New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

" People who draw Acts of Paliament are very commonly found fault with by those who never drew an Act themselves. It is impossible to forsee all the difficulties which will arise, and to use exactly precise words—to say nothing of all the difficulties under which Acts are drawn up."

—BRAMWELL, J. A., in *The Queen v. Monck*, (1877) 2 Q.B.D. 544, 552, 553.

Vol. XV. Tuesday, August 1, 1939. No. 14.

Contribution Between Joint Tortfeasors.

THE enactment of s. 17 of the Law Reform Act, 1936, and the new third-party procedure rules (see *ante*, p. 45), sometimes require an examination of recent decisions by the Courts in England, which are based on the corresponding section in the Law Reform (Married Women and Tortfeasors Act), 1935 (Engl.) (*28 Halsbury's Complete Statutes of England*, 473), with similar procedural machinery for its application.

Before any question of contribution can arise, there must be a joint tort, as the third party must be " a person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage ": Law Reform Act, 1936, s. 17 (1) (*a*). As to the difference between joint tortfeasors and independent tortfeasors, see *McElroy and Gresson's Law Reform Act*, 1936, p. 76 *et seq.*, and generally see *32 Halsbury's Laws of England*, 2nd Ed., pp. 190, 191. In *Kubach v. Hollands*, [1937] 3 All E.R. 907, 909, Lord Hewart, L.C.J., held that there was there no joint tort, as it was not possible to contend that the third party was " liable . . . in respect of the same damage."

Once the evidence has established that there is a joint tort, it is for the Court to decide " the amount of the contribution" recoverable from any person, and the amount recoverable is such as " may be found by the Court to be just and equitable having regard to that person's responsibility for the damage ": Law Reform Act, 1936, s. 17 (2).

An action for recovery of contribution, being an equitable remedy, should be tried by a Judge alone: *Stevens v. Collinson*, [1938] N.Z.L.R. 64, following *Ward v. National Bank of New Zealand*, (1883) N.Z.P.C.C. 551, 557. It would appear that in a claim under the Law Reform Act, 1936, there is no need to plead the statute: *Burnham v. Boyer and Brown*, [1936] 2 All E.R. 1165, 1166.

The proportion of contribution payable is in the absolute discretion of the Court—*Ryan v. Fildes*, [1938] 3 All E.R. 517; and this discretion also extends to costs—*Daniel v. Rickett, Cockerell, and Co., Ltd., and Raymond*, [1938] 2 All E.R. 631. In the former case, it was decided that the Court, in exercising its discretion, can award a contribution of 100 per cent., which, of course, is in effect a complete indemnity. As Tucker, J., at p. 524, said in reference to what is here enacted as s. 17 (2) of the Law Reform Act, 1936:

> " That subsection makes it clear that, although the section is dealing with contribution, and the word ' contribution ' finally indicates the payment of some smaller sum towards a larger sum, payable by some other person, none the less the section contemplates cases in which either or both of two defendants have been found liable to pay damages in law, and none the less one of them may be exempted by the order of the Court from making any contribution whatever. That is to say, two persons having been found legally liable to pay, *prima facie*, the whole of the damage, one of them, for reasons which may appear sufficient to the Court, may be exempted altogether from his liability. On the other hand, although the section is dealing with contribution, it is said in terms that the Court may direct that a contribution to be recovered from any person shall amount to a complete indemnity. It is clearly contemplated in that case that a contribution may amount to 100 per cent. contribution, and may become in effect an indemnity. Whether or not that is precisely the correct way to describe a contribution is immaterial, because the meaning is clear."

In *Daniel v. Rickett, Cockerell, and Co., Ltd., and Raymond* (*supra*), third-party proceedings, the Court had to exercise a judicial discretion and to assess the amount of contribution recoverable on the basis of a fair division of responsibility between the parties. The responsibility for the damage was apportioned at nine-tenths and one-tenth; and the declaration as to contribution covered the costs of the third-party proceedings. In referring to s. 17 (2), Hilbery, J., said:

> " I am told that nobody has so far decided what is the right interpretation to put upon those words ' just and equitable ' appearing in that section. We are not unaccustomed—at least most of us engaged in the law are not unaccustomed—to finding the word ' just ' in a statute, or ' just and convenient,' which is an association of words which occurs in another very well-known statute which has received judicial interpretation, and which, as a result of that judicial interpretation, has had certain limits placed upon it. I must, therefore, do what I can to construe those words, having regard to the context in which I find them, and I cannot, for myself, believe that they are intended to be used here strictly as terms of argument. When I see that those words are coupled with ' having regard to the extent of that person's responsibility,' exercising a judicial discretion in the matter, I am tempted to do that which I think is right between the parties, having regard to what I think, on the true facts of the case, is the fair division of responsibility between them. As a lawyer, I confess, that I am not very happy in giving that interpretation to the statute, but I believe that that is the intention of the section."

A defendant, though not originally a party can be added as a defendant or as a third party for the purposes of contribution under the statute—*e.g.*, *Burnham v. Boyer and Brown* (*supra*) and *Daniel's* case (*supra*).

The most recent case, *Hanson v. Wearmouth Coal Co., Ltd., and Sunderland Gas Co.*, [1939] 3 All E.R. 47, was decided by the Court of Appeal (Scott, Clauson, and Goddard, L.JJ.). No right of contribution was actually in issue, but their Lordships held that the Court of Appeal has jurisdiction to deal with the question of contribution where there is no appeal by the plaintiff against one of two defendants; in other words, had the Court of Appeal come to the conclusion

that both defendants were liable, it would have been the Court's duty to give effect to the right of contribution then arising, although the plaintiff had been content with judgment against one of the defendants. In this case, a coal company and a gas company were sued; and judgment was given for the coal company; it being alleged that one or the other or both were negligent and guilty of creating a dangerous nuisance. The Judge of first instance dismissed the action against the coal company, but found for the plaintiff against the gas company, and awarded him damages. The gas company appealed on the ground that it had not been negligent; and it was contended on behalf of the coal company, that, as the plaintiff had not appealed against the decision in its favour, the Court of Appeal was not entitled to consider the question of contribution between the defendants under the statute. Goddard, L.J., delivered the judgment of the Court, which dismissed the gas company's appeal against both the plaintiff and the coal company; and the judgment concluded as follows:

> "The gas company were entitled at the trial, by reason of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, to show, if they could, that the coal company were liable in whole or in part for the accident so as to obtain the benefit of indemnity or contribution given by the Act. The duty of the Court below was to decide on the rights of the parties at the date of the writ. The Court of Appeal must rehear the case and give the judgment which ought to have been given below, and, if the judgment below should have been that both defendants were liable, so that a right of contribution would arise, this Court has power to enter judgment accordingly, even though the plaintiff be content with judgment against one defendant. The result is that no question of contribution arises."

Where apportionment is desired, the proper procedure is to apply immediately after judgment has been delivered, and the Judge apparently has jurisdiction to apportion on his own motion, without any application being made.

In *Croston v. Vaughan*, [1937] 4 All E.R. 249, the appellant and the respondent had been defendants in an action for personal injuries arising out of a collision between two motor-cars. The learned trial Judge (Porter, J., as he then was) found that the appellant, who had suddenly and violently applied her brakes, while in a stream of traffic, had been negligent in that she stopped too suddenly and failed to give any warning by hand signal. The respondent was also found to have been negligent, in that he had failed to apply his brakes sufficiently to stop, but, instead, first pulled out to his off side in an endeavour to overtake. On judgment being given for the plaintiff, who was a passenger in respondent's car, against both defendants, an application was made to the Judge to apportion the blame between the two defendants in accordance with the provisions of the Law Reform Act. He did so, and ordered the appellant to pay two-thirds and the respondent one-third. From this order, the appellant appealed on the ground that the apportionment was wrong in its incidence of distribution.

At the commencement of his judgment, Greer, L.J., at pp. 250, 251, said:

> "In my judgment, we cannot interfere with the decision of the Judge. In matters of this kind, which usually arise in Admiralty actions, this Court is very reluctant to interefere with the estimate, formed by the Judge who tried the case, of the proportion in which the damages should be distributed."

And again, at p. 252, he said:

> "In my view, we are bound by the Judge's judgment as to liability, and we must therefore assume that he was entitled to approach the question of the distribution of liability in the light of the findings which he had already given, and which are unquestioned, and cannot be questioned, in this Court, in respect of the liability of the two defendants. In my judgment, that is sufficient to dispose of this appeal."

Slesser, L.J., who dissented on the question of the application of the Motor-vehicles Stop-light Regulations to the facts, as found, dealt with the question whether, after judgment had been given against the two defendants, an application could be made to the Court, with consent, that the Judge should fix the contributions as between the two tortfeasors so found. At pp. 253, 254, he said:

> "In my opinion, that procedure was one which was properly within the Judge's jurisdiction, in that it was a proceeding for contribution within the meaning of s. 6 (2) of the 1935 Act, which, having laid down in s. 6 (1) (*c*) [s. 17 (2) and s. 17 (1) (*c*) of the New Zealand statute] the liability for contribution, provides in subs. (2) that:
>
> > 'In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage. . . . '
>
> I am satisfied on the authorities that it is proper to say that this application was in the nature of a proceeding. It was a *lis* arising out of the original action, and was a proceeding which comes within the language of the section, as decided in such a case, for instance, as *Hood Barrs v. Cathcart*, [1894] 3 Ch. 376."

In those circumstances, His Lordship agreed that the Court of Appeal would be very loath to disturb the fixation of contributions as between the tortfeasors which had been assessed by the Judge, and, bearing in mind that in the cases which had arisen in Admiralty law, the matter would normally be one entirely for the discretion of the Judge, with which the appellate tribunal would not interfere, unless he had proceeded upon incorrect principles of law. With this view, Greer, L.J., at p. 257, expressed agreement.

Scott, L.J., who agreed with Greer, L.J., that the proportions fixed by the Judge for apportioning the blame between the two defendants, should be affirmed, addressed himself to the question of procedure, whether the Judge had jurisdiction to enter upon the task of apportioning the blame between the two co-defendants, whom he had held liable, without some separate formal legal proceedings being instituted. He said, at pp. 261, 262:

> "I agree with the judgment delivered by my colleagues on this point, holding that he had jurisdiction, and that it was the intention of s. 6 (2) of the Act of 1935 [s. 17 (2) of the New Zealand statute] that the trial Judge should deal with the matter, and that he had, as I say, power to dispense with any formal application. In am inclined to think that it was open to the Judge, even if one of the parties had dissented, to exercise the jurisdiction of that section if he thought fit. Reading that section as a whole, I think it was the intention of Parliament that the Judge who had heard a case of primary liability at the instance of a plaintiff, should, with the knowledge of the facts as proved in evidence before him, then and there assess the apportionment, not merely of the damage, but also of the blame.
>
> "The subsection is, it is true, illogical, because it assumes the joint liability of two tortfeasors, which indeed is the postulate of the proceedings for contribution, but goes on to give the Court power to exempt one of such persons from liability to make any contribution at all, or conversely, to make the other person pay the whole. In Admiralty, the Maritime Conventions Act, 1911, is worked in this country—as I know is the case also in the jurisdiction of other countries which have the proportional rule—by apportioning the blame for injury done in the main action, and the curious ambiguity created by s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, cannot arise."

In spite of the illogical details of the language of subs. (2), His Lordship thought that that section should be read as giving the Judge, on the evidence that he has heard, complete jurisdiction to assess the blame of each tortfeasor just as if he had held them liable as defendants to the plaintiff for that portion of the blame only.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1939.
April 28; June 7.
Myers, C.J.
Ostler, J.
Smith, J.

In re **DILLON (DECEASED), DILLON AND OTHERS v. DILLON AND PUBLIC TRUSTEE.**

Family Protection—Husband and Wife—Contract—*Bona fide* Contract for Valuable Consideration to devise Land to others by Will—Whether Husband can contract himself out of Obligation to make Provision for Future Wife—Whether Land devised in pursuance of Contract subject to the Statute—Family Protection Act, 1908, s. 33.

