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 1, 1927.

SIR CHARLES SKERRETT.

The Knighthood conferred upon the Chief Justice Sir Charles Skerrett is one due to the office he so well graces. Had the honour been conferred upon him as a recognition of his great ability as an advocate and lawyer it would have been at least twenty years overdue.

JOHN ALEXANDER, ESQ., C.M.G.

John Alexander, Esq., C.M.G., had he continued in the course he first set, would to-day have been one of the most distinguished members of our Bar. The winds of fate, however, had decreed a different course, and the demand amongst business men for his ability has resulted in his being one of our most distinguished solicitors. His contact, in that branch of the profession, with men and with life, has led him into perhaps the noblest sphere of life, the sphere of social reform. His activities in that direction, as a member of the Prison and other Boards render it doubly certain that he will bear the Cross of St. Michael and St. George with as great honour as he has put energy into his work for the good of society.

WEIGHTS AND MEASURES.

The new Weights and Measures Act and regulations, now in force, are framed to require the correct weight or measure of goods being given to customers; also, that certain classes of goods, which are specified, shall be sold by net weight or measure, to be shown on the packages and on the delivery notes or invoices; and that certain classes of goods must be sold by the full pound or half-pound.

"In order to make the position clear," stated Mr. F. W. Rowley, Secretary for Labour, to the Press, "it might be explained that the Act and regulations hitherto in force applied, except in the case of coal and firewood, only to the weighing and measuring appliances; that is to say, that all the Department could do was to inspect these appliances and see that they were satisfactory and correct. It had no control over the method of selling goods in order to ensure correct weight or measure being given to customers.

"The new Act gives this authority to the Department. For example, section 23 of the Act makes it an offence for any dealer to sell or deliver any goods short of the quantity asked for or represented. Further, section 18 requires certain goods that are sold by retail to be sold only by net weight or measure; that is to say, the weight or measure of the container shall not be counted. This applies to all goods that are not exempted from its provisions in the regulations.

WOMEN JUSTICES.

When some Ministers are chosen for no apparent reason and with no known qualification for the portfolios bestowed upon them it is too much to ask that reasons shall be given for the appointment of Women Justices. Doubtless the ladies appointed are estimable in all respects, but we have failed to mark any qualification fitting them for judicial office. To retort that there are many male J.P.'s whose judicial qualities are hard to discover while fair in sex warfare doesn't indicate that the move is one which will help the administration of Justice to function more favourably.

THE REGISTRAR REPROVES.

It is not often that the Highest Court of Justice in the land acknowledges the force of the Registrar's criticism of its decisions. This is however what happened in the **Admiralty Commissioners v. S.S. Chekiang** (1926, A.C. 637) in which the House of Lords was considering the assessment of damages in the case of a collision. The Registrar had written a book on the subject and referring to it Lord Sumner said:—

"I find the following passage in the learned Registrar's excellent work on this topic alluding first to the *Medina* and next to the *Marpessa*. "The House of Lords, though it has established a rule, has not given any practical assistance towards the difficult question of formulating a standard of damages in cases to which such a rule is applicable, which difficulty was chiefly responsible for the doubt as to the propriety of a claim for demurrage by a non-trading body. Indeed the tribunal ostentatiously put this difficulty on one side stating in this last decision that, though it did not agree with the Registrar's Report, it would not vary its conclusion.

"My Lords," continued Lord Sumner, "I acknowledge with contrition the justice of these strictures."

Happy the land in which the Chief Justice could commit the Prince of Wales for contempt and the House of Lords submit humbly to the criticism of the Registrar.

HARD COMMENT.

Some strange things are occasionally said by Judges about insurance companies that defend actions on purely technical points, but nothing more scathing than the remarks of Viscount Dunedin in a recent case. The appellant, a Polish Jew, was a small ladies' tailor whom burglars robbed of stock to the value of £1,656 6s. 3d. The Insurance Company when sued defended on the ground of non-disclosure of a refusal by another Company. The learned Judge, in delivering judgment in the House of Lords, with "unfeigned regret" in favour of the Company, said: "I am left with the impression that those—shall I call them attractive?—qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this Insurance Company as ever they were by the little Polish Jew."

COURT OF APPEAL.

Skerrett C.J.
Sim J.
Stringer J.
McGregor J.
Alpers J.

October 15, 18; December 13, 1926.

EXECUTORS OF ISAAC WELSH v. CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED.

Upham and Kirk for appellant.
Sim and Sargent for respondent.

Negligence—Rope Sling breaking—Previous careful examination revealing no defect—Deterioration caused by sulphate—Negligence not proved.

An appeal from the judgment of Herdman J. sitting as trial judge in an action brought by the executors of the late Isaac Walsh, deceased, against respondent Company.

Isaac Walsh was killed on November 17, 1925, by a cask of pelts falling on him during loading operations at Lyttelton of the ship "Canadian Challenger." The rope sling which broke had previously been examined and had all the external appearance of being in good condition. It had however deteriorated in consequence of a leakage of a pickle of water, sulphuric acid and salt from the casks containing the pelts which had been carried on the previous voyage.

The trial judge came to the following conclusions of fact, namely:—

(1) That there was no default on the part of the those responsible for the use of the slings in not knowing that the liquid contained in the casks of pelts consisted of a corrosive fluid or that leakage from such casks coming into contact with a sling might be a potential cause of danger.

(2) That the six slings provided were to all external appearance fit for use and were subjected before use to a proper and sufficient examination by the Boatswain and Welsh and also by the First Officer of the Ship to determine whether they were fit for use.

(3) That all proper precautions were taken to make sure that the slings were sound and fit for use.

THE COURT (per Skerrett C.J.). It is quite impossible we think for this Court to go behind these findings of fact of the trial Judge, and that clearly disposes of the case for the appellants upon the first suggested head of negligence.

The second head of negligence urged before us was that according to proper practice slings which had been used on a previous voyage should not be used in any subsequent voyage because after use on the first voyage they would be put away and as they would probably be wet they would deteriorate going through the tropics. This question is not referred to in the judgment of the learned Judge. It was stated by Counsel for the respondent company that after the evidence had been taken this suggested head of negligence was virtually abandoned. We have referred the matter to the learned Judge who tried the case and his recollection is that in the argument before him, Counsel for the appellants did not press this head of negligence but relied entirely upon the insufficiency of the examination of the slings before use. The evidence relied on by the appellants was the evidence of a Superintendent Stevedore at Lyttelton, of The Shaw, Savill & Albion Co., Ltd., and of a Marine Superintendent, at Lyttelton, of the same Company. The evidence related exclusively to the practice of the one Company—The Shaw, Savill & Albion Co., Ltd. There was substantial evidence that the practice deposed to was by no means a general or accepted one, and that it was quite proper and in accordance with regular and proper usage to use slings after proper examination until they showed signs of deterioration by wear, chafing, or otherwise. We think that it is fair to conclude that the point was virtually given up before the learned Judge in the Court below because it is inconceivable that had this not been the case he would not have dealt with the point in his careful judgment. We think that the appellants are bound by the manner in which their case was presented in the Court below. Furthermore, we are unable to conclude that the appellants have discharged the onus which rested upon them of establishing that it was a negligent act to use the sling on a second voyage.

The appeal will therefore be dismissed with costs on the highest scale as upon a case from a distance.

Solicitors for appellants: **Kirk and Somers,** Christchurch.
Solicitors for respondents: **Slater, Sargent and Dale,** Christchurch.

SUPREME COURT.

Adams J.

November 9, 11, 1926.
Auckland.

LYNCH v. LYNCH AND KANE.

Divorce—Solicitor advised Registrar case would be settled and Jury not required—Jury Dismissed—Right to Jury at Subsequent Hearing—Section 24 Divorce Act—Rule 52.

Northcroft for petitioner.
Dickson for respondent and co-respondent.

Petition by husband for divorce on the ground of alleged adultery. The case was set down for hearing on 9th November, before Mr. Justice Adams and a jury. The petition prayed for the usual relief but did not ask for damages against the co-respondent. The case had been set down for hearing before Judge and jury at the previous sessions, but a stay of proceedings was granted the respondent wife until the husband had furnished security for her costs to the satisfaction of the Registrar. The required security was deposited with the Registrar about midday on 8th November, the day previous to the day fixed for hearing. On this day the Solicitor for the respondent informed the Registrar that the case would be settled and that no jury would be required. The jury was therefore released from further attendance.

Dickson for the respondent: I submit I am entitled to an adjournment to prepare for trial whilst it is true that I prepared for trial on the previous occasion yet I have not got my witnesses here and I contend that it is unreasonable to suggest that security can be lodged at such a late hour and the respondent required to proceed at such short notice.

Adams J.: Did you inform the Registrar that the jury would not be required as the case would be settled?

Dickson: I told the Registrar casually that the case would be settled and the jury would not be required.

Adams J.: The Registrar as an Officer of this Court is entitled to act upon such information. The result is that if the application for an adjournment—an application which is without merit—is not granted there is no jury to proceed with the hearing.

