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THE NEW COURT OF APPEAL.

THE hopes and aspirations of the profession during the past fifty-odd years for a permanent Court of Appeal are realized in the Judicature Amendment Bill 1957, which has just been introduced into Parliament by the learned Attorney-General, the Hon. J. R. Marshall.

It would be tedious, at this time, to relate the long history of the profession's endeavours for the establishment of a permanent Court of Appeal, and the reasons for that advocacy, as they are covered in the paper read at the Dominion Legal Conference in Napier in 1953 by Mr L. P. Leary Q.C. and in Mr T. P. Cleary's supporting paper, which are published for all to read.*

For the benefit of those of our readers to whom the Bill may not be available, we summarize its contents.

At present, all the Judges of the Supreme Court are also Judges of the Court of Appeal, and that Court consists of two Divisions which sit from time to time. Under the Judicature Amendment Bill 1957, the Court of Appeal will consist of the Chief Justice (*ex officio*) and three other Supreme Court Judges specially appointed to the Court of Appeal as permanent members, of whom one will be appointed as President and will preside over the Court of Appeal unless the Chief Justice is present. Provision is also made for additional Judges of the Supreme Court to sit with Judges of the Court of Appeal in certain cases. The Court of Appeal will sit at such times and places as it thinks fit. For the purpose of making three Judges available for appointment to the Court of Appeal, the Bill increases the number of Supreme Court Judges by one. The Judiciary will then, in number, consist of fourteen: the Chief Justice, the President and two Judges of the Court of Appeal, and ten Judges of the Supreme Court.

The new Act will come into force on January 1, 1958.

Constitution of the Court of Appeal.

The Court of Appeal is to consist of the Chief Justice (*ex officio*), a Judge of the Supreme Court to be appointed as President of the Court of Appeal, and two other Judges of the Supreme Court to be appointed as Judges of the Court of Appeal.

A Judge may be appointed to the Court of Appeal from the Bar at the time of his appointment as a Judge of the Supreme Court, or at any time thereafter.

A Judge of the Court of Appeal will continue to have the powers of a Judge of the Supreme Court. He will also hold office so long as he remains a Judge of the Supreme Court; but he may, with the approval of the Governor-General, resign from the Court of Appeal without resigning his office as a Judge of the Supreme Court.

The Judges of the Court of Appeal will have seniority over all Judges of the Supreme Court except the Chief Justice or the acting Chief Justice. The President of the Court of Appeal will have seniority over the two Judges of that Court, and those two Judges will have seniority between themselves according to their seniority as Judges of the Supreme Court. If any Judge of the Court of Appeal resigns his office as a Judge of that Court without resigning his office as a Judge of the Supreme Court, he will then have, as a Judge of the Supreme Court, the seniority that he would have had if he had not been appointed as a Judge of the Court of Appeal.

The senior Judge of the Court of Appeal may act as President of the Court of Appeal during any vacancy in the office of President or during the illness or absence from New Zealand of the President.

A Judge of the new Court of Appeal may be appointed at any time after the passing of the Act, but he will not take up office as a Judge of that Court until January 1, 1958.

Additional Judges of the Court of Appeal.

During the illness or absence of any Judge of the Court of Appeal, the Governor-General may appoint another Judge of the Supreme Court to be an additional Judge of the Court of Appeal.

Whenever the Chief Justice and the President of the Court of Appeal certify that it is expedient to do so for the purpose of any appeal or proceeding, the Chief Justice may nominate any Judge or Judges of the Supreme Court as an additional Judge or additional Judges of the Court of Appeal for that purpose. The fact that an additional Judge sits is sufficient evidence of his authority to do so; and no judgment or determination given or made by that Court while he so acts may be questioned on the ground that the occasion for his so acting had not arisen or had ceased to exist. An additional Judge whose appointment as such has expired may sit in the Court of Appeal to give judgment in any case heard during the period of his appointment.

Judgment of Court of Appeal.

Any three or more Judges of the Court of Appeal may exercise the powers of that Court; but two Judges may act for the purpose of delivering judgment or of

* (1954) 28 New Zealand Law Journal, p. 109 et seq.

hearing an application for leave to appeal to the Privy Council. By re-enacting the provisions of s. 58 of the Judicature Act 1908, it is provided that the opinion of the majority is to prevail, and that, if the Judges present are equally divided in opinion, the judgment appealed from is deemed to be affirmed.

Sittings of Court of Appeal.

The Court of Appeal may appoint times and places for ordinary or special sittings of the Court and make rules (consistent with the Court of Appeal rules of procedure) for the disposal of its business.

(At present, sittings are fixed by Order in Council under s. 8 of the Judicature Amendment Act 1913 and s. 3 of the Judicature Amendment Act 1933.)

The President will preside unless the Chief Justice is present, in which case the Chief Justice will preside. The senior Judge of the Court of Appeal present will preside in the absence of the Chief Justice and the President. The Court may adjourn any sitting till such time and to such place as it thinks fit.

The Judges of the Supreme Court.

A new section is inserted in the Judicature Act 1908, as s. 4, which replaces s. 2 of the Judicature Amendment Act 1913, as amended by s. 2 of the Judicature Amendment Act 1953 and s. 2 of the Judicature Amendment Act 1956. The new section re-enacts the existing law, with the exception that the number of puisne Judges is increased from twelve to thirteen in order to make three Judges available for appointment to the Court of Appeal. It goes on to provide that, as is the existing practice, all Judges of the Supreme Court other than the Chief Justice are to have seniority according to the dates of their appointments. Where two or more Judges are appointed on the same day, and no order of precedence is assigned on their appoint ments they will have seniority in the order in which they take the Judicial oath. Permanent Judges will have seniority over temporary Judges. As the new section will come into force on the passing of the Act, the additional appointment may be made before January 1, 1958.

The senior Judge in New Zealand, not being a Judge of the Court of Appeal, becomes the acting Chief Justice during any vacancy in the office of the latter or during his absence from New Zealand. The Governor-General may authorize the senior Judge in New Zealand, not being a Judge of the Court of Appeal, to act as Chief Justice while the latter is prevented by illness or any cause (other than absence) from exercising the duties of his office; but the acting Chief Justice will not preside as Chief Justice at a sitting of the Court of Appeal.

At present, no one may be appointed a Judge unless he is a barrister or solicitor of not less than seven years' "standing". Section 6 of the Judicature Act 1908 is very properly amended to require that he must have had not less than seven years' practice.

The existing provisions relating to the salaries of the Judges (s. 3 of the Judicature Amendment Act 1956) are re-enacted. A new paragraph provides the President of the Court of Appeal with a salary of £3,500 a year. The other Judges of the Court of Appeal will receive the same salaries as Judges of the Supreme Court.

Section 52 of the Judicature Act 1908 is amended to provide that three or more Judges, including the Chief Justice, may appoint times and places for the sittings of the Supreme Court and make rules as to the order of disposing of business. At present the approval of the Governor-General in Council is required. That approval will, in future, be unnecessary.

At least one of the four Judges (in addition to the Chief Justice) appointed to the Rules Committee is to be a Judge of the Court of Appeal.

Criminal Appeals.

While the Bill does not, in terms, designate the new Court as a Court of Criminal Appeal, it becomes such by virtue of the Criminal Appeal Act 1945. A material difference between that statute and the Criminal Appeal Act 1907 (Eng.) is that there is omitted from its New Zealand counterpart a section corresponding to s. 1 of the English statute (as amended), which established a Court of Criminal Appeal consisting of the Lord Chief Justice of England and all the Judges of the King's (now Queen's) Bench Division. For the purpose of hearing and determining appeals, and for the purpose of any other proceedings, under the Act, the Court of Criminal Appeal is summoned in accordance with directions given by the Lord Chief Justice with the consent of the Lord Chancellor. The Court is duly constituted if it consists of no fewer than three Judges and of an uneven number of Judges. If the Lord Chief Justice so directs, the Court may sit in two or more divisions.

The Court of Appeal in England, which hears civil appeals, consists of the Master of the Rolls and the Lords Justices, with the Lord Chancellor and the Lord Chief Justice as members ex officio.

As the Queen's Bench Division supplies the Judges for criminal trials and for appeals in criminal matters from the lower Courts, it is clear that, in England, experience has shown that these Judges with their everyday contact with the administration of the criminal law are eminently fitted to form the Court of Criminal Appeal, while criminal jurisdiction has no part in the work of the Court of Appeal, whose members have left behind them any connection they may have had in the criminal Courts. The longer the former Queen's Bench Judges serve in the rarefied air of the Court of Appeal, the further they get from the varied incidents of a criminal trial. Hence, the constitution of the Court of Criminal Appeal from the members of the Judiciary with continuing experience of the administration of the criminal law in their several Courts.

There is a respectable body of opinion in the profession in New Zealand that the appellate functions in civil and criminal matters should not be concentrated in the new Court of Appeal, and for the same reasons as actuated the Legislature in England, when establishing the Court of Criminal Appeal, to confine its membership to the Judges of the Queen's Bench Division.

It is everyone's wish that those who are appointed to the new Court of Appeal will enjoy lengthy terms of office. Some, as we have seen, may never have presided at a Supreme Court criminal trial, as previous judicial experience is not a prerequisite for appointment to the new Court of Appeal. But the longer the members of that Court will serve, their cloistered seclusion from nisi prius work will segregate them further and

further from the current experiences of those who are concurrently presiding at the Criminal Sessions in all the Judicial Districts of the Dominion.

It may well be that the Court of Appeal may, from time to time, consist wholly of members skilled in equity, and quite inexperienced in the changing vicissitudes and circumstances of a criminal trial.

Moreover, one does not have to read very far in the pages of even the current volume of the *New Zealand Law Reports* to find appellate Judges regretting that the written record before them gives little indication of the course of a criminal trial.

A large part of the work in a Court dealing with criminal appeals deals with the summing-up of the Judge. This surely requires concurrent experience in the conduct of criminal trials for reaching a just conclusion.

Then, too, the matter of sentencing, not normally governed by legal principles, is a practical everyday one, conditioned, at times, by the incidence of crime in a particular locality and always by the facts relating to the particular case. Questions arising from these considerations can be dealt with more adequately by a Court consisting of trial Judges.

THE PROPOSED NEW CRIMES BILL.

WE feel it a duty to mention a matter which may fundamentally affect criminal law generally. It is reported that a new Crimes Bill will be introduced this year. It has not yet made its appearance in Parliament. But the proposed Bill, we are reliably informed, makes some considerable changes in the criminal law of New Zealand. Longer than the memory of any living practitioner, the codification of the criminal law has been unaffected except by what may be termed supplementary amendments. Fundamentally, it is still the original Criminal Code Act 1893, which was the subject of the most careful and highly-skilled consideration over a long period.