The Family Protection Act, 1908, should not be construed as defeating obligations incurred by a testator or rights acquired by contract with the testator in good faith and for valuable consideration.

Therefore, where a father, while a widower, made a valid and enforceable contract for valuable consideration whereby he agreed to devise his farm lands upon trust for a son and his daughters in equal shares subject to a certain annuity and forthwith to execute a will containing such devise, married and subsequently pursuant to such contract executed a will containing such a devise.

O'Leary, K.C., and **Biss,** for the appellants; **Cooper** and **Relling,** for the first respondent; **Carrad,** for the second respondent.

Held, by the Court of Appeal, *Myers*, C.J. and *Ostler*, J. (*Smith*, J., dissenting), That the lands so devised could not be made available to satisfy the claims of testator's widow under s. 33 of the Family Protection Act, 1908.

Gardiner v. Boag, [1923] N.Z.L.R. 739, G.L.R. 140; and **Parish v. Parish,** [1924] N.Z.L.R. 307, [1923] G.L.R. 712, distinguished.

In re Butchart, Butchart v. Butchart, [1932] N.Z.L.R. 125, 131, [1931] G.L.R. 498; **In re Thomson, Thomson v. Thomson,** [1933] N.Z.L.R. s. 59, G.L.R. 274; **Hammersley v. De Biel,** (1845) 12 Cl. & F. 45, 8 E.R. 1312; **Coverdale v. Eastwood,** (1872) L.R. 15 Eq. 121; **Synge v. Synge,** [1894] 1 Q.B. 466; **Charlton v. Guardian, Trust, and Executors Co. of New Zealand, Ltd,** [1934] G.L.R. 222; and **Bond v. Bond,** [1934] G.L.R. 565, applied.

Per *Smith*, J., dissenting, 1. That the Family Protection Act, 1908, imposes a statutory right in favour of wife, husband or children which, when the Court sees fit to enforce it, takes priority over all devises and bequests, whether made for consideration or not.

2. That the testator had fulfilled his contract when he made a will containing the devise pursuant to the contract.

3. That the lands so devised became part of the testator's estate and available (at the discretion of the Court) to satisfy the claims of testator's widow under the Act.

Gardiner v. Boag, [1923] N.Z.L.R. 739, G.L.R. 140, and **Parish v. Parish,** [1924] N.Z.L.R. 307, [1923] G.L.R. 712, applied.

Hammersley v. De Biel, (1845) 12 Cl. & F. 45, 8 E.R. 1312; **Coverdale v. Eastwood,** (1872) L.R. 15 Eq. 121; and **Synge v. Synge,** [1894] 1 Q.B. 466, distinguished.

Judgment of *Northcroft*, J., [1938] N.Z.L.R. 693, reversed.

Solicitors: Gawith, Biss, and Logan, Masterton, for the appellants; **Cooper, Rapley, and Rutherford,** Palmerston North, for the first respondent; **The Solicitor, Public Trust Office,** Wellington, for the second respondent.

Case Annotation: *Hammersley v. De Biel*, E. and E. Digest, Vol. 24, p. 621, para. 6512; *Coverdale v. Eastwood, ibid.*, Vol. 40, p. 475, para. 228; *Synge v. Synge*, ibid., p. 204, para. 1711.

SUPREME COURT.
Wellington.
1939.
June 30; July 14.
Myers, C.J.
Reed, J.

ATTORNEY-GENERAL v. TONKS.

Contempt of Court—Newspaper—Report of Proceedings before Magistrate—Prisoner pleading Guilty and awaiting Sentence—Comment that Prisoner should "meet with the utmost rigour of the law when he comes up for sentence."

A publication that states or implies that a sentence imposed by a Court of justice is or may be affected by popular clamour, newspaper suggestion, or any other outside influence is calculated to prejudice, or tends to interfere with, the due administration of justice, and is therefore a contempt of Court.

Where a prisoner had pleaded guilty to a crime and had been committed to the Supreme Court for sentence,

Solicitor-General, Cornish, K.C., and **Foden,** for the Attorney-General; **O'Leary,** K.C., and **Dunn,** for Tonks.

Held, That the comment in a newspaper report of the proceedings before the Magistrate, published before the prisoner had come up for sentence, that the nature of the offence demanded that the prisoner "should meet with the utmost rigour of the law when he comes up for sentence," was a grave contempt of Court.

Ex parte Hovell, (1869) N.S.W. S.C.R. (L.) 163, applied.

In re The William Thomas Shipping Co., Ltd., [1930] 2 Ch. 268; **Ambard v. Attorney-General of Trinidad and Tobago,** [1936] A.C. 322; **R. v. Gray,** [1900] 2 Q.B. 36; **Ex parte Fernandez,** (1861) 30 L.J. C.P. 321; **Hunt v. Clarke,** (1889) 58 L.J. Q.B. 490; and **Reg. v. Skipworth, Reg. v. De Castro,** (1873) 12 Cox. C.C. 371, mentioned.

Solicitors: Crown Law Office, Wellington, for the Attorney-General; **Alexander, J. H. and Julia Dunn,** Wellington, for Tonks.

Case Annotation: *Ex parte Hovell*, E. and E. Digest, Vol. 16 p. 22, note n.; *In re William Thomas Shipping Co., Ltd., ibid.*, Supp. Vol. 16, para. 224a; *Ambard v. Attorney-General of Trinidad and Tobago, ibid.*, para. 153a.; *R. v. Gray, ibid.*, Vol. 16, p. 21, para. 166; *Ex parte Fernandez, ibid.*, p. 72, para. 894; *Hunt v. Clarke, ibid.*, p. 24, para. 200; *Reg. v. Skipworth, Reg. v. De Castro, ibid.*, p. 21, para. 163.

SUPREME COURT.
Napier.
1939.
June 15, 20.
Smith, J.

In re **WAIOHIKI BLOCKS, NATIVE OWNERS v. HAWKE'S BAY RIVERS BOARD.**

Natives and Native Land—Public Works—Native Land taken for Public Works—Appeal from Final Order of Native Land Court awarding Compensation—Time—Date from which Variation by Appellate Court effective—Date from which Interest payable on Amount so varied—Public Works Act, 1928, ss. 104, 106—Native Land Act, 1931, ss. 64-66.

Part IV of the Public Works Act, 1928, relating to the taking of Native land for public works and the ascertainment of compensation therefor, provides for an appeal from a final order of the Native Land Court awarding a sum of compensation, and, for the purposes of appeal, such an order is an order within Part II of the Native Land Act, 1931, establishing and regulating the Native Appellate Court and its orders. Sections 64, 65, and 66 of that statute, dealing with variation of orders of the Native Land Court by the Native Appellate Court, apply, therefore, to an order of the Native Appellate Court made under s. 106 of the Public Works Act, 1928. Consequently, an order so varied must be deemed to be and remain an order of the Native Land Court, and the variation takes effect from the same date as if the order had been made by the Native Land Court.

Hence, in the case of orders appealed from and varied by reduction of the amount of compensation, and of orders not varied by the Native Appellate Court, interest is payable on the reduced amount or on the original amount as the case may be from the respective dates of the orders of the Native Land Court.

Counsel: Dowling, for the plaintiffs; **Willis,** for the defendant.

Solicitors: A. E. Lawry, Napier, for the plaintiffs; **Kennedy, Lusk, Morling, and Willis,** Napier, for the defendant.

The New King's Counsel.

Mr. W. J. SIM, M.C., LL.B.

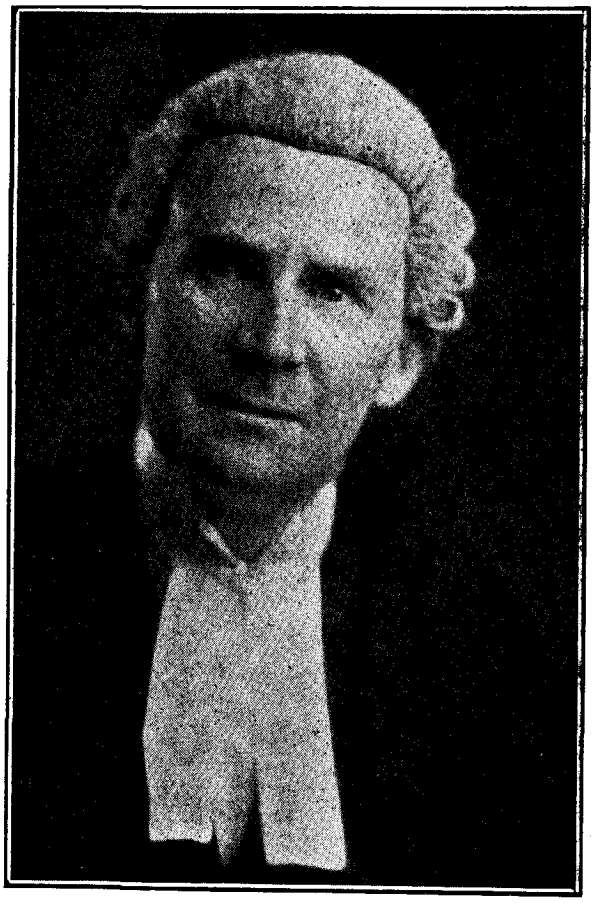
Letters Patent entitling Mr. W. J. Sim, of Christchurch, to practise as a King's Counsel were signed on July 19, by the Rt. Hon. Sir Michael Myers, as Deputy of the Governor-General of New Zealand, in the absence of Viscount Galway.

The new King's Counsel was called to the Inner Bar in the Supreme Court at Christchurch on July 25, 1939, before the ordinary business of the Court commenced.

The historic ceremony, at once simple and most impressive, took place in the presence of a full attendance of the Bar and a large gathering of the public including the grand jurors and Court officials attending at the opening of the Quarterly Sessions in Christchurch on that day.

The ceremony was commenced with the reading by the Registrar of the Letters Patent under the hand of the Rt. Hon. Sir Michael Myers, the Deputy of the Governor-General. Mr. Sim then read the declaration required to be taken by a King's Counsel, whereupon Mr. Justice Callan, with whom was associated Mr. Justice Northcroft, formally called upon Mr. Sim to take his seat within the Bar. Mr. Sim then entered the front row where Mr. F. Wilding, K.C., was already in his place.

Mr. Sim, who has been a partner in the well-known firm of Messrs. Duncan, Cotterill, and Co., Christchurch; for nineteen years, has severed his connection with that firm, and will take up active practice at the Bar in Wellington.



Steffano Webb, Photo.

Mr. W. J. Sim, K.C.

It is fitting here to recall some observations made by His Honour the Chief Justice on the occasion of the swearing-in of the late Sir Thomas Wilford, K.C. After His Honour had wished the recipient many years' enjoyment in active practice of the honour conferred by the Patent, His Honour continued as follows: "That is what the Patent is intended for. It is not intended to be given to a practitioner, however eminent, merely to carry with him into retirement. The Patent not only confers a privilege and an honour: it imposes obligations, not only express, but implied—and the implied are greater than the expressed because they involve the responsibility of leadership of the Bar and of helping, in a way that only leaders can do, the younger men of the profession to maintain in their integrity the great traditions established in England and followed in this country. The express obligations are greater since the Law Practitioners Amendment Act, 1915, because one of them is that the holder of a Patent granted since that year shall not practice as a solicitor. It is greatly to be desired in the interests of the profession, and, I believe, of the public, that the Patent shall not be allowed to fall into desuetude. I know that it requires a certain amount of courage for a practitioner to give up practice as a solicitor, and restrict himself to practice as a barrister only, but I take the opportunity of expressing the hope that from time to time the leaders for the time being of the Bar will take their courage in both hands and not hesitate to make the necessary application required by the rules governing the granting of the Patent."

