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"The founders of New Zealand recall the methods of the Greeks in establishing their colonies around the Mediterranean: They carried with them their poets, their philosophers, their legislators, their Judges, their settlers, their soldiers, and their seamen; and here you have the result."

—THE RT. HON. JAMES BRYCE, P.C., *to the late Mr. Justice F. R. Chapman, at Wellington, 1912.*

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The Supreme Court and the Court of Appeal: Their First Beginnings.

I.

THE recent sitting of the Court of Appeal in Auckland for the first time in its seventy-five years of history reminds us that the Supreme Court will reach its centenary in December, 1841. While Wellington has been the home of the Court of Appeal, with two occasional sittings in Christchurch, one in Dunedin, and, now, one in Auckland, it was in the last-named city that the Supreme Court had its birth.

We do not propose to trace the origin in New Zealand of the sovereignty from which the Judiciary derived its authority; but, on this topic, we refer our readers to Dr. N. A. Foden's recently published *Constitutional Development of New Zealand in the First Decade.* It will suffice here to say that in the supplementary Instructions of August 15, 1839, of Captain Hobson who was then proceeding to New Zealand as Her Majesty's Consul and as eventual Lieutenant-Governor, the following paragraph appeared:

> "All the powers necessary for the proper conduct of your office will be conferred on you by Acts of the Governor or Legislature of New South Wales, who will also make the necessary provision for the establishment of Courts of Justice and a Judicial system in New Zealand."

From the date of the signing of the Treaty of Waitangi, February 6, 1840, so far as the North Island was concerned, and from May 21 following, in regard to the whole of New Zealand, these Islands became an integral part of Her Majesty's dominions, and, in particular, of her Colony of New South Wales. On June 16 of the same year by a New South Wales enactment (No. 28 of 1840) the statute-law of that colony was extended to "Her Majesty's Dominions in the Islands of New Zealand." This gave the Supreme Court of New South Wales authority over the administration of justice in New Zealand "any law, usage, or custom to the contrary in any wise notwithstanding"; but, as regards criminal law, it already had that authority: 9 Geo. IV, c. 83, s. 4. Until May 3, 1841, the new colony so remained, and every question and proceeding, judicial or commercial, was referable to the Governor-in-Chief, his Council, and Courts in Sydney, for approval or rejection; and, in particular, several accused persons were sent to Sydney for trial, and, on conviction, some were sent to the penal settlements in Van Diemen's Land: *e.g.*, the trials mentioned in McNab's *Old Whaling Days.*

The New South Wales statute was soon superseded by local legislation, following the Royal Charter under the Great Seal of the United Kingdom, dated November 16, 1840, which constituted New Zealand a separate colony; the Letters Patent, of November 24, appointing Captain Hobson the Governor of New Zealand, and the Royal Instructions dated December 5. At Auckland, on May 3, 1841, the new Governor proclaimed that he had assumed the administration of the Government of Her Majesty's Colony of New Zealand, as the new separate territory was termed. The Charter constituted a Legislative Council, which was commanded to make and ordain all such laws and Ordinances as might be required for the peace, order, and good government of the colony; and it authorized the establishment of Courts of Justice and the issue of Commissions of the Peace.

At the first meeting of the Legislative Council, at Auckland, on May 24, 1841, the Governor, in his inaugural speech, said that the Charter brought into complete operation British laws throughout the whole Colony of New Zealand; and, further, that the Instructions under the Royal signet and sign manual more particularly prescribed the means whereby justice was to be administered. He proceeded:

> "I shall lay before you an Ordinance for the present re-adoption of all such Acts of New South Wales as were in force previous to our separation, and are now applicable to this Colony. It is not my intention, however, to propose for your adoption the laws of New South Wales; but it will be my endeavour, during the recess, aided by the advice and assistance of the law officers of the Crown, to prepare for your consideration such laws as will best provide for the administration of justice and the contingencies of social life in New Zealand; therefore the measures now proposed to you must be deemed temporary and contingent, as resulting from the present peculiar condition of the Colony."

On the Proclamation Day the Governor had announced the personnel of the Executive Council and the Legislative Council. The Governor, the Colonial Secretary, the Attorney-General, and the Colonial Treasurer comprised the former, and, with the addition of three Senior Justices of the Peace, they completed the membership of the latter. The Attorney-General, Francis Fisher, was sworn in on the same day. As Dr. Foden points out in his interesting article on p. 238, *post.*, Fisher's was a temporary appointment, suited to the immediate purpose of establishing the legislative and administrative bodies of the new Colony; and William Swainson, who succeeded Fisher in office in the following October, had actually been appointed Attorney-General before Fisher functioned, but he had not then arrived in New Zealand. He accompanied from England the first Chief Justice and the first Registrar of the Supreme Court. On the voyage, they devoted themselves to preparing "an outline of a legal system adopted to the conditions of an infant colony."

The first ordinance of the first session of the Legislative Council declared the laws of New South Wales, so far as they could apply to the condition of Her Majesty's subjects, to be in force in New Zealand, with an indemnity for all acts done since November 16, 1840. The Fourth Ordinance, passed on June 24, 1841, made provision for the summoning of juries and the trial of

civil and criminal cases. And the Fifth Ordinance, passed on July 5, in creating Courts of Requests, established our first Magistrates' Courts.

On December 22, 1841, in the second session, there was passed an Ordinance (No. 1) for establishing a Supreme Court to supersede in this country the authority of the Supreme Court of New South Wales. Wales. It declared :

> " 1. There shall be within the Colony of New Zealand a Court of Record for the administration of justice throughout the colony, which Court shall be called the Supreme Court of New Zealand.
>
> " 2. The Court shall have jurisdiction in all cases as fully as Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer at Westminster have in England, and shall be a Court of Oyer and Terminer and Gaol Delivery, and Assize and Nisi Prius."

Other clauses gave the Court jurisdiction in Equity, Probate, and Lunacy, and the sixth clause declared that the Court should not take cognizance of any criminal case when the offence had been committed prior to January 14, 1840, the date of the Proclamations concerning New Zealand made by the authority of the Governor-in-Chief, Governor Gipps of New South Wales. These clauses have been repeated in the enactments conferring jurisdiction on the Supreme Court ever since, and form part of the Judicature Act, 1908, the present statute.

The Ordinance provided that the Court was to be holden before one Judge, called the Chief Justice, and such other Judges as Her Majesty or the Governor should be pleased to appoint.

Provision was made for the enrolment of barristers or advocates admitted as such in Great Britain or Ireland, and solicitors from those countries as well as Scottish Writers to the Signet ; admission after service of articles in New Zealand was provided for ; and barristers might act as solicitors and solicitors as barristers for five years from the passing of the Ordinance, unless other provision be made. In addition, the Judges were empowered to make rules.

When the Supreme Court was thus established the white population of New Zealand was estimated to be 9,600, with a Native population perhaps six times as great : *Terry's New Zealand* (1842), p. 68.

The new Supreme Court Ordinance was one of those drafted by William Swainson, shortly after his arrival to assume office as Attorney-General. Of these Ordinances, Swainson wrote in 1859 in his *New Zealand and its Colonization* :

> " In the structure of the laws, the precedent was established of framing them in simple, concise, and intelligible language ; of confining the matter of each clause to a single subject ; of arranging the clauses methodically, under appropriate heads ; and of avoiding the prolixity and tautology by which our English legislative enactments were usually distinguished. And, not being hampered by any complicated pre-existing system, nor impeded by the opposing influence of a powerful profession, the lawgivers of the colony were also enabled to effect amendments in the law, which the British legislature has hardly yet succeeded in accomplishing.
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> " A simple system of oral pleading, suited to the primitive condition of the community, was established for eliciting the issue in civil actions ; and the form and language of indictments in criminal proceedings were materially amended."

The legal connection with New South Wales was completely severed by an Ordinance passed on March 15, 1842, which declared that all laws, Acts, and Ordinances of New South Wales theretofore in force in the Colony of New Zealand were repealed, and should thereafter have no force or effect whatever within that Colony.

The nineteen Ordinances, including that creating the Supreme Court, were sent by the Governor to the Colonial Office on March 29, 1842. The Permanent Under-Secretary was James Stephen, who termed them a remarkable collection. In a minute to the Governor's despatch, Stephen's legal knowledge enabled him to appreciate the efforts of our first law-makers. He said :

> " The first impression suggested by this catalogue is that the Legislature have been actuated by a morbid propensity for interfering with everything, unchecked by any just perception of the difficulties and dangers of such over-activity. My belief is that, in this case, such an impression would be erroneous. In the infancy of a colony the choice must be made between the adoption of an old and inapplicable code or of a new and immature code. Both are evils, but in my mind it is much safer to begin with a vigorous effort to lay the foundations of law on a right and durable basis, than to build it on a basis which must be wrong and which can never possess any stability. . . . If the English Code be borrowed but for a short time, it is barely possible to get rid of the embarrassment it creates. . . . The effort which has been made in New Zealand to arrest this mischief appears to me to indicate a very remarkable degree of learning, foresight, and practical ability."

But there was no Judiciary as yet. Justice was administered by the gentlemen who held Commissions of the Peace. Sir John Logan Campbell tells us in *Poenamo* that on May 15, 1841, he saw one of these Magistrates " sitting in front of his *whare* administering justice under the canopy of heaven." Of this period, before the Supreme Court was ready to function, he says : " Very primitive were our ways. We had parsons without churches and magistrates without courts ; but we scrambled through our divinity and our law somehow or other, so that we should be held in esteem as a Christian and properly-behaved people."

The first Judge of the Supreme Court, Mr. William Martin, M.A., a former Fellow of St. John's College, Cambridge, and a barrister of the Inner Temple, who had been appointed by the Secretary of State for the Colonies in the previous year, took the oath of office and assumed his duties as Chief Justice on January 10, 1842. In that current year's estimates, his salary is shown as £1,000. The office staff consisted of a Registrar with a salary of £300, and the " Crier of the Court and Tipstaff " whose annual emolument was £20.

In the third week of February, 1842, the Chief Justice opened the first Supreme Court sessions to be held in New Zealand. They took place in the old Court House, which abutted upon Queen Street near the southern corner of Victoria Street West. The first case called was the charge of murder against Maketu, referred to in Dr. Foden's article, p. 239 *post.*, of which more will appear in the next issue of the JOURNAL.

On June 15, 1843, in pursuance of the powers conferred by the Supreme Court Ordinance, Rules of Practice, which had been drawn by the Chief Justice, were gazetted. These contained seventy-two rules of practice, twelve of them relating to probate and administration, and to County Court practice, with the addition of various forms including forms of indictment. Though grand juries were not abolished, an alternative form of presentment was declared to be sufficient if signed by or on behalf of the Attorney-General.

On December 26, 1843, Mr. Henry Samuel Chapman, of the Middle Temple, took the oath of office as a Judge of the Supreme Court. From a letter of his, for a

copy of which we are indebted to his son, the late Mr. Justice Frederick Revans Chapman, we learn some intimate details of the early Supreme Court. Mr. Justice H. S. Chapman wrote to his father, in London :

" You will recollect that when I left England I hardly knew on what footing my office would be placed. The company at first asked for a Chief Justice for Wellington. Next in their despatch to the Colonial Office they spoke of 'a Judge with exclusive jurisdiction' for Wellington—saying nothing of Nelson, &c. Lord Stanley answered that what they asked would require an Ordinance by the Governor and Council of New Zealand, but that anticipating arrangements to that end he would forthwith send out a person properly qualified.

" When we reached Sydney, FitzRoy asked me to inquire of the Chief Justice on what footing the resident Judge of Port Phillip is placed. I did so and the position I hold is based on that of the Port Phillip Judge. Martin remains Chief Justice of the Supreme Court of New Zealand. I am a Judge of that Court. In making rules of Court both must concur. For the practical administration of justice the colony is divided into two districts, the northern and the southern. A line running east and west through the peak of Tongariro and Mount Egmont divides the two. By the Proclamation the north is assigned to Martin, the south to me. For the former the sittings of the Supreme Court will be at Auckland, for the latter at Wellington where all the business of the Court (similar to the business of the Courts at Westminster) will be transacted. For *nisi prius* trials and for criminal trials circuits will be held at Nelson, Russell (Bay of Islands) and New Plymouth—the first being in my district, the latter two in Martin's.

" There is no appeal or writ of error from one Judge to the other—for that would be inconsistent with the spirit of English law. Neither have we imitated the absurdity of a Court sitting in banco and consisting of two Judges. That has been tried in Van Diemen's Land and is a failure. A Full Court therefore cannot be had until we have three Judges. By a contrivance of our own, we shall give the public the benefit of a *curia advisare vult*, and that too at no cost to the parties, for we have agreed to meet once a year at New Plymouth to consult on the improvement of our machinery—to revise rules and so forth. I think therefore that as regards the public the administration of the law is placed on as good a footing as possible with two Judges and in a colony with several isolated settlements. As regards the convenience of the Judges it is also well arranged for, if either were taken ill the duties might be performed by both as before, and it follows from this that a visit to England by either Martin or myself or by both in succession, is not out of the question.

" Our time was almost entirely occupied, while I was at Auckland, in revising the Ordinances necessary to give me jurisdiction and our Rules of Court ; so that I could only make three short excursions, but they showed me the whole neighbourhood of the town, indeed, the whole of the remarkable isthmus on part of which Auckland is placed."

(Notwithstanding Mr. Justice H. S. Chapman's view as to " the absurdity of a Court sitting in banco and consisting of two Judges," we find that a Full Court (Martin, C.J., and Chapman, J.), sat at least once during the Supreme Court's early days. We refer to *The Queen v. Symonds*, (1847) N.Z.P.C.C. 387*n*, where, apart from an old *Government Gazette*, this important decision is alone reported. This was brought before the Court upon demurrer to a declaration in a suit on a writ of scire facias. Over fifty years later, the Judicial Committee, in an opinion delivered by Lord Davey in *Nireaha Tamaki v. Baker*, (1900) N.Z.P.C.C. 371, 384, referred with approval to certain of Mr. Justice Chapman's observations in *Symond's* case.)

On January 13, 1844, a new Supreme Court Ordinance (Sess. III, No. 1) was passed as the result of the conference between our first Judges : in general, it followed the Ordinance of December 22, 1841, and, further, it empowered the Governor to appoint Judges until Her Majesty's pleasure be known, and Judges so appointed were to hold office during Her Majesty's pleasure. The Governor was empowered to divide the colony into Judicial Districts and to assign to each a Judge or Judges.

Four days later, the Governor proclaimed the Northern Judicial District (which he assigned to the Chief Justice), and the Southern District, to which Mr. Justice Chapman was appointed. The respective areas appear to us of another day to be wholly disproportionate. The line of demarcation ran from the mouth of the Wairoa River (Hawke's Bay) to the highest summit of Tongariro, thence following the highest ridge to the summit of Mount Egmont, and thence to the source of the Otumatua River, and along that river to the sea. The South Island and Stewart Island (" New Munster " and " New Leinster ") were part of the Southern District, but the Chatham Islands were given to the Northern. Sittings were ordered to be held at such times and places as the Governor should appoint ; but twice in each year, in April and in October, sittings were to be held at Nelson before Mr. Justice Chapman. On January 12, 1844, Rules and Forms touching the Practice of the Supreme Court of New Zealand, " settled and approved by William Martin, C.J., and H. S. Chapman, J.," were approved by the Governor in Council and gazetted. Similarly, a set of rules as to probate came into being on May 2, 1844. An Ordinance (Sess. IV, No. 1), passed on September 28, 1844, gave to these rules the effect of statute.

To complete and certify a further set of Rules of Court, the Judges met at New Plymouth. Chief Justice Martin went thither, bush-fashion, from Auckland by way of Taupo, and he returned to Auckland, both journeys being made on foot, with canoe-crossings of rivers. Mr. Justice Chapman went to Petre (the present Wanganui) by boat, thence on foot to New Plymouth, and he returned to Wellington on foot. (The arduous nature of such a journey is described in Chapter 7 of William Swainson's *Auckland, the Capital of New Zealand*, published in 1853.) These additional rules, prescribing the duties of sheriffs and providing a scale of fees payable to Sheriffs or Sheriff officers, were approved by the Governor in Council on May 12, 1845, and gazetted ; and, to confirm the new " Rules, Forms, and Tables of Fees touching the Practice of the Supreme Court," an Ordinance was passed on November 5, 1846.

The first Registrar of the Supreme Court was R. A. Fitzgerald, appointed in May, 1841 ; but his, like Fisher's, was a " stop-gap " appointment, as the Judge, Attorney-General, and Registrar were already appointed by the Colonial Office. Consequently, Thomas Outhwaite, an English solicitor who had been practising in Paris, principally on Embassy work, was the first Registrar. He took office on January 1, 1842, and did not retire until 1869. He accompanied the Chief Justice to the Wellington Sessions in 1843, whither they went by the brig *Victoria*, and returned on foot by way of Taupo. The first sittings of the Supreme Court in the newly-constituted District centred on Whangarei, will not be the first time the Supreme Court has sat in North Auckland. Lady Martin, in *Our Maoris*, records her husband's presiding at a sitting held in Kororareka, now Russell, in September, 1844.

And, while we are considering " firsts," mention must be made of the first Judge's " associate." This was Mohi, a much-tatooed Maori who accompanied Chief Justice Martin everywhere. The Chief Justice lived in Judge's Bay (still so-called because of his association with it), which is beside the little church of St. Stephen, where the Constitution of the Church of England of the Province of New Zealand, as

drafted by him, was passed in May, 1857. In an open dinghy, Mohi used to row His Honour to the town; and from Official Bay (now no more) they would walk together to the Court-house. Mohi, who, with his fierce aspect, was a memory of our own pioneer forbears, attended his Judge in Court, sitting beside the Bench. His forensic costume was unusual, as it consisted of a voluminous shoulder-mat and a cartridge-belt in which he wore a tomahawk. But his dignity was irreproachable. Lady Martin in her memoirs, *Our Maoris*, in speaking of Mohi's fine character and gentleness, says that in appearance he was "wild, huge, and grotesque-looking"—a description that is borne out by his portrait, which is one of the illustrations to her book. Sir Frederick Chapman, who delighted in being reminded of Mohi, told us that when his father and Sir William Martin as a Judicature Commission, were conferring in preparation of their report on the administration of justice, in the late 'fifties, Mohi was sent with the two Chapman boys to guide them on a visit to Taupo and Rotorua, a journey accomplished on foot and by canoe along the length of the Waikato River. In those days, however, the term "Judge's associate" was unknown; the irreverent populace called Mohi, "the Judge's Man Friday."

The first mention of a Court of Appeal was made in October, 1846. This Court, in its first beginnings, we propose to consider in our next issue.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1938.
June 27, 28.
Myers, C.J.
Blair, J.
Kennedy, J.
Johnston, J.
Fair, J.