The subject is raised at this time because any approach to suggested amendments to so vital a statute as the Crimes Act 1908 should not be entrusted solely to a limited Departmental committee, no matter how competent its members may appear to be.

It has always been the salutary practice of the Law Revision Committee to refer any proposals for changes in the common law, or in existing legislation, to those selected members of the profession who, in the Committee's view, are best versed in the particular legal topic, for their inquiry and comment. Only after receiving their report does the Law Revision Committee itself get down to its examination of the proposal before deciding whether it will recommend its adoption to the Government, and the form it should take.

The history of the present Crimes Act demands that any significant amendments should be introduced into the Legislature only after the most careful scrutiny by recognized experts in criminal law and practice. Their report, too, should accompany the Bill when it is printed, so that all may see it. There is ample precedent for this course in relation to Bills affecting the criminal law.

The Criminal Code Act 1893 was the culmination of a series of reports, draft codes, and draft Bills dating back to 1833. The Criminal Code Commission, appointed in 1878, consisted of Sir James Fitzjames Stephen and three Judges, Lord Blackburn and Mr Justice Lush (of the English Bench) and Mr Justice Barry (of the Irish Bench).* Their work has been described as "an investigation of the most searching and elaborate character by a Commission of the highest authority." The Bill approved by the Commission did not become law in England; but on it was based, in New Zealand, the Criminal Code Bill 1883 which was prepared by Mr Justice Johnston and the Solicitor-General, Mr W. S. Reid.† But ten years of further consideration were to pass before the Bill finally became law as the Criminal Code Act 1893.

No one would suggest that the codified criminal law, as it has existed since 1893, should remain static in every respect. But that is not to say that unconsidered changes should be enacted. The subject-matter of the new Crimes Bill is of such importance with respect to the liberty of the subject and in relation to social consequences generally, that extreme caution should be the watchword. This requires a thorough examination of any changes in the criminal law contemplated by the new Bill. These should be carefully considered by the members of the profession throughout the Dominion who are best fitted by practical experience to deal with the difficult and highly-technical problems arising upon any fundamental amendment of the criminal law.

It is highly undesirable that the Bill should be introduced at a late hour in the current Session of Parliament and passed before its early expiration.

An example of caution in enacting new legislation—in this instance, affecting common-law principles—was the introduction into the Parliament at Westminster last year of the Occupiers' Liability Bill and its subsequent postponement for consideration at a later Session after careful expert examination.

Criminal law is of greater public importance than company law. Yet within our recent recollection is the long and careful consideration by a highly-qualified committee which preceded the introduction—let alone the enactment—of the Companies Act 1955.

These are examples that could even more usefully be followed in relation to changes in our criminal law, which affects the whole community, not merely a part of it.

The Crimes Act 1908 has a distinguished pedigree and a long history. We are suspicious of any changes in the fundamental principles of criminal justice: there are too many theorists abroad to-day. To make changes in substance and in procedure in criminal law is the work of practitioners experienced in that field, aided by skilled draftsmanship.

If the new Bill should be introduced in the present Session of Parliament, it should then be deferred for some time, at least until next year's Session, before its enactment, so that every one experienced in criminal law and practice can have the time to give it his best consideration. The profession will not be satisfied with less.

* For the full history of this preparation, see the Introduction by the learned author of *Garrow's Criminal Law in New Zealand*, 3rd ed., p. 1.

† Their Report, furnished on the introduction of the Bill, is reproduced in *2 Public Acts of New Zealand, 1908–1931 (Reprint)*, p. 176.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1957.

No. 1. Imprest Supply Act 1957.
No. 2. Imprest Supply Act (No. 2) 1957.
No. 3. Imprest Supply Act (No. 3) 1957.
No. 4. Federation of Malaya Act 1957.
No. 5. Civil List Amendment Act 1957.

CRIMINAL LAW.

Juror—Juror " incapable of continuing to perform [his] duty " —Such Words not limited to Cases of Sudden Illness of Serving Juror—Death of Juror's Wife a Ground for discharging Him and, with Consent of Prosecutor and Accused, coniinuing Trial with Remaining Jurors—Crimes Act 1908, s. 431, (4). The words " incapable of continuing to perform their duty " in s. 431 (4) of the Crimes Act 1908 are not limited to cases of sudden illness on the part of a juror himself. In the present case, a juror's wife died while he was serving in the course of a criminal trial. He was discharged, and, with the consent of the Crown Prosecutor and the accused, the trial proceeded with the remaining eleven jurors. *R.* v. *Kelman.* (S.C. Hamilton. July 31, 1957. North J.)

Trial—Jury—Judge's Inherent Jurisdiction to exclude Juror from Panel in Circumstances where Fair Trial cannot be had if Such Juror allowed to try Case—Jurymen serving on Jury who had served on Earlier Trial at Same Sessions of Person charged with Same Crimes as Accused in Relation to Same Girl on Same Dates—Jury convicting Accused—Conviction quashed—In Special Circumstances of Case, New Trial not ordered. The Judge presiding at a criminal trial has power of his own motion to direct the removal from the panel of any juror who has previously tried the same or a similar issue to that about to be tried, or in the case of any juror duly called in the ballot to exclude him, whether or not any challenge be made by either party if in the exercise of a judicial discretion the Judge considers such juror is unlikely to be impartial or indifferent. A paramount consideration is to secure a fair and impartial trial. (*Mansell* v. *The Queen* (1857) 8 E. & B. 54; 169 E.R. 1048, applied. *R.* v. *Burns* (1883) 9 V.L.R. (L) 191; *R.* v. *Gillen* (1914) S.A.L.R. 196 and *R.* v. *Cullen* [1951] V.L.R. 335, referred to.) *So held* by the Court of Appeal quashing a conviction. Four young men were each charged on indictment with offences in respect of the same fourteen-year-old girl on the same dates. The first trial was against A, and began at noon on May 15. He was charged with having on December 8 had unlawful carnal intercourse, and, in the alternative, with having attempted to do so. He admitted the intercourse, but pleaded the statutory defence. The trial went on into May 16, when he was convicted of unlawful carnal knowledge, the jury adding a recommendation to leniency. As soon as the jury in A's case retired to consider its verdict, the trial of B commenced at 11.15 a.m. on May 16. He denied intercourse, and, as well, pleaded the statutory defence. The jury retired at 3 p.m. and returned at 4.37 p.m. with a verdict of not guilty. The trial against the appellant commenced immediately upon the retirement of the jury in B's case. The jurymen who had comprised A's jury were then back among the waiting jurors. The jury which was empanelled to try the appellant contained four persons who had been members of the jury which convicted A; the foreman of the appellant's jury was one of these. The trial continued to the next day when the jury brought in verdicts of guilty of carnal knowledge on December 8, and guilty of attempted carnal knowledge on December 9. On appeal against conviction on the ground that the circumstances of the appellant's trial were such that he was placed in an unfair position, and it was unjust that the verdict should stand, *Held*, by the Court of Appeal, 1. That a direction should have been given by the Judge who presided at the appellant's trial excluding from the ballot the names of those jurors who had convicted A. 2. That to have allowed any of the jurymen who convicted A to sit on the jury whichw as to try the appellant was so prejudicial to the appellant as to prevent his receivlng a fair trial, a fortiori, when the jury which convicted him contained four who had convicted A and one of these became foreman of the jury at the appellant's trial; and that the conviction for unlawful carna knowledge should be quashed. 3. That the conviction of attempt should be quashed as it was one, which, on the evidence, was unwarranted and such that no reaionable jury could arrive at. 4. That, in the special circumstances of this case, a new trial would not be ordered on the charge of unlawful carnal knowledge. Observations as to the obsolescence of a challenge for cause in a criminal trial. *R.* v. *Greening.* (C.A. Wellington. July 25, 1957. Gresson J. McGregor J. T. A. Gresson J.)

DENTISTS.

"Mechanical construction or the renewal of artificial dentures"—Process normally used by Dental Mechanic working under His Qualified Employer—Dentists Act 1926, ss. 2 (1), 26 (3) (g). The word " mechanical " in the phrase " the mechanical construction or the renewal of artificial dentures " in para. (c) of the definition of " Practice of dentistry " in s. 2 (1) of the Dentists Act 1936, indicates the construction of a denture by the process normally used by a dental mechanic, working under his qualified employer, as distinct from the work in making and fitting a denture done by a qualified dentist. *Quaere*, Whether in para. (d) of the definition of " Practice of dentistry " in s. 2 (1), the word " construction " refers to the original fabrication of a denture; the word " renewal " means the fabrication or refabrication of a completely new substitutionary denture by using the old as a basic pattern; and the word " repair " means the reconditioning of an existing damaged denture. Where, therefore, a person held himself out in the circulars and advertisements as " constructing " dentures, he should be convicted of a breach of s. 26 of the Dentists Act 1926 with holding himself out as practising dentistry without being the holder of the qualifications made requisite by the statute. *Hoskin* v. *McGee.* (S.C. Auckland. July 1, 1957. Turner J.)

DIVORCE AND MATRIMONIAL CAUSES.

Seven Years' Separation—Defended Suit—Proof to Court's Satisfaction of Petitioner's Wrongful Conduct Absolute Bar to Decree—Divorce and Matrimonial Causes Act 1928, s. 10 (jj). Where, on a petition founded on the ground set out in s. 10 (*jj*) of the Divorce and Matrimonial Causes Act 1928, the respondent opposes the making of a decree, and it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court must refuse to grant the petition, as the discretion vested in the Court by s. 18 does not arise. (*Freeman* v. *Freeman* [1955] N.Z.L.R. 924, and *Wadsworth* v. *Wadsworth* [1955] N.Z.L.R. 993, followed. *McRostie* v. *McRostie* [1955] N.Z.L.R. 631, distinguished.) Observations as to the injustice, in certain cases, founded on s. 10 (*jj*), caused to a petitioner by the right given to a respondent to raise the absolute bar as a defence in cases where the Court, if it could exercise its discretion, would grant a decree. *Towns* v. *Towns.* (S.C. Christchurch. August 7, 1957. F. B. Adams J.)

EVIDENCE.

Commission to take Evidence—Directions to be given Examiner as to Authentication of Depositions—Divorce and Matrimonial Causes Act 1928, s. 49. The directions to be given to an examiner in the commission issued to him to take evidence, pursuant to an order made under s. 49 of the Divorce and Matrimonial Causes Act 1928, should include a direction that the depositions taken by him must be read over to the witness and signed by him and by the examiner who has taken the depositions (or, if the signature of any witness be omitted the reason for such omission must be stated). *Yates* v, *Yates and Another.* (S.C. Auckland. July 31, 1957. Turner J.)

FAMILY PROTECTION.

