[TUESDAY, FEBRUARY 2, 1926.

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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.

TUESDAY, FEBRUARY 2, 1926.

ANNOUNCEMENT.

A Full-page reproduction of the photograph of the Legal Practitioners who met at Wellington to farewell Sir Robert Stout P.C., K.C.M.G., will be included as a supplement to the next issue of "Butterworth's Fortnightly Notes." The photograph will be reproduced on art paper and will be suitable for framing. Single copies of this issue to be obtained from Butterworth's, P.O. Box 472, Wellington. Price 2/7 per copy, post free.

Court Sittings for 1926.

SUPREME COURT.

AUCKLAND.
At 10 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 27th July; Tuesday, 26th October.

HAMILTON.
At 10 a.m. on Tuesday, 23rd February; Tuesday, 8th June; Tuesday, 31st August; Tuesday, 23rd November.

NEW PLYMOUTH.
At 10.30 a.m. on Tuesday, 16th February; Tuesday, 18th May; Tuesday, 10th August; Tuesday, 23rd November.

GISBORNE.
At 10.30 a.m. on Monday, 8th March; Monday, 14th June; Monday, 23rd August; Monday, 15th November.

WANGANUI.
At 10.30 a.m. on Tuesday, 9th February; Tuesday, 11th May; Tuesday, 17th August; Tuesday, 16th November.

WELLINGTON.
At 10.30 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 27th July; Tuesday, 26th October.

PALMERSTON NORTH.
At 10.30 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 3rd August; Tuesday, 9th November.

NAPIER.
At 10.30 a.m. on Tuesday, 23rd February; Tuesday 8th June; Tuesday, 17th August; Tuesday, 9th November.

MASTERTON.
At 10.30 a.m. on Tuesday, 9th March; Tuesday, 7th September.

NELSON.
At 10.30 a.m. on Tuesday, 23rd February; Tuesday, 15th June; Tuesday, 23rd November.

BLENHEIM.
At 10.30 a.m. on Tuesday, 16th February; Tuesday, 8th June; Tuesday, 16th November.

CHRISTCHURCH.
At 10.30 a.m. on Tuesday, 9th February; Tuesday, 11th May; Tuesday, 17th August; Tuesday, 16th November.

TIMARU.
At 10.30 a.m. on Tuesday, 2nd February; Tuesday, 4th May; Tuesday, 3rd August; Tuesday, 2nd November.

HOKITIKA.
At 10.30 a.m. on Wednesday, 3rd March; Wednesday, 16th June; Wednesday, 15th September.

GREYMOUTH.
At 10.30 a.m. on Wednesday, 3rd March; Wednesday, 16th June; Wednesday, 15th September.

WESTPORT.
At 10.30 a.m. on Wednesday, 3rd March; Wednesday, 16th June; Wednesday, 15th September.

DUNEDIN.
At 10.30 a.m. on Tuesday, 9th February; Tuesday, 4th May; Tuesday, 3rd August; Tuesday, 2nd November.

INVERCARGILL.
At 10.30 a.m. on Tuesday, 3rd February; Tuesday, 18th May; Tuesday, 24th August; Tuesday, 16th November.

EDITORIAL.

THE ATTORNEY GENERAL.

Halsbury's "Laws of England" tells us that the Attorney General is the head of the Bar and has precedence over all King's Counsel. He has, to use the words of A. L Smith L.J. "to perform high judicial functions which are left to his discretion to decide."

The office of Attorney General is the greatest prize that a successful Barrister can gain apart from elevation to the Bench. When the office becomes vacant the Bar is entitled to expect that from its ranks one of its leaders, both as lawyer and man, will be selected. The public is entitled to know that the Government with all its vast, important, and difficult problems, is being advised on all its questions of moment, so far as the law is concerned, by a recognised leader of the Bar. As a man in the broadest and highest sense of the word the Honble. W. D. Stewart is a splendid example. He is a man who as a boy and young man was well educated. He has a keen appreciation for good literature and is no mean writer himself. He is a man of the highest honour, and his kind and sympathetic nature endears him to all who know him. He volunteered for the war, and as he was not entitled to a commission he volunteered as a private soldier. His marked ability soon lifted him into the ranks of the commissioned officer. He left New Zealand with the 8th reinforcements. He was a born leader of men In France he was intrepid to a degree. Many nights he lay in the wet muds of France in front of Houplines out in No Man's Land seeking information of the enemy in front. He was frequently leading patrols, wiring parties and exposing himself to innumerable dangers. His health was ruined at the war and he returned a cripple. He has been hampered by this ever since. As a lawyer had he stuck to his office there is no doubt he would have risen to a foremost position as a solicitor in Dunedin. We believe he has not practised at all since the war, at any rate if he has, his time there has been very broken, partly by politics and partly by ill health. Before the war though properly regarded as a careful lawyer he was never a brilliant advocate and one finds his name but seldom in the Law Reports. The profession, therefore, cannot be satisfied that their new leader is as yet qualified to lead them at the Bar. Doubtless he is wise enough to know his limitations and the services of some of the leaders of our Bar will, from time to time, by invoked by him on the part of the Government. We have already in a previous issue expressed the opinion that it is advantageous to have the Attorney General in the Upper House as none of the King's Counsel were to be found in the House of Representatives. When there are no real leaders of the profession in the Lower House surely both for the sake of the public and the profession a leader should be sought from without. This appointment will be watched with interest. If it is possible for a lawyer who does not pretend to be in the front rank of advocates to be successful as Attorney General then we know that the Honble. Mr. Stewart will succeed. In the circumstances we wish him well.

MINISTER OF JUSTICE.

It is very gratifying to find the Prime Minister has added to his Cabinet a comparatively new member in the person of Mr. F. J. Rolleston and particularly is it gratifying to the profession that he is the Minister of Justice. That Mr. Rolleston was bound to succeed as a politician was obvious a few months after his entry into Parliament. He brought a sound knowledge of the law, a keen and logical mind to bear on the difficult problems of finance and taxation in an enlightening manner. He seized on these difficult matters for analysis while the very great majority of his confreres ignored or flirted with them. The Hon. Mr. Rolleston will, we doubt not, prove an excellent Minister of Justice and we may look forward to the interests of the profession being protected in his hands. The profession will feel happy and confident in this appointment and we offer our congratulations to the new Minister.

SUPREME COURT.

Ostler J. Nov. 14, 17, 1925.
Palmerston North.

IN RE BARNES BANKRUPT.

Bankruptcy—Sec. 80 of Act—Money paid into Court under charging order nisi—Whether money received by creditor.

A debtor paid a sum of money owing to a creditor into Court after the making of a charging order nisi in favour of a third party. The creditor, Barnes went bankrupt a week later. The order nisi had never been made absolute. Official Assignee asked for an order that the money paid into Court be paid to him.

Innes for Official Assignee in support.
McGregor for Manawatu Bacon Co. Lt contra.

OSTLER J. made the order following **Butler v. Wearing** 17 Q.B.D. 182 and in re **Trehearne** 60 L.J.Q. B. 50. He held that payment into Court was not a receipt of the debt by the creditor within Sec. 80 of the Bankruptcy Act 1908.

Herdman J. Sep. 17, Oct. 19, Nov. 24, 1925
Hamilton.

PATERSON v. IRVINE AND IRVINE.

Mortgage—Assignment of equity—Subsequent increase of interest—Effect on the liabilities of original mortgagor.

We take the facts from the reasons of His Honour who said: This is an application for an injunction to restrain the defendants from selling or dealing with a third mortgage debenture for £5000 issued to the plaintiff by the Leviathan Hotel Co. Ltd. on the 9th of June 1913. The material facts upon which the Court is asked to grant relief are these:—

(1) On the 23rd of August 1916 the plaintiff with her brother, Mr. William Alan Paterson, executed a memorandum of mortgage in favour of the defendants and one, Christopher Irvine, over a property known as the Te Poi farm, near Mata Mata, to secure the repayment of the sum of £10,000 and interest. The mortgage provided for the repayment of £4000 on the 27th of January 1919 and the balance of £6000 on the 27th of July 1921. It also provided that the rate of interest on the first £2000 of the sum of £10,000 was to be 6% and that the balance was to bear interest at the rate of 5%. The mortgage contained a declaration that the provisions of the Mortgage Extension Act 1914 and its amendments should have no applications to it.