The new King's Counsel was born in Dunedin in 1890; he is a son of the Hon. Sir William Sim, a Judge of the Arbitration Court and of the Supreme Court of New Zealand from 1907 to 1914 and of the Supreme Court exclusively until his death in 1928.

His secondary education was received at the Otago Boys' High School, from 1902 until 1905, and at Wanganui Collegiate School, from 1906 to 1909. He graduated LL.B. from Victoria University College in 1913.

Shortly after commencing practice in Wellington, Mr. Sim became a member of the firm of Messrs. Findlay, Dalziel, and Sim; but his legal career was interrupted by the outbreak of the Great War.

He enlisted in August, 1914, and was a member of the Expeditionary Force which occupied Samoa. He was appointed Commissioner of Police and Crown Prosecutor at Samoa immediately after occupation. He held these offices until 1915, when he took commissioned rank with a regular Scottish Regiment with which he served until 1919, seeing lengthy service with the Salonika Army, and receiving the Military Cross for gallantry in action.

On his return to New Zealand, Mr. Sim entered practice at Christchurch and became a partner in the firm of Messrs. Duncan, Cotterill, and Co. Since entering this firm he has had an extensive practice at the Bar, and has been connected with many important cases in the city. He has also appeared regularly in the Court of Appeal and before the Full Court.

At the Bar Mr. Sim has not confined himself to any special or restricted field of law; he has conducted a great number of jury cases successfully up to the

very recent case of *Grant v. Cooper, MacDougall, and Robertson, Ltd.* (the Sheep Dip case).

Since he conducted the appeal in the *Christchurch City Corporation v. Christ's College*, a rating case in 1920, before the Court of Appeal, he has conducted cases on appeal over a wide field involving local body, misfeasance, rating, insurance, and Family Protection appeals. There was also the case before the Full Court, *Loftus v. Martin*, [1932] N.Z.L.R. 693, known as the "Ashburton Club" case, arising under the Licensing Acts. In the reports of Supreme Court judgments may be noted the important case in Divorce law of *Milliken v. Milliken*, [1920] N.Z.L.R. 452, and a series of cases upon widely differing subject-matters in contract and tort, commercial cases; various cases relative to death duties, including *Elder's Trustee and Executor Co. v. Gibbs*, [1923] N.Z.L.R. 503, and *Orbell v. Commissioner of Stamp Duties*, [1923] N.Z.L.R. 1342, and cases upon wills, such as *In re Levinge, Wynn Williams v. Mortimer*, [1933] N.Z.L.R. 276. He has also had many jury cases. His unreported cases involving the largest sums of money were the claim under the Public Works Act of *Wright* v. *Waimakariri River Trust* (the award being for approximately £13,000), and *A. J. White, Ltd. v. Mt. Cook Tourist and Southern Lakes Co., Ltd.*, a claim for £10,865, in which Mr. Sim appeared for the defence, which was successful.

If Mr. Sim can be said to have given particular attention to any branch of the law in practice, it would appear to be in equity and estate matters, such as arise incidentally to such a practice as that of Messrs. Duncan, Cotterill and Co.

Apart from his work at the Bar, Mr. Sim acted as counsel in the Radio Patents Inquiry set up by the Hon. the Minister of Commerce in 1937; and he has also acted as adviser to the Wheat Board and to the Wheat Committee since the inception of each body.

He has been interested in civic politics, and served on the Christchurch City Council from 1925 to 1927. In that term he was Chairman of the Council's Town-planning Committee.

He has taken a prominent part in Legal Reform, and has been a member of the Law Revision Committee and of the Rules Committee of the Supreme Court of New Zealand from their inception.

On the occasion of the Legal Conference held at Dunedin in 1936, Mr. Sim read a most informative paper on "Law Reform in New Zealand," which was instrumental in bringing about the Law Revision Committee. In 1938 before the Conference in Christchurch, he read a paper advocating "Absolute Liability in Motor Collision Cases," which was a penetrating review of the whole subject. The latter paper provoked keen discussion and led to a resolution by the Conference supporting the principle of absolute liability.

Mr. Sim is editor of two standard legal works: *The Practice of the Supreme Court and Court of Appeal of New Zealand* (better known as "Stout and Sim") and also *Sim on Divorce*.

On the field of sport Mr. Sim has had a pleasing record; prior to the War he played senior Rugby as well as cricket for Victoria University College, and, for many years after commencing practice in Christchurch, Mr. Sim continued to play senior football and cricket in Canterbury. For many years he has also been an active member of the well-known Richmond Hill Golf Club, of which he held the office of President for some years.

A Not-Indecent Publication.

II Decamerone in Translation.

The decision of the Supreme Court in *Sumpter v. Stevenson*, [1939] N.Z.L.R. 446, may well become a classic of the Law Reports. It will be read with as much interest by the student of manners and morals, and by the literary student, as by the lawyer. It would perhaps be an exaggeration to say that a failure to reverse the decision of the Stipendiary Magistrate would have exhibited New Zealand to the eyes of art and literature in the same lurid light that Tennessee reflects to the eyes of biological science; but the dismissal of the appeal would no doubt have been regarded as an indication that in New Zealand greater importance attached to conventional propriety of subject-matter than to literary merit—or that this country was, in this matter, more faithful to the motions of eighteenth-century Scotland or nineteenth-century England than in such matters as state marketing or pensions for the population.

The defendant, a circulating-library keeper, was convicted in the lower Court for "having in his possession for hire . . . an indecent book—to wit, a book entitled the *Decameron*." This, however, merely follows the form of the statute, where "indecent" means, in effect, not indecent *per se*, but indecent within the meaning and subject to the qualifications of the Indecent Publications Act, 1910; or indecent in the particular circumstances. Decisions under the Act can never be taken as pronouncements on indecency in a general sense of that term; further considerations of time, place, and purpose are involved.

The Indecent Publications Act, 1910, replaced the Offensive Publications Act, 1892, consolidated as part of the Police Offences Act, 1908. Of the earlier statute Williams, J., said in *Cooney v. Covell*, (1901) 21 N.Z.L.R. 107, "as a matter of history, one is aware that one of the main objects of the Act was to restrain the mischief done by the advertisements of quack doctors. He there held that "advertisement or other publication" in s. 5 was restricted to publications in the nature of an advertisement. Whether the term "printed matter" used in s. 3, the other prohibitory section of the Act, included a book at all was questioned by Denniston, J., in *Kennedy v. Rankin*, (1908) 11 G.L.R. 317. If, however, a document came within the Act as regards its physical form, s. 3 forbade its circulation if it was "of an indecent, immoral, or obscene nature," and also, by way of extension, if the Court was satisfied that it was "intended to have an indecent, immoral, or obscene effect." (Whether the intention was to be that of the author, perhaps long dead, or a publisher, perhaps recent, or the person circulating the document, the Courts never had occasion to lay down).

The Act of 1910 is, on the one hand, more extensive, as it applies to all kinds of documents; not, apparently, to sculpture, though pictorial representations of sculpture are no doubt included. On the other hand, it relaxes the sweeping prohibition imposed on everything that is in law "indecent," by recognizing in s. 5 that circumstances alter cases; by directing the Magistrate to take into consideration not merely the nature of the document, but also the circumstances of the defendant's act, and its purpose, and the literary, scientific, or artistic merit or importance of the

document; and by making it a condition of a finding of indecency that the Magistrate shall be of opinion that the defendant's act was of an immoral or mischievous tendency.

The only previous reported decision of the Supreme Court on the Act of 1910 is *Clarkson v. McCarthy*, [1917] N.Z.L.R. 624. There, a photographic reproduction of Giorgione's Sleeping Venus exhibited in the Queen Street shop-window of an Auckland picture-dealer was held by Cooper, J., to infringe the Act. Stated as exactly as condensation permits, the principle on which the judgment proceeds appears to be that the Contemplation of Pictured Nudity is Detrimental to the Young. His Honour observed, without committing himself, that "if placed in an art gallery it would not necessarily be classed as an indecent picture." The case may be an authority for saying that in the year 1917, despite the statements in the books to the effect that semi-draped figures are observed to be more salacious than nudes, in a picture in a shop-window in a main street nudity was a form of indecency: no more than this. The soap-manufacturers, to mention no others, have, as an incident to their priest-like task of pure ablution round earth's human shores, provided abundant pictorial evidence on which to base an argument that in the year 1939 such a proposition does not represent the general opinion of the population. It is, of course, a commonplace that standards of decency vary from place to place, from time to time in the same place, and from group to group of the population at one and the same time and place. Between the pudibund atmosphere that appears to pervade a New Zealand police-station and the catholicity of a lecture-room, or the supper-room at a club, there is a great gulf fixed. The task of the Magistrate or Judge is, setting aside his own opinions, to try to ascertain, with the aid of argument, but not that of evidence, the average current standard of decency applicable to the circumstances, and then to appraise the subject-matter before him according to that standard. In the isolation of the Bench the task may be more difficult than amongst ordinary members of the population.

Part of the interest of the recent case lies in the circumstance that the efforts of learned counsel for the appellant were ably seconded by the immortal author himself speaking to the Court across a world of space and a sexcentenary of time. His Epilogue commences with the words "Most Noble Damsels," but for present purposes it might equally well have begun "May it please Your Honour." The respondent much relied on a passage in *Reg. v. Hicklin*, (1868) L.R. 3 Q.B. 360, 371:

> "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

The continuation of the passage is:

> "Now, with regard to this book, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

To such suggestions Boccaccio makes his own reply:

> "Corrupt mind did never yet understand any word in a wholesome sense. . . . Everything is in itself good for somewhat, and being put to a bad purpose, may work manifold mischief. And so, I say, it is with my stories. If any man shall be minded to draw from them matters of evil tendency or consequence, they will not gainsay him."

(The passages quoted in the judgment are taken from John Payne's translation, which was presumably the book in issue in the case; the foregoing is in the less stilted language of J. M. Rigg.) Cockburn, C.J., and "Jhon Bochas" are, in New Zealand, both of them persuasive authorities—the latter by virtue of s. 42 of the Evidence Act, 1908. Of the two, the Florentine has apparently exercised better power of persuasion. *Reg. v. Hicklin* was cited, though not relied on, in the judgment in *Clarkson v. McCarthy*. It is now made clear that having been decided with reference to a statute not qualified as ours is, it is not applicable to the New Zealand law.

The practical effect of *Sumpter v. Stevenson* is that an accepted classic may, without much risk of criminal prosecution, be made available to such an extent as will reasonably meet the requirements of the studious reading public outside the ranks of the professed literary student. There are still limits; the judgment ends by saying: "I do not wish to be understood as holding that there may not be circumstances when the sale or hire of this book might not be held to be within the mischief aimed at by the statute." These limits will, however, not impede culture.

The position of modern books remains uncertain. It is significant that the judgment says:

> "The Professor [Professor Sewell, who gave evidence for the defendant] in his evidence named a number of books, some of them moderns. . . . For publicity reasons, it is not desirable that I catalogue these books in this judgment."

The *Solicitors' Journal* (London) writing on March 9, 1929, after the condemnation of *The Sleeveless Errand* under the English Act, says that it

> "raises again the very interesting question whether any modern book giving a picture of manners, complete as *Tom Jones* was complete, can ever escape condemnation if proceeded against. . . . Dryden is safe, for 'whether the publication of the whole works of Dryden is or is not a misdemeanour, it would not be a case in which a prosecution would be proper': Blackburn, J., in *R. v. Hicklin*. One wonders what Fielding, himself a Magistrate, would say to the wonderful distinction thus drawn between 'old and recognized standard works' and modern books 'in which there may be some obscene or mischievous matter'."

Wellington Law Ball, 1939.

The Annual Law Ball will be held this year on Friday, August 25, in the St. Francis Hall, from 8.30 p.m. until 2 a.m. The Rt. Hon. the Chief Justice, Sir Michael Myers, G.C.M.G., and Lady Myers have very kindly consented to act as Host and Hostess.

