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"If ever the fabled New Zealander sat on the arch of London Bridge and surveyed the ruins of St. Paul's, he would undoubtedly say: 'They were an odd lot of people who lived here, full of prejudices and faults, but one thing they understood—the art of justice.'"

—LORD MAUGHAM, L.C., at the Mansion House Banquet to His Majesty's Judges, 1938.

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

II.

IT will be remembered that, from the earliest days of local administration of justice, it was intended that a Court of Appeal should be constituted when the Colony had a Judiciary of three members. That was not to be until July 1, 1862. In the meantime, there was a curious makeshift appellate Court.

On October 12, 1846, a "Court of Appeals" was constituted by the Supreme Court Amendment Ordinance (Sess. VII, No. 3). Section 3 makes curious reading nowadays: it is as follows:—

> "For the purpose of providing a Court of Appeals within the Colony from the decisions of the Supreme Court thereof. Be it enacted, That until there shall be within the Colony a sufficient number of Judges to constitute a Court of Appeals, the Governor for the time being, and the Executive Council of the said Colony (excepting the Attorney-General), shall be a "Court of Appeals" for the said Colony, and shall have power and authority to receive and hear Appeals from the Judgments of the said Supreme Court where the sum or matter in issue shall amount to one hundred pounds or upwards, or shall involve directly or indirectly any claim or question respecting any property or civil right of the said amount or value, and to affirm, alter, or reverse such judgments in whole or in part, or to dismiss the said appeal with costs, as may be just. Provided always, that upon every appeal to be brought before the said Court of Appeals from any judgment of the Supreme Court upon the verdict of a jury of twelve men, the said Court of Appeals shall not reverse, alter, or inquire into such judgments except only for error of law apparent on the record."

This curiously-constituted appellate tribunal, from which the only lawyer in the Executive Council was excluded, and which, owing to the nature and frequency of the early land claims and Crown business generally, would in many cases be in the nature of a partizan, remained in existence on the statute-book, at least, until the Ordinance was repealed by s. 2 of the Supreme Court Act, 1860. It is clear from at least one appeal, *The Queen v. Clarke*, (1851) N.Z.P.C.C. 516, that the Attorney-General preferred the decision of the Judicial Committee on a question of law to that of his lay-colleagues, for leave was granted by the Privy Council on his (Swainson's) motion to appeal direct to Her Majesty in Council from the decision of the Supreme Court at Auckland (Martin, C.J.); and the appeal itself was allowed by their Lordships.

It is an open question, however, if the Ordinance was ever operative. In the early 'fifties, in *Ormsby v. Ormsby*, an appeal to the Governor and his Executive Council was proposed; but doubt then existed as to their jurisdiction, and the Supreme Court did not go beyond preliminary proceedings which were not decisive of the question. At least it was so stated by a member of the profession: see *1858 New Zealand Parliamentary Debates*, 64.

But, also in 1858, in the House of Representatives, Mr. Hugh Carleton asked the Colonial Secretary whether the Supreme Court Amendment Ordinance, 1846, was then in force; whether it had ever been proclaimed as in force; and whether it had ever received Her Majesty's assent. He said that it was important that the public should know whether or not there actually was any appeal from the Supreme Court other than an appeal to the Judicial Committee of the Privy Council.

On July 29, 1858, the Hon. C. W. Richmond, then the Colonial Treasurer but afterwards Mr. Justice Richmond, replied that he was not prepared to give the legal opinion involved in an answer to the first part of the question. The Ordinance had not been proclaimed, or assented to; but neither of these points was material. The Bill had not been reserved, but left to its operation. In a despatch from Earl Grey to Governor Grey, dated May 2, 1857, His Lordship had said that the Ordinance had "become obsolete and virtually abrogated by the recent Constitution Act of New Zealand," and he had not advised the Queen to make any order in its regard. He added:

> "You will take care, however, that in any future legislation on the same subject the regulation of appeals to the Queen in Council be referred exclusively to Her Majesty in Council, it being Her Majesty's prerogative to determine on what conditions she will receive such appeals, it being beyond the power of the local Legislature to narrow the exercise of that discretion."

Mr. Richmond concluded by saying that he would leave the honourable member to make what he could of that despatch (*ubi. sup.*).

If the Ordinance were ever in operation, then for nearly two years, from January 1, 1861, when the Supreme Court Act, 1860, came into operation, there was no provision for the hearing of local appeals from the Supreme Court.

It will be remembered that Mr. Justice H. S. Chapman expressed the view shortly after his appointment that there would be no Court of Appeal in New Zealand until three Judges were appointed. On July 1, 1862, Mr. Justice Gresson, who had been temporarily in judicial office since December 8, 1857, received permanent appointment. Chief Justice Sir George Arney and Mr. Justice Johnston were the other two members of the Judiciary at the time.

On July 15, 1862, a Court of Appeal Bill was introduced in the Legislative Council by the Attorney-General, Hon. Henry Sewell, and his motion for leave was seconded by Chief Justice Arney, who was a member of the Upper House. On the first reading, His Honour said he had given assistance in framing the Bill. On the second reading, a few days later, he referred to the recent power of appeal in criminal cases then recently introduced in England, and he said the whole of the new Bill was founded on the practice then

in force in Westminster Hall; and one good effect would be that the decisions of the new Court would, at any rate, assimilate to those of the English Courts.

In Committee, an amendment that at least one sitting of the Court of Appeal should be held in every year from January 1, 1863, onwards, was lost, the Hon. Mr. Richmond voting with the minority and the Chief Justice and the Attorney-General with the majority. The Bill passed both Houses without apparent discussion, and became law on September 15, 1862.

The Act, by s. 2, constituted a Court of record in the Colony to be styled "The Court of Appeal of New Zealand," and, by s. 3, declared the Judges of the Supreme Court for the time being to be the Judges of the Court of Appeal. Section 5 provided that any two or more of these Judges should have power to act as a Court of Appeal, but two Judges, at least, should concur in every decision of the Court. This lengthy statute of eighty-five sections made provisions for the civil jurisdiction of the Court, decreeing the procedure on appeal from the decision of the Supreme Court, in cases reserved by the Judges, in the striking of barristers and solicitors off the rolls, in proceedings in error, and in appeals from the District Courts; and it also provided for the Court's criminal jurisdiction, with trials at bar, trials by special juries, removal of convictions and orders to the Court of Appeal and also questions of law arising in trials in which a conviction had been recorded, and proceedings in error in indictments, inquisitions, and informations.

(The Court of Appeal Amendment Act, 1870, recited that doubts had been entertained whether the Court of Appeal had power to award costs in certain cases, and the amending statute set these doubts at rest by appropriate provisions, and it also empowered one or more of the Judges to adjourn the sittings of the Court of Appeal, or, if none of them was present, it empowered the Registrar to do so.)

Little time elapsed before the first sitting of the new Court of Appeal. On November 25, an Order in Council fixed a sittings of the Court to be held within the Supreme Court, Christchurch, on February 10, 1863, at 11 a.m., thus giving the sixty days' notice required by the new Act: *1862 New Zealand Gazette*, 334.

On February 10, 1863, the first sitting of the Court of Appeal was held in the Provincial Council Chamber, Christchurch. A full Bar of the Canterbury and adjacent provinces received their Honours. Chief Justice Sir George Arney, Mr. Justice Johnston, Mr. Justice Gresson, and Mr. Justice Richmond (who had been appointed to the Supreme Court Bench on October 20 of the previous year, within a month of the passing of the Court of Appeal Act).

The account of this historical sitting, which we take from the *Lyttelton Times* (Christchurch) of February 14, 1862, is as follows:—

> "The arrangements made for the comfort of the Bench, the attendant counsel, and the public were of a very complete character, and gave unmixed satisfaction. The robing-rooms were replete with every convenience, and the Council Chamber presented a very elegant appearance. The room itself a handsome Gothic hall. The Judge's bench was placed at the north end, under a canopy of crimson damask; the seats and their cushioned backs were covered with the same material. The tables for the Judges, the Clerk, and the counsel were of polished native wood, and of a form corresponding to the architecture of the room. Just without the bar, on the east side, is a large recess and a bay window, within which were seats for ladies. The Court within the bar occupied about one-third of the area of the hall, the remaining space being devoted to a barristers' table and benches, reporters' table, and benches for the gentry and official personages. The general public were accommodated in the strangers' gallery. The benches, all of Gothic design, had cushions and stuffed backs, covered with crimson leather. From this brief description, it will be seen that Canterbury was not unmindful of the outward respect due to the majesty of the law.
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> "Precisely at eleven o'clock, the hour appointed for the commencement of business, the Judges entered the hall, and all persons present immediately rose, nor did they resume their seats until Chief Justice Arney courteously indicated his desire that they should do so. The Chief Justice had no distinguishing seat on the bench, and, as there are four Judges, he could not be said to occupy the centre. He had on his right hand Mr. Justice Johnston; and on his left Mr. Justice Gresson and Mr. Justice Richmond.
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> "The Chief Justice, before entering upon the business, made a few remarks upon the establishment of a superior Court of law. He and his brethren on the Judicial Bench were grateful for this timely provision made by the Legislature in 1862. The opening of a Court of Appeal was an event significant of the progress of this Colony, and a most important incident in the history of its Judicature. To the public it offered new guarantees of a more complete and a more effective administration of justice. The enlarged relations which had grown up between the mercantile classes of the community and the complicated claims of right which were already brought before the Supreme Court absolutely required that any suitor being dissatisfied with the judgment of a single Judge should be enabled to have that judgment reviewed. To the Judges themselves the establishment of that Court was a source of unmixed satisfaction. It was on the solicitation of the Judges that the Government had entertained, and the Legislature of New Zealand in its wisdom had enacted, the important measure, under the provisions of which they were then assembled; for already questions of great difficulty had arisen, questions involving the application of refined principles of law, in which a single Judge, considering that the highest interests of individuals, perhaps of families, depended on his isolated decision, might well feel the burden of responsibility almost too heavy to bear. He believed he spoke the sentiments of all the learned Judges then on that Bench, in saying, that henceforth they would each administer the law with increased firmness, and with more of that self-consciousness, which every Judge must feel, who knew that his decision, if erroneous, might be corrected, after solemn argument, before the Court of Appeal. To the Bar, especially, this Court was an institution which would be of an incalculable benefit—fostering and training them up worthily in their noble profession, and familiarizing them with enlarged views of the principles and doctrines of law; the high character which he was pleased to acknowledge they at present maintained was an earnest of future progress under higher advantages; and he felt assured that they would bear favourable comparison with their brethren in the Courts of Great Britain. In conclusion, he acknowledged with grateful satisfaction the liberality of the local authorities, as shown in the handsome appointments of the hall in which they were then assembled, and in the other provisions they had made for the comfort and convenience of the Court."

The Court was then opened by the reading of the Proclamation (*supra*). Their Honours, by virtue of the powers vested in them by the Court of Appeal Act, 1862, thereupon made an order that the Registrar of the Supreme Court at Christchurch should act as Registrar of the Court of Appeal, and that he should hold the seal which had been transmitted to him by the Government. This order was the first rule of practice in the Court of Appeal, and it was ordered that it should come into operation forthwith and remain in operation until a further rule should be made on the subject: this appeared later in *1863 New Zealand Gazette*, 153.

At least two precedents were established on the Court's opening day. After the calling of the first case, *Slack and Le Fleming v. Lockhart*—an appeal from the judgment of Mr. Justice Gresson awarding

£6,000 for breach of contract in respect of the sale of a run—it was remarked from the Bench that there were no rules for the guidance of the Court; and, after conferring together, their Honours announced that two counsel might speak on each side, that appellant's counsel should open, and that one of them should have the right of reply.

The other precedent is given respectful observance to this day: before the first case was called, Mr. G. B. Barton, of Dunedin, asked the Court to fix as distant a day as possible for the hearing of the appeal, *Teschemaker v. McLean.* But the reason put forward was, however, not one heard nowadays. Counsel said that there were no books of reference available, as the Court had no library, and some time would necessarily elapse before they could be gathered from private sources. That case came on for hearing on February 19.