(2) On the 23rd of August 1916, that being the date of the memorandum of mortgage, the plaintiff being the owner of the debenture before mentioned mortgaged the same to the defendants and Christopher Irvine to the extent of £4000 by way of collateral security to the memorandum of mortgage. It will be noted therefore that this document operated as a security in respect only of £4000 of the £10,000 secured to the Irvines, the £4000 being the amount which Miss Paterson and her brother contracted to repay on the 27th of January 1919.

(3) About the month of April in the year 1921 the plaintiff with her brother transferred the Te Poi farm to one Ebenezer Henry Slater subject to the beforementioned mortgage of £10,000. At this date the sum of £4000 which plaintiff and her brother had contracted to pay off the principal on or before the 27th of January 1919 had not been repaid, and the due date of the mortgage, namely the 27th of July 1921, was near at hand. The mortgagors were however by virtue of legislation passed after the mortgage was executed entitled to claim protection under the enactment which gave defaulting mortgagors relief, so, whether or not the mortgagees wished to do so, they were debarred except by obtaining the consent of this Court from proceeding against the mortgagors who had defaulted in respect of the £4000.

(4) On the 10th day of February 1922 Slater and the Irvines executed what is termed a memorandum of increase in the rate of interest contained in the following words:—

> "The rate of interest payable under the annexed mortgage registered Number 73372 in respect of the whole of the principal sum of Ten Thousand pounds is hereby increased to six pounds ten shillings per centum per annum as from the twenty-seventh day of September, one thousand and nine hundred and twenty-one.
> Dated this tenth day of February, 1922."

A. W. Blair and Adams for plaintiff.
W. P. Gray for defendants.

HERDMAN J. gave judgment for the defendant. He held that the execution of the memorandum of increase did not release the plaintiff from liability. He referred to the following decisions: **Halsbury** vol. 15 p. 442; **Baynton v. Morgan** 22 Q.B.D. 77; **Way v. Hearn** 1862 II. C.B. 774; **Heade v. Loundes** 23 Beav. 361;**Knuckey v. Baddeley** 29 N.Z.L.R. 710; **Robertson v. White and Death** 1923 Gaz. L.R. 253; **House v. Bradford Banking Co.** 1894 A.C. 586.

Solicitors for plaintiff: **Chapman, Skkerrett, Tripp & Blair,** Wellington.
Solicitors for defendants: **Macdairmid, Mears & Gray,** Hamilton.

Sim, J. Nov. 6, 7, 16, 1925.
Dunedin.

LLOYD v. MOORE.

Sale of land—Agreement for sale—Specific performance—Mistake—Vendor contributing to purchaser's mistake—Whether vendor entitled to specific performance.

The parties to this action entered into a contract for the sale of the plaintiff's section of land. The defendant rescinded and the plaintiff brought an action for specific performance or damages. The defendant relied on several grounds including the insertion of a clause in the contract after the terms were settled and also on misrepresentation. Both these grounds were negatived by the learned Judge. The defendant erroneously thought he was buying the land as fenced and the plaintiff did not shew on the ground the precise boundaries. With this aspect of the case arose the only question of law of interest.

Calvert for plaintiff.
Sinclair for defendant.

SIM J. after dealing with the defendant's contentions said with reference to the above-mentioned question: In the circumstances the plaintiff must be treated as having contributed to the mistaken belief on the part of the defendant as to the boundaries of the allotment, and on that ground the Court is justified in refusing to enforce specific performance on the contract: **Tamplin v. James,** 15 Ch. D. 215. The plaintiff claims in the alternative to recover damages for breach of contract. He is entitled to forfeit and retain the deposit of £50 paid by the defendant. In assessing damages this amount has to be taken into consideration: **Ockenden v. Henly,** E.B. & E. 485.

Solicitors for Plaintiff: **Brugh, Calvert & Barrowclough,** Dunedin.
Solicitors for Defendant: **Solomon, Gascoigne, Sinclair & Solomon,** Dunedin.

Reed, J. Nov. 18, 26, 1925.
Auckland.

IN RE MENNIE DECEASED: MORPETH v. WILLIAMSON.

Will—Postponed legacies—Whether to carry interest until payment.

We take the facts from the reasons of the learned Judge. The action came before His Honour in the form of an originating summons to determine the meaning of some of the clauses in the will of James Milne Mennie deceased. The net value of the estate of the deceased is in excess of £83,000 and there are a large number of legacies. These may be grouped as follows: (1) Legacies to individuals totalling £2000, and to be paid within a year of the death of the testator: (2) A legacy of £10,000 to be paid to Mrs. Agnes Dey Williamson, a daughter of the deceased "within five years from the date of" the testator's death; (3) Legacies of £1000 to each of four children of the said Mrs. Williamson, to be paid as they respectively reach the age of 21 years and not to vest before that age, interest to be paid in meantime to the mother, commencing from one year after the death of the testator; (4) Legacies and bequests for public and charitable purposes totalling £14,000. "to be paid within five years from the date of" the death of the testator; (5) Residuary estate bequeathed for the purpose of founding and maintaining a school to be called "Mennie's Scottish Presbyterian School." There is also a bequest of the income for life of £5000 to the widow of the testator, but as all matters in respect of that have been already dealt with by this Court in connection with an applicattion under the Family Protection Act I am not concerned with it in this proceeding.

The testator died on the 14th January, 1924, and the executors have administered the estate to the extent that they have paid all debts and liabilities and death duties. They have also paid the legacies mentioned in Group (1), as above set out, and have set aside £4000 to meet Group (3), tthe will requiring the legacies, mentioned in these two groups, to be paid within one year of the testator's death. They have also made provision for carrying out an order under the Family Protection Act for payment to the widow of £1500 a year. This leaves unpaid Group (2), £10,000 and Group (4) £14,000, the legacies in respect of both of which groups are required "to be paid within five years "from the date" of the death of the testator. The executors have in hand £12,000 to meet these legacies of £24,000, and there is little prospect of the deficiency coming into the hands of the executors before the full term of five years. In those circumstances certain questions are asked which I paraphrase as follows:—

(1) Is the legacy referred to in Group (2), and payable to Mrs. Williamson, payable in priority to the legacies in Group (4)?
(2) As money becomes available towards payment of the legacies in Group (4) must it be distributed rateably amongst the several legatees or may the executors in their discretion apply it to pay wholly or in part any of the said legacies exclusive of the other?
(3) Are the legatees, in respect of the legacies grouped in (2) and (4), entitled to interest from the end of the executor's year till payment?
(4) If so at what rate per cent?

Gould for executors.
Northcroft for Agnes D. Williamson.
Prendergast for certain beneficiaries.
Richmond for residuary legatee.

REED J. said: The first question is only asked for the reason that it was thought advisable to have the definite authority of the Court for payment in view of the fact that one of the executors is the husband of Mrs. Williamson. The answer is in the affirmative, the will clearly so providing by paragraph 8 which reads:

> "I direct my trustees to pay all legacies and bequests in favour of individuals in priority precedence and preference to all legacies and bequests for any public or charitable or such like purpose."

The legacies in Group (4) are of the class last mentioned.

As to question 2 there is no contest, all the counsel engaged rightly admitting that the moneys mentioned should be distributed rateably, and the answer is in accordance there with.

The third question is in controversy, counsel for the various legatees submitting that interest should be allowed whilst counsel for the residuary legatee contends to the contrary.

As the unrealised part of the estate is not producing income commensurate with its capital value, and is quite insufficient to pay interest on the legacies, it follows that if interest has to be paid it must come out of capital, to the detriment of the residuary estate.

Whether interest should or should not be allowed depends upon the intention which the will itself, either expressly or by implication, declares: what in fact is the meaning of the words—the meaning, that is, which the words of the will, properly interpreted, convey. To assist in that interpretation the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. Per. Blackburn J. in **Allgood v. Blake** L.R. 8 Ex. 160, 162. In the present case the important fact that would be present to the mind of the testator was that his estate was not liquid, that in fact more than half of the estate consisted of real property, some of which would be difficult to realise.

His Honour finally decided the question as follows: The legatees in Groups 2 and 4 are not entitled to interest from the end of the executor's year unless the executors had

at that date sufficient realised assets to satisfy or partially satisfy such legacies. It is the duty of the executors to realise the assets as and when it may be most convenient and beneficial to the estate, and, as the proceeds become available, to pay the legacies. Interest on unpaid legacies will only run from such date or dates as realised assets are on hand and not so paid.

Th last question is, at what rate per cent., if it becomes payable, should interest be paid? There is no fixed rule as to this. In England the rate allowed has varied at different times. Rule 447 of the Code is not applicable, this not being a judgment or order directing an account of legacies. **In re Gibson's Will** 16 G.L.R. 298 Cooper J. said that:

> "This rule recognises that the rate of 8 per cent. interest upon unpaid legacies is, unless any other time of payment or rate of interest is directed by the will, the proper rate."