PILKINGTON v. McARTHUR TRUST LIMITED, AND ANOTHER (No. 2).

Practice—Pleadings—Service of Writ out of New Zealand—"Subject-matter of the action . . . situated in New Zealand"—Defendant Company registered and carrying on Business in Queensland—Action for Declaration that Debentures of another Company and held in New Zealand the Property of Plaintiff—Leave granted—Code of Civil Procedure, R. 48 (*e*).

The plaintiff entered into a deed which he executed in New Zealand with the company (the first-named defendant) purporting to transfer certain debentures issued by the Investment Executive Trust of New Zealand, Ltd., in exchange for shares in the defendant company which was at all material times incorporated and registered according to the law of Queensland, and carried on business in Queensland as an investment company. The debentures in question were in the hands of the second-named defendant, the Public Trustee, at Wellington, as statutory liquidator of the Investment Executive Trust of New Zealand, Ltd. (in liquidation).

The plaintiff sued for a declaration against the defendant company that the deed had been rightly rescinded by him, and was of no effect; and, alternatively, for a declaration rescinding it; and, as against both defendants, a declaration that the debentures were the plaintiff's property.

On motion for leave to serve the writ of summons out of the jurisdiction—namely, upon the company in Queensland—removed from the Supreme Court for argument,

Leary and **McLiver**, for the plaintiff; **Wiseman**, for the defendant company.

Held, by the Court of Appeal, granting leave, 1. That the subject-matter of the action, the debentures, was property situated in New Zealand, and that anything done in connection therewith was something affecting that property.

2. That, as the case came within R. 48 (*e*) of the Code of Civil Procedure, in granting such leave it was unnecessary to decide whether or not it came within R. 48 (*b*)—*i.e.*, whether the contract sought to be rescinded was to be in part performed in New Zealand.

Solicitors: **E. V. McLiver**, Auckland, for the plaintiff; **W. L. Wiseman**, Auckland, for the first defendant.

COURT OF ARBITRATION.
Wellington.
1938.
May 20.
O'Regan, J.

***IN RE* HAWKE'S BAY LOCAL BODIES' (BOROUGHS AND TOWN DISTRICTS) LABOURERS, ETC., INDUSTRIAL AGREEMENT.**

Industrial Conciliation and Arbitration Acts—Industrial Agreement—Holiday Provisions—Prescribed Holidays falling on Saturday—Interpretation.

A clause in an industrial agreement provided for the payment of all workers covered by it for certain holidays, including New Year's Day and Christmas Day. During the currency of the agreement, Christmas Day, 1937, and New Year's Day, 1938, both fell on a Saturday.

On an application for interpretation of that clause,

Held, That the holidays named in the clause must be paid for irrespective of the day on which they happen to fall.

Cathie and Sons, Ltd. v. Kinsman, [1938] N.Z.L.R. 49, [1938] G.L.R. 9, 37 Bk. of Awards, 2607, distinguished.

COURT OF ARBITRATION.
Greymouth.
1938.
May 2, 16.
O'Regan, J.

MURRAY
v.
H. BAIGENT AND SONS, LIMITED.

Workers' Compensation—Assessment of Compensation—Claim for Maximum Compensation—Plaintiff refusing to undergo recommended Operation to lessen Disability—"Unreasonable conduct"—Nature of Court Order—Workers' Compensation Act, 1922, s. 16.

Where medical opinion recommends an operation to lessen a claimant's disability, whether compensation is to be continued, suspended, diminished, or ended, depends entirely on the facts of each particular case; but, if the Court finds that the cause of the continued incapacity is not the original injury but the unreasonable conduct of the injured man, then his refusal is treated as a *novus actus interveniens*.

Where, as in the present case, five out of six doctors emphatically recommended an operation, the plaintiff, having made up his mind after one doctor's advice not to submit to it, is not entitled to shut his ears to any subsequent advice.

The Court held that plaintiff should undergo the operation, but without finding as a fact that his continued incapacity was due to any unreasonable conduct on his part; and adjourned the case for three months, with an order that arrears of weekly compensation be paid to date of the judgment, and, provided the plaintiff agrees in the meantime to undergo the operation, to be continued until the further order of the Court, with review of the case at the expiration of the three-months period.

Warncken v. R. Moreland and Son, Ltd., [1909] 1 K.B. 184, 2 B.W.C.C. 350, applied.

Tutton v. S.S. "Majestic" (Owners), [1909] 2 K.B. 54, 2 B.W.C.C. 346, and **Marshall v. Orient Steam Navigation Co., Ltd.**, [1910] 1 K.B. 79, 3 B.W.C.C. 15, considered.

Rothwell v. Davies, (1903) 19 T.L.R. 423, 5 W.C.C. 141; **Price v. Ashburton Borough**, [1916] N.Z.L.R. 870, G.L.R. 491, and **Wain v. Walker**, [1922] G.L.R. 230, referred to.

Counsel: **W. D. Taylor**, for the plaintiff; **Hannan**, for the defendant.

Solicitors: **Joyce and Taylor**, Greymouth, for the plaintiff; **J. W. Hannan**, Greymouth, for the defendant.

Case Annotation: *Warncken v. R. Moreland and Son, Ltd.*, E. and E. Digest, Vol. 34, p. 350, para. 2817; *Tutton v. S.S. "Majestic"* (*Owners*), *ibid.*, p. 349, para. 2808; *Marshall v. Orient Steam Navigation Co., Ltd.*, *ibid.*, para. 2807; *Rothwell v. Davies*, *ibid.*, p. 350, para. 2816.

SUPREME COURT. Auckland. 1938. July 8, 14. *Callan, J.*

MIKAERE v. TE WHAKA WAIAPU AND ANOTHER.

Practice—Costs—Successful and Unsuccessful Defendants—Plaintiff reasonably joining Two Defendants to ascertain which at Fault—Verdict against One only—Liability of unsuccessful Defendant for successful Defendant's Costs—Form of Order.

Where a plaintiff reasonably joins in an action two defendants' and, upon the face of the transaction either or both might have been at fault, and one only is found to be the wrong-doer, the burden of the costs of the successful defendant should fall upon the unsuccessful defendant.

Besterman v. British Motor Cab Co., Ltd., [1914] 3 K.B. 181, followed.

In such a case it may be necessary to determine whether the proper order is (*a*) a direct order that the unsuccessful defendant pay the party-and-party costs of the successful defendant to him; or (*b*) an order that the plaintiff pay the costs of the successful defendant to him, and recover them from the unsuccessful defendant.

In the present case, all counsel concurring, an order was made that the unsuccessful defendant should pay the whole of the party-and-party costs of the successful defendant to the latter.

Counsel: Hodgson, for the plaintiff; **Richmond,** for the defendant, Te Whaka Waiapu; **Wallace,** for the defendant, Alfred Whitman Ruff.

Solicitors: Potts and Hodgson, Opotiki, for the plaintiff; **Parr, Blomfield and Sparling,** Auckland, for the defendant, Te Whaka Waiapu; **Wallace and McLean,** Auckland, for the defendant, Alfred Whitman Ruff.

Case Annotation: *Besterman v. British Motor Cab Co., Ltd.*, E. & E. Digest, Practice and Pleadings Volume, p. 879, para. 4189.

SUPREME COURT. Dunedin. 1938. June 3, 10. *Kennedy, J.*

DUNEDIN AND KAIKORAI TRAM COMPANY, LIMITED v. FORSYTH.

Industrial Conciliation and Arbitration Acts—Award—Working-hours—Forty-hour week—Provision for Five Days of Eight Hours—Employment on Six Days of Six and two-third Hours—Claim for additional Wages founded on Breach—Jurisdiction—Amendment of Industrial Agreements—Industrial Conciliation and Arbitration Act, 1925, s. 98—Amendment Act, 1936, ss. 21, 22.

Where an order of the Court of Arbitration, under s. 21 of the Industrial Conciliation and Arbitration Amendment Act, 1936, reduced from forty-eight to forty the weekly working-hours under an industrial agreement by which the parties were bound and permitted Saturday work, but did not say anything as to the number of days per week on which the worker should work, there was no reason why six days of six and two-thirds hours on each day should prevail over a five-day week of eight hours or *vice versa*.

The award, which superseded the industrial agreement, specified a forty-hour week consisting of not less than eight hours on any five days of the week. The appellant company continued to work six and two-third hours daily for each of six days, and paid wages at a weekly rate not less than the award rate for a forty-hour week.

In an action claiming the difference in wages alleged to be due to the plaintiff under the award as for six days of eight hours each and the wages actually paid him, the plaintiff contended that for the weeks in which he worked six and two-third hours on six days, he was entitled to be paid a full day's wages.

A. C. Stephens, for the appellant; **F. B. Adams,** for the respondent.

Held, allowing an appeal from a Magistrate, 1. That the appellant's breach of the award did not entitle the worker to additional pay per week for time he had not worked, as his total weekly wage for forty-hours was not less than what it would have been if the award had not been broken by the substitution of the six-day week of six and two-third hours daily for the specified five-day week of eight hours each.

2. That the Court of Arbitration has no jurisdiction to make a general pronouncement as to the proper interpretation of an industrial agreement, as s. 98 of the Industrial Conciliation and Arbitration Act, 1925, applies only to awards.

Solicitors: Mondy, Stephens, Monro, and Stephens, Dunedin, for the appellant; **Adams Bros.,** Dunedin, for the respondent.

Court of Appeal.

First Sitting at Auckland.

A contribution to the pages of legal history in the Dominion was made by the sitting of the Court of Appeal in Auckland on August 3 and 4.

By an Order in Council, made on July 26, the Governor-General, in exercise of the powers conferred on him by s. 3 of the Judicature Amendment Act, 1933, and acting by and with the advice and consent of the Executive Council, appointed and declared that a special sitting of the Court of Appeal should be held within the Supreme Court House, in the City of Auckland, to hear a case pending before that Court, on removal from the Supreme Court, *Godwin v. Orr-Walker*, raising the question whether the provisions of Part II of the Fugitive Offenders Act, 1881, applied to the rendition of alleged fugitive offenders from New Zealand to any specified State in the Commonwealth of Australia (or any part thereof) for trial therein or thereat of an alleged offence against the criminal law of that State. It was recited in the Order in Council that the question was one of great importance on which, in the interests of comity between the Commonwealth of Australia and the Dominion, it had long been desirable to obtain a decision by the Court of Appeal of New Zealand; and, further, that, in addition to the great importance of the issue, it was essential in the interests both of the liberty of the subject and of the administration of criminal justice that the person whose extradition was sought should not be unduly detained in New Zealand pending the determination of the question in issue, and it was not desirable or expedient that the hearing should be deferred until the next ordinary sitting of the Court of Appeal on September 12 (*1937 New Zealand Gazette*, 1732).

This was the first occasion on which the Court of Appeal had sat in Auckland; and only on three other occasions had it sat outside of Wellington, twice at Christchurch and once at Dunedin.

About two hundred members of the Auckland Bar in forensic attire filled the counsels' part of the Supreme Court when their Honours occupied the Bench. His Honour the Chief Justice, Sir Michael Myers, presided, and with him were their Honours Mr. Justice Kennedy, Mr. Justice Fair, Mr. Justice Callan, and Mr. Justice Northcroft.

The learned Chief Justice, in opening the proceedings, referred to the Order in Council, made in terms of the Judicature Amendment Act, 1933, wherein the object of the sitting and the reasons for it had been set out. He said that the business of the Court at that sitting, of course, was limited to the terms of the Order in Council.

The President of the Auckland District Law Society, Mr. H. M. Rogerson, then moved,

"That, on this the first occasion on which the Court of Appeal has sat in Auckland, it be recorded that the members of the legal profession attended to pay their respects to the Court."

His Honour the Chief Justice expressed the thanks of their Honours, and made an order accordingly. He said that the Registrar would be directed to minute the order and to send a copy of it to the Registrar of the Court of Appeal in Wellington, so that it might be minuted in the records of the Court there.

The hearing of argument then proceeded.

William Swainson.

New Zealand's First Attorney-General.

By N. A. Foden, LL.D., M.A.

The conjunction of a sitting of the Court of Appeal in Auckland, for the first time, and the presence of His Majesty's Attorney-General leading for the Crown before that Court, brings to mind the first Attorney-General of New Zealand, William Swainson, whose tenure of office was wholly spent in the northern city.

Although it may be said that Francis Fisher was the first holder of the office of Attorney-General in New Zealand, his appointment was provisional only and continued for less than six months. When New Zealand was separated from New South Wales, Captain Hobson proceeded to make various appointments for the purpose of creating the official members of the first Legislative Council. The appointment of a lawyer resident in the Colony was necessary for the Council to be properly constituted for the immediate exercise of its functions. Fisher had been sent over from Sydney by Sir George Gipps, Governor of New South Wales, to act with Godfrey and Richmond as a Commission to inquire into the claims to land, but Captain Hobson co-opted his services as Law Adviser, and in May, 1841, after the severance had come into operation, he made Fisher Attorney-General. It was not the intention of the Colonial Office that a local lawyer should fill the office; and William Swainson of Lincoln's Inn was appointed by the Queen, early in 1841, to take over the position. He left England on April 9 of the same year, arrived in Port Nicholson exactly four months later and was sworn in as a member of the Legislative Council on October 18 following.

William Swainson.

Attorney-General of New Zealand, 1841–56.

With him came William Martin, who had been appointed Chief Justice. It was to the Chief Justice and himself in particular that Swainson referred later when he wrote in his book, *New Zealand and Its Colonization*: "Soon came English lawyers, imbued with English spirit, and eager to relieve the colony from the baneful influence of a convict code." One can imagine the enthusiasm of the young barrister arriving in the infant colony burning with the desire to frame a code of laws which would usher in an era of happiness and prosperity for the inhabitants. It cannot be doubted that the nineteen Ordinances of the second session of the Legislative Council which assembled on December 14, 1841, were the work of Martin and Swainson. Among these enactments was the Supreme Court Ordinance, the statutory progenitor of our present Judicature Act, 1908.

Swainson was a man of strong views, and it can be said of him that he carried out the duties of his office with diligence and distinction. In 1842 he gave expression to certain views concerning the jurisdiction of the local Government over some Native tribes in the Tauranga district, which opinions were displeasing to the authorities in Downing Street. An inter-tribal feud had resulted in the killing of a number of Natives and resort to cannibalism. When the Administration came to deal with the matter, the Attorney-General's opinion was sought as to how far the parties were amenable to English law. Mr. Attorney-General held the view that only the territory of those tribes who had become parties to the Treaty of Waitangi were under British jurisdiction. In the particular case the tribes were not signatories to the compact, and were therefore, in his view, not amenable to English law. When these disturbing counsels were read at Downing Street, the course was adopted of administering a rebuke to the Law Officer in New Zealand. Lord Stanley wrote: "I regard the Royal Commissions for the government of New Zealand as ascertaining beyond all controversy the limits of Her Majesty's sovereignty in that part of the world—that is, I hold that it is not competent for any subjects of the Queen to controvert the rights which in those Commissions Her Majesty has solemnly asserted." This statement of the legal effect of the instruments issued under the Great Seal in November and December appears to be correct and to demonstrate the error

of the Attorney-General's view. A severe warning followed: "Mr. Swainson must be apprized that neither he nor any other person who shall oppose this fundamental principle of your Government can be permitted to act any longer as a public officer under the Queen's Commission."

This overt threat would have deterred most Government officials from a re-statement of such unacceptable views, but once again, in 1843, after the Wairau affray, Swainson repeated the revolutionary opinion he had expressed in the previous year, and linked it up with the question whether Rauparaha and Rangihaeata though signatories to the Treaty had given their "intelligent consent" to it. Not unnaturally a further reproof emanated from the Colonial Office, couched thus: "To the colonial Attorney-General's renewed expression of his opinion [wrote Lord Stanley on February 10, 1844] that the Queen's sovereignty over the New Zealand Islands cannot be admitted because, in his judgment, those conditions have not been fulfilled which Her Majesty declared must precede the assertion of any such right, I answer by calling your attention to my despatch of June 21, 1843, and by observing that in this case the judgment of the Colonial Attorney-General is overruled and must hence forward be silenced by the opposite judgment of the Queen and Parliament. . . . I repeat, therefore, that the most implicit acquiescence in it is the indispensable condition of the tenures of any public office in the colony."

One cannot imagine that Swainson conformed to the requirement of "implicit acquiescence," but he remained in office until 1856, by which time the Constitution Act of 1852, providing for representative government in the colony, had been introduced.

With the institution of this new system of government, the question of ministerial responsibility came in issue, and the Attorney-General found himself called upon to guide the conduct of the head of the Government in this momentous matter. In his difficulty he took the wise course of declining to sanction the concession of full ministerial responsibility without referring to England for directions. The final issue of the question is well known.

Swainson was the first Speaker of the Legislative Council in 1854 when it became a part of the General Assembly, but upon vacating office as Attorney-General in 1856 he became an ordinary member of the same body.

The duties of his office required him to conduct prosecutions in criminal cases as well as Crown cases on the civil side, and in the performance of this work he acquired the reputation of being a sound and thorough lawyer. Of the various important cases in which he was engaged before the days of the *Law Reports*, two, in particular, might be mentioned. Towards the end of 1841, a Native, Maketu, perpetrated an atrocious murder, which provided the occasion of the first trial of a Maori on a capital charge. The importance of the case can be imagined; it has been well described by Swainson himself in the volume previously mentioned. An interesting point was taken by Maketu's counsel that he was entitled to a *jury de medietate linguae*, in other words to a jury consisting as to half in number of Maoris. The same plea had been advanced in the trial of a Native for theft in Wellington some months previously, but in each case the point was overruled as the right to such a jury applied only to aliens, whereas the Maoris were British subjects. Maketu, in due course, suffered the extreme penalty. The other case, decided in 1847, produced judgments from the pens of the Chief Justice and Mr. Justice Chapman dealing with the Crown's exclusive right of pre-emption in respect of Native lands. These judgments are of absorbing interest to the New Zealand student of constitutional law, particularly in their bearing on the Treaty of Waitangi, which in regard to pre-emption was said by the Chief Justice to introduce "nothing new and unsettled": see N.Z.P.C.C., 387*n*.

Freed from the shackles of office Swainson was able to speak forcefully on the vital policy issues which were involved in the Waitara trouble and the following Maori wars. In the main he exerted a steadying influence on the Administration during the first twenty-five years of the Colony's development, and his name deserves to be remembered as one who worthily upheld the traditions of an honoured office throughout a period of difficulty and even of danger.

Born in Lancaster in 1809, he passed to his long rest in 1884, and was buried in Auckland, the scene of the greater part of his unremitting efforts for the betterment of the land which he had been permitted to see develop so prodigiously.