In the first appeal to be heard, *Lockhart v. Le Fleming and Others*, Mr. Travers and Mr. Wynn-Williams appeared for the appellant and Messrs. Gillies (who afterwards on March 3, 1875, became Mr. Justice Gillies), Mr. Slater, and Mr. Harston, for the respondents. The Court reserved its judgment and then, after consultation with counsel from the other provinces, adjourned for a week. Judgment was delivered on the 20th.

On February 17, the appeal, *McLean v. The Queen*, was heard, with Mr. Hart and Mr. Gillies for the appellant, and Mr. Travers and Mr. Sewell for the respondent. This case lasted for three days. Then came a five-day appeal, on special case from Otago, *McLean v. Teschemaker*, in which, for some unstated reason, Mr. Justice Richmond declined to sit: this is the first reported case in the Court of Appeal: *Macassey* 10. Judgment was reserved, and Mr. Hart consented that it might be delivered by a single Judge, with leave to appeal given to either party. (Actually, judgment was not delivered until over seven months had elapsed.) After making absolute a rule for striking an Otago practitioner off the roll, their Honours read the Rules for the practice and procedure of the Court of Appeal, which they had drafted while at Christchurch: *1863 New Zealand Gazette*, 152. These dealt with affidavits; the stating and transmission of cases, each to be first approved by a Judge; and Supreme Court party-and-party costs, with fees to counsel "on a more liberal scale than in the Supreme Court." Costs as from a distance made their first appearance:

> "To *one* of the counsel, if usually resident in any place other than where the Court of Appeal shall sit, a liberal brief fee and refreshers shall be allowed besides reasonable cost of maintenance and travelling expenses for each day during which he shall be necessarily absent from his usual place of abode for the purpose of attending the Court of Appeal. If the same counsel, not resident in the place where the Court is held, appear in several cases, his allowance for maintenance and travelling expenses shall be equally divided, and the proper proportion allowed in respect of each case."

The Court of Appeal sat for the first time in Wellington on October 19, 1863, in the Court-house, Lambton Quay. On October 14, the Chief Justice, Sir George Arney, and Mr. Justice Johnston and Mr. Justice Gresson, by a rule of practice, revoked the appointment of the Christchurch Registrar as Registrar of the Court of Appeal, and ordered that the Registrar at Wellington, until further order, should have in respect of the Court of Appeal all such powers and duties as he then had in respect of the Supreme Court.

The Proclamation ordering the sitting was read at the commencement of the proceedings (*1863 New Zealand Gazette*, 341), and the Registrar's appointment was also announced. The cases heard were *Reg. v. St. Hill* (*a Magistrate*), *Ex parte Bolton* (in which judgment was arrested); *Reg. v. Tahana Tawhanake* (in which a conviction for forgery was quashed); *Woodward v. Austin*; and *Woodward v. Beard.* Judgment was given on October 27 in *McLean v. Teschemaker*, heard at the previous sitting; and on the motion of Mr. Brandon, for the respondent, leave to appeal to the Privy Council was given.

The third sittings of the Court of Appeal took place at Dunedin, on October 17, 1864. The members of the Court were the Chief Justice, Sir George Arney, Mr. Justice Johnston, Mr. Justice Gresson, Mr. Justice Richmond, and Mr. Justice H. S. Chapman (who had been reappointed, after a period in Tasmania, on March 23 previously).

The proceedings were opened before Mr. Justice Johnston and Mr. Justice Gresson. The Proclamation convening the Court (*1864 New Zealand Gazette*, 335) and the rule appointing the Otago Registrar to hold office as Registrar in the Court of Appeal were read. Mr. Gillies then read a letter signed by certain members of the profession relating to the costume of barristers appearing in the Court of Appeal. Their Honours declined to make any order on the subject, without consulting the other Judges. The Court then adjourned. On the following day, the learned Chief Justice said that the Court would appoint a future day to receive in Chambers a deputation from the profession on the matter of the costume of the Bar. Four appeals were heard, and judgments delivered, before the Court adjourned *sine die* on November 16, after refusing leave to appeal in one case. These are reported in *Macassey*, 212 *et seq.*

A rule reappointing the Registrar at Wellington to the duties of his office in the Court of Appeal on October 23, 1865, and the usual Proclamation had been gazetted (*1865 New Zealand Gazette*, 259), before the Court sat at Wellington on October 24, the Chief Justice and the three Judges being present. At this sitting, the Attorney-General, in the person of Mr. (afterwards Sir James) Prendergast, appeared in two criminal appeals, in support of the conviction: *Reg. v. Johnstone* and *Reg. v. White.* This seems to be the first recorded appearance of the Attorney-General, as such, in the Court of Appeal. During this sitting, Dr. Foster presented memorials to their Honours on the subject of "bar costume"; but the records do not show the result of these attempts to obtain a ruling on the question. On November 9, the Court adjourned until February 1, 1866, at the Court-house, Dunedin.

Before adjourning, however, their Honours made a rule revoking the appointment of the Wellington Registrar, and appointing the Otago Registrar to the duties of the Court of Appeal. The Court did not sit again until October 9, 1866, when this rule was revoked and the Wellington Registrar reappointed. With the usual formalities, the sitting was begun at Wellington on the same day, there being present Mr. Justice Johnston, presiding, Mr. Justice Gresson, Mr. Justice Richmond, and Mr. Justice H. S. Chapman, but owing to the indisposition of Mr. Justice Moore (who had been appointed temporarily on May 15, 1866, and the only temporary Judge to sit in the Court of Appeal) the Court adjourned to October 15. It then sat until October 30, and adjourned to Dunedin on May 8 following.

No adjourned sitting of the Court of Appeal took place at Dunedin; but, by arrangement between their Honours and the Government, a fresh sitting was proclaimed by Order in Council on May 21, 1867, to be held at Wellington on July 24 of that year (*1867 New Zealand Gazette*, 231); and, at that sitting, the reserved judgments were read by Mr. Justice Johnston and Mr. Justice Richmond. The Court thenceforth sat at Wellington in the month of October: but from the year 1872 onwards, there were two sittings in each year commencing in May and November.

With the passing of the Court of Appeal Act, 1882, the first period of the Court's history comes to a close.

In February, 1887, the regular sitting at Wellington was interrupted by a Proclamation appointing a sitting of the Court at Christchurch for March 8 for the hearing of the appeal from the verdict of murder and sentence of death of Hall arising out of the death of his father-in-law, Captain Cain, at Timaru. The judgment of the Court is reported, *Reg. v. Hall*, (1887) N.Z.L.R. 5 C.A. 93, and the story of the Hall trials is told in Mr. Justice Alper's *Cheerful Yesterdays*, and in Mr. C. A. L. Treadwell's *Famous New Zealand Trials*.

With this one intermission, the Court has sat in Wellington until the recent special sitting at Auckland.

Summary of Recent Judgments.

FULL COURT.
Wellington.
1938.
July 4, 15.
Myers, C.J.
Blair, J.
Fair, J.

IN RE **AN ARBITRATION, O'BRIEN AND THE SOUTH BRITISH INSURANCE COMPANY, LIMITED.**

Insurance—Motor-vehicles (General)—Comprehensive Policy—Construction—Owner and Hirer insured—Accident causing Death—Whether Words "loss damage liability or bodily injury" apply where Death has occurred—General Exceptions—Whether Consent and knowledge of "the insured" includes that of the Owner.

The company was the insurer of a motor-car under a comprehensive policy issued in the names of "the insured," G. and Co., as owners, and Mrs. O'Brien, as hirer, for respective rights and interests. Among the "General Exceptions" to the company's liability the following provisoes appeared:—

"No liability shall attach to the company under this policy in respect of any loss damage liability or bodily injury by accident occurring or arising—

"While any motor-car in connection with which indemnity is granted under this policy is— . . .

"(*d*) Being driven with the consent of the insured by any person who to the insured's knowledge is unlicensed or disqualified at the time from holding a license."

A typewritten slip attached to the policy read:

"For the benefits of sections 3 and 4 only of this insurance Mrs. Elizabeth O'Brien is deemed to be the insured."

Sections 3 and 4 related to medical expenses and personal accident respectively. Under section 4 the company's liability, if the insured's wife or husband should "sustain bodily injury by accident in direct connection with" the motor-car affected by the policy, the sum of £1,000 was to be payable if such injury should, within three months of the occurrence of the accident, be the direct and immediate cause of death.

While the policy was in force, Mr. and Mrs. O'Brien both sustained bodily injury by accident in direct connection with the car, the husband dying from the injury so sustained, the wife incurring certain hospital expenses. The accident occurred while the car was being driven with Mrs. O'Brien's consent by her husband, who, to her knowledge, was not the holder of a license. The car, however, was not being driven by him with the consent of the owner, which had no knowledge that he was unlicensed.

Mrs. O'Brien claimed £1,000 in respect of her husband's death and for her own hospital expenses. The company denied liability, and, in pursuance of a condition in the policy, a dispute as to the construction of the policy was deferred to arbitration.

On a case referred to the Supreme Court by the arbitrators and umpire,

Iles, for Mrs. O'Brien; **Burnard,** for the South British Insurance Co., Ltd.

Held, 1. That the words "loss damage liability or bodily injury" in the General Exceptions clause applied to a case where death had occurred.

2. That, reading the General Exceptions clause in conjunction with the typewritten slip and sections 3 and 4 of the policy, the words "the insured" in that clause referred to Mrs. O'Brien and to her only.

Linekar v. Hartford Fire Insurance Co., Ltd., [1936] N.Z.L.R. 776, G.L.R. 568, distinguished.

Quaere, per *Myers*, C.J., Whether in the event of circumstances again arising similar to those in **Jury v. North Island Motor Union Mutual Insurance Co.,** [1930] N.Z.L.R. 562, G.L.R. 171, and **Linekar v. Hartford Fire Insurance Co., Ltd.,** [1936] N.Z.L.R. 776, G.L.R. 568, the question of public policy should not be considered.

Solicitors: D. W. Iles, Gisborne, for Mrs. O'Brien; **Burnard and Bull,** Gisborne, for the South British Insurance Co., Ltd.

COURT OF APPEAL.
Wellington.
1938.
June 16;
July 18.
Myers, C.J.
Blair, J.
Kennedy, J.
Johnston, J.
Fair, J.

THE KING v. WHITE.

Criminal Law—Practice—Indictment—Offence involving Two Previous Convictions—Indictment containing no Reference to Accused's Previous Convictions—Offence so charged triable summarily—Jurisdiction—Whether Indictable Offence disclosed—Whether Power to Amend Indictment—Crimes Act, 1908, ss. 387, 392, 398, and 399—Justices of the Peace Act, 1927, s. 124—Licensing Act, 1908, ss. 272, 273 (*a*) (ii), (*f*).

W. was charged before a Stipendiary Magistrate with keeping liquor for sale at a place within an area proclaimed by the Governor under s. 272 of the Licensing Act, 1908 (within which no publican's license can be granted), and with having been twice previously convicted of offences under s. 273 of that statute. He elected to be tried by a jury and was committed for trial at a sitting of the Supreme Court. The indictment upon which the grand jury found a true bill, to which he pleaded not guilty, and upon which the common jury found him guilty, contained no reference to previous convictions. The offence so stated in the indictment was an offence determinable summarily under the Justices of the Peace Act, 1927, and not triable on indictment. During the trial counsel for accused in answer to the question of the learned Judge presiding admitted that accused had been twice previously convicted.

On a case stated under s. 442 of the Crimes Act, 1908,

Solicitor-General (Cornish, K.C.), for the Crown; **W. J. King,** for the accused.

Held, *per totam Curiam,* That the indictment, as it stood, did not sufficiently state an indictable offence.

Held, further (*Myers*, C.J., *Blair* and *Johnston*, JJ., *Kennedy* and *Fair*, JJ., dissenting), That there was no power to amend the indictment under s. 392 of the Crimes Act, 1908, as the indictment did not state a crime, but only an offence determinable summarily under the Justices of the Peace Act, 1927, and not triable on indictment; and the grand jury had no jurisdiction to find a bill and the bill found was a nullity.

