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"'*The best editions of the best authors.' These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect.*"

—SIR WALTER SCOTT, in *Guy Mannering.*

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Industrial Arbitration in France.

IN New Zealand, we have had Industrial Conciliation and Arbitration legislation on our statute-book for over forty years, and compulsory arbitration has become an incident of everyday life. But, in an old country like France, it is a recent innovation that is now in process of development.

M. Georges Hargavi, of the Paris Bar, has kindly sent us an account of the coming of industrial arbitration to his country. As we think our readers may like to learn of the development of that branch of law in its new French environment, we have translated for them parts of the communication for which we are indebted to M. Hargavi.

The entry of collective occupational relations into the field of law is probably one of the most important events in French life during recent months, and it promises to have lasting results in the industrial world. The French Revolution, in the name of individualism, suppressed occupational and professional groups. These, however, gradually re-established their right to exist; and, as the nineteenth century progressed, so did their influence increase. Though no juridical standard had been established to regulate the reciprocal relations of employers and workers, unions (or *cartels*) became important factors in the national life. But, up to the end of the War, in these collective relationships between capital and labour, as in international relations, the rule of force prevailed. From 1919 onwards, there were some tentative advances on the Legislature's part to deal with collective industrial bargaining, and the State made some attempts to interest groups of employers and of workers in the task of regulating rival industrial interests. The further extension of this plan by the State marked the beginning of juridical relations between occupational groups.

After the 1936 elections, the Legislature set out to give these collective groups statutory authority to discipline and organize their new relationships which economic evolution had brought into existence. It had become obvious that these industrial relationships must be accepted as part of the normal functioning of the nation's life. And this was one of the objects, by no means the least, of the recent social legislation which has the attraction of an entirely new code of law, the main effects of which are only now beginning to emerge from its tentative efforts to establish itself. Alongside the sections regulating the hours of work, such as those which provide for holiday-pay or the forty-hour week, we find other sections that give statutory recognition to collective occupational groups. The latter primarily regulate industrial agreements and provide for industrial arbitration.

The first juridical relations between occupational groups which came into existence were contractual in their nature. The law of June 24, 1936, set out, on the one hand, to facilitate the completion of industrial agreements, and, on the other, to encourage by means of negotiated agreement a further extension of industrial arbitration, which is at once compulsory and yet adaptable to the special needs of each branch of economic activity. Experience soon proved that before such a statute could be extended in its operation by mutual agreement, it was necessary that powerful and peaceful unions should already exist, and that, if disputes arose, there should be a public authority able to insist upon, and enforce, a just solution. Consequently, the object of the law of December 31, 1936, was to substitute for violence, strikes, and lockouts, the just decisions of enlightened and impartial tribunals in the form of Industrial Courts. On the whole, the innovation has justified itself. The awards of these Courts affect the whole fabric of the State, and, in their applications to divergent interests, show the same care for the common good. In general, they have contributed to the relations of employers and workers a new element of stability, justice, and peace.

Nevertheless, the Industrial Courts have given some decisions without a sufficient knowledge of special conditions pertaining to individual industries; and, again, some of them appear to have been too greatly influenced by doctrinaire considerations. Some criticism, too, has been directed towards the Courts' misunderstanding of economic realities or of the principles of law applicable to them. This, of course, does not help towards an enduring social peace, especially as these Courts exercising the like jurisdiction have given some contradictory decisions: though the members of these Courts have been found to be men of different outlook, their judgments have equal authority.

Little by little, however, compulsory arbitration has shown itself a useful means of meeting what promised to be a critical situation. It has certainly provided a means of resolving industrial disputes, the frequency and violence of which were becoming a national danger. Such a process of experimental legislation no longer sufficed to cope with the need for further legislation—a need which was obviously arising out of a fresh act of circumstances. It was absolutely essential to establish a single authority, sovereign in its own sphere, which would be responsible for developing a coherent branch of law. Such an institution would provide a solid and permanent juridical system instead of a hand-to-mouth method of dealing with industrial unrest.

At one stage it was considered possible to call upon one of the two great superior tribunals, the Council of State or the National Court of Appeal, to undertake this function. The principle of the law of December 31, 1936, implied that awards of the Industrial Courts were not appealable, though it did not exclude recourse for

the substitution of new awards for those already made. Such applications were, in fact, made to several of these inferior tribunals, but some of them declared that they were without jurisdiction to deal with them. But the law of March 4, 1936, by creating a special final tribunal, the High Court of Arbitration, settled the problem.

The jurisdiction given to the High Court of Arbitration makes it paramount in its own sphere, and gives it a status equal to that enjoyed by the Council of State and the National Court of Appeal. The new law, by conferring this novel jurisdiction on the appellate arbitration tribunal, has been at pains to emphasize the great importance of the dual functions for which it has been instituted: To supply a jurisdiction that offers to all interested parties the guarantee of an independent, paramount, and well-equipped Court that can establish on a really workable basis the administration of the law of collective industrial relations; and to confer on this new jurisdiction complete autonomy so that it can efficaciously develop and establish the principles of the new legislation which it has the duty to administer and perfect. To give a satisfactory basis for the proper functioning of a branch of law that is an innovation but at the same time a reality in national life, and, in particular, to provide uniform decisions, is the task of the High Court of Arbitration, which was given its jurisdiction by the law of March 4, 1938, and its organization and rules by the decree of April 3, 1938.

The president of the High Court of Arbitration is the vice-president of the Council of State; with him, he has two councillors of State, two superior Magistrates who enjoy judicial status, and two State officials on the active or retired lists; and, for occasional consultation, when required, there are two representatives of employers and workers delegated for the purpose by the National Economic Council. By the very nature of its composition, the new tribunal gives to litigants a guarantee of authority, independence, and efficiency. The procedure is expeditious and not costly. All trade-unionists, employers' groups, and even single employers, in whose regard respectively an award decision has been made, find easy access to the High Court of Arbitration in order that any dispute arising from labour conditions may receive prompt and final settlement. The grounds of appeal open to them are incompetence of decision, excess of jurisdiction, or error in law. Any award decision may be referred to the Court after the expiry of three days after its pronouncement. The Court has power to review the facts and to decide what is just and expedient. It may quash an award or decision of the Court of first instance, or amend or vary it. It may annul an award *in toto*, and, in doing so, it may make recommendations as to the terms to be incorporated in a new substitutionary award.

A right of appeal from a decision of the High Court of Arbitration arises only when an appeal is lodged by the Minister of Labour, after consultation with the National Economic Council which represents all interests. The ground for this exceptional procedure must be that the judgment appealed from is so contrary to the equity of the case that it may be dangerous to the maintenance of social peace. In addition, the Minister of Labour may, in the interests of justice, appeal to the High Court of Arbitration against an award of the inferior tribunals provided he does so in conjunction with the parties to it.

The High Court of Arbitration, therefore, has clearly-marked characteristics: to organize its supreme jurisdiction with all the necessary authority and independence; to develop the law of collective occupational relationships; and to replace haphazard decisions given under the threat of violence by the enunciation of permanent and well-defined principles of law.

There is every reason to hope that the judicial system which the new Court is developing in the sphere of social justice assigned to it will achieve results as fruitful as those achieved by the Council of State and the National Court of Appeal in the domain of public and private law. It must be remembered that the new Court is yet in its infancy, and that the success and prestige enjoyed by the final appellate tribunals, in France as elsewhere, were gradually attained by painstaking and persevering efforts on the part of their members.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1938.
September 22, 23.
Myers, C.J.
Blair, J.
Callan, J.

S.I.M.U. MUTUAL INSURANCE ASSOCIATION
v.
MINSON'S LIMITED AND OTHERS.

Insurance—Motor-vehicles (Third-party Risks)—Statement by Driver of Car that Accident his "Fault"—"Admission of liability"—Motor-vehicles Insurance (Third-party Risks) Act, 1928, s. 11 (3).

The expression "admission of liability" in s. 11 (3) of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, means an admission of liability to pay damages, either in express terms or necessarily implying such liability.

So held by the Court of Appeal (*Myers*, C.J., and *Callan*, J., *Blair*, J., dissenting).

Tustin v. Arnold and Sons, (1915) 84 L.J.K.B. 2214, referred to.

Per *Blair*, J., an "admission of liability" is an admission prejudicing the question of responsibility for the accident, such as an admission of being the blameworthy party for the happening of the accident in whole or in part.