Dickson: I contend that Section 24 of the Divorce and Matrimonial Causes Act gives either party the right to insist upon a hearing before a jury when the basis of the petition is an allegation of misconduct.

Northcroft for the petitioner: I dispute the right of the respondent and co-respondent to an adjournment. I contend that as soon as the security for costs has been deposited the petitioner has every right to bring the case before the Court, that is the practice and an arrangement to that effect was made. I contend also that under Section 24 and also Rule 52 it is in the discretion of the Judge as to whether the action should be heard before a jury or before a Judge alone. In this instance I contend that the respondent by reason of her counsel informing the Registrar that there would be no necessity for a jury has made an election and may not now insist upon a hearing before a jury.

Adams J.: The question is of considerable importance because if an erroneous decision were made upon Section 24 neither party on account of his or her position would be likely to appeal. I propose to take time to consider the question.

10/11/26. I have ascertained that the practice has been for a number of years to assume that Section 24 gives either party the right to insist upon having the contested matters of fact tried by a jury in all cases where adultery is alleged whether the petition is presented by a husband or wife. Grammatically it would seem that the Section gives that right only where the wife is petitioner, but the settled practice should be followed. Either party is therefore entitled to a jury. The case will be adjourned until Monday, 29th November. If on consideration the parties determine that a jury is not required they should immediately communicate with the Regsitrar. In case of a jury being required it may become necessary to consider what order, if any, should be made with regard to costs incurred by the Registrar in summoning a fresh panel.

Solicitors for petitioner: **Earl, Kent, Massey and Northcroft.**
Solicitor for the respondent and co-respondent: **J. F. W. Dickson.**

Herdman J. December 6, 16, 1926.
Auckland.

OFFICIAL ASSIGNEE OF HARRY WHITE FRETWELL
v. ARCHIBALD CHARLES FRETWELL.

Bankruptcy—Sale of Farm to Brother—Prior to conviction—Not Convict until Sentenced—Prisons Act 1908, Sections 52 and 54—Adjudicated Bankrupt—Whether sale by Bankrupt fraudulent to defeat creditors—Statute 13 Eliz. Chap. S.—Date of Sale uncertain—No proof mala fides.

Copis v. Midallton—2 Mad. 410; **In re Johnson Golden v. Gilliam**—20 Ch. Div. 397, referred to.

The Official Assignee in Bankruptcy sought:—

First: to set aside a conveyance of a piece of land containing 80 acres or thereabouts, situated at Waeranga, dated the 7th of November, 1923, executed by the bankrupt in favour of his brother, A. C. Fretwell, the defendant.

Second: to set aside a mortgage dated the 13th of November, 1923, covering the same lands executed in favour of the bankrupt.

Third: to obtain a declaration that the plaintiff is entitled to certain live stock and chattels delivered by the bankrupt to defendant and to obtain an order that the stock and chattels be delivered up.

The bankrupt and his brother were farmers carrying on separate farms in the Whangamarino Survey District. The bankrupt seriously assaulted a neighbour named Drake. He was indicted and found guilty on November 7th, 1923, and sentenced on November 10th, 1923.

On June 30th, 1924, Drake took action to recover damages from bankrupt for the injury done to himself, and on November 19th, 1924 obtained judgment for £638 4s. 8d. and costs £61 13s. 1d. Four days afterwards, on November 23rd, 1924, H. W. Fretwell was adjudicated bankrupt on his own petition.

After the assault had been committed bankrupt endeavoured to sell the farm as a going concern for £1,840. His solicitor counselled bankrupt to sell to his brother, the solicitor being anxious to preserve the farm from depreciation. The possibility of Drake taking action for damages was not discussed. Bankrupt sold to his brother. There was tendered in evidence at the hearing an agreement dated November 7th, 1923, in which the bankrupt is described as vendor and the defendant is described as vendee of 80 acres together with certain stock and chattels. The purchase price appears as £1,800 the words "as a going "concern" were inserted after the figures £1,800. The agreement provides for the payment of a deposit of £50 for the taking over of a Government mortgage of £620, and for a second mortgage to secure the balance. Possession was to be given on the date of the document. The Deed of Conveyance of the 80 acres also bears date November 7th, 1923, the consideration including the first mortgage of £620, total £1,600. The stock and implements were evidently to be bought for £200.

The Deed of Second Mortgage is dated November 13th, 1923, and is for the sum of £1,180.

The evidence concerning the date upon which the contract was signed is vague and uncertain.

HERDMAN J. The Official Assignee's attack on the transaction rests upon two grounds:—

First: He says that when bankrupt entered into a contract to sell his land and when he executed a conveyance thereof and purported to sell and deliver his stock to defendant he was a convict whose estate had, because of his conviction, become vested in the Public Trustee. It is claimed that because of his conviction bankrupt was incapacitated from selling or disposing of any part of his property.

Second: The Assignee claims that in breach of the statute, 13 Elizabeth, Chapter S, the bankrupt, fraudulently, and with intent to defeat and delay the claim of Drake, executed the conveyance before referred to and with the same intent delivered the stock and chattels hereinbefore described.

I shall consider, to begin with, the first proposition submitted on behalf of the Official Assignee.

Section 54 of "The Prisons Act 1908" provides that every convict shall be incapable during the time he is subject to the operations of Part 3 of the Act of alienating or charging any property or of making any contract "save as hereinafter pro-"vided," then follow sections which provide for the appointment of an administrator of convict's property, and which decree that on the appointment of an administrator a convict's property shall vest in the administrator and that the administrator shall have absolute power to let, mortgage, sell, convey and transfer any part of such property as he thinks fit. In the New Zealand Gazette of the 19th of April, 1906, appears the appointment of the Public Trustee to be the administrator of convicts' property.

In section 52 of the Act "convict" is defined.

I think that the section makes it plain that a person is not a "convict" within the meaning of the legislation until he has been sentenced.

We know that bankrupt was sentenced for his crime on the 10th of November, 1923. On that date therefore he became a convict and his estate vested in the Public Trustee.

But as it is claimed by Defendant that the dispositions of property in his favour were made before the 10th of November, 1923, it becomes necessary to consider the evidence for the purpose of deciding on what date the documents relating to the alleged sale of land were executed and upon what date the sale of the personal property was effected.

Prima facie the correct dates of execution have been inserted in the documents and I must accept them as correctly recording the date upon which a sale took place and upon which security was given unless other evidence available proves the contrary. I therefore turn now to the evidence given at the trial. The Official Assignee handed in a statement made on oath by defendant on the 17th of December, 1925, more than two years after the documents were executed.

In one part of his statement defendant said that he fancied that his brother was in custody at the time he, defendant, signed the agreement, but he did not think that he had been sentenced. He said, "I think it was just before he was sentenced that he "decided to sell and asked me to take over." He said that Mr. Osborne Lilly who acted as solicitor for both brothers, drew up the necessary papers. Speaking of the date upon which his brother signed, he said that he did not think that he had been sentenced. The farm stock and implements were sold as a going concern. Towards the end of his evidence after having made a statement which plainly showed an indefiniteness and uncertainty about detail he concludes by saying: "I do not "remember the exact date when I signed the agreement. I "can't remember whether it was after or before my brother "was sentenced."

Mr. Osborne Lilly was called to support the plaintiff's case, but his evidence like defendant's statement made before the Official Assignee is founded upon a somewhat misty recollection of events. He produced no diaries. He said that he kept none in which the events upon which the result of this action may depend were recorded.

It was evidently upon Mr. Osborne Lilly's advice that bankrupt decided to sell to his brother, and Mr. Lilly's motive in advising him to sell, was to save the place from neglect and ruin if imprisonment became the bankrupt's fate.

Mr. Osborne Lilly gives the following account of the execution of the papers: "I got H.W.'s signature to the agreement "and the conveyance at one time.

As the evidence is so obscure upon the point I think that the correct course to take is to hold that the dates inserted in the documents truly record the dates upon which they were executed. I have no doubt that H. W. Fretwell signed first and that defendant affixed his signature afterwards. I think also that this was done before the date upon which H. W. Fretwell was sentenced.

The onus of proving at this late stage that the dates inserted in the documents recording the sale are erroneous is on the plaintiff and this burden has not in my opinion been discharged. The fact that A. C. Fretwell signed the mortgage on the 13th of November and that he took possession of the stock in accordance with his undertaking on a date subsequent to the date of sentence does not seem to me to matter. A sale was effected before sentence and the land was conveyed in pursuance of the contract before that event happened. It therefore follows that Mr. Gould's contention that the sale of the farm and stock by bankrupt to his brother was invalid because bankrupt had become a convict has not been borne out.