It probably was a fair rate at the time the rule was made but it is a very old rule and rates are much lower at the present time.

The circumstances of the present case do not bring it within the actual four corners of the rule and I am therefore not bound by it. I think a reasonable rate should be allowed, and I fix that at six per cent.

Costs of all parties to be allowed as between solicitor and client and paid out of the residuary estate.

Solicitors for Executors: **Morpeth, Gould, and Wilson**, Auckland.

Solicitors for Agnes D. Williamson: **Earl, Kent and Co.**, Auckland.

Solicitors for certain beneficiaries: **Brookfield, Prendergast and Co.**, Auckland.

Solicitor for Residuary Legatee: **H. P. Richmond**, Auckland.

COURT OF ARBITRATION.

Frazer, J. Oct. 2, Nov. 17, 1925.
Auckland.

AWA v. TAUPIRI COAL MINES, LTD.

Workers Compensation—Piece worker—Average weekly earnings—Method of computation.

This was an action for compensation under the Workers Compensation Act but the only matter in dispute was the proper basis for computing the compensation due the plaintiff. The judgment is an interesting and important one. The relevant facts were the plaintiff was a piece worker and during the 12 months ending on the day he was injured he had been continuously in defendant's employment days and had earned £219 15s. 10d. He had worked on 181 days and had arned on an average £1 4s 1d per day. A full fortnight's work was eleven shifts, and a week's work was taken as 5½ shifts, though the custom of the mine when working full time was to work 6 shifts one week and 5 the next.

O'Regan for plaintiff.
Richmond for defendant.

FRAZER J. after reciting the facts said: It has already been stated that the plaintiff worked on 181 days during the year. According to the figures supplied to us, he lost 15 days through illness and a family bereavement, 16 days through recognised holidays, 14 days through a railway strike, and 70 days through the mine being closed owing to slackness of trade. It is common ground that an ordinary week's work at the mine was not a full week's work. Indeed, only one full fortnight was worked during the year. The normal week—that is, a full week's work without overtime—had no real existence in this case. In these circumstances the defendant company deducted six weeks from the 52, to allow for the periods covered by illness, bereavement, holidays and the railway strike, and divided the year's earnings by 46. The amount thus arrived at (£4 15s 4d) was, counsel submitted, the average weekly earnings of the plaintiff for the twelve months preceding the accident. It was argued that the 70 days during which the mine was not working were not days on which the plaintiff was "absent from work" within the meaning of Section 6, for that phrase implied that work was available if the worker was prepared to undertake it, and that the 70 days should not therefore be treated as days worked.

In our opinion the correct way in which to ascertain the average weekly earnings of a piece worker in a consistently irregular (though continuous) employment, such as that under consideration, is analogous to that settled by the House of Lords in **Anslow v. Cannock Chase Colliery** (1909) A.C. 435. The Imperial Act differs in its wording from the New Zealand Act, but in a case such as the present it becomes necessary to make such a computation "as is best calculated to give the rate per week at which the worker was being remunerated" while at work. This in terms is what schedule 1 (2) (a) of the Imperial Act requires to be done, except that the words "while at work," appearing in Section 6 (1) of the New Zealand Act, and used by us, are not found in the schedule to the Imperial Act. It appears to us that the rule laid down by the House of Lords, with a modification to which we shall refer, should be followed by this Court in cases such as this. The method is summarised in **Ruegg's Workmen's Compensation Act** (9th Edition, at p. 229) as follows—

> "Divide the total earnings of the workman by the number of weeks he actually worked; multiply the result by the number of weeks in the year when work was available (i.e., 52, less stoppages due to trade holidays, bad trade, stock-taking, and other normal incidents); and divide by 52. The result will give the average rate per week throughout the year at which the workman was being remunerated, and will eliminate any loss of work due to illness or other unavoidable absence."

This rule is, of course, not applicable, in a case of the kind exemplified in **Roberts v. Taupiri Coal Mines Ltd.** (1919) G.L.R. 32, but it is not suggested that any circumstances such as existed in that case operated here.

The figures supplied to the Court are apparently not quite accurate, for the full 52 weeks would cover 364 days, less 78 Sundays and off-Saturdays, leaving 288 possible working-days. The plaintiff admittedly worked 181 days, and was absent through illness or bereavement on 15 days on which work was available. This total of 196 days, subtracted from 288 days, leaves 92 days on which no work was available. This number is less than the number supplied to us, which was made up of 70 days due to slackness, 16 holidays, and 14 days due to a railway strike, aggregating 100 days. If we regard the time lost by the railway strike as included in the 70 days lost through slackness, the number of days lost by the mine is only 86, instead of 92.

The calculation, under the rule adopted by the House of Lords, is worked out as under:

The total earnings for the year were £219 15s 10d. The number of weeks actually worked by plaintiff was 33. This is arrived at by dividing the number of days on which he worked (181) by 5½. The Court is not bound to attribute the time worked to particular weeks (**Densem v. Speden** 8 G.L.R. 58). Dividing £219 15s 10d by 33, we get £6 13s 2d. The number of weeks in which work was available was, in round figures, 36. This is arrived at by adding the 15 days (approximately three working weeks) that the plaintiff was absent from work through illness or bereavement to the 33 weeks actually worked. £6 13s 2d multiplied by 36 gives £239 14s. Dividing this by 52, we get £4 12s 2d, which represents the average weekly wage of the plaintiff for the twelve months preceding the accident. In making this calculation, we have ignored fractions.

On the authority of **Densem v. Spedem** and **Nickells v. Waihi Grand Junction Gold Mining Coy., Ltd.** (10 G.L.R. 552), the final divisor should not be 52, if recognised holidays or other interruptions of work not due to ordinary slackness of trade occurred during the twelve months. This modification of the English rule is necessary in order to give effect to the words "while at work" in Section 6 (1) of the New Zealand Act. We think that the weeks (on the basis of 5½ days to a week) during which the plaintiff did no work, owing to recognised holidays and the railway strike, should be subtracted from the final divisor (52); for, though the relation of master and servant no doubt existed during those periods, the plaintiff was unable to work, and the company was unable, from causes apart from ordinary slackness of trade, to offer him work. The somewhat cumbersome method of arriving at the first multiplier under the House of Lords' rule can be simplified, in a case such as this, by adding to the time actually worked the periods during which, for personal reasons, the plaintiff did not accept work that was available. Assuming that the figures supplied to us are correct, 30 days (14 for the railway strike and 16 recognised holidays), or approximately 5½ weeks, should be deducted from the final divisor, which becomes 46½. The plaintiff's average weekly earn-

ings while at work during the twelve months preceding the accident should, therefore, be ascertained as follows:—

Total earnings	£219	15	10
Divide by 33	6	13	2
Multiply by 36	239	14	0
Divide by 46½	5	3	1

This calculation is, of course, dependent on the accuracy of the figures supplied to us, and it omits fractions, but counsel should have no difficulty in obtaining the required data from the company's records and working out an exact calculation.

A similar result would have been arrived at if the company instead of working broken time each week, had alternated weeks of full work with weeks in which no work at all was done, in such a manner as to provide 36 weeks' working during the twelve months.

Solicitor for Plaintiff: **P. J. O'Regan**, Wellington.
Solicitors for Defendant: **Buddle, Richmond and Buddle**, Auckland.

THE JUDICIAL BENCH.

A Suggested Reform.

by

P. J. O'REGAN, Esq.

Let me state at the outset that this article has not been suggested as the result of any appointment to the Bench in this country. Our Judges have heretofore upheld the traditions which are the inheritance of centuries, and their work will bear comparison with that of any other of the countries comprising the British Empire. First I write to comply with a long-standing promise to the Editor of "Fortnightly Notes" to become an occasional contributor, and, secondly, to outline a scheme for the appointment of Judges and Magistrates which, it seems to me, for more than one reason, would be a change in the right direction. Briefly, I favour a system under which Judges and Magistrates would be elected without any reference whatever to the Government of the day.

I shall be told of course that the elective system has been in operation in America since the birth of the United States, and that it has there produced grave evils. The reply is simple. I do not propose the adoption of the American method of election, though I am prepared to maintain, if need be, that the evils of that method have been greatly exaggerated.