Tustin v. Arnold and Sons, (1915) 84 L.J.K.B. 2214, distiguished.

Where the driver of a motor-car, who was managing director of a company which owned it, signed a document in which appeared the sentence

> "on moving off I pushed over a lady who at that moment started to cross the road"

and the following postscript:

> "Mrs. Rule [the injured pedestrian] has been extremely nice to me, and I am most anxious to do everything I can apart from the conviction that the accident was my fault"—

this was not an admission of liability to pay damages.

So held by the Court of Appeal (*Myers*, C.J., and *Callan*, J., *Blair*, J., dissenting),

On the grounds,

Per *Myers*, C.J., and *Callan*, J., That the admission of fault is not necessarily an admission of liability. That the statement left open as a ground for defence the setting up of contributory negligence or other available defence.

Per *Blair*, J., That the postscript was deliberatley stated, and meant that the accident—the injury to the pedestrian—was his fault, and the use of the word "conviction" meant that he was the party solely blameworthy.

Appeal from the judgment of *Northcroft*, J., [1938] N.Z.L.R. 557, on the above question, dismissed; and no opinion expressed on the second question (whether the word "owner" as used in s. 11 (3) and (4) of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, includes a driver of a car who is not the actual owner but at the time of an accident giving rise to a claim is in charge thereof with the authority of the owner).

Counsel: **Sim** and **E. J. Anderson,** for the appellant; **M. J. Gresson** and **Alpers,** for the respondents.

Solicitors: **Duncan, Cotterill and Co.,** Christchurch, for the appellant; **Wynn-Williams, Brown, and Gresson,** Christchurch, for the respondents.

Case Annotation: **Tustin v. Arnold and Sons,** E. and E. Digest, Vol. 29, p. 406, para. 3261.

COURT OF APPEAL.
Wellington.
1938.
June 23; Oct. 11.
Blair, J.
Kennedy, J.
Johnston, J.
Fair, J.

UNITED INSURANCE COMPANY, LIMITED AND ANOTHER v. THE KING AND OTHERS.

Land Agents—Bond—Failure to account—Leases, Tenancies, Agreements for Sale and Purchase, Mortgages for Balance of Purchase-money—Leases or Sales Arranged by Land Agent—Collection by him of Rents or Instalments of Principal or Interest under such Agreements or Mortgages—Whether such Rents or Instalments Collected "in his capacity as a land agent"—"Business"—"Transaction"—"Disposal of land"—"Letting of houses"—Land Agents Act, 1921-22, ss. 2 (1), 7, 23.

Section 23 (1) of the Land Agents Act, 1921–22, while applying to moneys paid in respect of the actual grant of a lease or tenancy by a land agent, does not apply to rents received by such agent in respect of a lease or tenancy arranged by him.

Where a land agent has arranged a sale of land for his principal, s. 23 (1) of the statute applies to the deposit and such other moneys as may be payable on the execution of the contract and to instalments of principal and interest collected by such agent under an agreement for sale and purchase, but not to instalments of principal and interest collected by such agent under a mortgage executed by a purchaser of land in respect of such sale to secure balance of purchase-money.

The terms "business," "other transaction," "disposal of land," "in his capacity as a land agent," "letting of houses," "in respect of," discussed.

In re a Fidelity Bond and the Land Agents Act, 1925 and 1927, Ex parte James, [1931] S.A.S.R. 73; **In re a Fidelity Bond given by the Colonial Mutual Fire Insurance Co., Ltd.,** [1931] S.A.S.R. 171, referred to.

Judgment of *Myers,* C.J., [1938] N.Z.L.R. 74, varied.

Counsel: **Goodwin,** for the appellant; **Prendeville,** for the Crown; **Harding,** for C. A. Cotton; **E. C. Wiren,** for Mr. and Mrs. North; **Cullinane,** for Father Tymons.

Solicitors: **Atkinson, Dale, and Mather,** Wellington, for the appellant; **Crown Law Office,** Wellington, for the King; **Meek, Kirk, Harding, and Phillips,** Wellington, for C. A. Cotton; **Luckie, Wiren, and Kennard,** Wellington, for Mr. and Mrs. North; **Kelly and Cullinane,** Fielding, for Father Tymons.

COURT OF APPEAL.
Wellington.
1938.
September 30; October 11.
Myers, C.J.
Callan, J.
Northcroft, J.

WILKINSON v. GLEN AFTON COLLIERIES, LIMITED: JENKINS v. GLEN AFTON COLLIERIES, LIMITED.

Workers' Compensation—Assessment—Agreement as to Five-day Week—Employer's Right to have Necessary Work done on Saturdays—Time worked in excess of Normal Shift to count as "Overtime"—"A full working week"—Workers' Compensation Amendment Act, 1936, s. 7 (2).

An agreement between the defendant company and three other coal-mining companies with two coal-miners' unions provided, by cl. 24, that the ordinary working-time at all collieries should be five days per week, but the management should have the right to have any necessary development, repair, or maintenance work performed on Saturdays when such work could not conveniently be carried out on other days and when the employment of additional men to do the work on other days would not be justified; and that such work should be paid for at ordinary time rates. Clause 26 provided that all time worked in excess of the normal shift should count as "overtime" and be paid for at the rate of time and a half for the first three hours and double time thereafter.

For the twelve months preceding the date of their respective accidents, the plaintiff Wilkinson was selected once to do Saturday work, and the plaintiff Jenkins worked on twenty-one Saturdays.

On cases stated under the Workers' Compensation Act, 1922, by the Judge of the Court of Arbitration,

O'Regan, for the plaintiffs; **Richmond,** for the defendant.

Held, *per Curiam,* 1. That the "full working week" was five days, Saturday being overtime.

2. That the claims came within s. 7 (2) (*b*) of the Workers' Compensation Amendment Act, 1936, and compensation was assessable accordingly.

Solicitors: **C. J. O'Regan,** Wellington, for the plaintiff; **Buddle, Richmond, and Buddle,** Auckland, for the defendant.

SUPREME COURT.
Wellington.
1938.
September 29; October 13.
Reed, J.

CARLYON v. BOYES.

Public Service—Commissioners' Powers—New Zealand Police Constable temporarily appointed Chief Police Officer at Cook Islands—Inquiry by Public Service Commissioner into Charges of Misconduct there—Whether such Officer subject to Control by Public Service Commissioners—No Opportunity given to Officer to obtain Legal Advice—Statutory Right to Representation by Counsel denied him—Appeal—Jurisdiction declined by Public Service Appeal Board—*Certiorari to Commissioner*—Public Service Amendment Act, 1927, s. 11 (3) (*a*), (7)—Cook Islands Act, 1915, ss. 29, 50—Finance Act (No. 2), 1931, s. 19—Finance Act, 1937, s. 41.

Section 19 of the Finance Act (No. 2), 1931, impliedly repeals s. 29 of the Cook Islands Act, 1915, and places the Cook Islands Public Service under the control of the Public Service Commissioners.

A police constable, seconded from the New Zealand Police Force and appointed temporarily Chief Police Officer at the Cook Islands, is during that appointment a member of the Cook Islands Public Service. Any charge against him in that capacity should be dealt with by the Public Service Commissioners, and not by a Superintendent or Inspector of Police under the Police Force Amendment Act, 1924.

Where one of the Public Service Commissioners held an inquiry into charges of insubordination against the officer in the course of his service at the Cook Islands, found one charge proved, imposed a penalty, and ordered him to be transferred to New Zealand, but refused to give him a reasonable opportunity to obtain legal advice and denied him his statutory right to be represented by counsel, and the Public Service Appeal Board declined jurisdiction, a writ of certiorari quashing the proceedings was issued to the Commissioner.

The King v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920), Ltd., [1924] 1 K.B. 171; **The King v. London County Council, Ex parte Entertainments Protection Association, Ltd.,** [1931] 2 K.B. 215; and **Reg. v. Justices of Surrey,** (1870) L.R. 5 Q.B. 466, applied.

Reynolds v. Attorney-General, (1909) 29 N.Z.L.R. 24; 12 G.L.R. 309, applied on question of whether certiorari lies but distinguished on question of whether proceedings too late.

O'Brien v. Cruickshank, [1922] N.Z.L.R. 758: G.L.R. 350, distinguished.