I now turn to the other ground upon which the Assignee's claim is founded, namely that the bankrupt's disposition of property were void under 13 Elizabeth, Chapter S, and I begin by observing that the transaction was not a voluntary settlement. Although the terms of the mortgage are unique in the sense that they deal with the mortgagor with uncommon liberality the fact remains that A. C. Fretwell did execute a charge in favour of the mortgagee over a property which was certainly worth some hundreds of pounds over and above the first mortgage. So, liberal and extraordinary as the terms of the mortgage may be, a consideration which was neither nominal nor unsubstantial moved from the purchaser to the vendor of the land and stock.

It is as if there had been a conveyance for value, so not only must fraud on the part of the vendor be shown but there must be proof that the purchaser was privy to the fraud. The principle is thus stated by May in his work on Fraudulent Conveyances: "Whatever fraudulent intent there may have been in the mind "of the vendor, it would not avoid the conveyance, unless it "was shown to have been concurred in by the purchaser. It

"could not be contended that the mere fraudulent intent of "the vendor could avoid the conveyance, if the purchaser "were free from that fraud."

The case which the Assignee sets out to make is that there was a conspiracy on the part of the two brothers to defeat a possible claim which Drake might make against the bankrupt. At the date of the transaction bankrupt was apparently solvent. His debts were few, and there is no satisfactory proof that he anticipated a claim from Drake. There was of course a possibility that Drake might sue for damages but on the other hand he might have remained content with the punishment by imprisonment which had been visited upon bankrupt through his action. If Drake did take action, how could bankrupt know what a jury would award ? They might have given nothing at all, or they might have awarded £10 or £100 or a larger sum. The question is, was the sale *bona fide* or was it a sham ? Was the object of the transaction to defeat creditors then in existence or creditors **in futuro ?**

In the face of Mr. Osborne Lilly's evidence, which I have no reason to doubt and which I feel obliged to accept, it seems to me to be impossible to hold that bankrupt when he parted with his property had it in his mind to avoid any possible liability which might arise in favour of Drake.

No action was taken by Drake until months had elapsed and judgment against bankrupt was not obtained until November, 1924, 12 months after the sale of the land and stock. Although bankrupt sold to a relative, as is pointed out by Plumber V.C. in **Copis v. Midallton**—2 Mad. 410—that does not necessarily involve fraud. After considering Mr. Lilly's evidence I am quite satisfied that the brothers had no intention of defrauding anyone when they entered upon this transaction. H. W. Fretwell was face to face with a serious situation. His chances of acquittal were evidently hopeless and he was advised for his own protection to enter into a "walk in walk out" arrangement with his brother. There is evidence that he had made an effort to sell to a stranger but without success. In July, 1923, he gave particulars of his farm to a Mr. Spragg and offered it to him as a going concern for £1,840.

The case is that of a man possessing intelligence of a low order, who being faced with a serious crisis in his life placed himself in the hands of his solicitor who rightly or wrongly thought that, as his client could not avoid imprisonment, it was best that he should sell his property to his brother. Mr. Osborne Lilly admits that he was the author of the scheme which made defendant the purchaser of bankrupt's stock and farm and quite frankly gave his reason for the advice that he tendered. He believed that it would be difficult to find a buyer, the country being poor, and that there would be difficulty and expense in getting a suitable caretaker. His anxiety was to preserve the farm from the depreciation which would be inevitable if it were left uncared for. A sale to A. C. Fretwell with a mortgage in favour of bankrupt would ensure that the latter had a hold on something and the liberal terms contained in the mortgage would operate as an inducement to the purchaser to keep up the value of his brother's security.

Mr. Osborne Lilly said in evidence that the matter of Drake bringing an action was never discussed by him with the Fretwells, and that the subject was never alluded to by the Fretwells. I know of no reason why I should doubt this statement. After considering all the evidence carefully I cannot believe that the motive of the Fretwells and their solicitor in carrying out the transaction impeached was to defraud Drake or anyone else. It seems to me that all concerned considered that H. W. Fretwell's situation was desperate, and although his fate was unknown it was certain that he was bound to suffer heavy imprisonment. It therefore became necessary to devise a plan which would save his estate from shipwreck, hence the sale of everything as a going concern and a mortgage back to the vendor.

I have prepared this judgment on the assumption that when the disposition of the property took place there existed a claim by Drake for unliquidated damages and that when judgment based upon the claim had been recovered it related back to the creation of the original obligation.

In a case of this kind if *mala fides* be proved that would be a sufficient justification for the interference of the Court, even though the transaction was founded upon a good consideration. But I have decided that *mala fides* has not been proved and I am of opinion that the consideration was valuable and sufficient. It is true that the transaction was between two brothers in circumstances that were unusual and no doubt such a transaction is open to more suspicion than one to a mere stranger. It is true that defendant paid in cash £50 only, but in committing himself to purchase the farm and stock for £1,800 he bound himself to pay a price which appears to me to err on the side of extravagance.

Referring to a transaction between relatives Fry J. in **In re Johnson Golden v. Gilliam,** 20 Ch. Div., page 197, made this statement : "When a *bona fide* and honest instrument is executed "for which valuable consideration is given and the instrument "is one between relatives, the Court cannot say that the differ "ence between the real value of the estate and the consider- "ation given is a badge of fraud and if it is not a badge of fraud "or evidence of an intention to defeat creditors it has no relation "to the case."

Finally I cite this passage from May's work at page 194 : "Where it is found that the transaction at issue is, on the whole, "fair and honourable, and not induced by the fraudulent in- "tention of defeating creditors or purchasers the Court is not "very particular as to the amount of the consideration ; if it "is valuable, and not so entirely inadequate as, from its insuf- "ficiency, to induce the presumption of fraud, it is enough."

The application of the Plaintiff will be refused and judgment will be for Defendant with costs as per scale as in an action to recover £200.

Solicitors for plaintiff : **Morpeth, Gould & Wilson.**
Solicitors for defendant : **Earl, Kent, Massey & Northcroft.**

Skerrett C.J. September 9, 10, 1926.
Auckland.

HENDERSON AND POLLARD v. HENDERSON AND OTHERS.

Will—Construction—Shares in Company—Bonus Shares issued—Whether Capital or Income—Rule in Howe v. Lord Dartmouth—Bouch v. Sproule (12 A.C. 197) followed—Gift of 300 Shares—Whether Bonus Shares follow gift—Bonus Shares must follow destination of original shares.

Four questions were asked in the Originating Summons and were answered as follows :—

1. Whether the will excludes the rule in the case of Howe v. Lord Dartmouth so far as the 3,032 shares in the Company are concerned ?

A : Yes.

2. Whether the said 3,032 shares remain unconverted and will the tenants for life be entitled to the actual dividends from time to time declared and paid in respect of such shares ?

A : The shares should remain unconverted and the life tenant will be entitled to such dividends.

3. Whether the bonus shares issued by the Company form part of the capital of the estate of the Testator or will be distributable as income ?

A : The shares so allotted form part of the capital of the estate and are not distributable as income.

4. Whether if such bonus shares form part of the capital of the estate the said Gordon Pollard will be entitled to the bonus shares issued in respect of the said 300 shares ?

A : The answer is in the affirmative.

The facts are abstracted from the judgment.

Inder for plaintiffs.
Thorne for Gordon Pollard.
Luxford for life tenants.
J. B. Johnston for Young Men's Christian Association.
Vialoux for The Leslie Presbyterian Orphanage.
Rose for Sailors' Home.

The will is dated the 14th August, 1923, and the testator died on the 17th October, 1923. The testator devised and bequeathed all his real estate and the residue of his personal estate unto the trustees upon trust to pay "the net income, interest and annual profits thereof to his brothers, Joseph and Henry Henderson, in equal shares during the term of their joint lives, and upon the death of either of them on trust to pay three equal fourth parts of the net income to the survivor during his life and to accumulate the residue of the net income which should fall into and become part of the residuary estate. Subject to the foregoing provisions the will declared that the trustees should from and immediately after the death of the survivor of them, Joseph Henderson and Henry Henderson, hold his residuary estate upon certain trusts therein expressed. The testator declared that his trustees should hold 300 "of "my shares in Henderson and Pollard Limited upon trust "for Gordon Pollard, eldest son of the said Herbert Henry "Pollard, absolutely." He further directed that the trustees should as soon as conveniently might be sell and convert the residue of his residuary estate into money and the trustees were to stand possessed of the net proceeds derived from such sale

in trust to pay certain legacies to individuals and to charities. The final balance of the residuary estate was directed to be held in trust for the Leslie Presbyterian Orphanage at Auckland, The Young Men's Christian Association at Auckland, The Sailors' Home at Auckland, and the Ladies' Benevolent Society at Auckland in equal shares.