Held, also (*Myers*, C.J., *Blair* and *Johnston*, JJ., *Fair*, J., dissenting, and *Kennedy*, J., not expressing any opinion), That, where the right to claim a trial by jury is dependent on there having been previous convictions, as well as a specific offence on a particular occasion, such convictions are an essential part

of the crime and must accordingly be stated in the indictment; and unless the jury finds both ingredients the crime is not complete.

R. v. Blackwell, [1936] N.Z.L.R. 854, G.L.R. 637 (except as to the *obiter dictum* that the previous convictions were an ingredient of the offence), considered and applied.

R. v. Skellon, (1913) 33 N.Z.L.R. 102, 15 G.L.R. 671, and **R. v. Stone,** [1920] N.Z.L.R. 462, G.L.R. 357, referred to.

The conviction was quashed and the judgment thereon arrested.

Solicitors: Crown Law Office, Wellington, for the Crown; **King and McCaw,** Hamilton, for the accused.

COURT OF APPEAL.
Wellington.
1938.
July 8, 18.
Myers, C. J.
Blair, J.
Fair, J.

ASHBY v. SHAW, SAVILL, AND ALBION COMPANY, LIMITED.

Worker's Compensation—Liability for Compensation—"Fit for work"—Worker recovered from effects of Accident but unfit for Work owing to Independent Disease—Certificate of Medical Committee—Facts to be stated—Conclusiveness—Workers' Compensation Amendment Act, 1936, s. 9 (1) (c), (2).

The words "fit for work" in s. 9 (2) of the Workers' Compensation Amendment Act, 1936, mean fit for work *quoad* the injuries sustained by the worker by the employment accident in respect of which he was entitled to compensation.

Where a certificate under the subsection is to the effect that the worker has recovered from his injuries sustained by his employment accident but that he is unfit for work owing to an independent disease not attributable to the accident, all these facts—being matters referable to the worker's "fitness" for work within the meaning of the subsection—should be certified by the medical committee. The certificate of the medical committee is conclusive as to such facts so certified, and the employer cannot be required by the Court of Arbitration to make any payments of compensation as from the date of the certificate.

Robert Addie and Sons' Collieries, Ltd. v. McAllister, [1937] 1 All E.R. 676, 30 B.W.C.C. 1, and **Smith v. Munn,** (1932) 47 C.L.R. 426, referred to.

So held, by the Court of Appeal, in a case stated by the Court of Arbitration.

Counsel: F. W. Ongley, for the plaintiff; **Blundell,** for the defendant.

Solicitors: Ongley, O'Donovan, and Arndt, Wellington, for the plaintiff; **Bell, Gully, Mackenzie, and Evans,** Wellington, for the defendant.

Case Annotation: *Robert Addie and Sons' Collieries, Ltd. v. McAllister,* E. & E. Digest, Supplement to Vol. 34, p. 76, para. 2970e.

COURT OF ARBITRATION.
Christchurch.
1938.
July 18, 30.
O'Regan, J.

RE **CHRISTCHURCH TRAMWAY AND POWER-HOUSE EMPLOYEES' AGREEMENT.**

Industrial Conciliation and Arbitration—Jurisdiction—Review of Agreement under Labour Disputes Investigation Act, 1913—"Matters" before the Court—Industrial Conciliation and Arbitration Act, 1925, s. 80—Finance Act, 1936, ss. 15 (4), 17.

Section 80 of the Industrial Conciliation and Arbitration Act, 1925, refers only to matters brought before the Court of Arbitration in accordance with statutory authority.

The jurisdiction of the Court, which is limited by statute, cannot be extended by means of a provision inserted by the parties in an agreement under the Labour Disputes Investigation Act, 1913.

Counsel: Upham, for the Christchurch Tramway Industrial Union of Workers; **Hutchison,** for the Christchurch Tramway Board.

Solicitors: Hunter and Ronaldson, Christchurch, for the Christchurch Tramway Industrial Union of Workers; **J. J. Dougall, Son, and Hutchison,** Christchurch, for the Christchurch Tramway Board.

SUPREME COURT.
In Chambers.
Hamilton.
1938.
August 3, 10.
Reed, J.

TIKI PAAKA v. MACLARN.

Charging-order—Jurisdiction—Judgment Debtor dead since Order *Nisi* made—Service on Administrator of Notice of Motion to make Order *Nisi* absolute—Service Insufficient—Code of Civil Procedure, RR. 314 (b) (e), 326, 346, 347.

The Court has no jurisdiction to make absolute a charging-order *nisi* made against a judgment debtor who has died after the making of that order and service of it upon him and the garnishee.

Finney v. Hinde, (1879) 4 Q.B.D. 102, and **Stewart v. Rhodes,** [1900] 1 Ch. 386, applied.

Counsel: M. H. Hampson, for the plaintiff; **Jack,** for the Public Trustee.

Solicitors: Hampson and Chadwick, Rotorua, for the plaintiff; **The District Solicitor,** Public Trust Office, Hamilton, for the Public Trustee.

Case Annotation: *Finney v. Hinde,* E. and E. Digest, Vol. 21, p. 647, para. 2262; *Stewart v. Rhodes, ibid.,* Vol. 24, p. 748, para. 7775.

SUPREME COURT.
In Chambers.
Wellington.
1938.
July 8.
Quilliam, J.

AAMODT v. AAMODT.

Divorce and Matrimonial Causes—Practice—Service of Petition—Respondent in Norway—Unheard of for Seventeen Years—Present Address unknown—Service dispensed with—Divorce Rules, R. 18.

Service of the citation and petition in a suit for divorce may be dispensed with although no affidavit in corroboration of the petitioner's affidavit is filed, where there appears to be no possibility of obtaining such corroborative affidavit, where, as here, the respondent had not been heard of for seventeen years.

Vercamer v. Vercamer (see note, [1938] N.Z.L.R. 563), followed.

Counsel: C. A. L. Treadwell, in support of motion to dispense with service.

Solicitors: Treadwells, Wellington, for the petitioner.

COURT OF ARBITRATION.
Invercargill.
1938.
June 16.
O'Regan, J.

SEAWARD DOWNS DAIRY FACTORY COMPANY, LIMITED v. HOPPER (INSPECTOR OF AWARDS).

Industrial Conciliation and Arbitration Acts—Award—Jurisdiction—Holiday Provisions—No Implied or Consequential Amendment by Statute—Industrial Conciliation and Arbitration Amendment Act, 1936, s. 21—Factories Amendment Act, 1936, s. 4 (1).

Section 21 of the Industrial Conciliation and Arbitration Amendment Act, 1936, confers no jurisdiction to make any consequential amendment of an award or industrial agreement in the matter of holidays, and the Court of Arbitration has no jurisdiction to amend such holiday provisions.

In re Wellington City Tramways, Omnibus, and Power-houses Employees' Industrial Agreement, (1936) 36 Bk. of Awards, 1437.

An award made in December, 1935, which conceded an annual holiday on full pay to every worker, other than casual workers, employed in or about a dairy factory or creamery for the required qualifying period, is not impliedly amended by s. 4 (1) of the Factories Amendment Act, 1936, which provides that no worker may be so employed on more than six days in any one week, and, consequently, the holiday provisions remained in full force.

Wilson v. Cardiff Co-operative Dairy Co., Ltd., [1937] N.Z.L.R. 1137, G.L.R. 635, 37 Book of Awards 3133, distinguished.

Counsel: H. J. Macalister, for the appellant.

Solicitors: Macalister Bros., Invercargill, for the appellant.

Radio Defamation.

An Unexplored Field of Law.

In Mr. A. P. Herbert's reports of *Misleading Cases* there is an interesting but indecisive case on the nature of defamation (whether libel or slander) when concealed within the spiral grooves of a gramaphone record: a footnote of query in *Pollock on Torts* may have been the inspiration of the report. The memoirs of Casanova present a cognate problem: a parrot was taught to utter about ladies, whose names it mentioned, an observation of the kind that is actionable in New Zealand without proof of special damage, and was then offered for sale in the London Exchange. The ladies interested "consulted several counsel, who agreed in saying that a parrot could not be indicted for libel, but that they could make me pay dearly for my jest, if they could prove that I had been the bird's instructor." The development of radio-telephony prompts an inquiry into other recondite forms of defamation.

The basis of the action for defamation is generally described in the books as a defamatory "statement," and a "statement" is explained as consisting of (*a*) printed words or some other permanent record, down to an effigy in the waxworks—these make libel; or (*b*) spoken words, sounds, gestures, or something else in transient form—these make slander. All these, however, are the works of man's hands or the words of man's mouth; Casanova's parrot never figured in a reported judgment, and there is no record of a trial of a slander conveyed by gestures published by means of a cinematograph film. It may however be confidently said that the reproduction of a human voice that comes out of ear-phones or a loud speaker is a defamatory statement: the conception behind the words of the text-writers is sufficient to embrace mechanical devices of this kind, even if the terms they have used do not. Had it not been for the confidential nature of an ordinary telephone instrument, or perhaps for the scrupulous observance by the public of that passage in the telephone regulations which forbids telephone messages to contain language of an objectionable nature, the point might have been settled long ago.

Another point is the range of liability. Conceivably the persons liable may be (*a*) the possessor of the receiving-set that ultimately enables the defamatory matter to become comprehensible, (*b*) the manipulator of the transmitting station, whose co-operation is essential, and (*c*) the person whose spoken utterance is mediately reproduced. It cannot be assumed that each of these is in the same position, and to each of them special defences may be available. In such a novel sphere it is fortunate that a certain amount of guidance is available from the treatment of radio-telephony in the law of copyright.

If the owner of a receiving-set uses it with the intention that the emitted sounds may be audible to a gathering identifiable as "the public," it has been held that he is giving a public performance within the meaning of the Copyright Act, 1911 (Imp.): *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, [1934] Ch. 121. It may be taken, therefore, that in the field of defamation he is publishing the matter complained of. In the case cited the Brewery Company, through its agent the hotel-manager, knew what was to come out of the receiving-set—namely, a pre-announced concert programme. If, however, the company had no reason to expect to evoke audible sounds that would be illegal either under the law of copyright or the law of defamation, it would seem that it would be protected under the rules relating to what is called in the latter branch of law "innocent dissemination." In libel, the questions when this defence is raised are: did the defendant know, and, if not, ought he to have known, that the matter he was disseminating was libellous? The issue is one of negligence: *Fraser on Libel and Slander*, 7th Ed. 23. "If one reads" (*sc.*, silently) "a libel, that is no publication of it, or if he hears it read, it is no publication of it, for before he reads or hears it, he cannot know it to be a libel": *Lamb's Case*, (1610) 9 Co. Rep. 59b. In slander it would seem reasonable that the same criterion should apply. Perhaps the owner of an unlicensed set, as he is doing an illegal thing in any case, cannot avail himself of this defence.

What is the broadcaster's position? In *Messager v. British Broadcasting Corporation*, [1927] 2 K.B. 543, McCardie, J., explained that "by means of electrical instruments the defendants by modulating the waves in the ether were able to affect, as they did affect, a vast number of electrical instruments possessed by members of the public, and thereby to render audible to that public the performance given in the defendants' studios." In doing what they did, they gave a public performance. This part of the decision was not challenged on appeal: [1928] 1 K.B. 660. Whether or not the decision is sound as an interpretation of the qualified definition of "performance" in s. 35 (1) of the Copyright Act, 1911 (Imp.)—as to which see *Copinger on Copyright*, 7th Ed. 145—it is a useful indication of what may be included in "publication" in a context where no statute is involved. It seems justifiable to say that the broadcaster, even though the last he has to do with it is to create (or modulate) electric currents (or waves) in the ether (or space occupied by atmosphere, stratosphere, and other spheres), must be held to be publishing the matter. In *Meldrum v. Australian Broadcasting Co.*, [1932] V.L.R. 425, it is implicit in the judgments that there was a publication of defamatory matter, always assuming the broadcasting apparatus to be "effectively connected with receiving apparatuses." (The actual issue in that case was an attempt to overcome the need to prove special damage, by contending that to read from a script was libel, not slander—a point not exclusive to radio-broadcasting.)