New Zealand Law Revision Committee.

July Meeting.

The Law Revision Committee met at the Parliamentary Buildings, Wellington, on July 29. The Attorney-General, the Hon. Mr. H. G. R. Mason, was in the chair; and the following members were present: the Solicitor-General, Mr. H. H. Cornish, K. C., Messrs. W. J. Sim, K. M. Gresson, and A. C. Stephens, and the Under-Secretary for Justice, Mr. B. L. Dallard. The First Assistant Law Draftsman, Mr. D. J. Dalglish, attended in place of the Parliamentary Law Draftsman, Mr. H. D. C. Adams.

Destitute Persons Act, 1910.—The Committee considered the report of the Under-Secretary for Justice on the matters referred to his Department at the previous meeting.

It was decided that no action be taken in regard to the suggestion that the fact that a husband has been guilty of adultery be added to the grounds on which a wife may obtain a separation and maintenance order; and similarly that no amendment be approved in respect of s. 51 of the statute to enable the secretary of a public or charitable institution to lay a complaint founded on failure to maintain a wife or child inmate of such institution.

Compromises by Infants.—It had been suggested that Magistrates might be empowered by an amendment of the Magistrates' Courts Act or the Infants Act to approve a compromise proposed to be made where the amount to be paid does not exceed £100.

The Committee recommended an amendment to empower a Magistrate to approve the compromise of such a claim, where the amount claimed is within the jurisdiction of the Magistrates' Court.

Trustee Act, 1908. The Committee decided to ask Messrs. K. M. Gresson and S. I. Goodall to confer and report on the bringing of the Trustee Act into line with the present statute-law in Great Britain.

The Committee spent the remainder of the day in consideration of various matters in which reports were pending, and in examination of draft clauses for insertion in proposed legislation and giving effect to recommendations of the Committee on a number of subjects previously reported.

The Use of Dangerous Things.

And the Principle of Absolute Liability.

Recent English decisions indicate the desirability of an exact terminology in dealing with those concepts which are indicated somewhat vaguely by terms such as "dangerous things," "things dangerous in their nature," "things inherently dangerous." It may be permissible to hark back to the dictum of Darling, J. (as he then was), in *Chichester Corporation v. Fisher*, [1906] 1 K.B. 167: "I very much doubt whether anything whatever can, strictly speaking, be called 'a dangerous thing.' That depends on its use—on environment. Water, which caused the injury complained of in *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330, is only dangerous under certain conditions, and so is fire. The expression 'in itself dangerous' is used in the headnote to *Rylands v. Fletcher*, but I do not find it in the judgments; nor do I think it an appropriate expression anywhere, except perhaps, as used by Mr. Pope in regard to 'a little learning'." In his instancing of fire, it may be confessed that his Lordship has disregarded the effect of the decided cases; but, in other respects, the dictum is a useful criticism of the illogical character of some of the judicial terminology, the use of which began as far back as the Squib case, *Scott v. Shepherd*, (1773) 2 Wm. Black. 892, 3 Wils. K.B. 412. There De Grey, C.J., (as reported in Wilson), said: "the squib had a natural power and tendency to do mischief indiscriminately." Nares, J. (as reported in *Blackstone*), was more particular: "he [the defendant] is the person who, in the present case, gave the mischievous faculty to the squib."

One may set apart for the present as a special category things brought upon land, and being such as are not normal to the use of land, which are all that *Rylands v. Fletcher* purported to deal with—"whether the things so brought be beasts or water or filth or stenches": per Blackburn, J., in the Court of Exchequer Chamber. But when such things are on fire, they fall into a more general class, to be noted below.

Next, it is apparently necessary to distinguish (except, as before, when on fire) things that grow naturally upon land, however dangerous they may be in fact. To them the principle of liability apart from negligence cannot in the present state of the decisions ever be permitted to apply: *Noble v. Harrison*, [1921] 2 K.B. 332. In one of the latest cases, *Shirvell v. Hackwood Estates*, [1938] 2 All E.R. 1, damage was done by a dead branch of a tree, expressly found to be "dangerous and liable to fall," yet it was admitted that liability could not be imposed under the rule in *Rylands v. Fletcher*, and other grounds had (unsuccessfully) to be sought.

The case of animals is also special.

There remain to be considered the various works of man's hands, not necessarily in the position of having been brought upon land. Here there are two main classes.

I. The first class consists of things capable of causing injury without further human intervention. They might truly be called "things dangerous by nature," or "things dangerous in themselves"; but by reason of the extended sense the Courts have given to these terms, some other description such as "inherently dangerous" is desirable. (Even this term has been used in another, and, it is submitted, less satisfactory sense, by Scott, L.J., in the late case of *Hall v. Jennings*, [1938] 1 All E.R. 579. Without reaching into the grotesque, it is hard to find a synonym that the Courts have not pre-empted.) In this class there is at least one thing of which inherent danger can be predicated in the most general terms—namely, matter in a state of conflagration although its use does not carry the consequence of absolute liability. Another fairly general group of things inherently dangerous possibly exists, that of weighty articles in unstable equilibrium; but the liability which has justly been assigned in such cases has been reached by the alternative course of reasoning which applies the maxim *res ipsa loquitur* to justify a declaration of liability on the ground of negligence: as in *Byrne v. Boadle*, (1863) 33 L.J. Ex. 13; *Briggs v. Oliver*, (1866) 35 L.J. Ex. 163; and *Sherlaw v. Lewis*, (1913) 32 N.Z.L.R. 1052. In such actions, evidence negativing negligence is tantamount to evidence disproving instability, as in *Schaef v. Tingey and Co.*, [1916] N.Z.L.R. 803. More often, however, a thing is inherently dangerous only with qualifications. Dust is not dangerous, neither is air, but a dust-laden atmosphere in a mine or a flour-mill may be. Coal-gas is capable of causing injury only in appreciable quantity, mixed with air, free from its gas-pipe, and in the vicinity of a flame. A grass paddock where a bottle is lying is inherently dangerous, but only in dry weather, and with the sun shining, and if the focusing effect of the glass be sufficiently strong. Electricity (in the concrete sense of metal charged with electricity) has sometimes been ranked with fire (in the concrete sense of matter in a state of conflagration) as inherently dangerous without qualification; but it is difficult to see, and there is believed to be no case that says that a current strong enough only to light a pocket torch or ring a bell is capable of producing injury. The same thing may be said of minute quantities of the less violent explosives, unless their explosion be attended with appreciable conflagration; but explosive in bulk, capable of spontaneous detonation or explosion through chemical disintegration or otherwise, is no doubt inherently dangerous. So of what is called "poison"—matter with toxic effect on the human body. There is a long range of poisonous substances, from the mildest to the most virulent. Vitriol can be made harmless by sufficient dilution; a speck of strychnine can be separated too small to hurt an infant; on the other hand, strawberries and oysters are poison to certain unfortunate individuals. To this extent the Privy Council's enumeration of "articles dangerous in themselves, such as loaded firearms, poison, explosives, and other things *ejusdem generis*" in *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640, appears to require qualification.

II. The second class consists of things that are safe enough if left alone, and capable of causing injury only because of human intervention. They may be called "things interventionally dangerous." Obviously the class is enormous; much may be done with a blunt axe intelligently wielded; but whilst some things are more dangerous than others, it seems impossible to draw any hard-and-fast line of distinction amongst them. Between David's sling, the Australian throwing-stick, Robin Hood's long-bow, the cross-bow, the shanghai, the air-gun, the musket, and the twentieth-century automatic repeating pistol, there is a difference

in degree, but none in kind. They are all devices for discharging a projectile. At one stage in the progression the power of a spring replaces the power of the arm; at another, chemical force replaces the mechanical powers; but quite probably in the hands of an expert a throwing-stick is a better weapon than a shanghai, and the most improved cross-bow was superior to the first fire-arm. In another progression the pedestrian uses a walking-stick, a simple tool. He bestrides a hobby-horse, which has moving parts, but propulsion still comes from his feet on the road. He mounts a pedal bicycle, and mechanical propulsion is introduced. Finally he replaces the pedals by an internal-combustion engine. The impossibility of putting any interventionally dangerous things into a legal class by themselves, apart from the particular facts of the case and the characteristics of the individual object, can be seen by examining the range of automotive vehicles. There is a wide variation in capacity of damage and amount of controlling skill required between such articles as a tricycle or bath-chair with engine attached, an electric luggage-truck on a railway platform, the motor-car of twenty years ago, and the latest model in use on the highways, with a loaded weight of a ton and a half and a seventy-horse-power engine.

Nevertheless, there is a distinction in law, as the cases show. Generally the user of an interventionally dangerous thing is liable only on proof of his wilfulness or negligence, but sometimes he has been held to the principle of what is called absolute liability—another unfortunate term—various defences such as plaintiff consents, act of God or third party, and contributory negligence are available to the defendant. It is on these latter occasions that the article is described as "dangerous in itself," or by some synonymous term; but what is meant by that, as the cases show, is that the potential power of the article for harm, or the amount of skill needed to control it, are such that as a matter of justice and common sense a person must be held, whether in particular circumstances or more generally, to use it at his peril. In the ordinary use of language, it is difficult to see how a thing which is not dangerous if people will only leave it alone can with propriety be called dangerous in itself. For the sake of a concise term to denote inherently dangerous or interventionally dangerous articles whose use is attended at law with liability irrespective of wilfulness or negligence, they may perhaps be described as "legally dangerous." The words of the Judges in *Birtwhistle v. Hindle*, [1897] 1 Q.B. 192, are much in point: "Machinery may be perfectly safe if worked with absolute care, and yet it may be certain or probable that such care will not always be used, and that if it is not used, injury may very likely arise. . . . If so, it is a question of circumstance and degree whether the machinery is, or particular parts of it are, dangerous": per Wills, J. "The Court must consider whether the chance of a shuttle flying out is or is not sufficiently great to make the machinery dangerous"; per Wright, J.

If this view be sound, it follows that the way the law approaches the issue, and the fact that it is "a question of circumstance and degree," must always prevent generalization to the effect that such and such an article—described in general class-terms—is (in the nomenclature suggested above) "legally dangerous." This principle has the defect of uncertainty which arises from the infinite variety of the subject-matter; but it has the advantage of elasticity in meeting the developments of human ingenuity. For instance, it has been said that before the decision in *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, it was open to argument that a motor-vehicle was a thing dangerous in itself—or, in the suggested nomenclature, legally dangerous; but that that case settled the point in the negative. It would seem, however, that all it settled was that a particular motor-omnibus in use in the streets of London in 1908 or 1909 was not legally dangerous. The phraseology of the judgments is consistent with the view that had their Lordships been examining such an engine of destruction as is common on New Zealand roads in 1938, they might without avizandum have stigmatized it forthwith as legally dangerous. The observation in that case that self-propelled vehicles "can ordinarily be pulled up in a much shorter distance" than a horse-drawn vehicle indicates the gulf between the vehicles under consideration in 1909 and some of those in use in 1938.

There are at least three lines of approach by which the Courts have reached the stage of being able to assign "absolute" liability for the use of a thing if its potential danger appears to warrant it. One has been by straining the doctrine of negligence. An award of damages for injury caused by defective harness was based on a finding of negligence in not having the tackle in good order: *Welsh v. Lawrence*, (1818) 2 Chit. 262. *Driscoll v. Poplar Board of Works*, (1897) 14 T.L.R. 99, is based on some obscure sort of negligence. In *Hutchins v. Maunder*, (1920) 37 T.L.R. 72, the damage resulted from defects in the machinery of a second-hand motor-car recently bought by the defendant. It was found as a fact that he did not drive the car negligently; that before buying the car he had had it examined by a competent man; that there was no negligence in his not having had the car dismantled to an extent which would, or might, have revealed the defect. Nevertheless it was held that to place the car in its then condition on the roads amounted to negligence. The reasoning is not convincing. The logical mind of Denniston, J., prevented him from finding negligence in the somewhat similar case of *Webb v. Cassidy*, (1907) 27 N.Z.L.R. 489. *Welsh v. Lawrence* and *Hutchins v. Maunder* were dissented from in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539, and by the affirmation of that case in the Court of Appeal, [1923] 2 K.B. 832, must be taken to be virtually overruled. The last-cited case has effectually closed the approach by straining the law of negligence; but it may be noted that the position of a specially dangerous vehicle, the characteristics of which are known to its driver, was not under consideration. It was not suggested that the laundry vehicle was of such a type.

Another line of approach has been by extension of the principle of liability laid down in *Rylands v. Fletcher*. In *Powell v. Fall*, (1880) 5 Q.B.D. 597, negligence was expressly negatived, the claim was apparently put forward as one of nuisance, and *Rylands v. Fletcher* was expressly applied. The dangerous vehicle was on a highway, as it was in *Mansel v. Webb*, (1918) 88 L.J. K.B. 323, where it was plainly stated that the principle of *Rylands v. Fletcher* applies to dangerous things on a highway. The difficulty of invoking *Rylands v. Fletcher* is that that case was expressly limited to the liability of an occupier of land as such, and that it declared the existence of liability for the escape of things in general; if they caused damage, they were dangerous enough, whatever

their particular characteristics, to create an absolute liability in the occupier. If the precise doctrine of *Rylands v. Fletcher* is to be applied to a defendant on the score of his momentary occupation of part of a highway, then he is liable for the damage he does with a vehicle of any character, irrespectively of negligence. But this is not the law, as Blackburn, J., was at pains to point out in *Rylands v. Fletcher*, and as Bramwell, B., laid down in *Holmes v. Mather*, (1875) L.R. 10 Ex. 261. This difficulty may have been present to the minds of the Court in the latest case, *Hall v. Jennings*, [1938] 1 All E.R. 579. There a chair of a merry-go-round flew off, the links that held it to the revolving centre having become disengaged through skylarking. No question of negligence was mooted. The machinery naturally had to be on some land or other; the nature of defendants' title is not stated, simply that they "were in occupation of adjoining ground." This was held sufficient in the English Court of Appeal to bring the case within the rule of *Rylands v. Fletcher*. This case does not help the issue of vehicles on a highway.

A third line of approach, and perhaps the soundest, has been by the application of the general law of nuisance, disregarding that exposition of a special part of it (if nuisance it be) which is contained in *Rylands v. Fletcher*. Instances are found in a series of cases dealing with damage caused to pipes by the weight of heavy vehicles, such as *Gas Light and Coke Co. v. St. Mary Abbott's Vestry*, (1885) 15 Q.B.D. 1, and other cases cited in, and leading up to, *Chichester Corporation v. Foster*, [1906] 1 K.B. 167. In the last-mentioned case Wills, J., explicitly refused to admit an analogy with *Rylands v. Fletcher*. The Judges preferred to base their decision on the fact that the defendant had no right to burden the road with the weight of such an exceptionally heavy vehicle; in effect, he was under absolute liability for such user.

It may be that the increased weight and speed of motor-vehicles have been matched by increased brake-control, more responsive steering-control, and more powerful head-lamps; but there is one essential safety-factor in which designers and builders have been able to make no improvement—the reaction-time of the driver. A time will come, if it has not already arrived, when not all, but some motor-vehicles must be deemed to possess that degree of potential danger which justifies the man in the street in looking on them as articles which a person uses at his peril. The present state of the law appears to enable the Courts, when the characteristics of such a vehicle are explained to them, to reach the same conclusion.

The authorities supporting this proposition may be briefly noted. In *Midwood v. Mayor of Manchester*, [1905] 2 K.B. 597, absolute liability was assigned for damage caused to buildings by explosion and fire from defendant's legally dangerous thing (an electric cable set in bitumen) which was in the highway. In *Mansel v. Webb* and the cases which lead up to it the dangerous thing was a highway vehicle, and again the injury suffered was to property off the highway. The step to sufferer's property on the highway was taken in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, (1914) 3 K.B. 772. The step between damage to property and injury to the person is bridged by the observations of Fletcher Moulton, L.J., in *Wing v. London General Omnibus Co.*, dealing with "cases where by excessive use of some private right a person has exposed his neighbour's property or person to danger. In such a case, should an accident happen thereupon, even through the intervention of an event for which he is not responsible and without any negligence on his part, he is liable for the damage. . . . If a man places on the streets vehicles so wholly unmanageable as necessarily to be a continuing danger to other vehicles either at all times or under special conditions of weather, I have no doubt that he does it at his peril." The reference to weather is explainable by the particular subject-matter—a vehicle that skidded. Whether the vehicle constitutes a "continuing danger" is obviously a matter of fact to be decided in each case as it arises.

There is a temptation to shorten discussion by treating the use of dangerous things as if it were the same topic as the custody of dangerous things or the sale and bailment of dangerous things, and to cite indiscriminately cases bearing on all three topics. The relevant considerations are of course in many respects similar, but how far they may be identical it is outside the scope of this article to examine.

Enjoyment Promotion Act, 1936.—A complaint has been made by the Law Ball Committee of the Wellington Law Students' Society and the Victoria University College Law Faculty Club (whose address for service is P.O. Box 1126, Wellington) that divers persons, named or to be named in their several Summonses, have wilfully and without just cause failed and intend to fail to provide their lawful partners with adequate entertainment, contrary to the form of the statute in such case made and provided. The Summons, after reciting that the Annual Law Ball will be held at the time and place to be mentioned for the purposes of (*a*) providing such adequate entertainment, and (*b*) providing further contribution to the Victoria University Student Building Fund, commands all and sundry of the named defendants to appear on Friday, September 9, 1938, at 8.30 o'clock in the afternoon, at the St. Francis Hall, Hill Street, Wellington, to show cause why an order should not be made for the payment of 10s. 6d. for the maintenance of the defendant and his partner, or in the alternative for the payment of 6s. for the defendant's own maintenance, at the said Hall, in accordance with the form of the statute in such case made and provided. And, so it is of later record, that the Rt. Hon. the Chief Justice, Sir Michael Myers, G.C.M.G., and Lady Myers will attend, as host and hostess, at the time and place aforesaid.

Anyone desiring to attend the proceedings may obtain admission on application being made at the D.I.C. Booking Office, Lambton Quay, Wellington.

In a trial of a charge of burglary and the possession of house-breaking instruments, the accused's counsel eloquently told the Jury that the iron bar found in the accused's car at the time of his arrest was not a jemmy but a lever for putting-on and removing tyres. When counsel had proved this proposition to his own satisfaction, he sat down. The late Mr. Justice MacGregor summed up with appalling brevity. He said: "The accused's counsel has told you that the iron bar was not a housebreaking instrument but a tool for putting on motor-car tyres. What he did not explain to you, gentlemen, was that the sticks of gelignite found in his possession were to be used for blowing them up again."

Court of Review.

