover judgment in the name of the Body Corporate called "the of the of " in the Magistrate's Court (or the Supreme Court of New Zealand) sitting at on the day of 19 for the sum of £ against the said Owner or Owners as such owner of the said land being the arrears of such rates (and additional charge of ten per centum lawfully added thereto) and costs due in respect of such land.

5. THE said judgment and such rates (and charge) and costs therein merged were and remained unsatisfied and unpaid to the Local Authority down to the day of the sale of the said land by public auction to the within named C.D. namely the day of 19 .

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act, 1927.

DECLARED at this day of 19 Before me:

.....
.....
A Solicitor of the Supreme Court of New Zealand.

Legal Literature.

The Law of the Air. By Arnold D. McNair, C.B.E., LL.D., of Gray's Inn, Barrister-at-Law, and Reader in Public International Law in the University of Cambridge; pp. 249, xv.

A Review by SQUADRON LEADER T. M. WILKES, M.C., N.Z.P.A.F., Director of Air Services.

I have read this comprehensive statement of the law in relation to Aviation with considerable interest. It is the first text-book on the subject which has appeared complete in relation to English law; and when it is remarked that the recent case of *Strand v. The Dominion Air Lines Ltd.* is commented upon, it will be seen how up-to-date Dr. McNair's work is. Probably never before has a decision been commented on in a text-book which was quoted generally in an appeal from such decision. It is also of interest to see that the author dissented from the view of the learned Judge from whom the appeal was successful.

After an historical note on the development of Air law in its international aspect, Dr. McNair deals exhaustively with the rules governing liability done by or from aircraft. He then passes on to consider the questions of nuisance and negligence in the use of aircraft at common law, and the strict liability imposed in certain cases in respect of the use of dangerous things. As our Air Navigation Act, 1931, parallels, and in fact re-enacts verbatim, the greater part of the Air Navigation Act, 1920 (Imperial), Dr. McNair's treatment of statutory liability is directly in point in relation to our difficulties in this phase of his subject.

Much space is devoted to consideration of the contract of carriage of goods and passengers respectively by aircraft, as well as of aircraft charterparties, and insurance, an interesting chapter, the purpose of which is to discuss a number of questions which, in the author's words, "frequently arise in the case of shipping and consider how far their analogy has been applied, or is likely to be applied, in the sphere of aerial navigation."

Dr. McNair says his book is not intended so much for the aviator and the air transport company as for their legal advisers, consequently he avoids technical language. But he has a good grip of the mechanical and other details of aeronautics, and is thus able to simplify his explanation of regulations "which must be complied with by persons engaged in or connected with aviation, whether as an industry or as a means of private pleasure or locomotion." He sets out the Convention dealing with the regulation of air navigation, which was signed at Paris in 1919, as well as the text of subsequent Conventions. As New Zealand is a party to this international code, its inclusion is very useful.

Speaking as a layman, so far as the law is concerned McNair's *Law of the Air* appears to deal very fully with the whole body of common law and statute law in relation to aviation in a detailed and effective manner. His sound views as proved by the result of the *Air Lines* case have already been noted. There is only this to add, that from the technical viewpoint his book is without blemish, and should prove of undoubted use to all dealing with the complicated problems raised by the newest means of transportation.

Practice Precedents.

Leave to Proceed Against Company in Liquidation.

Section 244 (*a*) of the Companies Act, 1908, provides:

> "No action or other proceeding shall be commenced or proceeded with against the company except with the leave of the Court, and subject to such terms as the Court imposes."

Doubt has been expressed as to whether the application for such leave should be made by Motion or by Summons.