Whether the broadcaster can invoke the plea of innocent dissemination no doubt depends on the circumstances, assuming the question to be one of negligence, and therefore of fact. If the statement is recorded matter, or spoken into the microphone by his staff or a person under contract to him, it is fairly clear that he must be responsible.

If he is broadcasting a public function, he may not be so certainly to blame. It may well be argued, however, that in such a case he is taking a risk which clearly exists. It is well known that broadcasting concerns employ a monitorial system, under which an officer with a switch at hand listens to what is being broadcast, and if the speaker shows signs of becoming irresponsible the transmission can instantly be interrupted. A monitor might indeed be excused for being less on his guard when broadcasting the proceedings of the Synod or the University Senate that when broadcasting those of a political demonstration or an all-in wrestling match.

Suppose the presence in which the broadcast words are actually spoken to be one that carries an absolute or qualified privilege, does this privilege extend to the broadcaster? As regards occasions of absolute privilege, the answer must be in the affirmative. "It is now well established that faithful and fair reports of the proceedings of Courts of justice, though the character of individuals may incidentally suffer, are privileged": per Cockburn, L.C.J., in *Wason v. Walter*, (1868) L.R. 4 Q.B. 73. The same case laid down the same rule in respect of reports of proceedings in Parliament. Although the question has actually been tried only in cases of libel, it can hardly be questioned that the same principle should be applied to what, but for the privilege, would be slander; nor that an actual reproduction of the voice supplies as faithful and fair a report as could be wished for. Of course, this right of reproduction has its limits; for instance, it is not permissible to "poison the minds of the public by circulating that which for the purposes of justice the Court is bound to hear" in the way of obscenity or blasphemy.

As regards occasions of qualified privilege, there is no common-law protection to be found for the disseminator of defamatory matter. A statutory protection applicable alike to occasions of absolute and qualified privilege and to those of no privilege at all is contained in the Law of Libel Amendment Act, 1910; but it is definitely limited to libel.

Where, as in New Zealand, broadcasting is undertaken by the Crown, further special circumstances arise. By s. 3 of the Crown Suits Amendment Act, 1910, a petition of right lies against the Crown for tort in general; but by s. 4 libel and slander are excluded, and the common law still prevails, under which the King can do no wrong. There is the converse principle that the King does not employ servants to do wrong, and the Royal prerogative does not protect them. Accordingly, they are personally liable like any other subject for the wrong they do. Some difficulty may, however, arise in ascertaining where the responsibility lies in a case of this sort. One civil servant is not the agent or servant of another, even although the former may be subject to the latter's control and direction; for the senior may not have an ordinary employer's power to select or dismiss his junior, and the rules of vicarious liability are therefore not applicable: *Roper v. Works and Public Buildings Commissioners*, [1915] 1 K.B. 45. Where the authority to broadcast is conferred by the Legislature on one of His Majesty's responsible Ministers, it might be thought that the maxim, *Qui facit per alium facit per se*, enjoyed more of its general application, since there is a statutory creation of responsibility. The cases of *Lane v. Cotton*, (1701) 1 Ld. Raym. 646, and *Bainbridge v. Postmaster-General*, [1906] 1 K.B. 178, show, however, that a Minister is not liable for the acts of officers of his department. In this connection reference may be made to s. 173 of the Post and Telegraph Act, 1928, enacting that

> "no officer or other person employed in or about the working of any telegraph shall be liable . . . to any action for damages by reason of his having as such officer or other person transmitted or conveyed or taken part in transmitting or conveying by any such telegraph any defamatory libel."

"Telegraph" as defined appears to be wide enough to include apparatus of radio-telegraphy; but "telegraph" and "telephone" seem to be intended as mutually exclusive terms, and, in any case, the protection extends only to libel and does not cover slander.

Finally, as to the actual speaker, one question may be whether he knew the transmitting microphone was at work; or perhaps, whether he ought to have known. If not, an absence of intention may save him; "what is published inadvertently is not a libel," nor, one may suggest, a slander.

In studio transmission, the broadcast defamation is all the defamation there is. In platform transmission there is local defamation as well. As regards the latter, privilege may exist. Whether it extends to the broadcast defamation is another open question. *Cessante ratione, cessat lex.* In *R. v. Creevey*, (1813) 1 M. & S. 273, 105 E.R. 102, Bayley, J., said: "when the occasion ceased, the right also would cease," and Le Blanc, J., "when he published his speech to the world, it then became the subject of common-law jurisdiction." Spoken in a case about absolute privilege, the words are applicable to qualified privilege as well. From this case and *R. v. Lord Abingdon*, (1794) 1 Esp. 226, it would appear that a speaker loses an absolute privilege (and, therefore, *a fortiori*, a qualified privilege) when the originally privileged statement is repeated by him elsewhere than in the presence where the privileges attaches. These decisions are generalized by *Odgers on Libel and Slander* into the proposition that "if a member of Parliament publishes his speech to all the world, and it is defamatory of the plaintiff, he will be liable both civilly and criminally." Presumably the same would hold true of a Judge, advocate, or witness in a Court of justice—provided the act of publication was his own doing, or not within his own power to avert. Both the cases cited were, however, cases of libel, and the simultaneity of broadcasting did not exist. If, for reasons beyond his personal control, the speaker cannot make his privileged communication without further publication, the position may well be different. It may be observed also that the authority of these cases was questioned in the great case of *Stockdale v. Hansard*, (1839) 9 Ad. & E. 1, 112 E.R. 1112, though perhaps restored in the equally great case of *Wason v. Walter* (*supra*). In the matter of republication it seems that the law as settled in *Wason v. Walter* gives more protection to a reporter than to the original speaker.

Now that the use of aeroplanes has been taken out of the sphere of common law and placed under that of the statute, there can be few remaining topics on which at the present time the law remains more completely concealed *in gremio legis*, awaiting a series of leading cases for its happy delivery.

A Test of Jurisdiction.—A wife had issued a complaint in a country Court, and it was well-known in the community that she had suffered much cruelty at the hands of her husband. Just before the time for hearing, she relented. She appeared before two local Justices of the Peace, and told them she did not want to go on. She impressed on them that she wished to leave the punishment to God.

The Justices conferred for some minutes. Then, said the senior of them, "We regret, my good woman, that we cannot do as you wish; the case is far too important."

The First Criminal Sessions.

A Murder Trial at Auckland.

In November, 1841, news came of an atrocious murder committed by a young chief in one of the islets off Kororareka, in the Bay of Islands. The name of the murderer was Maketu, and his victims were a Mrs. Robertson, her two children, and a little half-caste in the house.

Maketu made no secret of the murder when it was done, and the question of arresting him was a very serious matter to a Government hardly yet established and that had no soldiers to support its authority to enforce its laws. It was Maketu's own father who came forward and gave him up. A meeting of chiefs was called at Paihia; and Waka Nene, Heke, Tawai, Patuone, and Pomare, all leading Chiefs of the Ngapuhi Tribe, discussed the situation. Heke was furious at the surrender; he would not in the least have minded the Maoris shooting the murderer, but to pass over the whole adjudication to the British Government was, he thought, to give up his independence. But the others insisted that the young man should be tried according to the law that by treaty they had accepted, and sent a letter to Hobson, expressing their loyalty to the Queen and their confidence in British justice.

As George Clarke recalls in his *Notes on Early Life in New Zealand*, "The trial was fixed for February, 1842,* and it was the first Criminal Sitting of the Supreme Court in New Zealand, under Chief Justice Martin, who had recently arrived from England. I do not know why, but out of some dozen capable men at hand the Government chose me, though the youngest of them all, to act as interpreter on this most critical occasion. It was for the Government itself a question of life and death. The greatest care was necessary to make everything clear to the Maoris, and it was an anxious task to make them understand the meaning of our antique forms of law. There were many Natives in Court, who, of course, had never seen our way of procedure; they listened with intense interest, as in the presence of Maori scholars who could have corrected any mistake I might make—though they had never once occasion to do so—I explained the principle that the law assumed a man to be innocent until he was proved to be guilty; I told them, under the Judge's direction, the functions of the jury and of the counsel on either side, and made them understand what was meant by the technical plea of 'Not guilty,' and such forms of oath as 'You shall truly try,' or 'The evidence you shall give, shall be the truth, the whole truth, and nothing but the truth.'

"The contrast was so great between the deliberation of the trial and the passionate way in which the Maoris were accustomed to settle such matters among themselves that they were struck with admiration and awe at the formality and patience of the whole proceeding, and, anxious as the circle was, it was as a new revelation of our ways, and went far to inspire them with confidence in the desire, at least, of the Supreme Court to be scrupulously just in its administration of the law. They were much astonished at the grave process of proving a crime that was already confessed, and greatly impressed with the personal demeanour of the Judge and the solemnity which I tried to put into my rendering of his words."

Maketu was hanged and his body buried within the precincts of the old gaol, near the corner of Queen Street and Victoria Street West. 'It would never have done to give it to his friends just then. A year or two afterwards the remains were handed over. When Chief Justice Martin afterwards visited the Bay of Islands, the father received him sadly, but without resentment, and with every mark of deference and respect.

* The Sessions began on February 28, and on that day a charge of murder against a European was heard, and a verdict of manslaughter was returned. The Maketu trial began on March 1, the other trial being held first in order to show the Maoris that the English law was no respecter of persons but treated Maori and Pakeha alike.

Legal Literature.

Jenks's Digest of English Civil Law. By EDWARD JENKS, D.C.L. (Oxon.), Hon. Litt. D. (Wales), Hon. LL.D. (Bristol), Emeritus Professor of English Law in the University of London. Third Edition, 2 Vols., pp. 1258, cclxvii + Index, 120. Butterworth & Co. (Publishers), Ltd.

Lawyers do not look with favour on the idea of codifying the common law, though Lord Halsbury, in his preface to the first edition of the *Laws of England* that is for ever associated with his name, suggested that the monumental work might form the basis of such a code. The eminent men who have prepared the third edition of *Jenks's Digest* are careful to point out that they have prepared a digest not a code, though to the ordinary practitioner the distinction may appear a trifle subtle. But whatever it may be, it is interesting to find that the civil law of England can be so concisely stated as in these two volumes; and this excellent statement of the law in brief compass suggests that codification may be postponed indefinitely, so much time, trouble, and shelf space being saved by this well-produced work.

The learned Editor, Dr. Jenks, is assisted by such brilliant exponents of the common law as the late W. M. Geldart, M.A., D.C.L., C.B.E., formerly Vinerian Professor of English Law; Sir William Holdsworth, D.C.L., Hon. LL.D., K.C., Vinerian Professor of English Law in the University of Oxford, Bencher of Lincoln's Inn; Sir John Miles, M.A., B.C.L., Warden of Merton College; R. W. Lee, D.C.L., K.C., Rhodes Professor of Roman-Dutch Law, Oxford, Reader to the Council of Legal Education, Bencher of Gray's Inn. Three of these gentlemen are Fellows of All Souls College, and the other an Honorary Fellow of Exeter College, all in the University of Oxford.

The competence, academic distinction, and professional eminence of these authors forbids the other thought that perhaps the treatment of the almost all-embracing subject is not adequate. Whatever the merits of codification, there can be no doubt that compressed into these two thin volumes is the whole English civil law. What that means to the practitioner who may want a proposition of law concisely stated and of unimpeachable authority cannot be overestimated. It has been a revelation to examine this work and find how readily even abstruse problems answer themselves from its pages. Counsel can take these two volumes into Court in the confident knowledge that he will readily find an answer to any request for the law on any point however it may take him by surprise. In office practice the *Digest* will be found by barrister or solicitor an invaluable starting-point for inductive research into any problem.

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. 116. Appeal by the Commissioner of Taxes from that part of the order of a Commission which declared that the amount of £10 owing to the Commissioner of Taxes for land-tax should be an adjustable debt, and should be deemed to be discharged from the date of the sealing of the order.

Held, varying the Commission's order, 1. That the provision discharging the land-tax as an adjustable debt must be deleted.