At the time of his death the testator possessed 3,032 shares in a company known as "Henderson and Pollard Limited," and such shares formed part of his residuary estate. After the death of the testator Henderson and Pollard Limited, pursuant to powers contained in its Articles of Association, capitalised the sum of £7,500, being part of the undivided profits of the Company standing to the credit of its Reserve Fund. This was done by resolving that the sum of £7,500 should be distributed as a bonus to holders of ordinary shares in proportion to the ordinary shares held by them respectively; and this distribution was authorised to be made by the allotment of 7,500 unissued ordinary shares as fully paid-up, on the basis of one fully paid up £1 share in the Company's capital for every two shares held by a member. This scheme was duly carried out. There was no dispute at the hearing before me that this sum of £7,500 was capitalised and was distributed among the shareholders in accordance with their rights, on the footing that they became entitled thereto as capital. See Article 106A. of the Articles of Association of the Company. Accordingly, 1,516 fully paid up shares were allotted to the trustees under the will in respect of the 3,032 shares held by the testator at the time of his death in the capital of the Company. No question was raised as to the propriety of the trustees accepting the new shares.

SKERRETT C.J. The first question stated in the Originating Summons inquires whether the will excludes the rule in the case of **Howe v. Lord Dartmouth,** so far as the 3,032 shares held by the testator in the Company are concerned. I am quite satisfied that the testator has excluded the rule, for the reasons given during the course of the argument.

The answer to the question therefore is that the 3,032 shares should remain unconverted; and the tenant for life will be entitled to the actual dividends from time to time declared and paid in respect of such shares.

The answer to the second question is that the defendant Gordon Pollard will be entitled upon the death of the survivor of the said Joseph Henderson and Henry Henderson to a transfer from the executors and trustees of the will of 300 of the shares of Henderson & Pollard Limited and not to the proceeds actually derived from the sale thereof. The question of the additional shares will be discussed in the answer to the fourth question.

In answering the third question His Honour stated: The rule upon the subject is well settled and is stated by Lord Herschell in **Bouch v. Sproule** (12 A.C. 197): "When a testator "or settlor directs or permits the subject of his disposition to "remain in as shares or stock in a company which has the "power either of distributing its profits as dividend or of con"verting them into capital, and the company validly exercises "this power, such exercise of its powers is binding on all persons "interested under the testator or settlor in the shares, and "consequently what is paid by the Company as dividend goes "to the tenant for life and what is paid by the Company to the "shareholder as capital or appropriated as an increase of the "capital stock in the concern, comes to the benefit of all who "are interested in the capital." This rule has been followed in numerous subsequent cases. In the present case it is indisputable, as before stated that the Company avowedly exercised its power of capitalising its undivided profits to the extent of £7,500 and paid that sum by allotting to shareholders paid up shares in the Company.

The answer to the question must be that the shares so allotted form part of the capital of the estate of the testator, and are not distributable as income.

Answering the fourth question, His Honour continued:— This question is a somewhat difficult one, and appears to be untouched by authority. It is clear, however, that under the trusts of the will the trustees held 300 of the 3,032 shares of the testator in trust after the death of the survivor of the two beneficiaries before named for Gordon Pollard. It is true that no specific shares are directed to be held in trust for Gordon Pollard; nor has any allocation of the 300 shares been made by the trustees in respect of the bequest to that beneficiary. Nevertheless from the date of the death of the testator and subject to the life interest given by the will the trustees held the shares of the testator as to 300 thereof in trust for Gordon Pollard. The new paid up shares created by the Company after the death of the testator were allotted to the trustees in the proportion of one new share for every two of the 3,032 shares held by the trustees. It must therefore be taken that there were allotted to the trustees 150 new paid-up shares in respect of the 300 shares which were to be held in trust for Gordon Pollard and these shares must be regarded as an accretion to the 300 shares and as being derived from and in respect of the holding of such shares. If this is so the new shares were acquired by reason of the ownership of the testator's shares and in my opinion must follow the destination of such shares under the will. There is nothing unjust in this conclusion. The new shares were wholly subscribed and paid for out of the Company's Reserve Fund and the reduction of the Reserve Fund produced a reduction in the value of the original shares. That loss it appears to me was intended to be compensated for by the allotment of the new paid up shares. It does not appear to me to matter that no particular 150 new shares can be earmarked as allotted in respect of the 300 shares which were held in trust ultimately for Gordon Pollard. It is clear that the trustees have acquired 150 new shares in their right of shareholder as trustees for the beneficiary named. My conclusion therefore is that the new paid up shares were acquired by the trustees in their right as owners of the original testator's shares and the new shares must follow the destination of the original shares.

The answer to the fourth question is therefore in the affirmative.

Solicitors for plaintiffs: **Thorne, Thorne, White & Clark-Walker,** Auckland.

Reed J. December 7, 1926.
Auckland.

WILLIAMS v. NORTHERN STEAMSHIP CO., LTD.

Seaman—Contracting illness—Payment of Benefits—Re-employment—Subsequent relapse of same illness—Whether entitled to further benefits—Shipping and Seamen Amendment Act 1911, Section 6 and 7—Interpretation.

Action for wages. A seaman was employed on a ship belonging to the defendant Company and was put ashore because of his having contracted an illness. The Company paid to him the amount due by it under the provisions of Section 6 of The Shipping and Seamen Amendment Act 1911. The seaman recovered and was re-employed on another ship belonging to the same Company. He suffered a relapse and had to be again put on shore. He thereupon claimed to be again entitled to receive the benefit provided for under the Act.

Holmden for the plaintiff:

The plaintiff is within the grammatical wording of sub-section 7 of Section 6 of the Act. The illness was contracted while he was in the service of the owner of the ship from which he has just been discharged.

Meredith for the defendant:

Section 6 sub-section 1 fixes the quantum of benefit intended to be conferred by the Act. Before liability arises there must be a contracting of the complaint in the service of the ship or of its owners. The condition precedent is the contracting of such illness. There has been a contracting but such contracting has been discharged by payment. There cannot be a second liability without a second contracting, and in this case there is no second contracting.

REED J. I think that upon the facts there is no liability on the defendant. The wording of Section 6 sub-section (7) of The Shipping and Seamen Amendment Act 1911 may not be perfectly clear but the general purport of the provision is clear enough. It seems to me that for the plaintiff to succeed the illness in respect of which the claim is made must have been one that was contracted after the commencement of the service from which the seaman was subsequently discharged or in which the break of his employment occurred.

I must therefore enter judgment for the defendant. Do you ask for costs, Mr. Meredith?

Meredith: No, Your Honour.

Reed J.: Judgment for Defendant without costs.

Solicitors for plaintiff: **Wynyard, Wilson, Vallence and Holmden,** Auckland.

Solicitors for defendant: **Hesketh, Richmond and Clayton,** Auckland.

Skerrett C.J. November 11, 17, 1926.
Wellington.

BRUGES v. GOW.

Partnership—Premium—Paid for Goodwill—Partnership possessed no capital—Goodwill of no value and unsaleable—Construction—Partnership Act 1908, Section 43.

D. S. Smith and Hanna for plaintiff.
Von Haast for defendant.

The facts are set forth in the judgment.

SKERRETT C.J. It was agreed by the parties that I should determine whether the sum of £500, paid by Mr. Bruges to Mr. Gow contemporaneously with the execution of the partnership agreement, is a premium paid on entering into a partnership within the meaning of Section 43 of "The Partnership Act 1908"; and that, if I should so hold, I should set aside the Award and refer the matter back to the Umpire to determine whether, in the exercise of the discretion contemplated by that Section, he should order re-payment of the premium, or such part thereof as he thinks just.

The point is a short one, although not without difficulty because of the absence of authority defining what a premium on entering into a partnership is. Mr. Gow carried on the business of a Land, Estate, Insurance and General Agent at Wellington. On the 7th June, 1924, he admitted Mr. Bruges as a half partner in consideration of the sum of £500 paid to him for his own use on the entering into the partnership articles. The terms and conditions of the partnership were set out in an agreement executed by the parties on the date before mentioned. The sum of £500 is thus described in the partnership agreement:—

"Witnesseth that in consideration of the sum of £500 "this day paid . . . . as a premium or sum for the goodwill "of the business carried on by the said Neil Gow it is hereby "mutually agreed that . . . ."

The partnership at its inception possessed no capital—see paragraph (5). There is no reference in the Articles, except by the words just quoted, to the goodwill of the partnership business. Even in the Clause (16) giving a right of pre-emption to a surviving partner of the share of a deceased partner in the capital and assets of the business there is no reference to such goodwill.

Dealing with the construction of Section 43, I think it is clear that even the wide words of the section would not justify the Court in treating as a premium a sum of money paid to a partner as the price of a share in the tangible, capital, or corporeal assets of a proposed partnership business—such as lands, chattels, book debts, stock-in-trade, etc. The sum paid for this purpose gives to the incoming partner the agreed share of the capital assets of which it is the price and this share remains in him and he obtains the benefit of it on the winding up of the affairs of the partnership on dissolution. This view appears to be in accord with the actual practice of the Court when there has been a payment by way of premium and also payment in respect of the acquisition of a share in the capital assets or certain of the capital assets of the partnership. What I think is contemplated by the statute as a premium is a sum of money paid by the incoming partner in substance as a consideration for the creation of a partnership and its continuance during the agreed term.

