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"The lawyer has been a great guardian of personal and public liberty."
—*Sir T. W. H. Inskip, K.C.*

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Exemption from Military Service.

The refusal of the Magistrate's Court in Auckland to grant exemption from military service to two medical students has led to a great deal of attention being given by the daily Press, Parliament, and Church authorities to the case of the conscientious objector. It is a question whether it is not a misnomer to call one who applies for exemption from military service on the ground that such service is contrary to his religious belief a "conscientious objector." In England "conscientious objection to the undertaking of combatant service" was by Section 2 (1) (d) of the Military Service Act of 1916 ground for a certificate of exemption, and in our Military Service Acts somewhat similar provisions appeared. The terms, however, of Section 65 of the New Zealand Defence Act of 1912 are substantially different from those of the English Act, exemption under our Statute being granted, not because of a conscientious objection to combatant service, but because the Magistrate is satisfied that the service is contrary to the applicant's religious belief.

No doubt the task of a Magistrate in these cases is difficult. Nevertheless there are many cases in which the state of a man's mind has to be ascertained by a Magistrate. *Mens rea* is always an ingredient of crime, and it has been well stated that the state of a man's mind is as much a question of fact as the state of his pocket. The difficulty of the enquiry therefore is not good ground for adopting an interpretation of the Statute which means departure from the ordinary meaning of the words employed. It is not beyond question that Magisterial decisions have not erred in this respect. The Statute itself says plainly "the ground of exemption is applicant's religious belief." The interpretation given by Magistrates generally is, we believe, that the ground for exemption must be the belief of the religious system to which the applicant belongs.

The case in which this interpretation to the Statute, which is being followed, was given was *In re Burrell*, 9 Magistrates' Court Reports 23, a decision of the late Mr. S. E. McCarthy, S.M. In that case the applicant was a Christadelphian and it appears that in 1899 members of that society petitioned Parliament praying to be exempted from military service on the ground of religious belief. In their petition it was alleged that the Christadelphians had always been "opposed conscientiously to the bearing of arms, whether for offensive or defensive purposes, on the ground that the Bible (which they believe to be the word of God) commands them not to kill, not even to be angry with their fellow men without a cause; not to resist evil, to love their enemies, to bless them that curse them, to do good to them that hate them and persecute them, and to do unto all men as they would all men should do unto them." The ecclesiastical guide put in, which contained a statement of the doctrines forming the Christadelphian basis of fellowship, did not contain any positive statement as to abstention from military training and service, and the Magistrate found that the allegations in the petition went somewhat beyond the doctrine set out in the guide. There was, nevertheless, plenty of material from which a reasonable inference against righteousness of combatant service could be inferred. The Magistrate, however, came to the conclusion that religious belief within the meaning of the Act was not, in his opinion, the mere belief of the individual but of the religious system to which he belonged, adding that, if the former were the case, then each individual could construct a belief for himself so that it would be impossible to test his *bona fides* as the subsection contemplated. In conclusion he found: "As the religious body to which the applicant belongs does not in terms condemn military training and service as part of its religious system, I am unable to grant the application which is refused."

Another reported case is *In re Caird*, 8 Magistrates' Court Reports 133, a decision of Mr. Cruickshank, S.M. In that case the applicant was a rationalist and a humanist, and the learned Magistrate came to the conclusion that, as the applicant had no religious belief at all, any objections he might have to military service, good or bad, were, at any rate, not religious, and consequently no ground for exemption. The Magistrate referred to Willes, J., in *Baxter v. Langley*, 38 L.J.M.C. 5, for a definition of religion. That learned Judge said: "What is 'religion'? Is it not what a man honestly believes in and approves of and thinks it his duty to inculcate on others, whether with regard to this world or the next? A belief in any system of retribution by an over-ruling power? It must, I think, include the principle of gratitude to an active power who can confer blessings." Relying on this definition the Magistrate refused to regard rationalism and agnosticism or any negative antitheistic views as the kinds of religions meant by the Act. There is no indication in this judgment that if the applicant had professed a positive religion and his manner of life supported his professions, the Magistrate would have refused to credit him with a religious belief sufficient to sustain an objection to service.

It is believed that some Magistrates prefer the view that it is their duty to enquire into the religious belief of the applicant and not to restrict him to the primary beliefs of the Church to which he nominally belongs. Their view is that it is not impossible to ascertain the truth of the applicant's professions. It has been held in England that when a witness claims the right to affirm, instead of being sworn, on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief, it is for the Judge to satisfy himself that the witness comes within the condition stated in the Section of the Oaths Act relating to religious belief. If an enquiry as to religious belief can be held in such cases, it does not follow that it can be held where the existence of a principle of belief as specified in our Defence Act is the subject of enquiry. At the same time, before amendments are made it would be well to obtain from Magistrates generally a considered view of the proper interpretation of the Statute and their ability to make the tests necessary or to be made in any amended legislation.

Supreme Court.

Adams, J. April 15, 19; June 10, 1929.
Dunedin.

ATTORNEY-GENERAL v. DUNEDIN ARCADE CO. LTD.

Street—Dedication—Way Created by Lessee as Arcade—Owner Not in Occupation Except for Fractional Part of Day Between Surrender of Lease and Granting of New Lease—Intention to Dedicate Question of Fact—No Presumption of Dedication From User by Public as Against Owner—User of Way by Public as of Right Not Established—Evidence Consistent with Mere Permission or License.

Action by the Attorney-General at the relation of the Mayor Councillors and Citizens of the City of Dunedin against the registered proprietors of a parcel of land, being Sections 61, 70 and part Section 69, Block VII Dunedin, for a declaration that there existed over part of such land a public highway approximately 50 links in width extending from High Street to Maclaggan Street and known as the Royal Arcade. The plaintiff also claimed an injunction restraining the defendant from obstructing the alleged highway. The sections referred to formed a rectangular strip of land 330 feet in depth between the two public streets abovementioned. It was admitted that there could be no valid dedication after 1st January, 1887, when the Municipal Corporations Act, 1886 came into operation, and evidence was given to establish dedication before that date. The evidence showed that in 1861 Daniel Campbell executed a lease to Henry Farley of Section 70 and parts of Sections 61 and 69 for a term of 14 years from 1st October, 1861. On the execution of the lease Farley laid off a way through the demised land from High Street to Maclaggan Street and erected lean-to wooden buildings fronting the way on both sides throughout its length. The buildings were flimsy and were divided by partitions into upwards of 50 small shops each with a depth of 13 feet 6 inches. The way between the shops could not have been more than 11 feet in width from shop front to shop front and was formed of boards supported by wooden piles. The shops and the way were obviously temporary structures. On 5th March, 1862, Farley offered for sale by auction sub-leases of the shops for terms of four years at a fixed rental, and all the sub-leases, with the exception of four which were reserved, were sold to purchasers who entered into possession and carried on business. On 11th April, 1864, a lease of a further portion of Section 61 was granted by memorandum endorsed on the original lease, to Farley, and on 27th September, 1864, a lease of the remaining portion of Section 61 was given. All these leases expired on 1st October, 1875, so that from September, 1864 the whole of Sections 61 and 70 was held by Farley under leases from Campbell for terms expiring on 1st October, 1875. On 17th February, 1868, a deed surrendering these leases was executed. The deed, after reciting that the parties had agreed that the land included in the existing leases should be surrendered to enable Campbell "immediately to grant a new lease thereof" to Farley for the term of 21 years from 1st July, 1866, witnessed that such land was surrendered "to the intent that the residue of the several terms might merge in the immediate reversion in fee simple . . . and that Campbell might be enabled immediately to grant a new lease thereof." The new lease to Farley was executed on the same day and took effect immediately after the surrender but without any appreciable interval of time. The term of that lease was 21 years, computed from 1st July, 1866. In that lease the way was described as "a private street called Fleet Street." The land had always, except for a short period in 1868 before the last lease to Farley was executed, been mortgaged by the owner. The evidence tending to prove and disprove dedication appears sufficiently from the report of the judgment.

Barrowclough for plaintiff.
Hay with him **Fairmaid** for defendant.

ADAMS, J., said that the point was taken by counsel for the defendant that during the whole period from 1856 to 1873, except for a short time in 1868 during which the last lease to Farley was executed, the fee simple of the land was vested in mortgagees. A mortgagor who had conveyed the fee simple to his mortgagee could not dedicate any part of the land without the consent of the mortgagee: **President of the Shire of Narracan v. Leviston,** 3 C.L.R. 846; but if there had been an effective dedication before the last mortgage was given, the mortgagee would have taken subject to the dedication. That was so even under the Land Transfer Act: **Martin v. Cameron,** 12 N.Z.L.R. 769. That the question whether the competent person or persons for the time being intended to dedicate the way as alleged was one of pure fact was finally settled by **Folkestone Corporation v. Brockman,** (1914) A.C. 338. The intention of the owner to dedicate must be a real intention: **Macpherson v. Scottish Rights of Way and Recreation Society Ltd.,** 13 A.C. 744. The plaintiff's main submission was that the evidence of user by the public from 1866 to 1875 was sufficient to found a presumption of dedication which it lay upon the defendant to rebut. Assuming for the present that that submission was correct, His Honour had first to consider the state of the title at the material times. The defendant had shown that at all times from the execution of the first lease in 1861 to the expiration of the last term in 1887 the owner of the fee simple was continuously out of possession and was not at any time entitled to possession of any part of the demised land. It was also shown that the lease of 1868 was executed in pursuance of a contract on the faith of which the existing leases were surrendered. Had there been no such contract or new lease the then existing leases would have continued to run until 1st October, 1875, and in that case also Campbell would have had no right of entry or interference. What, then, was the principle to be applied in such cases? His Honour referred to **R. v. Barr,** 4 Camp. 16; **R. v. East Mark (Inhabitants),** 11 Q.B. 877; **Powers v. Bathurst,** 49 L.J. Ch. 294 **Farquhar v. Newbury Rural Council,** (1908) 2 Ch. 586, (1909) 1 Ch. 12; **London County Council v. Hughes,** 75 J.P. 239; **16 Halsbury,** pars. 47, 48, note "a," p. 35, note "l," p. 36, and said that in his opinion the authorities showed that where the land over which a public highway was claimed had been continuously under lease no presumption from user by the public could be made against an owner who was in fact out of possession and control. To justify such presumption it must be shown that there was a period during which the owner could have taken some action to exclude the public. The question whether the owner could have taken any such action was a practical question of fact to be decided on the evidence in accordance with reason and common sense. In the circumstances of the present case the most that could be said was that in 1868, for the fractional instant of time between the execution of the surrender and the execution of the new lease under a pre-existing contract, the owner, was in the eye of the law, seised of the fee. His Honour held, therefore, that during the period from 1861 to the expiry of Farley's lease in October, 1887, the owner of the fee for the time being was never in possession or control of the land, and that any presumption of dedication on the part of the owner or successive owners which might in other circumstances have arisen had been rebutted by the evidence as to title.