Counsel: **Rollings,** for the plaintiff; **A. E. Currie,** for the defendant.

Solicitors: **W. P. Rollings,** Wellington, for the plaintiff; **J. M. Tudhope,** Crown Solicitor, Wellington, for the defendant.

Case Annotation: *The King v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920), Ltd.,* E. and E. Digest, Supp. Vol. 16, para. 2303; *The King v. London County Council, Ex parte Entertainments Protection Association, Ltd., ibid.,* para. 925a; *The Queen v. Justices of Surrey, ibid.,* Vol. 16, p. 422, para. 2822.

Law and Practice of Set-off.

Development in England and New Zealand.

By N. M. Izard, M.A. (Cantab.) of the Inner Temple.

The difference between set-off and counterclaim is explained by Coleridge, C.J., in *Stooke v. Taylor*, (1880) 5 Q.B.D. 575, in the passage from his judgment which is set out in *Stout and Sim's Supreme Court Practice*, 7th Ed. 115, so it is unnecessary to repeat it here. Briefly, a counterclaim operates not merely as a defence, as does the set-off, but in all respects as an independent action by the defendant against the plaintiff. Both counterclaim and set-off are the creation of statute. It is proposed shortly to trace the history of set-off as it developed in England, and to indicate in what respects the law in England is applicable in New Zealand.

The first Statute of Set-off was passed in 1729 (2 Geo. 2, c. 22), but it was only a temporary enactment, its provisions being re-enacted by statute (1735) 8 Geo. 2, c. 24. Both Statutes of Set-off are in force in New Zealand to-day; though they are repealed in England, so far as they related to the Supreme Court of Judicature, by the Civil Procedure Acts Repeal Act, 1879.

The Statutes of Set-off were construed strictly by the Courts of Common Law, and it was held that a claim in damages could not be the subject of set-off: *Howlet v. Strickland*, (1774) 1 Cowp. 56; 98 E.R. 965, per Ashhurst, J. Conversely, it was held that a defendant could not plead a set-off where the plaintiff's claim was for unliquidated damages: *Grant v. Royal Exchange Assurance Co.*, (1816) 5 M. & S. 439, 105 E.R. 1111.

Courts of Equity, apart from statutory enactment. had allowed a set-off where they could find an agreement to set-off, which they did upon very slender grounds, to prevent circuity of action and multiplicity of suits: *25 Halsbury's Laws of England*, 486; *13 Halsbury's Laws of England*, 2nd Ed. 202, 203. After the passing of the Statutes of Set-off, equity followed the law and cases were held to be within the equity of the statutes though not within their actual words. But even in equity the right of set-off was restricted to liquidated demands—*Rawson v. Samuel*, (1841) Cr. & Ph. 161, 41 E.R. 451; *Best v. Hill*, (1872) L.R. 8 C.P. 10—unless the unliquidated claim directly impeached the right to recover the cross-claim—*Piggott v. Williams*, (1821) 6 Madd. 95, 56 E.R. 1027.

This was the state of the law as it existed in England before the Judicature Acts—namely, that both at law and in equity the defence of set-off was available except that (*a*) no set-off was allowed against a claim which sounded in damages, and (*b*) a claim which sounded in damages could not be made the subject of a set-off. This, of course, did not bar the defendant's right to oppose the plaintiff's claim by a counterclaim, if he had one. But a counterclaim is not a defence; it is an independent action for all purposes except execution: *Stumore v. Campbell*, [1892] 1 Q.B. 314, 316, per Lord Esher.

The difference between set-off and counterclaim may not as between the original parties have much practical effect, for every set-off may be pleaded as a counterclaim, and doubtless would be where the defendant's claim was greater than the plaintiff's; but where the plaintiff is the assignee of a chose in action or contract upon which the claim is based, the distinction becomes of practical importance.

Equity has long permitted the assignment of choses in action, the rule being that the assignee takes subject to certain equities. The debtor has as against the assignee the same rights of set-off and other defences as he would have had against the assignor at the date at which notice of the assignment is given to him: *4 Halsbury's Laws of England*. 2nd Ed. 455; *Roxburghe v. Cox*, (1881) 17 Ch.D. 520, 526. The debtor may also set off a debt which has accrued since notice if it has arisen out of a transaction inseparably connected with the original debt: *Smith v. Parkes*, (1852) 16 Beav. 119, 51 E.R. 720.

The debtor (or defendant) therefore has against the assignee the same right of set-off that he had against the assignor, but could not, before the Judicature Acts and the rules made thereunder, set off unliquidated damages, nor raise against the assignee a counterclaim which he might have made in the action had it been brought by the assignor.

By s. 25 (6) (1) of the Judicature Act, 1873 (Eng.), it was enacted that the assignment of a debt or other legal chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed"—that is, subject to all equities which would have been enforceable in a Court of Equity. The provisions of this section were first enacted in New Zealand in s. 7 of the Property Law Act, 1882, and they are now contained in s. 46 (1) of the Property Law Act, 1908. The decisions of the English Courts upon s. 25 (6) of the English Act may properly be applied to the construction of the New Zealand Act: *New Zealand Loan and Mercantile Agency Co., Ltd. v. Ellen Mitchell*, (1906) 26 N.Z.L.R. 433, 445, per Cooper, J. The effect of this section, however, was not to extend the class of contracts which were assignable before, but it had enabled assigns of assignable contracts to sue upon them without joining the assignor; *Tolhurst v. Associated Portland Cement Manufacturers*, [1903] A.C. 414, per Lindley, L.J.

In England the right of set-off was extended by O. 19, r. 3, of the Rules of the Supreme Court made under the Judicature Acts: *1938 Yearly Practice*, 291. This rule now reads:

> "A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sounds in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim."

And O. 21, r. 15, empowers the Judge to order separate trials if more convenient, but in the case of a counterclaim only: *ibid.*, 355.

After the passing of the Judicature Acts the Statutes of Set-off were repealed as far as they related to the Supreme Court of Judicature, subject to the qualification that "any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired," under those enactments was not to be affected by the repeal, and that the repeal was not to "operate in respect of any Court other than the Supreme Court of Judicature in England"; *25 Halsbury's Laws of England*, 488. The result appears to be that the present law of set-off, at least so far as

the High Court is concerned, depends entirely on O. 19, r. 3 (*supra*).

As to the reasons for and the effect of these alterations in the law relating to set-off, the Judicial Committee of the Privy Council, in the course of its judgment in *Government of Newfoundland v. Newfoundland Rail Co.*, (1888) 13 App. Cas. 199, 213, after referring to the case of *Smith v. Parkes* (*supra*), said :

> " That was a case of equitable set-off and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice and has been altered. Unliquidated damages may now be set off as between the original parties and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also gave rise to the subject of the assignment. It appears to their Lordships that in the cited case of *Young v. Kitchin*, (1878) 3 Ex. D. 127, the decision to allow the counterclaim was rested entirely on this principle."

This case was decided under the law of Newfoundland, where, as their Lordships said, at p. 209, " The colonial Legislature has adopted the convenient and just rule introduced into England by the Judicature Act, so that damages unliquidated at the time of the action may be made the subject of counterclaim "— *i.e.*, by O. 19, r. 3.

The facts of this Newfoundland case are interesting, and the case forms an excellent illustration of the extent to which set-off is permitted under English law. The facts are as follows : By contract in 1881, embodied in a statute, the plaintiff company covenanted to complete a railway in five years and thereafter to maintain and continuously operate the same. In consideration thereof the Government covenanted : (*a*) to pay the company upon the construction and continuous operation of the line an annual subsidy for thirty-five years, " such subsidy to attach in proportionate parts and form part of the assets of the company as and when each five-mile section is completed and operated " ; and (*b*) to grant the company in fee-simple 5,000 acres of land for each one mile of railway completed, upon completion of each section of five miles.

It appeared that the company completed a portion of the line, and received from the Government on the completion of each five-mile section the specified grant of land, and certain half-yearly payments in respect of the proportionate part of the subsidy which was deemed by the parties to attach thereto ; thereafter, the contract was broken by the company, and the Government refused further payments. In a suit by the company and its assignees of a division of the railway and of the rights relating thereto it was held :

1. That on the true construction of the contract (*a*) each claim to a grant of land was complete from the time when the section which had earned it was complete ; (*b*) on the completion of each section a proportionate part of the subsidy became payable for the specified term, but subject to the condition of continuous efficient operation.
2. That by the law of the Colony the Government were entitled to set off a counterclaim for unliquidated damages for the company's breach of contract in not completing the line.
3. That the set off availed against the assignees of the company, as the claim and counterclaim had their origin in the same portion of the same contract, the obligations which gave rise to them being closely connected.