2. That orders should not be made prescribing terms for payment of land-tax, a charge for which, practically speaking, is inviolate and does not bear interest.

Semble, Notwithstanding the priority of the claim of the Commissioner of Taxes in respect of the whole amount of arrears of land-tax, it would be quite proper for the Commissioner, when requiring payment of same, to consider the effect of the Adjustment Commission's order so far as it affects the basic value of the land. If arrears of land-tax have been computed on unimproved values which subsequent investigations and orders of Adjustment Commissions indicate were in excess of any basic value ascertained in terms of the provisions of the Act, it would seem to be unreasonable to insist upon payment of arrears of land-tax assessed upon the basis of any higher valuation.

The Court, in the course of the judgment, said:

"By s. 11 of the Land and Income Tax Amendment Act, 1924, land-tax due and payable is made a charge on the land in respect of which it is payable, and further gives such charge priority over all existing and subsequent mortgages, charges, and encumbrances. Consequently a charge for land-tax, whether it is a default assessment or not, becomes an adjustable security taking priority over all other charges. It cannot be reduced except by the consent of the Commissioner of Taxes or unless the value of the land is so small that it will not support even the charge for land-tax as a first security. Reduction of its amount, to accord with the value of the property, would, in fact, result in all subsequent securities becoming mere adjustable debts.

"While there are cases where the charge for land-tax may be regulated, Commissions should remember that the Commissioner of Taxes has himself a wide discretion in this matter, and that it is not necessary for the administration of the Act that that discretion should be taken from the Commissioner of Taxes and exercised by the Commission.

"The effect of orders of the Adjustment Commission must, in a very great number of cases, result in a diminution of unimproved values and in a still larger number of cases establish unimproved values below the minimum assessable valuations. In such cases, it would seem reasonable that the Commissioner should make some adjustment of the arrears of land-tax in conformity with the adjustments in property values made by the Adjustment Commission."

CASE No. 117. Appeal by the stock mortgagee against the order of a Commission.

In 1920, the applicants, H.V.J. and L.F.J., purchased a freehold property of 5,272 acres for £13,180. In order to finance the purchase they borrowed £9,000 from the Public Trustee and executed a second mortgage for £4,180 to the vendor. The Public Trustee subsequently increased his advance by £800 and there is now owing to him for principal £9,800 and also £1,044 4s. 1d. for interest, a total of £10,844 4s. 1d. The second mortgage for £4,180 was subsequently purchased by one H.E.F., who still holds it. A condition of the advance of £9,800 by the Public Trustee was that the applicant's father, the late J.J., should give to the Public Trustee as collateral security for the said £9,800 a first mortgage over his own leasehold property. The trustees of the late J.J. have also filed an application for an adjustment of his liabilities.

The applicants, H.V.J. and L.F.J., found it necessary to borrow certain moneys from the New Zealand Farmers' Co-operative Association of Canterbury, Ltd. (hereinafter called "the stock mortgagees"), for working-expenses and stock. The late J.J. guaranteed the moneys owing by them to the stock mortgagees, £3,142 4s. 9d., and joined in as a party to its security. In addition, the late J.J. advanced cash and provided livestock to his two sons, the applicants H.V.J. and L.F.J., to the total amount and value of £3,406 17s. 6d., which amount is still owing.

The late J.J. left ten children surviving him, and, after bequeathing a legacy of £100 to each of his four daughters and to two sons, he bequeathed the residue of his real and personal property equally between his other children. In order to secure his own account current with the said stock mortgagees, the deceased, J.J., had executed a second mortgage over his leasehold property and a collateral mortgage over his own stock and plant to the stock mortgagees; the two sons guaranteed the amount thereby secured, which now stood at £4,309 15s. 7d.

The position of the various encumbrances on the properties of H.V.J. and L.F.J. and of the late J.J. at the time of the hearing of their respective applications were as follows:—

Re *H.V.J. and L.F.J.'s Applications.*

Over applicants' freehold farm valued by Commission at £8,500.

(1) First mortgage to Public Trustee—			
Principal	£9,800 0 0		
Interest	£1,044 4 1		
		£10,844	4 1
(Collaterally secured over the late J.J.'s leasehold property.)			
(2) Second mortgage to H.E.F.—			
Principal	£4,180 0 0		
Interest	£1,719 3 0		
		£5,899	3 0
(3) Third mortgage to stock mortgagees (Collaterally secured over applicants' stock and chattels valued by the Commission at £2,790 and guaranteed by the late J.J.)		£3,142	4 9

Re *Estate of J.J.'s Application.*

Over applicant's interest in his leasehold farm valued by Commission at £4,254.

(1) First mortgage to Public Trustee (Collateral with mortgage given by H.V.J. and L.F.J. over their freehold property)	£10,844	4 1
(2) Second mortgage to stock mortgagee (Collaterally secured by securities over applicant's own stock and plant and valued by Commission at £1,665 and guaranteed by H.V.J. and L.F.J. ..	£4,309	15 7

The Adjustment Commission made orders which, *inter alia*, resulted in the various adjustable securities being written down as follows:—

	H.V.J. & L.F.J. (Freehold) Basic Value £8,500	Estate of J.J. (Leasehold) Basic value £4,254
Of the £1,044 4s. 1d. arrears of interest under the £9,800 mortgage to the Public Trustee, £950 was added to the principal (making a total debt of £10,750) and the balance remitted. The £10,750 was separately apportioned over the freehold and leasehold, viz:	£7,500	£3,250

* Continued from p. 243.

Of the second mortgage over the freehold, H.E.F. mortgagee, all arrears of interest and £3,180 of principal were remitted and the balance of £1,000 left on second mortgage of the freehold, viz: ..	£1,000	
The £3,142 4s. 9d. owing by H.V.J. and L.F.J. to the stock mortgagee and secured on stock and on collateral third mortgage of the freehold was reduced to £2,790 (value of stock) and left secured on their stock and plant alone. The third mortgage over freehold was discharged.		
The £4,309 15s. 7d. owing to stock mortgagees by estate of J.J. be written down to value of stock—namely, £1,665—and of the balance £500 to remain on second mortgage of the leasehold, viz:		£500
Total mortgages on lands	£8,500	£3,750

The unsecured moneys owing by the sons, £3,406 17s. 6d., were discharged as was also their guarantee of the estate's account current with the stock mortgagee. The guarantee of the late J.J. of the account current of the sons with the stock mortgagee was likewise discharged.

On behalf of the stock mortgagee, it was submitted that the Commission's valuations of the livestock and farm properties were too low and, in any event, as there was an obvious surplus of approximately £500 in the leasehold security after the Commission had made its adjustments, that £1,000 of the £4,309 15s. 7d. owing to the stock mortgagee by the estate of J. J. should have been left on second mortgage of the leasehold instead of only £500; and further that any splitting of the Public Trustee's first mortgage must detrimentally affect the stock mortgagee as second mortgagee of the leasehold.

Counsel for the other parties concerned all agreed that it was advisable and necessary that some apportionment of the Public Trust mortgage should be made and they agreed that the apportionment made by the Commission was substantially fair and reasonable.

Held, varying the Commission's order, 1. That none of the circumstances justified an order designed to favour the second mortgagee of the freehold at the expense of the second mortgagee of the stock and the leasehold, and based on a combination of the parties, save the second mortgagee of the stock and the leasehold. The apportionment, therefore, ordered by the Commission could not stand unless the second mortgagee of the leasehold came in as a party to agree to it.

2. That the proper order, despite the feelings and consideration applicants had towards the second mortgagee of the freehold, was to discharge the second mortgage of the freehold and interest thereon *in toto*.

In the course of its judgment, the Court said:

"It seems clear that the appellant's contention that on the Commission's valuation and apportionment the leasehold property of J.J.'s estate would support £1,004 of the amount owing on second mortgage instead of £500 as settled by the Commission is correct. No good reason was shown why that readjustment should not be made. But the more important question is the effect and purpose of the apportionment of the first mortgage to the Public Trustee. All counsel, save counsel for the holder of the stock mortgage and a second mortgage over the leasehold property, were in favour of the apportionment made by the Commission.

"The reason underlying this agreement, so far as counsel for the applicants were concerned, was the personal feeling the applicants had that the second mortgagee of the freehold property had come to their assistance more as a friend than as an investor, and that, in consequence, they should agree to any plan of apportionment which, as far as possible, protected his security.

"If, however, it is true, as counsel for the second mortgagee of the leasehold points out, that any splitting or apportionment of the Public Trustee's mortgage must detrimentally affect his client, such consideration for the second mortgagee of the freehold must be viewed in the light of that circumstance.

"The result of the apportionment of £7,500 of the Public Trustee's mortgage to the freehold is the creation of an equity of some £1,000 in the freehold property which, by the right of subrogation, belongs to the J.J. estate. This equity the Commission has, in effect, by its apportionment given to the second mortgagee of the freehold land.

"The first mortgage given by the late J.J. over the leasehold property was given as a further security to secure the principal-moneys (and interest) which were advanced by the Public Trustee to his two sons, H.V.J. and L.F.J., on the security of the first mortgage over their freehold property. The freehold property was admittedly the primary security. It is clear that the late J.J. executed the first mortgage in favour of the Public Trustee over his leasehold property only as a surety for his sons, and that no part of the money secured was received by or on behalf of him, and that he received no benefit therefrom. He was a surety for payment by the sons of the mortgage debt, and as such has a right of subrogation and also to have the securities marshalled in his favour, and that right accrues, and must be given operation to, before the surety has paid the debt.

"The equity of the surety in the freehold land is prior and superior to that of the second mortgage: *New Zealand Loan and Mercantile Agency Co., Ltd. v. Loach*, (1912) 31 N.Z.L.R. 292. The apportionment made by the Commission might not matter, if the J.J. estate was free to dispose of or release debts owing to it without regard to others. But the J.J. estate is itself subject to a second charge in favour of the mortgagee of the stock and leasehold and any surrender of it of its equity in the freehold operates prejudicially against the chargee's security.

"It was submitted by counsel for the second mortgagee of the freehold that the J.J. estate, as surety in respect of the first mortgage over both freehold and leasehold, was free to waive, and was willing to waive, as shown by its approval of the Commission's apportionment, its right to subrogation. In support of such submission counsel relied upon certain decisions referred to in *16 Halsbury's Laws of England*, 2nd Ed. 99, para. 109. These authorities, however, merely establish the right of a surety to waive his right of subrogation for the benefit of the creditor in whose favour he has given his guarantee. They in no way support the proposition that a surety may divest himself of his right of subrogation in favour of a third party, which admittedly was the intention in the present case to the detriment of a puisne encumbrancer of the surety's own property. But even if the trustees had a right to waive their right, that does not constitute a reason for the Commission lending a hand to such waiver, to the prejudice of the second mortgagee of the leasehold. There is no need for the Commission to create an equity in the freehold to favour the second mortgagee of the freehold. The reasons prompting the approval of applicants to this course should not weigh with the Commission.

"The freehold originally stood charged with the whole of the moneys owing to the first mortgagee. The owners of the freehold are the people primarily responsible for that debt and the freehold is the primary security for that debt.

"The freehold has been valued by the Commission at £8,500, and must remain mortgaged to that extent to the first mortgagee. The second mortgage must be discharged. The value of the leasehold and the freehold taken together amount to £12,754. Assuming the freehold will discharge in due course £8,500 of this sum, the balance of £2,250 secured by the first mortgage will have to be discharged by the leasehold. The basic value of the leasehold is £4,254. The equity remaining in the leasehold will therefore be £2,004. The mortgage over the stock and collateral second mortgage of the leasehold amounts to £4,309 15s. 7d., of which £1,665 is apportioned to the stock security. The balance of £2,644 15s. 7d. can only be met to the extent of £2,004 out of the equity in the leasehold estate, and the deficiency of £640 15s. 7d. is an adjustable debt which must be remitted. It will be necessary, in view of the opinion of the Court as above stated, to make certain alterations in the orders made by the Commission.