His Honour thought also that the plaintiff's case failed on the facts as to user by the public of right. There was very little evidence as to the traffic in the Arcade prior to October, 1866. Evidence was given that in 1861 the way was used by some school children going home from school and one witness stated he used it when going to the shops on business. There was scarcely any evidence that the Arcade was used as a way for vehicles. Upon that evidence it was obviously impossible to say that at any time before the completion of the first block of two storey buildings in October, 1866, there had been any user of the way by the public. The way was then widened and divided into two footpaths each of 12 ft., and a carriage way of 9 ft. in width. Both footpaths and roadway were constructed of wood on piles. In the article published in the Otago Daily Times of 18th June, 1866, the property was called "Farley's Arcade." In the article in the same newspaper on 20th October, 1866, the way was called "Fleet Street" and was said to be divided into two footpaths and a stoutly battened carriage way. Looking at the evidence as a whole, His Honour was strongly impressed with the view that it was more in favour of permission or license than of an intention to dedicate. The original way was formed of wooden boards supported by rough timber piles over a fairly steep sloping site. The first shops were described as shanties or stalls. Up to October, 1875, the way was in a state of transition. The newspaper report of the case **Farley v. Riley** showed that in 1864 the defendant and other tenants of the shops were in the habit of placing boxes, baskets, and goods outside their shops for a distance of 4 or 5 feet until it was almost impossible for passengers to get through. A witness also gave evidence that from 1864 to 1868 some of the shops had their goods disposed on the fairway. The way was only 11 ft. in width, and that practice must have obstructed the greater part of it. The first tenants claimed the right to put their goods out and that the verandahs under which the goods were placed were part of their shops. The practice was continued after the way was widened and had been so continued until the present day with variations as to space. The tenants

enjoyed the right to so obstruct the way during their tenancies, but the inference against dedication would be equally strong if the enjoyment was by permission only. Some of the witnesses said that persons using the way sometimes had to walk sideways to get in, and sometimes they had to squeeze through. It was also proved that from 1875 onwards concerts were held in the alleged highway and on those occasions the way would be almost entirely obstructed. The evidence on that aspect of the case left no doubt in His Honour's mind that during the whole of its history the way was seriously obstructed by the tenants to the knowledge and with the permission of the lessees. It was in effect used as an extension of the shops for the purpose of displaying and selling goods. Such obstructions would have been an intolerable nuisance on a highway.

The claim was that the way was in fact a highway from 1866, and that starting point was no doubt taken for the obvious reason that there was practically no evidence of public user for any purpose before the completion of the eastern block of brick shops in October of that year. The Otago Municipal Corporations Ordinance 1865 was assented to by the Governor, in August, 1865. Section 56 of that Ordinance provided that "the streets and roads fixed at the original setting out of the City of Dunedin . . . and such streets and roads as have since been opened and dedicated to the public or surrendered to and accepted by the Corporation as a public street or which may hereafter be so opened and dedicated or surrendered and accepted or which may be formed by the Council by virtue hereof shall be deemed for the purposes of this Ordinance public streets." Section 57 provided that the formation repair and ordering of all public streets within the City should be under the management and direction of the Council and be executed under the inspection and direction of the Surveyor. Part XI (Sections 184 to 338 inclusive) of the Municipal Corporations Act, 1876, was extended to the City by Proclamation on 2nd August, 1877. Section 184 of that Act defined "street" as "the whole of any public highway within the borough," and by Section 185 *all streets within the borough with the soil and materials thereof* were vested in and placed under the control of the Corporation. If, therefore, the way through the Arcade became a highway in 1866, it would be subject to those successive enactments, and finally subject to the provisions of the Municipal Corporations Act, 1920. Moreover, from 1865 onwards the control of the way and the duty of maintenance and repair would have been vested in the Corporation. Yet throughout that period of upwards of sixty years not one farthing had been expended upon it in formation, maintenance, repair, lighting or other matters connected with the care of public streets. The only work done by the Corporation was in 1876, when a water main was put through. The evidence did not satisfy His Honour that that was done at the expense of the Corporation. No entry of such payment had been discovered. The lessee, owners, and tenants for the time being had been left in complete control and had from time to time altered and maintained the way, increased and diminished its width, placed gates and other obstructions across the entrances, built and maintained over it a roof, gallery, and organ loft; obstructed the surface of the way with portable and permanent stands for the purposes of their business, and employed a beadle to maintain order, without a murmur of complaint from the Corporation or from the public. Moreover when the carriage way was destroyed and access for vehicular traffic was finally stopped no protest was made. The public and the Corporation were content. Instead of proceeding against the lessee as a wrongdoer, as one would have expected if the present claim was well founded, the Corporation continued the footpaths and water channels across the entrances in High Street and Maclaggan Street thus effectually preventing the use of any part of the way for horse or carriage traffic. The Corporation then turned its attention to a project to form a public street from High Street to Maclaggan Street parallel to, and only a chain or two to the west of, the Arcade. Further, on 4th September, 1928, the Corporation took a poll of the ratepayers on the question whether a loan should be raised to purchase the Arcade property. It seemed to His Honour that the evidentiary effect of those facts was very strong, if not conclusive, in favour of the defendant's contention. In a somewhat similar case, **Holloway v. Egham Urban District Council,** 72 J.P. 433, the same view was taken by Neville, J. Moreover there was considerable evidence that the way was known to be private property. The whole of the evidence was consistent with the view that the public user had been by the permission or license of the persons for the time being in possession, and in that view only was the inaction of the public and of the Corporation satisfactorily explained. On the other hand, it was inconsistent with an intention to dedicate or user by the public as of right. His Honour here referred to the passage in Wills, J.'s direction to the jury in **Eyre v. New Forest Highway Board,** 56 J.P. 517, which was adopted by Astbury, J., in **Shearburn v. Chertsey Rural District Council,** 78 J.P. 289. The result was that the plaintiff had failed to establish any dedication.

Action dismissed.

Solicitors for plaintiff: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Solicitors for defendant: **Sievwright, James and Nicholl,** Dunedin.

Blair, J. March 22; June 22, 1929. Auckland.

IN RE HILLS.

Bankruptcy—Discharge—Motion for a Declaration That Bankrupt's Public Examination Passed—Public Examination Commenced and Several Transactions Questioned But Investigation Not Able to be Completed Without Expense Owing to Way in which Accounts Kept—Examination Adjourned *sine die*—Lapse of Over Two Years Without Any Further Questions Being Put—Creditors Not Entitled to Hold Examination Unfinished for Indefinite Time Without Indicating Matters on Which Information Required—Duty of Bankrupt to Supply Proper Information at his Own Expense—Course to be Adopted—Bankruptcy Act, 1908, Section 124 (7).

Motion for a declaration under Section 124 (7) of the Bankruptcy Act, 1908, that the above-named bankrupt's "affairs have been sufficiently investigated and that his examination is finished," and motion for the bankrupt's discharge. Section 125 of the Bankruptcy Act, 1908, prevents an order for discharge until the bankrupt has passed his public examination and the argument was accordingly limited to the first motion. The bankrupt's public examination had begun on 3rd March, 1926; it lasted all day and was then adjourned to 27th August, 1926, and continued for the whole of that day. It was then adjourned *sine die* on terms that 7 days' notice be given to the opponents of the bankrupt of his intention to move for an order that he had passed his examination. The bankrupt was a land speculator and suggestions were made against many of his dealings and against certain other transactions in the name of his wife. In his examination many questions were asked as to various transactions in various parts of the North Island. Owing to his bookkeeping methods it would be necessary to incur very great expense to check these questioned transactions. Two-and-a-half years had elapsed since the examination was adjourned and no further move had been made by the objectors nor had they suggested or propounded any further questions.

A. H. Johnstone in support of motion.

Cooney to oppose.

BLAIR, J., said that it was suggested that had the bankrupt kept his accounts properly the expense of checking the questioned transactions would be unnecessary. Counsel for the objectors said that as the necessity for that expense was due to bankrupt himself, any want of detail or inability to supply a fully satisfactory answer was the fault of the bankrupt himself and it was his business to go to the expense of making investigations necessary fully to check the whole of his transactions. On the bankrupt's part it was urged that he had answered all questions put to him and was prepared to answer any more they liked to put. He claimed that his answers were full and complete answers. It was also stated that if any indication was given as to the precise matters upon which further information was required that would be supplied or obtained if available. His Honour agreed with the contention of the objectors that if by reason of the default of the bankrupt information which ought to be available were not available, the bankrupt could not be said to have passed his examination till he supplied that information. If the obtaining of that information involved expense, then it was for the bankrupt to bear that expense, or suffer the disability of not being able to pass the public examination. But if the position were, as suggested for the bankrupt, that no further questions were desired to be put, then it was not open to the objectors to continue to hold unfinished the public examination. It was clear that no further questions had been suggested in the last two-and-a-half years which had elapsed since the public examination was adjourned. There was something also in the bankrupt's claim that he could not be left unquestioned, and met with a claim that

he had not passed his examination. It appeared to His Honour that the proper course to take to bring matters to a head would be for the opponents to indicate generally the nature of the matters or accounts which they required the bankrupt to supply. If they did that and the bankrupt were unable or unwilling to go to the expense of obtaining that information, and it was information proper to be supplied, then the non-completion of the examination would be established as due to bankrupt's default and he had nothing to complain of. If upon the other hand the opponents' solicitors did not indicate generally the nature of the matters or accounts which they required, the bankrupt would be in a position to say that there were no more questions to be asked, and might fairly ask that his public examination be declared passed. His Honour declared, therefore, that if the opponents' solicitors did not, on or before 31st July next, supply the above general details to the bankrupt, or his solicitor, His Honour thought that it must be taken that there were no further questions to be asked and it would be for the Judge who presided at the examination, and who knew how the bankrupt answered the questions put to him, to say whether he would make the declaration asked for. If the bankrupt, having been supplied with such general details of additional matters or accounts required, failed to supply them, whether on the ground of expense or otherwise, it was clear that the bankrupt could not be entitled to the declaration asked for.

Solicitors for bankrupt: **Stanton, Johnstone and Spence,** Auckland.

Solicitor for opponents: **H. O. Cooney,** Te Puke.

Blair, J. June 10; 21, 1929. Auckland.

NEIL v. ROGERSON.

Mortgage—Overdue—Mortgagee Unable to be Found—Not Known Whether Alive or Dead—Mortgagor Desirous of Discharging Mortgage—Proper Course Application by Public Trustee for Order Under Section 87 of Public Trust Office Act, 1908—No Power to Make Such Order on Originating Summons—Amount of Interest Payable to Discharge Mortgage—Mortgage Not Providing for Payment of Interest—Interest Payable After Due Date Either as Damages for Detention of Mortgage Debt or Pursuant to Equitable Rule that Money Bears Interest After Date of Payment—Six per cent. Allowed from Due Date Until Amount Deposited in Bank to Meet Mortgagees' Claims—Thereafter Interest Earned Allowed—Public Trust Office Act, 1908, Section 87—Property Law Act, 1908, Section 75.

Originating summons to determine in what manner a certain mortgage long overdue, could be cleared off the title and what interest should be paid in respect of the same, the mortgagee being a person who could not be found and of whom it was not known whether she were alive or dead. Upon the motion for directions as to service of the originating summons the Public Trustee was directed to represent the mortgagee. The plaintiff, Dr. Neil, on 24th August, 1923, purchased for £3,000 a property in Grey Street, Auckland, the title to which was under the Deeds System and was subject to a mortgage. The mortgage was executed on 11th February, 1904, by a Mr. and Mrs. Thorn in favour of one A. J. Gallagher of Londonderry, Ireland, spinster, to secure the payment of £300 on 1st February, 1910, without interest. Dr. Neil bought the property free of encumbrances, but as the mortgagee Miss Gallagher could not be found and it was not known whether she was dead or absent from New Zealand, or whether she was actually an existing person, Dr. Neil took the title without the mortgage being discharged, and a sum of £350 was deposited in the Auckland Savings Bank in the joint names of the defendant Mr. H. M. Rogerson and another solicitor Mr. C. Z. Clayton, to meet the claims of the mortgagee when the same should arise. Mr. Clayton had since died, but Mr. Rogerson was prepared to abide by the order of the Court as to the disposal of the monies. The £350 was still at the date of commencement of the proceedings in the Savings Bank where it had been earning interest since its deposit in 1923. On 23rd August, 1923, Mrs. Thorn made a declaration that Miss Gallagher, the mortgagee, was her daughter by a former marriage, that the mortgage was intended as a gift to her daughter and that no interest had been paid. She also declared that the daughter had died and that she believed herself to be sole next-of-kin. On 20th July, 1927, Mr. Thorn made a declaration before a notary in Ireland that his wife, Mrs. Thorn, died in Dublin on 4th November, 1926, and that the mortgagee had never existed and no interest had been paid. He declared that his wife had assumed the name of Miss Gallagher to protect the amount she had advanced towards the purchase of the property.