The effect of O. 19, r. 3, was open to some doubt— *25 Halsbury's Laws of England*, 491 ; but it now seems clear from the cases that where before the Rules of the Supreme Court a plea of set-off could have been maintained in respect of a liquidated claim, such plea can now be maintained in respect of unliquidated damages. The defendant may set-off an unliquidated claim against a liquidated claim, but the converse, to set off a liquidated claim against an unliquidated claim, is not permitted : *McCreagh v. Judd*, [1923] W.N. 174, per Lush and Salter, JJ., following *Bankes v. Jarvis*, [1903] 1 K.B. 549.

The Statutes of Set-off are in force in New Zealand, and principles of law and equity based on those statutes are applicable. The provisions of s. 25 (6) (1) of the Judicature Act, 1873 (Eng.), have been enacted in what is now s. 46 (1) of the Property Law Act, 1908. But there is no statute or rule in our Code of Civil Procedure corresponding to O. 19, r. 3, of the Rules of the Supreme Court. Consequently, in the writer's opinion, the law on the question of set-off remains the same in New Zealand as it was in England before the coming into effect of the rules made under the Judicature Act. If that be correct, then the decisions of the English Courts since that time are not authorities on the law as it exists in New Zealand.

Accordingly, had the *Newfoundland Rail Co.'s* case (*supra*), been decided under New Zealand law, the Government would have had no right to set off its claim for unliquidated damages against the assignees, but would have been left with a right of action against the company alone. If the company had no assets, the Government's claim would have been unsatisfied while the assignees took the benefit of the contract without liability for the breach of the obligations arising under it.

This question is not merely academic, and in fact it was raised, but not decided, in the New Zealand case of *Chapple v. Tongariro Timber Co.*, [1935] G.L.R. 192, 302. It is, therefore, respectfully suggested that the adoption of a provision similar to the English O. 19, r. 3, might well be considered in making future amendments to our Code of Civil Procedure to meet such a case as this.

The Law of Libel.—It is generally agreed here that the law of libel requires to be amended, both as regards the position of newspaper proprietors and vendors, who may in law be liable for publication of a libel although they have no means of knowing that they are committing a civil wrong, and as regards damages which are frequently entirely out of proportion to any loss which the plaintiff has actually suffered. The subject was discussed in an article in the *Law Journal* (London) last June (*85 Law Journ.*, 440) in connection with the Bill for the Amendment of the Law of Defamation, which had been prepared under the auspices of the Empire Press Union. One clause of the Bill provides that it shall be a defence to prove that the defendant had no reasonable ground for supposing that the words complained of referred to the plaintiff, so as to overrule *Hulton v. Jones*, [1910] A.C. 20, 79 L.J. K.B. 198. Another attempt to deal with the matter has been made by Mr. A. P. Herbert's Bill which was introduced in July, but for the present has been dropped. The law of libel has, indeed, grown up without any consistent principles which are suitable to the carrying on of newspapers at the present time, and it is interesting to read in the report (*Times*, 25th ult.) of the speech of the Lord Chief Justice at the anniversary dinner, in connection with the Newsvendors' Benevolent and Provident Institution, that he proposes in the New Year seriously to consider whether he will not devote some of his leisure moments to an impartial consideration of the law of libel.

—APTERYX.

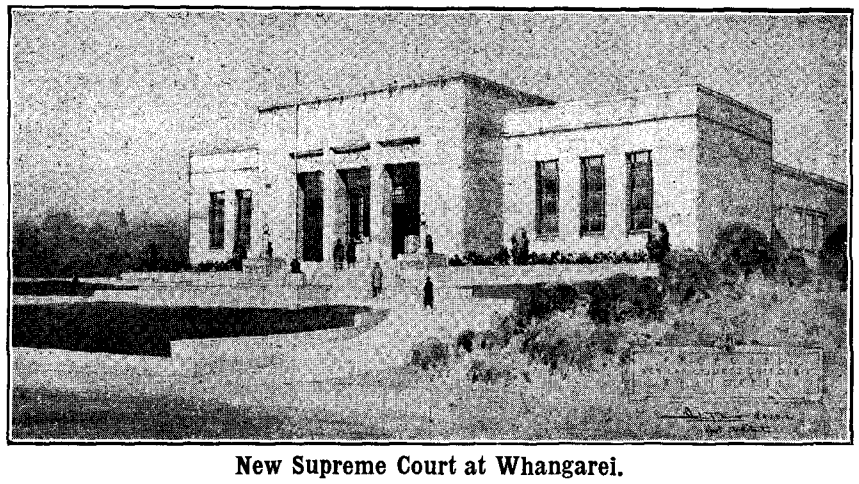
New Supreme Court at Whangarei.

FOUNDATION-STONE LAID.

The creation of a new Judicial District, with Whangarei as its centre, has necessitated the building of a new Court in that important northern town. The foundation-stone of this building was laid by the Attorney-General, the Hon. H. G. R. Mason, on the afternoon of October 3, in the presence of a large gathering of the public. The members of the legal profession in the new District attended in full force. The Mayor of Whangarei, Mr. W. Jones, presided.

In extending a welcome to the Attorney-General, His Worship said that the citizens of Whangarei had been looking forward to this event for a good many years. They regarded the proposed building not merely as an edifice but as the "Hall of Justice." He also hoped that a Land Transfer Office would be established in Whangarei when the Supreme Court Office came into being.

In welcoming the Hon. the Attorney-General, the President of the local Solicitors' Association and the oldest practitioner living in Whangarei, Mr. T. H. Steadman, referred to the progress of the district in the last fifty-four years. When he commenced practice there, over half a century ago, he could count the buildings on the fingers of one hand. There was a Court-house and "lock-up" on the corner of Walton Street, which was burnt down in 1891. In those days, the local Magistrates had a great deal of travelling to do, mostly on horseback, under adverse conditions over a territory extending from Helensville to Waimate North. The first Stipendiary Magistrate there was Mr. J. S. Clendon, a hardy man who rode the district in the middle of winter under any conditions. Mr. Steadman referred to the better travelling facilities now, and the increase of business justifying the establishment of a Supreme Court Office. He himself was the second solicitor in this district, where now there are fifty in active practice.



New Supreme Court at Whangarei.

Mr. G. N. Morris, S.M., said it gave him great pleasure to see the first step taken in the erection of a Supreme Court. He referred to the extensive area for which the Supreme Court would cater, a territory extending some three hundred miles north of Auckland. In his opinion the establishment of the Court was justified for three reasons: it would make the administration of justice there cheaper and easier; plaintiffs with just claims exceeding his own jurisdiction would not need to reduce their claims because of the expense now involved in attending the Supreme Court at Auckland, while persons accused of indictable offences would not have the expense of proceeding to Auckland with their witnesses; and appeals from his judgments could be made more readily. Litigants would not need to refrain from prosecuting appeals, as they probably had done in the past, owing to the expense involved.

His Worship also referred to the excellent situation of the new building, to the lack of dignity associated with the present makeshift one, and to the increase in the class of work which the Magistrates' Court building had had to cater for since his arrival here nine years ago.

Mr. Morris considered that there was a great future in store for Northland and that the proposed building would serve the community for many years to come.

The Attorney-General (Hon. H. G. R. Mason) said that since he assumed the portfolio of Minister of Justice he had devoted considerable attention to the question of reforms in our legal system. In the matter of law reform, he was happy to be able to say that, with the ready and most friendly and helpful co-operation of the Bar throughout the Dominion, much had been achieved, and, in collaboration with the Law Revision Committee, many desirable amendments during the past two years had been incorporated into the statute law; but there was another important matter which also comes under the heading of legal reform, and that was the provision of Court buildings suitable and adequate for the purpose they are designed to fulfil. Shortly after taking office he had been struck by the unsuitability of many of our Courts in this respect. Not only were they inconveniently arranged for present-day requirements but the tradition seemed to be to have them dingy, ill-lit and ill-ventilated, and almost of mediaeval design.

North Auckland's Importance.