Grandchildren—Special Circumstances for Consideration by Court on Applications by Grandchildren—Family Protection Act 1955, s. 3 (c). The Court, in considering an application under the Family Protection Act 1955 by a grandchild of the testator for further relief, considering the whole of the circumstances, should take into account, the following circumstances which arise out of the more remote relationship between a grandparent and a grandchild: (a) the fact that the applicant grandchild has any reasonable expectations from other paternal or maternal grandparents, and (b) the fact (particularly if it is a testator's son who has predeceased him) that the widow has re-married, since there may be both a moral duty and a legal obligation on the part of the stepfather to maintain the infant child of his wife by a former marriage. (*Dillon* v. *Public Trustee* [1941] N.Z.L.R. 557; [1941] G.L.R. 227, and *In re Allardice, Allardice* v. *Allardice* (1910) 29 N.Z.L.R. 959; 12 G.L.R. 753, followed. *Stone* v. *Carr* (1799) 3 Esp. 1; 170 E.R. 517, referred to.) *So held* by the Court of Appeal in allowing an appeal from the judgment of T. A. Gresson J. *In re Barclay, Barclay* v. *Burnett.* (S.C. Wellington. December 6, 1956. T. A. Gresson J. C.A. Wellington. July 17, 1957. Finlay J. North J. Henry J.)

LICENSING.

Offences—Keeping Licensed Premises open for Sale of Liquor —Allowing Liquor to be consumed on Licensed Premises during Hours of Closing—Liquor purchased before Hours of Closing—Delivery of Such Liquor to its Owner during Hours when Premises required to be closed, not an "opening for sale"—Serving Such Liquor to its Owner at Table in Dining-room after 8 p.m. constituting Offence of "allowing liquor to be consumed" during the Time at which Licensed Premises directed to be closed—Licensing Act 1908, s. 190—Sale of Liquor Restriction Act 1917, s. 10 (2). Delivery of liquor during the time when licensed premises are directed to be closed to a person whose property the liquor is, does not constitute a "sale" within the meaning of that word as used in s. 190 of the Licensing Act 1908. So, where the sale has been completed by appropriation and transfer of the liquor during lawful hours, the subsequent handing over to the owner, during the time at which the licensed premises are directed to be closed, of what in law has in the interval been his own property is not an "opening for sale". Section 10 (2) of the Sale of Liquor Restriction Act 1917 requires liquor to be served to a person who is actually present at table at the time of service, and limits the hour at which that may be done to 6 p.m. until 8 p.m. Consequently, if the licensee serves any liquor to its owner and his guests in the hotel dining-room after the hour of 8 p.m., he is guilty of the offence under s. 190 of allowing liquor, although purchased before the hours of closing, to be consumed in licensed premises during the time at which licensed premises are directed to be closed. (*Bristow* v. *Piper* [1915] 1 K.B. 271 and *Petersen* v. *Paape* [1929] N.Z.L.R. 780; [1929] G.L.R. 445, applied. *Olson* v. *Cruickshank* [1924] N.Z.L.R. 900; [1924] G.L.R. 286, distinguished.) *Macey* v. *The Police.* (S.C. Auckland. August 1, 1957. Shorland J.)

LIMITATION OF ACTION.

Actions surviving Death of Tortfeasor—Jurisdiction—Jurisdiction to grant Leave to bring Action within Six Years after Cause of Action arose—Jurisdiction exercisable although Twelve-months' Period expired before Enactment of Amendment Act conferring it—Prospective Effect thereof—Law Reform Act 1936, s. 3 (3) (b), (3A)—(Law Reform Amendment Act 1955, s. 2 (2)). Section 3 (3A) of the Law Reform Act 1936 (as enacted by s. 2 (2) of the Law Reform Amendment Act 1955), which is procedural in character, confers a new present and subsisting right upon an applicant and a new jurisdiction upon the Court to grant leave to bring proceedings with relation to a cause of action which arose at any point of time before the expiration of six years after the date when the cause of action arose, without regard to the period at which the representation may have been taken out. Subsection (3A) has present (i.e., prospective) effect in respect of actions which were not maintainable under the Law Reform Act 1936 in its original form, in that subs. (3A) is a present authority authorizing an application to the Court and conferring present jurisdiction upon the Court in respect of past circumstances. It does not directly affect any rights that persons had before the Court deals with the matter; but it gives retroactive effect to an order of the Court made after the subsection came into force. Any presumption against retroactive effect based on the Legislature's desire to do justice is inapplicable, since subs. (3A) itself contains provisions to ensure that justice be done, and there are no words restricting its operation whenever an application comes before the Court. Consequently, the jurisdiction conferred by subs. (3A), being exercisable notwithstanding anything in s. 3 (3) is exercisable even though the period of twelve months had already run before subs. (3A) was enacted. (*The Ydun* [1899] P. 236, followed. *Weldon* v. *Winslow* (1884) 13 Q.B.D. 784, applied. *Rodgers* v. *Public Trustee* [1956] N.Z.L.R. 914, overruled.) *So held* by the Court of Appeal, dismissing an appeal from the judgment of Henry J. [1956] N.Z.L.R. 824. *Davies* v. *Public Trustee.* (C.A. Wellington. July 17, 1957. Finlay A.C.J. Hutchison J. North J. Turner J. McCarthy J.)

Actions against Public and Local Authorities—Onus on Intending Plaintiff seeking Leave to bring Action Out of Time—Nature and Extent of Such Onus—Relevance of all Circumstances when Court exercising Discretion to grant Leave—Limitation Act 1950, s. 23 (2). The onus is upon an intending plaintiff who seeks leave under s. 23 (2) of the Limitation Act 1950 to bring an action out of time, to carry the mind of the Court to the conclusion that it considers that the failure to give the notice and the delay in bringing the action, or either of them (as the case may be) was (*a*) occasioned by a mistake or other reasonable cause; or (*b*) that the intended defendant was not materially prejudiced in his defence or otherwise by the failure or delay. The fact that the onus may be shifted during the progress of a hearing by evidence which is sufficient to discharge that onus in no way lessens the onus on the intending plaintiff who should in general be required to rely solely on the strength of his own evidence in support of his application. (*Haywood* v. *Westleigh Colliery Co. Ltd.* [1915] A.C. 540, and *William Cable Ltd.* v. *Trainor* [1957] N.Z.L.R. 337, applied.) If that onus is discharged, then leave may be granted, subject, however, to the discretion expressed by the words "the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose". All the circumstances of the case are relevant at that stage, even including such as may also have come under review in connection with the conditions precedent. The Court has to make its final decision upon the whole of the material before it. Before the Court can hold that it is just to grant leave, it must pay due regard to the whole of the material before it, including, in particular, all factors, at whatever point of time they may have arisen, which may point to the conclusion that injustice may arise because the intended defendant may be prejudiced in his defence of the stale claim. *So held* by the Court of Appeal dismissing an appeal from the order of Stanton J. *Quaere,* per F. B. Adams J., Whether, in cases where the Court grants the desired leave, the Court should not impose some form of condition which would enable it to review the question of prejudice after the event. *Brewer* v. *Auckland Hospital Board.* (S.C. Auckland. April 12, 1957. Stanton J. C.A. Wellington. July 26, 1957. F. B. Adams J. McGregor J. Shorland J.)

MARRIAGE.

Prohibited Degrees of Affinity—Court's Power of Dispensation —Nature of Discretion conferred on Court—Standard of Proof required of Applicant to establish compliance with Statutory Condition—"Satisfied"—Marriage Act 1955, s. 15 (2). Section 15 (2) of the Marriage Act 1955 confers on the Court a general discretion to dispense with the prohibition against the marriage of persons bound only by ties of affinity and not consanguinity, provided always that the Court is first satisfied that neither of the parties to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of the other party. Each case should be dealt with as it arises on its own special facts and circumstances. The dispensation from the definite prohibition in s. 15 (1) is to be granted only if the Court, in the exercise of a judicial discretion, thinks proper. No rules should be laid down with a view of indicating the particular grooves in which the discretion should run. (Statement of Bowen L.J. in *Gardner* v. *Jay* (1885) 29 Ch.D. 50, 58, approved in *Evans* v. *Bartlam* [1937] A.C. 473, 488; [1937] 2 All E.R. 646, 656, followed.) In any case where it is shown that an applicant or one of the parties to the proposed marriage has recently been divorced, it is desirable that the Court should have the opportunity of seeing and hearing the parties. *Semble,* It would be convenient for a Judge to direct, upon an application under s. 15 (2) coming before him, that the Solicitor-General should be served. The Court should have the assistance of counsel to undertake the cross-examination of an applicant's witnesses, including the applicant. *So held* by the Court of Appeal (North and Turner JJ., Finlay A.C.J. dissenting) remitting to the Supreme Court to determine the issue of fact a motion removed into the Court of Appeal. As to the standard of proof required of an applicant under s. 15 (2): Per Finlay A.C.J. That a Court which has to deal with an application under s. 15 (2) must be satisfied with the preponderance of probability arrived at by due caution and in the light of the seriousness of the issue involved that neither party to the intended marriage has by his or her conduct caused or contributed to the cause of the termination of any previous marriage of either party. (*Edwards* v. *Edwards and Elsegood* [1947] S.A.S.R. 258, followed. *Loveden* v. *Loveden* (1810) 2 Hag. Con. 1; 161 E.R. 648, and *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247; [1956] 3 All E.R. 970, applied.) Per Hutchison and Turner JJ. That the word "satisfied", as used in s. 15 (2), means "satisfied beyond reasonable doubt": the degree of probability which a reasonable and just man would require to come to a conclusion that the statutory condition has been complied with, the required degree of probability being a high one. (*Preston-Jones* v. *Preston-Jones* [1951] A.C. 391; [1951] 1 All E.R. 124, and *Bater* v. *Bater* [1951] P. 35; [1950] 2 All E.R. 458, followed. *McDonald* v. *McDonald* [1952] N.Z.L.R. 924; *Galler* v. *Galler* [1954] P. 252; [1954] 1 All E.R. 536 and *Watts* v. *Watts* (1953) 89 C.L.R. 200, referred to.) Per North J. That, in order to be "satisfied" in cases coming within s. 15 (2) it is sufficient if the Judge, with due regard to the gravity of the subject matter, comes to a clear conclusion that the condition has

been complied with. (Dicta of Sir John Latham C.J. and Dixon J. in *Briginshaw* v. *Briginshaw* (1938) 60 C.L.R. 336, 343, 361 and of Denning L.J. in *Bater* v. *Bater* [1951] P. 35, 36; [1950] 2 All E.R. 458, applied.) Per Henry J. That the word "satisfied" in s. 15 (2) is of itself sufficient to inform the Court of its task—namely, that, before it comes to a positive finding, it should be of the opinion that the proof is adequate having regard to the nature of the subject matter to be decided. *In re Woodcock and Woodcock.* (S.C. Palmerston North. August 9, 1956. Gresson J. C.A. Wellington. July 19, 1957. Finlay A.C.J. Hutchison J. North J. Turner J. Henry J.)