Turning now to the language of the agreement, what is the sum of £500 expressed to be paid for? From the reasons given by the learned Umpire, I gather that he interpreted the agreement to mean that the £500 was paid for the acquisition by Bruges of a half-share of the goodwill of the business theretofore carried on by Mr. Gow, and Mr. Bruges had therefore got what he had paid for. In my opinion neither the language of the Articles nor the substance of the transaction justifies that conclusion. The words used do not imply a purchase by Mr. Bruges of a share in the goodwill of the business. Nothing of the kind is expressed or contemplated. What is expressed, and what is contemplated is that Mr. Bruges should pay £500 to Mr. Gow so that a partnership, of which he was to be a member, should take over the existing business and goodwill of Mr. Gow. This is the precise operation of the agreement. The goodwill of the business, for what it was worth, became an asset of the partnership and on the dissolution of the partnership, apart from any special provision which the Articles might contain, would require to be sold as a partnership asset. (**In re David and Matthews** 1899, 1 Ch. 378; **Bill v. Fearis,** 1905 1 Ch. 466).

This is also I think the substance and effect of the transaction. It is doubtful whether the business, being in the nature of a professional business and its returns being dependent on the trust and confidence in the person or persons for the time being carrying on the business, can be said to have possessed an actual goodwill, or at anyrate a goodwill of any pecuniary value. Its value (if any) could only be obtained by means of the continuance of the partnership. The sum therefore paid for the goodwill was in substance and effect a premium paid on entering into the partnership. It is clear that the goodwill of the partnership business is of no value and is not saleable.

The result therefore is that I determine that the sum of £500 paid by Mr. Bruges to Mr. Gow on entering into partnership was a premium within Section 43 of the Partnership Act; and therefore, as was agreed, I set aside the Umpire's Award and refer the matter back to him to determine in the exercise of his discretion what order should be made as to the repayment of the premium or such part thereof as he thinks fit. The matter of quantum is entirely one for the Umpire. Mr. Gow must pay to Mr. Bruges the sum of £7 7s. 0d. and disbursements as the costs of the action to set aside the Award.

Solicitors for plaintiff: **Duncan & Hanna,** Wellington.
Solicitor for defendant: **B. Egley,** Wellington.

Herdman J. December 3, 1926.
Hamilton.

IN THE ESTATE OF JOHN BETTLEY.

Probate—Will wholly in Testator's Handwriting—Testator's Signature in Attestation Clause—Attesting Witnesses since dead.

In the Goods of Huckvale, L.R., P. & D., Vol. 1, page 375, followed.

E. V. Stace for applicant.

HERDMAN J. This is an application for probate of a will which excepting the signatures of the attesting witnesses is wholly in the handwriting of the deceased. The attestation clause which was written by deceased reads as follows:—

"Signed by the Testator John Bettley as and for his last Will and Testament in the presence of us, who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses. J. S. Edgecumbe, Commission Agent, Hamilton. E. T. Davey, Storekeeper, Hamilton. October 17th, 1900."

Outside of the attestation clause the signature of the deceased is not on the will, but it is said that it is plain that the signature is in the attestation clause.

Both the attesting witnesses are dead.

I have no doubt at all that the name "John Bettley" which appears in the attestation clause in the Testator's handwriting was his signature affixed, as the attesting witnesses declare, in their presence. It is written with ink which differs in colour from the ink used in all the rest of the document excepting the signatures of the attesting witnesses.

In other words the signature "John Bettley" and the signatures of the witnesses have been recorded with the same ink and with ink which differs in colour from that used when the rest of the will was written. The opinion that I have formed from an inspection of the document is borne out by Mr. Maning, the Manager of the Bank of New South Wales, who has had a long experience in judging handwriting and who is in a position to speak with personal knowledge of the handwriting of deceased.

The case bears some resemblance to one considered by Sir J. P. Wilde in **In the Goods of Huckvale,** L.R., P. & D., Vol. 1, at page 375. In that case the attesting witnesses were alive but they did not know whether or not the signature of the testator was on the paper when they subscribed their names. The Court nevertheless held that it was entitled to investigate the circumstances of the case and form its own opinion from those circumstances and from the appearance of the document itself whether the name of the testator was or was not upon it at the time of the attestation.

In this case the question is, did the testator sign the will? The circumstances I think prove that he did. The document was written by him. The words "John Bettley" are evidently a signature. There is evidence that they were not written at the same time as the will and finally I have the declaration of the attesting witnesses that the document was executed in their joint presence. Probate granted.

Solicitors for applicant: **Rogers, Stace & Hammond.**

LONDON LETTER.

Temple, London,

10th November, 1926.

My Dear N.Z.,—

No doubt you will have observed, in the London papers of a week ago, the news of the end of the **Pollak v. Donald Campbell & Co.** litigation, which has occupied very many days' time of the Official Referee, of the Divisional Court and of the Court of Appeal, during the last five years or so, and which, even in its dying stages, took apparently two long hours to agree to the terms of the settlement whereat the parties had arrived. No interest, except an occasional interlocutory interest which has been reported some while ago, attaches to the case; I suppose one only knows its name because it, and its associated cases, have for so long filled so prominent a part in terms' Cause Lists. I mention the matter, as introductory of a subject somewhat trite in these letters but, even more, somewhat grim in our lives here. With the decease of that case, we come to realise (but at its inception, only, alas!) the real effect of the "slump" long prophesied and long ago, indeed, supposed to have been realised. For some time, litigation has been at freezing point, to take a thermometrical metaphor; now we see it going below freezing point, and, as the Coal Strike has multiplied by tens and prolonged by months the industrial depression behind which (if a long way behind it) always follows our professional famine, we are going to see the indicator dive to such below-freezing-point depths that many of my learned brethren (I hate to think) are likely to see it disappear off the thermometer altogether. A leading, a very leading London commercial firm, of solicitors, has not a case on for hearing at all this term! The second biggest agency firm, that is the firm which does the second largest business in looking after country solicitors' London work, has not enough London litigation even to keep its staff pleasantly busy! If you are sick of this subject, you can be nothing like as sick of it as are certain of my brethren; it is sinister news, when at last the slump appears to begin to touch, appreciably, the solicitor branch.

Montague Shearman, J., is so indisposed that, it is said, he will never return to active work in the King's Bench Division. The vacancy, if the Houses of Parliament should consider it to be a vacancy, would, they say, be filled up (though I do not believe it) by Stuart Bevan or F. M. Schiller. I doubt very much, however, whether the two additional Judges will, for the present, be maintained on the K.B.D. side; and in any case forecasts of K.B.D. appointments are invariably belied by the appointments themselves, and, beyond that, I hesitate to confer, even in rumour, any further boons upon a man who, like Schiller, has just been left £3,000 a year by a grateful lay client! Mackinnon J., having suppressed at Chelmsford the cheers which greeted the acquittal of the lady who shot her errant husband by mistake, slipped and sprained his knee; and that is all the strictly legal news I have for you, though you will probably like to know that trouble, in the nature of misfeasance summons', is breaking out, intensively, in the Oil World and we must all hope against hope that it will not, even indirectly and distantly, touch our learned ex-Chancellor, Lord Buckmaster, who recently (and, I hope and suppose, as a corrective influence) got amongst that *galere*. Litigation, beyond the mind's measure and the dream of a lawyer's avarice, continues to impend, on the part of Dunlop's, over the head of magnates in the motor world; I am told, by a Magnate (to whom I felt excessively proud to find myself speaking, though he was, in truth, a very dull fellow, mentally, whatever he may be, industrially) that some five millions are involved, and some hundreds of thousands required to effect a settlement. But if I let myself go on talking on this delicious subject of millions, I shall drift into reminiscences of the **Lever Brothers v. Brunner Mond** suit, settled, as you will remember, for one million; and thence I shall pass into the present Brunner suicide-thrill and thence right away from the law altogether. Let us rather turn to the less magnificent disputes, upon a right understanding of which our ultimate fate depends. There are not many of them; none is of any memorable importance; there is, to be brief, nothing doing.

Judgment is reserved in the case which, of all of them, is the least technical but probably the most interesting: **Bowen v. Wilson.** Our **Motor Cars (Use and Car) Order, 1904,** demands the existence on a car of two independent brakes; are two independent brake-blocks, both working on the same brake-drum, two independent brakes? The answer to the question is likely to be difficult and, if in the negative, of rather serious effect, since many vehicles passed by Scotland Yard will be concerned, as the reports of the case mentioned, and also, as the reports of the case do not mention, there is the effect to be considered as re approval of vehicles (thus at fault, if fault it be) throughout the country, by local licensing authorities and upon a specification given to those authorities and widely published, which emanates from the State Department. Many of you, coming to this country, will have hastened to see or will hasten to see our dear Co-Optimists; their entertainment given in the Courts, in **Lawback v. Co-Optimists Entertainment Syndicate and Another,** produced no thrills in law, though it is not entirely uninteresting from a "Negligence" point of view. "Another" was that humourous little person, Miss Betty Chester; and she was found to be negligent in swinging her Indian Clubs, during a star turn, on the part of the gentleman upon whose head the club arrived. There is little point, for us, in that; but there is interest in the point that the promoters of the entertainment, being acquitted of any additional act of negligence of their own, in fact, were, in law, not *ipso facto* involved in their artiste's negligence.