This function has in the past proved most enjoyable, and it is hoped that the efforts of the Committee will this year be rewarded by a full and representative attendance of the Profession. The Ball is one of the few social functions held by the Profession, and every practitioner should note the date and make a point of attending.

Invitations will be issued shortly, and the Committee takes this opportunity of extending a most cordial welcome to the Profession in general.

Tickets are procurable from the Secretary of the Law Society, Supreme Court Library.

Pre-Trial Newspaper Publicity.

Some Wellington Counsels' Views.

[On March 7, of the present year, the JOURNAL suggested editorially, *ante*, p. 41 *et seq.*, that s. 143 of the Justices of the Peace Act, 1927, should be amended to prohibit the publication of the details of the examination in the Lower Court of an accused person subsequently committed to the Supreme Court for trial. The matter was taken up by the Law Revision Committee, which asked the New Zealand Law Society to express an opinion of the proposal. On this being referred to the Wellington District Law Society, the views of a number of Wellington counsel were sought. As a matter of general interest, some of the replies, with their writers' permission, are now published. —Ed. N.Z.L.J.]

Mr. H. R. Biss.—I hold very firm views that there should be a complete prohibition of the publication of this evidence. My view is that such a practice by the newspapers runs contrary to the fundamental principles of our Criminal Justice.

It is usual for counsel for an accused person not to cross-examine Police witnesses to any great extent, in the preliminary proceedings in the Lower Court, if it seems certain that the accused will be committed for trial, and the public is given by the newspapers a report only of the Crown's case, uncriticized and unattacked. This cannot help the accused in any way, but on the contrary there is a grave risk that it will prejudice his case when it comes to be presented in the Supreme Court, for it is impossible to say what effect such preliminary accounts of the evidence may have on the general public from whom the jury is to be drawn.

In my opinion, the publication of evidence given in the Lower Court should be forbidden with the exception of the name of the accused and his counsel, the nature of the charge, the names of witnesses, with a statement that the accused has been committed for trial.

If, however, the Magistrate hearing the charge is not satisfied that a *prima facie* case has been made out, then the prohibition might be relaxed, and the evidence made publishable.

The only possible justification of the publication of evidence given in the Lower Court is the desire of the newspapers to satisfy the cravings of their readers. This desire should not, I feel, be allowed to outweigh the desire that nothing should be done to prejudice an accused before his trial. I think it was Lord Hardwicke who said, probably two centuries ago, "Nothing can be of greater consequence than to keep the streams of justice clear and pure." We all know that comment in a newspaper on the evidence given would usually constitute contempt of Court, but my view is that a newspaper report which induces comment may be just as dangerous to an accused as printed comment. In any case, a very narrow line separates "report" from "comment," as our own Court of Appeal found when it came to decide whether a statement in a newspaper that a witness "from under her brown hat spared many quick smiles for the prisoner," was a statement of fact or comment.

I know that Judges have frequently expounded the principle that the administration of justice should be open to the public, and that the right of newspapers to report on judicial proceedings should be jealously guarded, but unfortunately newspaper reporters have not, as a body, the ability to report proceedings such as one might expect in a law reporter, and in any case, the prohibition which I advocate applies only to the publication of evidence in the Lower Courts. The newspapers could have, if they wanted it, the opportunity of publishing more fully the evidence given in the Supreme Court, which now is frequently reported as being "along the lines of that given in the Lower Court."

Mr. R. Hardie Boys.—Speaking generally, I favour the prohibition of the publication of evidence given in the Lower Court in indictable cases; there have, however, been cases even within my own limited experience where the publication of evidence in the Lower Court has proved of material assistance to the accused person at his trial.

Most of these instances are cases where:—

(*a*) Counsel for the accused has embarked fully upon a defence in the Lower Court with the idea of satisfying the Magistrate or Justices that there is no *prima facie* case to answer or that on any other ground the case should not go forward to trial; or

(*b*) Counsel for the accused has developed a certain line of cross-examination or of address to the Court in the confident hope that publicity equal to that which the Crown case has been given, will be given to his own remarks; or

(*c*) In one or two rare instances witnesses have come forward after the Lower Court hearing, their attention having been drawn, by the publication of evidence, to incidents which they have witnessed, although at the time they had no idea that legal proceedings might result from the incident.

In cases coming within (*a*) above, Counsel feel that even if the accused is committed for trial, the public has heard both sides of the question if equal publicity is given to the prosecution and the defence. It would not however, be true of every case of this class that publication of evidence had *benefited* the accused; speaking generally, the most that could be said would be that publication of the defence had offset the *detriment* that would otherwise be suffered by the accused.

The cases coming within (*b*) above are almost all instances where Counsel is deliberately "talking for publication" (quite properly of course). This is the true type of case where publication is aimed at to still the tongue of rumour and to correct false impressions (*vide* the recent Armstrong trial).

In a limited number of instances counsel might hope that publication of details will bring forward a witness or witnesses (perhaps some one whose existence but not whose identity is already known) so that class (*c*) above might include both the accidental discovery of material evidence and also the deliberate canvass by newspaper publicity for "the man in the brown suit."

For the reasons that underlie my view as above set forth, I favour the suggestion made in a recent issue of the LAW JOURNAL: first, that there should be a prohibition of publication of the evidence given in the Lower Court in indictable cases; but, secondly, as a safeguard, that the prohibition should not apply in cases where counsel for the accused himself applies that publication of the evidence should be permitted.

In practice, I, for one, would in this event require the accused to authorize me in writing to make this application.

I trust this view may help in your deliberations.

Mr. J. S. Hanna.—It seems to me that the present practice is on the whole satisfactory. No doubt, it is open to abuse, and, no doubt, on occasions it is abused, and the evidence, while often stated fairly enough, is, nevertheless, set out in a way calculated to inflame the public mind. That is a regrettable evil; but prohibition of the publication of evidence might, possibly, bring with it a still greater evil—namely, the encouragement of perjury. For this reason, in my view, the prohibition of the publication of evidence would be a mistake.

Mr. W. E. Leicester.—Referring to your letter of the 4th instant, I have to advise you that I agree with the views expressed in the NEW ZEALAND LAW JOURNAL (March 7, 1939, pp. 41–43) on this subject. I think that such evidence should be prohibited unless the defence otherwise requests.

It has always seemed to me that the present method of publication is very unjust to a person whom the jury acquits or against whom the grand jury returns a "No bill." The publication of the case for the prosecution in the Lower Court may involve severe social or financial consequences which the course of later events does nothing to correct.

Mr. J. Meltzer.—The suggestion that there be an additional subsection to s. 143 of the Justices of the Peace Act prohibiting newspaper publication of the details of the examination of witnesses under s. 138 is made, I presume, with the intention that no injustice should be done to an accused person before trial.

Whilst approving of the principle that no injustice should be done to an accused person before trial, I do not think that an amendment as suggested is warranted. The section, as at present framed, gives a discretion to the presiding Justices to prevent any person from having access to the Court-room "if it appears to them that the ends of justice will be best answered by so doing."

If it is considered that there are types of cases in which publication of evidence may prejudice an accused person before trial, then counsel should submit argument to the presiding Justices accordingly, and discretion should be exercised in proper cases.

It is to be noted that s. 138 gives power to summons persons to appear before Justices for the purpose of giving material evidence "*for the party charged*" as well as for the prosecution.

I am of the opinion that the section is not unjust as it stands at present.

Mr. F. W. Ongley.—My view is that the publication of the evidence which is almost invariably only the evidence against the accused must necessarily cause the case to be prejudged on that evidence only. On rare occasions (I have never known one) it may be that the publication of the evidence may bring to light evidence in favour of the accused and that rare occasion may be urged as a reason for retaining the present system. To meet that possibility I suggest that the amending provision should be so framed as to prohibit the publication of the evidence without the consent of the accused. Cases may occur where one of several accused persons wants publication and the other or others do not. Well you just cannot suit everybody and in my view the evidence should not be published without the consent of all those accused.

Mr. G. R. Powles.—I am strongly in favour of the suggested amendment to s. 143 of the Justices of the Peace Act, 1927, which would prohibit the publication of the details of the examination of an accused under s. 138 of the Act.

It should be pointed out that s. 143 itself at present provides that this examination does not take place in open Court. This has the effect of expressly preserving the essentially preliminary nature of what is clearly an investigation and not a trial. This seems to place upon those who are in favour of the publication of such evidence the onus of showing the desirability of such a course.

I do not propose to reiterate the well-known arguments on each side, but I mention one point. It is a fairly common practice amongst the newspaper Press, when reporting the actual trial in the Supreme Court, to say "evidence was given along the lines given in the Lower Court," or words to this effect. This means that the case becomes imperfectly reported, because the public when it comes to consider the jury's verdict has to rely upon an often imperfect and distorted recollection of the Lower Court evidence, and is thus unable to appreciate the merits. This is unfair both to the Crown and to the accused, and probably to the individual juror when he has to justify his verdict to his friends. If publication of the details of the examination in the Lower Court were prohibited this position would not arise.

Mr. J. F. B. Stevenson.—In my view, I think that the evidence given in the Lower Court in indictable cases should, as a general rule, be published, but that in cases where the accused or his counsel are of opinion that such publication may prejudice the defence, the accused should have the right to an order prohibiting publication.

Mr. Herbert Taylor.—In my opinion it would be better that there be no publication of Lower Court proceedings and that the same should be prohibited.

At the same time I believe that the complete prohibition of such evidence may give ground in the mind of unthinking people for believing that non-publication of such evidence is due to undue influence. This being so, the practical side of the situation might be met by a bare statement of the offence as indicated in the Attorney-General's letter of March 30 last, without headlines, billboards, or other adjuncts of publicity.

Either of these alternatives is, in my opinion, preferable to the present system.

Mr. C. A. L. Treadwell.—I have given your letter of May 4 careful consideration, particularly in view of the fact that on some occasions when I have been retained for the defence in criminal cases I have resented the manner in which the Lower Court proceedings had been reported in the newspapers.

I note that members of the profession are very divided in opinion on this difficult matter, and, in my view, that is an aspect of much importance in coming to a conclusion.

The matter may be determined by answering the question whether positive injustice has been established through this publication. It is, I think, unlikely that any such injustice has been done. It is true that in sensational and grave criminal charges a great deal of publicity has been given to the alleged crime before trial. That publicity has no doubt reached the jury men later selected to try the case. It cannot, however, on that account be said that the accused has been deprived of a fair trial. When the jury enter upon their duties their attention is wholly directed to the issues as circumscribed by the law. They inhale the atmosphere of the Court, and they are compelled to listen to the witnesses, counsel, and Judge. I think it may be said that they enter the jury-room quite unaffected by previous Press publications. Their recollection of what they read or discussed before the trial is forgotten by the Court proceedings.

Moreover, the liberty of the Press is still a precious heritage and not lightly to be discarded. There are ways and means now available to deal with harmful distortions of Court proceedings. The liberty that the British people enjoy is in no small measure the liberty of the people and of the Press to speak openly and frankly. The administration of justice in the Empire is on a plane much higher than elsewhere in the world. That is in part due to the fact that it is administered openly. The very fact that criminal proceedings are, except in certain rare cases and then on grounds of decency, entirely open to public scrutiny, affords one of the principal reasons why the Britisher insists on fair dealing in, as well as out of, Court. Many attempts have been made to restrict the full power of the Press and to shape rules restricting publication in some form or other. Better judgment has, however, in the past prevailed against any such oppression, and Lord Erskine's remarks on the subject in the trial of Stockdale delivered one hundred years ago are as apt to-day as they were then:

> "In like manner Liberty herself, the last and best gift of God to his creatures, must be taken just as she is; you might pare her down to bashful regularity, and shape her into a perfect model of severe scrupulous law, but she would then be Liberty no longer; and you must be content to die under the lash of this inexorable justice which you have exchanged for the banners of Freedom."

