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"There has never been a moment in our history when it has been more vital for every member of the profession, from the highest to the most humble, to remember that he is in the most real sense a minister of justice, and to co-operate in its most equable and rigorous administration."
—Mr. Justice Finlay.

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Legal Rights of Pedestrians.

Running down actions have been described as forming the staple litigation of to-day: *Grinham v. Davies*, (1929) 2 K.B. 249, per Salter, J., at p. 249. Many of such actions concern collisions between one vehicle and another, but probably the greater number of them are cases where pedestrians, walking along, crossing, or standing upon the highway, have been run-down by some form of fast-moving traffic. Questions, therefore, as to a pedestrian's right of user of the highway, or as to the duties of a pedestrian, are of considerable practical importance to-day, and the recent judgment of Myers, C. J., in *Cooper v. Symes*, 5 N.Z.L.J. 325, (1929) G.L.R. 463, attracts attention.

The case was one in which the appellant while walking along a road at night, the footpath not being fit for use, was knocked down and injured by an overtaking motor car. The learned Chief Justice said:

> "Apart from the fact that in the present case there is an express finding that the footpath was not fit for use, it would appear plain that a pedestrian has a right whether by day or night to walk along a carriageway of a road, and is entitled to the exercise of reasonable care on the part of persons driving vehicles along it."

Although, so far as we have been able to ascertain, there would appear to be no reported case decided since 1839 where this right has been considered by an English Court, the passage quoted is certainly in accordance with what is generally understood to be the law. In *Boss v. Litton*, (1832) 5.C & P. 407, Denman, C.J., summing up to the jury, said (p. 409) that all persons had a right to walk in the road and were entitled to reasonable care on the part of persons driving carriages along it. And during the course of the argument (p. 408) the learned Judge is reported as having observed, perhaps not altogether consistently with his summing up: "A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not especially at night when carriages are passing along." In *Cotterill v. Starkey*, (1839) 8 C. & P. 691, which we believe is the only other English decision on the point, Patteson, J., directed the jury (p. 694) as follows: "A foot-passenger has a right to cross a highway, and I believe it was held in one case that a foot-passenger has a right to walk along the carriage way; but without going that length, it is quite clear that a foot-passenger has a right to cross . . ." While these two authorities, by themselves, can hardly be regarded as completely satisfactory modern English text-writers appear to be unanimous in conceding the existence of the right, and in Scotland it has always been held that a pedestrian may properly walk along the highway notwithstanding the presence of a footpath on each side of the street: *Anderson v. Blackwood*, (1886) 13 R. 443; *McKechnie v. Couper*, (1887) 14 R. 345; and see *Craig v. Glasgow Corporation*, (1919) S.C. (H.L.) 1, per Lord Dunedin.

On these authorities there is no room for doubt that the learned Chief Justice's statement of the law in the passage quoted above is correct, and in fact no other conclusion would appear open to a Judge of first instance. Our only doubt is whether the law is really in conformity with modern conditions and particularly with the demands of present-day traffic. If all pedestrians using our city thoroughfares were suddenly to take it into their heads to leave the footpaths and to exercise their legal right of walking along the street itself, transport could obviously not be carried on for a day. Of course, such an eventuality is extremely unlikely to occur, but nevertheless pedestrians—even though they be few in number—walking upon the streets in preference to the footpath may seriously incommode traffic and, always provided that there are footpaths, it seems hardly reasonable that they should be allowed by the law to do so, at all events without their conduct being considered, in the event of the occurrence of an accident, negligence *per se*.

The unreasonableness of this legal right of a pedestrian to walk along the highway is increased by reason of the failure of the law to require him to observe any "rule of the road." It appears that he may walk where whim and fancy take him—on the left, on the right, or in the middle of the street. In England the rule is that foot-passengers walk on the right side of the road: *Beven on Negligence*, 4th Edn., 684; *Roberts and Gibb on Collisions on Land*, 2nd Edn., 93, though we are aware of no English case in which it has been held to be negligence for a pedestrian to walk on the left-hand side. An attempt was made in *Cooper v. Symes* (*cit. sup.*) to argue that the pedestrian was negligent in not keeping to the right; but as to this the learned Chief Justice said, after referring to the English rule as stated in *Beven*:

> "Nor do I find it necessary to attempt to determine the question as to whether the rule referred to operates in New Zealand. I am satisfied that it is a rule which is very little known in this country, and it is desirable in the circumstances to leave the question of its existence open until it expressly arises."

Probably there is a good reason for the English rule that pedestrians should keep to the right and vehicles to the left, for then vehicles overtake pedestrians on that side of the road which the latter leave free, thus giving a pedestrian what he does not have when walking on the left, a sense of security against being run down from behind. The correctness, however, of the observation of Myers, C.J., that the rule is little known in this country cannot be doubted. Here the custom is for foot-passengers as well as vehicles to keep to the left, though as regards pedestrians the practice would not appear to amount to a "rule of the road," or at all events not to such a rule the non-observance of which would be held to constitute negligence.