First, I would point out that the prevailing method of appointment by the Government of the day comes to us from times very different from our own. We still speak of "the King's Judges", because time was when the King, under the "advice", no doubt, of counsellors of his own choosing, did in fact appoint the Judges, and we know that in fact the King once claimed the right to sit on the Bench with his Judges, and that even after that right had dropped into disuse, there were Kings of England who attempted to influence judicial decisions. The days when such things were possible have drifted far down the gallery of the past, never to be revived. Nevertheless we still cherish the make-believe involved in the phraseolgy of those far-off times, and such is the effect of verbal formulae, that it requires an effort after all to realise the fact that the Bench is filled by the Government of the day—that in practice the Sovereign has ceased long since to be concerned in such appointments at all. It is time we adopted a system more consonant with the practical facts of our times, and I hope to convince the reader that the plan hereinafter outlined is pregnant with salutory constitutional benefits.

I propose, not that our Judges and Magistrates should be elected by the people, but that they should be chosen by their brethren of the legal profession. First, I would have an Electoral College elected by the profession. The number of persons comprising that College is a detail for further consideration, and, of course, the whole scheme could only be authorised by an Act of Parliament, thus ensuring the sovereignty of Parliament in the last analysis. But the College should be large enough to make it fully representative of the profession, and it could well be made elective by postal ballot and under the proportional system. Of course it would be elected for a given number of years, and it should hold sessions at periodical intervals. All members of the profession should be eligible for membership of the College, and every constituent, of course, could have one vote, and no more. Members of the College should be eligible for appointment to the Bench, but the choice need not be restricted to them. Perhaps the Attorney General and Solicitor General for the time being should be members **ex officio**. Details, however, do not belong to this rough outline I am endeavouring to bring before my readers.

It goes without saying that membership of the Electoral College would itself be a high honour—a compliment which the profession would be able to pay to representative members who, though equally worthy with the few to whom the present system restricts the highest honours, are now precluded from the proper opportunity of distinguishing themselves. This, though an incidental consideration, is important enough to induce the audience to whom this article is addressed to lend me its ear. Reflection will show, moreover, that it would give the profession a position of constitutional influence of which it is now deprived, and I dare to assert that the highest public interests would be more effectively served if our influence were legitimately extended.

One effect of the system I advocate would be to eliminate even the suspicion of political influence from the Bench. It has ever been the aim of Constitutional reformers to safeguard the independence of the Bench and to separate the Judiciary from the Executive. The theory underlying the system of election authorised by the American Constitution is that though both the Bench and the Legislature should equally derive their authority from "the consent of the governed", yet they would be more effectively separated than if the Bench owed its existence to the Executive. It should be borne in mind that the men who framed the Constitution of the United States lived in times very different from our own. They had in mind to an extent we do not realise the days, then not so far behind, when Tudor and Stuart Kings sought to sap the independence of Judges, sometimes through the medium of complaisant Ministers, and they sought a means whereby the Bench would derive its authority direct from the people. If the system they founded has not fully realised their hopes, we should not too readily censure their workmanship, nor should we conclude that our own system is the only alternative, or that it excludes the possibility of political influence. The Federal Supreme Court of the United States does in fact closely resemble our own, inas-

much as the members thereof, unlike the State Judges, are not elected by popular suffrage, but are appointed by the President, "with the advice and consent of the Senate". Yet, curiously enough, the Federal Supreme Court has by no means escaped the charge of allowing politics to influence its decisions. The reader is aware of course, that the interpretation of the Constitution is the function of the Supreme Court, and anyone who has followed American history does not require to be told that fierce political controversy has often centred round the interpretation of the Constitution. For example, the Cleveland Administration came into office in 1892 under a pledge to give effect to a radical reduction in the tariff, the public opinion of the Union having been shocked into activity by the McKinley Tariff of 1889. Of course, such a reduction of the tariff as Mr. Cleveland contemplated involved direct taxation, and so one of the first acts of the Administration was to procure the passage of income tax legislation by Congress. An income tax had been adopted by Congress before, and nobody had dreamed of suggesting that it was **ultra vires** its Constitutional authority. The "interests" behind the tariff got to work, however, and the Federal Court declared the Cleveland law unconstitutional. We have it on the authority of Lord Bryce that the Judges appointed by the Republican Party voted one way and the appointees of the Democratic Party the other. Following the Civil War political power was practically monopolised by the Republican Party, and hence the Cleveland income tax law owed its defeat to the fact that the Democratic appointees were the minority of the Bench!

As a matter of fact, however, we have no need to go so far afield as the United States for examples of political influence in connection with the Bench. With us there be no such example as that afforded by the Cleveland Income Tax Act, because under our system no Court has to determine the competence of Parliament. Within recent years, however, we have seen the occupant of the highest judicial post in England taking a prominent and aggressive part in the agitation against the legislation limiting the powers of the House of Lords. There are at least two instances in New Zealand history where men stepped from the arena of active politics to the Bench, and quite recently we have seen promoted to the Bench a gentleman who, a few weeks before, had delivered a heated political harangue. We may affect to ignore these facts, but make-believe is so closely allied with hypocrisy that we should strive to eliminate as far as possible. I can visualise no more effective remedy than a change in the system of appointment—than a system under which the occupants of the Bench, without lessening the ultimate control of Parliament, would owe their promotion to the free choice of their peers who had practised with them the great profession of the law. Under such a system they, for the first time in our history, would be completely emancipated from even the suspicion of influence by the Government of the day. Opinions may differ as to the propriety of Judges and Magistrates accepting appointment to Royal Commissions ,but if they did so with the sanction of their constituents I apprehend there could be possible objection. Under the system I propose the independence of the Bench would be completely secured and effectively preserved, the dignity of the Judicial office would be proportionately enhanced, and the legal profession exhalted to its proper degree of influence in the national life.

After all there is really nothing startling or revolutionary in the plan I have attempted to outline. The principle of election derives its greatest strength from history, for history shows that the principle is ancient as human society. Certainly Samuel annointed Saul King of Israel, but the appointment of a King was first ordered by the chiefs and elders of the people. In the early ages of Christianity the bishops were elected by universal suffrage of the faithful. Mr. Lecky tells us that "it should be remembered that the Early Church had adopted a system of government that was based on the most democratic principles. It can be no exaggeration to say that if the practice of electing bishops by universal suffrage had continued, the habits of freedom would have been so diffused among the people, that the changes our own age has witnessed might have been anticipated by many centuries, and might have been effected under the direct patronage of Catholicism." But the system of election still survives. In the Greek Church today the clergy elect the bishops in much the same manner as in the days preceding the rupture with Rome. In the Anglican Church, the clergy in Synod elect the bishops just as they did in pre-Reformation times. In the Catholic Church the system of appointing bishops has changed, and is not alike in every country, but the underlying principle is election. Usually the clergy nominate three of their number under the style of **dignus, dignior,** and **dignissimus,** whose names are submitted to the Pope for the final selection. The Pope himself is elected by the College of Cardinals, and the superiors of the numerous religious orders of the Church are elected by their respective members. The President of the American Republic is elected by a process similar in theory at least to that provided for the election of the Pope. The Electoral College is comprised of delegates elected by the people for the sole purpose of choosing the man who is to be the First Citizen of the Republic for the ensuing four years. Then there is the example of the Mother of Parliaments. The Speaker of the House of Commons derives the strength and dignity of his great office from the fact that he is freely elected by his fellow-members, and where can we find a greater example of independence, dignity, and impartiality? Examples might readily be multiplied for the edification of my readers, for lawyers are reputed to love precedents, but I have written enough to show that the system I suggest for the election of Judges and Magistrates in New Zealand is sanctioned by the verdict of history and the present-day practice of mankind.

There remains another important consideration. The change I propose would reduce the patronage and therefore the power of the Executive. Not the least danger of the present age is the tendency to multiply the functions of Government, and there is no greater menace to liberty—I mean individual liberty, of course. "Liberty," writes Mr. Lecky, "cannot be attained without a jealous restriction of the province of Government, and indeed may be said in a great measure to consist of such a restriction." In our own day Herbert Spencer has pictured "the coming slavery" in the form of legislative restriction behind which are caucuses of "ignorant and fanatical wirepullers." I do not pro-

pose to discuss here the proper functions of Government or the principles of legislation. Suffice it to say that any change having the tendency to simplify Government and to reduce the patronage of the Executive should commend itself to the sympathy of all thoughtful men. The system I propose would incidentally involve the healthy abridgment of the powers of the Executive.