Summary of Decisions.*

By arrangement, the JOURNAL is able to publish reports of cases decided by the Court of Review. As decisions in this Court are ultimately determined by the varying facts of each case, it is not possible to give more than a note of the actual order and an outline of the factual position presented. Consequently, though cases are published as a guide and assistance to members of the profession, they must not be taken to be precedents.

CASE NO. 115. Cross-appeals by mortgagors and the mortgagee from an order of a Commission. The mortgagors, who were trustees of a church, applied for adjustment of a mortgage to secure the sum of £25,000, the land mortgaged being church land, on which, in addition to a church and other buildings used for the purposes of the religious body concerned, a block of buildings, to be let as shops and offices, had been erected.

The Commission in its report to the Court of Review stated:

"The members of the Commission were unanimous that the mortgagors, in equity, should be relieved of their joint and several liability but felt that the Act of 1936 did not give sufficient powers to enable the relief to be given. If, however, the Court of Review considers the Act contains the power to give the relief asked, the Commission considers it should be given."

Held, dismissing the application for relief, That the relief granted by the Commission would favour those interested in the purposes of the trust to the detriment of the trustees, as the trustees gain no advantage from a reduction in the amount of the mortgage if they are held liable for the reduced amount and the adjustable debt; the order served no useful purpose.

In the course of its judgment, the Court of Review said:

"The argument addressed to us turned, in the main, on the power of the Court to relieve the trustees from personal liability from the amount secured, after adjustment, and the amount of the adjustable debt arising as the result of such adjustment.

"While individual trustees or their estates claimed relief as guarantors, no statements of assets and liabilities accompanied their claims and no evidence was produced that they were unable to meet their liabilities. It is, however, admitted that the joint and several liabilities of the trustees can be met by some of the trustees and not by others of them.

"We have in these circumstances not been asked to determine other than the general question as to whether the relief from liability recommended by the Commission can be given, and, if it can, whether in the circumstances it should be given.

"The loan asked for from the mortgagee was for the purpose of erecting the office and shop buildings on part of the land held by the church trustees. In terms, the memorandum of mortgage, which was executed on July 16, 1926, is one whereby some eighteen individuals, registered as proprietors of the land in question, in consideration of £25,000 lent to them by the mortgagee, mortgaged the land in question to the mortgagee. The receipt of the moneys advanced was acknowledged by the mortgagors jointly and severally, and the mortgagors jointly and severally covenanted to pay such moneys and interest thereon at the times and in the manner set out in the memorandum of mortgage. The certificate of title to the land witnesses that 'the persons named in the schedule hereunder written who with their successors in office are hereinafter referred to as "The Trustees" are seized of an estate in fee-simple as trustees under' a named deed. The schedule contains the name of the original trustees, their successors being notified, we understand, to the District Land Registrar by a certificate of the Board of Trustees as required. In the Register a discharged mortgage is entered as 'The trustees to ,' and the mortgage to the present mortgagee is entered 'The registered proprietors to ,' the mortgagee; but the words 'registered proprietors' are struck out, and the words 'The Trustees' substituted. This alteration is initialled by the District Land Registrar.

"The correspondence produced, relating to the granting of the loan and the execution of the mortgage, tends to show that the mortgagees regarded the application as one by the trustees. No reference was made to the individual trustees, and no inquiry made as to their means. Nevertheless, the covenants for payment of principal and interest, both in the preceding mortgage that was discharged when the mortgage now under consideration was given, and the present mortgage, are entered into jointly and severally by the individuals described as mortgagors. It is not contended that, *prima facie*, the memorandum of mortgage, as it now stands, the several individuals, who entered into the covenants, are not jointly and severally liable, but it is argued that such covenants were entered into by mutual mistake, and that this Court should take cognizance of that fact and relieve the mortgagors from their several obligations under the covenant.

"This Court, it is suggested, has, by virtue of the provisions of s. 43 (1) and (9) and s. 71, ample power to vary the terms of the mortgage, and in this case should rely on those powers to make the mortgage conform to what, it is said, was the obvious intention of the parties.

"No doubt the Court has wide powers to vary the terms of an adjustable security and make such order as it deems fit, when, for the purpose of the Act, an adjustment is shown to be necessary; but it is clear that such power should not be exercised unless it is necessary to exercise them for the purposes of the Act.

"In this case it as admitted that the parties to the covenants to pay are in a position to carry out their contract, and that without adjustment they can perform the bargain they entered into. This Court has already held that in such cases the machinery of the Act should not be put into operation: *In re D.B.*, [1937] N.Z.L.R. 1112. In effect, what we are asked to do is to rectify the memorandum of mortgage, not because rectification is necessary to enable the parties to carry out their bargain, but because in the view of one of the parties to it the bargain concluded does not express the true intention of the parties.

"When a contract has been concluded by deed, the question as to whether it can be rectified depends upon the admissibility and effect of testimony, apart from questions of law, which are within the province of the Supreme Court. The parties are aware of this, but suggest that this Court should exercise its powers because their equitable rights, if pursued in the Supreme Court, may be found to have been lost by reason of their own laches. If the Supreme Court holds that they have so lost their claim to ask that Court to grant them equitable relief, it appears to this Court that the same reason should prevent this Court granting relief unless it were necessary for a purpose of this Act.

"In our opinion, since it is not shown that applicants cannot carry out their obligations without alteration in the terms of the mortgage, this Court should not attempt in these proceedings a construction of the bargain between the parties, which the parties can well take to the Supreme Court if they so desire.

"Inasmuch, however, as the question of the exact nature of the order to be made in the event of the personal covenant not being discharged was not fully discussed, and the parties may desire adjournment to enable them to take proceedings in the Supreme Court for rectification of the memorandum of mortgage, judgment is withheld to enable the parties to make further representations. Such representations should be made at the sittings of the Court commencing on Monday, July 25, 1938."

* Continued from p. 216.

Legal Literature.

Change and Decay: The Recollections and Reflections of an Octogenarian Bencher. By SIR ARTHUR UNDERHILL, Kt., LL.D., Bencher of Lincoln's Inn. Pp. 228. London: Butterworth and Co. (Publishers) Ltd.

"It will be found that on the whole the ensuing pages do not show me as an unmitigated male frump and grouser, but rather as a friendly critic and adviser, and, in some respects, an admirer of modern views," the author says in answer to some of his friends who have criticized the title of his admirable book of recollections, *Change and Decay*. Under that title, he recalls the events and changes during a life which began on October 10, 1850, and which he is still enjoying.

After a happy boyhood, Underhill went to Trinity College, Dublin, in the days when Lord Cairns was its Chancellor and Dr. Mahaffy, "with a world-wide reputation as a Greek scholar and wit," a favourite Professor. His interest in philosophy and astronomy, in which he indulged at Trinity, did not apparently survive his articles to his father, a Wolverhampton solicitor. Strangely enough, the future great property and equity lawyer was insufferably bored by conveyancing work which occupied his articled years: "unsupportably dull and repellent" are his own words, and the documents which he had to copy "wearisome and verbose." So, in the autumn of 1869, with his father's approval, young Underhill left the solicitors' branch of the profession for ever, entered as a student of Lincoln's Inn, and became a pupil in the office of a common-law barrister.

His first interest was in the common-law side, and *Underhill on Torts* was the child of these years. He says that now, after sixty-odd years, he is sometimes asked by Canadian and American lawyers to whom he is introduced if he is the *son* of *Underhill on Torts*, to which he invariably answers that he is its father, but no longer its editor.

After five years of work on the Oxford Circuit, Underhill decided that the common law was not his vocation, and, as he was receiving useful conveyancing work from railway companies, he decided on devoting his attention to conveyancing and equity. His assistance in the first Settled Land Act brought him lectureships, which he held for many years under the Law Society and the Council of Legal Education. For ten years he was Reader in the Law of Real and Personal Property, but resigned in 1905 on his appointment as one of the Conveyancing Counsel of the Supreme Court of Judicature. Then came the general editorship of the *Encyclopædia of Forms and Precedents*, to the beginnings of which he makes entertaining references, and later, the position of revising editor for the real property and conveyancing titles in both editions of *Halsbury's Laws of England*.

The leading part which Sir Arthur Underhill took in the nature and direction of the reforms in real-property law fathered by the Earl of Birkenhead, forms a very interesting portion of his memoirs, and they earned him a knighthood.

As a book of recollections of eminent people on the Bench and at The Bar, *Change and Decay* is a real "find," and a whole page of the index is required to detail the subject of "Anecdotes" alone. Beginning with Lord Bowen, who, in the author's opinion, was the most brilliant man who has sat on the Bench in the long period Sir Arthur can span, he has something to say about a great many men whose names are familiar from the Law Reports. The last chapter is devoted to the author's yachting cruises.

Change and Decay is a fascinating account of a long and fully-lived life which happily continues. It should take its place on the lawyer's shelf alongside Sir Frederick Pollock's *For My Grandson*, Augustine Birrell's *Things Past Redress*, Sir Edward Clarke's *Story of My Life*, and Sir Henry Theobald's *Remembrance of Things Past*, all of them the autobiographical records of long lives usefully spent in the service of the law.

Practice Precedents.

In Divorce: Permanent Maintenance.

The word "maintenance" is used when permanent provision is sought after a decree of divorce or nullity of marriage. After a decree for judicial separation, the term "alimony" is used. After a decree for restitution of conjugal rights, the words "periodical payments" are used: Divorce and Matrimonial Causes Act, 1928, s. 9; and, generally, see *Raydon and Mortimer on Divorce*, 3rd Ed. 376.

There is no rule fixing any porportion of the husband's income payable by way of maintenance: *Hulton v. Hulton*, [1916] P. 57. In *Allardice v. Allardice*, (1903) 23 N.Z.L.R. 178, it was held that even though property of the husband is not producing income but is saleable that fact may be taken into account in ascertaining the husband's ability to pay maintenance.

As to the payment of a lump sum, see *Georgetti v. Georgetti*, (1908) 28 N.Z.L.R. 597; and as to payment of maintenance when there is an agreement for payment of an annuity to a wife, see *Lodder v. Lodder*, [1924] N.Z.L.R. 355.

An order for permanent maintenance may be enforced in the Supreme Court in the same manner as any other order for payment of moneys. It may be enforced in the Magistrates' Court: Destitute Persons Amendment Act, 1930, s. 2, which gives the Magistrates' Court power to cancel, vary, suspend, or substitute a new order for the order made by the Supreme Court. A copy of any such order must be forwarded by the Clerk of the Court to the Registrar of the Supreme Court where the original order was made. The Magistrate may not increase the amount to an amount exceeding £3 a week. The alteration of the order by the Magistrates' Court does not limit the jurisdiction of the Supreme Court on any appeal.

There is often a clause inserted in the petition for maintenance concerning the health of the petitioner. Such a clause is not included in the following petition; but, if it were, an affidavit by a medical practitioner would be the most satisfactory way in which to substantiate it. When a petition for permanent maintenance is prepared, it is usual to draw a full affidavit verifying the clauses in the petition, and not to merely rely on the short verifying affidavit.

Under s. 33 of the Divorce and Matrimonial Causes Act, 1928, the Court may on any decree for divorce or nullity of marriage secure to the wife such gross sum of money or annual sum of money for any term,

not exceeding her life as, having regard to her fortune (if any), to the ability of her husband, and to the conduct of the parties as it deems reasonable. The Court may, either, in addition to or instead of any order as to payment of a gross sum or annual sum, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance as the Court thinks reasonable. The Court has power to discharge or modify, or temporarily suspend, the order if the husband becomes unable to make the payments; and it may subsequently revive it either wholly or in part; and it may likewise increase the amount if satisfied the husband's income has increased: see hereon *Hammond v. Hammond*, [1934] G.L.R. 124; *Buzza v. Buzza*, [1930] N.Z.L.R. 737; and *Schischka v. Schischka*, [1936] N.Z.L.R. 50.

Rule 91 of the Divorce Rules provides that the application for maintenance is made by separate petition. The petition is supported by notice of motion, &c., and where the application for maintenance is by consent it may then be embodied in the motion: *Robertson v. Robertson and Favagrossa*, (1883) 8 P.D. 94. The order granting the decree absolute likewise contains the order as to payment of maintenance; but, where a separate petition is filed, a separate order is sealed. The application for permanent maintenance cannot be made prior to the granting of the decree absolute: it may be made at the same time or subsequently within a reasonable time after the grant of the decree absolute. What is a reasonable time depends on the circumstances: *Robertson v. Robertson* (*supra*); *Martin v. Martin*, [1923] G.L.R. 441; *Pooley v. Pooley*, [1936] N.Z.L.R. 598; *Scott v. Scott*, [1921] P. 107; and *Legge v. Legge*, [1928] 45 T.L.R. 157.

A certified copy of the petition must be *personally* served unless the Court or a Judge otherwise directs: R. 93. The husband or wife may file an answer to the petition for maintenance within fourteen days after service, and he or she must deliver a copy thereof to the opposite party or to his solicitor *on the same day*: R. 94.

PETITION FOR MAINTENANCE.

SUPREME COURT OF NEW ZEALAND.

.....District. IN DIVORCE.

.....Registry. No.....

BETWEEN A. B. &c. Petitioner
AND
C. B. &c. Respondent.

To the Supreme Court of New Zealand.
day the day of 19 .

The petition of A. B. of the City of in the Dominion of New Zealand married woman showeth as follows:—

1. That your petitioner is the petitioner in these proceedings.
2. That a decree absolute was granted to me by this Honourable Court at on the day of 19 .
3. That there are issue of the marriage two children both girls namely and both born on the day of 19 . Your petitioner has the custody of these children.
4. That the said C. B. is possessed of the sum of £ or thereabouts invested in Government bonds.
5. That the said C. B. is possessed of certain lands at containing acres of the value of £ or thereabouts.
6. That the said C. B. is a bank clerk and is in receipt of a salary of £ per annum.
7. That the said C. B. resides with his father at to whom he pays 15s. per week for board and lodging.
8. That on the day of an order was made by Mr. Justice at for the payment by the respondent to the petitioner of the sum of three pounds ten shillings per week (£3 10s.) for alimony pendente lite as from the day of 19 . There are no arrears of payments.
9. That apart from moneys received pursuant to the order referred to in para. 8 of the petition your petitioner has no income or assets of any kind.
10. That your petitioner resides with her parents at and pays the sum of three pounds (£3) per week for board and lodging on behalf of herself and children.
11. That your petitioner's parents are not able to assist your petitioner financially being old-age pensioners.
12. That the ages of the children preclude your petitioner from engaging in any occupation whereby her income might be supplemented as the health and age of your petitioner's parents is such that they are unable to care for young children.

Your Petitioner therefore prays:—

(i.) That an order be made by this Honourable Court for payment of permanent maintenance to her and her children.

(ii.) That the said C. B. secure to your petitioner the amount of such permanent maintenance for the term of her life giving a security over the land mentioned in para. 5 hereof and over other property belonging to the said .

(iii.) That the said C. B. be ordered to pay the costs of and incidental to this petition.

.....(*Signature*).

(*Small verifying affidavit.*)

Witness to signature:

MOTION IN SUPPORT OF PETITION FOR MAINTENANCE.

(*Same heading.*)

TAKE NOTICE that Mr. of Counsel for the above-named A. B. will move this Honourable Court on day the day of 19 at the Supreme Court House at the hour of 10.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard for an order in terms of the prayer of the petition filed herein for payment of permanent maintenance to the said A. B. and her children UPON THE GROUNDS that the said A. B. and her children are entitled to such permanent maintenance and require such maintenance for the support of the said A. B. and her children and is without means and that the said C. B. is well able to pay maintenance AND UPON THE FURTHER GROUNDS appearing in the petition and affidavit filed herein AND FOR AN ORDER that the costs of and incidental to this application be paid by the said A. B.

Dated at this day of 19 .

.....
Solicitor for the respondent C. B.

To the Registrar and to the petitioner A. B.

This notice of motion is filed by &c.

NOTE.—Entry of appearance is to be filed in usual form before the answer filed.

ANSWER OF RESPONDENT.

(*Same heading.*)

I A. B. of the City of bank clerk in answer to the petition for permanent maintenance filed herein by the above-named respondent make oath and say as follows:—

1. That I am at present employed by the [*Bank*] as a ledger keeper at a salary of £ .
2. That the allegations contained in paras. 1, 2, 3, and 8 of the petition for maintenance herein are correct.
3. That I do not own any Government bonds having disposed of them in the year 19 the moneys from which amounted to the sum of £ only.
4. That the lands referred to in para. 5 of the petition of the said C. B. are used for farming purposes the stock and chattels being subject to an agreement between myself and the Loan and Mercantile Co. Ltd., duly registered under the Chattels Transfer Act. Net working-expenses of the said lands for the year ended the day of 19 showed a net profit of only five pounds (£5).
5. That I and my brother are the joint registered proprietors of the lands referred to in para. 5 of the respondent's petition for maintenance such lands being subject to mortgage number for the sum of £ the rate of interest on same amounting to £ per year.
6. That the statement attached hereto marked "A" sets out my total income and my debts and liabilities and shows a balance of only £ .
7. That I pay my parents the sum of one pound fifteen shillings (£1 15s.) and not fifteen shillings (15s.) for board and lodging.
8. That although I am fully employed I suffer from an injury to my hip and am put to considerable expense thereby.

9. That I am forty years of age and the respondent is twenty-six years of age and is well able to earn income being an accomplished musician owning her own piano.

Sworn &c.

ORDER FOR PAYMENT OF MAINTENANCE.

(*Same heading.*)

day the day of 19 .

Before The Honourable Mr. Justice .

UPON READING the petition for permanent maintenance filed herein and the motion and affidavit filed in support thereof and the answer of the respondent C. B. filed herein AND UPON HEARING Mr. of Counsel for the petitioner and Mr. of Counsel for the respondent THIS COURT DOTH ORDER that the above-named C. B. do pay to the above-named A. B. the sum of £ per week for the maintenance of herself and the two children and of the marriage the first of such payments to be made on or before the day of 19 AND THIS COURT DOTH FURTHER ORDER that liberty be reserved to both parties to this petition to move at any time for a variation of this order should the circumstances of the parties change AND IT IS ORDERED that the said C. B. do pay to the said A. B. the sum of £ for costs and disbursements of and incidental to the petition.

By the Court.

.....

Registrar.

Bills before Parliament.

Social Security.—PART I: Cl. 3: Social Security Department. Cl. 4: Social Security Commission. Cl. 5: Acting Commissioners. Cl. 6: Meetings of Commission. Cl. 7: Commission to have powers of Commission of Inquiry.