I still have no Privy Council news for you, though Myers has just telephoned me, from that august house, to say that our New Zealand business will come into the list again on Tuesday next, following an Australian appeal. Other authorities put the prospective date somewhat later in the week; in any case, we shall soon be in the thick of it. Otherwise I have a pending Appeal of such startling effect, in matrimonial questions and for all parts of the Empire, just come in from the Straits Settlements that I am sorely tempted to put you wise about it here and now. But I suppose we must bide our time; on this subject I can, thus, do no more for you, at the present, than communicate our learned President's growl at finding a case in the "Undefended List," in which was asked an exercise of the discretion.

Yours ever,

INNER TEMPLAR.

THE IMPERIAL CONFERENCE.

The historian of the future, surveying the work of the last Imperial Conference, will treat it as an epoch in the development of the Empire. Preceded as it was by murmurs of dissension and autonomy—magnified to the utmost by foreign critics—in the ultimate result of its labours it exemplifies fully the British trait of compromise and common sense, and above all the faculty of governing divers races that has made the British Empire what it is to-day. The Conference has apparently been able in a few weeks to find a form of government that would satisfy governments with such different ideals as those of South Africa, Canada, New Zealand, and Newfoundland, and what seemed impossible has been done, and the secret of it is that the common love of liberty can harmonize all disharmonies.

The Report of the Inter-Imperial Relations Committee of the Imperial Conference was adopted by the whole Conference on the 19th November, but it does not profess to lay down more than main outlines and certain comprehensive formulas upon which it will be possible for subsequent Committees to build for years to come. The Report will be regarded as a Charter of Freedom for the British Commonwealth of Nations, ranking with the most important State documents, for in it are set forth the basic principles upon which the British Empire rests. No attempt has been made to draw up a regular constitution that will bind future generations, but rather a confession of faith as to what the Empire stands for in 1926, and an indication of how best to ensure its permanence. It exemplifies to the fullest degree the genius of the British people for adapting their political institutions to the changing needs of the day.

The keynote of the Report is that part which defines the status of Great Britain and the Dominions in the following words: "The group of self-governing communities composed of Great Britain and the Dominions . . . are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." These words may almost be said to be the genesis of an Imperial Constitution and constitute an express declaration of the equality of all the British Dominions, including Great Britain itself, to which in recent times they have been tending. Geographical and other conditions made equality of status by the way of federation impossible of attainment, the only alternative being by way of autonomy. In the United States where the geographical conditions and the historical development have been different, the evolution of the group of self-governing States contained therein has been equality by way of federation.

The Report reflects credit on all concerned, especially Lord Balfour, the Chairman, who alone of the Statesmen present, was a member of the first Colonial Conference in 1887.

The Committee explained why it omitted India from its paragraphs that dealt with status, pointing out that the position of India is already defined by the Government of India Act 1919, which will come up for revision in 1929.

On various occasions since the War, leading Statesmen and British Statesmen have referred to the "equality of status" of the Dominions—a status which was freely acknowledged by the Conference of 1923. But for the first time in the history of the Empire the Ministers of all parts of the Empire have jointly set forth on paper the *modus operandi* of the British Commonwealth. The Report says "equality of status as far as Britain and the Dominions are concerned is thus the root principle governing our inter-imperial relations." Of the matters which are dealt with in the Report the two most striking changes are the alterations in the title of the King and the curtailment of the functions of the Governor-General of a Dominion. Since the recognition of the Irish Free State as a Dominion consequent upon the signing of the Anglo-Irish Treaty, the present royal title has become out of date: "George the V, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King." Henceforth the King will be referred to as "George the V by the Grace of God of Great Britain, Ireland and the British Dominions Beyond the Seas, King, Defender of the Faith, Emperor of India."

The result will be a new Royal Titles Act, which will eliminate the United Kingdom of Great Britain and Ireland from His Majesty's designation, Ireland taking its place in the Royal title as a separate Kingdom. This is the only change proposed, the rest of the titles remaining as settled by the last Royal Titles Act (1901) which introduced "the British Dominions Beyond the Seas." The United Kingdom only came into existence with the Act of Union, and, after being mutilated in 1920 by the Home Rule Act it ended with the Treaty which created the Irish Free State as an autonomous member of the British Commonwealth of Nations.

The title "Defender of the Faith" ought at least to have been dropped when George III, in the Treaty of Amiens with Napoleon Bonaparte as first Consul of France, relinquished the title of King of France, which was not a more absurd anachronism, though it was distinctly offensive to the French people.

"Defender of the Faith" in its origin is a Papal title, and it became an absurdity almost as soon as it was granted, when Henry VIII after being exalted to this rank by the Pope, for personal reasons threw over his allegiance to the creator of his title.

The new title contains at least two implications to which exception might reasonably be taken by those concerned. The first is that the geographically delimited territory known as "Ireland" is a political unity; the second, that the Protestant Faith is now alone "defended" or protected by the Crown. Neither of these implications is true, and they should not be incorporated permanently in His Majesty's official style and title. There seems to be a confusion of thought as to the effect of the foundation of the Irish Free State upon titles and symbols of Royalty and British nationality. If Ireland is mentioned at all, only Northern Ireland is associated with Great Britain and is entitled to special mention. The Irish Free State is a Dominion and is also "beyond the sea" (i.e. the Irish Sea which separates it from Great Britain, where are the King's residences and the headquarters of Government) and accordingly it should receive anonymous inclusion amongst the other "Dominions Beyond the Seas."

The term "United Kingdom" may stand, for it still includes two Kingdoms (England and Scotland) under one Government, the principality of Wales and the Government of Northern Ireland. But the term "United Kingdom of Great Britain and Ireland" is

an anachronism. The Irish Free State is politically and racially far more remote from Great Britain than any other of the Dominions; in that State the Union Jack was abolished long before such a course was officially proposed in South Africa, and every sign of any connection with Britain, including the Royal Arms, has been carefully deleted.

Yet while being the only one of the Dominions to reject these symbols of unity, the Irish Free State is the only Dominion that is directly represented in them; for the Irish Cross or saltaire in the Jack and the harp in the Royal Arms are heraldic devices of Celtic Ireland and separationist aspirations with which Northern Ireland has no concern. These anomalies are as anachronistic as the fleur de les removed from the Royal Arms in 1801.

The title "Defender of the Faith" may well be altered to that of "Defender of Faith" which would imply what is the fact, namely, that any Faith sincerely held is permitted full liberty and granted full protection by British laws. To the many millions united in allegiance to the British Crown and professing varying faiths and creeds, the Crown impartially grants freedom and protection.

For some time it has been felt that the dual position occupied by a Governor-General as Constitutional Head of the State representing the Crown and acting on the advice of Dominion Ministers and, secondly, as representative of the Government of Great Britain, was not compatible with the equality of status already accorded to the Dominion. Accordingly the Report lays it down that the necessary result of the equality of status of all the Dominions is that the Governor-General shall represent the King, but shall not represent His Majesty's Governments. Official communications in future will be between Government and Government direct although a Governor-General will be kept informed of what is happening just as the King is informed of all current political action. Henceforth the Governor-General of a Dominion will act solely as the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion, that is held by the King in Great Britain. Each Dominion Government will thus have the right to advise the Crown in all matters concerning the affairs of that Dominion. The British Government will no longer give advice to the Government in opposition to the opinions of any Dominion. The procedure will be consultation between Ministers of the Dominions concerned. Apparently the Conference overlooked the position of States such as those of Australia—part of a Federal Constitution—where the principle involved is at present a matter of contention between the Governor of New South Wales and its Premier.

In dealing with appeals to the Judicial Committee of the Privy Council, the Report says it was no part of the policy of the Home Government that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. If this were to be taken to mean that it was recognised that single Dominions were completely free to legislate themselves, or to demand legislation by the Imperial Government to alter the present position, it would be most unsatisfactory for the invaluable benefit of such an appeal would be largely lost if the right to such an appeal were not universal amongst the Dominions. This was realised by the Committee which added, that it was generally recognised that where changes in the existing condition were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion. This seems reasonable and the Irish Free State representatives did not press the question of an immediate change in the present conditions governing appeals from the Courts of Southern Ireland though they reserved the right to bring the matter up again at the next Imperial Conference. The question of increasing the strength of the Committee and providing for the inclusion therein of Colonial Judges has recently been discussed in the House of Lords and at public functions in London and doubtless there will be some change in this respect in the future.

One question which arises for consideration is the operation respectively of British and of Colonial statutes. British legislation cannot be questioned as *ultra vires* The competency of Colonial legislation depends on the extent to which it is authorised by the written constitution of the Colony or Dominion, and its effect depends also on the special provisions of the Colonial Law Validity Act, 1865. These matters, including the reservation of Dominion legislation for the assent of the Crown and the power of a Dominion to give its legislation extra-territorial effect, are to be submitted to a Committee to be set up with terms of reference outlined in the Report.