POLICE OFFENCES.

Person in Control of Dance Hall permitting Liquor to be taken into Same—Defendant residing with Family on Premises—"Club" conducted with Nominal Entry Fee and Table Cover Charge for Each Person or Guest with Dancing—Use not consistent with Ordinary Use as "dwellinghouse"—Premises used as dance "hall"—Statutes Amendment Act 1939, s. 59 (1) (2), (5). The defendant was the lessee of spacious premises known as Cargill's Castle, situate on the outskirts of Dunedin, in which the defendant Winter conducted something on the lines of a cabaret, particularly on Saturday nights. He and his family lived there as the sole occupants. Anyone accepted by Winter could "join" what was termed the "club" on payment of a joining fee of 2s. 6d. This enabled him to remain a so-called "member" for life; there was no annual subscription. Such persons, on payment of a further "table cover charge" of 7s. 6d., would be supplied with supper, and, if they wished, they had access to the special floor where dancing facilities were available to them to the accompaniment of an orchestra. If a "member" brought guests with him, he had to pay 7s. 6d. for each of them also. Those attending were allowed to bring their own liquor. On the night in question, the police called at the premises, found liquor there in the possession of the three defendants other than Winter, but with his permission. There was dancing in the adjacent part of the room specially prepared for it. The proceedings were conducted in an orderly manner. The usual "table cover charge" of 7s. 6d. had been paid by each of the said three defendants. On an information charging the defendant Winter, that, having control of a dance hall, he permitted intoxicating liquor to be taken into such dance hall while a dance was being held, and on informations charging three other defendants with having intoxicating liquor in the vicinity of such dance hall, *Held*, 1. That the premises were not used by Winter in a manner consistent with ordinary use as a "dwellinghouse" within the meaning of that word as used in s. 59 (5) of the Statutes Amendment Act 1939. (*Archer* v. *Petersen* [1942] N.Z.L.R. 37; [1942] G.L.R. 1, applied.) 2. That the premises were used as a "dance hall," as that term is used in s. 59 (1) as all who paid the charge for supper were entitled to the dancing facilities provided; and it was not shown that, apart from dancing, there was any other form of entertainment or other attraction. *Police* v. *Winter and Others.* (Dunedin. April 15, 1957. Willis S.M.)

PRACTICE.

Appeals to the Privy Council—Appeal from Consultative Judgment of Court of Appeal given in Pursuance of s. 67 of Maori Affairs Act 1953—Whether Such Judgment Final—Effect of Alteration of Privy Council Appeals Rules—"Judgment"—Privy Council Appeals Rules 1910, RR. 1, 27—Public Works Act 1928, ss. 101 (1) (c), 105—Maori Affairs Act 1953, s. 67. Under s. 67 of the Maori Affairs Act 1953, the Chief Judge of the Maori Land Court stated a case for the opinion of the Supreme Court, and this, by consent, was removed into the Court of Appeal, which, in a judgment, expressed the opinion sought. The Maori Land Court applied for conditional leave to appeal to Her Majesty in Council. It was conceded that a large sum of money was involved, and the questions submitted to the Court of Appeal were of great general or public importance within R. 2 of the Privy Council Appeals Rules 1910. The question argued was whether the relevant statutory provision of the Public Works Act 1928 and of the Maori Affairs Act 1953 either expressly or impliedly excludes the right of the Court of Appeal to grant leave to appeal to Her Majesty in Council. *Held*, by the Court of Appeal, 1. That, subject to the conditions imposed by the Privy Council Appeals Rules 1910 being satisfied, a judgment given by the Court of Appeal in a consultative capacity is, in general, subject to review by Her Majesty in Council. (*Russell* v. *Minister of Lands* (1898) 17 N.Z.L.R. 241, distinguished.) 2. That, in all the circumstances of this case (as they appear from the several judgments) conditional leave should be granted. (*Canadian Pacific Railways* v. *Toronto Corporation* [1911] A.C. 461; *Minister for Lands* v. *Harrington* [1899] A.C. 408 and *Minister for Public Works* v. *Thistlethwayte* [1954] A.C. 475, applied.) Per Finlay A.C.J. The right of appeal to Her Majesty in Council given by the Privy Council Appeals Rules 1910 from a consultative judgment of the Court of Appeal on a Case Stated under s. 67 of the Maori Affairs Act 1953 is not restrained to any extent whatever before that judgment has been transmitted to and acted upon by the Maori Land Court. If the appeal be successfully brought, the judgment of the Judicial Committee of the Privy Council would be substituted for and become the judgment of the Court of Appeal. (*Lysnar* v. *National Bank of New Zealand Ltd.* [1935] N.Z.L.R. 756; [1935] G.L.R. 665, referred to.) Per North and McCarthy JJ. (dubitante). That, while, owing to the amendment of the Privy Council Rules in 1910, there are no technical difficulties in the way of granting leave to appeal to Her Majesty in Council in respect of a Case Stated for the opinion of the Court, the combined effect of the provisions of ss. 104 (1) (c) and 105 of the Public Works Act 1928 is to make an order of the Maori Land Court final, and, although s. 67 (3) of the Maori Affairs Act 1953 does not in express words say that the judgment of the Court of Appeal is to be "final", to grant a further right of appeal is to substitute another tribunal for the tribunal named by the Legislature. (Dictum of Edwards J. in *In re Mangaiainoka Block* (1912) 32 N.Z.L.R. 198, 199, referred to.) *In re Whareroa Block (No. 2).* (C.A. July 17, 1957. Finlay A.C.J. North J. McCarthy J.)

Commission to take Evidence—Application for Order for Examination Viva voce before Special Examiner Overseas—Principles on which Such Order made—Code of Civil Procedure, R. 177. A litigant is not entitled *ex debito justitiae* to an order under R. 177 of the Code of Civil Procedure for evidence of a witness overseas to be taken viva voce by an examiner. Whether it should be made is a matter of judicial discretion to be exercised in the circumstances of the particular case. (*New Zealand Towel Supply and Laundry Ltd.* v. *New Zealand Tri-Cleaning Co. Ltd.* [1935] N.Z L.R. 204; [1935] G.L.R. 269, referred to.) *Hill* v. *C. L. Innes & Co. Ltd. and Another.* (S.C. Auckland. July 30, 1957. Turner J.)

Striking out Pleadings and Proceedings—Action—Defendant accepting Amount less than Damages claimed in Full Settlement—Defendant repudiating Settlement—Court not prepared to Strike out Action on Affidavit Evidence—Order that, unless Amount paid to Plaintiff refunded by Him within Fourteen Days, Plaintiff would be restrained from proceeding with Action. In an action for enticement against O'B., K. claimed special and general damages amounting to £1,013 4s. 4d. Before the action went to trial, O'B., while denying liability, agreed with K.'s solicitor to pay £290 15s. in full settlement of K.'s claim and costs. K. refused to sign a formal discharge and swore he had not authorized his solicitor to settle on the terms mentioned. He claimed the right to proceed with the hearing of the action. On motion by the defendant to have the action struck out on the ground that to do so would be frivolous and vexatious and an abuse of the process of the Court, *Held*, 1. That the Court should not strike out the action on affidavit evidence. 2. That, unless within fourteen days, K. repaid to O'B. the sum of £290 15s. already paid by him, K. would be restrained from proceeding with his action and O'B. could have it struck out, without prejudice to O'B.'s right to contend that K.'s claim had been settled. In the meantime, the motion was adjourned sine die. *Kontvanis* v. *O'Brien.* (S.C. Christchurch. July 31, 1957. Stanton J.)

TRANSPORT.

Offences—Cancellation of Licence and Disqualification—"Special reasons" for mitigating Penalty—Disqualification of Driver of Goods-service serving Back-country Public—Evidence not establishing Section of Public likely to be deprived of Service if Driver disqualified—Transport Act 1941, s. 41. Where a driver employed on a back-country goods service run has been convicted upon a charge of driving a motor-car while under the influence of drink to such an extent as to be incapable of having proper control of a vehicle, it is not a "special reason" within the meaning of that term in s. 41 of the Transport Act 1949 (to justify the Court in ordering that he should be exempted from disqualification from driving a motor-vehicle) that he would not be available to continue driving the goods-service vehicle when the evidence fails to establish that the section of the public served by the run is likely to be deprived of the service if he is disqualified from driving. (*Profitt* v. *Police* [1957] N.Z.L.R. 468, distinguished.) *Leef* v. *Police.* (S.C. Auckland. July 26, 1957. Shorland J.)

LORD MORTON OF HENRYTON.

Twelve-Day Visit to New Zealand.

For nearly a fortnight early in August the New Zealand Law Society acted as host to Lord Morton of Henryton, Lord of Appeal in Ordinary and a member of the Judicial Committee of Her Majesty's Privy Council, who, with Lady Morton, spent a brief holiday in the Dominion, visiting Christchurch, Wellington, Hamilton, Rotorua and Auckland.

The visit was notable by reason of the infrequency of such contacts between the profession in New Zealand and the fountain-head of the common law in the Old World. Lord Morton emphasized the importance of the Privy Council as an inter-Commonwealth link, and those who were privileged to meet him could hardly fail to be impressed by a personality, which despite a marked individuality, derived much of its significance from the judicial background against which it has developed. Such visits, like that of the Lord Chancellor, Earl Jowitt, six years ago, serve to remind practitioners, and, in fact, the whole community that the law is a keystone in the arch of national existence. The common law of England, or New Zealand, is not like Melchizedek," without father, without mother, without genealogy, having neither beginning of days nor end of life". Like everything we do, and like everything we say, it is a heritage of the past, and the things of which Lord Morton spoke during his brief period in the country proceed from the basic foundations upon which all the laws and statutes of the Commonwealth rest. The common law with its unsurpassed powers of assimilation, elimination, and expansion has its origins in the past, and its quality is interwoven with the accumulation of a thousand years of statutes and judicial decisions. The renewal of such old accustomed ties must surely be encouraged by visits such as that of Lord Morton.

The visitors arrived by air from Australia on Sunday, August 4, after attending the Commonwealth Legal Convention in Melbourne, and as the guests of the New Zealand Law Society spent twelve days in New Zealand. After an overnight pause in Auckland they flew to Christchurch on the Monday.

Welcomed at Christchurch.

On their arrival in Christchurch Lord and Lady Morton were welcomed at Harewood airport by Mr Justice F. B. Adams, who was accompanied by Mr Justice Haslam and Mrs Haslam, Mr R. A. Young (President of the Canterbury District Law Society) and Mrs Young, Mr E. D. E. Taylor (Vice-President) and Mrs Taylor, and Mr Wood (the society's secretary).