" As regards the application of H.V.J. and L.F.J. the order of the Commission is varied as follows :—

" (*a*) £8,500 and £2,250 are to be substituted in lieu of £7,500 and £3,250 respectively in para. 2 of the order ;

" (*b*) Paragraph 3 of the order is deleted, and the whole of the principal and interest moneys secured by the second mortgage to H.E.F. are declared an adjustable debt and are discharged ; and

" (*c*) That £8,500 be substituted for £7,500 in para. 8 of the order, and the interest adjusted accordingly.

As regard the application of the estate of J.J., the Order of the Commission is varied as follows :—

" (*a*) £8,500 and £2,250 are to be substituted in lieu of £7,500 and £3,250 respectively in para. 3 of the Order ;

" (*b*) That £2,004 and £640 15s. 7d. be substituted for £500 and £2,144 15s. 7d. respectively in para. 4 of the order ;

" (*c*) That £2,250 be substituted for £3,250 in para. 11 of the order, and interest be adjusted accordingly ; and

" (*d*) That £2,004 be substituted for £500 in para. 15 of the order."

Obituary.

Mr. A. de B. Brandon (Wellington).

Mr. Alfred de Bathe Brandon, senior partner of the legal firm of Brandon, Ward, Hislop, and Powles, died at Wellington on July 30 at the age of eighty-four years. His father, the late Hon. A. de B. Brandon, M.L.C., was one of the pioneers of settlement in Port Nicholson and one of Wellington's earliest barristers.

Mr. Brandon was one of the nine boys who enrolled on the day of the opening of Wellington College. In 1872, he gained one of the first scholarships granted by the University of New Zealand, and, in the following year, he went to Trinity Hall, Cambridge, taking his B.A. degree four years later. He was called to the Bar at the Middle Temple, and on his return to Wellington was admitted as a barrister and solicitor, becoming at the same time a member of his father's firm. He held the position of Vice-President of the Wellington District Law Society in the year 1905.

A member of the Wellington City Council, from September, 1886, to January, 1891, when he resigned, Mr. Brandon, in November, 1893, was elected Mayor of Wellington.

Mr. Brandon was appointed a director of the Australian Mutual Provident Society in 1888, deputy-chairman in 1903; and chairman from 1918 until his retirement on May 31, 1934, after a record period of service.

Mr. Brandon was an active member of the Wellington Chamber of Commerce from 1892 and was a Councillor from 1894 to 1900, and from 1903 to 1906, being President in 1895, 1897, and 1898. In 1928 he was elected a life member. He also acted as a sinking fund commissioner for the Wellington City Council for some years. Mr. Brandon was a foundation member of the Wellington Automobile Club, and attended the inaugural meeting to form the club in July, 1905. He was president of the club from 1907 until 1912, and was later elected a life member.

Mr. and Mrs. Brandon celebrated their golden wedding in 1930 and were within two years of their diamond wedding celebrations.

Mr. Brandon, is survived by his wife, three sons, one of whom, Mr. Phillip Brandon, is the third generation in his late father's firm, and three daughters.

London Letter.

BY AIR MAIL. Strand, London, W.C. 2,
August 15, 1938.

My dear EnZ-ers,—

The present Parliamentary session had resulted in a bountiful harvest of new statutes as dealing with industry, social conditions, amendment and consolidation of the law, and the administration of justice. Notwithstanding the time spent on the discussion of Foreign Affairs, the new statutes already number forty-five. The one of most interest to you is the Inheritance (Family Provision) Act, 1938, which has received the Royal Assent.

Family Protection.—It is freely admitted that the new Inheritance Act is founded on your Testators' Family Maintenance statute, but it has its differences. For example, Mr. G. H. Newsom, of Lincoln's Inn, while recognizing that, in principle, it is a good thing, has called attention to certain " major defects " of the measure in its present form. To a common lawyer his commentary appears to be well founded and full of pith. He says that the Bill as it stands in its present form will " strike at the inadvertent and not at the malicious " ; for the Court can only make provision out of the testator's " net estate," defined in such a way that no testator need leave any " net estate " at all, if he chooses to make a settlement or even a deed of covenant in favour of those whom he means to benefit to the exclusion of his family. Further : A spouse, an infant son, an unmarried daughter and a disabled son are the only relatives who may apply to the Court. Why should others—a son just over twenty-one training for a profession, an orphan grandchild, a married daughter—be excluded ? And why should not any descendants who would have taken a share under an intestacy have the right to apply ? Again : if the estate is under £2,000 provision may be made out of capital and income ; if more, out of income only. So that if the estate is just on the wrong side of the arbitrary figure the income may, at 3 per cent., be worth little more than £1 a week. The available income, moreover, is not the whole income, but at most two-thirds, and less in some cases.

Mr. Newsom observes that the Bill is founded on Australian and New Zealand legislation, which knows no such limitations. Surely, he argues, it would be better if Parliament gave the Court a discretion as ample as the Dominion and State Parliaments have conferred on their local Courts, so that it has an entirely free hand as to capital and income.

Law and Justice.—When we come to Law and Justice, the labours of the Legislature are no less prolific and interesting. The Trade-marks (Amendment) Act, 1937, was passed with a view to the consolidation with amendments of the Acts of 1905 and 1919. It is incorporated in the Trade-marks Act, 1938, which is purely consolidating. This will now contain the whole of the statute law on the subject. The Patents, &c. (International Conventions), Act gives effect to the revised International Convention for the Protection of Industrial Property, which was signed on behalf of this country in London on June 2, 1934, and amends the Patents and Designs Acts, 1907 to 1932, as to matters affected by the Convention. In particular the inventor may be named in the patent. The Hire-purchase Act and the Leasehold Property (Repairs) Act both make

substantial changes in the law. The nature of the protection to hirers given by the former statute is explained in articles in the *Law Journal* (London) last week and this week. The latter protects lessees against oppressive claims in respect of dilapidations during the currency of the lease. In Criminal Law the Infanticide Act repeals and re-enacts with modifications the Infanticide Act, 1922, and makes a further relaxation of the law of murder in such cases. As to the Administration of Justice, there are two Judicature (Amendment) Acts, and the Administration of Justice (Miscellaneous Provisions) Act, and the Evidence Act, which, in itself, is full of interest. Lastly, there is the Children and Young Persons Act, which extends the powers of Magistrates to make orders as to the custody and supervision of children and young persons, and makes amendments as to the constitution of some Juvenile Courts.

A New Zealander in Colonial Judicial Office.—Mr. Alban Musgrave Thomas, formerly of Christchurch, and an old boy of Christ's College, who has been a puisne Judge in Cyprus for the last ten years, has been appointed Judge of the High Court of Nyasaland. From 1900 to 1903 Mr. Thomas was at Christ's College, and, on leaving, he was associate to the late Mr. Justice Denniston. He went to England to complete his legal studies and was there until the War broke out. He fought in France and Italy with the Royal Artillery. After the War, Mr. Thomas entered the Colonial Office and was posted to Kenya, where he was in Nairobi for some years, and, later, he served as Commissioner at Mombasa. Fever, however, forced him to move to a better climate and now, after ten years in Cyprus, he is transferred to Nyasaland.

In the Temple in the Old Days.—Mr. W. Basil Worsfold has contributed to the current number of *United Empire* a very interesting article on the Temple for the benefit of "the jaded Londoner or oversea Briton in search of quiet and coolness." The article, though brief, is a very informative, pleasant, and readable guide to the Temple. Of Middle Temple Hall he says, *inter alia*, "just as Cecil Rhodes planned his South African enterprises with his undergraduate friends at Oxford, so the adventurous youth of the sixteenth and seventeenth centuries planned expeditions and discoveries with their fellow-students in their chambers or dining-halls. For such discussions no place was more suitable than the (then) 'new hall' of the Middle Temple, built in 1562-73, where Queen Elizabeth danced and dined and Shakespeare's own Company of Players from the Globe performed *Twelfth Night* on Candlemas Day, February 2, 1601-2. . . . Frobisher, Drake, and Raleigh were members of the Inn. Pieces of the *Golden Hind* are in the Hall to-day. They form most of the table on which the Call Night students, for the first time in wig and gown, write their names in the Roll of Barristers."

Malta.—Last month the Judicial Committee, without calling on the appellant for a full reply, allowed the appeal in *Sammut and Another v. Strickland*. The report said that the Committee had decided on their finding and would communicate their reasons to the litigants. We hope that they will be given to the world at large, for they involve considerations of general importance as to the rights of strangers who come into the Empire as a community, of their own free will. So far as we understand the argument for the respondents, it was that the inhabitants of Malta joined the British Empire of their own free will and that, as this was so, the Crown could not legislate for them in the same way as for other Colonies which were based on settlement or conquest. The Judicial Committee were asked to decide that, in the events which had happened, the Crown either never had the power to legislate by Order in Council for Malta or, if it had, had abandoned that right when it granted the Constitution of 1921—and could not retrieve it. There may be some substance in the second point. The Letters Patent of 1921 contained a clause reserving the power to the Crown to revoke certain articles in its text, but no more. Since then, in August, 1936, there was a total revocation which the respondents challenged. We have never heard the first point raised; but suggest that any foreigners who elect to join the club of the Empire join it, like members of other clubs, on the understanding that they accept its rules.

How to be a Lawyer.—One has seen on the bookstalls a handy tome which tells one "How to be a Gentleman" for one and six, but the Ministry of Labour has reduced the price in telling the Great British Public how their sons can become a lawyer for four pence. Upon this momentous matter counsel is frequently asked to advise, without a fee, and here gratuitous advice is gladly given; here, at last, every lawyer feels (be his years in the law never so few) that he can speak as one having authority. For, as such, do not parents consult him of the law as a career for their son, and of comparative prospects in both branches of the profession? Upon which grave decision no better "Instructions" are available—more concise or more precise—than in this pamphlet issued last year by the Ministry of Labour: *Choice of Career Series, No. 15 (Secondary Schools), Law* (pp. 22, 4d.) What are the qualifications; how much the fees; particulars—for those who have a large capacity for taking pains—of scholarships and prizes; and, finally, what are the prospects in the Civil, or the Municipal or the Colonial Service for members of the Bar and for solicitors: are they not here set forth (as in all good "Instructions"), systematically, with particularity, and in lucid fashion? Yet what, perhaps, will interest most those who have succeeded and those who still aspire are the qualities said to be requisite for success! How those will shrewdly smile, and these will shrug their shoulders! Some may think of a brilliant essay by the first Earl of Birkenhead in "Points of View," that not by mere ability may the citadel be stormed. And that is what in prosaic, though practical words our "Instructions" vigorously point out. "A solicitor should be a good business man and judge of character—'a man of affairs.'" The Bar—prospects there are "problematical"; that profession is not for the general, but for those of "exceptional perseverance and determination to succeed." The qualities—are they not propounded in terms, perhaps, which sometimes flatter the successful? At the Bar, indeed, the principle of indeterminacy governs; and in this Advice (as in others) will not counsel be true to his reputation if, in the terms of his Instructions, he fairly puts the case for both sides without dogmatizing upon the attributes which are alleged to lead to success? He will confine himself to the facts; in advising upon a career in the Law, the law is that a law of success does not exist.

Yours as ever,

APTERYX.

New Zealand Law Society.

Council Meeting.

(*Concluded from p. 229.*)

Apportionment on Sale of Government Stock.—The following letter was received from the Under-Secretary of Justice :—

I have to acknowledge the receipt of your letter of the 18th March with reference to the introduction of legislation to authorize apportionment as between capital and income in cases of the purchase or sale of trust property.

In reply I have to inform you that the matter was referred to the Law Revision Committee by the Hon. the Attorney-General. The Committee has recommended the introduction of certain legislation, and the Law Draftsman is at present engaged in drafting the necessary clauses.

Scale of Fees for Company Debentures.—The Wellington Society forwarded the following report :—

My Council has now perused, considered, and collated the reports from the various District Law Societies and submits herewith the enclosed suggested scale of fees for the approval of the New Zealand Society.

