New Zealand
Law Journal
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"We are now on the threshold of an epoch of profound legal transformation. Our educational methods have to breed a race of lawyers able to utilise the spirit of law reform for the highest uses. They have to teach the importance at once of stability and change. To do so, they must know not only how to grasp the philosophic content of legal decisions. We must turn out lawyers with a courage to criticise what is accepted, to construct what is necessary for new situations, new developments, and new duties both at home and abroad."

—Rt. Hon. Lord Sankey,
Lord Chancellor of England.

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A Court of Criminal Appeal: Further Arguments.

In a recent article we drew attention to the weight of judicial and legal opinion which favours the creation of a Court of Criminal Appeal in the Dominion. This, in effect, simply means the conferring of additional powers on the Court of Appeal as at present constituted. Since that article, certain features of a recent Criminal Appeal emphasise the need for this improvement in our Criminal jurisdiction. The course of the argument and the remarks of members of the Court, on the motion for a new trial and appeal on case stated in *Rex v. Tarrant*, throw into high relief the necessity for an overhaul of the relevant sections of the Crimes Act to rectify the anomalous conditions that now exist.

At present, the powers of the Court of Appeal in its Criminal jurisdiction are limited to determination of questions of law reserved for its opinion, and to application for a new trial on the ground that the verdict was against the weight of evidence. If a convicted person considers he should not have been convicted owing to a miscarriage of justice with which the Court of Appeal is not authorised to deal, his remedy is under s. 447 of the Crimes Act, 1908, to make application to the Governor-General in Council. If the latter entertains a doubt whether such person ought to have been convicted, he may, instead of remitting or commuting the sentence, after such enquiry as he thinks proper, by order in writing direct a new trial.

It was noticeable during the argument of Counsel for the prisoner in the Tarrant appeal that both Bench and Bar were considerably hampered by the present state of the law relating to Criminal appeals. Many matters arise in an appeal of this nature which are on the border-line between fact and law; it becomes almost necessary to consider each one on its merits before finality may be reached as to whether, as questions of law, they may be discussed in argument, or should be ruled out because they are questions of fact. For example, the question as to whether there has been misdirection by the trial Judge on fact is not one for the Court, but for the Executive Council; the question as to whether directions to the jury on matters of fact amount to misdirection in law is a matter for the Court.

During the course of one of many such incidental arguments in the Tarrant appeal, His Honour the Chief Justice pointed out that if a man were convicted and appealed to the Court of Appeal and his appeal were dismissed, the Governor-General in Council might say there appeared to be a doubt; and this conclusion could be based on further evidence which was not before the Court. The exercise of the authority given to the Executive Council is a different function from the exercise of the jurisdiction given to the Court to decide questions of law in Criminal appeals; and some circumstances may involve matters upon which it would be improper for the Court to comment. In effect, the Legislature has expressly conferred on the Court certain powers beyond which it may not trespass, and has reserved other powers for the Governor-General in Council within the ambit of which the Court cannot intrude.

Towards the end of the argument in the same appeal, the learned Chief Justice made some observations as to the expression of opinion by the Court on questions of fact. The *Evening Post* (Wellington) reported him as follows:

> "The Chief Justice protested more than once during the argument that in respect of matters with which the Court of Appeal had no jurisdiction to deal but which might be brought before the Governor-General in Council the Court of Appeal should not express an opinion against the prisoner which might tend to prejudice his application before the Governor-General in Council under section 447. The Chief Justice did not say that the Court of Appeal should refrain from stating that a mistake had been made if the Court were unanimously of the opinion that it was clear a mistake had been made and that the mistake operated to the prejudice of the prisoner."

Some newspapers reported His Honour the Chief Justice as having said:

> "If it were shown that an error has been committed by the trial Judge which might have caused a miscarriage of justice, but that error was not one of law with which the Court of Appeal had jurisdiction to deal, it should refrain from expressing an opinion on the justice of the verdict or even from stating that a mistake had been made."

From this *obiter dictum* of the Chief Justice, Mr. Justice Ostler at once dissented. The Chief Justice remarked, in reply, that the position might become difficult for the Court if its members were not unanimous in their opinion on the facts involved; the Court might not have before it facts which afterwards come under the notice of the Governor-General in Council; and the Court might lay itself open to adverse comment if the Governor-General in Council saw fit to remind it that it was exceeding its jurisdiction in dealing with matters which the Legislature had not authorised it to consider.

Neither the learned Chief Justice, nor Mr. Justice MacGregor, one of the two other members of the Court constituted to hear the Tarrant appeal, discussed this matter in his written judgment; but Mr. Justice Ostler, in concluding his judgment, made the following observation:

> "I should like in conclusion to say a word on some observations which fell from the learned Chief Justice during the course of the hearing with which I found it impossible to agree. He expressed his opinion that if it was shown that an error was committed by the trial Judge which might have caused a miscarriage of justice, but that error was not one of law with which this Court has jurisdiction to deal, it should refrain from expressing any opinion on the justice of the verdict, or even from stating that a mistake had been made. I cannot help thinking that it would be very un-

fortunate if the Court of Appeal should establish such a precedent. In my opinion it is the duty of this Court if it thinks that such an error has been committed, and that error has caused or even might have caused a miscarriage of justice, to say so plainly, and even to make a recommendation as to the course which it thinks ought to be followed to remedy the injustice which has or might have been caused. Happily there is a recent precedent for this view. That is what was done by the Court of Appeal in *Rex v. Johnstone* [1931] G.L.R. 565. In that case the recommendation was made orally when the judgment was delivered, and does not appear in the report of the case.

"In the past the Court of Appeal has not hesitated to express its opinion plainly if it thinks that there has been an irregularity in the conduct of the trial which might have caused a miscarriage of justice, see *Rex v. Boakes*, 31 N.Z.L.R. 449 at 458.

"I shall always consider it my duty as a Judge sitting in a Criminal case in the Court of Appeal if I think an injustice has or might have been done to draw attention to it, even if the Court has no jurisdiction to remedy it.

"In my opinion it is equally the duty of this Court, if it comes to the conclusion that no error has been committed by the trial Judge, or if an error has been committed that the error could not possibly have caused a miscarriage of justice, to say so plainly. In this case I have come to the conclusion that no error was committed by the learned trial Judge, and there is no validity in the contention that there was or might have been a miscarriage of justice."

That the newspaper reports referred to did lead to misgivings on the part of the public is clear from a letter in the *Evening Post* (Wellington) in its issue of February 24. In reference to the observations of the Chief Justice, as reported, the writer asks:

"Does this mean that the Appeal Judges should sit back and let a man be hanged rather than that they should divagate an iota from the limit of their jurisdiction to point out an error which might result in a miscarriage of justice? This doctrine coming from the Chief Justice of the Dominion is alarming."

The correspondent goes on to say that he hopes other Judges will take an opportunity of expressing their views on this point, as it is most disturbing to think that there may be mental reservations on the part of the Bench involving a possible miscarriage of justice, when, not only a man's liberty, but his life, is at stake.

As we hope we have shown the whole point of the Chief Justice's comments during the argument in Tarrant's case was that the Court should not encroach upon the special jurisdiction of the Governor-General in Council by expressing an opinion with which the Court had no jurisdiction to deal but the Governor-General in Council had, and thus possibly prejudice the further application to the Governor-General in Council, which was the only tribunal with authority to deal with it.

It should be pointed out that in the Criminal Appeal, *Rex v. Wilkinson* [1931] N.Z.L.R. 599, where all the facts were before the Court of Appeal over which he presided, Sir Michael Myers said in his judgment at p. 603:

"The learned Solicitor-General has admitted that the accused is a person 'convicted of a crime' within the meaning of s. 447, and that there is power under the section to direct a new trial in a case like this. It is not, of course, for this Court to express any definite opinion as to what the Governor-General in Council ought to do, but I have no doubt that, in considering the matter, the Governor-General in Council will not overlook the fact that if the circumstances as now known had been known at the time when the accused was arraigned for sentence he would have had the opportunity of a trial. This statement is one to which the Governor-General in Council will no doubt have due regard, and may even be accepted—for it is so intended—as a recommendation."

In this, the other members of the Court (Reed, Adams, and Smith, JJ.) concurred.

