[TUESDAY, SEPTEMBER 1, 1925

Butterworth's Fortnightly Notes

VOL. I. No. 14. WELLINGTON, N.Z.: SEPTEMBER 1, 1925.

ANNUAL SUBSCRIPTION £2/17/6. IN ADVANCE £2/7/6.] [Registered as a Newspaper at the General Post Office.

CONTENTS.

Butterworth's Fortnightly Notes.

"Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in Heaven and Earth do her homage, the very least as feeling her care and the greatest as not exempted from her power."

—Richard Hooker.

The Editor will be pleased to receive manuscripts of Articles for consideration and any suggestions with regard to the development of the Paper.

Address all communications:— The Editor, Butterworth's Fortnightly Notes, 49-51 Ballance Street, Wellington.

TUESDAY, SEPTEMBER 1, 1925.

Our American Brethren.

As forty American warships lay within the harbour at Wellington we received greetings from our Missouri exchange, the Central Law Journal, wishing us success in our undertaking. The Great War where our friends from the United States fought side by side with our troops reminded us that the two nations came of a common stock and their ambitions lay along the same lines. The friendships there were furthered at the Peace Conference and with the better knowledge of each other has come the understanding that the two nations must inevitably lead in matters international.

The visit of the Fleet, conceived for no matter what purpose has resulted in our people getting to know officers and men of the American Navy and the enthusiasm which their visit has evoked is founded on the fact that there are no real differences in the outlook of these sailors and of ourselves.

Our Exchange in its useful columns in epitomising the most important cases reveals the fact that again there is little difference in the principles involved in the trial of actions in the two countries. The Common Law of England is the basis of the law of both countries and although American cases are not cited with much approval in our Courts there is no doubt that many of the decisions reported in the Central Law Journal would on similar facts be decided the same way here and for the same reasons.

We trust that as time goes on the two great nations will advance together for the improvement of the world and with regard to the law in particular that the difficulties that now exist to prevent our accepting the American decisions as authoritative will be removed. The visit of the Bar of America to the Bar in England which seems to be becoming an annual event has already resulted in a great improvement in the relations between the two bodies. The reason is largely because each now knows the other. Only with American lawyers could our Bar really fraternise because it would be impossible for us to understand the ways and ideas of other great nations. For us, with America there is so much in common with others there is so much difference. We trust that the great friendship between the British Empire and the United States of America now so well begun will continue to improve for the betterment of the whole World.

To the gallant sailors who have just left us, Bon Voyage.

SUPREME COURT.

Reed, J. July 9, 13, 1925.
Auckland.

GENERAL TRUST BOARD v. HEWITT.

Hamilton Parsonage Site Act 1904—For the general purposes of the Church at Hamilton—Meaning of—Statute—Interpretation.

The Hamilton Parsonage Site Act 1904 authorises the sale of certain trust property and provides for the trusts upon which the proceeds shall be held. Shortly put the main object of the trust was to purchase land in Hamilton, and erect a Parsonage thereon. This has been done. The Act then provides that any surplus moneys in the hands of the trustees after making provision for the parsonage "shall be expended as follows: (a) Any moneys remaining out of the proceeds of any sale or exchange shall be expended by the trustees for such Church purposes at Hamilton as the General Synod shall direct; (b) any moneys remaining out of any rents received under any lease shall be expended by the trustees for the general purposes of the Church at Hamilton." "Church" in the Statute means the Church of England. When the Statute was passed there was but one Church building situated either in, or in the vicinity of, the Town of Hamilton, namely St. Peter's. Later a new church building was erected, St. George's at Frankton. The town district of Frankton abutted on the borough of Hamilton. Both churches were administered by the Vestry of St. Peter's, there being, however, an advisory committee at St. George's. The town district of Frankton has been absorbed in the Borough of Hamilton. There has been a division of the parochial districts and St. George's is now outside the Parochial district of Hamilton, and has its own vestry. St. Peter's is now the only Church building within that Parochial district, but both buildings are within the boundaries of the present Borough of Hamilton. The vestry of St. George's claims to be entitled to share in the above-mentioned moneys, and the vestry of St. Peter's resists the claim. The General Trust Board of the Diocese of Auckland brings both vestries before this Court for the purpose of obtaining a decision as to their respective rights.

Hubble for plaintiff.
Richmond for St. Peter's Vestry.
Algie for St. George's Vestry.

REED J. held that the strict interpretation requiring the expenditure of the trust funds within the boundaries of the Borough of Hamilton as existing in 1904 was not the proper interpretation of the Statute. He held that expenditure from the trust funds upon objects situate outside the actual boundaries of Hamilton in 1904 is authorised provided the objects are for the purposes of the Church of England and reasonably can be said to be situated in the locality of Hamilton.

Solicitors for plaintiff: **Hesketh, Richmond & Clayton,** Auckland.
Solicitors for St. Peter's Vestry: **W. C. Hewitt,** Hamilton.
Solicitors for St. George's Vestry: **Gilfillan & Sullivan,** Hamilton.

Sim, J. July 24, 28, 1925.
Christchurch.

DICKERSON v. OTLEY.

Lease—Settled Land Act Sec. 34—No covenant without impeachment of waste—Lessor tenant for life—Whether lease against subsequent owner in fee.

By lease dated August 1912 Margaret Sears leased certain land to defendant. Lessor was tenant for life under the will of her husband J. J. Sears. She died on 30th December 1921. The lease was intended to be granted under Sec. 34 of Settled Land Act 1908. Plaintiff the present fee simple owner claims lease, which was for 18 years, is void against her because demise was not made without impeachment of waste and because it did not contain usual covenants for lessee to pay rates and taxes.

Peacock for plaintiff.
M. Gresson for defendant.

SIM J. said: "The lease does not refer to the covenants by the lessee which, by virtue of Section 84 of the Property Law Act 1908, are to be implied in every lease, unless negatived or varied as provided by Section 49 of that Act. There is an express declaration that no statutory covenants for title are to be implied in the lease, and this is the only reference to the subject of implied covenants. The position, therefore, is that the lease must be treated as having implied therein the covenant to repair set out in Section 84 namely to keep and yield up the demised premises in good and tenantable condition and repair excepting depreciation from fair wear and tear weather or natural causes without neglect of the lessee damage by fire earthquake tempest or inevitable accident. In the case of **Davies v. Davies**, 38 Ch. D. 499 Kekewich J. held a lease made by a tenant for life under the Settled Estates Act 1877 to be void as 'made without impeachment of waste' because the covenant to repair exempted the lessee from liability for 'fair wear and tear and damage by tempest.' This decision is directly in point in the present case, and is an authority for holding that the demise to the defendant was not made without *impeachment* of waste as required by Section 34 of the Settled Land Act 1908. It was said, however, that this decision ought not to be followed because a lessee for years is not liable to an action for permissive waste, that is to say for allowing waste which has not come about by his own acts, but comes about by a revolution, or by wear and tear, or by the action of the elements or in any other way not being his own act. In support of this contention counsel referred to the case of **In re Cartwright**, 41 Ch. D. 532 in which Kay J. held that a tenant for life was not liable to the remainderman for damages for permissive waste. Counsel referred also to the discussion of the subject in **Woodfall** (21st ed.) at p. 772. I find it unnecessary to express any opinion on this question for the reason that in my opinion the plaintiff is entitled to succeed on the other ground put forward namely that the provision in the lease with regard to the removal of buildings by the lessee offends against the statute. That provision is contained in the following covenant by the lessee: 'And also will at the end or sooner determination of the demise deliver up the said demised premises and all additions thereto except timber racks or any buildings or structures that may be erected on the said demised premises by the lessee which timber racks buildings and structures the lessee shall be at liberty to remove.' The power of removal given by this clause is not limited to trade fixtures, and under it the lessee is entitled to remove buildings and structures of every kind erected by him during the term. To remove from the demised premises buildings and structures, not being trade fixtures, is voluntary waste, for which the tenant clearly would be liable: **Foa** (6th ed.) p. 328. This provision, therefore, relieves the lessee from liability for voluntary waste in connection with the specified buildings and structures, and to that extent, at least, the demise has been made 'without impeachment of waste.' The effect of this apparently is to make the lease void as against the remainderman, and the plaintiff is entitled to a declaration that the lease was not a valid exercise of the statutory leasing power of the tenant for life, and is not binding as against persons taking in remainder: **Pumford v. W. Butler & Co. Ltd.** (1914) 2 Ch. 353. The question whether or not the plaintiff is entitled to any of the further relief asked for in the Statement of Claim was not discussed at the hearing, and if counsel cannot agree on the subject, may be mentioned in Chambers. The plaintiff is entitled to costs on the lowest scale with disbursements for fees of Court to be fixed by the Registrar. The plaintiff is allowed £3 3s for costs in connection with discovery.

Solicitors for plaintiff: **Hadfield & Peacock**, Wellington.
Solicitors for defendant: **Wynn Williams, Brown & Gresson**, Christchurch.