Pedestrians must, of course, *cross* the highway, and their right to do so is well recognised, but the requirements of modern fast-moving traffic certainly seem to demand, where there are footpaths, some reasonable restriction of the present legal right of the pedestrian to walk *along* a busy thoroughfare on what part of it he pleases.

Supreme Court.

Myers, C.J. December 3, 1929.
Wellington.

WOOLCOTT v. WOOLCOTT.

Divorce—Adultery—Proof—Admissions of Respondent—Uncorroborated Admissions Received with Circumspection, Caution and Distrust But if Clear, Distinct, Unequivocal and *bona fide* and No Ground for Suspecting Collusion Sufficient Proof of Adultery—No Absolute Rule of Law that Such Admissions Not Sufficient Proof of Adultery—No Absolute Rule of Law that Decree Ought Not to be Granted on Uncorroborated Evidence of Petitioner.

Petition for divorce on the ground of respondent's adultery. The petitioner's case was based chiefly on evidence of admissions, both oral and written, made by the respondent to the petitioner. The petitioner also gave corroborative evidence.

O'Regan for petitioner.

MYERS, C.J., said that in **Wilkie v. Wilkie,** (1928) N.Z.L.R. 406, Blair, J., seemed to have expressed the view that admissions by the respondent, whether in writing or oral, were not in any case sufficient proof in themselves of adultery. No authorities were cited in support of that view. His Honour had looked into the authorities and it seemed to His Honour that the view expressed in **Wilkie v. Wilkie** (*cit. sup.*) was not in accordance with them. It was sufficient to refer to **Williams v. Williams and Padfield,** 1 P. & D. 29 (where the material portion of the judgment in **Robinson v. Robinson and Lane,** 1 Sw. & Tr. 393, was set out in a footnote); **Getty v. Getty,** (1907) P. 334; **Le Marchant v. Le Marchant,** 34 L.T. 367; and **Collins v. Collins,** 115 L.T. 936. Those authorities showed that, while the admission unsupported by corroborative proof should be received with the utmost circumspection, caution and distrust, nevertheless if the Court were satisfied that the confession was a clear, distinct and unequivocal admission and was *bona fide*, that there was no doubt of its genuineness and sincerity, and that there was no reasonable ground to suspect collusion, a decree should be granted even if there were no confirmatory proof. His Honour had had the opportunity of discussing the matter with Blair, J., who, he was authorised to say, was himself of opinion that what he said in **Wilkie v. Wilkie** (*cit. sup.*) was too wide and concurred in the view His Honour had just expressed. His Honour understood indeed from Mr. Justice Blair that in a later case, which had not been reported, he corrected the statement made in **Wilkie v. Wilkie** (*cit. sup.*).

In the present case it might be suggested that the written admission was not in terms a confession of adultery, but, looking at the allegation in the petition and at the circumstances of the case as proved by the evidence of the petitioner, His Honour had no doubt that the confession must be regarded and construed as an admission of the misconduct alleged. If that written admission were the only proof adduced, however, without the further evidence given by the petitioner, His Honour would not have been prepared to grant a decree. But the petitioner, as to whose truthfulness His Honour had no doubt, gave evidence of oral statements made by the respondent in terms admitting adultery, and she gave other evidence which afforded corroborative proof.

There was another way of looking at the case. The petitioner had given evidence of having seen the respondent on two occasions at night in company with a woman under unusual circumstances but not such as would, without something more, have sufficiently proved her case. She taxed him with his conduct and he orally admitted misconduct. Later on he made the written admission already referred to. It had been suggested in some cases that the uncorroborated evidence of a petitioner should not be acted upon in a divorce suit and a decree granted upon that evidence alone. No doubt that was a prudent and proper general practice, but there was no absolute rule to that effect. There were cases where on a consideration of all the circumstances, the Court, being satisfied of the truth of the story and that there was no collusion, had granted a decree upon the evidence of the petitioner alone. But in the present case it could not be said that the case depended upon the petitioner's evidence alone. In **Dunstall v. Dunstall and Williamson,** 32 N.Z.L.R. 669, where the circumstances seemed to have been very much like those of the present case, a decree was granted by Stout, C.J. In the present case, as in that, the petitioner's evidence was supported by the statement in writing made by the respondent. From whichever point of view, therefore, the case was looked at, the evidence in His Honour's opinion satisfied the requisite tests, and the petitioner was entitled to a decree.

Decree *nisi*.

Solicitor for petitioner: **P. J. O'Regan,** Wellington.

Adams, J. November 1, 4; 22, 1929.
Christchurch.

IN RE HARMAN: HARMAN v. ANDERSON.