We think that we have said enough of this incident to prove that we find in it, especially in the implications and words of Mr. Justice Ostler, no less than in the observations of His Honour the Chief Justice, a convincing argument in favour of the extension of the powers of the Court of Appeal to include the jurisdiction conferred on the Court of Criminal Appeal in England by the Criminal Appeal Act, 1907 (see p. 17 *ante*). If similar authority had been given to our Court of Appeal, the difficulties to which we have referred could not have arisen.

We must qualify our remarks on the authority given to the Court of Criminal Appeal in England by suggesting that the further power to grant a new trial should be included in the Criminal appellate jurisdiction we desire to see in the Dominion. This power to order a new trial is not included in the English Criminal Appeal Act. In an address to the International Law Association at its Conference in London, in August, 1910, the then Lord Chief Justice, Lord Alverstone, said on this point:

"Our experience of the working of the last two or three years has been that there have been gross failures of justice owing to our not being able to order a new trial, there being no outstanding doubt about the guilt, and yet the case being so much for a jury that the Court of Criminal Appeal would not be justified in acting. The same view has been expressed by a number of His Majesty's judges in England."

On the general question of the prisoner's only remedy, where a question of fact is in issue, being an application to the Governor-General in Council, instead of an appeal to a properly constituted judicial tribunal with experience in dealing with the sifting and weighing of evidence, it is interesting to recall the words of Cockburn, C.J., in *Reg. v. Mellor* (1858) 27 L.J. M.C. 121, at p. 127:

"What presses strongly on my mind is this, that for such a case I see no remedy. It may be said, indeed, application may be made to the Crown if it can be shown that a prisoner has sustained on his trial such a prejudice as that to which I have referred, and that a pardon might be obtained. Such a course, however, would be attended with very serious inconveniences; in the first place, a guilty man might, under those circumstances, escape with perfect impunity; and, on the other hand, an innocent man would be placed at the mercy of the Crown, or of those who happen at the period of the application to be its advisers. . . . I believe a prisoner ought not to be at the mercy of the Crown or its advisers."

This provides a further argument for the establishment of a Court of Criminal Appeal, for the present condominium of Court and Executive Council in matters affecting the liberty and life of the subject is not in the best interests of British justice. As His Honour the Chief Justice shows, the Court is handicapped by the restrictions imposed on it; since it may deal with the law, but not with the facts. It follows that it is outside its functions to comment on facts which are within the province of the Executive Council. In any event, this would be, in many cases, an equivocal service to the prisoner, since the Governor-General in Council might be influenced by any recommendation or advice of the Judges while, at the same time, he might have before him further evidence favourable to the prisoner which was not before the Court. On the other hand, even with all the facts before it, a recommendation of the Court might be coldly received by an Executive Council alive to the fact that it, and it alone, was the ultimate judge of fact. For these reasons, as well as for those already given, the Legislature should end the anomalies inseparable from the present unsatisfactory elements in our Criminal appellate jurisdiction by a complete revision of ss. 442 *et seq.* of the Crimes Act, with the object of establishing, once and for all, the Court of Criminal Appeal that is so strongly urged by many members of the Bench and Bar.

Summary of Recent Judgments.

SUPREME COURT
Wellington.
Nov. 28, 1932;
Feb. 17, 24, 1933.

GOOCH v. N.Z. FINANCIAL TIMES AND OTHERS (No. 2).

Defamation—Libel—Practice—"Rolled-up Plea"—Justification—Fair Comment—Distinction between Allegations of Fact and Expressions of Opinion.

Action claiming damages for libel.

In an action for libel by the plaintiff against the defendants, the defendants pleaded the "rolled-up plea" in respect of a portion of an article in the *N.Z. Financial Times* on November 10, 1931. The learned judge on the evidence held that in certain respects the facts stated in the article were not truly stated, and further that the imputation of malice in fact was not well founded.

Hoggard, for plaintiffs; **Johnston, K.C., L. K. Wilson** with him, for defendants.

Held, 1. That the "rolled-up plea" in an action for libel—*viz.*, that in so far as the words complained of consist of allegations of fact, they are in their natural and ordinary meaning true in substance and in fact; and, in so far as the words consist of expressions of opinion, they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest—is not a plea partly of justification and partly of fair comment, but is a plea of fair comment only.

Since the judgment of the House of Lords in **Sutherland v. Stopes,** [1925] A.C. 47, the decision of the Court of Appeal in **Norton v. Bertling,** (1910) 29 N.Z.L.R. 1099, is no longer law, the Dominion court being bound to follow the decision of the supreme tribunal to settle English law; **Robins v. The National Trust Co., Ltd.** [1927] A.C. 515, 519.

2. That, as in certain respects, the facts stated in the article on which the action was based were not truly stated, the plaintiff was entitled to succeed without proof of malice in fact, and entitled to forty shillings damages, although the errors of fact were matters of minor importance, and the article, written in good faith, deserved not condemnation but commendation, having led to litigation that called attention to the fact that it is possible to issue in New Zealand a prospectus of a company incorporated elsewhere without such protection being afforded to the New Zealand public as is required in the case of companies incorporated in New Zealand.

Solicitors: Findlay, Hoggard, Cousins, and Wright, Wellington, for plaintiff; **O. & R. Beere and Co.,** Wellington, for defendants.

SUPREME COURT
Invercargill.
Aug. 22, 1932;
Jan. 30, 1933.
Kennedy, J.

IN RE McKAY, DECD.: LONGUET v. QUIN AND ANOR.

Will—Legacy—Substitutionary Gift—Share of Beneficiary predeceasing Testatrix "to go according to His or Her Will or Intestacy—Beneficiary under latter Will predeceasing Testatrix—Lapse—Effect.

Originating Summons for interpretation of the will of Isabella McKay, deceased.

By her will, Isabella McKay deceased (hereinafter called "the testatrix"), devised and bequeathed her estate in equal shares to a number of her relatives by name, including her sister Margaret Carroll and her nephew John Quin, and declared that "in the event of any of them the said brother or sisters or nephews or nieces dying before me the share of any of them so dying before me shall become part of his or her estate and go according to his or her will or intestacy." Margaret Carroll died before the testatrix, and left a will under which her two sons Richard Quin and the said John Quin took equal shares. Thomas John Quin died before the testatrix and his wife Grace was entitled to his residuary estate. The testatrix made four codicils to her will, which codicils were held to have revoked Thomas John Quin's share as a named beneficiary but to have left unaffected the substitutionary gift in case Margaret Carroll predeceased the testatrix.

Longuet, for plaintiff; **Stout and Macalister,** for defendant.

Held, that one-half of the share which Margaret Carroll could have taken had she survived the testatrix was taken by Richard Quin, and that as to the other half the testatrix died intestate, the bounty to Thomas John Quin failing because he would take, in the last analysis, not under the will of Margaret Carroll, but, under the will of the testatrix, and those took who were entitled as upon the intestacy of the testatrix.

Re Bosanquet, Unwin v. Petre (1915) 85 L.J. Ch. 14, followed. **Clarke v. Clemmans** (1866) 36 L.J. Ch. 171, discussed and distinguished.

Order accordingly.

Solicitors: Longuet and Robertson, Invercargill, for plaintiff; **Stout, Lillicrap, and Hewat,** and **Macalister Bros.,** both of Invercargill, for defendants.

NOTE:—Refer to *Theobald on Wills,* 8th ed. 875; *Halsbury's Laws of England,* Vol. 28, 613.

SUPREME COURT
Palmerston North
In Chambers.
Nov. 2; Dec. 23.
Blair, J.

IN RE A SETTLEMENT, G. TO R. AND OTHERS.

National Expenditure Adjustment—Settlement—Trustee's Application to modify Income Provisions—Hardship—National Expenditure Adjustment Act, 1932, s. 42.

Application by the trustees of the settlement for an order under s. 42 of the Act modifying the provisions of the settlement in so far as it provides for an annuity of £520 to the settlor, the ground being that resort to capital would involve hardship to the other beneficiaries.

Section 42 authorises the making of an order modifying a deed providing for payment of an annuity if "the Court is satisfied that the terms of the deed, will, or settlement cannot be complied with, or cannot be complied with without causing undue hardship to any person taking benefit or incurring obligation under such deed, will, or settlement."