Stout, C.J. June 26, July 13, 1925.
Auckland.

McSWEENEY v. ODLUM.

Mortgage—Unpaid interest—Sale through Registrar—Assessing value Section 115 L.T. Act—Whether original mortgagor still liable for deficiency—Meaning of "mortgagor" under L.T. Act.

The defendant was the owner of certain land held under the Land Transfer Act. On 20th April, 1920, she mortgaged it to plaintiff. The land was later sold to one Piesse subject to the mortgage. Piesse failed to pay the Piesse subject to the mortgage. Piesse failed to pay the interest due. Application was made to sell the land through the registrar under the provisions of the Land Transfer Act 1915. Under Section 115 of the Act the land was assessed at £800. That was not sufficient to discharge the mortgage. Prior to the date set by the Registrar for the sale Piesse paid to the mortgagee £497 1s 2d being the value of the land as estimated by the mortgagee less £312 18s 10d being the amount owing under the first mortgage. This left £492 18s 10d still due to mortgagee. The mortgagee thereon sued the mortgagor for this amount and interest. The matter came before the learned Chief Justice on a preliminary question of law.

Seymour for plaintiff.
Eichmond for defendant.

STOUT C.J. said: "The defendant complains that by the transaction that has been carried out she has lost her right of redemption, and that if the Act gives this right which has been exercised by the transferee of the land, she has been deprived of her property and her right of redemption, and her only remedy will be against the person to whom she transferred the land by suing on an express or implied covenant. It was pointed out that the wording of the Land Transfer Act is different from the wording of the Property Law Act, 1908. That prohibits foreclosure, and says that the mortgagor is entitled to redeem at any time before sale. The wording of the Property Law Act is, however, different from the Land Transfer Act, and the question really turns on what is deemed to be the meaning of the word 'Mortgagor,' in Section 111. Does it mean the original mortgagor? That is, does it mean the defendant, or does it mean the person who is the owner of the land subject to the mortgage? That is, does it mean Mrs. Odlum or Mr. Piesse? It may be that the Legislature did not intend to destroy the equity of redemption that was reserved to the mortgagor, but I cannot read the word 'Mortgagor' in Section 111 as being restricted to the original

mortgagor. If that were so read then it would be impossible really for the owner of the property who is liable to have his property sold to redeem in the way pointed out in the Land Transfer Act. No doubt the position is an unfortunate one for the present mortgagor, and it may be that the circumstances that have arisen in this case were not fully appreciated by the Legislature when the law was passed, but that will be for the Legislature to correct. As far as the Court is concerned, it has to decide whether the right given to the holder of the land by Section 111 exists, and whether, therefore, the right of the original mortgagor to intervene or redeem has been destroyed. No doubt the original mortgagor might have paid the interest on the mortgage, and might have got the original mortgagee to transfer the mortgage to her if she paid the amount of money required as due under it. But that was not done. No effort was made to pay. It may be that the original mortgagor did not know what was taking place between the mortgagee and the holder of the land. I am of opinion that it cannot be said that what was done released the defendant from the liability of fulfilling her covenant in the mortgage. She is still liable, and her only remedy will be against the person to whom she assigned, who will no doubt be bound to repay her the amount that she will have to pay to the plaintiff. It may be that the person to whom she assigned is not able to pay it, but that does not affect the legal liability, and I must therefore answer the question, 'Is Elizabeth Constance Odlum, the defendant, liable to pay to the plaintiff any money under or in respect of the said Memorandum of Mortgage Number 96889?' in the affirmative. The case does not ask whether the original mortgagor may have an action against the mortgagee for not giving notice of the intention to sell. Such cases as **Rudge v. Richens**, L.R. 8 C.P., 358, **Kennedy v. De Trafford**, 1896, 1 Ch., 762, **Hoole v. Smith**, 17 Ch. Div., 434, **Selwyn v. Garfitt**, 38 Ch. Div., 273, may be referred to. And see **Ashburner on Mortgages**, page 347. The only question really asked was, Has the sale put an end to the covenant to pay the mortgage money and I am of opinion it cannot be said this has been done. The mortgagor, if she got no notice of sale may have a remedy, or it may be that the sale was of no injury to her as the property was not worth more than Piesse paid and for breach of the right to get notice she may not have been damnified. These considerations did not arise in the question put to the Court and hence I have not dealt with them. There is nothing said in the order as to costs, and I presume the costs will be dealt with when judgment is entered up. I reserve the question of costs till then."

Solicitors for plaintiffs: **Hopkins, Smith & Seymour**, Hamilton.

Solicitors for defendant: **Alexander, Bennett & Sutherland**, Auckland.

Ostler, J. July 15, 1925.
Wellington.

FORD SHERINGTON LTD. v. L. MARKS & CO.

Patents etc. Act 1921—Sec. 127—Order by Registrar for payment of costs—Application to make order rule of Court.

On 9th April Registrar ordered defendant to pay plaintiff £6 6s costs in respect of a proceeding before him. Plaintiff applied to the Court asking for leave to enter judgment and to issue execution on the order of the Registrar.

Cornish in support.

OSTLER J. said: "All that is necessary to give the plaintiff a complete remedy by execution is an order making the Registrar's order a rule of Court. Section 16 of Judgments Act (1838) 1 and 2 Vict. c. 110 is still in force in New Zealand. That section provides, inter alia, that all rules of Court of Common Law whereby any costs shall be payable to any person shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom any such costs shall be payable shall be deemed judgment creditors, etc. It is not necessary for the plaintiff to ask for leave to issue execution. As soon as the order is made a rule of Court he has that right by virtue of the Statutory provision cited. I accordingly make an order making the Registrar's Order a rule of Court, with £2 2s costs of this application."

Solicitors for plaintiff: **Webb, Richmond and Cornish**, Wellington.

Alpers, J. June 18, July 22, 1925.
Nelson.

EMMS v. SIGLEY.

Vendor and purchaser—Possession—Whether vacant possession—Conduct of the parties—Ambiguous contract—Construction.

This is an appeal on Law and Fact from the decision of the Magistrate's Court at Takaka in an action which the appellant as plaintiff claimed from the respondent as defendant the sum of £50 being amount of deposit paid on a contract which appellant claimed to have rescinded and £26 12s for interest and for legal costs incurred in connection with the contract. On January 12, 1924, it was agreed in writing between the appellant and one Moulder, the authorised agent for sale of the respondent, that the appellant should purchase from the respondent a dwelling house at Takaka for the sum of £750. The sum of £50 was paid by way of deposit on the signing of the contract. It was stipulated that "the purchaser shall be entitled to possession on the 15th day of February 1924. The vendor shall pay rates and taxes up to the 15th day of February 1924 and if necessary the same and insurance premiums shall be apportioned as from that day." The schedule to the agreement contains a description of the premises sold as consisting of "one and a quarter acres of land, more or less, with a five-roomed dwelling house thereon at present occupied by Mr. Anderson, baker, of Takaka, and joins Mr. Arthur Emms' property at Lower Takaka." The question to be determined is whether or not the appellant was entitled under this contract to "vacant possession" on February 15th. Moulder, the agent, gave evidence and stated that the appellant told him he wanted the house for his own use. After the contract Moulder who said respondent had requested him to act "as his agent generally," wrote to the tenant Anderson to say "Emms would want the house on a certain date." The letter is not produced and Anderson swears "nothing was said in the letter about my having to go out," but the agent's recollection is no doubt to be preferred. Anderson refused to quit a house he had occupied for 11 years and on March 4th appellant's solicitors wrote to the tenant a letter in reasonable terms in the hope, apparently, of avoiding unpleasantness. "The legal position seems to be that Mrs. Emms can either put you out of the house or raise your rent very considerably. Actually she wishes to adopt neither of these courses. She is willing to allow you to rent the house at 15/- per week (an increase of 6d per week) keeping for herself the paddock not actually fenced in with the house." Appellant in fact wanted the cottage to house one of his workmen in, and the paddock for grazing a horse. But as he certainly did not want a lawsuit, his solicitors wrote, not to respondent, but to the tenant who was no party to the contract, a letter suggesting amicable compromise. The tenant refused to go out. As late as June 14th 1924 appellant was still willing to complete his purchase, and gave notice, by letter of his solicitors on that date, that unless vacant possession were given him within one month, he cancelled the contract.

Moynagh for appellant.
Joyce for respondent.