Will—Construction—Acceleration—Bequest of Income to Wife During Life or Widowhood and "Immediately After the Death or Future Marriage of My Wife" Bequest of Capital and Income to Brothers and Sisters Named—Codicil Revoking Bequest of Income to Wife and Directing Payment of an Annuity to Her in Lieu Thereof—Acceleration of Interests of Brothers and Sisters—Words "Immediately After the Death or Future Marriage of my Wife" Construed as Meaning From and After the Determination of the Estate by Death or Otherwise—Interests of Brothers and Sisters Vested in Possession at Testator's Death Subject to Annuity—Doctrine of Acceleration Applying to Both Real and Personal Estate.

Originating summons for the interpretation of the will and codicil of the abovenamed testator. By his will the testator devised and bequeathed to his trustees all his real and personal estate on trust after conversion to pay the annual income to his wife during her life, if she should so long continue his widow, and immediately after the death or future marriage of his wife, as to as well the capital as the income of the trust fund, in trust to divide the same into eleven equal parts or shares and to stand possessed thereof as to two of these shares to pay the income thereof to his sister during her life and from and after her death to divide the capital thereof equally between her two children, but if her children should predecease her then "the capital thereof should fall back into and form part of my residuary estate." He then settled the remaining nine shares upon similar trusts for his brothers and sisters and their children with provision for the wives of his brothers in certain events. In each case the ultimate trust on failure of children was in the same form. The testator then provided that the residue of his estate, including all moneys which under the terms of his will should fall back into residue should be divided equally among those of his brothers and sisters who should be living at the respective dates on which the capital of each or any of the eleven shares hereinbefore mentioned should revert to or fall back into residue. The testator on 20th October, 1924, made a codicil to his will revoking the direction for payment of the annual income to his wife during her life if she should so long continue his widow, and in lieu thereof directing that the trustees should stand possessed of the said trust moneys or the securities whereon the same should be invested upon trust to pay out of the annual income thereof the sum of £200 per annum to his wife during her life if she should so long continue his widow. The questions submitted to the Court were: 1. Whether there was an intestacy as to the income over and above the £200 per annum bequeathed by the codicil to the widow. 2. Whether the surplus income over and above the said £200 per annum should be paid by the trustees during the lifetime and widowhood of the widow to the life tenants of the eleven shares of the residuary estate. 3. Whether the said surplus income should be allowed to accumulate and form part of the capital of the said eleven shares at the death or remarriage of his widow, and a further question as to vesting which at the request of counsel, was not answered by the Court.

Wilding for plaintiff.
Donnelly for widow and others entitled on intestacy.
Sim for brothers and sisters mentioned in will.
K. M. Gresson for children mentioned in will.

ADAMS, J., said that he had come to the conclusion that the case fell clearly within the well settled rule as to acceleration, the earliest reference to which was to be found in **Perkins' Conveyancer,** sec. 567, where it was laid down that "if a man, seized of land devisable in two, devise it to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk

being alive, in this case the remainder shall take effect presently." In the case in Perkins the devise to a monk was illegal and void under the then existing Statute. The present case was in His Honour's opinion within the authority of **Lainson v. Lainson,** 18 Beav. 1, affirmed on appeal, 5 D.M. & G. 754, and **Eavestaff v. Austin,** 19 Beav. 591, to which His Honour referred at length. The testator in the present case had revoked the whole of the clause in his will containing the provision of the first trust for his wife but had left standing the words following "and immediately after the death or future marriage of my said wife." Those words must be construed as meaning "from and after the determination of her estate by death or otherwise," or on the happening of any event which removed the prior estate or interest of the wife out of the way. See **Jarman on Wills,** 1st Edn., 513; 6th Edn. 719. Construing the words of the will in that sense, there could be no doubt that the equitable estates or interests immediately following the revoked estate or interest given to the wife were accelerated, and therefore that the trusts for the brothers and sisters named vested in possession on the death of the testator, subject only to the annuity of £200 given to the testator's wife by the codicil. That construction gave effect to the clear intention of the testator. It was settled that the doctrine of acceleration applied both to real and personal estate. **Eavestaff v. Austin,** 19 Beav. 591; **Jull v. Jacobs,** 3 Ch. 703, 712; **In re Clark, Clark v. Randall,** 31 Ch. D. 72. See also **In re Willis,** (1917) 1 Ch. 365; **In re Conyngham,** (1921) 1 Ch. 491; **In re Brooke,** (1923) 2 Ch. 265. His Honour accordingly answered questions 1 and 3 in the negative, and question 2 as follows: Subject to the annuity of £200, the income was to be distributed between the life tenants of the eleven shares.

Solicitors for plaintiffs and trustees: **Wilding and Acland,** Christchurch.

Solicitors for widow and others entitled on intestacy: **Raymond, Stringer, Hamilton and Donnelly,** Christchurch.

Solicitors and sisters mentioned in will: **Duncan, Cotterill and Co.,** Christchurch.

Solicitors for children mentioned in will: **T. D. Harman and Son,** Christchurch.

MacGregor, J. November 1; 4, 1929. Wellington.