The settlor, on his remarriage at the age of seventy-seven, by deed of settlement conveyed to trustees his whole estate which prior thereto produced an income of £650 per annum. By the terms of the settlement the trustees stood possessed of the property or the proceeds on sale, to pay gift duty and other expenses incidental to the creation of the trust (which amounted to about £1,200), to invest the balance in trustee securities, to pay the settlor out of the resulting income an annuity of £520 in quarterly payments, to divide the balance of the income between six children and a grandchild, and, after the death of the settlor, to divide the capital into seven parts payable to the said children and grandchild. The clause authorising the payment to the settlor of £520 per annum from the income during life contained the following proviso: "Provided always that should the income from the capital of the estate subject to these presents be insufficient to provide the said sum of £520 per annum the settlor hereby specially charges the capital of the estate included herein with the payment from time to time of any deficiency in such annual sum and the trustees are empowered to pay him such parts of the capital from time to time as will make his annual income hereunder £520."

Immediately prior to the passing of the National Expenditure Adjustment Act, 1932, the gross income of the settled property was £562 per annum. Owing to reductions in income from mortgage investments it had become reduced to £44 10s 8d. The income was overdrawn to the extent of £44 10s. 8d., and there had not been any surplus income for payment to the children beneficiaries. The trustees stated that it would be necessary to convert certain cash securities in order to pay the annuity in full, and this conversion would be difficult owing to the depression, and would involve hardship to the other beneficiaries.

Cooper, for the trustees; **Hussey,** for the settlor.

Held, refusing application, That, as the relative hardship to the settlor would outweigh the hardship to the remaindermen, who were merely volunteers, and the settlor, by executing the settlement and paying gift duty and other incidental payments in relation thereto amounting to £1,200, lost income on that sum.

The costs of the settlor, as between solicitor and client, were ordered to come out of the capital, thereby imposing liability for the costs on the remaindermen's shares as the application was made for their benefit.

Application refused.

Solicitors: Cooper, Rapley, and Rutherfurd, Palmerston North, for the trustees; **J. M. Hussey,** Wanganui, for the settlor.

NOTE:—For the National Expenditure Adjustment Act, 1932, see *Kavanagh and Ball's New Rent and Interest Reductions and Mortgage Legislation*, p. 42.

SUPREME COURT
In Banco.
Christchurch.
Oct. 14; Nov. 2.
Reed, J.

IN RE LEVINGE (DECEASED), WYNN WILLIAMS AND OTHERS v. MORTIMER AND OTHERS.

Will—Annuities—Direction to pay out of Income—Indication of Testator's Intention to charge Corpus if Income insufficient.

Originating Summons to determine, *inter alia*, the following questions arising in the administration of the estate of Edward George Levinge (deceased):—

Whether the annuities given by cl. 14 of the will to Mrs. Elmslie, Frederick Levinge, and Emma Isabella Levinge are payable out of the income or out of the capital of the estate or both, and, in the event of such annuities being payable out of income only, whether the same are a continuing charge upon income so that arrears of annuity not paid in any year shall accumulate and be paid subsequently if appropriate funds are available?

The testator, Edward George Levinge (deceased), by his will bequeathed, *inter alia*, annuities totalling £800 a year. The balance-sheets for two years since his death showed an income of £443 and £458 respectively. Testator gave his housekeeper, Mrs. Bolton, a choice of gifts, his dwellinghouse and other provided benefits or an annuity of £250. She elected to take the latter. The trustees were authorised to appropriate a sum sufficient to meet such annuity from its investment, and, if that be done, the residuary estate is freed and discharged from the trusts for payment of the annuity, but the appropriate fund on her death falls into residue. It was admitted that by the terms of the will this annuity is charged on the whole estate, both corpus and income.

The testator then treats the remainder of his estate as being residue, and terms it his residuary estate, which he devises and bequeaths to his trustees for sale and conversion. This is followed by a series of trusts. First by cl. 12 there is the ordinary trust to pay funeral and testamentary expenses and debts "and the legacies bequeathed by this my will or any codicil hereto and the estate succession or other duties payable in respect of my estate or any part thereof." The trustees are then directed "to invest the residue" on certain specified securities. The will proceeds: "My trustees shall out of the income of the said moneys and investments pay the following annuities." The first annuity is of £50 to Mrs. Elmslie, "to be paid in priority to the remaining dispositions of this clause." "The remaining dispositions of this clause" are two annuities totalling £500. Power is given by the same clause to set aside or appropriate sums sufficient to pay these three annuities out of the income from the investment of such sums, and the will proceeds: "And I declare that from and after such appropriation the residue of my estate shall be freed from the trusts for payment of the said respective annuities but the respective appropriated funds shall *without prejudice to the said respective annuities* remain subject to the trusts hereinafter declared of and concerning my residuary estate." Then follows a clause "my trustees shall hold the residue of the said money and investments upon the trusts following." Then follows a number of pecuniary legacies totalling £3,100, followed by a bequest of "the final balance of my residuary estate" to certain named relatives in equal shares. Authority is then given to the trustees, if they see fit, to spend not more than £1,000 in buying a small section adjoining his dwellinghouse, which if done is to be subject to the same trusts as the dwellinghouse. Power is given to postpone sale and conversion; and it is provided that "the income to accrue from my decease from the parts thereof remaining unsold . . . shall be applied as if the same were income of the proceeds of such sale . . ."

Sim for the trustees; **Loughnan** for the annuitants; **Burns** for residuary legatees.

Held, on the only question decided, That if there were a deficiency in the income to pay the said annuities recourse might be had to the corpus to the full amount of such deficiency.

In re Boden [1907] 1 Ch. 132, distinguished.

Order made that, if there be a deficiency in the income to pay the annuities referred to in Question 2 of the originating summons, recourse may be had to the corpus to the full amount of such deficiency.

Solicitors: Duncan, Cotterill, and Co., Christchurch, for the trustees; **Izard and Loughnan,** Christchurch, for the annuitants; **Livingstone and Burns,** Christchurch, for the residuary legatees.

NOTE:—Refer to *Theobald on Wills*, 8th Ed., 572-3; *Underhill and Strahan's Interpretation of Wills*, 3rd Ed. 260; *Jarman on Wills*, 7th Ed., Vol. 2, 1111.

SUPREME COURT
Wellington.
Nov. 30.
MacGregor, J.

IN RE LESLIE (DECEASED), PUBLIC TRUSTEE v. LESLIE AND OTHERS.

Will—Construction—Gift to a Class—Proviso that should any of them predecease Testatrix leaving a Child or Children surviving her and attaining the Age of Twenty-one Years such Child or Children should take Share which Parent would have taken had such Parent survived Testatrix—Children of Member of Class who was dead at Date of Will—Right to look at Surrounding Circumstances.

Originating Summons to determine a question arising in the administration of the estate of Julia Leslie, who died in September, 1931, leaving a will dated January 18, 1912, probate of which has been granted to the Public Trustee, the plaintiff in these proceedings.

The Court was asked to determine whether the language of the will was wide enough to include the children of brothers and sisters of the testatrix and of her husband and dead at the date of the will.

Testatrix by her will directed that her residuary estate be divided into two equal shares, and that one of these shares be held upon trust for such of them the brothers and sisters of her late husband as were living at her decease, share and share alike, and the other share for such of them her brothers and sisters as survived her in equal shares, share and share alike. The residuary clause proceeded as follows:—

"Provided always that should any of them the brothers and sisters of my said late husband and my said brothers and sisters predecease me leaving a child or children who survive me and attain the age of twenty-one years then and in every such case such child or children shall take (and if more than one equally between them) the share his her or their parent could have taken of and in the residuary trust funds had such parent survived me."

E. S. Smith, for the Public Trustee; **Cleary,** for Julia Ann Brown Ruddiman and others in the same interest; **Young,** for Elizabeth Leslie and other defendants having a like interest.

Held, looking at the surrounding circumstances, That the children of a brother or sister dead at the date of the will were included in the class of person to take.

In re Tarbutt (deceased), Public Trustee v. Tarbutt [1932] N.Z.L.R. 316; G.L.R. 139; **In re Musther, Groves v. Musther** (1890) 43 Ch. D. 569; and **In re Walker, Walker v. Walker,** [1930] 1 Ch. 469 referred to.

The reasoning of **Gorringe v. Mahlstedt** [1907] A.C. 225, 227, and **Public Trustee v. Bolton** [1918] N.Z.L.R. 908, 910 applied as to circumstances justifying more extended meaning of "predecease."

Question answered in the affirmative.

Solicitors: Public Trust Office Solicitor, Wellington, for the Public Trustee; **Young, White, and Courtney,** *Wellington, for* one set of defendants (Julian Ann Brown Ruddiman and others); **O'Donnell and Cleary,** Wellington, for the remaining defendants.