"During my term of office three new Court-houses have been built, several are in course of construction, and many have been added to or altered in some material way," the speaker continued. "My objective is to provide buildings which will not only be useful to the general public, but which will also provide modern facilities and comfort to the staffs who are required to work within their walls. Careful regard is now had to the acoustics of buildings and also to the matter of proper ventilation by the installation of modern air-conditioning systems."

"The establishment of a Supreme Court in Whangarei is a recognition of the growth and the importance of the North Auckland District. During the last decade the development has been most marked. Statistics disclose that during the past ten years the population

of the district has increased by 25 per cent. This is considerably in advance of the average increase in other parts of the Dominion, and it is a sure sign of its growing popularity and prosperity. I am advised that the estimated population of the district which will be served by the new Courts is in the vicinity of 90,000.

"It is a cardinal principle in British communities that justice shall be readily available to all who seek the protection of the Courts; but if the costs of litigation are too burdensome they may amount to a denial of justice. It is the purpose of reducing the costs, especially the heavy costs of taking witnesses and litigants long distances, that largely underlies the proposal to establish a Supreme Court in Whangarei. With such a large population as I have already referred to, it does not seem to me to be reasonable or proper to continue to require litigants to journey well over one hundred miles to Auckland, particularly those from still further north, and I feel sure that the innovation of holding Supreme Court sittings at Whangarei will be found to be of the greatest service to the general public and the members of the legal profession in this Northern Peninsula.

The Oldest European Settlement.

"This part of New Zealand, which until but recently was described as 'the roadless North' strange to relate contains the oldest European settlement in the Dominion. The first British Resident, representing administrative and judicial authority was appointed in 1833, and had his headquarters a little further north in this district at Kororareka, which is now known as Russell. It was in this district also that the famous Treaty of Waitangi, which has been called the Magna Carta of our Native brethren, was signed in 1840. Time and the arrival of more people made it necessary to invoke certain rules and laws, which are a necessary concomitant of every civilized community. Law and order are the natural companions of liberty, and it is characteristic of our race that where Englishmen are congregated there will be found the law in some form. It prevents lawlessness, rights grievances, and guarantees safety. The early pioneers brought with them from England the great principles of civil liberty which had been won after centuries of bitter struggle and sacrifice, and which are proclaimed in the Great Charter and in the Declaration of Rights.

"The increasing complexity of our social structure inevitably brings an increasing complexity in the law of the land and makes its administration particularly exacting. Wherever we find learning, impartiality, and independence in the judiciary, integrity and fearlessness in the Bar, and mutual trust and confidence, justice must be ensured. But we must go further even than this: we must show to the people themselves that justice is being done, so we open to the public the Courts in order that justice may be seen to be done; and we give to the ordinary citizen the right to participate in its administration. To him belongs the right to sit on juries, and he is appointed to the ancient offices of Justice of the Peace and Coroner. The doors of the Court are open to the Press as it is recognized that the cleansing light of publicity and its deterrent influence are a safeguard and a protection."

Courts had been held in various parts of this district since the early days, Mr. Mason said. The existing Magistrates' Court building at Whangarei was formerly the property of the Railway Department, and was designed as an office for the Resident Engineer; but it was not conveniently adaptable for the purpose of a Supreme Court, hence the decision to erect an entirely new building on a new site. Much consideration had been given to the planning and the designing of the new building, the aim being to provide the maximum of utility consonant with economy, and at the same time aspiring to a monumental design, which will, as far as practicable, symbolize the purpose for which the building stands.

"I feel, from the plans which I have seen, that the structure, when completed, will be one of which this town may be justly proud," the Attorney-General said, in conclusion. "The laying of the foundation-stone, which will mark the advent of the Supreme Court in North Auckland, heralds a new era in the judicial history of the district."

BAR DINNER.

In the evening, the members of the profession resident in Northland entertained the Attorney-General at an informal Bar dinner held in the Settlers' Hotel.

Among the other guests present were Mr. B. L. Dallard, Under-Secretary for Justice, Mr. G. F. Dixon, Private Secretary to the Minister of Justice, and Mr. A. J. Ching, and Mr. R. Holder, Registrar and Deputy-Registrar of the Supreme Court respectively.

Mr. T. H. Steadman presided. After the loyal toast had been honoured, he proposed the health of the Hon. Mr. Mason, who had come to Whangarei to begin a new and important chapter in the legal history of the district.

"The Attorney-General."

Mr. H. C. Rishworth, in supplementing the chairman's remarks, stressed the long-felt need of a Supreme Court Office in Whangarei, and the suitability and accessibility of the site upon which the work of the Supreme Court for the new district would be performed. He hoped that Mr. Mason would be able to come back and see the building formally opened.

Mr. D. L. Ross, in supporting the previous speakers, welcomed the Minister on behalf of the practitioners in the Dargaville district. He thought that the presence of a Supreme Court in the Northland district would result in a higher standard of professional service, and would be an incentive to the younger practitioners to aspire to higher functions in the administration of justice.

The Hon. Mr. Mason, replying, after expressing his appreciation of the kindness to him of the profession in the North, said that the ceremony performed that day had been a very happy occasion for him. One was always happy to be doing the thing that one felt to be of importance and definitely in the right direction: and there was no question about that in the present instance. Reference by a previous speaker to the roads in the North reminded him of the fact that, as illustrating the comparative isolation of the northern districts, even when he was first elected to Parliament in 1926 it was not possible to pass his own electorate northwards without coming to clay roads where, in wet weather, one had to get out and push. Great improvements had, however, been made in recent years in road communication with Whangarei and North Auckland generally.

He hoped that certainly some time next year—sooner or later according to the activity of the architect—they would manage to open the building, and he certainly would find that a very happy occasion to be there.

THE PROFESSION'S CO-OPERATION.

The Attorney-General said that he did not know if it was in order for him to say much more, but he would like to say how very much he appreciated the help that the profession had been to him in all his work. At every turn the profession spoke of what he had been able to do, but it was only as the representative of the profession—as their spokesman, which was what the Attorney-General was—and because of their great kindness, that he had been able to achieve such results as he had done. Like the seconder of the toast, he did not profess to be anything more than an ordinary country solicitor, and he was profoundly thankful for the way in which the profession throughout New Zealand had co-operated and assisted him in those departments of public life in the way of law reform or otherwise where the advice of the profession could be useful in the public interest.

"THE BENCH."

Mr. R. K. Trimmer proposed the toast of "The Bench." This, he said, was a toast time-honoured. He thought that the Courts of Justice in our country were like a beacon light that remains undimmed through the international and economic crises of our generation. He instanced the trial of Roger Casement and referred to the meticulous care taken to ensure for the prisoner a fair and adequate trial. He also referred to the Bank of Portugal case, in which one of Britain's leading public men was directed to pay a considerable sum of money to a foreign litigant. He questioned whether such a result could be equally expected from the Courts of other countries.

Mr. Trimmer also referred to the way in which, in New Zealand, politics were completely separate from the Judiciary. Although in England, through the Lord Chancellor, law and politics became peculiarly interwoven, the Judiciary there likewise maintained an absolute independence of thought and action. He referred to the fairness in all Courts of Justice in this country; the way in which the accused is given a copy of the depositions beforehand; and how Crown Prosecutors in New Zealand lay all the facts before the jury and refrain from prejudicing the accused by unfair tactics. The Bench maintained the same scrupulous fairness. Those who practise in our Courts learn to admire more and more the fairness of our system: the care that is taken to protect accused persons, not only by enforcing the rules of evidence, but also by the maintenance of fair play generally our Courts, in the conduct of criminal trials, prevent an accused person being unduly prejudiced.

Mr. Morris, S.M., in replying said that he found it difficult to find an adequate way of responding to this toast. He wondered how much he fell short of the high ideals with which people credited him.

He said that in his nine years in this territory he had had unfailing courtesy and kindness from members of the whole of the profession. They had greatly helped him when he came there new to the North and to his office, and he had never had a real opportunity before of saying how much he appreciated their help in those early days.

Mr. Morris expressed high admiration for the solicitor whose work lies in the country towns such as were covered in his circuit. He thought that the practitioner in the larger cities, perhaps, had more Court work, but it was of a more restricted nature. Timber, kauri gum, and like products of remote districts, provided their own problems; and, with these, the city solicitor had little to do. Country practitioners had to cover a much wider field, and they carried on their work without the assistance of an adequate library. Nevertheless, with all their handicaps, they provided valuable and necessary assistance to the Magistrate.