ALPERS J. after reviewing the facts said: "It will be seen that the facts of the case resemble very closely those in **Dryden v. McCoy** (1921) G.L.R. p. 113 with one slight difference which, however, is significant. In the contract in that case 'all outgoings are to be apportioned'; in the present contract 'rates taxes and insurance premiums' are to be apportioned but no word is said about apportioning the rent. This might not unreasonably be relied on as clearing this contract of ambiguity. But assuming the contract to be in fact ambiguous, as a similar though not identical contract was held to be in Dryden's case, it becomes necessary to look at the surrounding circumstances to construe the ambiguous wording. The Magistrate held very properly that he was entitled to consider the sense in which

the parties themselves had acted upon the agreement between them (**Bank of New Zealand v. Wilson** N.Z.L.R. 5 S.C. 215, at p. 219). He finds that the solicitors' letter of March 4th amount, in its terms, to 'an adoption of the tenant in the clearest manner. I am unable to agree with that view. The respondent's agent Moulder had taken upon himself to inform the tenant of the sale and that the purchaser would want the house on the date fixed in the agreement. The tenant informed the appellant that he did not intend to get out and thereafter the appellant, who seems to have acted fairly and reasonably throughout the transaction, authorised his solicitors to make the offer of compromise contained in the letter of March 4th: but it is to be noted that even that letter insists upon possession of part of the premises—the paddock adjoining the house. I am of opinion that the agreement in this case is not ambiguous but that, if it be, both the appellant and the respondent's authorised agent have acted upon it in a sense contrary to that found by the Magistrate. I accordingly allow the appeal with £7 7s costs, and direct that the case be remitted to the Magistrate at Takaka to enter judgment in the action for appellant for £50, interest thereon till date of judgment, and for such sum for legal expenses and disbursements as he deems just."

Solicitors for appellant: **Glasgow, Rout & Moynagh**, Nelson.
Solicitor for respondent: **W. J. Joyce**, Greymouth.

Stout, C.J. July 4, 7, 1925.
Wellington.

QUIRK v. DWAN.

Practice—Costs—Registrar's ruling—Whether final.

This was an appeal from the decision of the Registrar in taxing costs after action. The Registrar had allowed an item of £55 being cost of bringing a witness from Victoria to give evidence. It was contended that this allowance by the Registrar was final. We report His Honour's remarks on this question as the other matter disposed of was of no general importance or interest.

McGrath for plaintiff.
O'Leary for defendant.

STOUT C.J. on this point said: A point was raised, however, to the effect that as the amount had been allowed by the Registrar there was no power for the Court to set that finding aside, and the case of **Cox v. Symonds** 32 N.Z.L.R. 652 was relied upon. In that case His Honour Mr. Justice Chapman held that as the Court had ordered that witnesses' expenses to be ascertained by the Registrar that the Registrar's decision was final. I am of opinion that there was no special order in this case, but the usual order of referring witnesses' expenses and disbursements to the Registrar, and that Rule 574 operates. The Rule says:

> "The Court may, after the taxation is made, on motion by any party dissatisfied therewith, where it appears that the Registrar has decided erroneously, whether as to amount or principle, refer it back to the Registrar, with directions to review his report and make such alterations in it as may be requisite."

To say that all decisions by the Registrar when a question of costs is referred to him at the conclusion of a trial are binding would be, in my opinion, to repeal Rule 574. Further, I may say that I am not aware that except there has been a special reference to the Registrar different from the ordinary reference, that it has ever been held that the Court has no power to review the Registrar's decision. There was, in my opinion, no delegation to the Registrar of any judicial duty which would prevent the operation of Rule 574. I am therefore of opinion that the Deputy-Registrar should not have allowed the amount he did allow for the expenses of the witness, and that it must be referred back to him to correct his finding and to disallow the sum mentioned, namely, £55. It is not usual to allow costs when the decision of a Registrar is over-ruled. See **Ward v. Bell**, 2 Dowling, 76. I therefore allow no costs to the appellant.

Alpers, J. June 19, Aug. 7, 1925.
Nelson.

REGISTRAR OF SUPREME COURT v. COLLINGWOOD COUNTY COUNCIL AND OTHERS.

Rating Act 1908 Section 73 as amended by Rating Act 1912 Section 5 (D)—One judgment for rates on several different properties—Sale by Registrar of properties separately—Whether Registrar bound to stop sales when enough realised to cover judgment.

The County Council had obtained one judgment for rates in respect of various properties separately rated. These were in due course offered for sale by auction by the Registrar who had previously ascertained the names and addresses of the Mortgagees of the different properties and sent to each of them in pursuance of Section 73 Sub-Section (2) of the Act a notice of the amount of rates due in respect of each mortgaged property and in each case he allocated to that property a proportion of the total costs. In no case was this proportion of costs as great as the costs of a separate summons for the rates on that particular property would have been. Prior to the sale one Mortgagee paid the rates and charges on the property mortgaged to him and that property was accordingly withdrawn from sale. The first property sold fetched only a little more than the rates owing on it. The second lot fetched over £500—more than enough to pay the judgment, rates subsequently accrued, summons costs, costs of sale and other expenses. Watson thereupon formally protested against the sale of any further properties, but the Registrar considering that each property should bear its own rates and that it would be unfair to (in effect) make the Mortgagee of the second property sold pay the rates on all the other properties, ordered the sale to proceed. All the other properties were sold. Watson threatened the Registrar with action if he completed the sales and the various buyers similarly threatened action if he did not. The Registrar issued an originating Summons for a declaratory Judgment to determine his position.

Glasgow for the Registrar.
Samuel for County Council.
Fell for certain buyers.
Brown for a mortgagee.
Hayes for Watson the ratepayer in default.

ALPERS J. said that although the Rating Act contemplated a separate judgment for the rates in respect of each property nevertheless in acting as he had the Registrar had followed the reasonable and common sense course and that inasmuch as a Public Body acting for public purposes is not bound to comply so strictly with statutory powers as a private individual (**Galloway v. Mayor of London** 1 English and Irish Appeal cases page 34; **London and North Western Railway Company v. Evans** 1893 1 Ch. D. 16-28) the sales were valid and that the Registrar should proceed with the sales as if a separate judgment had in fact been obtained in respect of each set of rates. The learned Judge added that as the Council had not strictly followed the Act by obtaining separate judgments it should pay the costs of the Registrar and the Mortgagees and buyers, but not of the ratepayer in default.

Solicitors for the Registrar: **Glasgow, Hayes & Rout**, Nelson.
Solicitors for the Collingwood County Council: **Maginnity Son & Samuel**, Nelson.
Solicitors for certain buyers: **Fell & Harley**, Nelson.
Solicitors for the Mortgagee: **Salek, Turner & Brown**, Wellington.

JURIES IN CIVIL CASES.

by

H. F. O'Leary, Esq., LL.B.

In December 1924 there were published in the Gazette certain Rules of the Supreme Court dealing with the rights of Trial by Jury in civil cases in New Zealand. These Rules are in substitution for Rules 254, 255, 256, 257 and 258 of the Code of Civil

Procedure which deal with the modes of trial of actions in the Supreme Court.

The summarised effect of the change is as follows: Under the rules now revoked a litigant if his claim were payment of a debt or damages or the recovery of chattels had an absolute right to have his cause tried by a Jury, which might be a Jury of four or twelve according to the value of his claim. Under the substituted rules the litigant has the right to a Jury where the relief claimed is in respect of a cause of action not exclusively a breach of contract. If the cause of action may be regarded as arising out of a breach of contract or out of a tort it shall be deemed, for the purposes of the Rules, to arise exclusively out of breach of contract. All actions other than those for which there is the right of trial by Jury shall be tried by a Judge alone unless it appears to the Court that the action or any issue therein can be more conveniently tried by a Jury in which event the Court may direct that the action or such issue be so tried. The result is that the litigant has only the right of trial by Jury in actions founded purely on tort.

It needs little consideration to see that the effect of these Rules is somewhat far reaching— the right of trial by Jury is taken away in a large number of actions which hitherto have been determined by Judge and Jury. Notwithstanding this drastic change, however, the Rules have excited little comment outside the legal profession. So far as the general public is concerned—and that is the body really affected by the Rules—one can only conclude that it is acquainted neither with the Rules nor with their effect. Amongst lawyers the new Rules when gazetted excited much comment and this comment has been renewed and enlarged now that we have had Sessions of our Supreme Court at which the effect of the Rules was seen. So far as my observations go the main current of criticism has been in the direction of condemning the alteration and I have heard it suggested that an effort should be made to revert to the position which existed prior to the promulgation of the Rules. It might be asked why should lawyers concern themselves as to whether a case should be tried with or without a Jury? They are there to take the law as they find it and if the right of trial is not given that is no concern of theirs. Such statements may at first sight appear to indicate the correct position but it must not be forgotten that often the lawyers are the first persons to know of a change, and it is at least their duty to inform the public of any alteration in its rights and also to suggest the expediency or otherwise of the change. It can also, in my opinion, be rightfully claimed that the lawyers have always been the guardians of the interests of the people—they have looked after the interest of the people when their rights were in danger, and, following the traditions of our profession, if we consider the people's rights are being invaded we should not hesitate to express our views. I therefore propose in this article discussing the position and giving my reasons for submitting that the change was unnecessary.