Rule 54 of the Winding-up Rules (*New Zealand Gazette*, 1887, p. 1495) provides the procedure with respect to certain sections of the Companies Act; but no mention is made of s. 244. The Act itself makes no express provision as to the procedure with which this statutory jurisdiction is to be exercised. In *In re Pukuweka Sawmills, Ltd.* [1922] N.Z.L.R. 102, [1921] G.L.R. 465, an application under s. 17 of the War Legislation Act, 1917, the late Mr. Justice Salmond said in regard to the procedure adopted: "The Act makes no express provision as to the procedure with which this statutory jurisdiction is to be exercised, and no rules of Court have been made in the matter. . . . The matter is one which is unprovided-for within the meaning of Rule 604."

In England, the procedure appears to be by way of Summons: Palmer's *Company Precedents*, 13th ed., Part 2. In *Re Rio Grande do Sul SS. Co.* (1887) 5 Ch. D. 282, it was said: "Leave may be given on an *ex parte* application." But, as a rule, leave should only be given on a Summons or Motion served on the liquidator: in *Western and Brazilian Telegraph Co. v. Bibby* (1880) 42 L.T. 81, it was laid down that the application should not be *ex parte*; in *Hagell v. Currie* [1867] W.N. 75, and in *Re St. Cuthbert's Lead Smelting Co.*, (No. 2) [1866] W.N. 154, it was held that the application should be by Summons supported by affidavit. The Companies Act, 1929 (Imp.), does not appear to have altered the procedure.

In New Zealand, RR. 416 and 417 of the Code of Civil Procedure set out the powers of a Judge sitting in Chambers and how applications may be made: Stout and Sim's *Supreme Court Practice*, 7th ed., 274. Here, the practice is to make the application under notice either by Motion or by Summons.

While it seems immaterial whether the application be by way of Motion or Summons, it should be noted that a Summons is, pursuant to R. 423 of the Code, *returnable at any time before hearing*, while a Motion would come within R. 395, thereby entitling the liquidator to three days' notice of the hearing. Further, while a Summons is returnable at any time before hearing, it has been held that such time must be *reasonable*; and what is a "reasonable time" depends on the circumstances of the particular case in issue. If the Summons procedure be adopted, the Order following is drawn as a Judge's Order in accordance with the recent ruling of their Honours the Judges.

After consideration, procedure by way of Notice of Motion is recommended: it seems closer in analogy to R. 54 of the Winding-up Rules than an application by Summons. Consequently, the forms here given follow the former procedure; but, in case it is desired to make the application by Summons (and there seems to be no reason why it should not so be made), a form of Summons is also given.

1. Notice of Motion.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.
In the Matter of Section 244 of the Companies Act, 1908,
and
In the Matter of an intended action
Between A.B. of etc., *Plaintiff*;
and C.D. & Coy., Ltd. (in Liquidation) a duly incorporated Company, etc., *First Defendant*;
and E.F. of etc., *Second Defendant*.

TAKE NOTICE that Mr. of Counsel for the Plaintiff will move this Honourable Court at on day the day of 19 , at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER granting leave to the above-named Plaintiff to proceed against the first-named Defendant in terms of Section 244 of the Companies Act, 1908, and for a further order that the said first-named defendant do pay the costs of and incidental to this application UPON THE GROUNDS that the Plaintiff has a good cause of action against such defendant AND UPON THE FURTHER GROUNDS set out in the affidavit of filed herein.

Dated at this day of 19 .

Solicitors for Plaintiff.

This motion is filed by whose address for service is at the office of .

To the Liquidator of C.D. & Coy., Ltd., (in liquidation), and to his Solicitors, Messrs. , and to the Registrar of this Court.

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2. Affidavit in Support of Motion.