The same afternoon, Lord and Lady Morton were the guests of Canterbury practitioners and their wives at a reception and cocktail party in the Winter Garden. The informal character of the occasion provided the visitors with a generous opportunity of meeting and mingling with their hosts.

Mr Young, expressing the sense of privilege of those present at meeting the visitors, said that Lord and Lady Morton had travelled thousands of miles in the past few weeks and had visited many places of interest. He hoped, however, that they would find in Christchurch a city and a people in special respects akin to their own, and an atmosphere in which they could relax and feel completely at home.

Referring to Lord Morton's distinction as a member of Her Majesty's Privy Council, Mr Young said he was only the second Law Lord of that tribunal to visit the country while in office, the previous visitor being Earl Jowitt, who as Lord Chancellor, came to New Zealand six years ago.

"We desire", said Mr Young, "to pay tribute to you as an eminent jurist whose career has already extended over forty-five years. For nearly twenty years you have fulfilled important judicial duties, for the last ten years as a Lord of Appeal in Ordinary. We acknowledge, too, your long service to your country and the Commonwealth during the First World War when you were awarded the Military Cross. We also know that, despite the responsibilities of high judicial office, you have found time to maintain your interest in legal education, and that you have recently been Chairman of the Royal Commission on Marriage and Divorce.

The legal history of Christchurch, Mr Young continued, went back only a century, but they had endeavoured to follow faithfully the traditions of the great Courts of his country; and his visit had the effect of reminding them of the bonds that linked the Dominion and the United Kingdom, bonds that were, he thought, no more strikingly typified than in their mutual respect for the Rule of Law.

Although they regretted that Lord and Lady Morton could not make their visit coincide with the Dominion Legal Conference in Christchurch earlier in the year, they all considered themselves most fortunate in sharing with their Australian friends the pleasure and honour of their presence in this part of the Commonwealth. He could assure them of the warmth and sincerity of the welcome of the profession in Canterbury.

Lord Morton, in reply, said he and his wife were deeply appreciative of the cordial manner in which they had been received. He thanked them most sincerely for the kind things that had been said of them, and said they were very glad to be in New Zealand. They had had the kindest of welcomes, and they greatly appreciated the kindness of the New Zealand Law Society in inviting them to be its guests while here.

"There are two reasons", he said, "why I have long wanted to come to New Zealand. The first is because, as a member of the Judicial Committee of the Privy Council, hearing appeals from New Zealand, I wanted to get in personal touch with the people who sometimes send these appeals to us. I had also heard from a friend about a year ago that New Zealand members of the Judiciary would like a member of our Committee to visit the Dominion, a fact which much encouraged my desire to be here. The second reason is that I have heard such reports of your lovely New Zealand scenery. I had several good friends from New Zealand in my College at Cambridge who told me much about it. Coming along today in the plane

and looking on those snowy mountains was a great experience.

"It is a good thing that we should come here and exchange views, and I want to say this: if you want to ask anything about the Judicial Committee, how it is constituted, how it carries out its work, or anything you just cannot get out of books, ask me any questions you like; because I found in Australia that they wanted to say: 'How about this, that and the other?' —and I will be only too ready to tell you anything I can. I feel we are a great link between New Zealand and Britain.

"I thank you all very much for having us here. We are looking forward to a very happy time. A most attractive programme has been prepared by the Law Society, and I am sure we are going to enjoy ourselves."

Lord and Lady Morton were also the guests of honour at a dinner party held at the Sign of the Takahe on the Cashmere Hills on the following evening after a day's relaxation which included an interlude at the Canterbury Jockey Club's Grand National meeting at Riccarton. They left Christchurch for Wellington by air on the morning of August 7.

The Wellington Visit.

The visit to Wellington began when the President of the New Zealand Law Society (Mr T. P. Cleary) and the President of the Wellington District Law Society (Mr R. L. A. Cresswell) met Lord and Lady Morton at Paraparaumu aerodrome and conducted them to their hotel in the city.

In the evening a dinner was tendered to them and members of the Judiciary and their wives at Government House by the Chief Justice, Sir Harold Barrowclough, in his capacity as Administrator of the Government and a member of the Judicial Committee. On Thursday, August 8, Lord Morton lunched with the Cabinet at Parliament House and Lady Morton was entertained at lunch by wives of officers of the Law Societies—Mrs T. P. Cleary, Mrs A. B. Buxton, and Mrs R. L. A. Cresswell.

The main function as far as practitioners and their wives were concerned was the reception given at the Skyline in Kelburn on Thursday afternoon. There was a large gathering and again the keynote was informality, with the visitors making every effort to establish as many personal contacts as possible.

Mr Cleary presented the guests to their hosts and extended a warm welcome to them.

"Some short while ago", he said, "we heard that, after the Melbourne Legal Convention Lord and Lady Morton would come on to New Zealand to pay us a short visit. Their principal reason was to enable as many of the legal people in this country to meet them as possible. As it is very rarely that we see members of the Judicial Committee, we felt very honoured and invited them to come here as our guests. Lord and Lady Morton say they enjoy meeting people, and we intend to take full advantage of that.

"Lord Morton is from the summit of the legal and judicial system, where he and his colleagues, with apparent facility, set right those things which perplex and vex us here. They are as familiar with Maori tribal custom as with Malayan usage, and if the need arises will solve even that question so obscure to us—the ownership of the bed of the Wanganui River.

"Lord and Lady Morton are from Scotland and live in England, but in the last few days they have shown themselves really New Zealanders by instinct. I can cite two pieces of evidence against them. First, Lord Morton was at one time a Rugby footballer, and still follows the game. Some names of All Blacks fall as easily from his lips as the doctrines of equity. Secondly, I have strong circumstantial evidence that the day before yesterday they were at Riccarton—I gather to the club's profit rather than to their own.

"We are grateful for Lord Morton's interest in us, living as he does in his distant constituency, and we trust that he and Lady Morton will derive, if not all relaxation, at least enjoyment from their very welcome visit to us."

Keen appreciation of the efforts of the Law Societies in their behalf and the warmth of their welcome in New Zealand was expressed by Lord Morton. He felt, however, that he should correct two things Mr Cleary had said.

"First, Mr Cleary told you that the primary reason for our visit to the Dominion was to provide an opportunity for you to meet us, whereas the primary reason was to give my wife and myself the privilege of meeting you. Secondly, he said that we in the Judicial Committee solve our problems with facility, which I believe is a synonym for ease, and he attributed to us some inward knowledge of Maori law which I assure you we do not possess. Your problems are difficult ones, as are all the problems which come to us, and, indeed, that is the reason for their coming to us. We could not solve them without the help of the advocates who present them, and who are thoroughly informed by practising here or in England. It is a long way to England, and it is not cheap to send New Zealand counsel, but we are glad to see them when they do come, and in my limited experience they present their cases well.

"One thing which encouraged us to come to New Zealand was that when I was at Cambridge I had friends from New Zealand who sang its praises. I have seen only a little, but enough to know that they were truthful men. Yesterday on the plane from Christchurch we saw the snow-covered Kaikouras and some bigger mountains in the distance that I couldn't put a name to. Today we have been for a drive and seen round the harbour and hills. We arrived back this morning full of enthusiasm for the city and its surroundings.

"A lot of you", he said, "have shown deep interest in the Judicial Committee and have asked questions about it, some of which I shall answer this afternoon. First, 'What is a Lord of Appeal in Ordinary—are there others who are not ordinary?' The answer is that there are nine of us who are appointed Lords of Appeal by statute to do two jobs—to sit on the Judicial Committee and hear appeals from the Dominions and other parts of the Commonwealth; and to sit as peers in the House of Lords to hear appeals from England, Scotland and Northern Ireland. There are others, for instance, the ex-Lord Chancellor, Earl Jowett, who are Lords of Appeal, but they do not hear appeals as their daily work as we do.

"Secondly, 'Why are you Lord Morton of Henryton and not just Lord Morton. Is it swank?'. The answer is that no two peers in the House of Lords may have the same name, and in 1947, when I was appointed, there was already a Lord Morton there.

Council, he had no robes at all.

Among those present at the function were the Mayor of Hamilton (Mr R. Braithwaite), and Mrs Braithwaite, the president of the B.M.A. (Dr R. North) and Messrs S. L. Patterson C.B.E., L. M. Inglis S.M., and Stewart Hardy S.M. This was the only formal function provided in Hamilton.

The next day the immediate past president of the Hamilton Society (Mr F. C. Henry), drove the distinguished guests to Rotorua, via Tokoroa and Taupo. At Tokoroa, Lord and Lady Morton were shown through the paper and pulp mill of New Zealand Forest Products Limited. Although the sawmill was not working, the paper and pulp mills were in action, and Lord and Lady Morton were able to see something of the extent of the development of this industry in New Zealand.

In Rotorua, Lord and Lady Morton were entertained at dinner by local practitioners, but what was more personally interesting to the visitors was a carefully planned tour of the thermal attractions of the town, coupled with trips to district lakes, and a brief pause at Moose Lodge on Lake Rotoiti, where Her Majesty the Queen and Prince Philip, Duke of Edinburgh, took a hurried recess from the ardours of a Dominion tour four years ago. An additional diversion provided for the visitors in Rotorua was a Maori Concert at which the audience were participants almost equally with the performers. The Rotorua interlude was personal in the extreme, with the emphasis on the pleasure and instruction of the guests, rather than on the formal legal implications of the visit. Rotorua is never better canvassed or demonstrated than by those to whom it has, by long residence, become a commonplace. These were the guides and mentors of Lord and Lady Morton when they devoted a long weekend to an area of New Zealand which is remarkable for the variety of its interests. When they left the Rotorua district Lord Morton, on behalf of his wife and himself paid a warm tribute to the hospitality of district members of the legal profession and to the New Zealand Law Society, all of whom, he realized, had co-operated in the presentation of a remarkable programme of entertainment.

Auckland Hospitality.

Lord and Lady Morton returned to Auckland on August 13 to renew the brief acquaintance they had with the city when they arrived by air from Sydney a fortnight before. On that occasion they were welcomed to the Dominion by the Hon. Mr Justice Finlay and the President of the Auckland District Law Society. (Mr B. C. Haggitt) and stayed overnight in Auckland before setting out on the following day on a through-flight to Christchurch.

The visitors had been driven by the vice-president of the Auckland Society (Mr D. L. Bone) from Rotorua to Auckland, via Whareroa, where they inspected the New Zealand Dairy Company's dried milk powder factory, and spent the Wednesday out-of-doors in a perambulation of the district.