In the first place it is as well to observe that the new Rules are made in pursuance and exercise of the powers and authorities conferred by Section 51 of "The Judicature Act 1908." By that Section the Governor-in-Council with the concurrence of any two or more of the Judges may alter or revoke existing Rules of the Code of Civil Procedure and may make additional Rules touching the practice and procedure of the Court. The Governor-in-Council has by the Rules under discussion altered the mode of trial of civil actions in the Supreme Court and whilst Section 5 1 exists in its present state there is nothing to prevent an alteration which will have the effect of abolishing Trial by Jury in civil cases absolutely. With all due deference I suggest it was never the intention of the Legislature to give to the Governor-in-Council such absolute power. Trial by Jury is unquestionably one of the most marked and characteristic features of the common law. To the average man it is the tribunal for the decision of disputed facts—to him it is the tribunal which with its faults, real or imaginary, is immeasurably superior to any other. Was it contemplated when Section 51 was enacted that the use of such a tribunal for the decision of the facts of a civil case was to be a matter for the Governor-in-Council and not for the representatives of the people?

What then is the effect of the change? It is this, that whilst the litigant suing in pure tort will have the facts ascertained and found by a Jury sitting under the direction of a Judge, the litigant suing on any other cause of action will not as a matter of right have the facts ascertained by a Jury. To state specific cases—the facts of a claim of damages for negligence will be ascertained by a Jury—the facts of a breach of promise action—or, an action for breach of contract founded on fraud will be ascertained by a Judge alone. Why is a jury less capable of finding the facts in a breach of promise action than in an action based on negligence? Is a Jury any less capable in the one case than in the other? I have noticed that some Judges have already noticed the effect of the Rules by stating, in cases which came up before them at sittings of the Court after the Rules came into effect, that they were called on to ascertain the facts in cases where they would have preferred the assistance of a Jury. It may, however, be answered that though the right to a Jury in such cases is not absolute yet there is under the Rules the option of applying for a Jury. I realise that such application can be made but the necessity for so doing puts the party who desires a jury in the odious position of telling the Judge that he has no confidence in him—the Judge who may preside and direct the Jury when summoned. It would not be surprising if few litigants or their advisers cared to place themselves in that position. What then is the reason for the change? Is it that the jurymen are not considered capable of appreciating or understanding the sometimes complicated facts of an action for breach of contract, or is it that they are swayed by prejudices in particular cases? The former reason cannot surely be sustained. With the march of education the average Juryman of to-day is well enough quipped to understand the facts of almost any case, particularly as they have the assistance and guidance of the presiding Judge trained in the arranging marshalling and explaining of complicated details. As to prejudice, I have heard it said that small justice is to be obtained from a common jury by an employer defending a claim for wages, or by a Shipping Company defending a claim for injury to person or property, or by an Insurance Company defending an action on a Policy. I would be sorry to think that a denial of justice is a com-

mon happening in trial by jury, but in any event are Juries the only class of the community swayed by prejudice? Did any reader ever hear medical testimony in a case where the character of the medical profession was involved or the testimony of scientific or expert witnesses where the merits of conflicting theories were in question? I grant that Juries on occasions do fall into error in deciding cases, but again I ask is this peculiar of Juries alone? Examine the records of the Court of Appeal during the last few years and it will be found that the Court of Appeal has in several cases felt bound to conclude that the Judge of first instance sitting alone has gone wrong in his conclusions on the facts of the case. I think it might be said that for every wrong verdict of a jury one could produce a wrong decision of a Court or Judge, thus showing that infallibility is not reserved for any Department of the Judicial system, and it is no solution of the difficulty—if difficulty there be—to abolish Juries because they occasionally fall into error and to transfer their functions to the Judges who commit errors in their own province.

It is not out of place to mention that the question of Trial by Jury in civil cases is one which was quite recently exercising the thoughts of the administrators and the lawyers in England. The exigencies of the War period made it necessary to considerably cut down, if not wholly to suspend, trial by Jury in civil cases. This was looked upon as a purely temporary War measure and was no doubt justified and unassailable. In 1920, however, on the expiry of the Acts which dealt with the War period the Administration of Justice Act was passed and the effect of this Act was in many cases to substitute for a litigant's absolute right to a Jury the discretion of the Court or Judge. After considerable agitation the pre-War right of trial by Jury has been re-established so far as the High Court is concerned—but not so in respect of the County Court. The lessening of the right has been the subject of much adverse comment and a considerable body of opinion is still clamouring for the total restitution of the pre-War rights. However, my main purpose in introducing the reference to the position in England is to set out the views on the question enunciated by eminent Judges who have had occasion to consider the matter judicially. In 1922 questions under the Administration of Justice Act 1920 arose for determination in the Court in England in the cases of Ford v. Blurton and Ford v. Sauber 38 T.L.R. 801. In his judgment Lord Justice Bankes made the following remarks on the question of trial by Jury:—

> "I trust however that the other aspect of the case may also be considered namely whether the right to a trial by a Jury is not sufficiently important to be restored and maintained subject always to exceptions which should be precisely indicated. The standard of much that is valuable in the life of the community has been set by Juries in civil cases. They have proved themselves in the past to be a great safeguard against many forms of wrongs and oppression. They are essentially a good tribunal to decide cases in which there is hard swearing on either side or a direct conflict of evidence on matters of fact or in which the amount of damage is at large and has to be assessed."

In the same case Lord Justice Aitken made the following remarks:—

> "Trial by Jury except in the very limited classes of cases assigned to Chancery Court is an essential principle of our law. It has been the bulwark of liberty and shield of the poor from the oppression of the rich and powerful. Anyone who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of Juries in civil cases. Many will think that at the present time the danger of attack by powerful private organisations or by encroachments of the executive is not diminishing. It is not without importance that the right now taken away is expressly established as part of the American Constitution."

These views were recited with approval by Mr. Justice Lush in Caleraft v. London General Omnibus Co. (1923) 2 K.B. 608. That Judge went on to say that:—

> "The safeguarding of the right to trial by Jury is an extremely important part of the administration of justice."

It must be remembered that the experience of these eminent Judges covered periods when both the absolute right and the restricted right to Juries existed and their views are therefore of considerable importance and weight.

As a matter of interest I may mention that Lord Russell of Killowen, Chief Justice of England at the end of last Century had a great preference for the Jury and it is said that he told a friend of his who wished to abolish trial by Jury that if he only knew His Majesty's Judges as well as he (Lord Russell) knew his judicial colleagues he would not be so keen on getting rid of Juries.

To sum up then I contend that for the ascertainment of facts a Jury—that is a number of men taken at random from the body of the community—acting in the presence of a Judge is the best tribunal. The laws of England have established that such a tribunal is best calculated to ascertain the truth in the greatest majority of instances as well as the best calculated to do justice in every sense of the word. The Juryman quitting his shop or office or workroom for the Court of Justice brings a freshness and earnestness to the enquiry which almost invariably results in the truth being ascertained. In doing this it is no small help that the Juryman realises that his Country has left a portion of the judicial authority in his hands, instead of resting the whole in some exclusive or professional body. The Judge and Jury sitting together exercise a mutual and very salutary control which adds an immense moral weight to their joint action.

Should then the right of Jury trial be encroached on? My answer is No, and that litigants are entitled if they wish it to have a Jury to try their cases—to have the view of a Jury of twelve men rather than that of a single Judge.

It is important to notice that the Rules of Court which deal with the matter in England are framed by the "Rules Committee" of the High Court. This Committee consists of representatives of the whole legal profession—Judges Counsel and Solicitors. I would respectfully suggest that a similar Rules Committee should operate in New Zealand and it would then be assured that any alteration would be with

the concurrence of the whole profession and thus indirectly at least the public would be represented.

The matter is one of much importance. The alteration is drastic and as I have pointed out the way is at present open for a still more drastic alteration. It is a matter which the members of the legal profession should, and I feel some do, interest themselves in, and if by this short article I have added to that interest my object has been attained.

LONDON LETTER.

The Temple, London,
24th June, 1925.

My Dear N.Z.,

The Bar is a terrible profession! We are up in the clouds one day. All is for the best in the best of all possible worlds. Cases are won, clients agreeable, dates and appointments convenient and adaptable, prospects favourable, promise abundant and success as good as assured. Next day, we are down in the depths: drafts will not be settled, briefs go astray, their Lordships are irritable, and causes, if they are not actually lost, take such an unsatisfactory turn that we are convinced we have no hope! The only comfort in one's own depression is that everyone else is, in his turn, depressed. An old friend told me a good tale to-day, of how a younger man came to him, distraught and contemplating heaven knows what desperate expedient, and begged to be advised. A matter had gone awry; he felt that he was not to blame, but he could not disguise from himself the annoyance it had involved for his professional client. This had happened some time ago, and since the event little new work and no new clients had crossed his threshold. Should he realise his defeat, and abandon the struggle for some safer career? My old friend is of a long experience. He put his hand on the young man's shoulder, and said to him: "Yes, my dear boy, you are probably right to assume the worst. What has happened is this. Your professional client has, no doubt called a meeting, at the Cannon Street Hotel, to which he has invited all your other clients and representatives of all the firms of solicitors who might have become your clients. He has addressed them, with reference to yourself, describing how the case which he entrusted to you was bungled and cautioning them never to employ you, as he certainly never intends to employ you again himself. Thereupon a resolution has been proposed, seconded and carried unanimously tha no solicitor shall ever send you another brief. . . ." And the young man, constrained to laugh, went his ways; and the next time my old friend saw him, he was worried to death because he had more work to do than he could possibly manage. . . There is no particular aptness about all this, except that times are hard all round, nowadays at the Bar, and business for all of us is spasmodic and precarious. The result on the individual is that a normal period of adversity, something, say, between twenty-four and forty-eight hours, convinces him that the end of the world is in sight, for lawyers at any rate.