FIFTY-FOUR YEARS IN PRACTICE.

Mr. H. C. Rishworth then proposed the health of the chairman. Mr. Steadman, he said, was the second oldest practitioner in the Auckland Province. He had fifty-four years of active work to his credit, and everyone hoped to see him take his place in the new Supreme Court. In addition, the town owed many of its amenities to him. He had taken a very full part in civic affairs, and had been Mayor of Whangarei. He also took a keen interest in local military affairs.

In reply, Mr. Steadman said he was remaining in active practice to see the Supreme Court functioning in Whangarei. In his civic work he had had great help from the citizens; and to his brother practitioners he owed a debt of assistance that was difficult to estimate at its true value. He was very grateful to them all.

The Profession's Experiences at the hands of Thieves.—The recent robbery at the home of Mr. Abrahams, K.C., of Sydney, while he was in England, before the Privy Council, reminds me that during this year the profession has suffered considerably in this way. The following account is taken from the *Solicitors' Journal*, and makes us think of our insurances:—

> "The legal year which began with the theft of the wigs of three Lords Justices and a good selection of their books has provided a few more incidents *ejusdem generis*. On Christmas Eve thieves took advantage of a party at the home of Sir Felix Cassel, K.C., to make themselves a present of some thousands of pounds' worth of jewellery. During the Lewes Assizes an enterprising thief made bold to enter the Judges' lodging just opposite the goal and take possession of the key of the flat of Mr. Justice Charles besides some gold cuff-links and studs. From further afield comes the news of a Judge in Budapest who, after severely admonishing a prisoner for the meanness of stealing children's coats from schools, found that his own overcoat and those of the jury had been taken during the hearing. No legal robbery I know of has had the splendid audacity of the occasion when a workman with a ladder interrupted a sitting of the Civil Tribunal in Paris to remove the Court clock which he said wanted cleaning. Neither clock nor workman was ever seen again.
>
> "The subject of lawyers' experiences at the hands of thieves recalls a curious adventure recorded in a newspaper of 1700, a future Lord Chancellor being the central figure: 'Two days ago Mr. Simon Harcourt, a lawyer of the Temple, coming to town in his coach, was robbed by two highwaymen on Hounslow Heath of £50, his watch, and whatever they could find valuable about him; which, being perceived by a countryman on horseback, he dogged them at a distance and they taking notice thereof turned and rid up towards him, upon which he counterfeiting the drunkard, rid forward making antic gestures, and being come up with them spoke as if he clipped the King's English with having drunk too much, and asked them to drink a pot, offering to treat them if they would but drink with him; whereupon they believing him to be really drunk left him and went forward again, and he still followed them till he came to Kew Ferry, and when they were in the boat discovered them so that they were both seized and committed, by which means the gentleman got again all they had taken from him'."

And there is, of course, the picture in *Punch*, wherein one burglar asks his mate who "observed" for him outside a mansion: "Did yer get anythink, Bill?" "No, a lawyer lives there." "Well, did yer lose anythink?"

—JUSTICIAR.

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. 120. Appeals by the executors and trustees of a deceased person's estate (hereinafter called "the appellants") in respect of orders of the Adjustment Commission relative to the adjustment of (*a*) the liabilities of the deceased estate of G. (hereinafter called "the applicants"); (*b*) the liabilities of the bondsmen in respect of an administration bond given for the due and proper administration of the said estate of G.; and (*c*) the liabilities of F. the owner of the property over which appellant's memorandum of mortgage and memorandum of extension thereof were registered.

The applicants for relief were the administrators of the estate of G., who, in 1919, had executed the second mortgage now held by appellants. In 1925 the administrators of G. sold the property of F., and the appellants granted an extension of such mortgage to F. and the administrators signed such extension thereby continuing the liability of the estate they were administrating. At this time the assets of the estate of G., approximately £5,000, were undistributed; but, shortly afterwards, they were distributed and no provision was made in respect of any contingent liability in respect of the second mortgage. In 1933 the mortgaged property was sold by the first mortgagees under their power of sale at a price which left a deficiency of over £5,000, so far as they were concerned, and with the result that the second mortgage no longer was secured on the land. It did not appear that the first mortgagees made any claim, or recovered any moneys, in respect of such deficiency, from either the appellants (as original mortgagors) or from the owner of the property, F. Relying on the covenants for payment on the part of the administrators the appellants brought an action in the Supreme Court against them as administrators and obtained judgment for the principal and interest secured by the second mortgage and costs.

The applicants' claim for relief was, therefore, against payment of a sum arising out of a mortgage which, despite the judgment, could be discharged under the provisions of the Mortgagors and Lessees Rehabilitation Act, 1936.

Contemporaneously with the application of the administrators, an application for relief was filed by the bondsmen, who claimed to be entitled to relief as guarantors of a liability arising out of, or in respect of, a mortgage.

The Adjustment Commission treated both sets of applications as being in respect of a mortgage debt; and, after inquiry into the circumstances in which it was incurred, and the value of the property over which it was secured, granted the fullest measure of relief possible by discharging the liability of both sets of applicants in respect of the principal and interest secured by the mortgage and also in respect of the costs awarded by the Supreme Court and Court of Appeal to the appellants.

Held, 1. That the decision of the Commission was justified in granting relief to both sets of applicants, assuming that the bondsmen were qualified to apply under the Act as guarantors as found by the Commission, which was doubtful.

2. That, for the reasons given in the judgment, it was inadvisable that the Commission's order discharging the bondsmen should be disturbed.

3. That, as the costs for which judgment was given against the estate of G. did not relate to the quantum of the amount secured or to the value of the security, and such judgment was not in the nature of an application under the Mortgagors and Lessees Rehabilitation Act, 1936, such costs should be borne as ordered by the Supreme Court and the Court of Appeal; and that the Commission's order in that behalf should be set aside.

In the course of its judgment, the Court said:

"The circumstances in which the mortgage debt was contracted, the fact that the appellants were vendor mortgagees, and the fact that the property was sold by them to the late G. at a price far in excess of its real value, and that this fact was known to appellants at the time the extension referred to was signed, amply justified, in our opinion, the Commission in coming to its decision. The only consideration that might affect such determination would be the presence in the estate of other assets readily available to meet the liability.

"Nothing that has been said by the appellants to this Court has been sufficient to convince us that the Commission was wrong in exercising its discretion in the way it did or that it would have been bound, in view of all the circumstances hereinbefore mentioned, even if assets were available in the estate, to make those assets liable for the amount claimed.

"The mere fact that applicants may have been imprudent or, indeed, may have committed a breach of duty in distributing the assets of the estate without making due provision for the contingent liabilities, does not, in our opinion, make it imperative that relief be refused. The whole of the circumstances must be taken into consideration, and, in this case, we think the Commission rightly determined what, in the circumstances, was equitable having regard to the real value and the sale value and the incidence of loss caused by misapprehension of the true value and the loss incurred by fall in prices. It has been frequently held by this Court that despite the presence of other assets, the adjustable debt created by a reduction in value in many cases will be discharged. The Court has not agreed that in all cases 'other free assets' must, to meet such adjustable debts, be made available and charged.

"We think that the decision of the Commission was justified in granting relief to both sets of applicants, assuming that the bondsmen were qualified to apply under the Act as guarantors, as found by the Commission.

"It seems to us, however, to be extremely doubtful whether the bondsmen can be described as guarantors. But, while it may have been unnecessary that the bondsmen should file an application for relief and the order of the Commission assessing their liability may be *ultra vires*, it is not, in view of a possible decision by the Supreme Court that the bondsmen are guarantors within the Act, advisable that this Court should disturb the order of the Commission in this respect, since the bondsmen themselves have come to this Court as guarantors, and in that character, at any rate, despite doubt as to right to assume it, can be discharged from at any rate a voluntary assumption of liability as guarantors.

"The order relieving the estate from liability in respect of principal and interest moneys secured by the second mortgage is upheld.

"The costs for which judgment has been given against the G. estate concerned litigation which was fought on the question as to whether the administrators were liable personally or in a representative capacity, and did not, in substance, raise or deal with the nature of an application

* Continued from p. 302.

under this Act—namely, the quantum of the amount secured or to the value of the security. As to whether appellants were justified in the attitude they took is not a question for this Court.