KIRKLAND v. MERRETT AND LUCAS.

Practice—Costs—Co-defendants—Plaintiff Reasonably Joining Both Defendants and Succeeding Against One But Failing Against Other—Costs Payable by Plaintiff to Successful Defendant Included in Costs Recoverable by Plaintiff from Unsuccessful Defendant—Discretion of Court—Code of Civil Procedure, Rule 555.

Motion for judgment by plaintiff at the conclusion of the trial by a common jury of 12. The plaintiff was a passenger in a motor car driven by the defendant McLucas. A collision took place during the night between that car and another car driven by the defendant Merrett, and the plaintiff was thereby seriously injured. He sued the defendants jointly and severally in one action for damages for his personal injuries. Both defendants defended the action, each alleging, and endeavouring at the trial to prove, that the negligence of the other defendant was the sole cause of the injuries sustained by the plaintiff. At the trial the jury found by their verdict that the defendant Merrett was solely to blame for the accident, and that the defendant McLucas was not to blame. The jury also assessed the amount of damages which they considered the plaintiff to be entitled to recover.

Mazengarb for plaintiff.
O'Leary for defendant Merrett.
Cornish for defendant McLucas.

MacGREGOR, J. (orally), said that judgment must be entered for the plaintiff against the defendant Merrett for the amount of the damages awarded by the jury, with costs according to scale on the amount so awarded. Judgment must also be entered for the defendant McLucas, with costs against the plaintiff according to scale, calculated on the amount claimed in the action. His Honour thought further that the costs so payable by the plaintiff to the successful defendant McLucas should be included in the costs to be recovered by him from the unsuccessful defendant Merrett, as was ordered in the parallel case of **Besterman v. British Motor Co.,** (1914) 3 K.B. 181. It seemed to His Honour that it was quite reasonable for the plaintiff to join both defendants in the same action. Each defendant blamed the other for the collision. In those circumstances His Honour thought it just that he should exercise the wide discretion as to costs given the Court by Rule 555 of the Code in manner indicated.

Judgment accordingly.

Solicitors for plaintiff: **Mazengarb, Hay and Macalister,** Wellington.

Solicitors for defendant Merrett: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for defendant McLucas: **Webb, Richmond, Cornish and Swan,** Wellington.

Ostler, J. November 6; 23, 1929. Napier.

NAPIER BOROUGH v. NAPIER HARBOUR BOARD.

Rates—Exemption—"Harbour Works Under the Control and Management of any Harbour Board"—Reclaimed Land on Which Offices Erected Solely for Use of Board Within Exemption—Quarry Owned by Harbour Board Used to Supply Stone for Harbour Works Not Within Exemption—Rating Act, 1925, S. 2—Harbours Act, 1923, S. 5.

Originating summons under the Declaratory Judgments Act, 1908, to determine whether the plaintiff Corporation was entitled to levy rates on two properties vested in the defendant Board. One of the properties was land which had been reclaimed from the sea by the Board, and on which offices, used solely as offices for the Board had been erected. The other property was land composed of limestone which had been quarried in order to obtain stone for the harbour works of the Board. The Board had removed stone over a considerable portion of the land almost down to sea level, and the land so cleared and levelled had been cut into town lots and leased. There still remained unleased an area of 3¾ acres which was still required for the purpose of obtaining stone for harbour works.

Lusk for plaintiff.
Grant for defendant.

OSTLER, J., said that the plaintiff rightly admitted that the property used solely as offices for the Board was exempt from rates by virtue of Section 2 of the Rating Act, 1925, which exempted "Harbour works under the control and management of any Harbour Board." It had already been decided by the Court of Appeal in **Wellington City Council v. Wellington Harbour Board,** 10 N.Z.L.R. 534, that land reclaimed from the sea by a Harbour Board upon which were erected offices and a bonded store which were used solely in connection with the harbour, was exempt as a harbour work. As to the 3¾ acres used for the purpose of obtaining stone for harbour works, His Honour was of opinion that it was not exempt from rates. "Harbour Works" were not defined in the Rating Act, but they were in the Harbours Act, 1923, Section 5, and that definition applied: **Wellington City Council v. Wellington Harbour Board,** 10 N.Z.L.R. 534; **Timaru Harbour Board v. Timaru Borough Council,** (1926) N.Z.L.R. 210, 216. His Honour read that definition and said that a quarry did not come within it. It was the work which was made from the stone taken from the quarry which was the harbour work, but the land from which the stone was taken for the construction of a harbour work was no more a harbour work than the land on which grew the trees which were cut for the construction of a wharf. It was a mere accident that that land happened to be near the harbour. If that was a harbour work because the stone quarried from it was used for harbour works, then if the quarry were 25 miles inland it would still be a harbour work. A harbour work included the land upon which stood a completed harbour work, but not the land upon which stood the materials used for the construction of a harbour work, even though that land was owned and the materials extracted therefrom by the Harbour Board. The work was under the control and management of the Board, but in His Honour's opinion it was not a harbour work and therefore was not exempt from rates.