For my part, I turn with relief to our correspondence. First, I may add this postscript to my last letter, that the Lord Chancellor is now nominated to compete with Lord Asquith for the Chancellorship of Oxford University, and Lord Birkenhead has engaged to desist from writing for the press. Here are the leading men of the law, indeed, and fascinating personalities, to boot! I have engaged with the House of Butterworth (into which, I should suppose from the look of it, Depression has never entered) to give you brief impressions of these and others, during the quiet weeks of the Long Vacation, so that you may know the men as well as the names. Viscount Cave I, and I hope you, will particularly enjoy. If I was Oxford University, no other candidate's qualifications would even be considered. For the present, however, we have more technical matter to deal with; I could, if I had a grudge against you, legitimately worry you with a long series of tax decisions, arrived at by Rowlatt J. in the current Revenue Paper. But I have mercy: "I am," said Dolly, in the famous dialogues, "a kind old thing": I propose to wait till the Revenue Paper is dealt with, and to compress into a short space the gist of the decisions which you should know. Of this, later.

Matrimonial causes have recently been foremost, in point of principle. Stephenson v. Stephenson has explained Cobb v. Cobb (1900) p. 294, and has established the discretion of justices, under our Summary Jurisdiction (Married Women) Act, 1895, Sec. 5 (c) to act upon their own principles in fixing the amount of maintenance and to disregard when reasons dictate, the principles applied by the High Court in dealing with alimony. In the case in question, justices allowed a sum, exceeding a third of the husband's income and taking no account of the wife's, and the Divisional Court of the Probate, Divorce and Admiralty Division held them justified in so doing, in the exceptional circumstances. In Fox v. Fox the Court of Appeal has closed the door, which Swift J. "opened to spiteful wives, proceeding to obtain a decree nisi, and, after obtaining an order for permanent alimony, refraining from application to have the decree made absolute." In Lankester v. Lankester, the President complicated the affairs of a couple who, reciprocally desiring a divorce, had resorted to Dakota, the more easily to achieve their purpose. The lady, having secured her divorce, married the man of her choice; but the man, returned to England, felt a doubt as to the position and determined to resolve it, by obtaining another divorce in our stricter Courts. He relied upon the lady's cohabitation with her new husband; but the King's Proctor intervened, and the President held the intervention to be good, for that the petitioning husband, being cognisant and an abettor of the new alliance, must be held to be accessory to and conniving at the adultery which he now said it involved. The technical point and result of the decision we may well understand; but the moral of the story I, for my small part, am quite unable to draw.

In this context I may comment on the internal rearrangements of the Division. Horridge J., you will remember, long sat as a Judge in Divorce; he became expert, and was removed, back to his normal sphere. I do not pretend to know the explanation of this, or why Swift J. relieved him. Horridge J. may not be the most popular of our Judges, but he is far from being the least efficient. He is going to Oxford Circuit at the moment, where I

shall presently join him and, no doubt, receive a sound drubbing for my pains. However, I shall be certain of exact justice for my client, and, rough though my passage may be, it will be less rough than if my Judge was Swift J. So far as we have "brutes, but just brutes", on the contemporary bench, these be they. We suppose they were sent to the Divorce Court to punish the sins of the Divorce Bar, which (we all insist) are many and great. However, inconsequent and slap-dash fellows though they are, in that Court, they are yet good men and true, genial and always kind to an intruding stranger like myself. This is apparently the authoritative view, for now they are left again to the very tender mercies of their Hill J., as generous and pleasant a Judge as ever sat aloft. He, and the chivalrous President with the deep, bass voice, constitute a Bench which we do not grudge them, but avowedly envy. Swift J. is sitting in the nisi prius Courts, where he conducts himself with a silent efficiency which none can deny, however sharp his occasional slaps may be.

There are current, at the beginning of this term and the end of last, a number of workmen's compensation decisions, but none of them is very significant and all of them are, as you know, faithfully collected in the standard report, where they are so thoroughly digested, annotated, indexed, explained and rendered fool-proof that you and I need not disquiet ourselves. You will find them all noted, promiscuously, in the Law Times, sifted in the Law Journal, reported, for the most part, in the Times newspaper and the urgent ones epitomised in the Morning Post. The demand, in Crewe v. John Rhodes Ltd., that every medical referee, whose certificate under the Acts is to be conclusive, should be provided with the expensive aid of X-ray photography for his diagnosis, comes from Atkin L.J., a Lord Justice, as you know, of small stature but great force. The Doctors are by no means unanimously in support of the suggestion. Their experience is that the process is indispensable in a very small proportion of the cases with which they have to deal, and they have come to feel that already the workman is excellently looked after, at the employers expense. If the X-ray had completely revolutionised diagnosis, in every and any application, their view would be different; but a large part of the cases, with which our County Courts are concerned, turn upon such maladies as chronic arthritis and stomach ills, for the discerning and explaining of which the old methods suffice. And I may say, in passing, that to-day we are made sensible of a very vigorous movement to bring into the closest alliance the two great professions of Medicine and the Law, in this country. The said Atkin L.J., as President of the Medico-Legal or the Lego-Medical Association (I forget which) and the Lord Chief Justice who has an obvious penchant for the doctors' business, are at the back or the head of it. In the Provinces, divers Law Societies are attempting developments along the same lines. The formal association is somewhat artificial; many doctors and many lawyers, while infinitely respecting each other and co-operating to the best of their ability, feel that the interests of the community may perhaps be best served by the two professions maintaining their respective independence.

Making communication over something like ten thousand miles of intervening space induces, I fear, an excessive spaciousness in the communicator. Forgive my prolixity, and give me leave to deal briefly with the topics which remain. The Rating and Valuation Bill, as it nears maturity rouses a fiercer hostility. The Farming community will certainly suffer, but the movement to defend their interests (notably against the fairer rating of the railways, which will prejudice them) is being diverted, some suspect, to preserve vested interests of existing but about-to-cease-existing officials. A deputation from the National Conference of Assessment Committees and the Association of Poor Law Unions received, on June 10th, a very courteous but entirely unsympathetic hearing from the Rt. Hon. Neville Chamberlain, the Minister of Health. I fancy it achieved little else than to spike the best guns of its friends, a body of Conservative M.P.'s pledged to oppose. The Minister was afforded, and availed himself of, an excellent opportunity to utter uninterruptible propaganda for his proposals. The Law concerning, and striving in vain to render innocuous, motor-car traffic is being much canvassed, as to its reform. We still are confined, though hardly a motorist knows it, to a universal and unrelaxable maximum speed of twenty miles an hour; a rule imposed some twenty years ago and never adapted to modern conditions because (I am perfectly sure) everyone has forgotten its existence; or had forgotten its existence, till some ill-advised enthusiast, on one side or the other of the controversy, revived its memory with a view to enforcing it or eliminating it. Rival deputations pursue the Minister of Transport, to clear our fine, new roads of the pest or the pedestrian! Moderate men, with no passionate interest in the internal combustion engine but no inveterate dislike of a very convenient means of getting about, join with both extremists in calling for measures of reform. There are too many accidents, and the reason of them is that there is too much rank bad driving. Of the latter, a little is due to incompetence, but more is due to vile manners and a damnable disregard of others' convenience and rights. A good deal of my own work deals with motor-car accidents, ranging from running down cases to charges of manslaughter. Judging from the general trend of sentiment, as I meet it, and from the utterances of the Benches before which I appear, there is every prospect of radical reform in the near future. If the motorist is given any latitude, it will only be for the purpose of fixing the fullest responsibility upon him. The rule of the road will become a matter strictly to be observed, and most heavily to be punished in the breach. The most urgent necessity is, by common consent, to prosecute the offender for the mere offending, and not to wait till he has had his accident or caused his death.

Lastly, the case of Rex. v. The Governor of Maidstone Gaol, so much discussed earlier in the year, has cropped up again and, this time, has achieved an interesting decision of principle. The Court of Appeal has refused to discuss the rights or wrongs of the Divisional Court's ruling, on a writ of Habeas Corpus and as to the transfer of a prisoner, undergoing penal servitude, from Belfast to Maidstone. It disclaims jurisdiction in a case, the substance of which arises out of a criminal cause or matter.