Law Reporting in New Zealand.

I.—Early Editors and Reporters.

By the Hon. Sir Frederick Revans Chapman.

It cannot be said that there was any systematic reporting of judgments delivered in the New Zealand Courts until Mr. James Macassey, of Dunedin, made a selection of Banco and Court of Appeal cases and published them in a solid Volume of 1,169 pages. The title page declares this to contain "Reports of Cases argued and determined in the Supreme Court of New Zealand: Province of Otago: Otago and Southland District. And on Appeal to the Court of Appeal of New Zealand, containing cases decided during the period extending from the year 1861 to 1872."

The Late Mr. James Macassey.
(Father of Law Reporting in New Zealand.)

The first case reported, *Teschemaker v. McLean*, really an Otago case, had been argued before Gresson, J., on August 9, 1861, by Messrs. J. Howorth and T. S. Duncan (of Christchurch), and Messrs. Gillies (afterwards Attorney-General and later on Judge of the Supreme Court) and Cook. (A very useful practice note is appended by the Editor who reviews decisions given down to 1866 on the practice upon argument of demurrer; and we learn, too, of the prevailing practice as to hearing two counsel on each side in the argument.) The first Court of Appeal report deals with a special Case stated and removed to the Court of Appeal. The parties are the same as in the above Banco report. The hearing was before Arney, C.J., Johnston and Gresson, JJ., at Christchurch, and the argument lasted over five days at the end of February, 1863. The Chief Justice delivered the Court's judgment on the following October 26.

The last case in the *Macassey Reports* is *Bank of Otago v. Gregg*, argued by Macassey (James Smith with him) for the appellants, and G. E. Barton (McKeay with him) for the respondent before Mr. Justice Chapman.

Although their title page bears the date "1873" the *Macassey Reports* were spread in eight or nine parts over several years. The editorial work is exceptionally well done, and the Volume is now very valuable. Apart from its legal importance, it throws much light on early Goldfields law, and on the law relating to Crown Lands and Conveyancing.

Before me, as I write, is a copy of the first Part of these, our first organised Reports. On its olive-green cover, it shows that it was issued in September, 1868.

In a foreword, Mr. Macassey says:

> "The effort now made will be attended by any result but that of pecuniary profit to the Editor: and as his only aim has been to render a service to the profession, he sincerely craves the kind indulgence of those readers who may be numbered among its ranks."

Mr. James Macassey crowded much valuable work in his thirty-nine years of life. He was an extremely acute lawyer, and a most painstaking reporter. In later years, the penetrating style in argument of the late Sir Charles Skerrett often reminded me of Macassey's style in Court, though on the personal side there was the greatest difference between the two men. Though he had a most successful career at the Bar, Macassey must go down in our legal history as "the Father of Law Reporting in New Zealand."

Practically contemporaneous with the completion of the *Reports* referred to, was Mr. Justice Alexander J. Johnston's first volume of the *Court of Appeal Reports*. Mr. Justice Johnston had been appointed to the Supreme Court Bench on November 2, 1858, and chiefly took the central district of the Colony. He was acting-Chief Justice in 1867, Wellington having in 1865 become the seat of Government. The first volume was published by the Government Printer in 1872, and claims to contain "The Cases decided in 1867, 1868, 1869, 1870, and 1871."

The second volume of the *Court of Appeal Reports* (1872-73) appeared in 1875. We find that several future members of the judiciary were heard at the Bar in these years, notably the Attorney-General (James Prendergast), F. R. Chapman, and R. Stout. Another interesting feature of this volume is the appearance in New Zealand Reports of a judgment of the Judicial Committee of His Majesty's Privy Council: *McLean and Others v. Macandrew and Others* (May 9, 1874), affirming the judgment of the Court of Appeal. As a review of the volume, written on its appearance, said, "Perhaps nothing would

tend more to destroy the illusion, which pervades Europe, of painted man-eaters, as figurative of New Zealand, than to offer a few copies of this work in the cities of the Old World."

The third volume of this series appeared in 1877, containing the cases decided in the years 1875, 1876, and in part of 1877. Mr. Conolly, another future Judge, appears in a Christchurch case reported here.

Mr. Justice Johnston had, in 1873, brought out *Supreme Court Practice*, as he says in a "Notice to the Reader" that the general Rules of Practice and Procedure of the Supreme Court, made in 1856, had been for some time out of print. The Introduction, Notes, and references, and an Index were undertaken with the concurrence of the Judge's colleagues. The Introduction is full of interest: it relates the creation of the Supreme Court, and the history of the Commission directed by Sir George Grey, as Governor, to Sir William Martin, C.J., and H. S. Chapman, J., on November 10, 1849, to establish "a uniform, simple and efficacious system of procedure." Their first Report, confined to "Pleading," was made on January 5, 1852. A second Report, which was approved by Mr. Justice Stephen—who was appointed a Commissioner after the retirement of Mr. Justice Chapman from the Colony in March, 1852—was presented in October, 1852. This led to the passing of the Supreme Court Procedure Act, 1856. A compendious work by the same Judge on the duties of Justices deserves to be re-edited.

Nothing further in the way of *Banco Reports* was issued in New Zealand until October 1873, when Mr. Gerald Dyson Branson, a member of the English Bar who had settled in Dunedin, commenced to issue in monthly parts the *N.Z. Jurist Reports*. The *Jurist* contains, "Reports of Cases argued and determined in the Supreme Court of New Zealand in its respective Districts, and on appeal to the Court of Appeal." The first volume includes "the Cases decided from January, 1873, to August, 1874, together with an Appendix of Important Cases decided in previous years." It was in a quarto format, and was published by Mackay, Fenwick, and Co., Princes Street, Dunedin.

In a foreword to this volume, Mr. Branson says:

> "In concluding the first Volume of the *New Zealand Jurist*, the Editor desires to call attention to the circumstances under which it has been published. The *New Zealand Jurist* was originally commenced in October, 1873, by Mr. G. D. Branson. He carried it to the 7th part (p. 148), when illness compelled him to relinquish this and all other business. The publication was carried on by Mr. Fredk. R. Chapman, of the Inner Temple, who brought the Volume to the close of the Reports. The Index, Table of Cases Reported, &c., have been forwarded by Mr. Branson who has left the Colony. Both Editors have experienced greater difficulties than many would suppose; the greatest, perhaps, being their inability to secure all the valuable decisions given by the several Judges outside the Otago and Southland District. Better arrangements have now been made, and it is hoped that in future this difficulty will be less."

The Editor then expresses his thanks for the assistance and interest of Mr. Justice Chapman, Mr. W. FitzGerald of Auckland (associate to Arney, C.J.), and Mr. H. C. Mandy of Christchurch. He concludes by saying that as it had been found highly inconvenient to prepare monthly parts for the press, *The New Zealand Jurist* would, in future, be issued quarterly, and edited by Mr. Chapman.

(*To be Continued*).

A Matter of Dividends.

A Recent Decision Reviewed.*

By W. M. Hamilton.

The effect of the decision in the recent *Alexander Mines* case appears to be that a shareholder who held subscribing shares on which he had not paid anything would be entitled to the same dividend as a holder of fully paid shares. This seems somewhat startling. It apparently means that the paid-up shareholders (having to be consenting parties to the Articles of Association) must be taken to have agreed to let the other shareholders have income derived from the capital of the Company without contributing anything at all. Such generosity on the part of holders of paid-up shares is at least unusual; and it is safe to say that according to general experience they would never entertain knowingly any such proposition. In the present case, it is clear they had no intention of doing so, as the Company had definitely agreed with them that it would make its dividends payable only on paid-up capital. Yet the inference from the decision is that the holders of paid-up shares have either magnanimously agreed to forgo their rights under the contract, or that the Company has deliberately and intentionally broken the contract.

An examination of the grounds on which it is held that this extraordinary result has come about does not, it is suggested with deference, disclose any evidence to justify either inference. On the contrary, there are Articles from which, notwithstanding some ambiguity, an opposite inference might very well be drawn.

The decision appears to be based on the ground that the Court must consider the Articles and the Articles alone, and that, unless they clearly provide for payment of dividends on capital, dividends are payable on the subscribed amount of shares. That this is the rule when the Articles are completely silent on the subject appears to be so, although it might well be suggested that it is not in accordance with either common sense and equity. But in the present case there are provisions which surely can be construed (and, if so, ought to be) as meaning that dividends are intended to be payable on capital.