Stillwell for plaintiff.
Terry for defendant.
A. H. Johnstone for Public Trustee.

BLAIR, J., said that he could not pay any attention to the hearsay statements in Mr. Thorn's declaration. Moreover both declarations were by interested parties and it would require more than death-bed statements to satisfy His Honour as to Mrs. Thorn's claim to the monies. His Honour entirely disregarded Mr. Thorn's last statement and also disregarded Mrs. Thorn's declaration. His Honour stated that he must assume until the contrary was properly established, either that Miss Gallagher was alive, or that if she were dead she left a will or next-of-kin competent to claim. Section 75 of the Property Law Act, 1908, permitted a mortgagor whose mortgagee was absent from New Zealand or was dead to pay the Public Trustee the whole amount due under the mortgage and obtain the equivalent of a discharge from the mortgagee himself. That course had not been adopted at the time because it was not possible to find out anything about the mortgagee. But at that time there was a declaration by the mortgagee's mother that she (the mortgagee) was dead, and there should have been no difficulty, therefore, in invoking Section 75. There was of course the difficulty as to ascertaining the amount due by the mortgagors, but at the worst it could have been assumed that the utmost that could have been demanded would be interest at the rate of 8 per cent., the maximum legal rate, for the period from the due date of the mortgage up to the date of payment. Owing, however, to the doubt raised as to whether the mortgagee was ever in existence it was not asked that Section 75 be invoked. It was suggested that the case could be met by an order under Section 87 of the Public Trust Office Act, 1908. That Section provided the machinery for the Public Trustee to be appointed to take possession and administer property when it was not known who the owner was, or whether the owner were alive or dead. Somebody owned the mortgage, but who the owner was was in doubt. It was clearly a case where Section 87 could be invoked. It appeared to His Honour, however, that as an order was required for the purpose of clearing the title and making a good title there would be some difficulty in turning an originating summons, framed to have certain questions answered, into an application by the Public Trustee under Section 87. It was suggested that Rule 550 met the case, but His Honour doubted whether that rule went far enough. An order made under Section 87 would have to specify which of the powers in Section 87 were to be exercised by the Public Trustee. Section 91 provided for the due registration of documents duly executed by the Public Trustee, and in order to exercise those powers the Public Trustee would have to produce to the Registrar a Court order duly made. There was not before the Court any application by the Public Trustee for an order under Section 87, although question 2 in the summons asked whether an order should be made under Section 87. His Honour did not think it would be proper to attempt to make such an order on the present application. The case was, however, one where upon due application by the Public Trustee an order should be made under Section 87. That would enable the Public Trustee to solve Dr. Neil's difficulties, and would enable the Public Trustee to make enquiries as to the existence of Miss Gallagher, or her next-of-kin, and would enable him also to collect the whole or such portion of the moneys in the bank as belonged to Miss Gallagher.

The main question in the summons was as to the correct amount payable by the mortgagor to the mortgagee in order to get a release of the mortgage. No question arose as to the principal money. That was payable on 1st February, 1910, and was still payable. The dispute arose as to interest. His Honour must assume that Miss Gallagher lent £300 for 6 years without interest, and at the end of the 6 years the amount would be immediately payable. What then was the position of a mortgagee, who lent money on such terms and at the end of the period made no request for payment and had not even yet made any such request? Having assumed, as His Honour must, that she lent £300 His Honour must continue to assume that she knew that she lent it, and knew the due date. But she lived in Ireland and might have died before the due date. There might be somewhere in Ireland her next-of-kin, entitled to the money and ignorant of their rights. His Honour could not assume against her at the present stage that she was alive and had forgotten about the loan, nor could His Honour assume that she

was a careless improvident person who took no care of her moneys. It was the duty of a debtor to seek out his creditor. His Honour must assume in Miss Gallagher's favour that there might be a good reason why nothing had been heard of her since the due date of the mortgage. When the Public Trustee was appointed the trustee of her property as an absentee or unknown person, it would be the Public Trustee's duty, when required to discharge a mortgage belonging to that unknown person, to first obtain payment of all moneys owing on that mortgage. That would have been his duty if Section 75 of the Property Law Act, 1908, had been invoked, and His Honour could not conceive that he had any lower duty if he were appointed under Section 87 of the Public Trust Office Act, 1908. What then was the amount of interest payable by the mortgagor to the mortgagee, for the period which had elapsed since the due date of the mortgage ? All parties agreed that the principle was as stated in 21 **Halsbury's Laws of England,** p. 116, par. 209, that there was no implied contract for the continuance of interest at the same rate or at any rate, after the due date of the mortgage. Interest in such cases was given not as interest payable under the contract but as damages for the detention of the debt. It was suggested that, as no interest was payable under the mortgage and no claim had ever been made by Miss Gallagher, she had suffered no damage by non-payment of interest. If she were before the Court the precise position could be ascertained. Although an order had been made that she be represented by the Public Trustee he had had no opportunity of making due enquiry as to whether Miss Gallagher or her next-of-kin were in existence, and His Honour, therefore, could not presume as against her anything unfavourable to her. The fact that no interest was payable under the mortgage carried the matter no further when considering the question as to whether a loss had been sustained by non-payment of interest on the due date. And although the position might be an unfortunate one for Dr. Neil nevertheless he acquired the property subject to that mortgage and he could not stand in any better position than the original mortgagors. His Honour referred to the judgment of Romer, L.J., in **In re Drax, Saville v. Drax,** 72 L.J. Ch. 508, 509. It was true that the mortgage in the present case provided that the principal was payable on 1st February, 1910, without interest, so that up to that date it was clear that no interest was payable, but from that date interest should be payable unless the circumstances were so strong as to rebut the rule. Up to the time when the money was deposited in the bank there did not seem to His Honour to be any circumstances that His Honour could look at as negativing the equitable rule unless His Honour made presumptions against Miss Gallagher, which it did not appear to His Honour that he was entitled to make. At the time that the money was deposited in the bank some efforts were made to find the mortgagee and her claim certainly would have been satisfied had she been found. Seeing that interest was payable, whether it be payable by virtue of the equitable rule enunciated by Lord Romer or on the basis of damages to the mortgagees, the measure of compensation was the same. Non-payment of money was compensated for by the payment of the interest it would have earned had it been paid on due date. In 1920 interest rates were lower than they were at the present time. Alpers, J., in **In re Douglas,** (1926) G.L.R. 19, allowed 6 per cent. as reasonable interest on unpaid legacies due to executors. Reed, J., in **In re Barnes,** (1926) G.L.R. 64, also fixed 6 per cent. as reasonable interest on unpaid legacies. His Honour thought that 6 per cent. was reasonable under all the circumstances in the present case and His Honour fixed that rate as reasonable whether interest were payable as interest or by way of damages.

In view of the fact that the principal moneys and a sum to meet a claim for interest was specially deposited for the mortgagee to claim it His Honour thought that it was proper that as from the date of deposit of those moneys the actual bank interest earned on those moneys should be sufficient to satisfy any claim for interest or damages after that date. In stating the above His Honour had not overlooked the fact that the interest earned on the £50 paid would really be interest on interest. His Honour accordingly held that the mortgagee was entitled to interest on the principal moneys secured by the mortgage at the rate of 6 per cent. per annum (simple interest) from the 1st February, 1910, to 18th September, 1923, and thereafter the mortgagee was entitled to the whole of the interest earned on the £350 paid into the bank. As against the mortgagee's claim for interest and principal credit was to be given to the mortgagor for the £350 paid on 18th September, 1923. His Honour directed that the case was a proper one for the Public Trustee to make application for an order to exercise all necessary powers under Part III of the Public Trust Office Act, 1908, but that such an order could not be made in the present proceedings. Mr. Rogerson was authorised and directed to pay the whole of the monies under his control to the Public Trustee after the Public Trustee had been duly appointed.

Solicitors for the plaintiff : **Dawson and Stilwell,** Auckland.
Solicitors for the defendant : **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.
Solicitors for the Public Trustee : **Stanton, Johnstone, and Spence,** Auckland.

Smith, J. May 22 ; June 13, 1929.
Dunedin.

LIGHTFOOT v. HUGH AND G. K. NEILL LTD.

Shops and Offices—Hours for Closing of Shops—Automatic Vending Machine—Machine Attached to Telegraph Pole in Public Street at Distance from Owner's Shop—Photographic Films Sold from Machine After Closing Hours—Machine Not a "Shop"—"Building or Place" in Which Goods Kept, Exposed, or Offered for Sale—*Ejusdem generis* Rule Applied—"Place" Including only Areas Capable of Physical Occupation by Occupier—Provisions of Act Relating to "Hawkers and Other Persons" Selling Goods by Retail Otherwise than in a Shop Applicable Only to Itinerant Traders—Shops and Offices Act, 1921-22, Sections 2, 36.

Appeal on point of law from the decision of Mr. H. W. Bundle, S.M., at Dunedin. Upon the hearing before the Magistrate, it was proved or admitted that the respondent carried on business at a shop at the corner of St. Andrew and George Streets, in Dunedin, as an optician and photographic supplier.

The respondent was the owner or lessee of an automatic machine fixed on a telegraph pole in a public street at or near the Stock Exchange Building, Princes Street, Dunedin, and at a distance of half a mile or more from its said shop at the corner of St. Andrew and George Streets. The machine was so constructed that it would deliver photographic films of two sizes on the insertion of coins for the appropriate amounts. The public had access to it at all hours of the day or night. On 6th March, 1929, at 7.25 p.m., a time when the respondent's shop was required by the Shops and Offices Act, 1921-1922, to be closed, films were obtained from the machine by purchasers who had inserted the necessary coins therein. The respondent's shop at the corner of St. Andrew and George Streets was at the time closed, but the machine was available, and was intended by the respondent to be then available, for the purchase of films by members of the public. The respondent was charged in respect of the automatic machine upon an information alleging that being the occupier of a shop within the meaning of the Shops and Offices Act, 1921-1922, it did fail to close its shop at 6 p.m. on 6th March, 1929. The Magistrate held that the facts were insufficient to support the information, and accordingly dismissed it. This appeal was brought from that determination.

Adams for appellant.
Anderson for respondent.

SMITH, J., said that the Act appeared to be designed principally to protect shop assistants in respect of their employment, and to that end provided for the regulation of three kinds of trading : (1) trading in shops ; (2) trading by hawkers or other persons by retail otherwise than in shops (Section 36), and (3) the sale after hours, within a district, of all goods comprised in a particular trade (Section 33). Mr. Adams contended : (1) that an automatic machine was itself a shop, and (2) if not, then that the respondent was an "other person" trading by retail otherwise than in a shop.