Yours ever,

INNER TEMPLAR.

WORK OF THE COURT OF APPEAL (July Sittings)

Hereunder we publish for the information of our readers a note of the work done by the 1st Division of the Court of Appeal and the Full Court last month. In addition to the cases mentioned hereunder there are the two cases already noted in B.F.N. No. 11 viz. Patchett v. Hyndman and Taranaki Farmers' Meat Co. v. Morgan.

COURT OF APPEAL.

MORGAN v. WRIGHT.

Cor. Stout, C.J., Sim, Herdman, MacGregor and Alpers, J.J. (July 6, 7, 8, August 1.)

Appeal from decision of Mr. Justice Reed in an action for breach of trust. The main question was as to whether certain transactions by D. G. Wright as to two properties, Surrey Hills and Windermere, could stand. The respondents claimed that D. G. Wright was entitled as assignee from H. H. Wright of an option conferred on H. H. Wright by his father's will. The appellants contended: (1) The right of purchase was not assignable; (2) if it were, it could not be acquired by a trustee who was not expressly authorised by the testator to purchase; (3) even if it could be so acquired, nevertheless the purchases by D. G. Wright could not be allowed to stand by reason of the circumstances and facts of the case.

Myers, K.C., Donnelly and **Brassington** for appellants.

Gresson and **Evans** for respondents.

HELD by the Court (Stout, C.J. dissenting): That D. G. Wright was not entitled to purchase either Surrey Hills or Windermere, and that he was liable to account for the purchase money received by him from the sales made by him of parts of these estates and that he held the balance of these estates upon the trusts of the will of the testator: and that all accounts and enquiries necessary to afford relief on this basis shall be taken and made in accordance with directions to be given hereafter. Further there should be an enquiry as to the profits made by D. G. Wright in his dealings with the live and dead stock on Surrey Hills and Windermere.

Appeal allowed with costs on the highest scale as on a case from a distance.

MACKENZIE v. MEDICAL BOARD OF NEW ZEALAND.

Cor. Stout, C.J., Sim and Alpers, J.J. (July 9, 10, 13.)

Appeal from the decision of Herdman J. in ordering the removal of appellant's name from the Register of Medical Practitioners.

Myers, K.C., and **McLiver** for appellant.

The Solicitor-General (A. Fair K.C.) and **Meredith** for respondent.

On the Court resuming on 13th July Stout C.J. announced: Since the conclusion of Mr. Myers' argument on Friday, we have had an opportunity of considering the evidence in this case, and we have come to the conclusion that the judgment under appeal cannot be disturbed. It will be unnecessary, therefore, to hear counsel for the Medical Board. We shall put into writing later our reasons for the conclusion arrived at by us. In the meantime, the appeal is dismissed with costs on the highest scale as on a case from a distance. The question of the costs of the proceedings in the Supreme Court was not determined by Mr. Justice Herdman, and that is left open for consideration by him.

Appeal dismissed. On 1st August written judgments were read.

MAYOR ETC. OF PALMERSTON NORTH v. CASEY.

Cor. Stout, C.J., Sim, Herdman, MacGregor and Alpers, J.J. (July 13.)

Appeal on point of law from decision of Reed, J., on question as to the power of a local authority to impose conditions as to tarring and sanding streets and footpaths on a new street being dedicated by an owner subdividing his land for the purpose of sale.

Gray, K.C., and **F. H. Cooke** for appellant.

H. R. Cooper for respondent. C.A.V.

TREMAIN v. MANAWATU DRAINAGE BOARD.

Cor. Sims, Herdman and Alpers, J.J. (July 14.)

Appeal from a judgment of Stout C.J. directing a third trial of this action on the grounds that the verdict was against the weight of evidence and that the damages awarded were excessive.

Watson for appellant.

Gray K.C. and **F. H. Cooke** for respondent. C.A.V.

TRANTER v. TRANTER AND LAMB.

Cor. Sim, Herdman and MacGregor, J.J. (July 17, 28.)

Appeal from decision of Adams, J. in setting aside the verdict of a jury for £1500 damages against the co-respondent in a suit for divorce and ordering a new trial as to the amount of damages upon the ground that the damages awarded were excessive.

Sargent and **Cousins** for appellant.

Donnelly and **Brown** for respondent.

HELD (dismissing the appeal) the verdict was rightly set aside and there must be a new trial as to damages.

Appeal dismissed.

CROWN MILLING CASE.

This will be noted later.

Cor. Stout C.J.. Herdman, MacGregor, Ostler and Alpers, J.J.

Attorney-General, Solicitor-General and **Adams** for appellant.

Skerrett, K.C., Myers, K.C., and **Leicester** for respondents.

Appeal from Sim J., who dismissed Crown's action for penalties under Commercial Trusts Act. C.A.V.

FULL COURT.

SYMONS v. THE KING.

Cor. Stout, C.J., Sim and Herdman, J.J. (July 16, Aug. 1.)

Petition under the Crown Suits Act for recovery of a sum of £127 10s, being ad valorem duty paid on an agreement for the sale of land under Sub-Section 9 of Section 76 of "The Finance Act 1915," as amended by Section 14 of "The Finance Act No. 2 1918." This section was repealed by Section 31 of "The Finance Act 1920," which came into force on the 11th November 1920. The contract for sale was made and duty paid in May 1920. On the 12th December 1921, after the Act of 1915 had been repealed, the sale was annulled and within six months of the annulment application was made for a refund of duty.

Kennedy for suppliant.

Solicitor-General (Fair K.C.) for the Crown.

HELD (per curiam) that Symons was not entitled to recover the duty.

Petition dismissed with usual costs.

McLEAN v. McLEAN.

Cor. Sim, Herdman, MacGregor, J.J. (July 17.)

Case stated for the opinion of the Full Court by Adams J. as to whether in an undefended suit for divorce there was sufficient evidence of an agreement for separation by mutual consent.

Campbell for petitioner.

Respondent not represented.

HELD there was no express agreement for separation and no evidence to justify the Court in saying that there was an implied agreement.

RULES UNDER THE ADMINISTRATION OF JUSTICE ACT 1922.

By Gazette of the 21st May, 1925, rules have been made with reference to the registration in New Zealand of Judgments under Section 4 of the above-mentioned Act. The rules are too long for publication but they provide for the machinery to approach the Court and the subsequent steps necessary up to execution of the Judgment.

FREEHOLD IN ENGLAND.

A correspondent has sent us the following note of a sale of land in England. The note affords us who live under the simple systems of Land Registration in New Zealand with an interesting comparison of the duties and difficulties of the English conveyancer.

"In the conditions of sale regarding the West Sussex properties which, as already stated in these columns, are to be offered by Mr. Harry Jas. Burt, of Steyning, at Pulborough on June 19, by the direction of the Committee of the Marquis of Abergavenny, appear some interesting details of the vendor's title to his holdings here. It is stated that he "is tenant in tail in possession of the property hereby offered for sale under the Compound Settlement created by (a) the will dated June 4 in the twenty-seventh year of the reign of King Henry VIII. of George Nevill Lord Burgavenny; (b) an Act of Parliament passed in the thirty-first year of the reign of King Henry VIII., intituled 'The attainder of Henry late Marquess of Exeter Henry Lord Montacute Thomas Darcie John Lord Hurst and others attainted by the Common Lawe and their estates forfeited'; (c) an Act of Parliament passed in the thirty-fourth year of the reign of King Henry VIII., intituled 'An Act of the restitution in name and bloode to Walter Hungreford and Edward Neville'; and (d) an Act of Parliament passed in the second and third years of the reign of King Philip and Queen Mary, intituled 'An Act whereby the heirs of Sir Edward Neville Knight are restored to the remainder of the Barony of Burgavenny.'"

The freehold of all the land now for disposal, extending to 622 acres, in the parishes of Pulborough, Nutbourne, and West Chiltington, is believed to have originally been included in the manors of Chiltington and Nutbourne, and as such formed part of the estates settled by the Act of Philip and Mary quoted above. Altogether eighty-four lots will be put up, comprising numerous small farms—92½ acres is the largest individual area—and the properties in West Chiltington embrace some of that capital fruit-growing and market-garden land for which the district is well known. There are also many excellent building sites with fine views over undulating heaths and commons, with the Arun Valley and the Downs in the background.

BENCH AND BAR.

The legal profession has sustained a loss by the death of Mr. Spencer Brent one of Dunedin's oldest lawyers. He began his legal career in 1871 being articled to Messrs. Haggitt Bros. and later admitted as a partner to that firm. His partner, Mr. B. C. Haggitt, later died and Mr. D'Arcy Haggitt removed to Christchurch leaving Mr. Brent and Mr. L. E. Williams to carry on the business. After one year Mr. Williams died and Mr. Brent practised alone until the year 1912 when he was joined by his son, Mr. F. S. Brent. The firm continued under the name of Spencer, Brent & Son until 1920 when Mr. Brent retired, living first at Waiohola and later at Roslyn, where he died. On his retirement the legal profession did not entirely lose touch with him, one of the soundest and most amiable of its exponents, having the benefit of his services as Auditor of the Otago District Law Society.