Scale of Fees for Company Debentures.	£	s.	d.
1. Where the sum secured does not exceed £500	6	6	0
2. Over £500 up to £1,000 for each adittional £100 or part	0	15	0
3. Over £1,000 up to £5,000 for each additional £100 or part (Increases £5/5/- per £1,000)	0	10	6
4. Over £5,000 up to £50,000 for each additional £100 or part (Increases £2/12/6 per £1,000)	0	5	3
5. Over £50,000 up to £200,000 for each additional £100 or part (Increases £1/5/- per £1,000	0	2	6
6. Maximum fee to be	337	2	6
7. Where the debenture provides for further advances the costs to be charged shall be based upon the maximum amount contemplated to be secured.			

Note.—Where banks or lending institutions have a settled printed form of security, the solicitor for the institution may make special arrangements as to charges for completing transactions involving such forms.

Deeds of Hypothecation.—Where a Deed of Hypothecation is prepared the scale for the corresponding debenture issue shall be increased by 20 per cent. with a maximum increased fee of £50.

Trust Deeds.—Where a trust deed is prepared the scale for the corresponding debenture shall be increased by 50 per cent. with a minimum increased fee of £20.

Perusal of Documents.—Solicitor acting for company where he is not acting for the lender shall be allowed a fee on perusal and completion as follows :

1. Up to £5,000 one-half of the preparation fee.
2. Over £5,000 one-third of the preparation fee with a minimum of £15 15s.

General.—All charges shall be subject to be increased in the following cases :—

(*a*) Where special skill is required in the preparation or perusal of any documents.

(*b*) Where the length of any document is specially increased by the peculiarity or the complexity of the transaction itself.

(*c*) Where an unusual amount of correspondence is involved.

(*d*) Where special responsibility is involved.

Note.—1. The scale is intended to include searches in the Registrar of Companies' Office, perusal of documents necessary to decide authority to issue debentures and affidavit of due execution and registration.

2. The suggested scale does not include costs for specific collateral charges. These shall be charged for according to the appropriate scale applying to them—Land Transfer or Deeds Scale.

3. The scale does not include the preparation of any prospectus or other document preparatory to the debenture issue.

After some discussion the Council decided as follows :—

(1) The report should be adopted as it stands as far as the section concerning Deeds of Hypothecation.

(2) **Deeds of Hypothecation**—£50 to be altered to £26 5s.

(3) **Trust Deeds**—50 per cent. to be altered to 33⅓ per cent.

(4) **Perusal of Documents**—Approved.

(5) **General**—The subsection should be deleted and the paragraph should read : "All charges shall be subject to being increased where special skill or an unusual amount of work is required owing to the peculiarity or the complexity of the transaction.

(6) **Note**—1, 2, and 3 adopted.

The Scale will be circulated in due course.

(*a*) Motions for New Trials ; (*b*) Appeals from Magistrate.—The President wrote as follows :—

I would like the following matters placed on the Order Paper for the next meeting of the Society :

(1) It has from time to time been suggested that Motions for New Trial which at present are taken before the Judge who presided at the trial should in all cases be taken before the Court of Appeal ; where, of course, the Judge who presided might or might not be a member of the Court.

(2) It has also been suggested that Appeals from Magistrates on points of law should be direct to the Court of Appeal, instead of, as now, to the Supreme Court. The objection to the present procedure is that there is no appeal from the Supreme Court, and many questions are of sufficient importance to warrant a judgment of the Court of Appeal. The difficulty is to some extent got over, in some cases, by taking the Appeal before a Full Court.

I do not at the moment express any view as to the desirability or otherwise of the suggested changes, but I think the matters are of sufficient importance to call for careful consideration by the Law Societies throughout New Zealand.

You will, of course, circulate this letter to the District Societies, but as the time is short before our next meeting, I do not expect that the various Societies will have time to sufficiently consider the proposed changes. I would therefore suggest that consideration be not hurried, and that it would be sufficient if all the Societies express their views in time for the September meeting.

It was decided to circulate the letter among the District Law Societies and ask for their comments for the next meeting.

Audit Regulations R. 11 (6).—The following letter from the New Zealand Society of Accountants was referred to the Audit Committee for a report :—

Attached is a copy of letter received from a member of the Society.

Would you be good enough to give me your Council's ruling on the point raised.
(*Letter enclosed*).

"Regulation 11, Clause (6) of the Solicitors' Audit Regulations, 1938, provides :—

" . . . no Auditor shall be deemed qualified to audit any Trust Account of a Solicitor, . . . if he or any other member of his firm or staff is, or at any time within the said period has, been engaged or concerned in keeping the Books of such Solicitor. . . . "

We shall be glad to have a ruling on the following point: Our firm is engaged to write up the Books and prepare the Annual Accounts of the General Account of a firm of Solicitors. We have no part in the receipt, handling, banking, or disbursement of moneys.

We are also engaged to audit the Trust Account of the same firm, but in regard to the Trust Account, all Books and Records are kept and written up by the Solicitor.

Does the regulation quoted above apply in such a case as to disqualify us from acting as Auditors of such Trust Account.

While this may possibly appear so from the wording of the regulation, we suggest that such was not the intention, and that probably circumstances such as these were not foreseen in the drafting thereof. As similar circumstances probably apply to other practitioners, we respectfully submit that the case is one that would merit a formal ruling being given by the Society.

Solicitor Acting for Farmers' Union.—The following letter was received from the firm concerned:—

We are in receipt of your letter of the 28th ultimo.

In the first place we were advised that the New Zealand Farmers' Union had decided to provide for its members a service of free legal advice on minor matters affecting the farmer. We were appointed by the Provincial Executive to act in Wanganui, other solicitors having been appointed in other centres. We are to be paid by the Union and the definition of minor matters is left to our own judgment. The free service, however, does not embrace the preparation of documents, the giving of considered opinions, or the conduct of litigation.

We were appointed on the 28th February last, and so far have been consulted on one occasion only. This was by a farmer who had been in correspondence with the Commissioner of Taxes in regard to his assessment for income-tax. We perused the letters and advised him that if he wished to carry the matter further it would be necessary for him to appeal against the assessment, but this did not come within the free service and it was a matter for his own solicitor. As far as we were concerned this ended the matter.

We note that attention has been called to ruling No. 11 and presume that the principle underlying this ruling is that opportunity should not be given for one practitioner to deprive another practitioner of his client. In our case for this to happen it would mean that we should disregard the well-established etiquette of the profession which our firm has observed for the past thirty years, but we wish to point out that the practice in Marlborough mentioned in your letter and which apparently is not objected to does undoubtedly divert business to the solicitor employed by the union and goes much further than the arrangement made by ourselves.

Similar procedure is adopted by the Automobile Association, which appoints and pays the costs of one particular solicitor to defend members who are involved in accidents or in breaches of the traffic regulations.

No objection is apparently taken to these associations so benefiting their members, and so long as such a practice is countenanced we see no reason why we should not undertake the work which the Farmers' Union is asking us to do.

It was decided that no further action or comment was necessary.

The "Devil's Own" Golf Tournament: this Month.—The seventh of these popular fixtures, designed "For the Relaxation and Rejuvenation of the Legal Profession," is set down for Saturday, 24th instant, to the following Monday (Dominion Day) at the Manawatu Golf Links.

Entries, accompanied by competitors' handicaps and par of their courses, should be made to the Hon. Secretary, P.O. Box 170, Palmerston North, not later than the 21st instant, though post entries may be accepted. The usual large gathering of members of the profession is expected at this happy and festive foregathering.

Practice Precedents.

Grant of Administration Pendente Lite.

Section 73 of the Court of Probate Act, 1857 (20 & 21 Vict., c. 77) (*8 Halsbury's Statutes of England*, 287), is *mutatis mutandis* in force in New Zealand, and is equally applicable to real estate as to personal: *In re Hunter, Hunter v. Hunter*, [1932] N.Z.L.R. 911; and it is submitted that s. 70 of the statute is similarly in force in the Dominion for the reasons given in respect of s. 73 by the learned Chief Justice, *ibid.* 915–16, affirmed on appeal by the Court of Appeal, per Reed and Adams, JJ., *ibid.* 925–26; Ostler, J., 929; and Smith, J., 942.

Section 70 is as follows:—

"Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or grant of probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be under the immediate control of the Court, and act under its direction."

(In England, this section has been replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 163 (1) (*8 Halsbury's Statutes of England*, 373)).

Unless there is a *lis pendens*—*i.e.*, the issue of a writ—there is nothing on which to found the jurisdiction; proceedings on a caveat, for instance, do not constitute a suit pending: *Salter v. Salter*, [1896] P. 291.

The Court's power to appoint an administrator pendente lite is usually invoked in contested testamentary and administration suits, and generally on the application of a person who is not a party to the suit: see *Williams on Executors*, 11th Ed. 408, 409, and the cases cited in *23 English and Empire Digest*, 200–205.

The appointment of an administrator pending suit does not follow as a matter of course whenever there is pending litigation, as the Court must be satisfied of the necessity for the grant—that there is something required to be done, and that there is no person empowered to do it, such as, for example, the preservation of the estate: *Horrell v. Witts and Plumley*, (1866) L.R. 1 P. & D. 103. If so satisfied, the Court may appoint a single administrator pendente lite: *Re Price*, (1931) 171 L.T. Jo. 251. Such an appointment may be made on the application of a person not a party to the suit—*e.g.*, a creditor: *Tichborne v. Tichborne*, (1869) L.R. 1 P. & D. 730. The Court will not usually appoint a party to the suit—*De Chatelain v. Pontigny*, (1858) 1 Sw. & Tr. 34; 164 E.R. 616; but there is no rule against appointing such a party—*In re Griffen, Griffen v. Ackroyd*, [1925] P. 38.

The grant, when made, is a limited one, to last during the continuance only of any action which is pending before it. In the present precedent, it is assumed that there has been a motion for grant of probate by the executor named in the will; that a caveat has been lodged, an order *nisi* made, and a writ issued by the executor for grant of probate in solemn form; and that the application for appointment of administration pendente lite is made by a son of the deceased.

An application for a grant of administration pendente lite is made by notice of motion served on all parties to the pending suit. It must be supported by an affidavit

showing the nature and value of the estate, and the circumstances which justify the necessity for the grant.

By the order appointing the administrator pendente lite he becomes an officer of the Court, and not the agent of any party; and his duties begin from the date of his appointment, and end with the sealing of the judgment or decree in the action—*In the Goods of Wieland, Wieland v. Bird*, [1894] P. 262; or, if there is an appeal, his duty ends with the disposal of the appeal—*Taylor v. Taylor*, (1881) 6 P.D. 291. During his term of office he has all the powers of a general administrator other than that of paying legacies or otherwise distributing the residue: he may sue and be sued; but, without the consent of all persons concerned in the distribution of the estate, the Court has no jurisdiction to authorize him to make a payment of maintenance to a residuary legatee: *Whittle v. Keats*, (1866) 35 L.J. P. & M. 54; and see *In the Goods of Harver, Harver v. Harver*, (1889) 14 P.D. 81.

The administrator pendente lite must lodge an administration bond—R. 531F of the Code of Civil Procedure—but the Court has power to dispense with sureties. Within three months of the making of the grant, he must file an inventory—R. 531O; and, within such time as may be ordered, he must file an account of his administratorship—R. 531P.

MOTION FOR APPOINTMENT OF ADMINISTRATOR PENDENTE LITE.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

No.

IN THE ESTATE OF A. B. &c. deceased.

TAKE NOTICE that this Honourable Court will be moved by Counsel on behalf of C. D. of the City of clerk at the Supreme Court House at on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER appointing C. D. &c. or some other fit and proper person to administer the estate effects and credits of the above-named A. B. deceased pending the determination of an action between E. F. the executor in the will of the said deceased named and X. Y. (the caveator) for the grant of probate in solemn form of the will of the said deceased now depending in this Honourable Court or until the further order of this Honourable Court WITH POWER to take possession of and manage the said estate collect and get in all moneys due to the said estate to pass accounts and to pay all debts due by the said estate but not to distribute the residue of the said estate UPON THE GROUNDS—

(*a*) That a caveat has been lodged against the grant of probate of the will propounded by the said E. F. and the said X. Y. has appeared in opposition to the grant of probate of the said will and an action has been commenced by the issue of a writ by the said E. F. as executor against the said X. Y. as caveator for a grant of probate in solemn form.