As to the first contention, the material part of the definition of "shop" contained in Section 2 of the Act was in the following terms : "Shop means any building or place in which goods are kept, exposed, or offered for sale, or in which any part of the business of a shop is conducted." Mr. Adams contended that an automatic machine was a place in which goods were kept, exposed, or offered for sale. Each portion of the definition of "shop" depended upon the meaning of the words "building or place in which." In His Honour's opinion, the word "place" should be construed according to the *ejusdem generis* rule. That rule was no doubt to be applied with caution, but where a genus or category was specified in a statute, and it was followed by a general word or words of ambiguous import, then the *ejusdem generis* rule might be applied as a useful "working canon" to enable the Court to arrive at the meaning of a par-

ticular enactment: **Tillmanns and Co. v. S.S. Knutsford Ltd.,** (1908) 2 K.B. 385, (1908) A.C. 406; **Attorney-General v. Brown,** (1920) 1 K.B. 773; **Magnhild (S.S.) v. McIntyre Bros. and Co.,** (1920) 3 K.B. 321. The word "building" indicated, in His Honour's opinion, the genus or category of "place." In its ordinary acceptance, the word "building," used as a noun, signified a structure which was capable of personal physical occupation. The word "place" ought, His Honour thought, to bear a similar meaning, otherwise the word "building" would have no definite meaning. That view was strengthened by a consideration of the other provisions of the Act. The latter part of the definition of "shop" supported it by including and excluding only buildings or places which were all capable of personal physical occupation. Again, every shop was regarded by the Act as having an occupier who was responsible for the observation of the provisions of the Act—Section 55. An occupier was defined (*inter alia*) as being a person occupying any building, enclosure or place used or intended to be used as a shop or office. An office was defined as meaning a "building" but not as an "enclosure or place." In respect, therefore, of the occupation of a shop, "enclosure" and "place" would seem to bear similar meanings. The "place" must be, His Honour thought, defined or limited in area, and must be capable of physical occupation at least by the occupier. The Act, of course, went further, and contemplated that a building or place constituting a shop was capable of physical occupation by shop assistants and customers. As to that, reference might be made to the definition of "shop assistant," to Section 5, as amended by Section 7 of the Amending Act of 1927, Section 9 (b) and (c), Section 10, Section 12, Section 28, Section 30, Section 50, Section 58, Section 62 (e), and Section 72 (i) (c). As, however, the Act contemplated that a building or place might be a shop if it had only an occupier without assistants, His Honour did not go further than to say that in his opinion the "building" referred to in the definition of "shop" must be a structure that was at least capable of physical occupation by an occupier and that the "place" must be a place which was defined or limited in its area, and which was capable of physical occupation by an occupier. In every case, the question whether a building or place was a shop must be determined upon a reasonable view of the facts. The present appeal was on a point of law only. On the facts, it was clear from the Magistrate's judgment that he did not regard the automatic machine in question, fixed to a telegraph pole in a public street half a mile away from the respondent's shop in George Street, as a building or place capable of physical occupation by an occupier. If the facts were before His Honour he should agree with that view. That finding was sufficient to dispose of the first contention that the respondent's machine was itself a shop.

Mr. Adams next contended that if the machine were not a shop, Section 36 referring to "hawkers and other persons who carry on business by selling or offering goods for sale by retail otherwise than in a shop" applied. His Honour was of opinion that the *ejusdem generis* rule previously referred to should be applied to determine the meaning of that Section. The word "hawker" indicated the genus of itinerant trader. A person who sold goods to the public by means of an automatic machine erected in a fixed position was not, in His Honour's opinion, an itinerant trader, and consequently he was not within the provisions of Section 36.

Appeal dismissed.

Solicitors for appellant: **Adams Brothers,** Dunedin.
Solicitors for respondent: **Statham, Brent and Anderson,** Dunedin.

Kennedy, J. June 7: 13, 1929.
Auckland.

IN RE LAURENSON.

Licensing—Prohibition Order—Person Charged with Being Found Drunk in a Public Place and with Assault—Plea of Guilty to Both Charges—Prohibition Order Made on Charge of Assault in Addition to Conviction and Fine—No Jurisdiction to Make Such Order—Plea of Guilty and Silence of Counsel when Order Made Not Equivalent to a Personal Application for Order—Conviction Severable—Amended by Omitting Part as to Prohibition Order—Power of Court to Order Justices to Pay Costs—In Circumstances Justices Not Ordered to Pay Costs—Licensing Act, 1908, Section 212—Justices of the Peace Act, 1927, Section 328—Inferior Courts Procedure Act, 1909, Section 7.

Motion for a writ of *certiorari* to quash that part of a conviction which provided for the issue of a prohibition order. On 5th April, 1929, John Laurenson was charged at the Magistrates' Court at Whakatane before the two presiding Justices, with (a) being found drunk in a public place, to wit the main road to Te Teko, on 30th March, 1929, and with (b) assaulting one Edward Jackson at Te Teko on 30th March, 1929. Laurenson appeared and pleaded guilty to both charges; he was convicted and discharged on the charge of drunkenness, and on the charge of assault he was convicted and fined £5, and in addition a prohibition order was made against him.

Fleming in support.

Hubble to oppose.

KENNEDY, J., said that the cases in which a prohibition order might be made were set out in the Licensing Act, 1908, Section 212. Such orders might be made either with or without consent. They might be made with consent on a personal application to a Magistrate for the issue of the same. They might be made, without consent, in two cases, namely first where it was made to appear in open Court that any person, by excessive drinking of liquor, misspent, wasted or lessened his estate, or greatly injured his health, or endangered or interrupted the peace and happiness of his family, and secondly where any person had been three times convicted of drunkenness within six months. In the last case the order might be made by a Magistrate without the necessity of a formal application. It was clear that none of the circumstances which would give the Justices jurisdiction to issue a prohibition order existed in the present case. No personal application was made by Laurenson and his silence or the silence of his counsel when the Justices, as part of the punishment for the drunkenness or for the assault, intimated that a prohibition order would issue, was not equivalent to a personal application by Laurenson. Nor by the mere plea of guilty to a charge of drunkenness, was it made to appear in open Court that Laurenson was, by excessive drinking, misspending, wasting or lessening his estate, or greatly injuring his health, or endangering or interrupting the peace and happiness of his family. It was stated in an affidavit that the conviction for drunkenness mentioned was the first conviction of any kind against Laurenson. It followed that the Justices acted without jurisdiction in issuing the prohibition order. They had no more right, under the circumstances, to issue a prohibition order than they had to order punishment in excess of the statutory maximum. They exceeded their powers and it was irrelevant to consider whether they were actuated by the high motive of doing what, in their opinion, was best for Laurenson, or whether they awarded, as they say, a lesser punishment because they issued a prohibition order. That part of the conviction which provided for the issue of a prohibition order was, therefore, bad. It was, however, severable from the residue and the conviction would under the powers conferred by Section 7 of the Inferior Courts Procedure Act, 1909, be amended by striking out the words "and prohibition order issued for twelve months." In the result the prohibition order was quashed.

Counsel for Laurenson had subsequent to the hearing, notwithstanding the pleas of guilty, applied to the Justices to rehear the charge of drunkenness and to cancel the prohibition order. The Justices then amended the record of the convictions by deleting the prohibition order from the conviction for drunkenness and by adding the prohibition order to the conviction for assault. That by itself would be a slender foundation for an inference that the Justices, under colour of correcting a mistake in the record of the conviction, had improperly manipulated the alteration to preserve the prohibition order. The affidavits filed, however, excluded that sinister suggestion and established that the convictions, as first entered, did not correctly record the punishments announced in Court by the Justices. When the Justices intimated their willingness to re-hear both charges, counsel for Laurenson withdrew his application for a re-hearing. In the Supreme Court counsel for the Justices admitted that the prohibition order was made without jurisdiction, but opposed an order for costs. His Honour did not accept the contention that Section 328 of the Justices of the Peace Act, 1927, excluded the power of the Court in the present case to order costs to be paid by the Justices adjudicating (see **In re Mulvaney,** (1928) N.Z.L.R. 129), but having regard to the circumstances set out in the present judgment and to other circumstances mentioned in the affidavits, His Honour did not think that the present case was one in which such an order should be made.

Solicitors for Laurenson: **E. Armstrong,** Whakatane.
Solicitors for Justices: **Meredith, Hubble & Ward,** Auckland.

Kennedy, J. May 24, 27; 31, 1929. Auckland.

GREEN v. NEW LYNN TOWN BOARD AND FORREST.

Municipal Corporation—Drainage—Trespass—Town Board Constructing Drains on Private Land Without Proper Notice to Owner or Occupier and Without Obtaining Permission of Owner or Occupier to Drains Constructed Above Ground—General Notice in Newspaper of Intention to Construct Drains Not Sufficient—Subsequent Suggestions by Owner as to Work to be Carried Out to Minimise Inconvenience Resulting from Operations of Board—Suggestions Carried Out—No Estoppel or Waiver—Portion of Land Subsequently Taken Under Public Works Act—Basis of Assessment of Damages—Municipal Corporations Act, 1920, Section 219; Public Works Act, 1928, Sections 34, 80; Town Boards Act, 1908, Section 33.

Action claiming damages for trespass and an injunction restraining the defendants from further trespass and a mandatory injunction requiring them to remove a sewer constructed by them upon the plaintiff's land. The defendant Forrest, a contractor to the defendant Town Board, constructed for the defendant Board a sewer, partly underground and partly overground, on the plaintiff's land. The plaintiff complained that the entry upon his land to construct such sewer, the operations of the workmen thereon, and the continuance of the sewer upon his land were a trespass. The Town Board had not complied with the conditions set out in the Eighth Schedule to the Municipal Corporations Act, 1920. No formal notice had been given to the owner or occupier personally of its intention to construct such drains, although a general notice of its intention to construct drains had been inserted in the local newspaper. A letter was also sent to the plaintiff by the defendant Board intimating that in the course of a few days it would be excavating upon the plaintiff's property in connection with its sewerage construction contract. The permission of the owner or occupier to the construction of the drain above ground had not been obtained. The defendants endeavoured to show that the plaintiff had by his conduct waived compliance with the statutory requirements. Evidence was given that on one occasion when the plaintiff had called at the office of the defendant Board on other business a drainage plan was produced to him, though the sewer as subsequently constructed was not exactly in accordance with such plan. It was also claimed that the plaintiff was estopped by his conduct from claiming damages for trespass in that after the works was commenced he had made certain suggestions to, and approved certain of the operations of, the contractors, designed to minimise the inconvenience and damage flowing from the works done.

Fleming for plaintiff.

Haddow for defendants.

KENNEDY, J., said that the Town Board (which had since the writ was issued become a Borough) had all the power conferred on Borough Councils by Divisions V and VI of the Municipal Corporations Act, 1920: Town Boards Act, 1908, Section 33. It might accordingly cause to be constructed upon or over the streets and public places within the Town District all drains from time to time shown on its drainage map, and until the preparation of such map all such drains as the Board might from time to time think needful for the efficient drainage of the Town District. It was, however, not entitled to construct any drain through or upon any private land unless it had first complied with the conditions in the Eighth Schedule to the Municipal Corporations Act, 1920. The Municipal Corporations Act, 1920, Section 219, moreover, provided that it should not be lawful for a Town Board to make any drains upon or under any private lands or buildings other than an underground covered drain unless permission in writing of the owners had been first obtained. The Town Board did not comply with the conditions so set out in the Eighth Schedule to the Municipal Corporations Act, 1920, and particularly with the condition as to notice to the owner and occupier. The drain, so constructed on the plaintiff's land, was, as to part, other than an underground covered drain, i.e., it was a drain above ground, and the Town Board did not, before constructing it upon the plaintiff's land obtain the plaintiff's permission in writing as required by the Statute. The Town Board had, however, on 21st October, 1927, inserted in a newspaper circulating in the Town District a general notice of its intention to construct drains. Such an advertisement was not compliance with the provisions of the Eighth Schedule to the Municipal Corporations Act, 1920, of notice to the owner and occupier, for the notice in writing there referred to should be personally served: **Toronto Corporation v. Russell,** (1908) A.C. 493.