In my opinion, in all matters of social or judicial reform no alteration of the existing forms or procedure should be undertaken unless there is clear and urgent public need for it. In this case where one learns there is a great difference of opinion, it seems to me that it is impossible to say that there is any such urgency, or that the administration of justice would be advanced.

On the contrary, once the liberty of the Press is restricted in this way, may it not be said that the way is open for further suppression on different matters of public affairs.

Mr. D. W. Virtue.—My view after giving the matter consideration is that it is desirable in the interests of justice not to publish prior to trial, the evidence led for the Crown in the Lower Court. I assume it is not necessary to go into reasons for my view herein, but having regard to the suggestion that has more than once been made, that the publication of the evidence sometimes assists the accused in the preparation of his defence, inasmuch as persons who are able to give the defence assistance come forward, I think that any amendment to the Act prohibiting the publication of evidence should also provide that if the accused so desires in any particular case, the Press may be at liberty to publish the evidence at length.

Mr. G. G. Gibbes Watson.—The subject is a difficult one, but on the whole I incline to the view that no alteration should be made in the present law.

I think at times it may be in the interest of the accused person that the nature of the Crown evidence against him should be made public as early as possible. Such a course prevents the circulation of what may be greatly exaggerated rumours as to the nature of the evidence against an accused person, and may, in some cases, result in persons coming forward to give evidence on behalf of the accused.

Also it seems to me that under the present law, harm does not come so much from the publication of the evidence, but from the manner in which certain newspapers, at times, write special headings and introductory paragraphs to the reports of such evidence. Probably these abuses can be dealt with under the law as it now stands; but, if not, the only alteration that I would support would be an alteration for the purpose of stopping these last mentioned abuses.

I do not think the present is an opportune time to support any legislation which has as its object further restriction by way of censorship on the rights of the Press to publish true and accurate reports of matters of public interest.

Mr. J. D. Willis.—I favour legislation on the lines suggested.

It is, of course, in cases of murder that evidence given in the Lower Court is most freely discussed amongst the general public, this very often prejudicing the interests of the accused on his subsequent trial, although the same result must also frequently obtain when the crime with which the accused is charged is of a less serious character. Juries hearing a case in which public interest is aroused are always warned to disregard anything read by or imparted to them outside the Court-room, but it is fair to assume that pre-trial publicity, inducing as it does speculation and gossip among the general public, is not favourable to an accused person who, after all, is presumed to be innocent until the contrary is proved.

It is not necessary in the interests of justice to publish evidence given in the Lower Court—on the other hand, the non-publication of such evidence may result in a fairer trial to the accused even if in all cases this result does not necessarily follow.

London Letter.

By Air Mail.

Strand, London, W.C. 2,
July 8, 1939.

My dear EnZ-ers,

Last week the Court of Criminal Appeal gave their reasons for allowing the appeal in the case of *R. v. Wharton*. The judgment given by the Lord Chief Justice is a fine example of the application of the fundamental principles of English justice to cases of this kind. It does not appear clearly from the report that, at the time of the offence charged, the appellant was a member of the now existing Irish Republican Army. Certainly he was a member of a society of the same name which was in existence in the bad times before the establishment of the Irish Free State. The trial Judge, in summing up on a charge of conspiracy to cause explosions, told the jury that they needed no evidence as to the Irish Republican Army, because its nature at the time when the appellant belonged to it was a matter of history—namely, an illegal conspiracy formed to commit crimes against Great Britain and a "rebellion." The charge drew no sufficient distinction between the I.R.A. of eighteen years or so ago and the I.R.A. of 1939, nor were the jury reminded, as they should have been, of the appellant's evidence that he had no connection with plots or schemes made in recent times, had successfully dissociated himself from the conspirators of our own day, and did not know the dangerous nature of the things found in his possession. By references to the past and by omissions as to the present the minds of the jury may have been left in uneven balance, prejudicial to the prisoner. The perfect equilibrium at which the scales of English justice must ever be held was disturbed.

The Mansion House Dinner.—The more I dine at the Mansion House the more convinced I am of the greatness, the worthiness and the judicious quality of the Lord Mayor, and of the Aldermen and Sheriffs of the City of London. I accepted without difficulty or any reserve Lord Macmillan's assertion that the Court of the Aldermen and Sheriffs were doing justice as long ago as A.D. 1111. Indeed, there were some who felt that he was, if anything, understating their antiquity, particularly having regard to his earlier admission that the toast of those persons was one upon which it was not only legitimate, but appropriate, to expand.

They in their turn spoke of H.M. Judges in terms of the highest praise; the Lord Mayor, Major Sir Frank Bowater, in a speech of condensed and pointed eulogy; and he did not fail to call attention to the heavy responsibility which lay upon the shoulders of Lord Maugham in the making of J.P.s. Mr. Sheriff Rowland, handsomely and humorously recognizing the importance of the City Court and the comparative ignorance of its procedure prevailing amongst the Lords, made it clear also that he thought our Judges are wonderful.

For their own part the Judges, by the mouths of their chief spokesmen, showed no sense of their own or even of each others' shortcomings. Lord Hewart, indeed, went so far as to describe them, without any qualification, as his "brilliant colleagues"; and he also made it comparatively plain that while there is a lot of work in the K.B.D., there are, in a manner of speaking, no arrears. The whole house was with him when he hinted that the whole body of cases set down for hearing could not be tried immediately and simultaneously the moment each came into existence. He was in his best form, full of vigour; and the "change and decay" to which he made passing reference was not—barring freshness and variety—discernible in his person or in his speech.

Colonial Judges.—Sir Donald Somerville, Attorney-General, costumed more gorgeously than all others, spoke up for the Bar, made reference to the perennial unpopularity of law officers, and mentioned what he might do if he should happen to be alive when he retires Mr. Waymouth Gibson, President of the Law Society, in a very brief but pithy speech, indicated the solicitors and the great part they have played in the matter of the Poor Persons Procedure.

The Lord Chancellor, according to custom, was the chief speaker, and his words were fully reported in the press. One of the few Chancellors with full command not only of English law but of the English language, he spoke of the causes, and gave examples, of good British laws used and equally administered at home and overseas. He made special reference to his colleagues, the distinguished Judges who were present from the Dominions and Colonies. They, with the Home Judges, have "a single philosophy and a single creed; they stand for the ancient traditions of law and justice." In referring to the important changes and the losses of the legal world during the year he did not omit the name of Theo Mathew.

Hair as Evidence.—Since I wrote on this subject recently (*ante*, p. 144) the solicitors acting for the prosecution in the case under comment have supplemented the paragraph in the daily newspapers. They have given a full account of the evidence which they were able to adduce. On perusing it I feel that it presented ample ground upon which the Midland Bench could conclude that, notwithstanding the defendant's denial of all knowledge of the mishap he did know of it. They may have been wrong, but no one can possibly say that there was not evidence to support their finding. The paragraph in the daily newspapers on which I based my comment made no report of the further evidence tending to establish *mens rea*. It left lawyers in doubt as to whether the Bench had considered that the presence of the incriminating hairs, found close to the windscreen pillar, was enough to establish it. On my main submission, which was that evidence to show *mens rea* should be tendered in all prosecutions for this particular offence, I have nothing to add. No doubt a case will arise when the point will be decided by the Divisional Court.

The Pedestrian.—False classification is a fruitful parent of confused thinking. Nowhere is this more evident than when men talk of *the* pedestrian and *the* motorist. As Lord Ponsonby said in the House of Lords debate on the Report of the Select Committee on Road Accidents, "Pedestrians are suggested to be peculiar bipeds who use their legs and are rather a nuisance. We are all of us—the millions of people in this country are all pedestrians." We have ventured to point out this obvious truth many times. It will continue to be missed as the obvious so often is.

It is possible to divide mankind in many ways which provide that those in one class are not in another—by colour, shape of head, religion, blood group, and many other tests. But to speak of two opposing groups when every member of the second is also a member of the first is perfectly nonsensical. *The* motorist is invariably for part of his time a pedestrian; *the* pedestrian, almost without exception, becomes a motorist as driver or passenger on frequent occasions, be it only for a short stage in a public service vehicle. It is idle to regard the interests of the man on his feet as opposed to the interests of the man in the car. They are all human beings, all fallible, all in need of a measure of protection from others and even from themselves.

The true classification is into the selfish man and the decent citizen, and each is sometimes on foot and sometimes driving or being driven. When the good citizens get the selfish people under control, and not before, the slaughter on the roads will be reduced to what is unavoidable.

The letter Killeth.—Two good legal stories (both true) are told in the law reports and chronicles of June 29 The first is the tale of *Pratt v. Pratt*, unfolded in the House of Lords itself by Lord Romer, Lord Macmillan regarding it from a different angle but to the same effect, Lords Wright and Porter concurring. It is a story full of human nature and good law; excellent reading for lawyers.

Under the new law, as we know, a man or woman may obtain divorce for desertion over the prescribed period. A. deserts B. without cause, refusing to return save on conditions which B. and the law regard as intolerable. Time goes on, and the day when B. may get a decree for desertion draws nigh; but before it arrives A. writes to B. genuinely asking for an interview with a view to reunion, without conditions; B., who by that time prefers desertion to matrimony, writes in the negative; and, in the fulness of time sues for divorce. The Court's answer is: "No, certainly not. Desertion ceased when A. wrote that letter; and as A.'s present life is blameless you have no remedy, and must remain married." Clear law, on which the Judge of first instance, the L.J.s of the Court of Appeal, and the Lords were all of one mind. The writing of A.'s letter, genuinely and without deceit, was an act enough to end the desertion which had previously been going on. Lord Romer said: "It was plain that before the respondent could return there would have to be some sort of discussion between her husband and herself in person or by letter. It could not be expected that she should make an unheralded entry into his house."

Only Apparently Married: Effect of a Decree.—The second story is that of *Eaves v. Eaves*, told in the Chancery Division by Farwell, J., to a rapt and approving audience; a variant of a pretty old legal tale showing how a widow, married anew for 12 years, remained a widow still; in other words, how on pronouncement of the decree of nullity the second marriage was treated as null and void *ad initio*, without prejudice (I suppose) to the validity of acts done thereunder during the long years before the decree.

Her first husband had left to her certain property for her use during her life or widowhood, reversion to his son if she married again. On her second marriage the property was transferred with her full concurrence to the son aforesaid, the defendant in the action. That was in July, 1925, and the marriage ceremony took place in September of the same year. The decree absolute, on the ground of nullity, was pronounced on November 15, 1937; and thereafter she claimed the life interest and an account on the footing that she had never ceased to be a widow. "I agree," said Farwell, J., in effect, "that by virtue of the decree you were a widow all the time; but that does not end the matter. You agreed to the transfer of the fund, knowing, as you both did, that the marriage was about to take place. The ceremony did take place, and you lived all those years as a married woman, took no steps to have the marriage annulled, and never made a claim, until now, against the defendant, who had no means of knowing the true position." So he gave judgment for the defendant with costs.

It looks like the work of our old and almost retired friend, Estoppel; although, so far as I can find, the name was suppressed.

Yours, as ever,

APTERYX.

New Zealand Law Society.

Council Meeting.

(*Concluded from p. 174.*)

Notifying all Practitioners of Name of Solicitor struck off Roll.—The Auckland Society wrote as follows:

"At the last meeting of my Council it was pointed out that under the system at present in force in cases where a solicitor had been struck off the roll, it would be possible for members of the profession still to have dealings with him or even to pay him moneys without knowing that such action had been taken.

"It was decided at such meeting that the matter be referred to your Council with the suggestion that consideration might be given to the desirability of introducing some method whereby notice might be given to the general body of practitioners of the striking-off the roll of the name of a solicitor. I would be glad if you would please bring the matter before your Council accordingly."