EXTRACT FROM THE PRINTED REPORT OF THE DECISIONS OF THE N.Z. LAW SOCIETY.

We extract from the printed report of the Decisions of the Council of the New Zealand Law Society made on the 10th July, 1925, the following which are of interest:—

1. Is or is not a Solicitor acting for a First Mortgagee entitled to charge a production fee when registering a memorandum varying the terms of a mortgage?

A Solicitor is entitled to a production fee only when he produces a title for the purpose of registration of a dealing by another Solicitor, or perhaps by himself acting other than as Solicitor of the Mortgagee.

2. That while expressing no opinion as to the propriety of a Solicitor acting as an Agent for an Insurance Company on Commission, the Council sees no reason to interfere with a usage which appears to have obtained in many districts in New Zealand.

3. Resolved: That a Solicitor as an Officer of the Court owes a duty to take an affidavit unless he has a sufficient excuse for refusing to perform that duty.

4. Is it irregular for a Barrister, in the event of a vacancy in the office of Crown Prosecutor or Counsel to a Public Department to take steps to have his name mentioned to the Minister or Officer in whose hands the appointment lies for consideration with any others? (Note: It is recognised that this has been done in good faith in the past.)

Resolved: That the Council deprecates any action by a practitioner who is candidate for the position mentioned or any similar position in the direction of bringing pressure to bear upon its Minister or Officer in favour of his candidature.

FORENSIC FABLES.

No. 6.

THE DOUBLE-FIRST AND THE OLD HAND.

A Double-First, whose Epigrams were Quoted in Every Common Room of the University, became Weary of Tuition and went to the Bar. Shortly after his Call, a Near Relative Provided him with a Brief. He was to Appear for a Public Authority which Owned a Tram-Car. The Plaintiff was a Young Lady who had Sustained Injuries whilst being Carried Thereon from her Place of Residence to her Place of Business. Her Story, as Set Forth in the Statement of Claim, was that the Conductor, without Any or Alternatively Sufficient Warning, had Rung the Bell whilst she was Stepping off the Vehicle, and that by Reason of the Premises she had Fallen Heavily in the Road, Abraded her Shin-Bone, and Suffered from Shock and Other Discomforts. Her Claim (including Extra Nourishment and Various Items of Special Damage) Totalled £583 4s 9d. The Double-First found himself Opposed

by an Old Hand of Unrivalled Experience in that Class of Action, who Conducted the Case for the Plaintiff in a Manner which Shocked the Double-First Exceedingly. Whilst the Jury was being Sworn he Informed his Solicitor-Client in a Whisper which could be heard in the Central Hall that he would not Settle for Less than Five Hundred, and he Asked the Double-First, with Reference to the Plan, whether he would Agree (1) the Exact Spot where the Pool of Blood was Found, and (2) the Precise Locality where the Conductor had Admitted to the Policeman that he had done the Same Thing on Another Occasion. The Double-First Struggled against these Tactics in Vain. In his Final Speech, the Old Hand Reminded the Jury of the Possibility that Tetanus might Hereafter Supervene, and the Certainty that a Disfigured Tibia would Seriously Impair the Plaintiff's Matrimonial Prospects. Apart from his Successful Application for a Stay of Execution on the Ground that the Damages (£1000) were Excessive, the Double-First had a Disastrous Day.

..Moral. Despise not Your Enemy.

REVIEWS.

THE BENCH AND BAR OF ENGLAND.

by

J. A. Strahan.

After perusing the pages of the Trial of Jean Webster it is a pleasant change to turn to this very interesting book—The Bench and Bar of England, by J. A. Strahan. The book is a collection of sketches by Mr. Strahan which coriginally appeared in the Blackwood's Magazine.

The author has practised at a Criminal Bar, gone the Midland Circuit and been an Equity Draftsman and Conveyancer in succession; for about a dozen years he was on the reporting staff of a law paper when his duties necessitated his spending nearly every day in Court; also he has been a lecturer and examiner in law both in England and Ireland, and his text books Digest of Equity and A Concise Introduction to Conveyancing are well known to the members of the legal profession in New Zealand.

His remarks on Judges are illuminating. Weak Judges get their turn, but on the Judicial humourist he is a little hard. The tedium of the Court proceedings is often greatly relieved by a happy comment or a quip in point. Mr. Strahan's opinion, however, is that the Judicial humourist has rarely a greater sense of humour than his graver brethren, he has merely a lesser sense of dignity. He surprises us by the statement that the three most witty men on the English Bench in recent years, were, Lord Chief Justice Coleridge, Lord Bowen and Lord Macnaghten. He refers us to Lord Macnaghten's judgment in **Van Grutten v. Foxwell** if we wish to enjoy a remarkable display of humour, learning and literature. His Bar anecdotes are an excellent collection. He tells of a young counsel who displayed his opinion of the learning of the Bench clearly if not consciously. He had argued a case, and to his surprise and indignation the Judge decided it against him. He appealed, and when opening his case in the Court of Appeal, he began by stating and explaining at great length some most elementary legal principles. At last the Judges became impatient, and one of them said, mildly, enough: "Don't you think, Mr. Smith, you might assume that the Court knows some law?" "No, no, my lord," answered the young barrister hastily, "that was just the mistake I made in the Court below."

He tells this of the late Mr. Oswald, the author of the Treatise on "Contempt of Court" (which his fellow barristers insisted were all based on personal experiences). An unlearned and underbred Judge, after a tussle with Oswald, in which the Judge had come out second best, had announced angrily that he could teach him neither law nor manners. "I respectfully agree, my lord," answered Oswald blandly, "you could teach nobody either."

No man can get through a great leading practice at the Bar unless he not merely learns to learn quickly, but also to forget quickly. The following record of Sir Charles Russell's conversation with a Junior Counsel is of interest: The Junior Counsel in an intricate case had suddenly died and a friend of the author was lucky enough to get his brief. The case was one which raised many points and had been already several times before the Court. The friend had little time to make it up; but this did not disturb him, as Sir Charles Russell, who was leading him had argued the case on the occasions when it had been previously considered, and so he assumed was familiar with all the facts. At the conference, however, much to the friend's amazement, the first question which Sir Charles put to him, in his brusque peremptory way, was: "Well, what is this case all about." "Why, Sir Charles," replied Mr. Strahan's friend, "I thought you would know more of it than I possibly can." "I know nothing about it," said Sir Charles. "But," persisted the friend, "you have argued it three times already." "I tell you I know nothing about it," answered Sir Charles angrily. If I remembered the facts in all the cases I have been in, what sort of a thing would my head be now, do you think."

The author also mentions that the late Mr. J. Chamberlain had this same faculty.

The testimony of experts is generally regarded as biased testimony, but one seldom comes across such an example as is recorded by the author, of a distinguished scientist cross-examined as to a different view which had been maintained by him on the same point in another case, answered indignantly: "You seem to forget, sir, that I, like you, was then appearing on the other side."

Of the fair sex as witnesses Mr. Strachan expresses himself, thus: "Women I have usually found much better witnesses of what they have seen, than men. Men reflect on and draw inferences from what they have seen, and are apt to mix in their evidence what they surmise must have happened with what they actually saw happening; women usually tell just what they saw. Their evidence, however, is reliable only so long as their passions are not involved; when love of their husband or children, or hatred of their neighbour, enters into the question, not a word they utter can be trusted. They have no conscience.

The author's story of the young guardsman who was playing cards with Lord Russell, who answered Lord Russell by telling him "that he was not in his blasted old Police Court now" gives a different colour to the story than does Mr. Barry O'Brien in his "Life of Earl Russell."

It is expected, of course, that the irresponsible Lockwood would feature in these pages, and we are not surprised to learn that when he was a Junior on the North East Circuit he proposed the health of the Assize Judges, Mr. Justice Lush and Mr. Justice Shee by asking the mess to drink to wine and women, coupling the toast with the names of Mr. Justice Lush and Mr. Justice Shee.

This is undoubtedly one of the very best books of its kind extant.

TRIAL OF KATE WEBSTER (Edited by Elliott O'Donnell.)

This latest addition to the series of Notable Trials is not up to standard. The subject has few interesting features to the Barrister.

The trial was of Kate Webster for murder of another woman. There were no features of outstanding interest and the result of the Trial was inevitable on the evidence apart from the various and varying statements made by the prisoner in her futile efforts to lay the blame on others. Mr. Sleigh's task in defending Webster gave him no hope of success. His speech, as well as the other speeches reported in the third person, appears to be incomplete thereby depreciating the value of the book.