It was contended on behalf of the defendants that the plaintiff had waived compliance with the requirements of notice and also the requirement of his permission in writing. Waiver was the abandonment of a right and it might be either express or implied from conduct. A person entitled to the benefit of any statutory provision might waive it, and allow the transaction to proceed as though the provision did not exist. Where the right was a right of action, an express waiver depended on the same consideration as a release. If it were a mere statement of an intention not to insist upon the right it was not effectual unless made with consideration. But where there was consideration the statement amounted to a promise and operated as a release: 13 **Halsbury's Laws of England,** 165. In November, 1927, during a conversation between the plaintiff and the Town Board engineer, when the plaintiff had called at the office of the Town Board on other business, the engineer referred to a drainage plan produced. His Honour was satisfied that, although the plan was produced, the plaintiff was not made aware of the exact nature of the drainage work to be done on his section. But even if he had been so made aware, nothing that he did or failed to do amounted to a waiver by him of compliance by the Town Board with the statutory requirements, which he had a right to assume would be complied with. He was not informed then, nor had he any reason to think, that the Town Board proposed to disregard those statutory requirements. It could not fairly be inferred, from his conversation, that he consented to the Town Board proceeding as if the statutory requirements had been complied with. Moreover, the sewer through the plaintiff's land was not constructed in the manner intended by the Town Board at the time the conversation referred to took place. The sewer actually constructed was from one to two feet higher than the drain shown on the plan of levels prepared. If the sewer had been constructed, as shown in the levels first prepared, it would have been, for the most part, under and not above ground. The letter sent by the contractors intimating that in the course of a few days they would be excavating in connection with their sewerage construction contract upon the plaintiff's property would not avail the Town Board. Such letter was not the notice required by the statute, nor did it obviate the necessity for permission in writing. When therefore, the contractors to the Town Board entered on the plaintiff's land and commenced and continued the construction of the sewer, the statutory requirements as to notice and as to permission in writing had not been complied with nor had they been waived by the plaintiff. The entry was illegal and not pursuant to, but in excess of, the powers conferred on the Town Board. The original entry was a trespass and so was the continuance in possession during the greater part of the time taken to construct the sewer, and the construction of the sewer. A cause of action, on entry, accrued to the plaintiff, and that cause of action was not, in His Honour's opinion, released by plaintiff's subsequent conduct. Nor was the plaintiff estopped by what subsequently occurred from asserting his rights of action for trespass to his land. There was some conflict as to the attitude of the plaintiff from a short time after the entry upon the plaintiff's land until July, 1928. The plaintiff gave evidence that he objected to what was being done, (although he no doubt then believed the Town Board had power to do what it purported to do) but made certain suggestions designed to minimise the inconvenience and damage resulting from the operations of the contractors, while a witness for the defendants indicated that the plaintiff's attitude was from the first one of friendliness, that he pointed out work to be done and generally consented to the operations. On the whole His Honour was disposed to accept the plaintiff's evidence on this point as more accurately disclosing his attitude, and to find that he did not consent but made only the best of what he deemed a bad job. His Honour found it difficult to believe that one whose attitude to the Town Board was so consistently one of complaint, should in the circumstances have consented to and approved of the Town Board's operations. After the work had advanced, certain small drains, roughly at right angles to the main sewer-drain, were cut, either at the plaintiff's suggestion or with his consent, to diminish what the plaintiff conceived to be the damage to his property resulting from the construction of the sewer. That particular work the plaintiff might not treat as a trespass, but he could claim compensation under the Public Works Act, 1928, for damage resulting therefrom (if any) as for an injurious affection of his land. In arriving at the damages awarded in the present action no allowance would be made in respect thereof.

The writ in the present action was issued on 20th September, 1928. On 2nd May, 1929, the defendant Town Board took for drainage purposes, as on 11th May, 1929, a strip of land running through the plaintiff's section and comprising the land upon which the sewer had been constructed. An amended statement of defence was then filed by defendant pleading that the plaintiff's only remedy was under the Public Works Act, 1928. Leave of the Court to file such amended statement of defence was not obtained although the defence had arisen subsequent to the issue of the writ. At the trial no objection had been taken to the filing of that amended statement of defence and His Honour was informed that the plaintiff consented thereto. It was admitted accordingly that the plaintiff could not, subsequent to 11th May, 1929, claim an injunction and that the damages recoverable in the present action, were necessarily reduced. His Honour had accordingly to assess the damages suffered by the plaintiff over and above what might at the date of the hearing of this action be claimable by him for the taking of the land actually taken, (land over and above what such taking legalised : Public Works Act, 1928, Sections 34 and 80) and for the injurious affection (if any) of his remaining land by the user of the sewer upon the land taken and by the cutting of the four small drains above referred to at right-angles to the main sewer. His Honour was invited by counsel for the defendant Town Board to treat the case as one of a mere technical trespass calling for nominal damages only. More than nominal damage was suffered by the plaintiff and His Honour could not regard the action of the Town Board in commencing, and continuing with, the construction of an overground sewer on a man's land, and trespassing on land other than that ultimately taken under the Public Works Act, 1928, without compliance with the statutory requirements as a trifling matter. Nor could the Court overlook the fact that, even after complaint was made, the Town Board proceeded in a leisurely manner to deal with the complaint. His Honour accordingly assessed the damages properly claimable in this action at £25. Evidence was tendered of the plaintiff's loss of time, subsequent to the trespass, in instructing engineers and solicitors but that formed no part of the damage suffered by the trespass, and, the allowance made for preparation for trial, was intended to be in respect of costs so incurred. His Honour certified that the action was a proper one to bring in the Supreme Court.

Solicitors for plaintiff : **McVeagh and Fleming,** Auckland.
Solicitors for defendants : **Haddow and Haddow,** Auckland.

WINSLEY BROS. v. WOODFIELD IMPORTING CO.

In the report of this case *ante* p. 183, the following alteration should be made : Substitute for the words commencing " In such a " in the fifth line from the foot of the first column on p. 184, to the word " rejection " in the first line at the top of the succeeding column, the following : " In such a case, the question would still remain whether the buyer was entitled to reject the machine, or whether by acceptance or by the length of his user he had lost that right, and was limited to a claim in damages only. On the other hand the fact that the property would have passed but for the breach of condition would not of itself prevent rejection."

Discovery Against the Crown.

" The rule of discovery, as recognised by our Courts, is that the Crown is entitled to discovery against the subject, in accordance with the ordinary rule regulating discovery ; but the suppliant is not entitled to discovery against the Crown and must be content with such discovery as the Crown may be disposed to give. Every practitioner who has had experience of conducting proceedings against the Crown is aware that this discretion is sometimes used unmercifully against the party making complaint, and he would be a bold man who would assert that the ' public interest ' does not sometimes signify, in this connexion, no more than the interest of the Crown in winning the case."—J. W. Gordon, K.C., in the " Law Quarterly Review."

Crime and Morality.

With Special Relation to Reports of Probation Officers.

(By W. E. Leicester, LL.B.)

When the history of criminal law in this Dominion comes to be written, it will be interesting to see whether the Probation Officer is classified as a civil servant, a psychiatrist, or a Court official with the power but without the authority of a police Magistrate. At one stage this legal chameleon (who is regarded as a much greater prodigy than nature ever intended him to be) kept himself strictly to the observance of his statutory powers, but more recently, affected no doubt by his surroundings, he appears to have developed into an advocate, a pleader of lost causes, and a philosopher looking upon the world with the sort of joyless pessimism that has made Dean Inge a theological best-seller. It is not a matter of surprise, therefore, that certain members of the judiciary view with the cold eye of disdain the persuasive influences of the Probation Officer and treat his recommendations as being little more than suggestions made by one who possesses no special qualifications to judge the real merits of the case. What else can be expected when the Probation Officer deals with questions of amounts and periods of time involved, the gravity of the offence and the like, which relate, after all, to the legal aspect of the matter ? In the result, counsel who breasts the barrier with a recommendation to probation may find the course distinctly hardgoing and finish with his client sentenced to a lengthy term of reformative detention. Unhappily, the converse rarely applies—although in some quarters a different opinion is held—and a recommendation against the granting of probation does not mean that the prisoner is restored, subject to payment of the costs of the prosecution, to his tear-bespattered relatives. About the present position there is, in fact, too much *quod* and too little *quo*.

During the last few years, I have read, with or without the permission of the Court and invariably at the last moment, a great many of these reports and I have often been amazed at the reasoning that seeks to satisfy the understanding and direct the judgment of those who have to administer justice. That the reports are written with an honesty of purpose, I do not question. It is their effect that I challenge. Hearsay evidence, which is inadmissible at the trial can scarcely, when presented in its worst form and derived from the most dubious sources, become admissible upon conviction. True enough that it would be impossible to ask the Probation Officer to confine the information which he gives to the Court to his own knowledge and observation, and Section 5 of the Offenders Probation Act, 1920, seems to contemplate a more extensive investigation when it provides :

" (1) It shall be the duty of a Probation Officer, when so required by the Court—
(a) To make enquiries as to the character and personal history of any person accused or convicted of an offence, and as to such other matters in relation to such person as the Court may direct, and to report fully thereon to the Court in writing ; and
(b) To keep a full record of such enquiries and of the results thereof.

(2) It shall be the special duty of the Probation Officer, if satisfied in any case that the best interests of the public and of the offender would be served by the release of the offender on probation, to recommend to the Court that he be so released."

But in actual practice one frequently finds that the Probation Officer has made certain enquiries from the Police and remained apparently satisfied with this. The police for their part may have cause to think ill of an accused person for reasons alien altogether to the offence with which he is charged. Accordingly, the report sent in to the Court consists in such instances partly of those investigations and partly of reflections on the accused's past history, his mode of living and the impression that the offence makes on the public—the correctness of all of which deductions depends less on the accuracy of the information obtained than on the personal outlook of the Probation Officer who analyses the information in his report. The question was recently considered in England by the Royal Commission set up as a result of the Savidge case, and the following recommendation made :

"It has been represented to us that the statements as to character given by the Police are not always confined to facts which they have ascertained, but sometimes include impressions or opinions which they have formed as to the accused's manner of life or the character of his associates. We think that the Police should only depose to facts within their knowledge, and should refrain from expressing opinions which may be incapable of proof or disproof."

At one time, the Ecclesiastical Courts exercised a wide dominion over the morals of the people. They were the instrument through which the State acted in the enforcement of obedience to the laws of God. In 1847 Archdeacon Hale published criminal precedents which illustrate the nature of this jurisdiction and consist of a collection of extracts from the Act Books of six Ecclesiastical Courts between the years 1475 and 1640. The offences, which are numerous, comprise adultery, procuration, incontinency, incest, defamation, sorcery, witchcraft, behaviour in church, neglect to attend church, swearing, profaning the Sabbath, blasphemy, drunkenness, haunting taverns, heretical opinions, profaning the church, usury, ploughing up the church path. In the Archdeacon of London's Court between November 27th, 1638, and November 28th, 1640, there were thirty sittings and 2,500 causes entered. "It is not difficult," says Holdsworth, "to see why the Parliament in 1640 abolished the Ecclesiastical Courts. A system which enabled the officers of inferior courts to enquire into the most private affairs of life upon any information was already out of date." The ordinary Ecclesiastical Courts were, of course, restored in 1661, and in the process of time their jurisdiction has completely altered. It is necessarily so, because it does not follow that the morality of one man is the morality of another. The morals of two nations separated by a boundary line may be essentially separate and different. According to the Report of the 1925 Labour Delegation, the brothel in Tsarist Russia was a State-recognised institution, formally opened when new by the police officer and hallowed by a religious ceremony in the course of which the premises were blessed by a Russian orthodox priest. In Berlin and many other cities of Europe, it is registered and supervised by the *Sittenpolizei*, a Police Department dealing with the control of public morals. In this country the brothel, like the bookmaker, is neither registered nor hallowed.

That our Courts to-day should be asked to exercise, directly or indirectly, the functions of the old Ecclesiastical Courts is improper and unwarranted. The infusion of morals into criminal law can lead only to doubt and uncertainty. Some would say that it is immoral to admit to probation one who embezzles thousands, while another is sentenced to imprisonment with hard labour for pillaging a tin of sardines. Here, morality appears to be on the side of the stronger. The law itself may be immoral—for example, when it permits the Statute of Limitations to be pleaded to avoid an existing debt. Why, it may be argued, should a prisoner be recommended to probation because he is a widower with nine children, when in fact he has killed his wife by his insistence upon her annual childbearing ? If a syphilitic man can marry an inexperienced girl and without legal penalty beget a brood of half-wits (which the tax-payers have to keep), why should the presence of gonorrheal infection be suggested as a ground for refusing probation ? The profiteer in a staple commodity gets a knighthood, but the man who steals a loaf of bread may get a month. A short time ago, the Court of Criminal Appeal was called upon to consider the sentence imposed upon an old man of 72 for the sacrilegious theft of eightpence. He had received five years.