The Secretary mentioned that it had been customary in the past when orders had been made against practitioners by the Court of Appeal to send out notices to each District Society of these orders, and a similar course could readily be adopted after each meeting of the Disciplinary Committee.

It was unanimously decided that the New Zealand Law Society should notify the District Societies of all fines, suspensions, strikings off, and restorations ordered by the Disciplinary Committee, and that the District Societies should in turn notify all their own members.

(*a*) **Restitution of Conjugal Rights: Setting down for Trial.** (*b*) **Difference between Supreme Court Rules and Rules under Divorce and Matrimonial Causes Act.**—The following letter was received from the Rules Committee:—

Divorce Rules, Rule 51.

"I refer to your letter to me of July 1, 1937, forwarding letters from the Wanganui District Law Society and the Wellington District Law Society relating to the rules setting down divorce proceedings.

"I have to say that the letters were considered at a meeting of the Rules Committee held on March 24 last, when the following resolutions were passed:

"1. That the Committee desires the matter to be considered by the Department of Justice in connection with the ampler revision of the Divorce Rules understood to be under consideration.

"2. That the Committee does not endorse the principle that a petition for restitution of conjugal rights should be allowed to be set down at any time.

"3. That the Law Society be informed that the matter is under consideration and will be further dealt with at the next meeting of the Committee."

Women as Jurors and Justices of the Peace.—The President drew attention to the following extract from the *Dominion* of June 7, 1939:—

"'There are many anomalies in the law which prevent women from taking their proper place and shouldering their duties in public life,' said Mrs. E. Molesworth, when speaking to members of the United Women's Association in Auckland last week. 'I will outline some of those anomalies in the hope that after studying the subjects we may act constructively, and one by one have these injustices swept away.'

"Mrs. Molesworth said that of the cases tried in the Supreme Court approximately 50 per cent. dealt with women. In the majority of these cases there was not even one woman present in Court. In the year 1937 to 1938, 3,248 women were brought before the Magistrates' Court in New Zealand on criminal charges, and there were 2,698 convictions, while approximately half the number of children who were tried were convicted. Quoting cases from her own experience, she stated that men were unable to understand the psychological causes of certain crimes committed by women.

"In fighting against the appeal for women jurors, men had been heard to say that women would be inclined to be romantically soft-hearted, she continued. In searching the records one would be amazed at the number of cases in which men had been sentimentally lenient toward crimes committed by members of their own sex. There should be equal representation of the sexes on juries, and all cases concerning women and children should be tried by women Magistrates.

"In every Court in New Zealand the Magistrate had the right to order his own Court, Mrs. Molesworth added. There was a permissive regulation which allowed women to share the bench, and she had discovered that there were 38 women Justices of the Peace on the telephone last year who had signified their willingness to sit in the Magistrates' Court. In spite of this they were not called. As a result many injustices had been enacted through the inability of the men to see through the eyes of women and children.

"It was decided at the meeting to elect a deputation to wait on Mr. W. R. McKeen, S.M., with a view to securing the admission of women Justices to the Bench in all cases where women were tried, and where two Justices were called. The members also agreed to make representations to the Minister of Justice, Hon. H. G. R. Mason, with regard to appointing an equal representation of women on all juries."

It was decided to refer the matter to the District Societies for an expression of opinion.

Legal Aid to Poor Persons.—The Law Revision Committee wrote as follows:—

"At its meeting to-day, June 15, the Law Revision Committee approved the draft Bill as amended by the Sub-committee of which you are a member.

"In order that the Bill may be proceeded with in the coming session, the Committee will be glad if your Council will now advise whether it approves the Bill on the understanding that the regulations when drafted will be submitted for the consideration of your Society.

"The Committee regrets the shortness of this notice, but as the matter is felt to be an urgent one, it is hoped that your Council will be prepared to consider it at its meeting to-morrow."

The Secretary explained that a Sub-committee of two Wellington practitioners and himself had been asked to consider the question of legal aid to poor persons, and after consideration had recommended the adoption of a system on the lines of that in force in England—*viz.*, Poor Persons Committees appointed by the Law Society—to which all applications would be referred and verified, and which would appoint solicitors and counsel when necessary to conduct the cases. All practitioners would automatically be on the lists of those available for the work.

It was unanimously decided that the Council approved the introduction of a Bill on the general lines suggested, but that, as the Bill before the Council was too wide in some of its clauses, it should be referred to the Standing Committee with power to settle the form of the Bill and to reply to the Law Revision Committee.

NOTE.—At a meeting of the Standing Committee held on Tuesday, June 20, the letter and a draft Bill were approved and sent to the Attorney-General:—

"*Legal Aid to Poor Persons.*

"The letter from the Secretary of the Law Revision Committee enclosing a draft of the above Bill was duly received, and the Bill was considered at a meeting of the Council of this Society held on Friday last.

"It was impossible for an enactment of such far-reaching effect to be considered in detail by a general meeting, but the principle of the Bill was approved, and it was left to the Standing Committee to deal with the form thereof. I may say, however, that the suggested course—*viz.*, a short Bill to be followed by regulations made by Order in Council—caused some discussion, for the reason that my Society has invariably set itself against such form of legislation. However, as it was represented that it was urgently desired to bring down the measure at the forthcoming session, the Society felt that on this occasion it would not pursue this objection.

"As to the draft Bill forwarded to my Society, the Standing Committee which has power to act for the whole Society, consider that clause 2 (1) is too general in its terms, and is in the circumstances quite unnecessary. The Committee has therefore redrafted clause 2 (1) and 2 (2) and has also added a reference to 'poor persons' in 2 (2) (*a*), and its completed draft is forwarded to you herewith. It is suggested that the draft adopted by the Standing Committee adequately meets all requirements.

"My Society therefore approves of the draft Bill as amended on the understanding that the regulations when drafted will be submitted for the consideration of the Society."

Chief Judge Jones: Native Land Court.—The President drew attention to the fact that Chief Judge Jones of the Native Land Court had retired after a lengthy and honourable period of service.

The following motion was unanimously carried:—

"That this Society places on record its appreciation of the services rendered to the Dominion by Chief Judge Jones of the Native Land Court, and of his help to and courtesy towards members of the profession. Furthermore, it desires to extend to him its best wishes for a lengthy and pleasant retirement."

Camels.—Mr. Justice Branson had an interesting case on circuit recently in which he had to decide on the character of the camel. Is the camel domestic or *ferae naturae*? The witnesses were in sharp conflict. Two of them swore to the docility and pacific nature of the camel. One of them had been with camels for twenty-five years in Regent's Park and never seen a camel bite a human being. Two others testified to the treacherous and untrustworthy character of the beast. On the balance of evidence, the Judge decided that the camel falls into the domestic class. Accordingly the plaintiff could not recover without proof that the particular animal had a vicious "propensity" of which the defendant knew or should have known.

—APTERYX.

Dicey's Law of the Constitution.

Dr. E. C. S. Wade's New Edition.*

REVIEW BY H. F. VON HAAST, M.A., LL.B.

A reviewer, who, in reading for his call to the English bar, forty years ago, *Dicey's Law of Constitution*, took as gospel his three great principles, the Sovereignty of Parliament, the Rule of ordinary Law, and the Dependence of Conventions upon Law, must realize, as Dr. E. C. S. Wade points out in his introduction to the 9th edition of that work (edited by him), that since that time "the constitution has been evolving and the emphasis, which in 1885, as well as in 1914, Dicey placed upon his principles, has been changed. This change has been accelerated by the pace at which the sphere of modern governmental agencies has developed."

Although the text of the classic, as it appeared in 1908, remains intact in the new edition, Dicey's critics, the most formidable of whom was Dr. Jennings in *The Law and the Constitution*, reject Dicey's conception of the rule of law, and his views on the nature of administrative law, by the latter of which present-day students of the constitution understand something entirely different in scope from Dicey's conception.

In view of the tendency in New Zealand for the Legislature to enact shadowy outlines of a policy or scheme and to delegate to some Minister or Civil Servant the task of creating what may prove either a Demeter or a Frankenstein according to his discretion, the reader may well agree with the learned editor that "the parliamentary draftsman . . . does not regard judicial control of administration as fundamental. . . . The result is a mass of enactments displaying a technique, which is frankly based upon expediency and recognizes the inadequacy of the common law and the methods of its Judges to control . . . the law of *statutory discretions*."

The editor's views on delegated legislation in the introduction and on administrative law in a long chapter in the appendix are very appropriate just now when the decision of a Judge of first instance on the widest of "statutory discretions" and of delegated authority awaits approval or reversal by the Court of Appeal in New Zealand.

Practitioners as well as students will find the explanation, at p. 520, of the remedies of mandamus, prohibition, and certiorari useful; and law reformers will call for the enactment in New Zealand of the Administration of Justice (Miscellaneous Provisions) Act, 1938, which substitutes a simpler process of review by judicial order, leaving untouched *habeas corpus* procedure.

In dealing in the introduction with the Sovereignty of Parliament, the editor discusses the sovereignty of the parliaments of the Dominions and the difficulty of adopting a federal Dominion Constitution to changing political conditions, and of the adoption of a policy of centralization that so many Governmental functions require. Particularly interesting is his examination of the conventions of the Constitution as concerned with Dominion status, and all the questions arising thereout.

The student will be well advised not to confuse himself by reading the criticisms of Dicey first, but to read and absorb those great principles that Dicey laid down and that have had such influence on the preservation of our democratic liberties, and then to consider these in the light of subsequent criticism and constitutional and legislative developments.

The old-time lawyer who has witnessed the march of progress tending to whittle away insiduously our personal freedom and the reference to the Courts of justice for the protection of individual liberty may regret the decline of the respect of the Englishman for the rule of law and come to the conclusion that if Equity was once the measure of the Chancellor's foot, British democracy is following in the wake of totalitarian Nations where there is no such thing as Equity and the Law is the length of the Dictator's Arm.

* *Introduction to the Study of the Law of the Constitution*, by A. V. Dicey, K.C., Hon. D.C.L. Ninth Edition, fully revised, and with a new introduction by E. C. S. Wade, M.A., LL.D., Fellow and Tutor of Gonville and Caius College, Cambridge. Pp. clvi + 681. London: Macmillan and Co., Ltd.

Donoghue v. Stevenson: A New View.

If there is any snail more than another that attained notoriety, surely it was the one that climbed into Mr. Stevenson's ginger-beer bottle. Apart from the manner of his glorious death wherein he emulated the Duke of Clarence, who I seem to remember was drowned in a butt of Malmsey, he gave rise to one of the greatest battles that have ever been waged in legal history (*Donoghue v. Stevenson*, [1932] A.C. 562) and the consequence of his venial trespass into the vacant bottle gave rise to an upheaval in the legal world as momentous as the Great War itself.

The facts as we all remember were that the Pursuer having satisfactorily disposed of half a bottle of ginger beer by pouring it over an ice cream (p. 605), proceeded with her libations by transferring the balance into a glass, when there floated out the decomposed carcase of the hero of the piece.

The Pursuer in anticipation I suspect of what might have happened at once announced that she felt ill, and straightway brought her action in damages.

Of course every person who pours ginger beer over an ice cream and consumes the resulting compound should be prepared to take the consequences, and with all respect to the learned counsel who handled the proceedings in their earlier stages, I believe that the whole disaster to the Defender might have been averted if they had managed to convince the lady or at least suggest to the Court, that, snail or no snail, a mixture of ice cream and ginger beer would have been enough to give an ostrich a stomach-ache. However, there it was, and the case very quickly got out of hand; and once it had been worried by the big dogs of the law quarrelling over the marrow in the bones, there was very little meat left on the carcase.

The case is notable also in that it provoked an almost unpleasantly acute division of opinion that unhappily separated the learned Lords, who most disrespectfully exhumed the hitherto sacred and inviolate remains of *George v. Skevington*, (1869) L.R. 5 Exch. 1 and *Heaven v. Pender*, (1883) 11 Q.B.D. 503, and of *Mullen v. Barr*, [1929] S.C. 461, more recently interred; and tore them to pieces again.