Solicitors for plaintiff: **Kennedy, Lusk and Morling,** Napier.

Solicitors for defendant: **Sainsbury, Logan and Williams,** Napier.

Ostler, J. November 1; 21, 1929.
Wellington.

HAMMOND v. DUNCAN.

Practice—New Trial—Judgment Against Weight of Evidence—Appeal Appropriate Remedy Where Trial Before Judge Without Jury—Discovery of Fresh Evidence—Evidence Procurable Before Trial—Alleged Unfair and Improper Practice of One Defendant—Action Claiming that Defendant Indebted to Estate of Deceased—Defendant Failing to Disclose Payment Made to Him by Deceased—Not Shown That Such Payment was to be Set-off Against Deceased's Debt to Defendant—Fact That Plaintiff Not Given Opportunity of Cross-Examination as to Set-off Not Ground for New Trial—New Trial Refused—Administration Action—Costs—Defendant Trustees Refusing to Furnish Proper Information Ordered to Pay Costs of Unsuccessful Plaintiff.

Motion for new trial on the grounds: (1) unfair and improper practice on the part of one of the defendants, Lloyd Hammond; (2) discovery since the trial of material evidence; (3) the judgment being against the weight of evidence. The action was an administration action claiming accounts on the basis of wilful default. The facts are sufficiently set forth in the report of the judgment.

Cohen and Cooke in support of motion.
Treadwell and Hussey to oppose.

OSTLER, J., said that the third ground could be dismissed at once. The trial was not before a Judge and jury but was before a Judge alone. Consequently if the losing party considered that the judgment was against the weight of evidence his remedy was to appeal: see **Klingenstein v. Walters,** 3 N.Z.L.R. (C.A.) 18. With regard to the first ground, the unfair and improper practice alleged was that Lloyd Hammond did not disclose to the Court that on 18th June, 1920, the sum of £2,200 had been paid to him by his father, John Hammond. The plaintiff was the residuary legatee under John Hammond's will. One of his claims in the action was that Lloyd Hammond owed £3,000 to John Hammond's estate. Lloyd Hammond proved that at the time when John Hammond agreed to giving a mortgage over his Rata property to the plaintiff for a sum of £3,000 which was then owed by Lloyd Hammond to the plaintiff, John Hammond owed him approximately £3,000. In proving this Lloyd Hammond produced clear evidence showing that on 30th June, 1921, he paid £1,448 17s. 10d. to the New Zealand Loan and Mercantile Co., at Wanganui. That was the balance owing by John Hammond to that company upon an account, which had been running since 1919. Lloyd Hammond did not produce that account at the trial. After judgment was given the plaintiff procured a copy of the account from the company. As he procured it without any difficulty and as before the trial he knew of its existence (as was shown by the fact that he periodically paid money into it which he owed to John Hammond), it could not be said that the plaintiff could not have procured a copy before the trial if he had exercised due diligence. The account showed that on 18th June, 1920, John Hammond paid £2,200 to Lloyd Hammond. It was claimed that it was an unfair and improper practice on the part of Lloyd Hammond not to disclose this fact to the Court. If the plaintiff had been able to show as a fact that the £2,200 was to be set-off against the £1,448 17s. 10d. then the claim would, His Honour thought, have been a valid one. But he could not show that. All he could say was that it was possible that that was the position. His complaint was that he was deprived of an opportunity of cross-examination of Lloyd Hammond to ascertain whether it was the position. In His Honour's opinion that was not in itself a sufficient ground for ordering a new trial. Lloyd Hammond had sworn an affidavit on the present motion in which he explained the £2,200. His Honour accepted that explanation as true, and said that it was perfectly satisfactory. His Honour had seen and observed Lloyd Hammond while in the witness-box under the stress of a long and severe cross-examination, and he was quite prepared to accept his explanation as true. That being the case His Honour could not hold that he was guilty of any impropriety in not mentioning the receipt of the £2,200.

The second ground upon which a new trial was asked for was the discovery of fresh evidence. Lloyd Hammond swore during the trial that since 1919 he had not kept any books of account recording the transactions between John Hammond and himself. He stated that up till 1918 he was in partnership with John Hammond and he kept books then. A Mr. Ewen had sworn an affidavit to the effect that in 1921 Lloyd Hammond said to him: "I keep my father's books and my own." He further said that Lloyd Hammond showed him a ledger and a day-book and that opening a ledger he showed him how he kept the accounts. Mr. Ewen was unable to say that the accounts he was shown were not the partnership accounts, which Lloyd Hammond admitted that he had kept, and Lloyd Hammond swore that the books he showed to Mr. Ewen were the partnership books. Consequently the discovery of that fresh evidence did not show that Lloyd Hammond's evidence was untrue, and it was not evidence which if produced at the trial would have had any effect on His Honour's judgment. The next evidence relied on as material evidence discovered since the trial was the evidence as shown in the New Zealand Loan and Mercantile Co.'s account of the payment by John Hammond to Lloyd Hammond of the £2,200. His Honour had already pointed out that that evidence could with reasonable diligence have been procured before the trial, but even if it could not have been, the explanation of Lloyd Hammond, which His Honour accepted as true, robbed it of all materiality, and the motion must fail on this ground. These were the only grounds relied on by counsel for plaintiff.