(*b*) That pending the determination of this Honourable Court there is no person capable of receiving and getting in the moneys due to the said estate.

AND UPON THE FURTHER GROUNDS set out in the affidavit of the said C. D. filed in support hereof AND FOR AN ORDER that sureties to the administration bond be dispensed with.

Dated at this day of 19 .

Solicitor engaged in the proceedings.

To the Registrar and to X. Y. the caveator and X. X. his solicitors of the City of .

This notice of motion is filed by solicitor for C. D. &c. whose address for service is at the offices of Messrs. &c.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I C. D. of the City of clerk make oath and say as follows:—

1. That I am a son of the above-named A. B. who died resident or domiciled at the City of in the Dominion of New Zealand on or about the day of 19 .

2. That to the best of my knowledge and belief the estate of the said A. B. deceased consists (*inter alia*) of—

(*a*) A freehold property situate at Street in the City of on which is erected a modern five-roomed bungalow of the total value of £ .

(*b*) One thousand (1,000) shares in the Bank of New Zealand; and

(*c*) Cash in bank amounting to the sum of £ .

3. That the said freehold property is let for a term of two years which has yet six months to run at a weekly rental of £ per week.

4. That the said freehold property is subject to a mortgage to the Corporation Limited for the sum of £ .

5. That interest amounting to the sum of £ on the said mortgage accrues due on the day of 19 and on every quarter-day thereafter, and the said mortgage contains a power of sale exercisable on fourteen days' default in payment of any interest thereunder.

6. That there is now depending in this Honourable Court an action entitled E. F. against X. Y. touching and concerning the validity of the will of the said A. B. deceased and numbered in the above-named Registry and such action cannot be heard before the commencement of the civil sessions of this Honourable Court commencing on the day of 19 .

7. That during the dependency of the said action there is no person authorized to collect the rents of the said freehold property or the dividends on the said shares or to pay the said interest and the debts of the said deceased.

8. That I will faithfully administer the estate effects and credits of the said deceased pending the said action save distribution of any part of the residue thereof under the directions and control of this Honourable Court.

9. That I will exhibit into this Court a true full and perfect inventory of all the said estate effects and credits of the said deceased within three calendar months after the grant of administration pending suit to me and I will file a true account of my administratorship within such time after the said grant as may be ordered by this Honourable Court.

GRANT OF ADMINISTRATION PENDENTE LITE.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion filed herein and the affidavit of C. D. of clerk filed in support thereof AND UPON HEARING Mr. of Counsel for the said C. D. and Mr. of Counsel for X. Y. the caveator [and by consent] IT IS ORDERED that the said C. D. be and he is hereby appointed to administer the estate effects and credits of the said A. B. deceased pending the determination of an action commenced by the said E. F. as plaintiff against the said X. Y. as defendant to prove in solemn form the last will of the said A. B. or pending the further order of this Court with power to take possession of and manage the said estate collect and get in all moneys due to the said estate and pay all debts due by the said deceased but without power to distribute any part of the said estate to the beneficiaries in the will of the said A. B. named or any of them upon the said C. D. entering into a bond in his own name without sureties for the due performance of such administration and that the amount of the said bond to be lodged herein be the sum of [*here insert the amount under which the estate has been sworn in the executor's affidavit in his application for grant of probate*] AND IT IS FURTHER ORDERED that within three months from the granting of this order the said C. D. do file an inventory of all the estate effects and credits of the said A. B. deceased which shall come into his possession or the possession of any person by his order or for his use and shall within months of the determination of the said action file a true account of his administratorship AND IT IS ALSO ORDERED that the costs of and incidental to this order as taxed by the Registrar be paid out of the estate of the said deceased.

By the Court.

Registrar.

ADMINISTRATION BOND.

(*Same heading.*)

KNOW ALL MEN BY THESE PRESENTS that I C. D. &c. am held and firmly bound unto Registrar of the Supreme Court of New Zealand for the said District at in the sum of £ for which well and truly to be made to the said or to such other Registrar for the time being I DO BIND MYSELF and my executors and administrators firmly by these presents.

WHEREAS by Order of this Court of the day of 19 IT IS ORDERED that letters of administration of the estate effects and credits of A. B. deceased be granted to me pending the determination of an action which has been commenced by E. F. against X. Y. to prove in solemn form the last will of the said A. B. or until the further order of this Court on my entering into a bond in the sum of £ for the due administration of such estate effects and credits.

NOW THE CONDITION of the above-written bond is that if I the above-bounden C. B. exhibit unto this Court a true and perfect inventory of all the estate effects and credits of the deceased which shall come into my possession or the possession of any person by my order or for my use on or before the day of 19 and well and truly administer the same according to the powers and authorities conferred upon me by order of this Court and by law and render to this Court a true and just account of my said administratorship within months next after the date of determination of the said pending action then this bond shall be void and of none effect but otherwise shall remain in full force and effect.

Signed the day of 19 in the presence of (*Signature.*)

Name of witness:
Address:
Occupation:

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England"

AND

The English and Empire Digest.

CRIMINAL LAW.

Evidence—Prisoner Giving Evidence on Own Behalf—Cross-examination—Character—Question Suggesting Dishonesty—Criminal Evidence Act, 1898 (c. 36), s. 1 (*f*).

The test as to whether questions asked of a prisoner offend against s. 1 of the Criminal Evidence Act, 1898, is not the intention of counsel, but their effect on the minds of the jury.

R. *v.* COHEN, **[1938] 3 All E.R. 380. C.C.A.**

As to cross-examination as to character: see HALSBURY, Hailsham edn., vol. 9, pp. 215–217, par. 303; and for cases: see DIGEST, vol. 14, pp. 363–366, Nos. 3848–3874.

Indictments—Amendment—Amendment Alleging New Offence—No Application to Quash at Hearing—Appeal—Administration of Justice (Miscellaneous Provisions) Act, 1933 (c. 36), ss. 2 (2) (i), 3 (*b*).

An amendment of an indictment so as to include a fresh offence must be objected to at the trial, or it cannot be quashed on that account on appeal.

R. *v.* CLEGHORN, **[1938] 3 All E.R. 398. C.C.A.**

As to amendment of indictment: see HALSBURY, Hailsham edn., vol. 9, p. 139, par. 182; and for cases: see DIGEST, vol. 14, pp. 234–236, Nos. 2197–2222.

EXECUTORS.

Liability of Representative—Survival of Action—Action for Penalties—Whether Action in Tort—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), ss. 1 (1) (3), 4 (2).

The survival of causes of action against a deceased's estate by s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, applies to an action for penalties under the Income Tax Act, 1918.

ATTORNEY-GENERAL *v.* CANTER, **[1938] 3 All E.R. 329. K.B.D.**

As to survival of action: see HALSBURY, Hailsham edn., vol. 14, pp. 415–417, pars. 779–783; and for cases: see DIGEST, Supp., Executors, No. 6711 *et seq.*

GIFTS.

Between Husband and Wife—Advancement—Husband joining as Surety in Mortgage—Required by Mortgages to pay as Surety—Proof in Wife's Estate.

Where a husband joins as surety in a mortgage by his wife and as such is required to discharge the debt, there is no presumption of a gift to the wife.

Re SAILSBURY-JONES; HAMMOND *v.* SALISBURY-JONES, **[1938] 3 All E.R. 459. Ch.D.**

As to presumption of advancement: see HALSBURY, Hailsham edn., vol. 15, pp. 716, 717, par. 1247; and for cases: see DIGEST, vol. 27, pp. 161–167, Nos. 1302–1360.

NUISANCE.

Creation Unknown to Occupier—Right of Stranger to Abate—Whether Occupier Liable for Failure to Abate Before Notice.

If the owner of land does not know of a nuisance existing on it, he may not be liable in damages to an adjoining owner who can abate the nuisance himself.

SEDLEIGH-DENFIELD *v.* ST. JOSEPH'S SOCIETY FOR FOREIGN MISSIONS AND HILLMAN, **[1938] 3 All E.R. 321. K.B.D.**

As to continuing a nuisance: see HALSBURY, Hailsham edn., vol. 24, pp. 84, 85, par. 148; and for cases: see DIGEST, vol. 36, p. 214, Nos. 567–575.

SALE OF GOODS.

Rejection—Restrictions—Marked Goods—Whether Restrictions on Rejection Apply to Unmarked Goods—Claims in Respect of Quality and Condition—Timber not Properly Seasoned—Faulty Manufacture.

Faulty manufacture does not come within the terms "condition and quality."

VSESOJWZOJE OBJEDINENIJE "EXPORTLES" *v.* T. W. ALLEN & SONS, LTD., **[1938] 3 All E.R. 375 K.B.D.**

As to rejection: see HALSBURY, 1st edn., vol. 25, Sale of Goods, pp. 230, 231, pars. 400–404; and for cases: see DIGEST, vol. 39, pp. 586–590, Nos. 1876–1910.

WILLS.

Construction — Amount of Legacy — Inconsistency between Words and Figures.

Where a legacy is stated first in words and then in figures which are inconsistent, the second provision prevails.

Re HAMMOND; HAMMOND *v.* TREHARNE, **[1938] 3 All E.R. 308. Ch.D.**

As to inconsistent clauses in a will: see HALSBURY, 1st edn., vol. 28, Wills, pp. 677, 678, par. 1292; and for cases: see DIGEST, vol. 44, pp. 606–609, Nos. 4335–4365.

Direction by the Testator that Payments be made to his Daughter "only so long as she shall continue to reside in Canada"—Impossibility of Determining what Future Conduct would fall within the Terms of the Will—Condition Subsequent—Void for Uncertainty.

A condition subsequent in a will that a beneficiary must "continue to reside in Canada" is void for uncertainty.

SIFTON *v.* SIFTON, **[1938] 3 All E.R. 435. J.C.**

As to uncertainty: see HALSBURY, 1st edn., vol. 28 Wills, pp. 536, 537, par. 1059; and for cases: see DIGEST, vol. 44, pp. 440–444, Nos. 2667–2687.

Rules and Regulations.

Dairy Industry Act, 1908. Dairy-produce Regulations, 1938. July 20, 1938. No. 1938/91.

Agricultural Workers Act, 1936. Agricultural Workers Extension Order (No. 4), 1938. July 27, 1938. No. 1938/92.

Poultry Act, 1924. Chilled Eggs (Marketing) Regulations 1935. Amendment No. 1. July 27, 1938. No. 1938/93.

Cinematograph Films Act, 1928. Cinematograph Films (Storage, Exhibition, and Renting) Regulations, 1929. Amendment No. 2. August 3, 1938. No. 1938/94.

Transport Law Amendment Act, 1933. Fitness Certificate (School Motor-car) Exemption Order, 1938. August 3, 1938. No. 1938/95.

Fisheries Act, 1908. Salt-water Fisheries Amendment Regulations, 1938, No. 2. August 3, 1938. No. 1938/96.

Fruit Control Act, 1924. Fruit-export Control Board Election Regulations, 1938. Amendment No. 1. August 3, 1938. No. 1938/97.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices General Regulations, 1938. Amendment No. 2. August 11, 1938. No. 1938/98.

Health Act, 1920. Drainage and Plumbing Regulations Extension Order, 1938, No. 2. July 29, 1938. No. 1938/99.

Mining Act, 1926. Mining Regulations, 1926. Amendment No. 7. August 8, 1938. No. 1938/100.

Transport Licensing Act, 1931. Transport Licensing (Goods-service) Regulations, 1936. Amendment No. 1. August 17, 1938. No. 1938/101.

Law Practitioners Amendment Act, 1935. Law Practitioners Act (Diciplinary) Rules, 1936. Amendment No. 1. August 18, 1938. No. 1938/102.

Health Act, 1920. Hairdressers (Health) Regulations Extension 1938, No. 2. August 11, 1938. No. 1938/103.

Customs Amendment Act, 1921. Trado Agreement (Canada) Order 1938, No. 2. September 1, 1938. No. 1938/104.