The minority of the Court in whose nostrils the corpses of the first two cases were still offensive, buried them deeper still (p. 576), and danced on their graves; but the majority of the Court retaliated by canonising the first two and condemning to eternal execration the last named pair of the unfortunate martyrs in the cause of Justice. —R.J.

Mr. J. N. Nalder Retires.

Farewell by the Gisborne Bar.

Members of the Gisborne District Law Society recently assembled to farewell the Registrar of the Supreme Court, Mr. J. N. Nalder, on his retirement after forty years service with the Justice Department. In addition to the members of the Society, there were present Mr. E. L. Walton, S.M., and Mr. E. G. Rhodes, Mr. Nalder's successor in office.

The President of the Society, Mr. J. de V. W. Blathwayt, said they were gathered to say farewell to Mr. Nalder on his retirement as Registrar of the Supreme Court, Clerk of Court, and Official Assignee, after being in Gisborne for the past seventeen years. Prior to his coming there, he had served for a period of fifteen years on the West Coast of the South Island. The speaker said he had no doubt in that that rich and varied experience enabled Mr. Nalder to carry on his duties in Gisborne with such efficiency, and gave him his great knack of dealing happily with all those with whom he had come in contact.

"A few moments ago Mr. Nalder stated that Gisborne appealed to him, and he was therefore going to remain here," Mr. Blathwayt continued. "I can say in return that Mr. Nalder has certainly appealed to Gisborne. In the carrying-out of his official duties he has always been regarded by our profession as the very soul of honour. He has always been firm, but just and calm; he has exercised a broad common sense, has been easy of approach, and at all times ready to help in every way. In short, he has been a most efficient officer of his Department, and at the same time a friend both to the legal profession here, and to every individual member of it. I have always thought that every man who earns the respect and esteem of his fellow-men to such an extent as Mr. Nalder, has some particularly outstanding characteristic. In his case, I think all will agree, that that characteristic was a shining courtesy. To all of us Mr. Nalder has seemed to have exercised this most admirable virtue in the grand manner. In all matters, whether his decision has been for or against any of us, it has been a privilege and a pleasure to deal with him. We regret that our long and happy official association with him must now draw to its close, but we realize that he has to the full earned the fruits of retirement, and we are glad to see that he looks so well like being able to enjoy his retirement."

The President then asked Mr. Nalder to accept a parting gift as an expression of esteem and goodwill, and with it went all the profession's best wishes for a long and happy retirement.

Other speakers were Mr. L. T. Burnard, Mr. J. G. Nolan, Mr. J. S. Wauchop, and Mr. E. L. Walton, S.M.

Mr. Nalder, in thanking those present for their gift and the many kind words that had been said of him, spoke of the attachment he had formed for Gisborne and its people; he had spent seventeen of the happiest years of his life at Gisborne and would continue to reside there. Mr. Nalder gave an interesting account of his duties in the Justice Department during the many years he had spent on the West Coast of the South Island, and particularly of litigation arising from mining disputes.

Mr. D. E. Chrisp explained that the function was a double-barrelled one. On behalf of the profession he welcomed Mr. E. G. Rhodes, the new Registrar, and he hoped Mr. Rhodes would have as equally a pleasant and successful term of office as the retiring Registrar.

In reply, Mr. Rhodes said he had not had the happy experience of ever having been on the West Coast, but it would seem that, from what had been said of Mr. Nalder, it was a great advantage to any one coming to Gisborne. He merely spent eighteen years in Wellington so he felt, coming there, unarmed and green. But the ready assistance given to him by the Magistrate, the staff, and the kindly way the legal profession had called on him on his arrival had given him heart to carry on. He felt, however, that Mr. Nalder had left him a hard row to hoe.

"When I joined the Justice Department I had heard the legal profession spoken of as an honourable one," Mr. Rhodes continued. "I thought that was merely 'swank'; but, with more wisdom and age, I have come to the conclusion that it means a trusted profession. The spirit that exists between officers of the Justice Department and the legal profession leads to harmony and efficiency. I know myself when I left Wellington the atmosphere was such that I felt I was not merely saying farewell to practitioners, but I was leaving behind real friends. I expected to see Mr. Nalder farewelled. I am, however, welcomed. I thank you sincerely for this opportunity of meeting you all together."

Correspondence.

Law in the Modern State.

The Editor,
NEW ZEALAND LAW JOURNAL.
Sir,

Mr. M. H. Hampson's letter in your last issue recalls immediately to my mind certain paragraphs of an article I wrote in the LAW JOURNAL of December 6, 1938 (1938 N.Z.L.J. 351), and I hope I may be pardoned for referring to them again.

I quoted Professor Roscoe Pound: "The older juristic theory of law as a means to individual liberty and of laws as limitations upon individual wills to secure individual liberty, divorced the jurist from the actual life of to-day."

Then taking the case of the proposed compulsory insurance of motor-cars causing damage, it must now be agreed that accidents do happen to pedestrians. For example, it is always possible that the child of a working-man may run under the wheels of my car, and may spend a year in hospital and thereafter remain crippled for life. Mr. Hampson [*hungry and discontended freeman*] will say: "It was the child's own fault; why should I pay?" I [*fat and placid serf*] say: "This may happen to me; it is better that I should pay an insurance premium beforehand, and the poor child will be sure of sufficient compensation to obtain proper treatment. Payment of such a premium is a normal incident of ownership of this dangerous piece of mechanism, and if I cannot afford it, then I should not drive a car." This illustrates the changed viewpoint of law to-day. There are countless factors that affect the compulsory

insurance question, and I do not advocate it here, but the method of approach is clear.

Mr. Hampson, with all due respect, would seem to be heaving his brick into an oncoming tidal wave when he asserts that no change has taken place, and no change must take place in our law. But what about the profession's business outlook in the last twenty-five years? Has this not altered, first *de jure* and then *de facto*? I previously quoted Professor Pound: "When the lawyer refuses to act intelligently, unintelligent application of the legislative steam-roller by the layman is the alternative." Is not this what happened then? Will it not continue to happen so long as the lawyer refuses to keep up with the times?

Yours etc.,
R. G. PALMER.

Marton,
July 14, 1939.

Teaching Staffs in University Colleges.

The Editor,
NEW ZEALAND LAW JOURNAL.
Sir,—

In your JOURNAL, for April 4, 1939, appears a report on Examinations for Barristers and Solicitors. That report contains a statement, *ante*, p. 77, that the teaching staff of the University Colleges have no part at all either in formulating the prescriptions or in the selection of examiners. It would further appear from the report that there is no means whereby the teachers in a subject—*e.g.*, law—may meet together in conference. As the position in both of these respects is not precisely that stated in the report and as it is desirable that your readers be correctly informed, I venture to set out certain facts.

Regulations governing legal education are made by the Senate of the University of New Zealand—Law Practitioners Act, 1931, s. 13. The Senate, however, may not appoint any examiners or make or alter any statute with reference to any scheme of study until it has first received and considered any recommendation that the Academic Board may make in that behalf—New Zealand University Amendment Act, 1926, s. 18 (4); and before the Academic Board makes any recommendation to the Senate with reference to the law course, or the Senate makes or alters any statute dealing with the law course the advice of the Council of Legal Education must be sought and considered—New Zealand University Amendment Act, 1930: ss. 3, 4.

The Academic Board is the teachers' assembly in the University and includes, among others, two members of the Professorial Board of each College, appointed by the respective Boards—University of New Zealand Amendment Act, 1926, s. 15. Any teacher in a College, who wishes to make a submission either to the Academic Board or to the Council of Legal Education, is quite in order in asking his Professorial Board to discuss his recommendation and send up a report for consideration by the appropriate body. Proposals relating to the appointment of examiners, and to examinations generally, may be made in a similar manner.

When a matter is of considerable importance the Academic Board itself usually refers it to the Colleges for their reports. This was done recently in connection with both the general revision of the law course and the later revision of certain prescriptions.

The teachers of law may also originate changes in the law course by bringing the matter before the Council of Legal Education. This body consists of two Judges of the Supreme Court, two members nominated by the New Zealand Law Society, and two teachers of law nominated by the Senate of the University. Business may be brought before it (in writing), by the Professors of Law and the heads of the law departments at the Colleges.

As to conferences of teachers the matter is provided for as follows in the New Zealand University Amendment Act, 1926, s. 18 (2):

> "The [Academic] Board, may, with the consent of the Chancellor or Pro-Chancellor, from time to time convene meetings of the professors or lecturers engaged in teaching the same subjects or groups of subjects at the constituent colleges, for the purpose of considering the reporting to the Board in respect of any matter on which the Board may desire to make a recommendation to the Senate."

The Executive Committee of the Senate may also approve of a conference requested by the senior teacher of a subject, after consultation with his fellow teachers in that subject.

Yours, &c.,
J. F. MCKENZIE,
Registrar.

University of New Zealand,
Wellington, C.1.

Practice Precedents.

Bankruptcy: Application to avoid Settlement.

Section 75 of the Bankruptcy Act, 1908, provides as follows:—

> Any settlement of property . . . made in favour of a purchaser or incumbrancer in good faith and for valuable consideration . . . ,—
> (*a*) Shall, if the settlor is adjudicated a bankrupt under this Act within one year after the date of such settlement, be void as against the Assignee [that is to say, the Official Assignee in Bankruptcy]:
> (*b*) And shall, if the settlor becomes bankrupt at any subsequent time within three years after the date of the settlement, be void as against the Assignee, unless the parties claiming under such settlement prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in such settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

As to what constitutes a "settlement," see the cases cited in *Spratt on Bankruptcy*, 186 *et seq.*

In *Ideal Bedding Co., Ltd. v. Holland*, [1907] 2 Ch. 157, a voluntary settlement in favour of his wife and child by an insolvent settlor of his equitable reversionary interest in personal estate comprising stocks and shares not subject to an imperative trust for sale was held void under the Fraudulent Conveyances Act, 1571 (13 Eliz., c. 5) as against the creditors of the settlor on the ground that it delayed hindered or defrauded the plaintiffs who were judgment creditors suing on behalf of themselves and all other creditors from obtaining either (*a*) a charging order, or (*b*) the appointment of a receiver.

In the precedent following, an order to administer the estate has been made pursuant to Part IV of the Administration Act, 1908. The Rules in Bankruptcy with respect to the realization, administration, and

distribution of the property of a bankrupt debtor are applicable. Rules 29 and 30 of the Bankruptcy Act (see the Bankruptcy Rules, *1893 New Zealand Gazette*, 375) provide that the application must be by motion supported by affidavit, and the rules of the Supreme Court relating to motions and affidavits are applicable to motions and affidavits in bankruptcy.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.

IN THE MATTER OF the Bankruptcy Act 1908 and of the Administration Act, 1908,
AND
IN THE ESTATE OF A. B. &c. deceased.
AND
IN THE MATTER OF a Memorandum of Transfer dated the day of 19 from the said A. B. deceased to C. D. &c. AND of a Declaration of Trust dated the day of 19 relative thereto.

TAKE NOTICE that Mr. of Counsel for the Official Assignee in Bankruptcy at the duly appointed administrator of the estate of the said A. B. under Part IV of the Bankruptcy Act 1908 WILL MOVE THIS HONOURABLE COURT at 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:

1. That C. D. of : the transferee under the above-mentioned memorandum of transfer and trustee under the above-mentioned declaration of trust do join and concur in all acts and things necessary for making the property comprised in the said memorandum of transfer and referred to in the said declaration of trust available for satisfying the claims of the creditors of the said deceased:

2. That the costs of and incidental to this application be paid out of the proceeds of the said property.

AND FOR SUCH FURTHER OR OTHER ORDER as to this Honourable Court may seem meet UPON THE GROUNDS that the estate of the deceased is being administered under Part IV of the Administration Act 1908 and such order is necessary and UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein.