When giving judgment for the defendants His Honour reserved the question whether the Court had jurisdiction to order the defendants to pay the plaintiff's costs, saying that if he had jurisdiction he would so order. His Honour had examined the authorities quoted by Mr. Cooke, particularly **Heugh v. Scard,** 33 L.T. 659; **Jeffreys v. Marshall,** 23 L.T. 548; **Kean v. Burn,** 7 L.T. 666; **In re Skinner,** (1904) 1 Ch. 289; and **Easton v. Lander,** 62 L.J. Ch. 164, and in His Honour's opinion, seeing that the defendants were trustees, and that they failed in their duty of giving proper information to the plaintiff His Honour had jurisdiction to order them to pay the plaintiff's costs of the action. His Honour made an order accordingly.

Solicitor for plaintiff: **L. Cohen,** Wanganui.
Solicitor for defendants: **J. M. Hussey,** Wanganui.

Blair, J. April 12, 15, 16, 19; November 15, 1929.
Auckland.

CHESTNUT v. SEATON.

Misrepresentation — Fraud — Damages — Fraudulent Misrepresentation by Vendor as to Area of Land Subject to Floods—Measure of Damages.

Action claiming £800 damages for alleged false and fraudulent representation on the sale of a farm by the defendants to the plaintiff at the price of £2,900. The fraudulent representations alleged were: (1) that the farm would carry 30 cows for 10 months in the year and that that number had been carried for that time on the property. (2) That the farm was not subject to floods. The Court found that the liability of the land to floods had been misrepresented to the plaintiff to the extent of at least ten acres and that the plaintiff had acted on those representations. The allegation of misrepresentation as to the carrying capacity of the farm was not proved. The question arose as to the proper measure of damages. The case is reported on this point only.

West for plaintiff.
Haigh for defendants.

BLAIR, J., said that upon the question of damages the plaintiff framed his case in the following way. He purchased the farm, stock included, as a going concern at the price (including mortgages) of £2,900. He called a number of witnesses, valuers and farmers, who said that the value of the stock and farm was so much less. Plaintiff himself claimed £800 damages and that claim was made on the basis of misrepresentation as to carrying capacity as well as to liability to flooding. Chestnut himself valued the farm at £1,860 and stock at £240, total £2,100. He had the right to repudiate the purchase as induced by fraud, but had elected to retain the property and sue for damages. The witnesses called for the plaintiff based their valuation of the property on its current market value. They did not base their values upon what Chestnut paid with a proportionate reduction for the depreciation due to the misrepresentation. It seemed to His Honour that that was the proper basis. If A bought 100 tons of potatoes at £10 per ton on the representation that the potatoes were all high grade Oamaru potatoes and the vendor had fraudulently included 20 tons of rubbish, the basis of damages, if the purchaser elected to retain the whole

100 tons, would be to reduce the price the purchaser paid by an allowance for 20 tons of worthless rubbish charged at £10 per ton, in all the sum of £200. It might happen that the purchaser's price for the good potatoes was too high according to the then market price. It seemed to His Honour that he could not, however, in such a case be heard to say that the real market price at the time he bought was only £9 per ton and that his damages instead of being £200 were £280. He could repudiate the contract as induced by fraud, but if he elected to accept the contract and claim damages for fraud then his damages must be limited to the damages due to the fraud itself and not damages due to the fact that he made a bad bargain in relation to that part of the contract the benefit of which he elected to retain. It appeared to His Honour that to do that would in effect be reframing the whole contract between the parties, when the action was one for damages in deceit such deceit being limited to a portion of the contract and severable from the rest of the contract. To apply a test to the present contract, the plaintiff bought stock along with the farm, and amongst the stock was a pedigree Jersey bull. If in the calculations of the price of the farm and stock that bull had been included at say £50 and it subsequently were established that the bull was fraudulently represented as pedigreed whereas in truth and fact it was not: in an action for damages for that misrepresentation would it be competent for the plaintiff to do as he had done in the present case, namely to call witnesses to prove that the whole farm and stock was worth less than he had paid for it and assess his damages on that basis rather than on the difference in value of a pedigree bull as compared with the bull which was the sole item of deceit.