PART II: SUPERANNUATION.—Cl. 8: Commencement of this Part. Cl. 9: Administration of this Part. Cl. 10: Interpretation. Cl. 11: Persons over sixty-five years of age entitled to superannuation benefits. Cl. 12: Qualifications of persons entitled to superannuation benefits. Cl. 13: Rates of superannuation benefits. Cl. 14: Qualifications as to age of persons entitled to age-benefits. Cl. 15: Other qualifications of persons entitled to receive age-benefits. Cl. 16: Rates of age-benefits. Cl. 17: Deductions from basic rate in respect of income and accumulated property. Cl. 18: Rate of benefit may be increased in respect of children. Cl. 19: Additional benefit in respect of service in South African War. Cl. 20: Assessment of value of accumulated property. Cl. 21: Modification of provisions as to accumulated property in their application to married applicants. Cl. 22: Qualifications of women entitled to receive widows' benefits. Cl. 23: Rates of widows' benefits. Cl. 24: Deductions from rates of benefit computed in accordance with *last preceding* section. Cl. 25: Separate benefit may be granted to widow when benefit ceases to be payable in respect of children. Cl. 26: Children entitled to receive orphans' benefits. How orphans' benefits to be paid. Cl. 27: Rates of orphans' benefits. Cl. 28: Family benefits. Cl. 29: Conditions attached to grant of family benefit. Cl. 30: Rate of family benefit. Cl. 31: How family benefit to be paid. Cl. 32: Family benefit to be expended for maintenance or education of children. Cl. 33: Invalids' benefits. Cl. 34: Rates of invalids' benefits. Cl. 35: Additional benefit payable in respect of blindness. Cl. 36: Duration of benefit in respect of children. Cl. 37: Vocational training of blind beneficiaries. Cl. 38: Medical examination of invalids. Cl. 39: Persons entitled to miners' benefits. Cl. 40: Conditions precedent to grant of miner's benefit. Cl. 41: Rates of miner's benefits. Cl. 42: Application for miner's benefit to be accompanied by medical certificate. Cl. 43: Funeral expenses of deceased miner. Cl. 44: Benefit to widow of deceased miner. Cl. 45: Benefits in respect of temporary incapacity. Cl. 46: Rates of sickness benefits. Cl. 47: Rate of sickness benefit affected by other payments in respect of same incapacity. Cl. 48: Applications for sickness benefits to be supported by medical certificates. Cl. 49: Period for which sickness benefit payable. Cl. 50: Method of payment of sickness benefits. Cl. 51: Unemployment benefits. Cl. 52: Rates of unemployment benefits. Cl. 53: Deductions from rate of unemployment benefits. Cl. 54: Period for which unemployment benefit payable. Cl. 55: Persons entitled to benefit in respect of service in Maori Wars. Cl. 56: Qualifications of applicants for Maori War benefits. Cl. 57: Rate of Maori War benefit. Cl. 58: Commission may grant special benefits in cases of hardship. Cl. 59: Claims for benefits to be investigated by Department. Cl. 60: No person to receive more than one benefit. Cl. 61: Mode of ascertaining income and property of applicants for benefits. Cl. 62: Limitation in special cases of benefits conferred by this Part of Act. Cl. 63: Special provisions as to war pensioners. Cl. 64: Special provisions affecting rates of benefits payable to overseas pensioners. Cl. 65: Benefits granted in respect of children under sixteen years of age may be continued for educational purposes. Cl. 66: Period for which benefits payable. Cl. 67: Payment of benefits. Cl. 68: Benefits to be absolutely inalienable. Cl. 69: Effect of absence of beneficiary from New Zealand. Cl. 70: Recovery of payments made in excess of authorized rates. Cl. 71: Benefit may be reduced in certain cases. Cl. 72: Forfeiture of instalments of benefits. Cl. 73: Claims to benefits in respect of disabilities caused by accident affected by right to recover compensation or damages. Cl. 74: Provisions applicable on death of beneficiary. Cl. 75: Repeals and savings.

PART III: MEDICAL AND HOSPITAL BENEFITS, AND OTHER RELATED BENEFITS.—Cl. 76: Administration of this Part. Cl. 77: Classes of benefits to be provided under this Part of Act. Cl. 78: Commencement of benefits. Cl. 79: Qualifications of persons entitled to claim the benefits to be provided in accordance with this Part of Act. Cl. 80: Right to benefits restricted in cases where person receiving medical or other treatment is entitled to claim compensation or damages. Cl. 81: Provisions in special circumstances. Cl. 82: Appointment of Committees. Cl. 83: Contracts of service entered into for purposes of this Part of Act may be terminated by Minister on recommendation of a special tribunal and not otherwise. Cl. 84: Scope of medical benefits. Cl. 85: Medical benefits to be afforded in accordance with a contract between the Minister and medical practitioners. Cl. 86: Selection by beneficiaries of medical practitioners. Cl. 87: Duties of medical practitioners. Cl. 88: Scope of pharmaceutical benefits. Cl. 89: Pharmaceutical benefits to be provided in accordance with arrangements made by Minister. Cl. 90: Interpretation. Cl. 91: Payments in respect of Hospital treatment afforded by Hospital Boards. Cl. 92: Payments in respect of hospital treatment in private hospitals or in approved institutions. Cl. 93: Special provisions as to maintenance in mental hospitals. Repeals. Cl. 94: Scope of maternity benefits. Cl. 95: Payments in respect of maternity benefits afforded by Hospital Board. Cl. 96: Payments in respect of maternity benefits afforded in private hospitals. Cl. 97: Services of registered midwives and maternity nurses. Cl. 98: Special provisions as to State maternity hospitals. Cl. 99: Payments in respect of maternity benefits. Cl. 100: Minister may make arrangements for the provision of supplementary benefits.

PART IV: FINANCIAL PROVISIONS.—Cl. 101: Commencement of this Part. Cl. 102: Social Security Fund. Cl. 103: Employment Promotion Fund to be abolished on 30th September, 1939. Cl. 104: Moneys payable into Social Security Fund. Cl. 105: Moneys payable out of Social Security Fund. Cl. 106: Authorizing grants from Consolidated Fund in aid of Social Security Fund. Cl. 107: Social Security Contribution. Cl. 108: Commissioner of Taxes to assess and collect Social Security Contribution. Cl. 109: Persons liable for payment of Social Security Contribution. Cl. 110: Exemptions from liability to pay Social Security Contribution. Cl. 111: Commissioner may grant personal exemptions. Cl. 112: Rates of Social Security Contribution. Cl. 113: Due dates of registration fee. Cl. 114: First instalment of registration fee. Cl. 115: Penalties for default in payment of registration fee. Cl. 116: Registration fee may be deducted from wages in certain cases. Cl. 117: Charge on salaries and wages to be deducted by employers. Cl. 118: Offences by employers. Cl. 119: Due dates of payment of charge on income other than salary or wages. Cl. 120: Penalties for wilful evasion of charge. Cl. 121: Commencement and termination of liability for charge on income other than salary or wages. Cl. 122: Assessment of charge on income other than salary or wages. Cl. 123: Special provisions as to trustees. Cl. 124: In computing charge on income, Commissioner may set off losses incurred in business against subsequent income. Cl. 125: "Income" defined. Cl. 126: Social Security Stamps. Cl. 127: Mode of payment of Social Security Contribution. Cl. 128: Recovery of Social Security Contribution. Cl. 129: Burden of proving exemption from liability to pay Social Security Contribution. Cl. 130: All persons over sixteen years of age required to be registered. Cl. 131: Penalty for failure to register. Cl. 132: Offence to employ unregistered person. Cl. 133: Repeals and savings.

PART V.—Cl. 134: Offences. Cl. 135: Proceedings for offences against this Act. Cl. 136: General penalty for offences. Cl. 137: Exemptions from stamp duty. Cl. 138: Regulations. Cl. 139: Annual reports. Schedule.

Students' Supplement

TO

The New Zealand Law Journal.

No. 1. TUESDAY, AUGUST 23, 1938.

The Law and Tradition.

" The mind of modern man is what it is by virtue of transmitted and imparted tradition and social reactions."

—Robert Briffault ; Breakdown, the Collapse of Traditional Civilization.

THE publication of this Supplement marks a new departure, and I feel that students can justifiably claim that it is not without importance. Obviously, the opportunity for the junior members of the profession to write articles for publication in the LAW JOURNAL, without the necessity for competing with practitioners, is a privilege of considerable value to them. Moreover, it gives students of law in New Zealand some measure of equality with those more fortunate Law Schools in other parts which are able to publish their own journals.

The publication of this issue of the JOURNAL should also be recognized as of vital interest to the profession. It will enable a better understanding by the profession of the outlook of the new generation of lawyers ; and, conversely, it will enable students, by addressing their minds to problems generally within the purview of their elders, the better to appreciate the difficulties in the midst of which they must spend their lives.

But is that all ? Should not this opportunity be used also to express opinions which have a significance beyond the confines of the legal profession ? The world of to-day is vastly different from the pre-War world ; the problems confronting its people are different, and it is only to be expected that the outlook of many younger persons to-day will differ substantially from that of the seniors of the community. I feel that those junior members of the legal profession who consider the world around them, approach the study and the practice of the law with their minds riven by a conflict difficult to reconcile.

I summarize it thus—the world and its problems are ever changing ; the acceptance of such change is essential ; but social conditions are continually striving to maintain the present form of society unaltered ; and this must spell disaster for civilization in course of time. The law, as the bulwark of liberty, is vitally interested in this conflict of a changing world and the maintenance of a traditional civilization. Students must be affected by this conflict, and should endeavour to appreciate its significance.

Ours is a traditional civilization ; though human society is the outcome of human purposes, the expression of human desires and endeavours, yet for the vast majority its workings are wrapped in mystery. Our beliefs, our education, our moral and ethical standards, and our law are the outcome of tradition handed down through the ages.

Let us consider the position of the law. Precedent is the foundation of our case law, and tradition itself admittedly plays no small part in the legal system. So long as practices imposed by tradition are used for the maintenance of the independence of the judicial system, no objection can be raised ; but should tradition be called upon as part of the law administered, the law will be under indictment with all tradition ; for surely, in a changing world, the fact that a certain dogma has been accepted in the past has no probative value of its applicability to the present.

This needs some explanation. Society must have rules of conduct for individuals *inter se*, and there are reasons of practicability in favour of some at least of these rules being imposed by case law. But the matter does not rest there. Case law embodies the dogma in a past age, and in so doing, and in so far as it does so, it allies itself to one side of the conflict above mentioned—it allies itself to the maintenance of a traditional civilization.

The purpose of a large portion of the criminal law for instance is to prevent the established institutions of the State from being brought into hatred or contempt, thereby upholding the tradition that authority is wielded for the common welfare of mankind. Our law of property and of contract is based on the tradition of a divided community, on the tradition of different rights for those who own and those who labour ; this is a tradition incidentally which has been at the foundation of all earlier civilizations.

It is difficult to draw the line of demarcation between the value of case law for defining the rights of individuals and the danger of the maintenance of a traditional civilization ; but the danger must be appreciated. Although the advantages of the experience and knowledge transmitted by tradition are great, when society, as at present, endows tradition itself with validity, it is adopting a suicidal policy.

What is the result of this policy ? The human mind which is capable of miraculous achievements in certain of the sciences, manifests an insipid futility with regard to vitally important matters threatening the very existence of civilization. The usual excuse is to blame this futility on to the frailty of human nature. The excuse will not suffice : the human mind has again and again shown its ability to adapt itself and to overcome difficulty, if allowed to do so. We must face the stark fact that we live not in a " society " or a " civilization " in the true sense. An agglomeration of human beings does not constitute a society ; and the agglomeration of human beings which we erroneously call society is unable to appreciate—and analyse—the vitally important matters of this world ; it is unable to combine as a " society," mainly because it is hemmed in and limited by the validity given to tradition. The law, as an organ of tradition, must accept its share of the blame for the condition of society.

The future must remain a matter of conjecture. Let us remember, however, that the Egyptian, the

Chinese, the Greek, and the Roman civilizations each perished in the attempt to preserve unaltered the conditions of their eras. This incapacity or refusal to change, to adapt themselves to altered conditions, is, moreover, the usual manner in which organisms and races perish. To give validity to tradition is merely another way of opposing a change in our social conditions; and to the eminent sociologist from whom I have quoted at the opening of this editorial it is the death-knell of the current western civilization.

The exit of that civilization, if it is allowed to pass, may initiate a dark age or its death-knell may be the birth-pangs of a new civilization. It is a matter of conjecture and an uncomfortable conjecture unless educated men and women, including the members of the legal profession, address their minds to the basic difficulties of this world. Of especial importance to us is the question whether the junior members of the profession will interest themselves in such problems. The inauguration of this Student Number of the LAW JOURNAL must surely give opportunity and prompting to them to do so.

That is the reason for claiming that this publication may be of importance beyond the confines of the legal profession; whether the Student Law Journal will achieve such importance can be judged only over a period of years. The opportunity rests with the students; the judgment rests with the profession.

—A. R. PERRY.

The Students' Supplement.

The pages which follow comprise what is known to the profession as the "Students' Supplement" to the NEW ZEALAND LAW JOURNAL. In one respect this description is a misnomer.

Those eligible to contribute articles are undergraduates in law and all persons who have graduated within the last seven years. An endeavour has been made by the insertion of a circular in the NEW ZEALAND LAW JOURNAL, by notices posted in the different centres, and mainly by the efforts of Committees working in such centres, to ensure that the publication is the result of a national effort. No doubt many who would have contributed this year have not been able to do so, either because the "Supplement" has not come to their knowledge or because their notice was too short.

It was anticipated that this first supplement would be subject to such defects and shortcomings. I can only say that it is hoped that the supplement will become a regular annual publication, and that in future such defects may be obviated and the supplement attain such a standard as will justify its continued publication.

The task of choosing which articles were to be published has fallen to the lot of the Editorial Board. This Board comprises Professor James Williams of Victoria University College, who was asked to represent the teaching staffs of the four University Colleges; Mr. I. H. Macarthur, who was asked to represent the interests of the profession; Mr. E. K. Braybrooke, who was appointed by the Auckland Committee; and Mr. J. C. White, who was appointed by the Christchurch Committee. To these gentlemen for their advice and services so willingly given to further the publication, the thanks of all students are due.

—A. R. PERRY.

The Covenant to Insure.

A Consideration of Tredegar v. Harwood.

By H. J. EVANS.

Few cases in recent years have caused more surprise to lawyers than the decision of the House of Lords in *Viscount Tredegar v. Harwood*, [1929] A.C. 72. Regarded now as the leading authority on the construction of the covenant to insure in a lease or mortgage, its effect has been, in the view of many conveyancers, to call in question much that was regarded as certain by previous judicial dicta and well-established practice.

The facts of the case were simple. A long-term lease contained a covenant by the lessee to insure the premises "in the Law Fire Office or in some other responsible insurance office to be approved by the lessor." Mrs. Harwood, the assignee of the lease, failed to keep up the existing insurance in the Law Fire Office, and instead took out a policy in the Atlas Company. The lessor, who for reasons of estate management was anxious that all his insurances should be in one office—namely, the Law Fire Office—refused to treat Mrs. Harwood's insurance in the Atlas Company as compliance with the covenant, and brought an action in the Chancery Division for determination of the question of law involved.

The case ultimately reached the House of Lords. By a majority it was held, reversing the unanimous decision of the Court of Appeal, that the covenant imposed upon the lessee a primary obligation to insure in the Law Fire Office, and that, accordingly, the lessor had an absolute right to withhold his approval of an alternative office without entering upon reasons. Furthermore, the majority considered that, even assuming that an implied term was to be imported into the covenant—that the lessor's approval was not to be unreasonably withheld—the grounds of the lessor's disapproval, which have already been indicated, were reasonable. These findings it is proposed to consider in detail.

1. It is a little difficult to see why the covenant should have been construed as involving a "primary obligation" to insure in the Law Fire Office. As was pointed out in the Court of Appeal, the meaning thus put upon the words requires the addition of some such expression as "failing which," to indicate that the alternative is really a subservient clause, only coming into play if, for some reason, insurance in the Law Fire Office should not be available. It would seem more reasonable to argue that the use of the word "or" *prima facie* imports an alternative: see per Parke, B., in *Elliot v. Turner*, (1845) 15 L.J.C.P. 49. If it is then objected that to import such an alternative does not dispose of the matter, in that it might be exercisable as well at the lessor's option as at the lessee's, the maxim *Verba chartarum fortius accipiuntur contra proferentem*, which now finds its chief application in cases of ambiguity, could be invoked: see *Broom's Legal Maxims*, 9th Ed., 379.

2. In view of the construction placed upon the word "or," the observations of the majority of the Law Lords upon the meaning of the expression "to be approved by the lessor" must be regarded as obiter.

There is still, therefore, no authoritative decision on the shorter form of covenant, to insure " in some responsible insurance office to be approved by the lessor." Can the lessor refuse to approve every office except the one of his own preference, or can the lessee insist on the lessor's approval being given to an office of his own nomination, provided it is responsible ? The majority evidently regarded " approved " as synonymous with " selected," and treated the requirement of responsibility as having been inserted for the protection of the lessee. Lord Blanesburgh's view was in strong contrast. He says, at p. 85 :

> " Suppose again, that for some reason the Law Fire disappeared or were absorbed in some other office. The appellant could not in that case require a lessee to insure in an office of his own nomination, for the privilege of nomination is not reserved to him. And if the appellant, desirous of confining insurances to one office, were to disapprove of every other office as submitted to him, however responsible or unobjectionable in every way some at all events of those submitted might be, that action on his part I cannot doubt would be held unwarranted on the well-known principle explained and applied by Tindall, C.J., in *Dallman v. King* (4 Bing. N.C. 105, 109). The gist of the covenant is that the office selected by the lessee and tendered for approval should be responsible. To withhold approval, therefore, from every responsible office but one, and that for some reason entirely irrelevant to insurance protection, would go to the destruction of the thing granted and, ' according to the well-known rule, the thing granted would pass discharged of the condition'. "

A further indication that the problem is still regarded as unsolved appears from a precedent in *The Conveyancer* (Vol. 14, 321), where, in a footnote to a covenant to insure " in some office selected by the lessor," reference is made to the " disadvantage " of using the term " approved." For the foregoing reasons, therefore, it is submitted that whatever the true position may be it is impossible to say with any certainty that " approved " means " selected."