1. There is Article 3 which authorises the adoption of the agreement which expressly provides that dividends shall be made payable on the paid-up capital and not on nominal capital. Surely that Article, and the adoption of the agreement by virtue of it, is binding on the Company just the same as having an Article specifically stating that dividends should be so payable. It is an Article which authorises payment of dividends in the manner agreed. It hardly seems necessary to go any further.

2. Article 109 provides for payment of dividends to members according to their rights and interests. That provision even read by itself could be construed as meaning according to capital actually contributed, as their rights and interests on winding up would be settled on that basis. The provision however read in conjunction with Article 3 seems to admit of only one meaning.

3. Article 108 makes provision for payment of interest in cases where capital is paid in excess of calls.

*Alexander Mines, Ltd. v. Hill & McVicar [1932] N.Z.L.R. 1598.

It is hard to conceive why such a provision should be necessary if dividends are already payable on unpaid capital. The Article says that such capital while carrying interest shall not confer a right to participate in profits. Such a reasonable inference from the regulation is that only capital paid-up is intended to be entitled to participate in profits. The Article by authorising Directors to receive money in excess of calls indicates at least that it was intended that directors can only so receive money on the condition mentioned, that is, that any capital paid in excess of calls is not to be treated as paid-up capital. This restriction on the right of directors to take paid-up capital might well be construed as intending that the rights and interests referred to in Article 109 should mean rights and interests to extent of capital which directors were authorised to receive.

None of the authorities referred to in the case, it is submitted, precluded the Court from adopting the view above submitted as to the meaning of the Articles; and, with all respect, it is submitted that there is a good deal of force in the view expressed in the dissenting judgment of Mr. Justice Herdman.

His Honour Mr. Justice Smith.

Official Overseas Recognition of His Worth.

It is seldom that a Judge of our Courts can look for any outside recognition of his work: he must look for reward only in the knowledge of work faithfully done in the interests of the community, and, as the years go by, in a consciousness of that silent approval our profession gives only for work patiently and silently done through the years. For the Bar is in this sense the inevitable and infallible judge of the Judges of our Courts, and fails not in a true estimation of the value of our Judges' services. Indeed, we are apt to think that it is only in our own ranks that there is a true appraisal of a Judge's worth.

It is, therefore, the more pleasing to the Bar to learn of the appointment of Mr. Justice Smith by the United States Government to act as Commissioner under The United States – Peru Arbitration Treaty: to learn that the quality of the man thus selected has made itself known well beyond our own narrow circle. We may not discover by what means officialdom in Washington looked out on the wide world and chose this fellow-New-Zealander of ours; but we know that if the choice were destined to fall on one amongst us, it could not have fallen more unerringly.

Life Tenant and Remainderman.

Apportionment where Securities Deficient.

The attention of practitioners is drawn to a very useful article in the February issue of *The Accountants Journal*, the official organ of the New Zealand Society of Accountants. It gives a set of accounts showing the method of treatment in the case where land subject to a mortgage of settled funds is sold through the Registrar, subsequently let by the trustees pending ultimate sale, and, finally, sold at a figure that produces less than principal and interest.

Some Delicate Questions.

By Wilfred Blacket, K.C.

Some months ago I greatly commended the Judges of the Supreme Court of New South Wales for their knowledge of modern habits and customs, in as much as four of them had unanimously decided that evidence that a man had on several occasions kissed a girl was not proof that he was engaged to her. It might not even be evidence that he liked her, but that point was not raised. Now, however, I have in consideration the Court's requirements as to corroborative evidence in connection with maternity cases, and venture the suggestion that some decisions therein are worthy of further consideration.

As I am not now in practice I am able to write with much freedom on these matters. My present submission is that the Courts by successive refinements of reasoning as to "corroborative evidence" have made it necessary for a complainant in affiliation cases to produce stronger evidence in corroboration than that which would be sufficient to support the charge. Let me illustrate.

In *Ex parte Brown re Morris* the facts put forward as corroborative as stated by Street, C.J., were "that the parties were known to have been on affectionate terms for a long time, that they were known to have been together for lengthy periods, and that at a picnic on the day in question they went away for a considerable time, and were afterwards found in the back of a motor-car between 11.30 p.m. and midnight." His Honour went on to say it was contended "that these circumstances showed not only opportunity, but were such as to give rise to the inference that the opportunity was taken advantage of"; but the Court, holding unanimously that "the evidence only showed that there was opportunity" refused to regard it as corroborative of the complainant's evidence. Now, with all respect to their Honours' judgment, it does seem that they overlooked the most important fact in the case—the birth of the child. This fact shows that on "the day in question" the mother and some other person "took advantage of the opportunity" afforded by their seclusion. The only question is as to the identity of the "other person"; the complainant says it was the defendant; is not the other evidence corroborative of her statement? It is not suggested that the lady was a flirt, nor that she had any affection for anyone else at the picnic: quite clearly her whole time and attention were given to the defendant.

Assume that the matter had been in divorce, and that there had been evidence of non-access by the husband; would not proof of the birth of the babe, the affection the respondent and co-respondent had for one another, their lengthy periods of seclusion, the evidence of their conduct and seclusion on "the day in question," and their being found at midnight in a parked car, be ample evidence to justify a finding of adultery against the co-respondent on that date? I confess that to me these facts seem to make a complete case, yet in *Ex parte Brown* this body of evidence was held to be not even corroborative of the complainant's evidence.

In another respect, too, the law as to corroboration in affiliation cases seems, so to speak, to have skidded

and run up against a lamp-post, for the section does not say that the corroboration must be of the act directly involving the defendant's liability. It is not required that the evidence should prove that the defendant "availed himself of the opportunity." All that is needed is that there should be corroboration of the girl's evidence "in some material particular as to the paternity of the child." In this case one material particular was that the parties were on affectionate terms and habitually sought seclusion; another was that on "the day in question" the end of their perfect day was their being discovered in the back of a parked motor-car at midnight. The evidence was amply corroborative of these "material particulars" and each of them related to the paternity of the infant. In the Middle Ages in order to prove adultery against a cardinal it was necessary to have the testimony of ninety eye-witnesses—a body of evidence that was rarely obtainable; in Soviet Russia evidence that two people were alone in a room for however short a time is held to be proof of an act of immorality, and this indeed may not be an unreasonable presumption of law in Soviet Russia. The true rule is, of course, between these two extremes, and our Courts have made it quite clear that they will avoid the errors of Russian law.

The learned Chief Justice further commended the Court's decision by referring to the social freedom of our time. "If a generation or so ago," he said, "a young man and a young woman were found together in that way, inferences of the most discreditable character might have been drawn against them. To-day people could not shut their eyes to the fact that the situation was altered. A degree of freedom was allowed to young men and women in relation to one another which would not have been tolerated or even thought possible in the days when chaperons were regarded as necessary in women's society." This, of course, is obviously true, and it would only be a person of lewd imagination who would draw any unkind inference from the fact that two young persons were in the habit of indulging in prolonged hiking or motoring trips; but, when such persons are on obviously loving terms and seek lengthened periods of complete privacy and seclusion, there is surely some justification for such inference, for human nature in spite of altered conventions, is quite probably similar now to what it was in the Victorian Era. Also in comparing early Victorian conventions with those of to-day it is necessary to remember that in those days chastity was esteemed to be a priceless virtue, and also that lovely woman who "stooped to folly" in natural course gravitated to the streets, whereas at the present day "the streets" are not the penalty nor even an alternative, and Freudian psychology—taught in our universities and set forth in many cheap publications—teaches us that virtue is an evil habit of "self-repression" indulged in only by the feeble-minded, and that habitual immorality described as "ample self-expression" is the only proper rule of conduct for intelligent persons. Therefore it is that young ladies who in the jargon of their set assert that they are "not fussy" are not shunned or condemned by their acquaintances, for the modern view seems to be that a girl's habits of life are of interest to herself alone, and this perhaps is quite as it should be.

In illustration of the premises I may mention that once years ago when visiting another State a fond parent who was merely a casual acquaintance told me that at 7 a.m. on that morning his two daughters had returned from a "gypsy tea" spent with two boy friends, the function having commenced at 5 p.m. on the previous day. In answer to his suggestion that they were rather late in their home-coming the elder daughter had said: "Oh Dad you are quite too early Victorian," and the younger said: "Early Victorian! Why you are absolutely prehistoric." He asked for my decision on the case stated and I unable to decide off-hand whether the words cited amounted to the general issue in a case of tort, or to a confession and avoidance, or whether they were an informal plea of universal custom, could only make the feeble reply that "of course the girls had to come home some time."