(*Same heading.*)

I, of , Merchant, make oath and say as follows :—

1. That I am the Plaintiff in the above intended action.
2. That on the day of 19 , the said first defendant passed a resolution for the voluntary winding-up of the said Company.
3. That hereunto annexed and marked "A" is a letter received by me from the Liquidator of the said Company stating the said Company had passed the said resolution.
4. That the said defendant Company on the day of 19 , entered into a written agreement with the second defendant to purchase 100 Studebaker Motor-cars to be supplied over a period of six months as appears by the said agreement.
5. That for valuable consideration I purchased from the second defendant his business including the assets and goodwill of such business.
6. That the said first defendant failed to take over more than half of the number of the said cars referred to in para. 4 of this my affidavit.
7. That I have thereby been put to great financial loss.
8. That one of Accountant was appointed Liquidator of the said first defendant Company.
9. That the said Liquidator refused proof of my estimated loss in the liquidation.
10. That I have a good cause of action against the said first defendant Company for the breach of the contract dated aforesaid.
11. That the second defendant is joined so as enable me to use his name in the action to be brought.
12. That it is just and right that leave should be granted to me to proceed against the said first defendant Company pursuant to section 244 of the Companies Act, 1908.

SWORN, etc.

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3. Affidavit in Opposition.

(*Same heading.*)

I, of , Accountant, make oath and say as follows :—

1. That I am the duly appointed Liquidator of the above-named Company (in liquidation).
2. That the said Company is duly registered as a Public Company under the Companies Act, 1908.
3. That on the day of 19 , the said Company went into voluntary liquidation.
4. That the assets of the said Company are insufficient to meet its debts and liabilities and the costs of winding-up.
5. That I duly rejected the proof of the claim of the above-named Plaintiff because the contract was not made with the said second defendant but with the Company of which he was Manager.
6. That the said contract was not one that could be assigned.
7. That on the day of 19 , I gave notice in writing of the rejection of proof to the said Plaintiff.

SWORN, etc.

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4. Order Granting Leave.

(*Same heading.*)

Friday the day of , 19 .
Before the Hon. Mr. Justice .

UPON READING the Motion filed herein and affidavit filed in support thereof and the affidavit filed in opposition thereto AND UPON HEARING Mr. of Counsel in support of the said Motion, and Mr. of Counsel in opposition thereto IT IS ORDERED that leave be and the same is hereby granted to the Plaintiff to proceed against the first defendant in the Supreme Court of New Zealand at , in terms of section 244 of the Companies Act, 1908, on the Plaintiff forthwith giving an undertaking that if Judgment is obtained no step will be taken to enforce the said Judgment without the leave of this Court AND IT IS FURTHER ORDERED that the costs of and incidental to this application be reserved and be costs in the action.

By the Court,

Registrar.

NOTE :—If there is no appearance in opposition on behalf of the Liquidator, an affidavit of service is required.

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5. Application by Summons.

(*Same heading.*)

(summons for leave to sue.)

Let the Liquidator of the above-named defendant Company, its Solicitor or Agent appear before the Right Honourable Chief Justice of New Zealand at his Chambers, Supreme Court House, , on day the day of 19 , at 10 o'clock in the forenoon or so soon thereafter as Counsel may be heard UPON THE HEARING of an application for an Order pursuant to the provisions of section 244 of the Companies Act, 1908, that notwithstanding the liquidation of the said Company the applicant may be at liberty to proceed with an action in the Supreme Court of New Zealand at and for an Order that the costs of and incidental to this application may be costs in the said intended action UPON THE GROUNDS that the applicant has a good right of action on the merits and ON THE FURTHER GROUNDS appearing in the Affidavit filed in support of this Summons.

Dated at this day of , 19 .

Registrar.

This Summons is issued by Solicitors for the above-named Plaintiff whose address for service is at the office of Messrs. of , Solicitors.

Obituary.

Inspector P. J. McCarthy of the Southland Police District died suddenly at Invercargill on December 13. The late Inspector had been stationed at Wellington, Auckland, Kawhia, Frankton Junction, Cambridge, West Coast, and Invercargill, and he had many close friends in the legal profession throughout New Zealand. Members of the Southland District Law Society met before Mr. E. C. Levvey, S.M., to express their united sorrow at the Inspector's passing, and Messrs. G. M. Broughton (President), H. J. Macalister (Crown Solicitor), and Eustace Russell paid tribute to the memory of the deceased. Acting Inspector Packer spoke on behalf of the Police Force. The late Inspector is survived by his widow, a daughter, and a son, Mr. W. P. McCarthy, Solicitor, of Greymouth.