3. Still another feature of the case was the calling in question by two of the Law Lords (Viscount Dunedin and Lord Phillimore) of the soundness of the judgment in *Houlder Bros. and Co. v. Gibbs*, [1925] Ch. 575. In that case the Court of Appeal had propounded the rule that where to a covenant by the lessee not to assign without the consent of the lessor there is added the well-known proviso as to reasonableness in not withholding such consent, the test of reasonableness must be applied with due regard to the purpose of the covenant, and cannot take into account extraneous or collateral considerations unconnected with the relationship of landlord and tenant. Viscount Dunedin's view, in which Lord Phillimore evidently concurred, was that reasonableness was to be read in a general sense, and not merely with reference to something which touched the parties to the lease. The expression of these views, however, was obiter, and accordingly the decision in *Houlder Bros.*' case (*supra*) still stands unshaken. Moreover, it is submitted on principle that whatever objections may be raised against the decision it at least provides a workable rule. What Judge will be able to say what should and what should not be regarded as reasonable once extraneous matters are liable to be brought in ?

4. Most of the covenants to insure contained in recent conveyancing precedents give the lessor a right to select the office. It is suggested that the following forms of covenant might be resorted to in those cases where it is desired to give the choice to the lessee :—

(*a*) " In some responsible insurance office."

This would be appropriate only in those instances where the lessor is willing to take the risk that no insurance office which is responsible is objectionable on other grounds.

(*b*) " In the [*named*] office or in some other responsible insurance office."

If there be no reason to believe that the named office is likely to cease operations, and if the lease be for a comparatively short term, this form of covenant would be acceptable, subject to some extent to the remarks under (*a*).

(*c*) " In some responsible insurance office to be approved by the lessor, provided that such approval shall not be unreasonably or arbitrarily withheld in the case of any responsible insurance office proposed by the lessee."

In a substantial number of cases, it is submitted, such a form of covenant could be resorted to without prejudicing the lessor's interests. Furthermore, the arguments which can be adduced for giving the lessee, in certain cases, the right to insure in an office of his own choice would apply with even greater force to the case of mortgagor and mortgagee. Even in that case, of course, particular circumstances might render it desirable or necessary for the mortgagee to retain unrestricted the right to insist on the office ; but such circumstances should be exceptional. It would seem to be more in harmony with the spirit of our law, under which the mortgagor is himself the owner of the freehold, that the choice of the insurance office should be reserved to him, subject to the mortgagee's right to withhold approval in those instances where, owing to the irresponsibility of the office or to its being unsuitable on grounds connected with the relationship between the parties, his security would otherwise be endangered.

Appreciation.

The Editorial Board, on behalf of the law students and clerks, desires to thank the many persons who have assisted in producing this Student Supplement, and especially Mr. A. R. Perry, who has acted as secretary to the Board and has willingly undertaken quite the heaviest part of the burden of promoting and organizing the venture.

Our best thanks are also due to Messrs. Butterworth & Co. (Aust.), Ltd., for undertaking the publication of the Supplement ; and to the New Zealand Manager of Messrs. Butterworth & Co. (Aust.), Ltd., and the Editor of the NEW ZEALAND LAW JOURNAL for the encouragement, help, and advice which they have so freely given.

JAMES WILLIAMS,
For The Editorial Board.

Magistrate : " And what did you do when you heard the accused using such awful language ? "

Constable : " I told him he wasn't fit to be among decent people, and brought him here."

Donoghue v. Stevenson.

([1932] A.C. 562.)

By R. L. MEEK, LL.B.

Descend from Empyrean heights,
Oh Muse, thou fount of pure delights!
Come, hymn the story, strange but true,
Of Stevenson and Donoghue!

When thirsty, Mrs. Donoghue
Would scorn all alcoholic brew,
She'd heard that whisky, beer, and rum
Were thought de trop in Kingdom Come,
And only non-fermented drink,
Like tea or water, would she sink.

One day in Summer, Mrs. D.
Was purchasing some cakes for tea,
But, finding that she had a thirst,
Decided to assuage it first,
Selecting as her drinking base
A café in Wellmeadow Place.

She and her boy friend sought the shop,
And bought some bottled ginger pop.
The bottle which contained the brew
Concealed its contents from her view,
But, quite content, she bought a bun,
And chose a corner in the sun.

(Stay, reader! For I must allude
To facts you may have misconstrued.
I ought to make it clear that she,
At this time, *wasn't* Mrs. D.,
But while the case was on, you see,
She wed her boy friend, Mr. D!)

Now, from the bottle I've described,
He poured a glass out—she imbibed,
And murmured, as she munched her food,
"How nice! How exquisitely brewed!"
Her friend surveyed the bill of fare,
And chose some ice-cream and a pear.

Oh, goodness gracious! Deary me!
Oh, what a dire catastrophe!
Alas! poor Mrs. Donoghue
Poured in her glass the residue,
And, floating in the ginger ale,
Observed—a horrid squashy snail!

A student of biology
If such a sight he chanced to see,
Would say: "Now look at that! How odd!
A decomposed gasteropod!
It really is extremely queer
To find one floating in my beer!"

But Mrs. D. was different—she
Knew nothing of biology.
She gazed at it—she caught her breath—
She gasped—she turned as pale as death—
Her soul was to such sights untuned—
She simply whispered "Lawks!" and swooned.

Oh, loudly let the welkin ring!
Oh, blow on horns like anything!
All praise and highest honour to
The snail, and Mrs. Donoghue!
For Mrs. D. said "Listen here!
I'll sue the makers of the beer!"

"They've got no right to let a snail
Get drownded in my ginger ale!"
Her lawyers briefed the best K.C.'s,
Who sued *in forma pauperis*,
And argued that an action ought
To lie for such a heinous tort!

And experts came and testified
How animals could get inside.
Lord Moncrieff found for Mrs. D.;
The Higher Court dismissed her plea;
The House of Lords, by three to two,
Upheld poor Mrs. Donoghue!

Ascend to Empyrean heights,
Oh Muse, thou fount of pure delights!
For that's the story, strange but true,
Of Stevenson and Donoghue!

On the Napier Circuit.—Though it was not a case of great importance, twenty-one witnesses were called from all parts of New Zealand to give evidence in the Supreme Court at Napier when Raymond Hildebrand Horsfall was tried on charges of theft and receiving. During last Christmas holidays, a street photographer was busy in Napier snapping sunburnt countenances and slipping cards into the hands of prospective customers. This was to prove the undoing of a villian, for many of those who were photographed sent in their cards with postal notes attached, and a number of the postal notes formed part of the haul which a thief collected in a Napier shop. Working quickly the police communicated with the senders of postal notes, and found nearly a score who had kept their butts. Having the numbers of the postal notes the police were able to warn post-offices and ultimately catch their man. Little did these careful people think that their 1s. snapshots would give them two more holidays in Napier at the expense of the country for the purpose of attending the Magistrates' Court and Supreme Court hearings. Some of the evidence had a touch of humour. One young lady admitted that she had sent for a photo which was not of herself. The Crown prosecutor having noticed the description "young man" on the card gracefully refrained from further questions to the embarrassed witness. The most diverting witness, however, was a civil servant, born during the war and having the Christian names of "Joffre French." Having been photographed four times, he showed super-efficiency by sending his postal notes by registered post, and then mounting the butts of the notes and the receipt for the registered letter on cardboard. "That is the Government way," he said. The Court laughed when Mr. Lusk asked, "You did not open a file I suppose?"

A Hint to Examiners.

By J. C. WHITE, LL.M.

Whenever an address is delivered to students by a practical lawyer, we are told that a "knowledge of first principles and the ability to apply them" is the foundation of a successful career in the profession of the law. No doubt examiners do endeavour to test whether or not students appreciate the fundamental principles of a subject, but the main object must often be lost sight of in the plethora of case law students are compelled to recite. The following question (with an answer) is submitted to examiners in Torts papers as a suggested test for a knowledge of principles and their application to a common problem :—

> "*Sum up to a jury in a running-down case, stating simply and intelligently the general principles of negligence, contributory negligence, the* Bywell Castle *rule, last opportunity and the onus of proof, omitting as far as possible reference to fact, and not quoting any decided cases.*"

The answer which follows may possibly brand the writer as one who has not grasped the principles of negligence; but, having prepared the answer, he can vouch for the searching qualities of the question. Perhaps one may be excused for failing to state simply principles which seem to be inherently abstruse, and which, without illustration by reference to the facts, almost defy clear exposition to the lay mind.

THE ANSWER.

Gentlemen of the jury, the burden of proving that the defendant is responsible for the injuries suffered by the plaintiff in this case lies on the plaintiff. The plaintiff must satisfy you of two things before he can succeed: first, that the defendant has been negligent; and, secondly, that the damage suffered was a direct result of that negligence. Unless you are satisfied on both these points the plaintiff cannot recover.

Now, what is meant by negligence? It is not a difficult legal term and simply means doing a thing which a reasonable person would not do, or failing to do something which a reasonable person would do in the particular circumstances of the case. Putting it even more clearly and shortly, negligence in any given circumstances is the failure to exercise that care which the circumstances demand.

Now, gentlemen, if you decide that the plaintiff has proved negligence on the part of the defendant which caused the injuries that does not end the matter. You must then consider whether the plaintiff has been guilty of negligence which contributed to or was partly the cause of the accident. You will test the plaintiff's conduct in the same way as the defendant's, by asking the question: Was it reasonable in the circumstances? In deciding that, you will bear in mind the plaintiff's contention that he was placed in a position of sudden danger as a result of the defendant's negligence, so that he had no time to think in the "agony of the moment." You may agree with that, in which case he cannot be said to be guilty of negligence for failing to exercise the standard of care required of him in normal circumstances. You may think, however, that this is a case in which the plaintiff did have time to decide on some action, even though he had to think rapidly, and in that case he will not be excused. It is for you to say, and it is for the defendant to satisfy you that the plaintiff was negligent.

If you find that both parties were guilty of negligence which contributed to the accident, and that the acts of negligence were contemporaneous, or took place at substantially the same time, you must find a verdict for the defendant. If, however, you think it is quite clear that, although both parties were negligent, one had a later opportunity of avoiding the accident by the use of reasonable care, you must then find for the other. You may think that this is a case in which it is not possible to draw a clear line between the negligence of one party and the other so that you can say one had a later opportunity of avoiding the accident; but a further suggestion has been made—namely, that the defendant *should* have had the last opportunity of avoiding the accident. By that I mean, if you think the defendant's negligence consisted in travelling at such an excessive speed that he prevented himself from having an opportunity of avoiding the accident when it became imminent, then you are entitled to find for the plaintiff on the ground that the defendant should have had that last opportunity.

There is only one further point on which I wish to address you concerning the question of liability—that is the meaning of finding a verdict "according to the evidence" which you have sworn to do. You are not entitled to find a verdict for either party, just because there is some evidence one way or the other. It is your duty to see which way the scales are tipped, to consider all the evidence, including what the witnesses said and such silent evidence as skid-marks, broken glass, and so on. You will remember the demeanour of the witnesses and the fact that some are interested and some are independent. With a view to being satisfied, gentlemen, both Judges and juries can usefully apply tests to the evidence. You can ask yourselves whether the story of a witness, or the result of one side's evidence, is *probable* in the circumstances of this case. Another test is to look for corroboration, for it will help you considerably if you can point to any circumstance, particularly any of those things which I have called silent evidence, which give added weight to the story of one side or the other. The matter is one for you, gentlemen, and it is your duty to give a verdict in accordance with the way the scales are tipped by the weight of the evidence, and in accordance with the rules of law I have explained to you.

There are three courses open to you. You may find the plaintiff alone negligent—if so, that ends the matter, and you will find a verdict for the defendant. You may find the defendant negligent and solely responsible for the accident—again that ends the matter, and you will find for the plaintiff. Thirdly, you may find both parties guilty of negligence contributing to the accident. In that case, you will find for the defendant if you think the acts of negligence cannot really be separated in point of time, and you will only find for the plaintiff if you think that the defendant had or ought to have had a clear later opportunity of avoiding the accident.

NOTE.—The above answer is based on the relevant portions of *Salmond on Torts*, 9th Ed., with particular reference to the decisions of the Privy Council and House of Lords in *Swadling v. Cooper*, [1931] A.C. 1, and *McLean v. Bell*, (1932) 147 L.T. 262, and on summings-up delivered in New Zealand cases.

Magna Carta.

Is It Still Law?

By K. L. Sandford, LL.B.

My friend Jenkins is a man of no little dignity and breeding, but there is an amount of law he does not know. I once asked him why he did not read his current Law Reports and statutes, but he replied with smug irrelevance, that he didn't believe in 'em. He considered that all legal principles should be abolished and that there should exist instead a great axiom to cover all human relations: "Give every man a fair go."

"Hardly practicable," I murmured.

"Take Magna Carta" he said, ignoring my remark, "A perfect example of the principle. Much of its glory sparkles even now. It is time I told you something of it."

I hastily pleaded an early appearance, but with gentle insistence he pressed me into a chair, and locked the door.

There was little original in Magna Carta (continued Jenkins). It was largely a restatement of the rights and liberties of the people which King John, a cheerful scoundrel, had attacked and suppressed. Just so is most law—a great proportion consists of the declaration, the re-assertion, or repetition of some older law or custom, with additions or modifications.

For example, here is clause 9 of the Charter (actually there were no clauses, the document reading akin to an old-fashioned unpunctuated will): "We will and grant that all cities and boroughs shall have their liberties and free customs." Shades of modern legislation!

There are one or two rather interesting sections devoted to judicial administration. Take this, for instance: "The Common Pleas shall not follow our Court, but shall be holden in some place certain." Formerly, to bring suit in the C.P.'s. the litigant was obliged to follow the King throughout his travels, and bring his case to hearing as best he could. Of course, it was a little difficult to find a Judge anywhere in those days. They went on circuit once in seven years, so it was a shame if one missed the last day for setting down. Magna Carta provided for annual sessions, and also laid the foundation of the modern practice of reserving points of law.

This is quaint: "Judges shall only be appointed of such as know the law and mean duly to observe it." Reminds me of a tale concerning Kekewich, J., whose reputation was one of great learning, but whose application of it did not always commend itself to all. Many of his decisions were reversed. Said counsel, once: "This, my Lords, is an appeal from a judgment of Mr. Justice Kekewich; but there are other reasons for submitting that the judgment is wrong." It is hard to believe it of Lord Justice Bowen, but I have it on reliable authority that he said: "To have a judgment by my brother Kekewich in your favour is certainly unfortunate, but not necessarily fatal."

In force to-day is the time-honoured declaration: "A freeman shall not be fined for a small fault but after the manner of the fault, and for a great fault after the greatness thereof." Let the punishment fit the crime. But have they really stopped sending convicts to Australia?

I can say at this stage that Magna Carta is still in force and binding on the Crown, save in so far as its provisions are not obsolete or repealed. It is law in New Zealand. But where could one find it amongst the absurd mass of legislation that has poured in a never-ending stream from the country's Parliaments in the last thirty years? Even in 1668, Lord Hale, in his masterly preface to *Rolle's Abridgement of the Common Law* made a plea that the law of England be contracted into a narrower compass. Even then it had gone beyond the ken of normal man.

There is no modern diplomacy more amusingly cunning than the provision in clause 30 relating to merchants whose country is at war with England. They are to be gently detained until it is ascertained how English merchants have fared at the hands of the enemy. Subject to particular acts applying to aliens, this clause is still in force.

Here and there are stray clauses of this kind: (1) Widows are not to be forced to remarry against their will; (2) A surety is not to be called on, unless the principal debtor fails to pay; (3) No man's goods are to be seized without immediate compensation; (4) Crown debts shall have priority.

The Great Charter relies for much of its glory on the declarations in clause 29. The first section is: "No free man shall be taken or imprisoned, or be disseised, or be outlawed or exiled, or any otherwise destroyed; nor will we proceed against him, nor condemn him, unless by the lawful judgment of his peers, and by the law of the land." Contained herein are the foundations of habeas corpus and trial by jury. But despite this section, trials by jury were not a matter of right in all cases, for trial by battle remained lawful till 1819.

Trial by battle was most interesting, if a little bloody. It could be demanded by the defendant in a private suit based on an allegation of crime against the defendant. The plaintiff needs must battle in his own person, unless he be a priest, an infant, lame, blind, or sixty. The battle took place in the presence of the Judges, attired in their scarlet robes, who sat looking on while the combatants, each armed with a staff and a shield, cudgelled each other from dawn to dark, or until one cried "Craven." As recently as 1817, the defendant in *Ashford v. Thornton*, 1 B. & Ald. 405, 106 E.R. 149, claimed battle, but, as the allegation was one of murder, the plaintiff wisely declined, and accepted a nonsuit.

"And now" said Jenkins, with grave mien, "stand, while I read to you the few words that will form the bulwark of British justice for time unending, the second section of clause 29: *Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.* (To None Will We Sell, To None Will We Deny Or Delay, Right, Or Justice).' There is a breadth about the simple language employed, as if those who wrote it felt that they were asserting universal principles of justice. Even as late as *Chester v. Bateson*, [1920] 1 K.B. 829, a litigant claimed its protection, and received it. It was a case where recourse to the Courts was prohibited by Order in Council, without the sanction of a particular Cabinet Minister. And does not this kindle a spark of

recognition in our own country, where in the past ten years privileges and prerogatives have been stolen from the Courts and entrusted in many cases to the arbitary judgment of an individual parliamentarian, unversed as he cannot but be in the experience of weighing and judging conflicting issues? Referring to this problem, Lord Shaw of Dunfermline said in *R. v. Halliday*, [1917] A.C. 260, 287: 'There lurk the elements of a transition to arbitary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the executive of a refuge to the device of Order in Council would increase the danger ten-fold were the judiciary to approach any such action of the Government in a spirit of compliance rather than that of independent scrutiny'."

John had an unhappy end, Jenkins continued. He was crossing the Wash when the tide rose, sweeping away his baggage, jewels, and money, and leaving him naught but a heavy cold. This changed to a fever, and he died a few days later at Newark on October 19, 1216.

The Charter was not firmly established as the Common law of the realm for nearly a century after Runnymede, in which period it was confirmed no less than thirty-two times. But historians have perhaps treated it with more enthusiasm than judgment, for men of the middle ages read into many of the clauses meanings which would have surprised the original drafters. So much of it became obsolete in a very short time. As Darling, J., said in *Chester v. Bateson* (*supra*): "Magna Carta has not remained untouched; and like every other law of England, it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and the Persians." It is oft described as the "keystone of British liberty." That title for it will long remain.

I fetched a long sigh as Jenkins concluded his oration, and asked him if he knew the latest score.

Rylands v. Fletcher.

No case on earth has half the worth
Of Rylands versus Fletcher,
For it supports all sorts of torts,
Does Rylands versus Fletcher.
For broken dams and skidding trams,
Quote Rylands versus Fletcher;
If gypsies roam you'll send them home
With Rylands versus Fletcher.

For bottled snails, where all else fails,
Quote Rylands versus Fletcher;
For noxious weeds and vicious steeds
Use Rylands versus Fletcher;
If rabbits spread, enough is said
In Rylands versus Fletcher;
In short, for every tort, in Court,
Quote Rylands versus Fletcher.