Workers' Compensation.

A Recent House of Lords' Distinction.

The House of Lords has again had to decide a borderline case on workers' compensation, and confirmed the decision of the County Court Judge in favour of the worker, which had been upheld by the Court of Appeal: *Northumbrian Shipping Co. v. McCallum* (1932) 74 L.J. 144. The respondent was engaged as a bo'sun on the appellants' ship, but accepted further employment from them as a night watchman. Whilst going, through private property in the docks, to take up his nocturnal duties, he fell, in an unexplained way, into the water, and was drowned. The appellant employers seem to have relied on the cases which decide that the sphere of a seaman's employment is restricted to his ship and to the appliances, such as gangways, which are immediately annexed to it.

The Court of Appeal had found that the dead man was, at the time of the accident, not a seaman but an "ordinary workman" engaged to perform special duty as a night watchman on the ship, and had thus brought the case within *John Stewart and Son (1912), Ltd. v. Longhurst* [1917] 86 L.J., K.B. 729; [1917] W.C. & I. Rep. 305; [1917] (A.C. 249). Lord Macmillan, in delivering their Lordships' judgment, dismissing the employers' appeal, said that they could not regard the Court of Appeal's finding to be based on a satisfactory ground for judgment. McCallum by undertaking the special duty of night watchman on the ship did not divest himself of the character of a seaman, and the case must be determined on the footing that he was a seaman returning to his duty on the ship after leave. In all cases of a seaman returning from shore leave to his ship in a public harbour, it would be found that the principle of the Courts had been to try and find the dividing line separating risks incidental to the seaman's employment from those which he shared with all the public. Though the decision in *Charles R. Davidson and Co. v. Mc. Robb (or Officer)* [1918] (87 L.J., P.C. 58; [1918] (W.C. & I. Rep. 136); [1919] (A.C. 304) was in favour of the workman and in *John Stewart and Son (1912), Ltd. v. Longhurst (supra)* against him the principle was the same in each case, and it was the facts that differed. This man had left the public highway with its risks common to all wayfarers and had entered the private premises of the harbour in which the ship lay with its special risks to which only those who had business at the harbour were exposed, and seemed to their Lordships to have come within the protection of the Act.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

The Memorandum of Incumbrance.

The statutory form of memorandum of incumbrance provided by Form F in the Second Schedule to the Land Transfer Act, 1915, is no doubt intended to be the Land Transfer counterpart of the deed creating *inter vivos* an annuity charged upon land or a rent-charge. The form in question is not in everyday use, but is a convenient form of security for periodical payments for the purposes of maintenance pursuant to a family arrangement or yet again on divorce or separation between husband and wife. In practice one occasionally uses this instrument to advantage in such cases.

It will be recollected that under the old conveyancing system an annuity (whether charged upon land or not) and a rent-charge are not one and the same thing; the former is primarily payable by the grantor personally and the land (if any estate is charged with payment) is a security to which resort may be had on default in payment; the latter, on the contrary, is primarily payable out of the rents and profits of the land, and may be recovered by distress. Either may be granted to another person for life, for a term of years, or even in fee-simple. Curiously enough, even an annuity granted with words of inheritance at one time descended to the heir to the exclusion of the next-of-kin (see, *e.g.*, *Turner v. Turner* (1783) Amb. 776, 782; 28 E.R. 1155); and a purported grant of a rent-charge, void as a rent for want of form, may none the less be good as a grant of an annuity. In either case, the grant may or may not be made redeemable.

The Land Transfer Act, however, in providing the memorandum of incumbrance as an instrument to secure payment of a sum of money, annuity, or rent-charge, has virtually made it a species of mortgage. (See s. 101 (1); s. 2, definition of "Mortgage," particularly para. (*d*); see also *Hogg's Australian Torrens System*, p. 969, and *Walker v. Walker* [1932] N.Z.L.R. 1440, at pp. 1447-8, *per* Myers, C.J.). *Prima facie*, then, the instrument is a mortgage, with all the usual incidents of a mortgage under the Land Transfer Act; the grantee has a power of distress on the tenant under s. 106; the grant is subject to the implied right to redeem unless that be inconsistent with its provisions; and the grantor impliedly covenants to pay the principal sum with interest thereon, to insure, to repair, and to do the other things provided for on his part in the Fourth Schedule to the Land Transfer Act. Moreover, one would infer that the provisions of s. 110 of the Property Law Act, 1908, would probably supplement those of the Land Transfer Act in defining the rights and remedies of the parties under the instrument. With the engrafting of the Property Law Act principles on the Land Transfer System we are already familiar from *Daveney v. Carey*, (1913) 33 N.Z.L.R. 598, and parallel cases. The provisions of s. 110, just cited, seem to be rules of substantive law and not inconsistent with the rules of the Land Transfer System itself.

Perhaps the use of the instrument in New Zealand is pretty well confined to the grant of a charge securing periodical payments during the life of the grantee in the family arrangement or matrimonial cause above referred to. Certainly it is not in as common use in New Zealand as the law books would have us believe the deed granting a rent-charge is or has been in England. There is to be considered, too, the possibility of a desire in the future by the grantor to sell his land, a desire which in this country would almost certainly be frustrated by the continuance of the security. A practical method has therefore to be found to provide in that event other security in substitution for that of the original grant. In *Walker v. Walker*, [1932] N.Z.L.R. 1440 (see pp. 1449-50 of the Report), the memorandum of incumbrance provided, astonishingly enough, that in the case of sale the grantee should release the security on condition that the grantors should set aside and invest such sum of money as should in their opinion (and not the grantee's) be sufficient to provide the annuity in future. One would have thought that the grantee should have had the right to name such sum subject always to some test of the reasonableness of the amount. Again there is need for some direction whether such amount is to be sufficient to produce, when invested, the funds to meet the recurring payments by means of interest or dividends only, and the capital so preserved for the grantor, or whether the capital moneys are to be resorted to to make up, with the interest or dividends, the payments to the grantee during life.

Some precedent writers give a form of a right to redeem on payment of a named sum. Yet another method (appropriate to the case of a life annuity) would be to provide for fixing the sum (in default of agreement) upon an actuarial basis according to the age of the life annuitant or grantee. The sum so fixed might be directed to be spent in the purchase of an annuity for the grantee or otherwise to be invested for his benefit. Again, there is always the possibility of the grantor's providing other suitable land or property as a security, a method which gets over the difficulty of putting the investment of capital moneys in the name of the annuitant or the grantors, or alternately seeking out trustees in whose name the investment may be made. Finally a last resort is to be found in s. 111 of the Property Law Act, 1908, under which the Court may assess and control such amount as, when invested in Government securities, the Court considers will be sufficient by means of the dividends to provide for the charge, with an additional amount for costs and expenses.

"System" in Paying Accounts.

A Montreal firm, of which one of our members is the auditor, pressed for the payment of an overdue account and received from the customer the following reply:—

"We acknowledge receipt of your letter of yesterday's date and are surprised at its tenor. If you do not yet know of our method of dealing with accounts we will give you an illustration for your information.

"At the end of each month, when we see what balance we have at the bank, we reserve a certain amount of it for our creditors. We write the name of each creditor on a slip of paper, place it in a hat, and draw lots up to the stipulated amount. The winning accounts are then paid.

"We would like to point out that if we have any more of your impertinence you will not even be put in the hat!"

—*Canadian Chartered Accountant.*

London Letter.

Temple, London,
10th January, 1933.

My Dear N.Z.,

In the Courts: Some more (if only a little more) progress is being made with the heavy arrears of the K.B.D., and the Chancery Division Judges who have been enlisted in the good cause have borne themselves with most creditable propriety. Particularly remarked upon has been the handling, by Luxmore J. (more than once briefed in your matters, before the Privy Council, in his days as advocate) of a very Common Law matter, wherein a member of the Bar was litigant. There is always the fear, in such circumstances, that judgment may go against the man who seems to have a personal advantage, in order that there may be no possible controversy between the Judge and his own conscience as to impartiality. It is not easy to conceive a more formidable complication of this difficulty, than that the Judge, trying the case, should be upon unfamiliar ground. In this instance the learned Judge discharged his function with such profound skill as gave universal satisfaction to the disinterested and critical lookers-on. There is no doubt that for all the dryness of its habitual business the Chancery Division does produce the most broadminded and un-dry Judges; though it may be said, with all submission and some temerity, that a larger proportion of Common-Law Lords is a thing to be desired in the highest Court of Appeal. It can hardly be right that an appeal in a running-down case for instance, coming from some other part of the Empire than yours, should have been decided by the Chancery mind?