There remains for final consideration the feasibility of realising in practice the plan I have outlined. It goes without saying that it holds no attraction for the hustings, though I venture the opinion that my proposal would commend itself to all those sections of opinion favourable to the principle of popular self-government. The first step, however, must be taken by the profession itself, and it seems to me that no Government will remain deaf to the united and emphatically expressed wishes of the legal profession. I am encouraged to hope for a hearing by the fact that I have placed the foregoing plan orally before many of my brethren, and have been surprised to learn how friendly they are to it. Accordingly I have now endeavoured to give definite shape to ideas which have been forcing themselves on me for some time past.

LONDON LETTER.

The Temple, London.
14th October, 1925.

My Dear N.Z.,

The new term and the new legal year of the Courts began on Monday last, and to sit now in chambers in the Temple is to be sternly reminded that I must quit fooling, in these letters, and return to the realities. Particularly formidable on the lawyers' horizon, here, are the new Law of Property Acts, due to come into operation in less than three months' time. A feverish search is now being pursued for a short cut to the necessary knowledge; on our Common Law side counsel apply daily for the name of the best, but also the shortest and simplest, text book on a subject which may at any moment crop up in the least expected context; and among the ranks of the solicitors, who for the most part are so busy with practical affairs as to have little time for academic inquiries, last-moment arrangements are being made for series of lectures "to put them wise". Otherwise, no point has yet arisen for my comment in technical matters; and, having noted the coming into operation of the three new statutes, as to the Guardianship of Infants, Summary Jurisdiction (Maintenance and Separation) and the Administration of Justice, we may seize this last occasion to resume and conclude our personalities.

Among leaders of the Bar, I have so far omitted Barrington Ward, who is certainly a man of strength and account. Of medium size and dark complexion, not the least of his assets is a vigorous and healthy physique. He is less strikingly brilliant than brilliantly sound; in his career he pursues an even course, never creating a stir but constantly being heard of; he may very likely become a Judge in later years, and, if he does so, moderation will probably be his main characteristic. Not many of us know much about him, and if, in the cases we have in hand, we learn that he is to lead us in the final event, we are neither moved by a great excitement nor affected by anything in the nature of a disappointment or dispair. It is a curiously thrilling moment, in the conduct of a litigation, when the question arises, shall we be led and if so by what King's Counsel? Etiquette forbids our being consulted, in our capacity as Junior, as to the selection of our leader; were things otherwise, men of the reliable Medium Category, such as Barrington Ward, would perhaps relieve the star performers of many of their briefs.

I cannot leave this discussion without a reference to our dear old friend and unspeakably delicious humourist, C. F. Vachell, K.C. He looks a little old man and he writes his notes in a large and laborious hand on his briefs. He was called something like forty years ago and even before that he practised, I believe, as a solicitor. So he must be getting on? He shows, however, no loss whatever of vitality, no failing of temper. Some slight physical defect of the eye prevents you from discovering how directly he is regarding you and how effectively he is dissecting you. His humour is of the sort which bespeaks an infinite humanity; his attitude has something of the paternal about it. Yet, for all this, he has a very marked reserve; to his nearest intimates, in the profession, he never discloses his emotions and his real feelings. His never far repressed tendency to jest, and to jest with a twisted, wry expression of his sphinx-like old face, is cover, I incline to think, for a touch of cynicism at heart. He has an endless experience of nisi prius work and a power of observation which nothing escapes: his approach towards you is entirely impersonal and it is upon your affairs and outlook that he focuses attention. With his humour he has also a very biting wit, and he is capable of a mock solomnity which is very damaging. Need I, after all that preface, add that in my opinion he is one of the most effective cross-examiners of his day? Had he curbed his humorous utterances, so that his reputation as a wit had not precluded the appreciation of his positive genius for cross-examination, and had he directed his early career more towards London and less towards his circuit, we who know him have little doubt that he would have achieved an outstanding success in that type of litigation which, being always of the sensational and most often of a social character, brings a barrister's, and especially a cross-examining barrister's, name most before the public. When, in rapid succession, Carson, Isaacs, Bankes, Lush and Shearman disappeared from the ranks of famous leaders, he was given a moment's consideration. If, however, a man is to seize the advantage of such an occasion, he must at the first adapt himself thoroughly to the requirements of the professional client. It is doubtful if he may, until he is established, allow anything like full rein to any such thing as a subtle humour; it is certain that he must say a last and firm good-bye to his circuit, however much he may like it. Vachell could not or would not thus comply; other more available, more adaptable men were preferred. He remained with the Oxford Circuit, where he is, as well as the Leader of the Circuit, still the most powerful and popular of its King's Counsel. He has very often sat as Commissioner of Assize; he would, in questions of fact at any rate, make a model Judge.

There are of course a lot of us at the Bar, and,

even as I write, name after name occurs to me with which I should like to deal. From your point of view, however, too many personalities might be an embarras de richesse! Let us bring the matter to a conclusion with three more identities, it being born in your mind and carried to my credit account that I am intentionally omitting those last appointed King's Counsel, with whom I dealt fully in a letter of some months ago and who included my two selected friends and favourites, Geoffrey Lawrence (Wisdom) and S. L. Porter (Amiability), each of them being, I should perhaps add, as wise and as amiable as the other! Of the three remaining nominees, Harold Morris K.C. simply must be detailed, since he is, perhaps, of all the profession the most popular with the profession. Sprightly, debonnair, an exactly appropriate man in the summer months to wear a grey top-hat, always smiling and always glad to see you and pass the time of day with you, such a man must have some success even if he was in truth a perfect fool. But Harold Morris is anything but a fool; he has as much cleverness as may be tolerated in an English man of the world and society, and his personal charm of manner is by no means the sole merit of his address. Two Juniors are our last to be mentioned, and, first, the venerable Bremner on the Common Law side, a man who must, even during the period of his full practice, have been led by some four generations of leaders and is the prototype of that class of successful junior who, succeeding by the excellence for the most part of his chambers work, of his advice, draughtsmanship and guidance, avoids the taking of silk for the reason that his necessary eloquence is an unknown and practically untested quality. Men may came and men may go, but old Bremner, white haired and full of years and dignity, goes on forever. On the Chancery side there is the smooth, fine-looking, sufficiently learned and eminently urbane Dighton Pollock lastly to be considered, another Pollock judge in embryo. He is Junior to the Treasury, on the Chancery side, so that we may expect to see him one day on the Bench without ever having seen him within the Bar. He has, moreover, an enormous practice of his own; there are generally in every age some half a dozen Chancery juniors who appear in every case, great or small, originating summons, petition or full-blown witness action, or who, at any rate, appear to the casual observer so to appear. How Dighton Pollock finds time to do all his work, which is not very heavily remunerated, as you will remember, in each instance and of which an under-ten-guineas set of papers is likely to require as much research and thought as the larger and the largest species, we do not pretend to know. With the pronounced features of the model lawyer and the most apt deportment and voice of the learned advocate, he combines a studied courtesy and deliberation. He makes it a point never to be, or at least never to seem to be, in too much of a hurry. He is, in fact, just the very man of all the Judges, King's Counsel and Juniors of the day, upon whom, as a type, a skilful writer would hit to conclude these personal studies.

Most unfortunately I am no more a skilful writer than I am a man of my word. I am not going to conclude where I said I would conclude; I am going to add a postscript, that postscript is going to be Theo Mathew, and Theo Mathew, as it happens, is entirely unlike anything else at the English Bar! He is a type of his own. He spoils the symmetry of the series. But who cares? Who cares what Theo Mathew does, provided he goes on being Theo Mathew? I suppose that his slightly eccentric and eminently contemplative figure, making its curious way past the Inner Temple Church, Hall and Library to chambers in Paper Buildings, is a thing as familiar to all of us as anything this side of Fleet Street. He is just the same as I have known him to look at these last twenty years. He used to look a little old for a young man, and now he looks absurdly young for an old one, if a man called a mere thirty-five years ago may be called "old"? He has a special ability as a Junior, and he might have risen to pre-eminence, but for his pre-eminent sense of humour. He is of the Junior Bar what Vachell is among leaders: an incomparable and irrepressible jester. Too much of lawyers' humour is, as we know to our cost, ponderous and highly technical; Theo Mathew's humour has no such faults and is, at the very least, "good enough for Punch". His sketches, rapidly and ruthlessly executed in court or out of it, recall Frank Lockwood; and that observation I am inclined to regard as a great compliment to Frank Lockwood. Altogether, Theo Mathew is the darling of the Bar and the delight of the Bench.