The Introduction is not couched in language that will appeal to the legal practitioner and the reflections and opinions anent the psychological and criminalogical aspects are not convincing. Mr. O'Donnell's style of writing is not sufficiently calm to give confidence in his capacity accurately to draw deductions of much weight on the scientific problems he unravels.

The report of the Trial itself loses much by not having a verbatim report of the examination of the various witnesses or at least of the chief witnesses. The value of giving the questions and answers in full is to a young practitioner and a student of advocacy high. If the publishers hope to maintain the great reputation this series undoubtedly has they must not allow the true object and worth of the Trials to be supplanted by deductions from and roamings into the psychological features of problematical value and the reporting of the trial itself to suffer. If the standard set by say Messrs. Filson Young and Roughead could be maintained the publishers will be doing a great service to the legal profession for although the trials are read by laymen as well as legal practitioners yet they are primarily intended for and are useful to the latter.

These Notable Trials should be read by all members of the Bar for with few exceptions they report the methods of great advocates. They are wonderfully interesting and their use is inestimable. The verbatim reports of modern criminal trials of importance must always contain valuable material for the Barrister. We should like to see some of the great criminal Trials that have taken place in the Colonies included in this Series. The time will come, of course, when they will be published and we see no reason why they should not be incorporated in the Notable British Trials Series now.

COLLISIONS ON LAND.

By Roberts and Gibb.

This work is due to arrive in New Zealand in about three weeks' time. In these days of increasing Motor Traction the subject of Collisions on Land is of much more importance than formerly and this work should prove of considerable assistance.

NOTER UP, &c.

(A full note of each of the cases referred to hereunder will be found in the Law Journal for May 16, 1925, and many of the cases will be reported later in the Law Reports.)

EXECUTORS AND ADMINISTRATORS.—Canada—Action for malicious prosecution—Appeal—New trial—Death of plaintiff—Right of personal representative to proceed—Practice—New trial—Right of Supreme Court to impose conditions.—Wing Lee v. Yick Pong Lew, L.J. 463.

Held, (1) that, where the plaintiff in an action for malicious prosecution appeals from a judgment ordering a new trial and dies before the hearing of the appeal, the cause of action survives to his personal representative; (2) that the Supreme Court of Canada has power to impose conditions on the grant of a new trial.

As to right of personal representative to continue an action ex delicto, brought by the deceased: See **Halsbury**, Vol. 14, Title "Executors and Administrators," Part III, Sec. 1, Par. 525.

As to grant of new trial: See **Halsbury**, Vol. 23, Title "Practice and Procedure," Part II, Sec. 8, Pars. 374-380.

FOOD AND DRUGS.—Milk—Cream rising—Sale from bottom of churn—Omission to stir—Abstraction of fat.—Bridges v. Griffin, L.J. p. 466.

Held, that where a person, knowing that cream would rise naturally to the top of a churn, omits to stir the milk and sells it from the bottom, there is an abstraction of fat within Sale of Food and Drugs Act, 1875, Sec. 6, and Milk Regulations, 1901, Clause 1.

As to abstraction of cream: See Halsbury, Vol 15, Title "Food and Drugs," Part V, Sec. 5, Par. 147.

HUSBAND AND WIFE.—Divorce—Turkish domicil—Decree nisi by Court not now in existence—Treaty of Peace (Turkey) Act, 1924 (c. 7), Sec. 1 (1) (2).—Seager v. Seager, L.J. p. 466.

Held, that where a non-Moslem national of Great Britain domiciled in Turkish dominions and subject to the jurisdiction of Turkish national tribunals, had obtained a decree nisi for divorce in His Majesty's Supreme Court of the Sublime Ottoman Porte (Matrimonial Jurisdiction), which Court had ceased to exist before the decree was made absolute, an application for a decree absolute should be made to His Majesty's Supreme Court in England, and the facts should be recited in the decree.

As to jurisdiction of the English Courts in Divorce causes: See **Halsbury**, Vol. 6, Title "Conflict of Laws," Part IX, Pars. 388-399.

INSURANCE.—Lifepolicy—Trust for wife if assured died before certain date—Policy moneys not liable for payment of assureds debts in event of his death before that date.—Ioakimidis Policy Trusts, In re: Ioakimidis v. Harteup, L.J. p. 465.

Held, that an endowment policy effected for the benefit of the wife of assured in the event of assured's death before a certain date, leaving his wife surviving him, but if assured survived that date, the policy moneys were to be payable to him in cash or to his executor or administrator, is effected on the assured's "own life," and impressed in the event which happened with a trust for the wife, and is a valid policy within Married Women's Property Act, 1882, Sec. 11, so far as it created a trust for the wife in the event which happened, and the policy moneys are not liable for the debts of assured.

As to policies effected under Married Women's Property Act, 1873: See **Halsbury**, Vol. 16, Title "Husband and Wife," Part V, Sec. 5, Par. 804.

LANDLORD AND TENANT.—Lease—Reservation—Passage of gas, water and other pipes through demised premises—Extent of right.—Taylor v. British Legal Life Assurance Company, L.J. p. 465.

Held, that where a lease reserves "the passage of gas, water and other pipes and electric wires through the demised premises," the words of the reservation should not be extended to an altogether new system of pipes and wires when there is an existing system to which they can apply.

As to exceptions and reservations in a lease: See **Halsbury**, Vol. 18, Title "Landlord and Tenant," Part IV, Sec. 4, Pars. 886-888.

LAW JOURNALISMS.

A WIFE'S TORTS.

There is a good chance of **Seroka v. Kattenburg** (17 Q.B.D. 177) being overruled by statute, and of a husband ceasing to be liable for his wife's torts. This we gather from the statement made by the Lord Chancellor in the House of Lords on Wednesday in answer to Lord Danesfort's inquiry whether the Government would appoint a Select Committee on the subject. It will be remembered that the question arose recently in **Edwards v. Porter** (1925 A.C. 1), and Lord Cave, with Lord Birkenhead, were for overruling the **Seroka Case**, and holding the husband not to be liable. They considered that the change had already been effected by recent legislation. But the majority, Lords Finlay, Atkinson and Sumner, took the contrary view. The Government, said Lord Cave on Wednesday, propose to introduce legislation to deal with this and other points affecting husband and wife at a convenient time. (9/5/1925.)

JUDGE AND JURY.

Again, this week there has been something of a "scene" between Judge and Jury in the King's Bench Division, and in the course of it Mr. Justice Acton spoke very plainly as to the shortcomings of the jury, which took a too independent course. Into the merits of the particular difference of opinion we do not propose to go. It would be a lack of respect on our part towards the learned Judge to venture to question the correctness of his reasoning, and to attempt to do so on the faith of newspaper reports only. Assuming that the Judge was right and the jury was wrong, we venture the submission, even so, that these too frequent misunderstandings must be attributed to a fault in the handling by the presiding Judges of their juries; and, at any rate, we very much doubt if the former are warranted in the public condemnation of the latter which tends to become a habit. It may be conceded that juries are, for the most part, stupid, recalcitrant, pig-headed, or what you will. The fact remains that some Judges invariably have good juries, and other Judges invariably have bad juries. It is very nearly justifiable to go even further and to suggest that the good Judges are always provided with the good juries, and the bad Judges are always provided with the bad juries. But again assuming that our suggested view is entirely untenable, it is obvious that the nation, which constitutes the jury, is not likely to change its habits or its methods. There is then no alternative but that the Judges should do so. (9/5/1925.)

A FAULTY VERDICT OF A JURY.

In **Weber v. Birkett** the Lord Chief Justice, delivered on March 5 last, has, as "Cursitor" recently said, been upheld, on appeal, by Bankes, Scrutton and Atkin, L.JJ. ("Times" 22nd ult.). It will be remembered that an action in defamation combined two claims, one in respect of a speech (slander) and the other in respect of a report of it (libel); and that, with the defence, one hundred guineas were paid into Court in respect of each claim, that is to say £210 in all. The jury found for the plaintiff and fixed the damages at £200; but, notwithstanding the most pressing invitation from the Lord Chief Justice, the jury would not allocate the damages to the respective claims. Each side, therefore, claimed judgment, relying upon such hypothetical allocations of the £200 awarded, with reference to the £210 paid into Court, as were severally convenient to themselves. The Lord Chief Justice felt himself bound to hold that the result of the jury's finding must be the same as if they had disagreed and made no finding at all, and that the same consequences must follow. With that conclusion the Court of Appeal has readily and entirely agreed; and it would thus appear that, however regrettable is such defeasance of a jury's manifest intention, the learned Judge is in no degree to be blamed in this instance. A further but more technical interest attaches to the judgment of the Court of Appeal, in that Atkin, L.J. upon **Benning v. The Ilford Gas Company** (1907, 2 K.B. 291) being cited as a useful authority, threw considerable doubt upon its correctness. (16/5/1925.)

Printed by Warnes & Stephenson, Ltd., 127 Tory St., Wellington, for the Proprietors of "Butterworth's Fortnightly Notes."