Working Over-time. There has been much fun over the hearing of an Appeal in the Vacation, the leisure of the Lords Justices being supposed to be immune in this respect. But the Judicature Act of 1925 seems to have made an end of the immunity; and the appeal was duly heard, in the country resort of Lord Justice Romer, the full light of publicity for the instant penetrating even into the privacy of his seaside house. Raynor Goddard, J., has been sitting for the first half of the Long Vacation in the more normal Long Vacation business; he is not unknown to New Zealand, as he appeared, more than once, for your Government in the Privy Council, during his recent and fully occupied days at the Bar.

Promotions: The going-up of Judge Holman Gregory, K.C., and Mr. Cecil Whiteley, K.C., is matter of no national moment. Both are, at least, highly competent and thoroughly agreeable. I have watched the careers of both of them now for over a quarter of a century, and I am one of the blest in that regard being one who expected nothing (much) and so was not disappointed. I am not sure, however, that the Bar is not made up of, or is not made popular by, its mediocrities; and I know lawyers and laymen who persistently prefer their company, avoiding the brilliants as inclined to be tedious, to say the least. No one could possibly cast the least aspersion on either of these two, in that aspect.

Recent Losses: The death of another London Magistrate, Sir William Clarke Hall, has just occurred and has caused a blank which, in certain ways, it will not be easy to fill. His profound interest in the children has been witnessed by his literary as well as his legal discourse; and it is of course not possible for a man to be fanatic upon such a subject and not be admirable. He had his faults, but they were, I understand, all of the more attractive, human kind: the tendency to be more discursive, than a judge should be, being one of them. Sir Charles Biron, the Senior Metropolitan Magistrate, told me that when, as a young man, he went on to this unique bench, he was accustomed to write upon his blotting paper, immediately upon taking his seat "Don't Talk."

Other Judges, please copy.

There has also died, during the rather long period I have now to review, Sir Benjamin Cherry, one of the participants in what was regarded as a positive misdemeanour or at least a Common Law (or should I say, Equity?) Nuisance at the time, the new Laws of Property. You, N.Z., came through that event with me, I think; we were writing to each other at the time, or I was even then engaged upon these heart-rending appeals to your friendship which receive from you, heartless, no answering letter, ever, (as to which, by the way, I have for still more years been writing a "London Letter" to Singapore, in a less staid journal than your LAW JOURNAL; and I was nearly knocked down when an answer, in the same paper, did astonishingly appear. I wish you would write us a New Zealand letter). To return to Sir Benjamin Cherry and his Life Work—for we on the King's Bench side always suppose it was mainly Sir Benjamin's, however, firmly in the bows was the figurehead of our Lord Birkenhead. Nothing of a like kind can presumably happen to you; you have not the antique to adorn or the disease, of senility, to eradicate. We over in the Temple still wonder whether there ever was really such a problem to solve or whether Sir Benjamin's series of statutes provided, necessarily, the right solution of it; and it may be that, as outsiders, we saw more of the game than they did in Lincoln's Inn. As to the opinion of solicitors, in London or (since they do their own conveyancing work more habitually) in the country, we always took the view, we Common Law Advocates, that our poor, abject English solicitors are trained to stand anything, judging by the perfectly impossible examinations they suffer in their early youth and, we say, are cowed thereby. Next, whether Sir Benjamin was a considerable or an inconsiderable draftsman is a moot point; I know expert circles, best competent to judge, in which diametrically opposing views are held. Of course, the drafting was by no means solely his; and there were others besides, even the recognised Sir Arthur Underhill, who, by the way, is the kindest hearted man at the Bar, and a perfect dear. Parliamentary drafting, as I have had cause often to remark, differs very importantly from equity drafting; and the respective draftsmen have a lot to say about each other and it is rarely flattering. So perhaps it is a question which cannot be answered and is best not asked: were the new Laws of Property good and proper drafting or not? A question which answers itself is, will Sir Benjamin be missed by those who knew him? He will indeed, irreparably.

Yours ever,

INNER TEMPLAR.

Practice Precedents.

Leave to Proceed without Personal Service of a Writ of Summons where Defendant has Disappeared.

Rule 53 of the Code of Civil Procedure (*Stout and Sim*, 7th Ed., 75) provides that on proof that any Defendant is absent from New Zealand at the time of issuing the Writ, and that he is likely to continue absent, and that he has no Attorney or Agent in New Zealand known to Plaintiff who will accept service, the Court may give leave to Plaintiff to issue a Writ and proceed thereon without service *subject* to certain stipulations.

It sometimes happens that the Writ is issued before the absence of defendant is known, in which case an Order is made that the Writ be amended so as to meet the requirements as to times for filing defence and hearing: see *Pollock v. Alexander*, (1913) 32 N.Z.L.R. 780; 15 G.L.R. 464.

If the application is made prior to the issue of the Writ, the proceedings are intituled "In the matter of the Judicature Act, 1908, and In the matter of an intended Action, etc."

The Court has a discretion which it is bound to exercise judicially and on proper grounds. In the exercise of that discretion it will not go into the merits, but it must be satisfied that Plaintiff has a probable cause of action. *Société Générale De Paris v. Dreyfus Brothers* (1887) 37 Ch. Div. 215.

Rule 53 is to be *read in conjunction with* Rule 48.

The order is made conditional on Plaintiff giving security to the Registrar of the Court that all such sums as Defendant may recover in the Action in case the Judgment given in the Action is afterwards set aside, together with the costs sustained by Defendant.

The Registrar requires two approved sureties to the Bond.

MOTION TO PROCEED WITHOUT PERSONAL SERVICE OF WRIT OF SUMMONS.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.
.....Registry.

BETWEEN A.B., &c., *Plaintiff*
AND C.D. of , Grocer, *Defendant*.

Mr. of Counsel for the above-named Plaintiff TO MOVE in Chambers before the Right Hon. , Chief Justice of New Zealand at the Supreme Courthouse , on day the day of , 19 , at ten o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER:—

1. Giving the above-named Plaintiff leave to proceed against the above-named Defendant without personal service of the Writ of Summons and Statement of Claim issued out of this Honourable Court.

2. Fixing the times and places for filing the Statement of Defence and for the trial of the action and for an order to amend the said Writ accordingly.

3. Giving directions for publication of the Writ of Summons and Statement of Claim to be published in a newspaper circulating within the Dominion of New Zealand.

4. That the costs of and incidental to this Action be costs in the cause UPON THE GROUNDS that the above-named Defendant left the Dominion of New Zealand without the knowledge or consent of his creditors with intent to defeat his said creditors AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed in support hereof.

Dated at this day of , 19 .

Certified pursuant to the Rules of Court to be correct.
Council moving.

Reference: His Honour is respectfully referred to Rules 48 and 53 of the Code of Civil Procedure.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I, , of the City of , Manufacturer, make oath and say as follows:—

1. That I am the Plaintiff in this Action.

2. That on the day of , 19 , a Writ of Summons and Statement of Claim were issued out of this Court against the above-named Defendant by myself as Plaintiff claiming the sum of £ as therein in the said Statement of Claim set forth.

3. That subsequently to the issue of the said Writ I called on numerous occasions at the residence of the defendant and at his place of business but could not get any information as to defendant's whereabouts or as to when he would return.

4. That on the day of , 19 , I called at the offices of the Steamship Company Limited at No , Street, within the City of and I found that Defendant had booked the passages of himself and his family by the S.S. [*ship*] which sailed for overseas on the day of , 19 .

5. That on the day of , 19 , an Order for the appointment of an Interim Receiver and Manager of the said business of Defendant was made by the Hon. Mr. Justice , at .

6. That to the best of my knowledge and belief Defendant has no relatives in New Zealand.

7. That I have been unable to obtain any information or knowledge that defendant appointed an Attorney or Agent in New Zealand who will accept service of the proceedings issued herein.