If in our conception of criminal punishment, we have outgrown the stage when the retribution inflicted on the offender was regarded as the natural sop to the injured, then it is clearly inconsistent to punish a wrongdoer for moral derelictions unconnected with the charge that brings him before the Court. Law in its essence rests upon the relations between the individual and the society of which he is a member : the communion between the individual and his conscience is outside the scope of law so long as there is no transgression of the established law. It is no business of the law to enforce morality, however important it may be that every law should have a moral as well as a legal sanction. There is not, and never could be, any positive universal standard of ethical conduct. Most men are moral, not because of some innate preference for doing the right rather than the wrong thing, but because it is highly inconvenient to have to bear the consequences of unconventional behaviour. We have long abandoned the Greek notion that men can be made good by statute and have adopted the individualistic view that different men can lead good lives in different ways. Obedience to the law does not make a man good although it may prevent him from being bad. Its merit is negative, showing how to avoid vice, not how to find virtue. "It is the sub-vicious," says Samuel Butler, "who best understand virtue. Let the virtuous stick to describing vice, which they can do well enough."

It will be remembered that the fourth count in the indictment against Socrates charged him with being in the habit of quoting mischievous passages from Homer and Hesiod to the prejudice of public morality. The Court consisted of 501 judges, who voted against him by 285 to 216. He urged that the penalty to be imposed should be a life pension granted by the State, but this suggestion was waved aside as being both frivolous and vexatious. He was sentenced to death. Nowadays, probation would have been considered ; but on his past reputation and utterances the chances are distinctly in favour of his doing time.

New Zealand Law Society.

Proceedings of the Council.

The second meeting of the year of the Council of the New Zealand Law Society was held in Wellington on Friday, 5th July, 1929. Mr. A. Gray, K.C., President of the Society, was in the chair. The following gentlemen were in attendance as the representatives of the District Law Societies, namely:—

Auckland (represented by)		Messrs. F. L. G. West, A. H. Johnstone, and J. B. Johnston (Proxy for Mr. R. McVeagh)
Canterbury	,,	Mr. M. J. Gresson
Gisborne	,,	Mr. C. A. L. Treadwell
Hamilton	,,	Mr. F. A. Swarbrick
Hawke's Bay	,,	Mr. H. B. Lusk
Marlborough	,,	Mr. H. F. O'Leary (Proxy)
Nelson	,,	Mr. C. R. Fell
Otago	,,	Messrs. W. R. Brugh, H. L. Cook, and R. H. Webb
Southland	,,	Mr. G. G. G. Watson
Taranaki	,,	Mr. G. M. Spence
Wanganui	,,	Mr. W. A. Izard
Westland	,,	Mr. A. M. Cousins
Wellington	,,	Messrs. A. Gray, K.C., C. H. Treadwell, and C. G. White

Various matters of interest to the profession were considered, some being of a more or less confidential nature. Among other subjects the following were dealt with:

Judges' Salaries and Pensions.

The question was revived relating to the inadequacy of the present salaries and pensions of the Supreme Court Judges. The President mentioned that the matter had recently been brought under the notice of the Attorney-General, who had promised to place the matter before the Government for careful attention. In a discussion of the subject the view was expressed that there was real need for urging a review of the salaries paid to the Judges, and particularly of the rate of superannuation allowance paid to a Judge upon retirement. The matter was left to the President to discuss with the Attorney-General when a favourable opportunity offers.

Appointments of Deputy Official Assignees in Bankruptcy.

The Council considered representations made to it concerning the policy of the Department of Justice in appointing officers employed in the Public Service of the Dominion to the positions of Deputy Official Assignees, it being contended that such appointments are not in the best interests of the creditors, as the winding-up of a bankrupt estate frequently involves the exercise of considerable business knowledge, and that, however well such officers may be able to perform the duties pertaining to their own particular offices, it does not follow that they possess the necessary qualifications to wind up and realise, to the best advantage, the business affairs of a bankrupt. The matter was accordingly brought, through the Attorney-General, under the notice of the Minister of Justice, who informed the Council that its views would receive every consideration when any further appointments were being made.

Conveyancing Scale, 1928, Paragraph (6) p. 14: Costs of Leases.

The report of a committee which had been set up to consider this part of the scale of conveyancing charges, which had previously been referred to District Law Societies for their comments, was discussed. The Council resolved to adopt the recommendations of the Committee, that the existing scale of charges for Leases be altered as follows:—

"Delete clause (a) and substitute the following:

(a) For ordinary lease or an agreement to grant a lease for a term exceeding twelve months (including engrossment of counterpart and obtaining execution by lessee where lessee employs no separate solicitor):

	£	s.	d.
Where the rent does not exceed £50	3	3	0
For every extra £50 or fraction of £50 of rental up to £200	1	1	0
For every extra £50 or fraction of £50 of rental over £200 up to £1,000	0	10	6
For every extra £50 or fraction of £50 of rental over £1,000.. ..	0	5	3

Special covenants and conditions shall be charged for extra.

"Clause (b). Delete this clause."

Legal Conference.

A letter was read from the President of the Auckland District Law Society extending on behalf of his Council an invitation to hold the next Legal Conference at Auckland during Easter, 1930.

The Council unanimously resolved to accept the invitation.

Appointment of Mr. M. Myers, K.C., as Chief Justice of New Zealand.

The Council unanimously passed a resolution recording its appreciation of the appointment of Mr. Myers, K.C., to the office of Chief Justice of New Zealand, and congratulating him on his appointment.

Lord Tenterden.

"It was his great work on the 'Law of Merchant Shipping' which secured Lord Tenterden a judgeship. Until he wrote that book Abbott, as he then was, had never been a pronounced success. His father, a barber of Canterbury, apprenticed him to his own trade, but later as he had 'no genius for the profession' sent him to Oxford. Neither at Oxford nor at the Bar did he distinguish himself. According to Lord Campbell, on the rare occasions when he had to address a jury he showed 'marvellous ineptitude' for the task. Yet, although he had never applied for silk, and had never been in the House of Commons, he became Lord Chief Justice of England—and all this on his merits and because he had written one good book. The life of Lord Tenterden should and does greatly encourage the legal author to pursue, with undying hope, his otherwise unremunerative and colossal labours. —"Outlaw," in the *Law Journal.*

Lord Halsbury.

His Life and Times.

Permission has been granted to the " NEW ZEALAND LAW JOURNAL *" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.*

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DISSOLUTION.

In the course of 1885, the Gladstone Ministry, sharply criticised in Parliament and the country on foreign affairs, especially Egypt and the Sudan, had fallen a prey to Cabinet discussions on home policy. A motion of the Conservative Opposition on a clause in the Budget, led suddenly and unexpectedly to the defeat of the Government—partly through the votes of the Irish, and partly through Liberal abstentions. Gladstone insisted that a Budget defeat involved resignation, and the Queen sent for Lord Salisbury, the Conservative leader in the Lords. Lord Salisbury's task might have been easier if he could have made an immediate appeal to the country, but the recent passage of the Franchise Bill, and more particularly of the accompanying Seats Bill, which the Conservatives themselves had pressed for, now raised a Constitutional problem. In this crisis, Lord Salisbury consulted Sir Hardinge Giffard, who advised that the passing of the Seats Bill had made an immediate dissolution legally impossible, and Gladstone himself had to admit that Giffard was right. Lord Salisbury was thus in the trying position of having to hold office for several months with a minority in the House of Commons, but, after obtaining a general guarantee of Opposition support, he undertook the thankless task, and, it may be added, carried it through with a skill which gave great satisfaction to the Queen and augured well for the future.

Lord Salisbury's telegram to the Queen on June 14 says: "An unforseen difficulty on another matter has arisen which may be serious. Sir Hardinge Giffard advises that passing of Seats Bill has made dissolution legally impossible."

Two days after this, the Queen entered in her Journal: "Dissolution being impossible, and Lord Salisbury's party being in a minority, it would be impossible to wind up the session . . . . without obtaining from Mr. Gladstone a promise of support . . . . I wrote this and forwarded it to Mr. Gladstone. Received an answer from Mr. Gladstone after dinner, doubting impossibility of dissolution (which, however, he afterwards found was the case)."

So Gladstone had to agree that Giffard was right.

Two days before this the Queen had entered in her Journal: "and Lord Salisbury really did not know who to appoint as Lord Chancellor. He thought he must consult Lord Selborne." (Lord Selborne was the out-going Chancellor, whose son had married Lord Salisbury's daughter).

LORD CHANCELLOR.

Not many days later, the world learned that the Prime Minister's choice had fallen on Sir Hardinge Giffard. The new Chancellor took the title of Baron Halsbury of Halsbury, in the parish of Parkham, Devon, which, as we have seen, was one of the former seats of his family.

On June 14, 1885, Sir Hardinge Giffard had some anxious hours before his appointment as Lord Chancellor was finally confirmed. He had returned all his briefs, and already sent his friend Mr. Webster down to take his place at Launceston, when there came the hitch, and sudden and unexpected difficulties threatened to overwhelm the new Ministry before it was born. But, although so much was at stake, Sir Hardinge's invincible cheerfulness never failed, and his good-humoured and confident aspect, and festive white waistcoat, encouraged the sinking hearts of his friends, and the supporters of Lord Salisbury's policy, as they crowded round him in the House of Commons to congratulate or condole, as the Fates might ordain. The hearty cheers with which they greeted the final decision bore testimony both to Sir Hardinge's personal popularity and appreciation of his courageous acceptance of whatever destiny might be in store for him.

At first the appointment came rather as a surprise to the public and the legal profession, but almost at once it was recognised as sound, and the new Chancellor was soon to justify the confidence placed in him. In the House of Commons his direct and definite opinions had rather alarmed some of the more timid spirits in the leadership, and Disraeli had not often given him the opportunity of expressing them, but, when he got into the House of Lords, his strong political judgment was most valuable to his party, and in his high office his clarity of mind and grasp of legal principle, together with his sound common sense, were to distinguish him both as statesman and judge.

The Lord Chancellorship is not only the oldest and most dignified of the great law offices, but holds a position of unexampled power and responsibility. The Lord Chancellor ranks before every other subject, except the Royal Dukes, and the Archbishop of Canterbury. He is the Custodian of the Great Seal of England, and his designation of "Keeper of the King's Conscience," which has come down from mediæval times, is a testimony to his great influence. He has the presentation to between six and seven hundred Crown livings, as well as to twelve canonries. He is the head of the law. He is President of the Chancery Division of the High Court. He is a member of the Judicial Committee of the Privy Council, and presides when the House of Lords is sitting to hear appeals. In fact, he is responsible for the efficient working of the entire judicial system of Great Britain. The Judges of the High Court (other than the Lord Chief Justice) are all appointed on his recommendation, and he is responsible for the nomination of most of the other important offices connected with the administration of justice, such as the Registrarships, Masterships of the Court of Chancery, Masterships in Lunacy, Taxing Masterships, etc. He sits upon a historic bench, called the Woolsack, which is placed immediately opposite the throne, and which, by a legal fiction, is not regarded as being within the actual precincts of the House itself.

At the time that he was appointed Lord Chancellor, Giffard was busy in the Courts, and, as had so often happened in his life, the opening came at a fortunate moment. Sir John Holker, who would have been his most formidable rival, had died, and there seemed nobody with stronger claims to high office than himself.

William Brett, Viscount Esher, Master of the Rolls, had a good many supporters, and for a time the issue seemed doubtful between them. But Giffard had fought several contested elections, and had done yeoman work for the party, both in and out of Parliament. Brett had been Solicitor-General for twelve months only, and had then accepted a puisne Judgeship, so his services did not outweigh Giffard's whose appointment was an exceedingly popular one. The Carlton Club supported Giffard to a man. The genius for friendship, which had been so marked all his life, stood him in good stead now. Even those who had doubted his capacity for supporting this high honour with the weight and dignity it needed soon found that he was more than equal to it, and that he was always *primus inter pares* even among men of such eminence as Lords Selborne, Watson, Bramwell, Blackburn, Herschell, Davey, Bowen, and Macnaghten.