—R. L. M.

Rights under Voluntary Transfers of Land.

By H.R.C. Wild, LL.M.

In the course of their dealings with the Land Transfer Act, successive generations of law clerks must have been filled with admiration for the simplicity of the Torrens system. One of the principles on which that simplicity is founded is that "no interest shall pass until registration" and there is probably no section in our Act more familiar to the student than s. 38, which embodies this principle in the Land Transfer law of New Zealand. It is indeed quite likely that many clerks, and not a few practitioners, have had this principle so firmly fixed in their minds that they would set aside as purely academic any considerations as to the rights of a person claiming under an unregistered instrument. It is as well, therefore, for us to observe that these rights can and do become the subject of keen and learned argument which the Courts are not always able to settle with unanimity.

Let us suppose, for instance, that a registered proprietor of land contemplating a gift of his property signs and delivers a memorandum of transfer in favour of the donee. What rights are created by such an instrument? Does it give the donee any kind of title to the land, or does it merely vest imperfect rights in him, or is it entirely worthless until registration? And what is the position if the donor should repent his munificence and seek to revoke the gift?

In considering gifts, one must always bear in mind the well-known rule of *Milroy v. Lord*, (1862) 4 DeG. F. & J. 264, 45 E.R. 1185, that in order to render a voluntary settlement valid and effectual the settlor must have done everything which according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property and render the settlement binding on him, "for there is no equity in this Court to perfect an imperfect gift." In its application to the Land Transfer system this rule therefore involves a consideration of what must be done by a transferor under a voluntary transfer before the transferee will be enabled to make his interest legal by presenting the instrument for registration.

Although the point has arisen incidentally in various cases, no Court seems to have been directly confronted by the question until *Scoones v. Galvin*, [1934] N.Z.L.R. 1004, came before our Court of Appeal in 1934. In this case S. gave instructions to his solicitors to prepare a transfer by way of gift to his infant nephew, reserving to himself a life interest in the property. Subsequently, he signed the transfer and handed it to his solicitors who already held the relative certificate of title. Shortly afterwards he died. In due course, the solicitors presented the transfer for registration, but just after the document was lodged a caveat was entered on behalf of the donor's widow. It was claimed on her behalf that there was no completed gift, and that, since the transfer was a voluntary one, no interest could pass under it until registration.

On the facts, the Court held that although the transfer had been delivered there had been no delivery, actual or constructive, of the relevant certificate of title and there was therefore no completed gift before the donor's death. In view of the importance of the questions

raised by the facts of the case, however, Myers, C.J., Blair and Kennedy, JJ., went on to assume that delivery had been made of both the transfer and certificate of title, and to consider whether this would constitute a complete gift.

In dealing with this problem their Honours were faced with a number of dicta in earlier cases. A typical example may be quoted from Stout, C.J., in *Todd v. Commissioner of Stamp Duties*, [1923] N.Z.L.R. 528, 533:

> "Under our Land Transfer Act title is never complete without registration. No interest, legal or equitable, passes by an instrument until that instrument is registered. And so it was held [in *Commissioner of Stamp Duties v. Halliday*, [1922] N.Z.L.R. 507] that until registration there was nothing that passed. And so it was held in *Commissioner of Stamps v. Erskine*, ([1916] N.Z.L.R. 937). . . . The provisions of the Land Transfer Act are clear that no interest passes till registration (s. 38)."

Their Honours, however, were able to distinguish these cases (in *Erskine* and *Halliday* there had been no delivery of the instrument of gift; in *Todd* the observations of Stout, C.J., were obiter, his judgment in any case having been reversed by the Court of Appeal on another ground). Basing their reasoning on *Macedo v. Stroud*, [1922] 2 A.C. 330, and *Anning v. Anning*, (1907) 4 C.L.R. 1049, the learned Judges went on to hold that where there has been delivery of both the executed transfer and the certificate of title there is a complete gift, for "if the transfer is accompanied by the certificate of title then there is nothing more which it is necessary for the donor to do to perfect the gift": *Scoones v. Galvin*, [1934] N.Z.L.R. 1004, 1018.

This opinion was not subscribed to by Herdman and Fair, JJ. The former Judge agreed that, in view of the fact that there had been no delivery of the certificate of title, the gift was incomplete, but added that "having regard to the very explicit and clear language used in s. 38 of the Land Transfer Act, and bearing in mind the policy of that statute, it is difficult to escape from the view that a gift such as was proposed in the present case is never complete until registration of a transfer is actually effected."

Fair, J., agreed on the facts but expressly refrained from delivering any opinion as to whether, notwithstanding s. 38, the gift would have been complete had both the transfer and title been delivered.

Last year, a very similar case arose in *Brunker v. Perpetual Trustee Co. Ltd.*, [1937] A.L.R. 349. The relevant facts were that an owner of land, intending to make a gift subject to a life interest to himself, asked a friend to prepare a transfer. The document was executed and retained in the friend's possession. After the donor's death, it was presented for registration without the certificate of title, which, all along, was held by the mortgagee. The donor's trustee entered a caveat, and instituted a suit in equity upon which the trial Judge found that the transfer had never been properly delivered to the donee and that the instrument was accordingly void. On appeal to the High Court of Australia, a majority affirmed this judgment, holding that there had been no delivery of the transfer to the transferee who had therefore received "no indefeasible right to register" the instrument. Latham, C.J., viewed the facts differently, holding that the transferee lawfully had possession of the transfer and with it a right to register. On his interpretation of the Real Property Act (N.S.W.), production of the certificate of title to the Registrar was not essential before registration could be effected, and the donor had therefore done all he was required to do to perfect the gift. (In New Zealand, of course, the Registrar would not register without the title.) Dixon, J., in whose judgment Rich, J., concurred, proceeded to discuss the position that would have arisen had there been delivery of the transfer, and found that, unless some further condition was prescribed by the statute, delivery of the transfer would allow the transferee to register—in spite of objection from the donor. (Such a condition does, of course, exist in practice here where production of the title is insisted upon.) His Honour went on to consider the requirements of the Real Property Act (N.S.W.) as to production, and concluded that if the transferee was successful in inducing the Registrar to dispense with production, then the transferor would be unable to bar registration. This view, His Honour pointed out, was not adopted in *Scoones v. Galvin* (*supra*) but it can scarcely be said to have been considered in that case where the Court had no reason to depart from the assumption that production of the title, if not necessary by the provisions of the Act, was at least always insisted upon by the Registrar. In any case these observations of Rich and Dixon, JJ., are obiter and not essential to the decision, and it is submitted that neither the dissenting opinion of Latham, C.J., nor the judgment of the majority throw any doubt on the correctness of the decision in *Scoones v. Galvin* (*supra*).

It would appear that several principles emerge from the two decisions. First, there is a perfect gift of land under the Torrens system on the actual or constructive delivery of an executed transfer and the relative certificate of title to the donee. There may still be a complete gift if the title is not delivered, but this will depend on the requirements of the particular statute as to registration without production of the title. When such a complete gift has been made, moreover, the donee can proceed to register even though the donor objects, for the gift is complete and cannot be revoked. But it is clear that if there is no delivery of the transfer (or of the certificate of title if it is required to be produced before registration) then there can be no complete gift, for the donor has not done everything it is necessary for him to do to perfect the gift, and the Court is precluded from assisting the donee who is a mere volunteer.

On the Wrong Tack.—The advice is given regularly to students to be masters of general knowledge. However, it is probably well for the student to know a little law also, if the following "howler" is any criterion.

Question: Explain what is meant by the "Doctrine of Tacking."

Answer: "Tacking" is a nautical term which has apparently slipped into this paper by mistake!

Very Hard.—*Question* (in examination in Criminal Law) What is meant by the term "Peine forte et dure?"

Answer: Imprisonment with hard labour.

Pity the Typist.—We had a typist in our office recently, a contributor writes, and she thought she knew a thing or two. One opinion referred to a judgment of the Full Bench, but she produced it in her typescript as "the Fool Bunch."

German International Rivers.

By W. I. Gunn, LL.M.

By international law, every State has unqualified jurisdiction over any part of a river within its boundaries. It follows that a State, through whose territory only an infinitesimal portion of a river flows, can exclude, at its pleasure, any vessel belonging to a power which controls the remainder of the river. In practice, however, many international rivers have been opened by conventions to the navigation of foreign vessels.

The principal of abolishing prohibitions or lessening restrictions on international rivers received considerable impetus from the Peace Treaties of 1919. Part 12 of the Treaty of Versailles deals with the question of conceding to the nationals of the allied and associated powers equal treatment with German nationals on German rivers. Similar provisions were contained in the Peace Treaties with Austria, Hungary, and Bulgaria. The Rhine, Elbe, Oder, Piemen, and Danube were declared international rivers within limits prescribed by the Treaty of Versailles. The provisions of the treaty would also have applied to the Rhine–Danube canal when it was completed.

International Commissions, comprising representatives of all riverain States as well as delegates from other powers, were established over the Elbe and Oder, Germany being accorded the largest representation on these commissions.

An international Commission for the Piemen was to be constituted only in the event of one of the riparian States making a request to the League, and Germany would have been represented on such a Commission.

The Treaty of Paris, 1856, had expressly declared that freedom of navigation of the Danube was available for the vessels of all nations, and had provided for a European Danube Commission, with power to regulate navigation and collect sufficient taxes to cover the cost of the construction of necessary engineering works at the mouth of the river. The powers of the Commission had been subsequently enlarged, but its functions had been suspended by the Great War. However, the Treaty of Versailles set up the International Danube Commission to supervise the Danube from a point one hundred miles above its mouth to its source. Its duties comprised such matters as river patrol, dredging, channel-marking, fixing of dues, and trying of offences against its regulations.

Control over the rest of the Danube was, as a provisional measure, conferred on a Commission known as the European Commission. Its membership is limited to Great Britain, France, Italy, and Rumania, whereas the International Commission comprises delegates from all Danube riparian States, plus Britain, France, and Italy.

At the Peace Conference, the Convention of Mannheim, governing the navigation of the Rhine, was slightly modified, and the Rhine Commission was authorized to extend its jurisdiction to other parts of the Rhine, and to portions of the Moselle.

In the event of disputes arising on the interpretation of the clauses concerning rivers in the Peace Treaties, there was to be an appeal to the League.

Herr Hitler, in pursuance of his avowed policy of abrogating "the iniquitous Treaty of Versailles extorted from an impotent government," in November, 1936, tore up the page of the Treaty dealing with German rivers. The Fuhrer presented the sixteen powers represented on the German River Commission with a memorandum declaring Germany's intention of renouncing the river clauses as incompatible with German sovereign rights. Consequently, River Commissions can no longer exercise jurisdiction within German territory. However, Herr Hitler declared that navigation on German rivers is free to the vessels of all nations at peace with Germany, on the same terms as German vessels, provided that German ships receive reciprocal treatment from those nations.

The river clauses were partly designed for the purpose of providing inland States, with Czechoslovakia and Switzerland, with a direct access to the sea, which Germany can now sever at will. Therefore the Czechs, fearing economic strangulation by Germany's placing unfair restrictions on their shipping on German rivers and imposing heavy dues on German railways, are enlarging their port of Bratislava on the Danube, their only non-rail communication with the world.

In March, 1938, Germany violated Article 80 of the Treaty of Versailles, by which Germany agreed to respect Austria's independence. Austria was united with Germany and Herr Hitler on "Anschluss night" (April 10, 1938) proclaimed the Holy German Reich of Teutonic Nationality. Among the great military and economic advantages which accrued to Germany from this seizure was the addition of five hundred miles of the Danube to the Reich.

In May, 1938, Herr Hitler announced that by 1945, a Rhine-Main-Danube canal would be completed, which will enable fifteen-thousand-ton vessels to pass from the North Sea to the Black Sea. Germany's abundant supplies of cheap coal may then be easily transported to Linz, where it will be used with Austria's high-grade ore in Europe's largest steel plant. Linz, incidentally will be the base for the fleet of Danubian warships Germany intends to construct. A British war-time blockade of Germany will become exceedingly difficult, because Germany will have access to widely separated seas, and because, by the Treaty of Montreux, 1936, which superseded the Straits Convention of 1923, Britain has pledged that she will not send warships through the Dardanelles in time of war.

On the completion of the canal, Germany hopes to accomplish its avowed aims of gaining control of Danubian trade and taking over all river-shipping which is at present shared by German, British, French, Dutch, Rumanian, Czech, and Yugo-Slav companies.

However, before this economic objective can be accomplished, Germany must circumvent the International Danube Commission, which unofficially exists to prevent any forceful monopoly of Danube commerce. When Herr Hitler unilaterally annulled the river clauses in the Versailles Treaty in 1936, he denounced the Commission and withdrew Germany's delegates; but after his occupation of Austria he made no further attacks on it, and even allowed its representatives to retain their diplomatic privileges. Nevertheless, it appears certain that the Commission will lose control over the Austrian portion of the Danube, and the future alone will show whether more Nazi coups will further restrict the Commission's area of operations.

W. S. Gilbert and the Law.

By R. L. Meek, LL.B.

Strephon: When chorused Nature bids me take my love, shall I reply, "Nay, but a certain Chancellor forbids it?"

Lord Chancellor: But my difficulty is that at present there's no evidence before the Court that chorused Nature has interested herself in the matter.

Strephon: No evidence! You have my word for it. I tell you that she bade me take my love.

Lord Chancellor: Ah! but my good sir, you mustn't tell us what she told you—it's not evidence. Now an affidavit from a thunderstorm, or a few words on oath from a heavy shower, would meet with all the attention they deserve.

Strephon: And have you the heart to apply the prosaic rules of evidence to a case which bubbles over with poetical emotion?

This delightful conversation, to be found in Act I of *Iolanthe*, illustrates admirably Sir W. S. Gilbert's attitude towards "the Law"—the law which refused him a livelihood and yet influenced his work in so remarkable a manner.

The Gilbert of *Topsy-Turvyland* revolted against the arid formality and prosaic humorlessness of legal procedure; Gilbert, the debunker, saw in the law abuses and defects which he was not afraid to satirize; Gilbert, the humorist, saw that lawyers and Judges and policemen were often very funny people; Gilbert, the dramatist, delighted in the intricate hair-splitting of lawyers—

> "Who can make it clear to you
> That black is white when looked at from the proper point of view";

and Gilbert, the poet, rose above the law, and yet still surveyed it laughingly from above.

When Gilbert first "was called to the Bar," he was not exactly "an impecunious party." He writes: "Coming unexpectedly into possession of a capital sum of £300, I resolved to emancipate myself. With £100 I paid my call to the Bar, with another £100 I obtained access to a conveyancer's chambers, and with the third £100 I furnished a set of chambers of my own, and began life afresh as a barrister-at-law."

But he received little return from his investment, in his first two years earning the sum of £75—an amount obviously insufficient to satisfy his "appetite fresh and hearty"—and averaged only five clients per year during the four years of his practice. Whether Gilbert was a good lawyer or not cannot be ascertained—he appears to have been, in his own words, "a clumsy and inefficient speaker"—but perhaps we should be grateful for his failure at the Bar, as he soon took to his pen to supplement the pitiful profits of his brief and almost briefless career.

Gilbert's first "start in life" was at the Bar; and his first opera written in conjunction with Sullivan was legal, *Trial By Jury*. Gilbert at the close of his life was appointed J.P. for Middlesex, and constantly sat as a Magistrate at the Edgware Petty Sessions; and his last play was legal, *The Hooligan*. It is only natural that his love of the law should manifest itself in an inimitable way in many of his writings.

Gilbert's lawyers are superb. In the *Bab Ballads*, the best-known is, of course, "Baines Carew, Gentleman."

> "Whene'er he heard a tale of woe
> From client A or client B,
> His grief would overcome him so
> He'd scarce have strength to take his fee.
>
> It laid him up for many days
> When duty led him to distrain,
> And serving writs, although it pays,
> Gave him excruciating pain."

In the operas, themselves, we behold a veritable galaxy of legal luminaries, ranging from the "Lord High Chancellor" in *Iolanthe* to the "solicitor" in *Patience*.

Trial By Jury is, of course, intrinsically legal throughout. The story of the facetious Judge who:

> "Fell in love with a rich attorney's
> elderly ugly daughter,"

in order that the attorney should provide him with briefs to appear before "the Sessions of Ancient Bailey," and who presides over a farcical breach-of-promise action—*Edwin v. Angelina*—is one of the most felicitous in Gilbert's whole repertoire. It is interesting to note that Kekewich, J., dissented from the popular approval of this "dramatic cantata," stating that he "liked all Gilbert's plays except *Trial By Jury*." Perhaps he objected to the following words in the chorus "All Hail, Oh Judge!":—

> "May each decree
> As statute rank,
> And never be
> Reversed in banc."

The Sorcerer contains a notary, before whom Alexis and Aline sign their marriage contract. Incidentally, this scene provides us with a singularly neat description of the characteristics of an English deed in the words:—

> "See they sign, without a quiver, it—
> Then to seal proceed.
> They deliver it—they deliver it—
> As their Act and Deed!"

H.M.S. Pinafore gives us one of the most popular characters in all "G. and S"—The Rt. Hon. Sir Joseph Porter, K.C.B., First Lord of the Admiralty. In the well-known song—"When I was a lad," he traces his evolution from an "office boy to an attorney's firm" to his present position as "The Ruler of the Queen's Navee"—a splendid piece of satire.

Mr. Bunthorne's "solicitor" in *Patience* has the unpleasant duty of conducting the raffle whereby Bunthorne is to be sold to the highest bidder among the "twenty love-sick maidens."

Pooh-Bah in *The Mikado* numbers Lord Chief Justice among his multifarious offices, and in the same opera Gilbert expresses his distaste for "that Nisi Prius nuisance who just now is rather rife." Much of the fun in *Ruddigore* has legal connections; we find Sir Bailey Barre, Q.C., M.P., in *Utopia Limited*; and Dr. Tannhauser, a "notary," appears in the last opera, *The Grand Duke*.

Perhaps the most legal of all the operas is *Iolanthe*, with its immortal Lord High Chancellor and chorus of Peers, and although Gilbert makes his Lord

Chancellor sing of the law that " it has no kind of fault or flaw," he ridicules many faults and flaws almost imperceptibly as the opera progresses. The Lord Chancellor himself, on being called to the Bar, intended to " work on a new and original plan "—

" I'll never throw dust in a juryman's eyes,
(Said I to myself—said I)
Or hoodwink a Judge who is not over-wise,
(Said I to myself—said I),
Or assume that the witnesses summoned in force
In Exchequer, Queen's Bench, Common Pleas, or Divorce
Have perjured themselves as a matter of course,
(Said I to myself—said I) "—

but he soon grew sadly disillusioned.