His Honour understood Mr. Haigh for the defendant, on the authority of **Smith v. McKenzie,** 1 N.Z.L.R. C.A. 1, 17, to admit that if any of the plaintiff's allegations of fraud were established then the measure of damages was the difference between what Chestnut paid and the fair value of the property as at September, 1927, *the date of purchase. Mr. West claimed that if he estab*lished deceit as to one of his allegations then the plaintiff was entitled to succeed for the whole difference in value according to the valuer's estimates, and that the damages were not referable to the particular item of deceit established, nor was the basis of value to be proportionable to the price paid. His Honour after referring to the judgment of Williams, J., at pp. 17 and 19 and to the judgment of the Court of Appeal at p. 33, in **Smith v. McKenzie** (*cit. sup,*) said that in that case there was the greatest difficulty in fixing a specific sum for a representation not having a definable effect on the price. In the present case the area actually subject to flood and the extent of the flooding and its effect on the value of the land could be more or less defined. Mr. West cited **20 Halsbury's Laws of England,** 734, 735, as justifying his contention that in the present case the damages must be arrived at by taking the estimate of market value from what was agreed by Chestnut to be paid. The principle of all cases on damages for misrepresentation was to arrive at the representee's "net loss arising from the representee's alteration of position." His Honour did not see how in the present case one could arrive at a fair basis of damage, confined as it was to the flooding, by endeavouring to reconcile divergent views as to the market value of the farm, and having collated all that data use it to ascertain what Chestnut should have paid had he known that 15 acres of the property were subject to flood. On the facts as His Honour had found, Chestnut's damages were due to 10 of those 15 acres being subject to flood when he bought them in the belief that they were not. The only satisfactory way His Honour could see of arriving at "the increase which the representations actually and truly made to his bidding" was to ascertain from the evidence what difference the flooding made in the prices. The article in **Halsbury** was by Spencer Bower and he at pp. 218 and 219 of his book on **Actionable Misrepresentation** repeated what appeared in **Halsbury.** Spencer Bower at page 218 of his book prefaced the chapter on damages by stating that the governing principle was that the sum to be awarded must represent neither more nor less than the total amount of the moneys irrevocably paid away and the value of any property irrevocably parted with by the representee in consequence of having altered his position in the manner proved. The damages in the present case crystallised themselves round the flooding of 10 acres of land, and His Honour assessed damages on that basis free from differences of opinion by witnesses as to the value of the stock and the farm generally. Assessing damages on that basis the position was that Chestnut must have expected about 5 acres to be flooded, but actually about 15 acres were subject to flood, so that to the extent of 10 acres there was flooding to be compensated for. The evidence satisfied His Honour that the misrepresentation affected an area of about 10 acres covered with water for a period of 24 hours and sometimes longer, about 6 times a year. The witnesses dealing with the flood damage said that flooding left the grass dirty until cleaned by rain and it would take some time for the ground which had been submerged with water to become dry enough not to become unduly "pugged" by stock. Flooding took place normally at a time when there was not an excess of feed on the farm. The best basis that His Honour could adopt for compensation to the plaintiff for that handicap on his farming operations was to endeavour to assess the reduction of value at per acre. A witness for the defendant, Osmond, a valuer, was in cross-examination questioned as to the difference in value if the farm were not subject to floods and he said there would be a *difference of £5 per acre. That on the 33 acres would be £165,* but he was referring to the whole property being free from flood. If his estimate were accepted a reduction would have to be made for that portion which was known to be subject to flood. Another valuer, Hemphill, said that he made a reduc*tion of £7 per acre for the ten acres subject to flood. That no* doubt was low, because the liability to flooding of a greater area than represented affected to some extent the whole farm's working. His Honour did not think he should in favour of the defendant weigh the damages with nice scales. He would fix the damages at £150 which was more than double Hemphill's figure and only a slight reduction on the figure given by Osmond for the whole farm being free from flood. A witness for the plaintiff—Mr. Bell—made a difference of £15 an acre for land subject to flood.

Judgment for plaintiff.

Solicitors for plaintiff: **Jackson, Russell, Tunks and West,** Auckland.

Solicitors for defendant: **Russell, McVeagh, Bagnall and Macky,** Auckland.

Smith, J. September 5, 6; November 26, 1929.
Masterton.

OTARAIA DAIRY CO. LTD. v. FLYNN.

Company—Articles—Contract—Restraint of Trade—Co-operative Dairy Company—Articles purporting to Require Shareholder to Supply Milk to Company from One Cow for Every Share Held—Obligation to Supply Determinable Only on Sale of Land, Termination or Sale of Lease, or on Shareholder Satisfying Directors of Inability to Supply and on Shareholder Paying Double the Value of Each Share Held—Obligation Unlimited in Point of Space—Quaere as to Severability of Condition as to Payment of Double Value of Shares—Remaining Conditions Invalid as Unreasonable Restraint of Trade Even if Such Condition Severable—Articles *ultra vires*—Dairy Industry Amendment Act, 1924, S. 2.