Up to the Minute Case Law.

Noter-up Service to The English and Empire Digest.

All important current cases since the last Supplement (Jan. 1, 1932) to the *English and Empire Digest* are indexed in this feature under the classification prevailing in the latter work.

The reference given in brackets immediately following the case is to the page in the current volume of *The Law Journal*, (London), where the report can be found; and, secondly, to the *Digest*, where all earlier cases are to be found.

BANKRUPTCY AND INSOLVENCY.

Bankruptcy—Motion dismissed—Appeal—Poor person—Payment of Deposit.—*In re* A DEBTOR (p. 291).

As to actions by poor persons: DIGEST (Practice Volume), p. 435.

BILLS OF EXCHANGE.

Negotiable Instrument — Drawn and Accepted — Place of Drawing Altered—Inland Bill made into Foreign Bill.—KOCH *v.* DICKS (p. 329).

As to what alterations are material: DIGEST 6, p. 372.

COMPANIES.

Company—Memorandum Alteration—Change in Company's Objects—More Efficient or Economical Carrying on of Business. —*In re* SCIENTIFIC POULTRY BREEDERS' ASSOCIATION (p. 328).

As to alteration of objects of a company: DIGEST 9, p. 649.

EASEMENTS.

Easement of Light—Window and Skylights—Prescription—Commencement of Period—Adequate Light—Quality of Light.—SMITH *v.* EVANGELIZATION SOCIETY INCORPORATED TRUST (p. 346).

As to the extent of easement of light: DIGEST 19, p. 125.

ESTOPPEL.

Estoppel—Insurance Policy—Guaranteed by another Company—No Evidence of Formal Contract—Estoppel by representation.—NATIONAL BENEFIT ASSURANCE CO., LTD., *In re* (p. 134).

As to estoppel by representation: DIGEST 21, p. 290.

FRIENDLY SOCIETIES.

Friendly Society—Annual Return—False Return by Branch—Date of the Commission of the Offence—Information to be preferred within six months—Summary Jurisdiction.—WINDRIDGE *v.* COURT "GOOD INTENT" No. 2349, OF THE ANCIENT ORDER OF FORESTERS FRIENDLY SOCIETY AND OTHERS (p. 291).

As to limitation of time for proceedings: DIGEST 25, p. 331; also Vol. 33, p. 325.

HUSBAND AND WIFE.

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Forensic Fables.

THE VOLUBLE PLAINTIFF AND THE LACONIC INTERPRETER.

Once Upon a Time there Appeared in the Royal Courts of Justice a Voluble Plaintiff of Foreign Extraction. His Country, which Owed its Origin to the Treaty of Versailles, was Situated in the Balkan Region. The Claim of the Voluble Plaintiff, which was both Large and Complicated, was Stoutly Resisted by the Defendant.

As the Voluble Plaintiff was Unacquainted with the English Language the Services of an Interpreter were Requisitioned. When The Time Came for his Cross-Examination, Counsel for the Defendant, by Way of

Clearing the Decks, Asked the Voluble Plaintiff whether he had not some Three Years ago Made a Fraudulent Claim upon Under-writers. The Question having been Translated, the Voluble Plaintiff Gave a Shrill Scream Resembling that of a Locomotive Engine when Entering a Tunnel and delivered an Eloquent Speech, in the Course of which he Threw his Arms about in a Terrifying Fashion. At the End of Five Minutes the Voluble Plaintiff Paused for Breath and the Judge Enquired of the Interpreter what the Voluble Plaintiff had said. The Interpreter Cleared his Throat and Replied: "'E Say 'No.'"

MORAL: *Keep it Short.*