With that, the series concludes, and we are done with personalities just in time to return, with the new term, to principles. I promised (I think) that in dealing with the personal aspect, I would "begin with the Lord Chancellor and end with myself". Behold therefore in me a man who, but for the fond illusions of his mother and the loose flattery of his uncles and his aunts in his youth, might now have been a highly respectable manager of a branch bank, something automatic but worthy in the City, or at least something useful to the community and perfectly safe and sound in himself. They thought I was brilliant, and so did I, till I was called and discovered what a brilliant thing brilliance must be to be really brilliant. After the first shock of pupilage, self-confidence was restored as I became used to dealing with my great man's sets of papers and making notes full of learning but empty of responsibility. After long waiting, I was employed by a kindly friend to prosecute some Smith or Jones for stealing a pair, may be, of boots. I went into court, overwhelmed with fear and anticipating certain failure, notwithstanding that the accused had more than once admitted to my police witnesses that it was "a fair cop". With time I became used to prosecuting any man for any offence, and would approach the task with a light heart, though the brief might not have been in my hands more than a few seconds before I opened the case. Again came the shock of dreadful responsibility, when some undiscerning solicitor appointed me to defend his client. . . . And then I was entrusted with the conduct of a civil action; never shall I forget the harrowing anxiety of that first pleading and how I doted over every word of it! I think the strain of that pleading must have brought me somewhere a nervous breakdown, though the case itself was, of course, settled, long before it came into court. So the years passed, while I "devilled" this and that brief for all and sundry, being here to-day, a hundred miles away to-morrow and concentrated, as occasion demanded, upon any subject from a broken heart of a promisee to a time clause in a

builder's contract. And here I am to-day, sometimes so overwhelmed with papers that I see no hope of leisure, sometimes so full of leisure that I see no more hope of work. I confess to being still a little nervous before I get on my legs and to being, as a family man, quite impossible, since I know nothing of my plans except that I shall have to alter them when I have made them and I can make no statement as to my income except to hint that it is likely to cease altogether at any moment! Of my profession I can only say that it is precarious, nerve-racking, fearfully exacting and at times, terribly depressing, but I would not change it for any other in the world; and goodness knows that, by reason of the upheaval of the war, I have had a turn at most of them in most parts of the world. In sum, mine is the common case at the English Bar to-day, and that is why I have quoted it.—

Yours ever, INNER TEMPLAR.

The Temple, London,
28th October, 1925.

My Dear N.Z.,

The legal term is now noticeably in full swing and we are all going about with worried looks, as if we did not know what it is to have a day's rest, much less ten week's rest on end! The more bold of us even complain that the nature of our duties is so exacting as to prevent us giving due attention to the pheasants, now that the leaves, all gold and brown, are falling; but not all of us go quite so far as that. Admitting ostensibly that we have no complaint in this matter, others of us slip off surreptitiously on a Saturday morning and do what we can about it. For the rest of the week, at any rate, the Courts are as busy as ever, and many matters of interest have transpired.

Notably, in the first week of the term, the Court of Appeal has affirmed the Court below in the "lunatic" case, The York Glass Co. Ltd. v. Jubb. The Imperial Loan Co. v. Stone, (1892) 1 Q.B. 599, will be familiar to you, and a full consideration of that case and of Moulton v. Camoux 4 Exch. 17 was had: the point of the decision is as to the voidability of a lunatic's contract and it turns upon the scienter of the other contracting party and the onus upon the lunatic of proving it. This is likely to be a leading case, and it should be carefully noted. Collins and Collins v. Plant (see the "Morning Post", Legal Digest, of October 19, where alone, so far as I know, it is noted) is of interest to solicitors, in relation to their own remuneration. The essence of the case was the claim of a layman, against partner in an enterprise, in respect of an agreed fee paid by him to his solicitors for the legal work involved in the enterprise; and the point of it was as to the defendant partner's claim to have the agreed fee reduced to a total of the scale fees, by reason of the provision of section 8 of the Solicitors' Remuneration Act, 1881. Whatever may be the provisions of your legislation in the matter of your remuneration, the case must be of interest to you as to the power of recovering over. With us, of course, the question of solicitors' remuneration has been lately dealt with; but, welcome though that dealing may be here, it is a subject with which, presumably, I need not trouble your Lordships (as Tristram Shandy would say) in my discourses. I think, however, that you will like me to inform you, in generality, upon the Centenary Celebrations of our Incorporated Law Society, with which the opening of the new term was signally marked. It is dull to read of other people's dinners and dances, especially when they are over and done with, and I will not resuscitate the receptions and festivities themselves. The speeches are of a more continuing interest, but may be read, almost verbatim, in the recognised legal periodicals, notably in the "Law Journal" of October 17. Enough for me to inform you that the celebrations were of a remarkable, indisputable and even surprising success and effect. Our ancient Inns looked on with paternal, or rather elderly approval and encouragement, and our, less old, General Council of the Bar felt kindly disposed to its colleague. Truth to tell, however, the position which the celebrations have disclosed is such, in the minds of many, as should fill the Barristers' Societies with no little misgiving that the Solicitors not only surpass them, immeasurably, in the matter of prosperity, but also have a vitality of organisation which we, resting on our oars, may be in danger of losing. So much for my friends, the solicitors; let us return to our modern authorities.

There is an interesting little case, involving a point less little, of Perfitt v. Feast to be noted in the matter of negligence. Again, so far as I know, it is only noted as yet in the "Morning Post"; see the Legal Digest of Monday last, 26 October, or, if that is presently beyond your reach, hear the following. A lorry driver was backing down a narrow passage, in such circumstances that he must needs look out upon his "off" side: his mate must also needs be busy on the "off" side, to aid him; on the near side stands the plaintiff, holding tackle out of the lorry's way, and over that poor plaintiff's foot goes the lorry. The plaintiff sues the lorry-men's employers, for damages for negligence, and, appearing in the County Court, bespeaks a jury. He proves the above facts and says, "Now let the defendents shift the onus I have put upon them, or suffer judgment." The County Court Judge says that all the foregoing facts are as consistent with no negligence as they are consistent with negligence; he withdraws the case from the jury and that is that, until the plaintiff goes up to the Divisional Court. Here he gets an order for a new trial, Mr. Justice Swift and Mr. Justice Fraser being of one mind that the principle of Scott v. London Dock Co. 3 H. and C. 596, applies. Shall I take it that you know that principle, or shall I assume that you are as bad a man as myself and, upon that assumption, set it out? Forgive me if I misjudge you, in guessing your answer: "Where a thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not occur if proper care is taken, there is reasonable prima facie evidence that the injury arose from defendants' negligence". Negligence is an ever interesting and an ever imminent topic: feeling that it is one, which we must have at heart in principle and, so far as may be, at our finger ends in reported instances, I have ventured to go fully into this case, which I did not assist but did hear myself.

(To be Concluded.)

It takes 65 muscles of the face to make a frown, and only 13 to make a smile. Why waste energy! Keep smiling.

REX v. McKECHIE.

In this case the Court of Appeal by a majority of three Judges to two, decided that the offence of conspiracy created by section 219 of the Crimes Act 1908 could not be committed by a husband and his wife alone. The rule that a husband and wife cannot conspire with each other goes back to the days of Edward III., and, in the opinion of the majority, this rule has not been abrogated by the legislation in New Zealand. I quite agree that the rule should be abrogated, but this must be done by legislation dealing explicitly with the subject and not by any Judge-made law. The reasons given by the Chief Justice and Osler J. in their attempt to abrogate the rule are not likely to command the respect of lawyers. Let us take first the Judgment of the Chief Justice. The ground on which the common law rule was based was that husband and wife were but one person in law. That, however, does not suit the Chief Justice, and so he proceeds to find another ground for it, namely coercion. "What might be termed the basis of the law" he says, "was not that they are one person in law, and have but one will, but that the husband was supposed to dominate and control the acts of his wife." Having thus put the rule on a false ground—a ground for which he does not, and cannot quote a single authority—the Chief Justice proceeds to deal with it on this basis. He quotes long passages on the subject of coercion from Bishop's Criminal Law, which he described as "the very able American Treatise." These passages it is clear, have nothing to do with the crime of conspiracy, for in another passage in the book, a passage which the Chief Justice ignores—the law is thus stated: "A conspiracy cannot be committed by one person alone. Neither can it be by a husband and his wife alone, they being regarded legally as one person." This passage makes it clear that, according to Bishop, the law in America is the same as it has been decided by the Court of Appeal to be in New Zealand. The Chief Justice refers to several cases, but they do not support his view. Only one of them was a case of conspiracy and in that a husband and wife and their servants were all indicted together for conspiring to ruin the trade of the prosecutor. It is difficult to understand by what process of reasoning this case can be regarded as an authority for saying that husband and wife can conspire with each other, and yet the Chief Justice says triumphantly "there was no suggestion in that case of a plea of coverture". How could there be such a plea in the circumstances?