Part of an article in *The Graphic* about this time says: "When in 1850 Mr. Hardinge Giffard received his call to the Bar in the Benchers' Room at the Inner Temple, he would have been a rash man who would have singled him out from his fellows as the one who would sit on the Woolsack. There was nothing to indicate a career of such distinction, for neither at Oxford, nor as a law student, had he given any evidence of the ability which had marked Roundell Palmer, for instance, for high places in the law. But the keen observer might have seen something in the towering forehead, resolute mouth, and keen eyes of the young man from Merton, which might well carry him far beyond his colleagues."

The elevation to the Woolsack meant, of course, farewell to his old constituents, to whom he addressed the following letter:—

GENTLEMEN,

Her Majesty having been graciously pleased to entrust me with the custody of the Great Seal, it becomes my duty to say farewell as your representative in the House of Commons.

I find it hard to express my grateful sense of the unvarying kindness which has been extended to me during the period which has elapsed since I was first elected for your borough, down to the present time, not only from those whose views upon political questions were in harmony with my own, but also from very pronounced political opponents, from whom I received most generous and forbearing treatment.

While expressing to you all my heartfelt gratitude for your kindness, permit me to express a hope that nothing has occurred to make you feel regret at the association of my name with your ancient borough.

Believe me, Your obliged and faithful servant,

HARDINGE STANLEY GIFFARD.

June 24, 1885.

(To be continued.)

Court of Arbitration.

The following fixtures have been arranged by the Court of Arbitration:—

Napier: 5th August, 1929, at 10 a.m.

Auckland: 19th August, 1929, at 10 a.m.

Counsel: "The case which I have just cited, your Honour, is particularly good wine, and I propose to deal with it at some length."

MacGregor, J.: "Don't water it down too much, Mr.———."

Appeals to Privy Council.

Condition as to Time for Preparing Record.

Rule 5 of the Rules of 10th January, 1910, providing for appeals to the Privy Council from our Supreme Court and Court of Appeal, reads:

"Leave to appeal under Rule 2 shall only be granted by the Court in the first instance:—

(a) Upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding five hundred pounds, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(b) Upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

On every application for conditional leave to appeal the Court of Appeal always, of course, fixes the time within which security is to be given in accordance with paragraph (a) of the Rule; but it has not in the past been the usual practice for any time to be fixed by the Court within which the appellant shall take the steps mentioned in paragraph (b) of the Rule. An instance, however, of times being fixed under both paragraphs, and of the effect of non-compliance with a condition as to time for preparing the record, is to be found in *Gisborne Harbour Board v. Lysnar*, (1923) N.Z.L.R. 345.

In *H.M. the King v. Power* the Court of Appeal at its present sittings granted conditional leave to appeal to the respondent subject, not only to security being given in the sum of £500 within three months, but also to a condition that the steps under Rule 5 (b) be taken within four months. The Chief Justice suggested that, although it had not in the past been the general practice for a time to be fixed under paragraph (b) of Rule 5, this course should in future be adopted.

Chief Justice Martin in a presidential address recently to the Canadian Bar Association pointed out that with the advance of science new outlets and opportunities for human activity had made for material evil as well as material good. "That good," he said, "cannot be conserved to the people, that evil cannot be warded off without the aid of the law wisely formulated and adequately enforced. The eyes of the people look to the profession of the law for leadership in this. The call of the people is to us for help. They know that the profession is the best qualified to lead and help in the adjustment of suitable law to the new conditions."

London Letter.

Temple, London,
8th May, 1929.

My dear N.Z.,

Considerable excitement obtained here last week, at least among a small but very select number of us, to read of the appointment of your new Chief Justice. On behalf of two of us, more particularly interested and pleased, I was appointed to send off the congratulatory cable on a joint account. I was disappointed to learn, from the Eastern Telegraph Company, that my cable must go that way and that New Zealand is some six hours ahead of us in time, so that my message would lose that much time on the way. "It will get there to-morrow," said the clerk. "What's the good of to-morrow?" said I; "this is a something we want to get over at once." I argued that if he sent the cable round the other way, across America, we should gain time instead of losing it, for the United States are, I know by recent experience, some considerable distance in our rear in the matter of the clock. "If you will only fall in with the scheme," said I to the clerk, "I shall have the felicity of congratulating Myers yesterday . . ." So much for the cable congratulations. We have added our various epistolary. Here is the public. If there is any other known form of congratulation, I shall be glad to be told of it, and we will certainly adopt it. My only regret is that I shall not now live to be "led" by him, as I always hoped might be my lot before he thus passed away from our ken. Will some kind lawyer in New Zealand send me a brief to come over and argue in his Court? If there is no other question with which I might be entrusted, I could at least be trusted to press for a right of audience: which, when he counted up the number of letters I have written to you, none of your Judges could be so hard-hearted as to refuse? However this may all be, I congratulate you and I congratulate him and I condole genuinely with myself, for I don't believe there are any kind lawyers in New Zealand . . . not of the particular sort above required, I mean.

Hayley Morriss occupies the attention of the common law court public at the moment; and although the context of the cases is in many ways unpleasant the interest is legitimate. Horridge, J., is displaying his curious merit as a Judge; I say curious, for you might suppose from his manner he was the unkindest bully of all, but he is in fact, the most to be depended upon for a sound and just (I will not say, always bland) conduct of a trial. That, I think, is all the comment you will require from me upon this subject.

The Magistrates' case, *Rex v. Newport-Salop Justices* (for a report of which see "The London Times" of 24th and 25th April last), has a double interest; first it bears upon the subject of school discipline, and the right to enforce it and the extent to which parents may curtail it, a subject of which most of us know little as parents since we are usually only too glad to leave it to the master to relieve us of this invidious task; second, it deals in an interesting manner with the often-arising question as to the "person aggrieved." This latter point also arose, and perhaps more effectively, in the case reported on the following day: *Sevenoaks Urban District Council v. Twynam.* And, in the last-named case, as the "Justice of the Peace," of May 4th, comments, there is a particularly interesting example of the not-always-remembered observation of Lord Halbury in *Quinn v. Leathem.* "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." I quote this apt quotation because it is so apt; how I came across it was in a context of a more extreme nature, in that the question raised was whether the reported finding of facts by a Judge, as to a transaction which formed the subject matter of two litigations, was any binding evidence, or any evidence at all, as to the fact of them in the litigation which was not being reported. A.B. was made bankrupt; he resisted the receiving order and carried his resistance to appeal in the High Court. The High Court, dealing with the appeal, pronounced in the judgment upon the facts which caused the bankruptcy. Later A.B. sued for damages for malicious presentation of a bankruptcy petition; the same facts became material a second time. You will not need to be told that the pronouncements of the High Court in the receiving order matter carried the thing no further as to the establishing of the facts, pronounced upon, for the second purpose; but it was interesting to discover by what means the judgments, thus reported, could be made any sort of evidence at all. What happened eventually was that the plaintiff referred to the reports, chapter and verse, in his pleading and alleged that their Lordships, so pronouncing, had told the truth: and the defendant saw fit to admit this was so, and turned his eyes, for salvation, rather to points of law . . . of which, by the way, there are a good half-dozen in every malicious prosecution action, as you remember, or will do well to remember.

The Rating and Valuation Act, 1925, and, to a small extent, its follower of 1928 have suddenly come to the fore, as I told you, many months ago, they would, and have found myself and my unlearned brethren totally unprepared, as I have been telling my brethren and myself for months that they would. Outside London, at any rate, they necessitate a new assessment as at about this time; the new assessments have been made, and are giving dissatisfaction to those same "aggrieved"; the aggrieved, whether by means of objections to draft valuation lists or by way of proposals for the amendment of current valuation lists, are taking the decisions of assessment committees which, in the more serious cases, always amount to a compromise and lead to an appeal! So Rating Appeals, after years of quiescence given to still us into an imprudent oblivion, have suddenly become the fashion again; and we of the Bar, who are only formally concerned with the early procedure which has been formidably altered, and who are mainly concerned with the principles of assessment which remain the same, are daily being caught out by our professional clients! However, that trouble is over now for the most part; we have had enough bumps to awaken us to the necessity of learning the formalities again; and we are past the technicalities, which for some unknown reason so much abound in rating law even in its regenerate form, and are awaiting or conducting argument of the substantial points, which rest upon their old bases. I have a very novel series of cases, as to which I am likely to be one of the first in a wide field; what is the nature and means of calculating, the rent from year

to year which the hypothetical tenant pays, in the case of the English Mansion House which, in these break-up days, could by no possibility be let from year to year at all or be let in any way or for any term at any real rent, since its up-keep is so expensive, and for the owner, who lives there, it is a drain on the pocket rather than a roof over the head! It is going to be a very interesting matter; for the change of the English country-side, in this respect, and of the English method of living under the oppressive conditions of the day, are new phenomena in rating law, and the respondent authorities are, unless I am mistaken, going to be put to some difficulty to defend their drafted, or any, valuation on a rental basis. I have a number of such houses to deal with; as to most of them the owner would, from a financial as opposed to a sentimental point of view, let you the house at no rent at all, or even pay you a small annual consideration to go in and live there, if thus he might save what he is put to to keep the place up. I will let you know the result when a principle is established. Perhaps the matter does not interest you, as you are not blessed, or obsessed, with these handsome anachronisms. That the matter will very considerably interest my tribunal, the Rating Appeal Committee of the Quarter Sessions of the Counties wherein the houses lie, I have no doubt. Most of the members of those committees are themselves estate owners; they will, unless I mistake, allow short shrift to any expert witness who dares to tell them the annual value of such houses by means of the measurements of the rooms and grounds! The bigger the house, these days, the less the value in the market, of course; the whole world, and especially his wife, to-day is after the small, compact house, which pre-war, was for the humble, meek, poor and unpretentious, only.

I should call your attention to the House of Lords' decision in *Hyman v. Hyman* (April 30), which turns upon a covenant, in a deed of separation, that the wife should not sue for further support, alimony or maintenance than in the deed provided; and which decides now finally that so necessary a power in the court, as that to make provision for her on the dissolution of her marriage, must be incident of the power to decree the dissolution and must be beyond the wife's power to deprive herself of it. You will study the report for yourself, for the facts and the niceties of it; I may not tell you, for I am under prohibition to go into such detail in these letters; but I should be a defaulting scribe if I omitted to advise you of the fact of this somewhat important decision.

For the rest, the General Election not only impends, it menaces. In a few days' time there will be no Parliament, and this country will be handed over to the uncontrolable depredations and ravaging of thousands of uncivilised candidates and their supporters, dinning into our ears patently spurious arguments and breaking into our houses with wholly impossible promises and intolerable familiarities. Such is the sheer tyranny of democracy. For my part, I have alrcady started upon a career of speeches, to be continued at least twice every night till the very eve of the election itself on May 30th. I have, as becomes my profession, and to help a friend who is mad enough to want to spend his money, his time and himself in the House of Commons, gone amuck on speeches; have delivered half-a-dozen or more already; threaten another couple of dozen at the least; and know that none of my victims can say me nay. Why on earth they come and listen, I cannot conceive. Once they didn't; and I was left in empty possession of a waggon on a village green, a gawdy picture of the candidate, and sweet, quiet empty space to address. I addressed it for twenty minutes, and I like to think I converted it entirely to my, or my friend's, way of thinking. There were a couple of women, with a child, some thirty yards away to the left, having a gossip after shopping and intrigued as to the curious fact and behaviour of the gentleman on the waggon; there was, at the same distance to the right, a smithy, with the blacksmith and his customer occasionally appearing at the door to remark and wonder upon the same matter; I am certain they must have known by my fervour, that they (with the rest of God's universe) were being addressed, though they were not inquisitive enough to come a little nearer and ascertain why. Have you ever made a speech, a lengthy speech, an impassioned speech, to nobody? No? Then be guided by me and choose, if choose between two evils you must, such a unanimous crowd of unconvincable opponents as I had last night. London and the Law Courts, to-day, seem quite a calm and desirable backwater, compared to the Suffolk country which I am attempting to make hideous with my friend's politics.