"The costs awarded by the Supreme Courr and by the Court of Appeal were in respect of matters necessarily determinable before an application to this Court, if they were to be raised at all. The advisability of raising tho question was a matter entirely for the G. estate, and the costs incurred should be borne as ordered, as in our opinion the considerations moving the Commission and this Court in discharging applicants from principal and interest moneys do not apply to costs incurred in this particular litigation.

"That part only, therefore, of the Commission's order relieving applicants from payment of those costs will be set aside.

"It was stated to the Court that the appeal so far as it relates to the order made in the case of F. would not be proceeded with if the administrators were held not liable to the appellants (the mortgagees): such being the case it will apparently not be necessary for the Court to consider that appeal. The appeal will therefore be dismissed unless within 14 days from date of this judgment appellants notify this Court of their intention to prosecute the appeal."

London Letter.

By Air Mail. Strand, London, W.C. 2,
November, 1, 1938.

My dear EnZ-ers,—

On October 12, the Law Courts reopened for the new judicial year, a special service being held in Westminster Abbey and a Red Mass at Westminster Cathedral. So refreshed spiritually, the Judges and others had physical refreshment as well, for the Lord Chancellor's Breakfast was revived this year by Lord Maugham, L.C. It was more than the mere restoration of an institution neglected and unobserved for a period of seven long years. It was worthy of the great relief following the great crisis; it was worthy of the Lord Chancellor himself; and, while avoiding all overstatement or fulsome praise, it may truthfully be recorded that the meal, while seemly to the hour and the occasion, was satisfying also, containing as it did all the elements conducive to a dignified but successful social function, and removing also from many, pleasantly but effectively, the normal desire for lunch and the urgency of the usual longing for work during the remainder of the day. It will be admitted that such results could not be achieved by the mere exchange of Long Vacation anecdotes over a cup of coffee in the Royal Gallery of the House of Lords.

In the years which have elapsed since the National Economy Acts were put in force the Judges, their clerks, the K.C.s, and the few representative juniors, having proceeded from their places of worship to the House of Lords, did not linger there for more than the space of a few minutes. But they stayed long on the twelfth of October; and when they at last emerged in twos and threes, cheerful but reluctant, the day was far spent. With incredible disregard of personal safety, certain of them moved without hesitation into the oncoming tide of traffic in search of their taxis or limousines; yet not one of them sustained any personal or serious injury, or added by his negligence to the arrears of running-down cases on the cause lists. Their guardian angels and clerks hovered successfully.

Those who were present later, in the Hall of the Royal Courts of Justice, will bear me out in this testimony: that the Judges in their march past have never in our time been excelled in èlan, dressing, procedure, and impressiveness; and that the following description by a high authority does them less than justice: "Before the Judges took their seats as usual in the various Courts, the usual procession, headed by the Lord Chancellor, took place as usual along the Central Hall of the Law Courts."

Two Interesting Cases.—Next day, the 13th, much good and necessary work was done in the Royal Courts of Justice; and on the 14th a band or group of lawyers were discovered in the Temple perusing, and discussing with some emotion, the reports of two cases heard on the 13th, and appearing in the *Times* of the 14th aforesaid. I observed that while they were able to find to their comparative satisfaction the *ratio decidendi* in the case of *Thompson v. Thompson*, decided in the Court of Appeal by the M.R., Scott and Clauson, L.JJ., they were still exercised by speculation as to the weight of evidence where a co-respondent, found to have committed adultery with a respondent, was thereafter certified by two gynæcologists to be *virgo intacta*; and support of the judicial view was found in earlier discoveries of juries where a similar phenomenon was alleged.

But these lawyers have not yet found peace in the matter of the judgment delivered in the K.B.D. by the Lord Chief in *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (Charles and Macnaghten, JJ., concurring), on the same day, the 13th October. It seemed to shock them in their most sensitive part—that is to say, in their Elementary Principles—and they were still wondering, and disputing, and searching the Law Reports when I last saw them on the late afternoon of that day. The Principles so shocked as aforesaid were said to have been founded on a long line of innumerable judgments delivered in the Courts of Common Law, and extending far back into the unrecorded past.

Of New Masters.—Briefly, and apart from the old law relating to slavery, what was believed was this: that if A. entered into a contract of personal service with B., as employer, B. could not transfer his rights in A. and his contract of service to C. without A.'s consent. A., in other words, could not be transferred willy-nilly to a new master; nor could C. sue A. for breach of contract, there being in fact no contract or agreement between them. So (it was thought) a farm labourer, who entered into an agreement of long or short hiring with Farmer X. was bound by his contract; but if X. transferred his farm to Y., the free labourer and his contract would not go with the farm, and the labourer was free to enter into a new agreement with Y. or not, as he pleased. In certain circumstances he might even sue X. successfully for damages for breach of contract. Nor was it thought necessary that the labourer should assign a reason or good cause for declining the transfer. His mere whim was enough, and his real reason might or might not be disclosed to third parties in the local pub—namely, that Y. had whiskers, and whiskers he could not abide.

Now it seems that if the farmers were a couple of companies and had amalgamated and obtained an order in the Chancery Division that the property in the farm, its equipment, and liabilities, be transferred to the amalgamated company, the labourer and his contract would go, whether he liked it or not, as part of the "property and liabilities."

A company, as we know, has a true and often recognizable legal personality, as distinct from those of the directors and the persons who own or control it. Yet there are certain differences between Farmer Giles and Farmer Giles, Limited. One is that the company has no whiskers, and it would be all in vain for the labourer to complain that the new manager wore them or that the board of directors were not the kind of men he would like to work for.

Ratio Decidendi.—So Mr. Nokes, who was not a farm labourer, but a miner under contract of service with the Hickleton Main Colliery, Ltd., was surprised to find himself, some time after the event, lawfully transferred to the Doncaster Amalgamated Collieries, Ltd.; and, staying away from work without having terminated his contract by due notice, he was ordered to pay to his new masters 15s. damages for breach of contract, and 10s. costs. And the K.B.D. found, without using the language of the New World, that this was O.K. by the law. The *ratio decidendi* is not to be found, as suggested by an unlearned student, in the Lord Chancellor's Breakfast of the day before, but in the words of s. 154 of the Companies Act, 1929, and, in particular, of subs. (4) thereof, wherein it is declared that "property" includes "property, rights, and powers of every description," and that "liabilities" include duties. The view that Mr. Nokes, or rather his contract of service, was part of the property or (it may be "and") liabilities transferred will not be lightly disregarded whatever the issue of an appeal; having regard to the fact that the learning of the tribunal is of the highest quality.

Counsel also were admittedly of the best—that is to say, Mr. H. I. P. Hallett, K.C., and Mr. G. W. Wrangham for the appellant; Sir Walter Monckton, K.C., and Mr. H. B. H. Hylton-Foster for the respondent company.

The Latest Judicial Changes.—The retirement of Lord Justice Greer, which I prophesied recently, has now taken effect, and, to the general regret of the profession, he leaves the Court of which he has been a valued member for eleven years, and in which he has presided since the death of Lord Justice Scrutton. The appointment of the three additional Lords Justices authorized by the recent Judicature Act has already been made, and the vacancy caused by Lord Justice Greer's retirement has been filled by the promotion of Mr. Justice du Parcq to the Court of Appeal, thus creating a vacancy in the King's Bench Division which has been filled by the appointment of Mr. W. N. Stable, M.C., K.C. With these two excellent appointments the changes in the Court of Appeal and the King's Bench Division are for the present complete. But as each new Lord Justice is appointed, it should be noted that he comes in under the new system. First-instance Judges are no longer, as in the past, brought in to help the Court of Appeal. On the contrary, the new Lords Justices hold themselves ready to be first-instance Judges. In fact, this is nothing new, for Lords Justices have frequently sat in the High Court, and it seems only to show that the surplus judicial strength is now likely to be in the Court of Appeal. The previous arrangement was probably more suitable, and the new one may prove only temporary. And if Lord Justice Greer's ingenious suggestion should be accepted, and Judges progress down from the House of Lords to the County Court, there will be some considerable surprises in store.