In the evening a reception was tendered to Lord and Lady Morton by the Law Society at the Trans-Tasman Hotel where a large and representative gathering of practitioners and their wives acted as hosts. Again there was a studied avoidance of undue formality with the result that the visitors were able to indulge to the full their expressed desire to meet people. At the same time the nature of the proceedings had the effect of commending to those present in the most effective fashion the personality and cordiality of the guests.

Mr Haggitt, in a brief speech, referred to Lord Morton's career at the Bar, and traversed his upward progress as a Judge of the Chancery Division of the High Court, a Lord Justice of Appeal, and, in the last decade, as a Lord of Appeal in Ordinary. As a member of the Judicial Committee, Mr Haggitt emphasized, Lord Morton was, in effect one of their own Judges, and, as such, should be no stranger among them.

"When the Commonwealth and Empire Law Conference was held in London in 1955", said Mr Haggitt, "Mr Justice Gresson led the New Zealand representation and expressed the hope, in replying for New Zealand, that the Judicial Committee would become peripatetic, and would from time to time sit in New Zealand and in the other Commonwealth and Colonial countries over which it has judicial jurisdiction. We in New Zealand are promised that as from the beginning of next year we are to have a separate Court of Appeal, and it is the hope of the profession that the Court will sit in the main centres, and not remain permanently embedded in Wellington. So may I ask Lord Morton this: 'Can it be that the Board of the Judicial Committee, having heard of the possibility of New Zealand having a peripatetic Court of Appeal, has decided not to be outdone and has asked Lord Morton to spy out the land?'."

Lord Morton, replying to the remarks of the President, dealt in some detail with the functions of the Judicial Committee and the constitution of the House of Lords in relation to the Lords of Appeal. He ventured the opinion that his colleagues on the Board of the Judicial Committee were as yet scarcely aware of the establishment of a separate Court of Appeal in New Zealand, or of its probable wandering policy, but he said that the notion of a peripatetic Judicial Committee appealed to him. In fact, he undertook to discuss the idea with his colleagues on his return to London.

Thursday was devoted to purely social diversions. Lord Morton, after a scenic drive in the morning was the guest of the Law Society at luncheon at the Northern Club. He visited the Supreme Court and Library and met the Auckland Judges in the afternoon, and in the evening was rejoined by Lady Morton for dinner at the Auckland Club as guests of the Judges. Lady Morton accompanied Mrs Haggitt and the wife of she vice-president of the Auckland District Law Society (Mrs D. L. Bone) to lunch at the Travel Club.

The New Zealand visit came to a close when Lord and Lady Morton embarked on the Oronsay for Sydney on Friday, August 16.

During his visit Lord Morton was invited by the New Zealand Broadcasting Service to speak over the national network and the text of his talk which was given on August 18 is reproduced on the following page. He dealt in detail with the functions and procedure of the Judicial Committee of the Privy Council with special reference to the hearing of New Zealand appeals.

THE JUDICIAL COMMITTEE AT WORK.

By LORD MORTON OF HENRYTON *.

The Judicial Committee of Her Majesty's Privy Council is, as many of you know well, the body which hears appeals from the Courts of New Zealand, Australia, and many other parts of the Commonwealth, and advises Her Majesty whether or not the appeal should be allowed. I shall try to give you a picture of the Judicial Committee today, how it works, and how its members are selected.

There is one fact which should never be forgotten. The Judicial Committee is not an English Court considering, and sometimes overruling, decisions of the New Zealand Courts. It consists of all members of the Privy Council who have held certain high judicial offices, one of which is, of course, the office of Chief Justice of New Zealand. It is true that, because the Judicial Committee sits in London, the five or seven men who hear the appeals from New Zealand are usually English or Scottish Lords of Appeal, but the holders of high judicial offices in the Dominions are always welcomed among us, and we in England regard this right of appeal to Her Majesty in Council as a most valuable link between New Zealand and the Old Country.

In 1914, your distinguished Judge, Sir Joshua Williams, came to London to sit regularly as a member of the Judicial Committee. It was intended that he should live permanently in London to attend to those duties. Unfortunately, he died after twelve months' valuable service on the Judicial Committee. From time to time, Chief Justices of the Dominions have sat as members of the Judicial Committee, and I am sure we should welcome the assistance of Sir Harold Barrowclough, the present Chief Justice of New Zealand, if he should ever find it possible to join in our deliberations.

The judgment of the Committee takes the form of advice to Her Majesty. I think anyone who visits the Judicial Committee for the first time is impressed with the simplicity of the proceedings compared with the importance of the issues at stake. At least five members of the Judicial Committee sit to hear each appeal from a Dominion, and sometimes seven of us sit to hear appeals on Constitutional questions. We sit, in ordinary morning dress, behind a curved table in a large room at No. 9 Downing Street. The table is curved so that we may all be the same distance from counsel.

Occasionally a few members of the public come in. They are free to come and go at any time and, as there are no witnesses and there is no excitement, they generally do not stay very long.

I have no time to talk about the wide variety of appeals which we hear from many parts of the world, although I can assure you that the problems which we have to solve are always difficult and sometimes very curious.

The five or seven members of the Judicial Committee who sit to hear an appeal are always referred to as "the Board" and I am often a member of the Board, as I am one of the Lords of Appeal in Ordinary.

* A broadcast address, August 18, 1957, from all New Zealand National Stations.

There are nine Lords of Appeal in Ordinary and, of the present nine, seven had their legal training in England and two in Scotland. The nine of us divide our time between sitting in the House of Lords, hearing appeals from England, Scotland, Wales, and Northern Ireland, and sitting in the Judicial Committee. Lords of Appeal who practised at the English Bar have usually, though not invariably, gone through the following stages: first, appointment as Queen's Counsel; secondly, selection to be a Judge of the High Court; thirdly, promotion to be a member of the Court of Appeal; and lastly, promotion from the Court of Appeal to the House of Lords. I am glad to say that at the present time no consideration of politics enters into the selection at any of those stages, nor does selection at any stage go by seniority. I mention these facts to show that we ought to know something about legal principles before we reach the Judicial Committee.

Now, how does the Board work on a New Zealand appeal? I think I should tell you something about that and I can do so without betraying any confidences. We get the printed case of the appellant and the respondent before the hearing and we can also, if we wish, get a full copy of the judgments of the New Zealand Courts before the hearing. Everyone of us can decide for himself how much he will read before counsel opens the case. My own plan, for what it is worth, is to read only the printed cases at that stage, so that I may know what the appeal is about. For instance, is it a constitutional question, a tax question, or some other kind of question? I do not read the judgments at that stage because I think it is fair that the appellant, who has, after all, lost in the Court below, should have a clear opportunity to make his opening speech to minds free from preconceived ideas. Counsel for the appellant is always faced with the task of reading and combating the New Zealand judgments against him, and I think he ought to be allowed to approach that task in his own way. Later, each one of us will return many times to the cases and to the judgments, and re-read them in the light of the argument of counsel on both sides.

I shall say nothing about the hearing, for it is very much like a hearing in any Appellate Court; but what happens when the hearing is over? That is a thing you cannot find out from any book. In your Court of Appeal, and in the House of Lords, each member of the Court writes an opinion of his own. The majority rules the day, but the dissenting opinions are there for anyone to read. In the Judicial Committee, one judgment goes out as a judgment of the Board. Now how is that achieved?

Of course, as you can well imagine, we have many discussions on the case each day when we adjourn at four o'clock. When all the arguments are ended—sometimes after a hearing lasting some days—and the direction, "counsel and parties will withdraw", is given, a very full discussion takes place and we all state our provisional views. I do not think that it is a breach of confidence to say that the junior member of the Board is invited to state his views first, in order to get rid of any possibility that he may be influenced

too much by opinions expressed earlier by the senior members. The discussion may be prolonged. If it turns out that we are unanimous, we go on to decide who shall draft the judgment and what form it shall take. If, however, for the moment, we are three to two or four to one, further discussions follow, either then or at a later stage, at which our various views are fully discussed. It may be that unanimity is thus achieved. If it is not, at least the points of divergence emerge clearly. If we are still divided in opinion, a member of the majority drafts the judgment, but our task is by no means finished at that stage, as you can well appreciate. When the draft judgment has been prepared it is fully considered and freely criticized by the other four members of the Board. That accounts, I think, for what may sometimes seem a long delay before the judgment is finally issued. We are most anxious to ensure, if possible, that no words are used which may be misunderstood. The responsibility is great, as our decision is final and binding, but I feel that if five or seven trained minds all concentrate on trying to produce a judgment that is right, they should have a reasonable chance of succeeding.

THE NEW COMPANIES ACT 1955.

Receivers and Managers.

By E. C. Adams, I.S.O., LL.M.

Appointment of a Receiver or of a Receiver and Manager.

Part VII of the Companies Act 1955 deals with receivers, and with receivers and managers. It is the usual practice in New Zealand in debentures and in debenture trust deeds to make express provision for the appointment of a receiver or receiver and manager in specified events. For example, see the precedents given in *Morison's Company Law in New Zealand*, 2nd ed., 922, 931. It is observed in *6 Halsbury's Laws of England*, 3rd ed., 501, that such a power given in debentures of a series is a fiduciary power, and if an appointment is made which is not for the benefit of the debenture-holders, but with a view to the benefit of the company or third persons, the Court will interfere and appoint its own receiver.

A receiver or receiver and manager will be appointed by the Court where the principal or interest is in arrear; or where the security is in jeopardy, even if no event has happened which either under the debentures or the trust deed makes the security enforceable; or where the company has sold the whole, or substantially the whole, of its undertaking and assets otherwise than in the ordinary course of business, and has ceased to be a going concern; or on an order being made or a resolution being passed for the winding up of the company. The Court will also in some cases appoint a receiver in place of a receiver appointed by debenture-holders under a power contained in the debentures.

Disqualifications: Appointment as Receiver and Acting as Receiver or Manager.

Following s. 282 of the Companies Act 1933, s. 342 of the Companies Act 1955 provides that a body corporate shall not be qualified for appointment as receiver of the property of a company, and any body corporate which acts as such a receiver shall be liable to a fine not exceeding £100. Subsection (2) provides that nothing in the section shall disqualify a body corporate from acting as receiver as aforesaid, if acting under an appointment made before April 1, 1934. There is no provision corresponding to subs. (2) in the Companies Act 1948 (U.K.).

The Companies Act 1955, in s. 343 (following s. 367 of the Companies Act 1948 (U.K.)) introduces a new disqualification—that of an undischarged bankrupt.

An undischarged bankrupt is not qualified for appointment as receiver or manager of the property of a company and if he acts as such he is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £500 or both, unless his appointment and the bankruptcy were both before January 1, 1957, or he was appointed by the Court.

Non-Liability to Misfeasance Proceedings of Receiver or Receiver and Manager.