Other matters dealt with in the Report are Merchant Shipping; Relations with Foreign Countries including the making of Treaties; Representation at International Conferences and the general conduct of Foreign Policy. Right throughout the Report the position of the Dominions outside Great Britain has been advanced, and the appointment of an Irish representative at Washington, and a similar proposed appointment of a Canadian representative are welcomed.

In the realm of foreign affairs it is urged that any Treaty made by a Dominion Government should be made in the name of the Head of that State. If the British Government makes a Treaty on behalf of some or all of the Dominions it will specify which Governments are parties to the Treaty and the Treaty will be signed by the King. It was unanimously recognised, however, that in foreign affairs, as in matters of Imperial Defence, the chief share of responsibility for the present must be borne by the British Government. While the Dominions do not wish to be committed unnecessarily by the Imperial Government, yet they recognise all the same, that there is a corresponding danger of the Dominions committing the Imperial Government. The Dominions wish therefore that the main responsibility of foreign diplomacy shall continue to be borne by the Imperial Government, which incidentally bears the expense. The Foreign Office will thus continue to represent the Dominions in general.

As for improving personal contact within the Empire, the Report says that representation whether in London or in the Dominion capitals, is a matter for future settlement on the understanding that whatever arrangements are made shall be supplementary to the present system of direct communication between Government and Government. In conclusion, the Report states that it is premature to accept the statute of the Permanent Court of International Justice, which provides for the compulsory submission of certain cases. When adopting the Report the Conference congratulated the British Government on its share at Locarno in "contributing to the promotion of the peace of the world."

THE SALE OF STANDING TIMBER

(By H. F. Von Haast).

The sale of standing timber with its notional conversion of an incorporeal hereditament into a chattel has raised some nice problems that have been discussed in a series of cases of which the following are the principal :—

James Jones & Sons, Ltd. v. Earl of Tankerville (1909, 2 Ch. at p. 445).

Morison v. Lockhart (1912, S.C. 1017).

Macklow v. Frear (1913, 33 N.Z.L.R. at p. 271).

Egmont Box Co. v. Registrar General of Lands (1920, N.Z.L.R. 741).

Waimiha Sawmilling Co. v. Howe (1920, N.Z.L.R. 681).

Kursell v. Timber Operators and Contractors Ltd. (42 T.L.R. 435).

In these cases the following questions have been propounded, if not completely solved.

1. How far is such conversion effective not only as against the vendor and his representatives but against the world ?

2. What constitutes a sale of goods ?

3. When does the property in the timber pass to the purchaser ?

The purpose of this article is to analyse the decisions in the cases cited and to endeavour to extract the principles and rules of law laid down therein.

In order that readers may follow the reasoning, a short summary of the law on the subject prior to the Sale of Goods Act will be advisable. Trees are part of the land on which they grow and a conveyance of the land passes the trees upon it. Thus growing trees are part of the land, but the cut logs are goods. It is when the owner of the land sells the standing timber to another that difficulty arises.

Prior to the Sale of Goods Act, on such a sale the question of whether the standing trees were to be considered land within the meaning of the 4th or goods within the meaning of the 17th section of the Statute of Frauds depended on subtle considerations as to whether they were to be severed by the buyer or seller, and whether they were to get any benefit from remaining attached to the land before severance. The cases were conflicting and eventually it was laid down in Marshall v. Green (1 C.P.D. 35) that " when the subject matter of the contract is something affixed to the land, the question is whether the contract is intended to be for the purchase of the thing affixed only or of an interest in the land as well as the thing affixed."

In that case the defendant by word of mouth purchased certain growing trees for £26 of the plaintiff on the terms that the defendant should remove them as soon as possible. It was held that the case was within the 17th section, " the land being considered as a mere warehouse of the trees sold."

Subsequently to Marshall v. Green Chitty J. in Lavery v. Pursell (39 Ch. D. 508 at p. 516)—(a contract for the sale of the building materials of a house for removal, which he held came within section 4) thought that it was a point that required a good deal of attention, whether a standing tree could be made by any act of the parties a chattel.

Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, is postponed.

Rule 2. Where there is a contract for the sale of the specific goods and the seller is bound to do something for the purpose of putting them into a deliverable state, the property does not pass until such thing is done, and the buyer has notice thereof.

" Delivery " means voluntary transfer of possession from one person to another.

" Specific goods " means goods identified and agreed on at the time a contract of sale is made.

Goods are in " a deliverable state " within the meaning of the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Section 60. The rules of the common law save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud . . . or other invalidating cause, shall continue to apply to contracts for the sale of goods.

It will be seen therefore that in solving the problem of whether the property in the timber passes or not, we have to enquire whether the timber agreed to be sold is " specific," " ascertained," " identified," " in a deliverable state."

In **Macklow v. Frear** (33 N.Z.L.R. at p. 271) Cooper J. held that an agreement for the sale and purchase of all the kauri trees growing upon a certain block of land was an agreement for the sale of " goods " under the sale of Goods Act, and that, the goods being specific and ascertained and the whole of the purchase money having been paid at the time the agreement was signed, the property passed to the purchaser " if not at the time when the money was paid, certainly when the trees were severed from the ground and became logs."

In **Egmont Box Co. Ltd. v. Registrar General of Lands** (1920 N.Z.L.R. 741 at p. 743) Sim J. said : " Now the mere agreement of the parties may convert an hereditament into a chattel." In that case he held that as the grants in question gave the plaintiff the right to cut and remove the timber, but imposed on it no obligation to cut any timber, there was no agreement for the sale of " goods," there being no agreement that the trees should be severed.

In **Waimiha Sawmilling Co. Ltd. v. Howe** (1920 N.Z. L.R. 681) in which the appellant and respondent entered into an agreement by which the latter agreed to purchase all the millable timber on certain land and to remove the timber within a certain time, the Court of Appeal held that the agreement was a sale of " goods " within the meaning of the Sale of Goods Act with a licence to go on to the land for the purpose of cutting and removing the timber, and could not be construed as a lease. Cooper J. whose decision on this point was affirmed held that the goods were " specific " although " millable timber " was defined to mean " all totara, rimu, matai and kahikatea timber, trees and logs, measuring 3 ft. or more by log measurement now or hereafter during the continuance of this agreement growing, standing or being upon the land described in the schedule hereto." The point does not seem to have been taken as it was in **Kursell v. Timber Operators and Contractors Ltd.** (42 T.L.R. 435) that the timber was in consequence of the definition not " specific and ascertained."

The definition however of goods in the Sale of Goods Act and the subsequent decisions on that definition

gave legislative sanction to the doctrine in Marshall v. Green, that the mere agreement of the parties could convert an hereditament into a chattel and extended that doctrine to contracts where severance was contemplated. **Macklow Brothers v. Frear** (33 N.Z.L.R. 264 at p. 270). **Egmont Box Co. Ltd. v. Registrar General of Lands** (1920, N.Z.L.R. 741, at p. 743). The subtleties that had previously to be considered have been swept away and "under the Act the sole test appears to be whether the thing attached to this land has become by agreement goods, by reason of the contemplation of its severance from the soil." (Halsbury, Volume 25, page 113, paragraph 222 note (n). In that Act "goods" includes "emblements, growing crops, and **things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.**" Standing timber has been held to come within that definition.

In **James Jones & Sons Ltd. v. Earl of Tankerville** (1909, 2 Ch. p. 440) Parker J. said (at page 442): A contract for the sale of specific timber growing on the vendors' property on the terms that such timber is cut and carried away by the purchaser certainly confers on the purchaser a licence to enter and cut the timber sold, and at any rate as soon as the purchaser has severed the timber, the legal property in the severed trees vests in him," and (at page 445) "In determining the effect of such a contract at law the effect of the Sale of Goods Act 1893 has now to be considered. Goods are there defined in such a manner as to include growing timber which is to be severed under the contract of sale, whether by the vendor or purchaser, and S. 52 of the Act seems to confer on the Court a statutory power of enforcing at the instance of a purchaser specific performance of a contract for the sale of ascertained goods, whether or not the property has passed by the contract."

It is therefore settled law that growing timber which is agreed to be severed under a contract of sale is goods within the meaning of the Sale of Goods Act 1908.

Before considering the cases specified and the questions arising thereout it will be convenient to set out those sections of The Sale of Goods Act that have to be considered.

Sections 18, 19 and 20 Rule 1 are as follows:—

18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

19. (1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

20. Unless a different intention appears, the following are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

In none of these tree cases was it material to consider when the property in the standing timber passed to the purchaser. That question was however of vital importance in the Scotch case of **Morison v. Lockhart** (1912, S.C. 1017) and in the English case of **Kursell v. Timber Operators and Contractors Ltd.** (42 T.L.R. 435).

(To be continued)

EXECUTIVE COUNCIL.