The most remarkable thing about the Judgment is the reasoning in connection with the construction of sections 219 and 40 of the Crimes Act. To say that the words of section 219 "everyone is liable who conspires with another person" have the necessary effect of making husband and wife two persons for the purposes of conspiring, notwithstanding the plain words of section 40 is simply to beg the question. To give effect to the Chief Justice's view section 219 must be read as if it had contained these or similar words: "and for the purpose of this section a husband and wife are to be deemed two persons". There is nothing however, to justify the introduction of any such words.

Ostler J. found himself unable to agree with the Chief Justice in his construction of section 219, but arrived at the conclusion that coverture had ceased to be a defence in such a case. He thought that the law with regard to married women had been altered in so many respects that the old rule as to the unity of husband and wife had disappeared. He did not venture to specify any exact date for this change, but said that it had taken place before the passing of the Criminal Code of 1893. It may be possible perhaps, to admire Ostler J.'s courage in propounding the novel and startling doctrine that criminal liability may be created in this mysterious way, but he will not be able, I am sure, to find an authority for such a doctrine, although his search goes back as far as "the dark days of Edward III." or as far back even as the days of the Flood. Fortunately for the credit of our jurisprudence, it did not find acceptance with any of the other Judges.

—LEX.

FORENSIC FABLES.

No. 14.

THE JUDGE WHO CLOSED HIS EYES.

A Judge of Considerable Experience was Trying on a Summer's Day a Case of Unexampled Dullness. Counsel for the Plaintiff was Opening. He Continued to Cite to the Judge a Multitude of Authorities, including the Well-known Decision of the House of Lords in **The Overseers of the Parish of Criggleswick** v. **The Mudbank-on-Sea Docks and Harbour Board Trustees and Others,** and the Judge was Satisfied

that he had Never been So Bored in the Whole Course of his Professional Life. At about Three-Thirty P.M. the Judge Allowed his Attention to Wander Slightly, as he Felt Sure that Counsel for the Plaintiff would not have finished his Opening at the Rising of the Court. Five minutes Later he Fell into a Gentle Doze Which Soon Developed into a Profound Sleep. He was Aroused at Four O'clock by the Sudden Cessation of Counsel's Droning and

the Cries of "Silence" with which the Usher Preluded the Coming Judgment. The Case was Over, and the Judge had no notion what Counsel for the Defendant had said. Was the Judge Dismayed? Not at all. He Assumed a Look of Lively Intelligence and Said that, as he had Formed a Clear Opinion, no Useful Purpose would be Served by his Reserving his Judgment. He Admitted that During the Course of the Excellent Arguments which had been Addressed to him his Opinion had Wavered. But, After All, the Broad Question was whether the Principle so Clearly Stated in the House of Lords in **The Overseers of the Parish of Crigglestwick** v. **The Mudbank-on-Sea Docks and Harbour Board Trustees and Others** Applied to the Facts of the Present Case. On the Whole, despite the Forceful Observations Made on Behalf of the Defendants, to which he had Paid the Closest Attention, he Thought it Did. It was Therefore Unnecessary to Discuss the Topics which, in the View he Took, Became Irrelevant. There would, accordingly, be Judgment for the Plaintiffs, with Costs; but, as the Matter was One of Great Public Interest, there would be a Stay of Execution on the Usual Terms. The Judgment, which was Appealed Against in Due Course, was Affirmed both in the Court of Appeal and the House of Lords; the Lord Chancellor Commenting, in the Latter Tribunal, on the Admirably Succinct Manner in which the Experienced Judge had Dealt with a Complicated and Difficult Problem.

Moral: Stick to the Point.

SUMMARY OF LEGISLATION, SESSION 1925.

(Sessional numbers, prices, and dates of coming into force are inserted following the titles of Acts, for the convenience of practitioners desiring to purchase advance copies from the Government Printer).

1. **CONSOLIDATION.** The following consolidating enacments, prepared under Section 5 of the Statutes Drafting and Compilation Act 1920 were passed, namely:—

Industrial Conciliation and Arbitration (No. 24; 2s.; 1st. April 1926).

Rating (No. 30; 1s. 6d. 1st April 1926). Includes the provisions relating to rates on native land.

Valuation of Land (No. 31; 9d.; 1st. April 1926).

Local Elections and Polls (No. 35; 1s. 3d.; 1st. April 1926).

Electric-power Boards (No. 38; 1s. 6d.; 1st. April 1926). Sec. 23 (5) is new matter.

Two similar Acts, **Lands for Settlement** (No. 15; 1s. 9d.; 1st. January 1926), and **Coal-mines** (No. 39; 2s. 9d.; 1st. April 1926), shew by their titles that they are measures of amendment as well as consolidation. The seven-page explanatory memorandum circulated with the Coal-mines Bill, and the Bill itself, printed with new matter underlined, will be of material value to practitioners in mining districts wishing readily to ascertain how much of their law must now be re-learned.

Nurses and Midwives Registration (No. 10; 9d.; 1st. January 1926) and **Weights and Measures** (No. 26; 9d.; 1st. January 1927) repeal and replace existing law, but with considerable alteration. Of interest and value are the latter's marginal references to New South Wales legislation.

A kind of negative consolidation is the cleaning-up of the statute-book effected by **The District Courts Abolition** Act (No. 19; 6d.; 29th. September 1925), with a short six sections of enactment, and over four pages of schedule, involving a hundred or so of verbal amendments to existing Acts.

2. **CONVEYANCING.** Acts particularly affecting conveyances include the following:—

Housing Amendment (No. 7; 6d.; 29th. August 1925). The restrictions on freehold titles acquired in respect of workers' dwellings (Housing Act 1919 sec. 21 and sec. 22) are repealed, and are to be removed from certificates of title.

Rent Restriction Continuance (No. 9; 6d.; 29th. August 1925). Part I of the War Legislation Amendment Act 1916 and its amendments are further continued in force till 31st. August 1926.

Stamp Duties Amendment (No. 11; 6d.; 1st. October 1925). The duties on mortgages executed after the passing of the Act and on discharges are each reduced to 2s. 6d. Section 85 of the 1923 Act is corrected. The effect of **Wellington Corporation v Minister of Stamps**, (1925), G.L.R., 158, is negatived.

Land and Income Tax Amendment (No. 12; 6d.; 21st. September 1925), provides for a commission of inquiry to release land from the burden of sec. 11 of the 1924 Act in cases of hardship.

Land Transfer Amendment (No. 20; 6d.; 1st. October 1925), makes further inroads on the uniformity of Australasian Land Transfer Acts. The burden of entries on a large title subdivided by way of lease may be eased by the issue of certificates of title for separate leasehold interests. Profits a prendre are at last expressly recognised. Memoranda varying mortgages need be signed only by the party whose rights are reduced or liabilities increased by the variation. Various amendments, mainly for administrative convenience, are made to the principal act.

Chattels Transfer Amendment (No. 21; 6d.; 29th. September 1925). The effect of notice by registration is restricted; registration districts are altered; the principal Act is to bind the Crown [making **In re Buckingham**, (1922), G.L.R. 190, and **The King v. Canterbury Farmers' Co-operative Association Limited**, (1924) G.L.R. 243, no longer law] A provision novel in New Zealand, but familiar in the Commonwealth, is that the principal act as amended, and some parts of the amending act, are to be prepared, certified by the Attorney-General, issued as "The Chattels Transfer Acts 1924-25 (Reprint)," and to be subject to sec. 29 of the Evidence Act 1908. In fact, "all copies" of the principal act hereafter printed are to be in this form.

Life Insurance Amendment (No. 25; 6d.; 29th September 1925), amends secs. 65 and 66 of the principal Act, getting rid of the effect of **Re Claridge**, (1925) G.L.R. 9, C.A. It also permits devolution on a policy on the death of a policy-holder (not being the assured) without probate or letters of administration, within limits of value An explanatory memorandum was printed with the Bill.

Death Duties Amendment (No. 32; 6d.; 29th September 1925). Further exemptions. Right of appeal against assessments extended to questions of fact as well as law.

Native Land Amendment and Native Land Claims Adjustment (No. 40; 9d.; 1st. October 1925) makes further miscellaneous contributions to the existing glue-pot.

3. **COMMERCIAL.** The following may be noted:—

Iron and Steel Industries Amendment (No. 3; 6d.; 31st. July 1925), increasing bounties, and limiting term for payment of bounties.