Yours ever,

INNER TEMPLAR.

Bench and Bar.

His Honour Mr. Justice Frazer of the Court of Arbitration is at present in Australia for the special purpose of investigating the systems of industrial arbitration in operation in the various States of the Commonwealth and also of making inquiries into the Australian workers' compensation laws. It is anticipated that he will be absent for several weeks, and His Honour Mr. Justice Blair is meanwhile acting as President of the Court of Arbitration.

Mr. C. A. L. Treadwell has been appointed Wellington representative of the Gisborne District Law Society on the Council of the New Zealand Law Society.

The following admissions to the Profession have been made recently at Wellington: solicitors on the roll admitted as barristers—E. A. R. Jones, R. M. Morgan, R. E. Tripe; solicitors—R. H. Bell, G. O. Cooper, H. M. A. Major, H. S. Port, A. Tyndall.

The following have been recently admitted as solicitors at Auckland: R. E. Jones, R. L. Munro, R. A. Potter.

Rules and Regulations.

Public Works Act, 1928: Amendments to Electrical Supply Regulations, 1927. Amendments to Electrical Wiring Regulations, 1927.—Gazette No. 49, 4th July, 929.

Electrical Wiremen's Registration Act, 1925, and Electrical Wiremen's Registration Amendment Act, 1928. General Regulations.—Gazette No. 46, 20th June, 1929.

Bills Before Parliament.

In this column will be summarized, with special reference to any of their provisions affecting the Profession, all Bills from time to time introduced into Parliament, irrespective of their chances of becoming law. The provisions noted are those of the Bills as originally introduced, but in exceptional cases important amendments during their progress through Parliament will also be shown. A general summary of the year's legislation will be published, as in the past, at the end of the Session.

Compulsory Military Service Repeal. (MR. JORDAN). Abolishing militia and cancelling universal obligation to be trained. Repealing Parts IV and VI of Defence Act, 1909.

Imprest Supply. (RT. HON. SIR JOSEPH WARD). Authorising imprest grants not exceeding £2,678,000 out of funds and accounts in First Schedule and not exceeding £314,000 out of accounts in Second Schedule.

Gaming Amendment. (SIR GEORGE HUNTER). Allowing totalizator investments to be telegraphed to secretary of racing club; S. 28 of principal Act repealed; S. 29 amended.—S. 2. Removing restriction on publication of dividends; S. 30 of principal Act amended by repealing subsections (1), (4) and (6).—S. 3.

Local Authorities Empowering (Relief of Unemployment) Extension. (RT. HON. SIR JOSEPH WARD). Period within which local authorities may borrow money in relief of unemployment extended to 30th June, 1930.

Marriage Amendment. (MR. MASON). Marriages with deceased wife's niece or deceased husband's nephew valid and issue thereof deemed born in lawful wedlock; Section not to render valid any such marriage where either party has thereafter and before 26th April, 1906, remarried, nor any other such marriage contracted on or after 26th April, 1906, where either party has thereafter before passing of this Act remarried; Section not to deprive any person of property which he may have lawfully inherited, acquired, or become entitled to prior to coming into operation of this Act, or affect any *lis pendens* existing on 26th April, 1906, or on coming into operation of this Act.—S. 2. "Deceased wife's niece" and "deceased husband's nephew" defined.—S. 3. Section 46 of Marriage Act, 1908, repealed.—S. 4.

Workers' Compensation Amendment. (MR. HOWARD). Making insurance of employees against accident compulsory and providing for miscellaneous alterations in amount of compensation payable. £1,000 in case of death from injury of any worker leaving total dependents. If incapacity lasts for two days compensation to be payable. During any period of total incapacity weekly payment to the amount equal to average weekly earnings at time of accident. During any period of partial incapacity weekly payment to be amount equal to difference between average weekly earnings before accident and average weekly amount which worker able to earn after accident. Limitation on duration of weekly payments imposed by S. 5 (7) of principal Act removed. Limitation of £1 on reasonable medical and surgical expenses imposed by S. 5 (10) removed. Limitation to £1,000 of amount recoverable in action arising out of negligence of fellow-servant imposed by S. 67 (3) removed. Words "100 per cent." in Second Schedule omitted and "£1,000" substituted.—S. 2. Act not to bind Crown.—S. 3. The Bill also purports to increase from £750 to £1,000 the limitation on the aggregate amount of weekly payments imposed by Section 5 (8); but this has already been done by S. 3 (c) of Amendment Act of 1926.

Local Bills.

Bluff Harbour Reclamation and Leasing and Empowering.
Gisborne Harbour Board Amendment.
New Plymouth Borough Council Empowering.

Private Bills.

Associated Churches of Christ Church Property.
Christ College Canterbury.
Wellington Bishopric Endowment Trust (Church of England).
Wellington City Mission.

Forensic Fables.

THE DEAF REPORTER, THE DILIGENT YOUNG COUNSEL, AND THE GLORIOUS WIN.

There was Once an Old Gentleman who Practised as a Special Pleader in the Early Part of the Eighteenth Century. Being Very Deaf and Extremely Stupid, he Thought he would Take to Reporting. His Reports, by Reason of his Above-Mentioned Disabilities, were Shockingly Bad. As his Contemporaries Knew that the Old Gentleman Heard One Half of the Case and

Reported the Other, they Paid No Attention to his Efforts. When the Deaf Reporter had Produced One Volume he Passed Away, much Regretted by his Laundress, to whom (according to Some) he was Secretly Married. Two Hundred Years Rolled by, and a Diligent Young Counsel, who was Accustomed to Go to the Root of Things, Unearthed the Forgotten Volume. To his Joy he Discovered therein an Authority which Exactly Fitted the Difficult Case he had to Argue on the Morrow in the County Court. The Startling Proposition Contained in the Head-Note was Due to the Fact that the Deaf Reporter had Omitted the Word "Not" when Taking Down the Observations of Mr. Justice Punt in the Court of Common Pleas. The Diligent Young Counsel Waited till the County Court Judge Showed Signs of Wobbling and then Loosed Off his Splendid Find. The County Court Judge, who was Anxious to Catch his Train, was in no Critical Mood. Thus the Diligent Young Counsel had a Glorious Win and Sowed the Seeds of a Large and Lucrative Practice.

MORAL: *Si Auctoritatem Requiris Circumspice.*

Legal Literature.

Richard Burdon Haldane—An Autobiography.

This is the best autobiography this reviewer has yet read. It is of special interest to the lawyer. It is the life story of one of England's greatest Lords Chancellors, "the greatest Secretary of State for War England has ever had," and a sublime philosopher.

The reading of Lord Haldane's life and thoughts should not fail to imbue the reader with a modicum of his great humility. To this reviewer his humility and humaneness give the book an incalculable value. His appreciation of happiness he expressed as follows :—

> "But if we have striven to think and to do work based on thought, then we have at least the sense of having striven with such faculties as we have possessed devoted to the striving. And that is in itself a cause of happiness, going beyond the possession of any definite gain."

Then, remarking how Faust had discussed this truth, Lord Haldane completes the story of his life with these golden words :—

> "So it may turn out in some degree with each of us, whatever our circumstances and our capacities. This creed is one which fits into what is highest in the various forms of religion. "*It is open to all of us—provided we keep ourselves humble in mind and avoid self-seeking and vanity.*"

The cheap sneer of the public, aroused at one sad time in his life to public anger, to Lord Haldane's philosophy could have best been answered in the words of Milton :

> "How charming is divine philosophy not harsh nor crabbed, as dull fools suppose, but musical as is Apollo's lute."

Lord Haldane's capacity to proceed with his life unaffected by the opinion of lesser people was both a comfort to him and a regret to his friends. Had he expressed himself in definite terms against the Germans when the War broke out, instead of allowing a false emphasis to be given by a degraded and hysterical Press to an expression of his made before War was contemplated with reference to the effect on his mind of his education at Gottingen, he would now rest amongst the greatest heroes of the War. Instead of explaining away, and it would have been easy enough for him, his remarks about his "spiritual home" he allowed the Press to inflame the public against him as if he were a spy. There is nothing so besmirching the good name of the Press as was the vile campaign against Lord Haldane at the beginning of the War. It needed but sane reflection to remind them that the efficiency of our "Contemptible Little Army" was due to Lord Haldane's genius for seeing clearly, his organising capacity, and above all his burning desire to serve his Country. Why his political friends remained silent is impossible to understand, for they knew the truth. There was no effective organisation to send an Army abroad till Lord Haldane took over the Secretaryship of State for War. On 19th November, 1918, Sir Douglas Haig in writing to Lord Haldane said : "Until you arrived at the War Office no one knew for what purpose our Army existed." Then later in the same letter he adds :

> "I and many soldiers with me are greatly distressed at the ungenerous treatment which you have received during the critical phase in our Country's history ; and I hope the day is not far distant when the invaluable services which you have rendered to our Empire may be adequately recognised."

These remarks should be enough to fill the hearts of Englishmen in general, and English lawyers in particular, with pride.

That Lord Haldane was a great lawyer, a most successful barrister, and one of the most eminent of England's Lords Chancellors is perhaps not well known beyond the ranks of the legal profession. He was born in 1856. He received a comprehensive education, the part of which that appealed most to his mind being obtained in Gottingen. He studied philosophy intensively, but ultimately studied law and at the age of 23 was called to the Bar. At this time his industry was enormous ; he had the enthusiasm or passion for his profession which ensured his success. In the early days of his career at the Bar he was left to argue alone before the Privy Council an important application for the Government of Canada. It was the first of a great number of briefs from that Dominion.

About 1885 he took an active interest in politics. He became a strong supporter of the Liberal Imperialist Party. His career as a politician was an interesting one. His mind did not allow his being trammelled by the planks of his party. When he saw fit, as he did when Lord Balfour introduced his Education Bill in 1902, he voted against his party. His politics to me smacked more of the Conservative than the Radical. He regarded education, public health, and the preservation of the Empire as most important planks in his political platform. He played the leading part in founding the London University. It is impossible to do justice in this review to his national service in organising the English Army before the War, nor would it be just to him to try and give in a few words his part in the Great War. His name should rank with such men as Lord Haig and Lord Reading as having played a major part in that terrible drama. Lord Haig called him "The best Secretary of State for War England has ever had." By his preparations he made victory possible. Posterity will assuredly recognise his greatness, for as Emerson said "Greatness appeals to the future." Those of us who practise at the law and have occasion to study the reports need not be told of his greatness. He was profound. How later he became for the second time Lord Chancellor, but on this occasion in a Labour administration, is an interesting incident in the closing hours of his career. He died at the age of 72, a profound lawyer and a complete philosopher. His life is an inspiration to all.

—C. A. L. Treadwell.

New Books and Publications.

Cyclopaedia of Insurance Law. Complete in eight volumes. By George J. Couch, LL.B., (Cornell), (Lawyers Co. of New York). Price £18.

The Law of the Land. Second Edition. Revised and enlarged by the Author, Sir H. S. Theobald, K.C., M.A. (St. Catherine Press). Price 24/-.

Odgers' Digest of the Law of Libel and Slander. Sixth Edition. By W. Blake Odger, M.A., and Robert Ritson. (Stevens & Sons Ltd.). Price £2/7–.

De-Rating Explained with Practical Examples. By Isaac Dixon, F.S.I. (Shaw & Sons, Ltd.). Price 3/6.

Lord Chief Baron Pollock. By Lord Hanworth, P.C. K.B.E., Master of the Rolls. (Murray). Price 12/-.