Dated at this day of 19 .
X. Y.,
Solicitors for the said Official Assignee.

This notice of motion is filed by, &c.
To the Registrar and to C. A. and his Solicitor, V. W.

AFFIDAVIT IN SUPPORT OF MOTION.
(*Same heading.*)

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

1. That I am the duly appointed Official Assignee in Bankruptcy for the District of and by an order dated the day of 19 made by this Honourable Court at was appointed administrator of the estate of the said A. B. under Part IV of the Administration Act 1908.

2. That the said A. B. died intestate at on or about the day of 19 .

3. That the assets in the estate of the said A. B. as at the date of the death of the said deceased consisted of [*Set out particulars*] of the total value of £ .

4. That the liabilities in the estate of the said deceased are as follows: [*Set out particulars*] making in all the sum of £ .

5. That by memorandum of transfer dated the day of 19 the said A. B. transferred to one C. D. all that piece of land containing roods being section &c. and being the whole of the land &c. Copy of such memorandum of transfer is annexed hereto and marked "A."

6. That by a declaration of trust dated the day of 19 the said C. D. declared that although in the said memorandum of transfer the consideration therefor was stated to be the sum of £ the receipt of which sum was acknowledged such sum had not nor had any part thereof been paid by the said C. D. to the said A. B. and the said C. D. did by such declaration of trust covenant to hold such piece of land upon trust for the said A. B. until he the said C. D. should transfer to the said A. B. or if the said A. B. should be dead to C. B. the sister of the said A. B.

7. That I am advised that the said declaration of trust under the circumstances existing is effectual to create a trust of the said land in terms of the said declaration of trust. Copy of the said declaration of trust is hereunto annexed marked "B."

8. That the said C. D. has informed me that the said deceased anticipated at the time of execution of the said memorandum of transfer that it would be necessary for him to enter a home for the aged in and feared that the property might be taken away from him his intention being to avoid the loss of the property and to make some provision for his sister C. B. on his death.

9. That the said A. B. was not able on the day of 19 (the date of the said memorandum of transfer) to pay all his debts without the aid of the land comprised in the said memorandum of transfer having at that time little or no property beyond the said land and being then in debt to the Hospital at in the sum of £ for maintenance.

10. That the effect of the said memorandum of transfer and declaration of trust has been to place the said land being an asset in the estate of the said A. B. deceased beyond the reach of the creditors of the said deceased and to hinder delay and defraud such creditors.

11. That on the day of 19 an order was made by this honourable Court granting leave to the Official Assignee at to commence proceedings to compel the said C. D. to join and concur in all acts and things necessary for making available for satisfying the claims of the creditors of the said deceased A. B. the property comprised in the said memorandum of transfer.

Sworn &c.

No.

"A."

MEMORANDUM OF TRANSFER.

I A. B. of : being registered as the proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in all that piece of land situated in the containing roods be the same a little more or less being the whole of the land comprised in C.T. Register-book Volume , Folio .

IN CONSIDERATION of the sum of £ paid to me by C. D. of : the receipt of which sum I hereby acknowledge DO HEREBY TRANSFER to the said C. D. all my estate and interest in the said piece of land.

AND IT IS HEREBY DECLARED that no agreement in writing was entered into by the parties hereto in evidence of the foregoing transaction.

In witness whereof I have hereunto subscribed my name this day of one thousand nine hundred and .

Signed by the said A. B. in the presence of— } A. B.

Witness:
Name: .
Address: .
Occupation: .

This is the copy Memorandum of Transfer marked "A" referred to in the annexed affidavit of sworn at this day of 19 before me—

A solicitor, &c.

"B."

STAMP DUTY.

TO ALL TO WHOM THESE PRESENTS SHALL COME. GREETING:

WHEREAS I C. D. of in the Dominion of New Zealand am seised of an estate in fee-simple in all that parcel of land situated in aforesaid and comprising roods more or less and being the whole of the land comprised in Certificate of Title Register-book Volume Folio AND WHEREAS the said land was transferred to me by one A. B. of aforesaid by Memorandum of Transfer bearing date the day of 19 AND WHEREAS in the said Memorandum of Transfer the consideration was stated to be sterling (£) AND WHEREAS the receipt of such sum was therein acknowledged but neither such sum nor any part of it has ever been paid NOW THEREFORE in consideration of the premises and by the request and at the direction of the said A. B. I the said C. D. DO HEREBY DECLARE AND COVENANT for myself and for my heirs executors administrators and assigns that I will hold the said parcel of land in trust for the said A. B. until such time as I shall transfer the title thereto free from encumbrances to the said A. B. if he be alive or if he be dead than to his sister C. B. or until such time as I shall have paid to the said A. B. if he be alive the total sum of £ or if he be dead then shall have paid to the said C. B. such

part of the said sum of pounds (£) as I may not have paid to the said A. B. during his lifetime AND I DO FURTHER COVENANT that if at any time the said A. B. shall request me so to do I will if I shall not have paid to the said A. B. the total sum of pounds (£) execute in favour of the said A. B. a transfer of my title to the said parcel of land free from encumbrances provided that I shall have first been paid such sum or sums as I may from time to time have paid to the said A. B.

In witness whereof I have hereunto set my hand this day of one thousand nine hundred and .

Signed by the said C. D.)
in the presence of—)

Witness :
Name : .
Address : .
Occupation : .

ORDER TO AVOID SETTLEMENT.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the notice of motion and affidavit in support filed herein and UPON HEARING Mr. of Counsel for the Official Assignee as administrator of the estate of the said deceased and Mr. of Counsel for the said C. D. the transferee of the above-mentioned Memorandum of Transfer and trustee under the above-mentioned Declaration of Trust IT IS ORDERED that C. D. of : do join in and concur in all acts and things necessary for making the property referred to in the said Memorandum of Transfer and the said Declaration of Trust (being all that piece or parcel of land, &c.) available for satisfying the claims of the creditors of the said deceased AND IT IS ORDERED that the costs of and incidental to this order be TAXED by the Registrar of this Court and paid out of the proceeds of the said property and liberty is hereby reserved to either party to apply for directions herein.

By the Court.

Registrar.

Recent English Cases.

Noter-up Service
FOR
Halsbury's "Laws of England"
AND
The English and Empire Digest.

AGENCY.

Secret profits—Termination of Agency—Agent's Duty to Act Honestly and Faithfully—Non-disclosure of Secret Profit—Duty to Account.

Where an agent is employed to find a house, and he sells to his principal one he has himself bought, he must disclose any secret profit, although he informed his principal that he is selling his own property.

REGIER *v.* CAMPBELL-STUART, **[1939] 3 All E.R. 235. Ch.D.**

As to secret profit by agent: see HALSBURY, Hailsham edn., vol. 1, pp. 251–254, pars. 425, 426; and for cases: see DIGEST, vol. 1, pp. 475–478, Nos. 1572–1593.

CARRIERS.

Carriage of Passengers — Passenger Ticket — Conditions — General Exclusion of Liability—Followed by Exclusion of Particular Risks—"From any cause whatsoever"—Passenger Slipping on Floor being Washed.

In a contract for carriage of passengers by sea a condition excluding liability for "all risks whatsoever of the passage" is not limited to "marine risks."

BEAUMONT-THOMAS *v.* BLUE STAR LINE, LTD., **[1939] 3 All E.R. 127. C.A.**

As to conditions limiting liability: see HALSBURY, Hailsham edn., vol. 30, p. 621, par. 780; and for cases: see DIGEST, vol. 41, pp. 306–308, Nos. 1678–1692.

COMPANIES.

Directors—Retirement by Rotation—Article Providing for Annual Retirement of One-third of Number, or if Number not a Multiple of Three then the Number Nearest to but not Exceeding One-third—Only Two Directors Subject to Article.

An article providing for the annual retirement of one-third of the directors, or if their number was not a multiple of three then the number nearest to but not exceeding one-third has no application when there are less than three directors.

Re DAVID MOSELEY AND SONS, LTD.; MOSELEY *v.* DAVID MOSELEY AND SONS, LTD., **[1939] 2 All E.R. 791. Ch.D.**

As to retirement of directors: see HALSBURY, Hailsham edn., vol. 5, pp. 340–344, pars. 560–565; and for cases: see DIGEST, vol. 9, pp. 526–528, Nos. 3465–3483.

LANDLORD AND TENANT.

Agreement for Lease—Acceptance—"Subject to a Lease to be drawn up by Our Clients' Solicitors."

Acceptance "subject to a lease to be drawn up by our clients' solicitors" is equivalent to "subject to contract" and is not binding.

H. C. BERRY, LTD. *v.* BRIGHTON AND SUSSEX BUILDING SOCIETY, **[1939] 3 All E.R. 217. Ch.D.**

As to necessity for agreement of all terms of lease: see HALSBURY, Hailsham edn., vol. 20, p. 42, par. 47; and for cases: see DIGEST, vol. 30, pp. 371–374, Nos. 343–371.

WORK AND LABOUR.

Work and Labour—National Health Insurance—"Insured Person"—Widow's Right to Pension—Proof that Insured Person "Available for but Unable to Obtain Employment"—Franking of Contribution Card at Labour Exchange—"Conclusive Evidence of Genuine Unemployment"—National Health Insurance Act, 1924 (c. 38), s. 3 (3) (*a*) (*b*)—National Health Insurance Act, 1928 (c. 14), s. 1 (3)—National Health Insurance (Arrears) Regulations, 1930—Circular A.S. 267.

The franking of Health Insurance cards at the Employment Exchange is conclusive evidence of genuine unemployment within s. 3 (3) (a) (b) *of the National Health Insurance Act, 1924.*

DONOVAN *v.* NATIONAL AMALGAMATED APPROVED SOCIETY, **[1939] 2 All E.R. 718. K.B.D.**

As to temporary unemployment: see HALSBURY, 1st edn., vol. 28, Work and Labour, p. 916, par. 1620; and for cases: see DIGEST, vol. 44, pp. 1308–1311, Nos. 140–154.

WILLS.

Covenant not to Revoke—Revocation by Marriage—Construction of Covenant—Wills Act, 1837 (c. 26), ss. 18, 20.

A covenant not to revoke or alter a previous will is not broken by the marriage of the testator.

Re MARSLAND; LLOYDS BANK, LTD. *v.* MARSLAND, **[1939] 3 All E.R. 148. C.A.**

As to covenants relating to wills: see HALSBURY, 1st edn. vol. 28, Wills, pp. 514, 515, par. 1025; and for cases: see DIGEST, vol. 44, pp. 178, 179, Nos. 73–86.

Rules and Regulations.

Industrial Efficiency Act, 1936. Industry Licensing (Waxed-paper Manufacture) Notice, 1939. July 10, 1939. No. 1939/89.

Industrial Efficiency Act, 1936. Industry Licensing (Colloidal-sulphur Manufacture) Notice, 1939. July 12, 1939. No. 1939/90.

Board of Trade Act, 1919. Board of Trade (Fish Export Price) Regulations, 1939. July 19, 1939. No. 1939/91.

Social Security Act, 1938. Social Security (Maternity Benefits) Regulations, 1939. Amendment No. 1. July 19, 1939. No. 1939/92.

Social Security Act, 1938. Social Security (Supplementary Maternity Benefits) Regulations, 1939. July 19, 1939. No. 1939/93.

Coal-mines Act, 1925. Coal-mines Regulations 1939. July 19, 1939. No. 1939/94.

Post and Telegraph Act, 1928. Telegraph Regulations 1939. July 19, 1939. No. 1939/95.

Primary Products Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934. Hop Marketing Regulations 1939. July 26, 1939. No. 1939/96.

Cinematograph Films Act, 1928, and the Statutes Amendment Act, 1936. Cinematograph Operators Licensing Regulations 1938, Amendment No. 1. July 26, 1939. No. 1939/97.