Land and Income Tax Amendment (noted above) in effect exempts from taxation the income of co-operative dairy companies distributed as bonuses to suppliers; and extends exemptions in respect of re-insurance business.

Mutual Fire Insurance Amendment (No. 29; 6d.; 29th. September 1925). By-laws may provide for retirement of directors in rotation.

Kauri-Gum Control (No. 34; 6d.; 1st. April 1926), on the lines of the Meat, Dairy Produce, Fruit, and Honey Export Control Acts now in force.

Apprentices Amendment (No 36; 6d.; 29th. September 1925).

Samoa Shipping (No. 53; 6d.; royal assent reserved). The Crown may apply to Samoa any provisions of the Shipping and Seamen Act 1908 and its (sc. existing) amendments.

Shipping and Seamen Amendment (No. 54; 6d.; royal assent reserved). Farmers' launches exempted from survey. Slight miscellaneous amendments.

4. **CRIMINAL.** The master criminal seeking new crimes to commit will find little to interest him except such offences as are created in various penal sections of acts noted under other headings. Apart from the constitution of Juvenile Courts (not open to the public) and certain provisions about "delinquent" children, contained in the Child Welfare Act noted below, there seems to be no legislation that can be classed under this heading.

5. **ADMINISTRATIVE.** Acts affecting more particularly various local bodies and departments of government, and members of the public doing business with them, include (besides those already noted under "Consolidation"):—

Imprest Supply (Nos. 1, 4 and 8).

Cook Islands Amendment (No. 2; 6d.; 31st. July 1925), authorising the expatriation of lepers to Makogai in the jurisdiction of Fiji.

Land and Income Tax (Annual) No. 13; 6d.; 21st. September 1925). Identical with that of last year, except clause 3 of Part II. of Schedule—Ordinary income-tax.

National Provident Fund Amendment (No. 14; 6d.; 1st. October 1925) Hospital Board as from 1st. April 1926 are compulsorily brought under sec. 3 and following sections of the 1914 amendment, and various amendments are made.

Repayment of the Public Debt (No. 16; 6d.; retrospective to 1st. April 1925). Not so good as its title. The Public Debt Extinction Act 1910 (which also was not so good as its title), is repealed, not, unfortunately, as "spent"; and fresh provisions are made.

Pensions Amendment (No. 17; 6d.; 29th. September 1925).

Government Railways Amendment (No. 18; 6d.; 29th. September 1925). Railways Board constituted; extended powers conferred of transport of passengers and goods otherwise than by rail; a new system of accounts between the Consolidated Fund and the Railway Department introduced.

Child Welfare (No. 22; 1s.; 1st. April 1926). Child Welfare Branch of Education Department established, industrial schools metamorphosed, Juvenile Courts authorised, Part I. of Infants Act 1908 (name received by child on adoption) amended.

Main Highways Amendment (No. 27; 6d.; 29th. September 1925).

Hutt Valley Lands Settlement (No. 33; 6d.; 1st. October 1925).

Forests Amendment (No. 37; 6d.; 1st. October 1925).

Deteriorated Lands (No. 42; 6d.; 1st. October 1925). To be deemed part of the Land Act 1924.

Harbours Amendment (No. 43; 6d.; 1st. October 1925, and, in part, 1st. January 1926). Deals principally with methods of keeping harbour boards' accounts.

Public Reserves and Domains Amendment (No. 44; 6d.; 1st. October 1925).

Hospital and Charitable Institutions Amendment (No. 45; 6d.; 1st. April 1926).

Public Works Amendment (No. 47; 6d.; 1st. October 1925). Affects motor-lorries, gravel quarries, irrigation races.

Legislature Amendment (No. 48; 6d.; 1st. October 1925). Preserves the local voting rights of Ministers and other Members of Parliament despite their residence at the seat of government.

Counties Amendment (No. 49; 6d.; 1st. October 1925). Inter alia, abolishes separate riding accounts, and meets the matter of long-distance service-motor-cars by a provision that every vehicle used for hire in a county shall for by-law purposes be deemed to play for hire there.

Land Laws Amendment (No. 49; 6d.; 1st. October 1925). The Land Act of the 1908 Consolidation, together with its dozen or so of amendments, was consolidated only last year into the Land Act 1924, but now receives further technical modification. The Deteriorated Land Act 1925 mentioned above is also virtually an amendment of the Land Act.

Electrical Wireman's Registration (No. 23; 6d.; 1st. April 1926).

6. **LOCAL.** People, institutions, and bodies so fortunate as to obtain the benefit of special legislation without going through the steps required by the Standing Orders relating to local bills and private estate bills, include those affected by the "washing-up" acts noted further on, and also those affected by the following nominally Public Acts:—

Massey Burial-Ground (No. 5; 6d.; 29th. August 1925).

Rotorua Borough Amendment (No. 6; 6d.; 29th. August 1925.

Canterbury College and the Canterbury Agricultural College Amendment (No. 28; 6d.; 29th September 1925).

Ashley River Improvement (No. 41; 6d.; to come into force by Order in Council.)

7. **"WASHING-UP" ACTS.** It remains to mention, but is impracticable to summarize, beside the Native Land etc. Act noticed above, the following:—

Reserves and Other Lands Disposal and Public Bodies Enabling (No. 46; 2s. 9d.; 1st. October 1925), containing 142 sections which involve perhaps as many substantial amendments of Acts.

Finance (No. 51; 1s.; 1st October 1925). 51 sections, of which only three are financial enabling clauses of general effect, the rest being expressly or virtually amendments of various general or special acts, or original local legislation.

CORRESPONDENCE.

Auckland,
14/1/26.

(The Editor, Butterworth's Fortnightly Notes.)

Dear Sir,—

In the last edition of the Notes, it was mentioned that contributions on the matter of Legal Education were welcome. I thought that having had my education in both England and New Zealand, I might be able to make some suggestions, and therefore I have written the following article on the subject. It seems a great pity to me that some of the older members of the profession who have been trained in both countries do not write on the matter. Hitherto it seems to have been a discussion, interesting indeed, between Mr. Stephens and Professor Algie, the profession as a whole "occupying the gallery", and the members secretly hoping for the sake of their sons that the powers that be do not make the exams. too hard.

"There are three great problems of Legal Education —the making of a professional man, the equipping him with certain fundamental knowledge, theoretical and practical, and the ensuring of his future interest in and study of the law that he may always give of his best to the public. It is inevitable that these three problems be dealt with at the same time, that is, prior to admission to the profession, and it is very essential that they be tackled by men who absolutely understand them.

"The weakness of the system of training in New Zealand is that only the second of these problems is considered, and even the practical part of that is sadly neglected. It must be sufficiently obvious that no mere insistence on a high standard of University Examination will either make a professional man, a practical man or a genuine student, though it may tend to eliminate those who have no real taste for the law. What must be done to create a good educational system is to recognise in a proper light and to combine in due proportion the theoretical, practical, and ethical elements.

"Professor Algie has pointed out the value of a correct grouping of subjects in aiding study and in creating interest. The Cambridge Special Law Board has stressed the same matter. Experience will eventually decide the correct grouping. The Cambridge authorities have recently twice altered their groups. The greatest way of fostering interest is by calling into play the competitive instinct of the student, and it has been proved in other Universities that in the study of law this is best done by the argument of cases under the supervision of the lecturer or a well-known barrister, by the preparation of papers, criticisms of cases, and the submission of essays for competition. The drawing of wills, settlements and various types of instruments also creates a lively interest, and is useful practice. It is submitted that the law student, like the medical student, should devote the whole of his time, during the first two years at least, to study at the University. The importance of this lies in the sowing of those seeds of loyalty, honour, comradeship and open-mindedness, which are the basis of what he will in real life know as the professional spirit. It is not necessary in England to study at a University for the bar or for the solicitors' profession, and indeed, the University examinations do not exempt from the Bar or Law Society examinations, merely exempting from attendance at lectures and in the case of the Bar, from attendance at a certain number of Dinners. The old custom of eating dinners emphasises the social aspect, the fostering of the professional spirit. The great number of students attending the Universities as well as taking the other examinations shows how greatly is valued the University spirit. There is no substitute for this part of education in New Zealand yet. The system of serving articles and of reading in chambers in England brings the student into contact with real life, assists him to become acquainted with the members of his profession, and gives him an opportunity to learn something of human nature before his admission. We in New Zealand have no substitute for this, and we need one.

"The problems arising out of any discussion of the subject of Legal Education are many and difficult, but their very difficulty should make the true lawyer the more keen to solve them."

Yours faithfully,

W. A. BEATTIE.

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