8. That I verily believe Defendant left New Zealand with intent to avoid his liabilities and defeat his creditors.

9. That personal service of the said Writ of Summons and Statement of Claim herein cannot be effected on Defendant.

10. That I desire to obtain judgment herein so that the estate may be administered by the Official Assignee in Bankruptcy on behalf of any creditors of Defendant that may exist.

SWORN, etc.

ORDER GIVING LEAVE TO PROCEED WITHOUT PERSONAL SERVICE.

(*Same heading.*)

day, the day of , 19 .

UPON READING THE MOTION filed herein and the Affidavit filed in support thereof and the Writ of Summons and Statement of Claim filed herein AND UPON HEARING Mr. of Counsel for the above-named Plaintiff I DO ORDER that the said Plaintiff be and he is hereby granted leave to proceed without personal service on the Defendant of the Writ of Summons and Statement of Claim herein upon his entering into a Bond for an amount and subject to conditions to be fixed by the Registrar of this Court at pursuant to Rule 53 AND I DO FURTHER ORDER that the Writ of Summons and Statement of Claim herein be published three times in the newspaper published at and that the Defendant do file his Statement of Defence at within days after the last publication of the said advertisements and that the Writ of Summons be amended accordingly AN I DO FURTHER ORDER that the Action be tried at at the sittings of this Court which commence on the day of , 19 , AND that the costs of this application be fixed at together with disbursements and be costs in the cause.

Judge.

AFFIDAVIT OF JUSTIFICATION.

(*Same heading*).

We, E.F., of Bank Manager, and G.H., of Civil Engineer, severally make oath and say as follows:—

1. That we are the proposed sureties in the penal sum of £ on behalf of A.B. the Plaintiff in the above-named Action No. .

2. That the said Plaintiff has by an Order of this Honourable Court been granted leave to proceed in the said Action without personal service on the above-named Defendant on his giving to the Registrar of this Honourable Court at security by Bond in the sum of £ to ensure payment by the

said Plaintiff of all such sums and costs as the Defendant may recover in case the judgment in the said Action is afterwards set aside.

3. That after payment of all our just debts we are well and truly severally worth in real and personal property the sum of £ .

SEVERALLY SWORN, *etc.*

Signature.

BOND.

(*Same heading*).

KNOW ALL MEN BY THESE PRESENTS that A.B. the Plaintiff in the above intituled action No. and E.F., of , Bank Manager, and G.H., of , Civil Engineer, are held and firmly bound unto Registrar of the Supreme Court for the said District at in the sum of £ for which payment well and truly to be made to the said [*name of Registrar*] or to such Registrar for the time being WE DO and EACH OF US DOTH BIND OURSELVES and the executors and administrators of us jointly and severally by these presents.

WHEREAS by an Order of this Court IT WAS ORDERED that the above-named Plaintiff may proceed in the above-named action without personal service of the Writ of Summons herein on his giving to the Registrar of this Court at security by Bond for an amount fixed by him pursuant to Rule 53 AND WHEREAS the Registrar has fixed the amount at £ NOW THEREFORE the Conditions of the above-written Bond is that if the above-named Plaintiff the said and the said E.F. and G.H. herein pay to the said Registrar all such sums as the Defendant may recover in this Action in case the judgment in this action is afterwards set aside with the costs sustained by the Defendant then this Bond shall be void and of no effect but otherwise shall remain in full force and effect.

Dated at this day of , 19 .

SIGNED by the said A.B. in the presence of—

Name: .....
Address: ..... } (*Signature*).
Occupation: .....

SIGNED by the said E.F., etc. (*Signature*).

SIGNED by the said G.H., etc. (*Signature*).

Rules and Regulations.

Cinematograph Films Act, 1928. Amendment of Cinematograph Films (Censorship and Registration) Regulations.—*Gazette No.* 3, January 19, 1933.

Convention between the United Kingdom and Poland respecting Legal Proceedings in Civil and Commercial Matters: Extension to New Zealand.—*Gazette* No. 4, January 26, 1933.

Convention between the United Kingdom and Portugal respecting Legal Proceedings in Civil and Commercial Matters.—*Gazette* No. 4, January 26, 1933.

Land Act, 1924.—Amended Regulations *re* Licenses to Occupy on Deferred Payments.—*Gazette* No. 9, February 9, 1933.

Convention between the United Kingdom and Italy respecting legal proceedings in Civil and Commercial Matters: Extension to New Zealand.—*Gazette* No. 9, February 9, 1933.

Honey-export Control Act, 1924.—Notification by New Zealand Honey Control Board *re* Assumption of Control of Honey intended for Export from New Zealand to the United Kingdom, the Irish Free State, and the Continent of Europe.—*Gazette* No. 9, February 9, 1933.

Copyright Act, 1913.—Extension to the Federated Malay States.—*Gazette* No. 11, February 16, 1933.

Hawke's Bay Earthquake Act, 1931.—Regulations relative to **Preparation of District Electors' List for Borough of Napier.**—*Gazette* No. 11, February 16, 1933.

Transport Department Act, 1929.—Warrant in Terms of the Motor-vehicle (Supplementary) Regulations, 1928, approving of the "Wratten's Safety Signal" Motor-direction Indicator for use on Motor-vehicles.—*Gazette* No. 12, February 23, 1933.

Act Passed.

Mortgagors' and Tenants' Relief Amendment. Amendment of the Mortgagors' and Tenants' Relief Act, 1931 (the principal Act). S. 2—Amending s. 2 of the principal Act: Conferring on mortgagor a right to apply for relief where mortgagee has failed for three months after authority given by the Court to exercise any power or do any act referred to in s. 4 of the principal Act. S. 3—Mortgagor debarred from contracting out of benefits provided by the principal Act: retrospective. S. 4—Amending s. 6 of the principal Act: Lessor not entitled to obtain or execute judgment for rent while application for relief of lessee pending.

New Books and Publications.

Evidence in Criminal Cases. Second Edition, 1932. By W. Shaw. (Butterworth & Co. (Pub.) Ltd.). Price 13/6d.

Rayden and Mortimer's Practice and Law in the Divorce Division. Third Edition. By Clifford Mortimer and Hamish H. H. Coates, assisted by F. S. H. Bryant. (Butterworth & Co. (Pub.) Ltd.). Price 49/-.

The Lawyer's Remembrancer and Pocket Book, 1933 Edition, Revised and Edited by J. W. Whitlock, M.A., LL.B. (Butterworth & Co. (Pub.) Ltd.). Price 6/6d.

Rating Valuations of Public Utility Undertakings. By E. Witton Booth, M.B.E., A.M.Inst.C.E., F.S.I., Barrister-at-Law. (Butterworth & Co. (Pub.) Ltd.). Price 25/-.

The Law of Wills and Administration in New Zealand. By Professor J. M. E. Garrow, 1932. (Butterworth & Co. (Pub.) Ltd.) Price 72/6d.

Sweet and Maxwell's Law Finder. Second Edition. A Guide to Current Law Books, Leading Cases and Statutes. (Sweet & Maxwell Ltd.). Price 3/-.

Limitation of Actions in Equity. By John Brainyate, M.A. (Stevens & Sons Ltd.). Price 16/-.

Local Government. By John P. R. Maud. (Home University Library Series). (Thornton Butterworth). Price 3/-.

The Law and Practice Relating to Incorporated Building Societies. By C. P. Best, B.A., LL.B. (Isaac Pitman & Sons Ltd.). Price 16/-.

The Law of Inland Transport. By W. H. Gunn, LL.B. (Isaac Pitman & Sons Ltd.). Price 11/-.

Yearly Supreme Court Practice. Thirty-fifth Edition, 1933, 2 Vols. (Butterworth & Co. (Pub.) Ltd.) Price 47/-.

Contested Documents and Forgeries. By F. Brewster. (Book Co. Ltd., Calcutta).

Chitty's Annual Statutes, 1932, Vol. 28, Part I. By Hon. D. Meston. (Stevens & Sons Ltd.) and (Sweet & Maxwell Ltd.). Price 31/-.

Recollections of a Prison Governor. By Lt.-Col. C. E. F. Rich, D.S.O. (Hurst & Blackett). Price 22/-.

Supreme Court Forms.

The work on Supreme Court Forms, commenced some years ago by Mr. J. C. Stephens of Dunedin, has now been completed and will be published in a few weeks' time. Orders at the publication price of 45/- are being taken; after publication the price will be 50/-.