We may remember Gilbert as a humourist, a poet, an artist, or just the person who wrote words for Sullivan, but a study of his life and works from a legal point of view gives us the best insight into his character. The law of which he could still write in 1882—

" The law is the true embodiment
Of everything that's excellent "—

remained one of his first loves until the end, and when Gilbert " went to the Bar as a very young man," his rather impetuous decision was destined to have results which affected in the most exquisite manner the whole of the English-speaking world.

Instruction or Construction?

The New Law Course.

By D. A. S. Ward, B.A., LL.B.

At the recent Legal Conference a remit was carried, on the motion of Mr. W. D. Campbell (Timaru) inviting the New Zealand Law Society to consider the new University regulations for the law course. The main change in the course is the addition of subjects from the B.A. syllabus. It is hoped that the following views of one who has recently taken both courses may stimulate useful discussion.

One thing is clear. These changes are only a patching up of a dangerously inadequate training-machine. It is granted that the inclusion of " cultural " subjects will help to broaden our outlook. It is not enough that by cramming legal rules we should become efficient at the business of the law. The layman tends to look on us as priests of a strange but necessary order, skilled in the secret and complex processes of buying land, making a will, and suing a neighbour, but rather to be avoided in other spheres of community life. With a historical background and a working knowledge of the fundamentals of economics and political science, our function may be something more than the practice and interpretation of a complicated set of rules, unintelligible to the layman, and sometimes even to the lawyer.

If the only aim of the new law course is that we should become " men of the world," then that aim is not good enough, and no tampering with the existing syllabus will leave our consciences quiet. Many able and intelligent members of our profession are giving political and social service to the community. Yet an awareness of our responsibility for the continued advance of society as an organic institution is confined to the academic few. Although we have, as a profession, a traditional and admirable conception of our duty to the community, it is too narrow a conception. The blame for this must be placed on the educational system of which we are products. We are merely taught a technique.

The law is the framework of society, the skeleton on which depend the muscles, the nerves, the living heart itself. It is a crystallization of social ideals and a product of social conditions. Society, like other living things, is always in a state of flux. The lawyer is the medium through which changing social ideals and conditions must find legal form. What part do we play in creating those ideals, and to what extent do we try to understand those conditions? Our legal training has not fitted us for our part in the racial adventure, because its aim has been to teach us the practice of a pre-existing system.

The profession may soon have to justify its existence by proving (as it can) its use to mankind. To do that, it must understand what society is now, what it grew from, and what it is growing into. With social institutions, as with individuals, growth and change go hand in hand. We must identify ourselves with these processes, controlling and directing them. This can be done only if we have the scientific attitude of mind, and, through analysis and criticism, seek always an adjustment for a future. We cannot all be research workers, but we can have the open mind and the point of view of the research worker.

In a few decades the growth of the material sciences has transformed our environment, and with it our conceptions of the world. The social sciences, of which the law is a branch, have lagged far behind. Only a searching inquiry into the spirit of legal education, a plain statement of its aims, and a change in its methods to suit those aims will meet the needs of society. Legal training must cease to be merely instructive and become constructive.

Only one thing in the new course raises a hope that this needed reorientation of our minds will soon take place. Certain " social sciences " have been included in a group from which subjects are to be chosen. This is a small step on the way. Its effect may be largely nullified by the present method of cramming into the mind masses of facts, any of which may have to be dredged up again for examinations. It is futile to criticize or try to reconstruct the law course without going back not only to the motive behind it, but to the method of teaching. One feels that it is not the fault of the teaching staffs that there is no revolution in this system. While it remains as it is, it must help to defeat the purposes of those seeking to improve legal education.

As for the actual subjects of the new course, Mr. Campbell gave good reasons for making English, Logic, and Ethics compulsory, and for dropping the farce of learning by heart the Code of Civil Procedure. It is hard to understand why elementary Psychology, now so popular that it may be called a " social " science in quite another sense, should not also be compulsory. Barrister and solicitor alike have often to deal with distorted minds. Our criminal law is said to need

reconstruction in the light of modern knowledge—the knowledge of others.

The writer would go further and suggest Political Science and Outlines of Sociology as compulsory subjects. The former is now optional, but the latter is not even that. It will be said that the course is already too long. The solution lies partly in the exclusion from professional subjects of the absurd mass of detail, leaving only broad principles to be absorbed. Moreover, as Mr. Campbell contends, Roman Law and Latin should be optional. We must also look for some means of making the course a full-time one—a problem with more aspects than the financial one.

This article is an attempt at a broad view. Let us put first things first, and, when we have settled and stated the aim of legal education, try to achieve that aim in the best possible way. It should be done before it is too late.

An Inequitable Result on the Mortgagors and Lessees Rehabilitation Act.

By E. G. Mitchell.

A matter of particular interest to trustees arises out of the recent Mortgagors Relief Legislation and its bearing on life-tenancies.

Where an asset of an estate which is held by a trustee for a life-tenant is a mortgage and the mortgagor has applied for and been granted relief, the loss to the estate is not always apportioned as equitably as could be desired. The position is briefly that if the security is abandoned to the trustee and he subsequently realizes it, the loss is apportioned on the lines laid down in the case of *In re Atkinson Barber's Co. v. Grosesmith*, [1904] 2 Ch. 160 (C.A.). Usually, however, the Commission drastically reduces or extinguishes the arrears of interest, extends the mortgage, and may or may not write down the principal.

Generally speaking, the interest is the first to be reduced, and it is submitted that in some cases undue hardship is caused to life-tenants because the rule in *Atkinson's* case does not apply, unless the security is abandoned to the mortgagee and realized by him.

The effect is that the burden of the loss as between life-tenant and remainderman is fixed by the Commission when determining not the question between life-tenant and remainderman, but that between mortgagor and mortgagee. The attention of the Commission does not advert to the question as between life-tenant and remainderman.

In large estates the loss to the life-tenant may be substantial, and it is suggested that this could be avoided by making provision for trustees to apply to the Supreme Court. It is unfair that the life-tenant should be a heavy loser while remaindermen escape scot-free, and it is submitted that the trustee need not wait until the mortgage is repaid but could create a capital overdraft to pay out the life-tenant's share. This could be adjusted on repayment of the mortgage, and this course is preferable as the life-tenant has already been deprived of income for some time.

A Lessor's Control of Sub-Lessees.

By J. R. Marshall, LL.M.

It is usual to insert as one of the covenants in a lease a condition to the effect that: "The lessee shall not assign or sublet the demised premises or part with the possession thereof without the written consent of the lessor first had and obtained."

By the Law Reform Act, 1936, s. 19, this clause, where it appears in any existing or future lease, is to be deemed to be subject to a statutory proviso to the effect that such consent is not to be unreasonably withheld.

This provision against assignment without the consent of the lessor does not protect the lessor against assignment without his consent by a sub-lessee.

It is well settled that once a lessee has sublet with the consent of the lessor, the sub-lessee can sublet without obtaining the consent of the head lessor.

This is based on the principle that there is no privity between the head lessor and the sub-lessee and therefore the sub-lessee is not bound by the covenant in the head lease.

In *Williamson v. Williamson*, (1874) L.R. 9 Ch. 729, which dealt with a covenant similar to the above, Lord Justice James said, at p. 732: "I am clearly of the opinion that the under-lessee is in no way bound by the original stipulations as to assignment of the lease. The words are that the lessee, his executors, administrators, and assigns (the words lessee or lessees imply executors, administrators, and assigns) shall not do a certain thing. Beyond all question that is a bargain between the lessor and the lessee and does not extend to anything affecting the estate of the under lessee between whom and the original lessor there is no privity whatever. There is no privity of contract and no right."

Once a sub-lease is granted, the lessor has lost what little control he may have had over the persons or companies who may become the occupiers of his land or premises. Provided the covenants of the lease are performed and observed, he cannot interfere.

In leases for short terms, this may not be of much importance, but in leases for twenty-one years, which is a common term for Glasgow leases, and for longer periods than that in the case of building leases, the possibilities of the land or premises being sublet more than once is by no means remote.

The situation can be met in two ways:—

1. The lessor may make his consent to the sub-lease expressly conditional on the insertion therein of provisions restricting the sub-lessee from parting with possession of the property without his consent and requiring the lessee to bind himself to enforce the restriction. The form of such proviso would follow along these lines:—

> "Provided always that the consent hereby given is upon the express condition that the sub-lease to be made under and by virtue thereof shall contain a covenant by the said [*sub-lessee*] that the [*sub-lessee*] his executors administrators and assigns will not assign sublet or otherwise part with the possession of the premises to be comprised in the said sub-lease or any part thereof without the consent in writing of the said [*lessor*] his executors administrators or assigns and also a proviso for re-entry by the said [*lessee*] his executors administrators and assigns in case the said [*sub-lessee*] his executors administrators and assigns shall commit any breach of such covenant."

2. The lessor may make it a condition of his consent that he should himself be a party to the sub-lease and that the sub-lessee should not assign or sub-let without his consent.

It could not be said that a lessor who made his consent to a sub-lease subject to either of the conditions suggested above was withholding his consent and in any case it cannot be unreasonable for a lessor to ask for some control over his own property.

In the case of *In re Spark's Lease*, [1905] 1 Ch. 456, Mr. Justice Swinfen Eady, in deciding the question of costs, held that it was reasonable for a lessor who had leased another part of a building which he himself occupied to ask, before giving his consent to a sub-lease, for what purpose the portion to be sublet was to be used and to stipulate for a covenant between the sub-lessee and himself requiring his consent to any further sub-lease.

This case is an illustration of both the suggestions put forward in this note, for although by refusing to accept a conditional consent the sub-lessee failed to agree with his adversary quickly and therefore had to pay costs, in the end he went the second mile and the case was settled on the understanding that the lessor should be joined as a party to the sub-lease and a covenant inserted providing for his consent to be obtained to any further assignment or sub-lease.

Maori Law.

By E. D. Morgan, LL.B.

To comment on Maori law is to tread a slippery path. Cowan, Tregear, Donne, and Elsdon Best have written profusely of pa and weapons, mats and legends, but little on the laws of the ancients. This sketch, therefore, largely a scrapbook of their scattered comments, should be regarded as a Maori once described Sir George Grey's collection of legends—"*pokonoa*," lacking tohunga's authority.

It seems that the character of their law was influenced by three facts: (*a*) Property other than land was comparatively of little value; (*b*) either they had never had writing or it had disappeared with the loss of learning among the *tohungas*; and (*c*) they had a definite idea of the tribe as a separate entity. Thus conveyances were the rule, contracts the exception; law was purely customary; the concept of an injury done to the tribe coloured the whole law of wrongs.

Details of property law are the easiest to discover. The chiefs held most land, but every freeman in the tribe had some estate. Various easements were recognized. There were rights to gather shellfish, hunt rats, or trap eels in certain places, which were sometimes perpetual, sometimes limited.

In studying the recognized claims to land, the similarity of Maori law to our own, and also its wide differences, become apparent. Many claims our law would regard with sympathy—*e.g.*, descent, or the gift of the ruling chief in open assembly. Others seem to have their foundation in "*tapu*." If a man's umbilical cord were buried in certain land, if he had been wounded or cursed, or had made a birdcage of enemy bones and kept a tame parrot there, he had a claim to it. It is recorded that a Maori who claimed his ancestor had seen a ghost on a section received a Crown grant.

To show a claim, the Maori caveat was put on the land. This was the "*rahui*," a stick with feathers or grass tied to it, frequently painted with red ochre, the colour of *tapu*. Cowan translates it as "prohibitory stick." Acquiescence in the *rahui* meant that in time the "caveator" acquired ownership.

Land disputes produced the nearest approach to a Maori Court of Justice. Those "learned in genealogies" (term reminiscent of the *jurisconsulti*) assembled as pre-arranged to judge the matter, and their judgment was binding. The disputants stated their own cases, the aggressor opening.

One remarkable feature of primitive Maori society was the will, or rather death-bed bequest. It seems to have arisen as Maine assumed the Roman will arose, in a chieftain's choice of which son should succeed him, by his last words, "*poroaki*." The Maori bequest, however, went far beyond the early Roman will, being often used to bequeath, not a *universitas juris*, but a single piece of property, and overriding the claims of succession. If the "testator" expressed no wishes as to the disposal of his property, his eldest son succeeded. Succession claims also came before the "learned in genealogies."

It will seem out of order to a lawyer of to-day that there was a Court to determine title to property, acting with certain rules of procedure, but no Court to deal with crimes and torts, not even a "smelling-out" by witch-doctors. There was indeed, no distinction between crimes and torts as we know them. "Crimes," in general, were dealt with by self-redress, many "torts" by semi-legal punishment from the tribe. Matters, too, which we would regard as acts of God were often held to be tribal wrongs. Sometimes the system is absurdly reminiscent of criminal law in "Erewhon," which after all was situated in New Zealand. If a canoe-paddler through carelessness drowned one of his fellows, if his son was injured, or his wife eloped to another tribe: in each case the tribe punished him, for it had lost a warrior, a warrior-to-be, or a mother of warriors. The punishment was a raiding party (*taua-muru*) which plundered his hut and perhaps thrashed him into the bargain. The prospective victim set a feast for the bailiffs, and watched them without emotion. As Horsley puts it, "a gentleman was to receive punishment at the hands of his peers."

Utu, the law of an eye for an eye, translates very nearly as "damages." It was payment for a wrong, in goods or blood. If murder was done, the victim's relatives could with justice kill the murderer, or in lieu, demand that one of his slaves be executed or his goods surrendered. Theft was similarly punished by self-redress (*tika*) if the stolen goods were discovered in the thief's whare. Adultery was always met by damages in land, giving rise to a proverb, "land for woman." Punishment for the rape of a married woman was death; of an unmarried girl, compensation.

Opinions vary on the existence of marriage ceremonies. It is probably true, as Elsdon Best states, that no ceremony existed among the lower classes, but the union was still a properly arranged affair. Among the *rangatira* class, wedding incantations (*karakia atahu*) were repeated over the couple, and followed by a feast. The "handing over" of the wife by her relatives was universal among the well-

born, even if there was no other ritual. There were also the betrothals in the *wharematoro*, when both sexes announced their choice. Women were largely independent, and only in adultery proceedings were they regarded as chattels.

Divorce is even more of a vexed question. It seems that the divorce incantation (*karakia toko*) and the ceremony in which a *tohunga* sprinkled the woman with water and plucked away her love for her husband were used by relatives who had decided the marriage must end. Divorce between the couples may have been by separation.

The slave class sometimes possessed none of the rights described. If the slave was a left-over from a cannibal feast, he no longer had the rights of a human being. He had no "*mana*" and his death could not be avenged. Return from capture could not remove his disgrace; the kindly fiction of *postliminium* had no place in Maori jurisprudence. Apart from this outcaste state, his treatment was not irksome. The master sometimes permitted him to work for another, the slave being paid by present, half of which was by custom his own.

At the other end of the scale was the *Ariki*, priest-king and Divus Caesar of the great tribes. He could trace direct descent from the union of Heaven and Earth, and once appointed he was the equal of the rest of the tribe. "'We two' will do this" ran his royal announcements. His actions were regulated, to a degree, by a council and by public opinion. Sometimes he was the perfect sovereign of Austin's definition, but, as Maine pointed out of another Native ruler, he did not make laws although he was Chief Judge. He had more of the divine essence than other men, was *tapu* in his body, had rights to flotsam and jetsam, treasure trove, and, like our King and Queen, royal rights over whales.

After his sub-chiefs came the *tohungas*. They were hereditary priests who preserved the tribal records, could remove and apply *tapu*. As priests, they spoke the incantations for birth, death, "social" marriages, and over men going out to war. Often a *tohunga* was Lord Chancellor to his chieftain. In the *whare-kura* he taught the chiefs' sons genealogies, customs, and magic spells, the course beginning when the boys were twelve, and lasting for three or four years. Every precaution was taken to hedge it about with deepest secrecy. In this "holy house," built facing the east, future judges committed the tribal laws to their amazing memories.

Even the slightest sketch of Maori law cannot omit "*tapu*," that peculiar creation of Polynesia. It was the essence of the gods, protecting the body of a chief (especially his hair), buildings, gardens, and many other articles of property. To *tapu* an unprotected plot of kumaras, for instance, ensured their safety from thieves. (One chief even tapued a herd of goats). *Tapu* was based on religion and superstition, it was the law above the law, the silent policeman of property, and this powerful invisible guardian stood for much in Maori law and order.

A Matter of Degree.—In Otago in the early days a Maori named Joshua was "up" for making liquor without a license. "Are you the Joshua who made the sun stand still"? the Magistrate asked him when he was called to give evidence. "No," was the reply, "I am the Joshua who made the moon shine still."

When We are at The Bar.

(Being an Extract from a Song in the A.U.C. Law Students' Mock Court, 1938.)

By J. E. Moodie.

We'll never be guilty of errors in pleading,
When we are at the Bar;
We'll never ask questions that tend to be leading,
When we are at the Bar;
We'll never let cases pile up on our hands,
Or turn a deaf ear to our clients' demands,
And we'll never wear spotted shirts under our bands,
When we are at the Bar.

We'll always remember the keys of our lockers,
When we are at the Bar;
We'll never let Magistrates' Court cases block us,
When we are at the Bar;
We'll come into Court at a quarter to ten,
With law reports, pleadings, and paper and pen,
We'll check our instructions again and again,
When we are at the Bar.

We won't file a motion without affidavit,
When we are at the Bar;
And then ask the Court to respectfully waive it,
When we are at the Bar;
We won't quote from precedents faulty in law,
Nor loudly repeat what we've said just before,
And if we should slumber we never will snore,
When we are at the Bar.

We'll be among Auckland's outstanding attractions,
When we are at the Bar;
Snowed under with briefs for most lucrative actions,
When we are at the Bar;
We'll win all our cases with reasoning clear,
We'll never be rivalled by anyone here,
For all of the rest will be Judges, we fear,
When we are at the Bar.

Scintillae Curiae.

In a divorce suit from the West Coast, the lady who was the respondent, in the course of her evidence, had indignantly recalled the interest taken by her neighbours in the happenings of her married life. During cross-examination, she exclaimed with some feeling, "And they are a lot of sticky-beaks!" The presiding Judge, who is still happily with us, looked aomewhat perplexed at this outburst. Then he quietly asked a question from the Bench, "Do you mean that they were a lot of Nosey-Parkers?"

* * * *

The late Mr. Justice MacGregor was hearing an application for reduction of alimony made by a former husband, then resident in New York. His affidavit disclosed that he was a very sick man. An affidavit by a doctor said that the applicant suffered from boils, and there was every indication that these would greatly increase in number. "He doesn't seem to have much faith in the National Recovery Act recently passed in the United States," was His Honour's comment.