Unemployed Leaders.—The letter of "A Templar" to the *Times* a few days ago sets out the unfortunate plight of the silks, and refers to a celebrated *Punch* cartoon representing out-of-work K.C.s singing for alms in the Strand as "amusing to everybody except those who were finding how true it was." It discloses the fact that about 80 per cent. of litigation in the Courts is financed by insurance companies; and that one of the economies which they decided to effect in patriotic response to the economy appeal of 1931 was "to refrain from engaging leading counsel in any but exceptional cases. Within a week it was possible to visit any Court in the K.B.D. without seeing a silk gown, and on circuit this absence was even more marked." This condition of things has continued for seven years, and it may be hoped, says the writer, that the seven lean years may be followed by seven fat ones.

There is much to be said for his suggestion that for the good of all parties concerned, the Bar Council, the Law Society and the insurance companies might take counsel together and "ascertain how the interests of the public, the underwriters, and of the legal profession might all be safeguarded without any one body being selected for sacrifice. Failing that, counsel might recognise the fact that fees have been allowed to become too high; that twenty guineas in town or twenty-five guineas on circuit is not an insulting fee in the average running-down case, and may be accepted without any charge of undercutting; and that the loyalty which leaders have always shown in protecting the interests of their juniors demands a corresponding loyalty on the part of the juniors. Otherwise the leaders will demand the right to turn the tables."

Causes of Post-War Unemployment.—The writer does not indicate just how the silks could effectively retaliate, but it may be hoped there will be no need for hostile action, and that the undoubted grievances of the K.C.s may be remedied according to their merits. He has no evil word to say, this Templar, of the legal system under which the leaders (and many juniors, too) have been allowed to suffer and endure.

"The English legal system," he declares with obvious sincerity and truth, "is the admiration and envy of the world. In no other land has the legal profession such a standing; and its training has given the nation a Bench of unique prestige. Its merits come from its slow and cautious development. The loose money after the War somewhat demoralized it, to the extent of awakening cupidity, with the natural result of annoyance to clients. Moderate-fee men paid the penalty that ought to have been paid by the big-fee men; to-day the silk who used to make an income of a few thousand a year is faced with ruin. Like a less honourable person, 'to dig he is unable; to beg he is ashamed.' But if he is to be turned out of business it means that a new legal system, freed from the control of those who perfected the old, has come to stay; and it is at least doubtful whether this is to the advantage of the nation."

Strictly Without Prejudice.—An enlightened lady elector, on her way to a political meeting was heard to say recently: "I'm not prejudiced at all. I'm going with a perfectly open and unbiased mind to listen to what I am convinced is pure rubbish."

Yours as ever,

APTERYX.

Practice Precedents.

Appeals to the Court of Appeal: Order as to printing Court of Appeal Documents.

Rule 12 of the Court of Appeal Rules provides that, where any evidence has not been printed in the Court below, the Court may order the whole or any part thereof to be printed for the purpose of the appeal. By R. 13 all cases on appeal must be printed; and, where there is a statement in writing of the reasons for the judgment or order appealed from, a copy of such statement is to be printed as part of the case, but where such reasons have been stated orally, a proper report of such reasons of the statement made by the Judge, and approved of by him, must be printed as part of the case. Rule 14 provides that the evidence in every such case where such evidence is requisite for the decision of the case is to be printed unless otherwise ordered by the Supreme Court or a Judge thereof.

Counsel usually agree upon any evidence that may be excluded; but, when they cannot agree, application is made on notice of motion to the Court or a Judge. The following precedent contemplates an application to the Court. Until the notice of appeal has been served there is no jurisdiction to make an order under R. 14 dispensing with the printing of evidence in a contemplated appeal: *Official Assignee of Harding v. Harding*, (1914) 33 N.Z.L.R. 1492.

MOTION AS TO PRINTING CASE ON APPEAL.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry. No.

BETWEEN A. B. &c. plaintiff

AND

C. D. &c. defendant.

TAKE NOTICE that this Honourable Court will be moved by Counsel for the above-named defendant on day the day of 19 at the hour of 10.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER for leave to omit from the case on appeal to be printed in this action the exhibits set forth in the schedule hereto AND FOR A FURTHER ORDER that the photographs put in as exhibits in this action be not printed in the case on appeal but that five copies of the said photographs be lodged in the Court of Appeal for the use of the members of the said Court of Appeal UPON THE GROUNDS that the exhibits set forth in the said schedule are not necessary for the determination of the said appeal AND UPON THE GROUNDS that the cost of printing the said photographs would be excessive AND UPON THE FURTHER GROUNDS set out in the affidavit of E. F. filed in support hereof.

SCHEDULE.

[*Set out the exhibits.*]

Dated at this day of 19 .

Solicitor for the defendant.

This notice of motion is filed by &c.

To the above-named plaintiff A. B. and his solicitor G. H. and to The Registrar.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I E. F. of the City of solicitor make oath and say as follows:—

1. That I am a solicitor employed by I. J. of the City of the solicitor for the above-named defendant and as such have knowledge of the above-mentioned action.

2. That judgment in the above-mentioned action was obtained on the day of 19 and notice of appeal was duly served on the plaintiff on the day of 19 .

3. That due security for the said appeal was fixed by the Registrar of this Honourable Court on the day of 19 .

4. That the defendant desires to avoid unnecessary expense in the printing of the case on appeal to be filed in the Court of Appeal and desires to omit from the said case on appeal the exhibits set forth in the schedule to the notice of motion filed herein.

5. That the said exhibits are not necessary for the determination of the said appeal.

6. That the solicitor for the plaintiff refuses to agree to the omission from the case on appeal of the said exhibits.

7. That included in such exhibits were photographs and the cost of printing same would be £ . To save the cost of printing such photographs the defendant desires the leave of this Honourable Court to lodge five copies only of the said photographs in the Court of Appeal for the use of the members of such Court in lieu of printing the said photographs.

8. That the following exhibits relate solely to allegations decided by this Honourable Court in favour of the defendant and are therefore not relevant to the issues to be raised in the said appeal that is to say Exhibits A B C D and E.

9. That the following exhibits relate to matters which it will be suggested are not relevant to the issues to be determined on the hearing of the said appeal that is to say, Exhibits 1 2 3 and 4.

Sworn, &c.

ORDER AS TO PRINTING.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the notice of motion for an order as to printing the case on appeal and the affidavit of in support thereof filed herein AND UPON HEARING Mr. of Counsel for the defendant and Mr. of Counsel for the plaintiff IT IS ORDERED:

1. That exhibits numbers be not reprinted but that five copies of the said exhibits in their present form be made available for the use of the Court of Appeal.

2. That exhibits be not reprinted but that copies of the originals be incorporated in the case on appeal.

3. That exhibits be omitted from the case on appeal.

4. That exhibits be not reprinted but that extracts from the said exhibits as agreed upon by Counsel be printed in the case on appeal.

5. That exhibit number be printed in the case on appeal.

6. That the photographic exhibits be not printed but that five copies of the said photographs be provided for the use of the Court of Appeal and that one copy be provided for the use of Counsel for the plaintiff.

By the Court.

Registrar.

Rules and Regulations.

Scientific and Industrial Research Act, 1926. Scientific and Industrial Research (Allowances) Regulations, 1938. October 26, 1938. No. 1938/144.

Nurses and Midwives Registration Act, 1925. Nurses and Midwives Regulations, 1938. Amendment No. 1. October 26, 1938. No. 1938/145.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Gisborne) Regulations, 1938. Amendment No. 1. November 2, 1938. No. 1938/146.

Dogs Registration Amendment Act, 1937. Dogs Registration (Prevention of Hydatid Disease) Regulations, 1938. November 9, 1938. No. 1938/147.

Agriculture (Emergency Powers) Act, 1934: Primary Products Marketing Act, 1936. Honey Board (Transfer of Powers) Order, 1938. November 9, 1938. No. 1938/148.

Primary Products Marketing Act, 1936: Agriculture (Emergency Powers) Act, 1934. Honey Marketing Regulations, 1938. November 9, 1938. No. 1938/149.

Primary Products Marketing Act, 1936: Agriculture (Emergency Powers) Act, 1934. Cool-stored Butter Regulations, 1938. November 9, 1938. No. 1938/150.

Judicature Act, 1908. Sittings of the Supreme Court, 1929. October 12, 1938. *New Zealand Gazette*, 2400.

Government Railways Act, 1926. General Scale of Charges. Amendment. *New Zealand Gazette*, 2403.