It is proposed to publish regularly a short statement of that subordinate legislation that appears in the form of regulations and Orders in Council. The full text of such as is of interest to the profession is published in "Rules and Regulations."

Regulations as hereinafter mentioned appeared in Gazette No. 1 published on 13th January, 1927:—

1. Regulating the length of any net used in taking Quinnat Salmon, under sections 83 and 94 of The Fisheries Act 1908.
2. Amending the General Harbour Regulations, regulation 20, dated 30th August, 1926 and gazetted 9th September, 1926, by substituting "February" for "January," under section 234 of The Harbours Act 1923.
3. Regulations as to the control of Downy Mildew and Phylloxera in Vines, under Orchard and Garden Diseases Act 1908.
4. Extended regulations dealing with the registration and returns of Industrial Unions and Associations, Industrial Agreements, Councils of Conciliation, Court of Arbitration and Miscellaneous, under The Industrial Conciliation and Arbitration Act 1925.
5. Amending regulations of 8th March, 1926 (Gazetted 18th March, 1926) under The Discharged Soldiers Settlement Act 1915.
6. Revoking under section 12 of The Customs Amendment Act 1921 the Order in Council of 28th September, 1925 (Gazetted 1st October, 1925) suspending the duty on certain wheat.
7. Full regulations dealing with weights and measures under The Weights and Measures Act 1925, and revoking similar regulations made on 9th March, 1923.
8. New regulations for Trout-fishing in Auckland Acclimatization District, under The Fisheries Act 1908.
9. Regulations as to licences to fish for Atlantic Salmon in the Southland Acclimatization District, under sections 83 and 94 of The Fisheries Act 1908.
10. Amendments and additions to the Rules of the Auckland Stock Exchange, under The Sharebrokers Act 1908.
11. Regulations as to drainage and plumbing applied to the Counties of Ashburton and Waimairi and the Boroughs of Geraldine, Greymouth, and Rotorua, under The Health Act 1920.

DOING WITHOUT HOLIDAYS.

In the course of the hearing of an income-tax appeal relating to a holiday or convalescent home on November 16, Mr. Justice Rowlatt made the following observation on the subject of holidays: "Some of us, when we were young, did not always go away for a holiday. We stopped behind because we thought that we might get on better in the profession. When we had a little better position we went away, and it was then that we found how much we had been living on our capital all the time, so to speak. Some of the members of the profession have passed into another world because they did not appreciate that fact in time."

LEGAL LITERATURE.

THE TRIAL OF KATHARINE NAIRN.

(Notable Trial Series), Butterworth & Co.

Edited by William Roughead, this is a worthy addition to the series of Notable British Trials, published by Butterworths. There is the atmosphere of the country of Sir Walter about this book, the old names are all there, Dalrymple, Lockhart, Graeme, Ramsay and Dundas, and then too the place names bring back memories of Scotland's greatest novelist. We read also of the Grim Tolbooth of Edinburgh in the Lawnmarket, north-west of St. Giles Kirk where the hapless Captain Porteous was accommodated before his end.

The Ogilvys of Eastmiln, who dwelt amongst the braes of Angus, above the waters of the Isla, were never a lucky race, and a curse must surely have laid on the whole brood of the Jacobite laird Thomas Ogilvy.

The book deals with the violent deaths of three of his sons: Thomas, Patrick, and Alexander, while his two other sons met similarly violent ends. Thomas, the eldest and laird of Eastmiln, took to wife Katharine Nairn, daughter of Sir Thomas Nairn, Baronet of Dunsinnan, but that light-hearted woman had not been a wife twelve months before she found greater attractions in her rightful lord's younger brother, Lieutenant Patrick Ogilvy, invalided home from his regiment in the Indies.

So the scene was set for tragedy, a middle-aged husband and a young wife in love with her husband's romantic brother. And into this scene came the mysterious Anne Clarke, "one who was to prove the evil genius of the house and the harbinger of dishonour and death."

It is suggested that this mysterious Anne Clark who had known too well the life of the bawdy-houses and taverns of Auld Reikie, drove the unhappy Katharine on to crime with the hope of destroying Thomas and Patrick, so that her old lover Alexander, might become the laird of Eastmiln.

Nothing however was shown at the trial to prove this, and if the presumption was correct Anne was successful not only in using Katharine and Patrick to destroy Thomas, but also in using the law to destroy Patrick.

It is certain that as soon as the poison had done its deadly work with the ill-fated Thomas Ogilvy, she summoned Alexander to Eastmiln, and it was his efforts which first set the law in motion against his brother and Katharine. Katharine certainly murdered her husband and Patrick was her accomplice and was duly hanged. What part Anne Clark played in urging on the murderess must always remain an absorbing mystery.

The evidence for the prosecution and defense is given with all fulness, and care, by the compiler, and particularly interesting are the opinions of the Lord Justice Clerk and the Solicitor-General on the case.

The compiler has cleared up the mystery of how Katharine Nairn escaped from the Tolbooth, a problem that puzzled her own generation.

Of her subsequent fate he is not so certain, and we are given two or three rumours to choose from, the most picturesque of which is her affair with the gallant Irishman in Calais, who however was forced to desert her after his duel on the ramparts with Mons. La Bouillie, the Governor's son.

Her conduct from the beginning shows us a woman who never at any time appears to realise the enormity of her offence, and she appears to have enjoyed the notoriety it brought her rather than felt its shame.

It is only necessary to add the opinion of that assiduous student of history, Andrew Lang, given on the Ogilvys in his essay Paolo and Francesca in Angus: "Readers of Mr. J. A. Symond's book on the Renaissance," he writes, "hold up obtesting hands at the rich and varied iniquities of the Courts of mediaeval Italy. But for complex and variegated depravity the family of Mr. Ogilvy of Eastmiln could give the Baglioni and other Italian miscreants a stroke a hole."

GEORGE WINDER.

"The English Empire Digest," Volume 31, was published in London during December. It will be available in New Zealand in February.

"At what time did the master get home this morning, James?"

"Was he—er unsteady?"

"Well, madam, I did hear him make reference to the fact that the Six Musketeers had beaten the Eight Horsemen of the Apocalypse."

PRIVY COUNCIL APPEALS.

The Privy Council allowed the Appeal of George and Doughty against the Commissioner of Taxes, restoring the judgment of Sir Robert Stout, with costs for the appellant in the Lower Court, and also the Appeal in Gardner v. Te Porou Hiramana and others, endorsing the judgment of Ostler, J., minority Judge, and dismissed the action with costs before the Privy Council and below.

BENCH AND BAR.

Sir Robert Stout, P.C., K.C.M.G., Ex-Chief Justice, and Lady Stout celebrated their Golden Wedding on 1st January, 1927, and received the congratulations of many members of the Bench and Bar.

Mr. R. N. Watson, Stipendiary Magistrate at Feilding, was farewelled by the members of the local Bar upon the occasion of his transfer to the new district which has been created. This new district commences just north of Marton and extends to Taumaranui.

Mr. Watson was the first British Chief Justice of Samoa during war-time and had therefore to administer both British and German law. He is also the author of a very interesting "History of Samoa."

Mr. L. E. Morgan has purchased the practice of Mr. E. W. Reeves, of Reefton. The practice will be carried on under the title of Reeves and Morgan.

Mr. Morgan was formerly on the staff of the Public Trust Office in Wellington and Christchurch. He subsequently joined the staff of Messrs. Duncan, Cottrell & Co.

Mr. L. Grant Weymess has commenced the practice of his profession in Blenheim. Mr. Weymess has had a thorough and varied experience in Blenheim and Wellington offices. He was well known in the athletic world, he being a distance runner.

Mr. L. A. Charles has purchased the practice carried on by Mr. H. C. Orbell, at Ashburton. The practice will be carried on under the firm name of Orbell and Charles.

Mr. J. O. J. Malfroy has entered Trinity Hall, Cambridge.

THE ART OF CROSS-EXAMINATION.

The Blazed Trail has entered into so many modern novel that it is hard to conceive of any person not knowing what a Blazed Trail or track is nowadays. If such there be we would explain that a blazed trail or line is a line traversed through bush country and to mark the way the bark of the tree is cut down so that anybody returning along that line may have the way indicated to them by the marks on the trees. This knowledge however, had not been acquired by a West Coast Lawyer, although he had been practicing in a timber milling district for many years. The case was being heard by the Warden, the dispute being in regard to timber cutting rights the area of one having been found to overlap the other. A witness stated that he had walked along a blazed line from point A to point B.

This point was noted by the Innocent at Home so he opened his Cross-examination in the following way:—

Q.—You walked from point A to point B?
A.—Yes.
Q.—Did you see any smoke about?
A.—No.
Q.—Did you see any matches or charred wood about?
A.—No.
Q.—(feigning surprise) No sign of fire at all?
A.—No.
Q.—(dramatically) Then what did you mean by coming here and telling us a deliberate lie, that you walked down a blazed line from A to B?

The Warden took tweny minutes to recover.