In *In re Johnson & Co. (Builders) Ltd.* [1955] Ch. 634; [1955] 2 All E.R. 775, an unsuccessful attempt was made to bring within the ambit of s. 333 of the Companies Act 1948 (U.K.) (which corresponds to s. 321 of the Companies Act 1955) a person who had been appointed receiver and manager of a company by a debenture-holder. It will be recollected that, in s. 2 of our Act, the term "officer", in relation to a body corporate, is defined as including a director, *manager*, or secretary. Section 321 of the Companies Act 1955 reads as follows:

> (1) If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, *manager*, or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Assignee, or of the liquidator or of any creditor or contributory, examine into the conduct of the promoter, director, *manager*, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.
>
> (2) The provisions of this section shall have effect notwithstanding that the offence is one for which the offender may be criminally liable.
>
> (3) Where an order for payment of money is made under this section, the order shall be deemed to be a final judgment within the meaning of paragraph (*f*) of section twenty-six of the Bankruptcy Act 1908.

(Note the word which I have italicized, "manager".)

An ingenious attempt was made to link this word with the word "manager" in s. 2, the definition section, so as to make a receiver and manager appointed

by a debenture-holder liable under the United Kingdom section corresponding to our s. 321. But the English Court of Appeal, going thoroughly into the history of the relevant section, would have none of this. The burden of complaint against the receiver and manager was that he had not carried out his duty: to the company and its contributors, to preserve the goodwill and business of the company. But the case shows that a receiver and manager has no such duties to the company, although in practice he is usually expressed in the debenture as being the agent of the company. As pointed out by Jenkins L.J., the duties of a receiver and manager for debenture-holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business at the expense of the debenture-holders. Therefore, he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business might be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee; and he therefore commits no breach of duty to the company by a *bona fide* sale, even though he might have obtained a higher price and even though from the point of view of the company, as distinct from the debenture-holders, the terms might be regarded as disadvantageous. And, as pointed out by Parker L.J., any work of management done by a receiver is not done as manager of the company but as manager of the whole or part of the property of the company, and his powers of management are *ancillary* to his position as receiver.

New Provisions as to Receivers and Managers Appointed Out of Court.

> Section 345 is also new. It makes a receiver or manager appointed under an instrument personally liable (except as the contract provides) and entitled to indemnity as if he had been appointed by the Court, and also enables him to apply to the Court for directions.

This section is retrospective, inasmuch as it applies whether the receiver or manager was appointed before or after the commencement of the 1955 Act, except to this extent: it does not make a receiver or manager personally liable under a contract entered into by him before the first day of January, 1957.

Power of Court to Fix Remuneration on Application of Liquidator.

Section 347 of the Companies Act 1955, following the United Kingdom Act of 1948, contains new provisions enabling the Court to fix or revise the receiver's or manager's remuneration for past periods. Subsection (4) expressly provides that the section shall apply whether the receiver or manager was appointed before or after the commencement of the Act, and to periods before, as well as to periods after, the commencement of the Act.

Provisions as to Information Where Receiver or Manager Appointed.

Section 348 is new to New Zealand, and follows the United Kingdom Act. It makes provision for information, particularly for the shareholders and creditors as well as the debenture-holders, where a receiver or manager of the whole or substantially the whole of a company's property is appointed on behalf of the holders of debentures secured by a floating charge. In subs. (3) (*b*), the Registrar is given the functions which are conferred on the Board of Trade by the United Kingdom Act.

It has already been held in England that subs. (2) of this section (which directs that a receiver for debenture-holders shall render abstracts of his receipts and payments), is not applicable to a receiver appointed before the commencement of the Act: *In re Welsh Anthracite Collieries Ltd., Industrial and General Trust Ltd.* v. *The Company and Others* [1949] 2 All E.R. 948; 65 T.L.R. 755. There are very useful observations on the general principle that an Act is not to be presumed to be retrospective. But the conclusion to which the Court came, put quite briefly, was that there was nothing in the section which affected the position or increased the duties of a receiver who was appointed before the Act came into operation; and, in this view, the Court was somewhat fortified by the provisions of subs. (6) which reads as follows:

> (6) Nothing in subsection two of this section shall be taken to prejudice the duty of the receiver to render proper accounts of his receipts and payments to the persons to whom, and at the times at which, he may be required to do so apart from that subsection.

The provisions of subs. (8) do not appear in the United Kingdom Act. They are rendered necessary by the provisions of s. 92 of the Property Law Act 1952, which appear to have no counterpart in the United Kingdom. Subsection (8) is, therefore, of great interest and importance to the New Zealand conveyancer. Subsection (8) reads as follows:

> (8) Where any instrument contains power to appoint a receiver or manager of the property of a company on behalf of debenture-holders, nothing in section ninety-two of the Property Law Act 1952 shall be construed to require any notice to be given before any money secured by the debentures becomes payable, or before a receiver or manager is appointed and enters into possession of the property of the company.

Section 92 of the Property Law Act 1952 (formerly s. 3 of the Property Law Amendment Act 1939) contains provisions restricting a mortgagee of *land* from exercising certain of his rights, until he has given the mortgagor at least one month's notice of his intention to exercise them. In s. 2 of the Property Law Act 1952, the term "land" is defined as including all estates and interests, whether freehold or chattel, in real property. As "real property" is not defined in the Property Law Act 1952, we are thrown back to its meaning at common law. There appears to be little doubt but that a debenture in the normal form executed by a company which owns any estate or interest in land is affected by s. 92 of the Property Law Act 1952. Take for example the charging clause in the precedent given in *Morison's Company Law in New Zealand*, 3rd ed., 921:

> The company as beneficial owner hereby charges with such payment its undertaking goodwill of all businesses and all its property and assets whatsoever and wheresoever and uncalled capital (including reserve capital) both present and future.

The mere fact that an instrument of charge affects other property as well as estates or interests in realty, would not bring it outside the ambit of s. 92 of the Property Law Act 1952. If any authority is required for this opinion, I think that it is supplied by the stamp-duty case, *Zealandia Soap and Candle Co. Ltd.* v. *Minister of Stamp Duties* [1922] N.Z.L.R. 1117; [1922] G.L.R. 505. As Salmond J. said (Reed J. concurring):

> An agreement for the sale of the land does not cease to be an agreement for the sale of land because it includes other property sold at the same time and for the same consideration.

Similarly, it seems to me, a mortgage including an estate or interest in land does not cease to be a mortgage of land because it also charges other property.

It appears that the only reported decision on s. 92 of the Property Law Act 1952, is *O'Brien* v. *Skidmore* [1951] N.Z.L.R. 884; [1951] G.L.R. 447. In *Garrow's Real Property in New Zealand*, 4th ed., 499 (*rr*), I express the opinion that that case was wrongly decided; and I refer to an article by the late Mr H. J. von Haast in (1951) 27 New Zealand Law Journal 268. In the same volume of the Law Journal, however, at p. 378, there will be found an article by Mr A. L. Tompkins expressing a contrary view. On more mature consideration, I must say thas I now prefer the careful analysis of the section by Mr Tompkins. In practice when a mortgagee of land is exercising his power of sale conferred by a mortgage of land, either the Registrar of the Supreme Court or the District Land Registrar will see to it that the notice required by s. 92 of the Property Law Act 1952 has been duly given to the mortgagor. But, as s. 348 (8) of the Companies Act 1955 does not exempt a debenture-holder from sending a month's notice to the mortgagor before exercising his power of sale, the exemption from s. 92 of the Property Law Act 1952 is only a partial one. No notice is required to be given:

(1) before any money secured by the debentures becomes payable; or
(2) before a receiver or manager is appointed and enters into possession of the property of the company.

The reason for this partial dispensation from the provisions of s. 92 is that, when a company gets financially shaky, the immediate exercise of these two powers by a receiver often becomes imperative, if the security is to be adequately protected.

Special Provisions as to Statements Submitted to Receiver.

Section 349 is also new. It provides that the statement of the affairs of a company required by s. 348 (as explained above) to be submitted to the receiver (or his successor) shall show as at the date of the receiver's appointment the particulars of the company's assets, debts, and liabilities; the names, addresses, and descriptions of its creditors; the securities held by them respectively; the dates when the securities were respectively given; and such further or other information as may be prescribed. It is similar to s. 231, as to the statement to be submitted to the Official Assignee on a winding up by the Court. In subs. (4) the Registrar is given the functions which are conferred on the Board of Trade by the United Kingdom section.

PAGES FROM THE PAST.

II. Manslaughter by Proclamation.

History is not unduly communicative about George Augustus Constantine, the Marquis of Normanby, whose commission as Governor and Commander-in-Chief of the Colony of New Zealand and its Dependencies was published at his command in Wellington under the Great Seal of the United Kingdom on January 8, 1875, but his period of office "during Our Will and Pleasure" under Letters Patent in the thirty-seventh year of the reign of "Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen" was not without its moments of high excitement and juridical controversy.

If for nothing else he was responsible for Reg. 63 of what were termed "Regulations for the Public Prisons of the Colony under the Prisons Act 1873", which read:

> "Any prisoner attempting to escape will render himself liable to be shot by any officer of the gaol, after being called upon to stand."

The Regulations were proclaimed in March, 1875, and, before the year was a brief six months older, Cyrus Haley lay dead from a gunshot wound inflicted by Warder James Miller, while he was in flight from Her Majesty's Gaol in Dunedin, an establishment which had gained some notoriety in the country by reason of the fact that its annual manifesto of "Ways and Means" had so consistently showed a profit that Provincial Treasurers were wont to flourish it before the gaze of angry Oppositions as a perfect example of mathematical, figure-manipulating, and calculating policy.

The Marquis Governor was a Knight Commander of the Most Distinguished Order of St. Michael and St. George, and had determined that his appointment should surpass the unspectacular eighteen-months' incumbency of his predecessor, "the terse, most lynx-eyed of fault-finding Governors", Sir James Fergusson, Bart., father of the urbane, willing of ear and open of heart Governor-General, Sir Charles Fergusson, Bart. (1930-1935). The "Most Honourable George Augustus Constantine" was not only Marquis of Normanby but also the Earl of Mulgrave, Baron Mulgrave of Mulgrave of the County of York, and also of New Ross in the County of Wexford in the Peerage of Ireland. And it was in this exalted capacity, and also as a Member of Her Majesty's Most Honourable Privy Council, that he created a capital offence, unknown to English law, which dispensed with the formalities of trial and sentence, and constituted the subordinate officers of a gaol at once the judges and the executioners of offenders.

The significant feature of the Regulation, which was dubbed at the time "Manslaughter by Proclamation", was that it proceeded neither from English law, nor from the Legislature of the Colony. It was promulgated, not in the shape of an Act of Parliament, but in the form of a Proclamation by one who, with the ink of the august phraseology of his Commission barely dry, was consumed by a burning ambition to reform the entire penal system of the Colony.

Even in those far-off days, there were few so bold

(*Concluded on p. 276.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Wanganui Recalled.—When, at the reception in Wellington to Lord Morton of Henryton and Lady Morton, the President of the New Zealand Law Society, Mr. T. P. Cleary, mentioned the rights to the bed of the Wanganui River, it was by no means the first time Lord Morton had heard the name Wanganui. Twenty years earlier when *In re Macleay, Macleay* v. *Treadwell* [1937] N.Z.L.R. 230 was before the Privy Council, one Fergus D. Morton K.C., led for the appellant. The case concerned the construction to be put upon a will involving a Wanganui farming property, and the Hon. S. O. Henn Collins K.C., who led for the respondents, had with him George W. Currie, of Wanganui, and Joseph Stanton (now Mr. Justice Stanton) of the New Zealand Bar. The order of the New Zealand Court of Appeal on the question of an heir-at-law was discharged and judgment given for the appellant.

Lord Altrincham's Outburst.—The suggestion by Lord Altrincham in his recent attack upon the Queen that her training and upbringing "would not have been good enough for Elizabeth I" ignores the fact that Elizabeth I would have been difficult to fit into the constitutional arrangement of the present day. The monarchy can only persist as a visible symbol of unity in the British Commonwealth if its head steers a course between austerity and extravagance, artistic culture and the more commonplace pursuits of the great majority of the public. It seems reasonable to expect if that unity is to be maintained the Queen is not only prevented by custom and tradition from answering criticism, but is kept away altogether from controversy likely to arise from it. Few would argue against the proposition that both the Queen and Duke of Edinburgh have made an outstanding success of their respective roles and that the Monarchy has rarely been more popular than it is at the moment. It is by no means easy to give the impression at one and the same time of being unique as well as ordinary. Other sovereigns, at all events, have not managed to do so. For Lord Altrincham to declare that he would like the Queen to be "doing things on her own initiative" is just as silly a statement, at least, constitutionally, as his declaration that she is a "priggish school-girl" and her speeches are "a pain in the neck." Certainly, as a correspondent in *Time and Tide* points out, "she cannot match the noble Lord in the elegancies of diction to which he is prone."

The American Heritage. "When Peter the Great of Russia visited Westminster Hall in 1697, he was astonished to learn that all the busy men in wigs and gowns hanging about the Hall were lawyers. 'Lawyers!' he exclaimed, 'Why! I have but two in the whole Kingdom, and I believe that I shall hang one of them the moment I get home.'" This comment was part of the welcome address by the Lord Chancellor to the 3,000 delegates from the American Bar Association who assembled in July in the Hall for a formal presentation attended by the Law Lords and the Appeal and High Court Judges. But even more remarkable was the assemblage of a similar number at Runnymede to commemorate with a memorial stone the signing there of the Magna Carta, seven hundred and forty-two years ago. This was not, like the American Constitution, a declaration of rights in general terms, but a category of definite remedies, and the expression of what has since remained one of the most deeply-imbedded principles of the law: *Ubi jus, ibi remedium.* What the common law of England has meant to England was neatly put by the Hon. Earl Warren, Chief Justice of the United States, in his reply to Lord Kilmuir. "Of all the cargo carried by the first Mayflower," he said, "the most enduring was the cargo of the common law carried to the new land."

A Useful Test.—One of the most interesting of the sessions of the American Bar Association was that on trial by jury in England and in the United States, held in the Old Hall, Lincoln's Inn, London. The principal speakers were Joseph A. Ball, President of the State Bar of California and the Hon. Mr. Justice Peck, of the New York State Appellate Court. Both were in agreement as to the retention of juries in criminal cases, but in respect of civil cases there was a sharp divergence of viewpoint. The former in a well-reasoned paper argued against any invasion of the province of the jury which he contended was "actuarially sound", its verdict being predictable only on a survey of the case on its merits. More people, he said, were taking an active part in the affairs of justice than ever before in the history of the United States, and litigants felt a confidence in the decision of the twelve judges whom they approved before selection. Mr. Justice Peck, on the other hand, favoured the trend in England where in only about 3 per cent. of civil cases were juries used. His inference was that these hearings took two and a half times as long as those tried by Judges alone, involved wastage of productive time, and brought about in the long run, much the same results as were obtained by Judge-alone cases. A New Zealand counsel who met the much-publicized Thomas E. Dewey at a garden party subsequent to the session asked him which point of view he considered the better. "Well, I guess Mr. Justice Peck would be right," he replied. "You see, I appointed him to his job on the Bench."

From My Notebook.—"To find twenty partners and fifty assistant attorneys within the walls of one office is in no way unusual, and firms with one hundred-and-twenty attorneys—not counting the contingent staff of probably treble that number—are not unknown."

"Gowns are not even requisite for all judges: no judicial wigs have been seen anywhere in the United States, except when *The Winslow Boy* or *Witness for the Prosecution* appeared on Broadway, and no judge is ever unable to "see" counsel."

"In no case is the Supreme Court (a body of nine men—the Chief Justice and eight associates—which sits with a forum of six) bound by its previous decisions, and if it desires at any time to put a new interpretation on a statute it may do so without let or hindrance. Further illustration of the importance of the Court is found in the Constitution which provides in s .3 of Art. I that, if a President is impeached, the Chief Justice has to preside over the Senate to hear the case. The Court is supreme indeed."—"The American Scene" (*Law Times*).

PAGES FROM THE PAST.

(*Concluded from p. 274.*)

or callous as to deny the need for a complete overhaul of the existing methods of suppressing and punishing crime. Eight years before, Mr Justice Richmond, in his last charge to the Grand Jury of Otago, had said: "Responsibility for the crime spread by our own gaols . . . will lie at our own door as a community. As a community, do I say? As individuals we will be responsible, for it will be no excuse to any one of us, that 'we have followed a multitude to do evil'."

There was no constitutional precedent for a Governor of New Zealand to assume, by the sweep of a pen, the power of life and death over the prison population of the country. Nor does such a right exist today. No doubt there are many throughout the country at the present time, old boys of Wellington College as late as the early days of the West School, who will recall how easy it was in 3A and 3B for the attention to stray from the lingual tergiversations of a Heine, the geometrical complexities of a Gifford or the down-to-earth, no-nonsense English of a Firth, and to gaze across the valley at the armed guard doing sentry-go on the ramparts of Mount Cook Gaol. Would he shoot or wouldn't he? The possibility was vividly anticipated between interludes of Caesar's Gallic Wars, the Pons Asinorum, and Goldsmith's "Deserted Village".

The truth of the matter is that the prisoners of Her Majesty the Queen may not be stripped of rights not yet forfeited to the law, nor can any official, high or low, create the sort of new Court of summary jurisdiction in Her Majesty's gaols which was, in effect, brought into being by the Marquis of Normanby's Reg. 63.

The much-discussed Regulations were based broadly on the schedule to the English Prisons Act 1865, with very little alteration. The principal exception was the infamous Reg. 63. The careless wording of the Regulation alone emphasized its invalidity, since felons and over-night drunks were equally liable to be shot, and if "any officer of the gaol" was authorized to shoot, then it was competent for the Chaplain, the surgeon, or the cook to use a rifle as well as a warder.

This "manslaughter by proclamation" was hardly less than martial law in a modified shape, and certainly represented an exercise of authority without parallel in Colonial administration then or since.

The history of English law on the subject is interesting and informative. If the warden of a gaol in England were to shoot a prisoner while in the act of running away, provided the fugitive had not committed any assault on his gaoler, he would immediately face a charge of manslaughter. One of the leading authorities on English criminal law in the Marquis of Normanby's day, *4 Bacon's Abridgment*, 7th edn. (1832) 34; has a chapter headed "Of the Duty and Power of Gaolers and Keepers of Prisons, and Herein, What Acts They May Lawfully Do and for what Abuses Punishable". Here, the following propositions are laid down:

> "If a criminal endeavouring to break the gaol assault his gaoler, he may be lawfully killed in the affray. But, if a prisoner get out of gaol, and the gaoler in pursuit of him kills him, he is guilty of an escape, though he never lost sight of him, and could not otherwise take him; not only because the King loses the benefit he might otherwise have had from the attainder of the prisoner, by the forfeiture of his goods, etc., but also because the public justice is not so well satisfied by killing him in such an extrajudicial manner."

Russell on Crimes and Misdemeanours" 4th edn. (1815) 860, said:

> "Gaolers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore, an assault upon a gaoler which would warrant him, apart from personal danger, in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended which he could not otherwise prevent."

4 Blackstone's Commentaries 133, and *Burn's Justice of the Peace* (1869) 876 follow these earlier authorities, and both were available to His Excellency or his advisers. They all emphasize, after their own fashion, that according to English law the shooting of a prisoner, in the absence of any assault on the gaoler, is an act of unjustifiable homicide, or, in the words of Sir Michael Foster (*Crown Cases*, 322) an "enormous violation of the trust the law reposeth in its ministers of justice".

If this was the law in England, it must also have been the law in New Zealand. The only legislation on the subject in New Zealand at that time was the Prisons Act 1873, which, so far from repealing the English law on the killing of prisoners, employed considerable resolution in preserving the English statute untouched. Sections 32-34 of the New Zealand Act provided that a prisoner sentenced to penal servitude, and escaping from custody, "being thereof lawfully convicted", rendered himself liable to certain punishment, and, in specific cases, to solitary confinement. His Excellency ordained that, as in the case of Cyrus Haley, prison-breaking could be a capital offence.

But there was worse to come at the inquest into the death of Cyrus Haley. The Coroner was informed by Warder James Miller that prisoners could be shot for lesser offences than attempted escape. "The Regulations", he said, "provide that we must keep prisoners thirty yards from us, and on no account must we allow them to come nearer. Had Haley attempted to rush me, I should have fired at him at thirty, or at the very least, at twenty-five yards". Haley, however, rushed nobody. He simply made his bid for liberty.

What Warder Miller obviously did not appreciate was that the Regulations he quoted would not have protected him from the consequences of using a rifle in such circumstances. No sentry in the Army would venture to use his rifle against persons approaching him, unless he had good reason to fear an assault, and had no alternative but to fire. On this point, *Forsyth's Cases and Opinions*, 216, said:

> "Under what circumstances is a sentry justified in firing upon persons approaching him? If he fire wantonly and unnecessarily, and thereby takes away life, he is guilty of manslaughter, if not murder."

The Marquis of Normanby, however, considered that a warder should shoot a prisoner dead the moment he came within thirty yards of him, assault or no assault, and insisted that fleeing prisoners must be shot if they refused to stop when called upon. The bare statement of such propositions so demonstrate their monstrous illegality that His Excellency could not reasonably be surprised at the furore they created.

R. J.