Action to recover £415 15s. 7d. the balance alleged to be due on 455 suppliers' shares of £1 each of which the defendant was registered as the holder in the share register of the plaintiff company. In 1923 the defendant and his father decided to engage in dairy-farming and they entered into a deed of partnership for that purpose, dated 1st August, 1923, for a period of five years from that date. The defendant agreed with the plaintiff company (on what date does not appear in the judgment) to supply his milk to it, his obligation under this arrangement being limited to a period of five years. On 16th July, 1923, shortly before the partnership commenced, the directors of the company allotted 30 suppliers' shares to the defendant. At the end of the defendant's first milking season, viz., 8th August, 1924, the directors allotted to him 425 additional shares, being the number of shares in proportion to butter-fat delivered which the directors might allot to him under the then existing provisions of Article 17 of the company's articles of association. The defendant continued to supply the company until 1st June, 1928, or thereabouts, and after that date supplied his milk elsewhere. On 10th October, 1928, the directors resolved that the defendant be required to pay the whole of the balance unpaid on his shares within three months and that the secretary to the company should make a demand on the defendant accordingly. Demand was duly made, the secretary stating that the resolution of the directors was authorised by Article 13 (a). The company sued to recover the amount claimed. The defendant counterclaimed for an order rectifying the register by the removal of his name and issued a third party notice to his father. The third party did not appear. The defendant submitted (1) that he was not a shareholder; (2) that the directors never made any call on the members of the company; (3) that the amount claimed was not claimed under any call made in accordance with the Articles; (4) that the claim was invalid as the defendant was not legally bound to supply milk

to the company; (5) that if any contract to supply existed that contract was in restraint of trade and invalid and unenforceable; (6) that Article 13 (a) constituted a penalty and was unenforceable. His Honour found on the facts that the defendant was a shareholder in the plaintiff company to the extent, in all, of 455 suppliers' shares. His Honour held, on a review of the Articles of the company, that no contract to supply milk on "a share per cow" basis, under Article 13 attached to the 425 shares allotted to the defendant on 8th August, 1924, these shares having been allotted on a butter-fat basis under Article 17. As to the 30 shares first allotted to the defendant His Honour assumed for the purposes of that part of his judgment which is reported below that an obligation to supply milk from one cow for every share allotted attached to them. Article 10 and 13 read as follows:—

"10. An application signed by or on behalf of any applicant for shares in the Company shall, if an allotment of shares be made thereon, be an acceptance of shares within the meaning of these Articles, and every person to whom such allotment shall be made shall be entered upon the register of shareholders and shall be liable for allotments and all calls made upon shares so allotted, and, if the shares be suppliers' shares, shall also be bound to supply milk to the Company from one cow for every such share so allotted."

"13. (a) Should any holder of suppliers' shares cease to supply one cow's milk for every share held by him in the Company, the directors may call upon him immediately upon such default or at any time thereafter to pay the whole of the balance due by him on such shares to the Company within three months, without releasing such shareholder from his liability for breach of contract to supply milk from cows in the proportion aforesaid.

"(b) Any supplier may, with the leave of the Directors, retire from the Company, on good and sufficient reason being shown to the Directors, and the Company may repurchase his shares at the discretion of the Directors.

"(c) A fine of 2s. 6d. per share in respect of which no milk is supplied per month shall be levied at the end of each season, at the discretion of the Directors, against all holders of suppliers' shares who shall fail to supply milk to the Company from cows in the proportion of one cow to each such share so held by such shareholder between the months of August and April, both inclusive.

"(d) It shall be competent for any supplier or his representatives in case of death to determine his contract with the Company on a sale of the land on which his cattle are running, or on the termination or sale of the lease of the land on which his cattle are running, in case he shall hold the same on lease, or on his or their satisfying the Directors that he is or they are otherwise unable to continue to supply, upon payment to the Company of the sum of 40s. per share for every suppliers' share held by such supplier. For the purpose of ascertaining the number of such shares held by such supplier the entry or entries in the share register of the Company shall be *prima facie* evidence thereof for the purposes of this and the preceding subsection of this Article.

"(e) The Directors may, in their absolute discretion, enforce and apply the whole or any subsection or subsections of this Article."

The case is reported only upon the question of the validity of the contract purported to be created by the above-quoted Article.

Biss for plaintiff.
Macassey and Lawson for defendant.

SMITH, J., said it was clear that subclauses (a) and (c) of Article 13 must be construed to refer only to shares allotted on the basis of one share per cow. Subclause (a), under which the directors had acted in bringing the present action, could refer then only to the defendant's 30 suppliers' shares. The most the company could recover would be the balance payable on those shares; and for that purpose His Honour assumed that the word "due" in subclause (a) should be construed as "payable." In His Honour's opinion, however, the company could recover nothing under Article 13 (a). The clause operated only "upon default" under the contract to supply milk which the Articles purported to attach to the shares. It contemplated that the balance payable on the shares might be called up, and that a liability for breach of contract would remain. But if there were no valid and enforceable contract, there could, in His Honour's opinion, be no default, and Article 13 (a) could not apply. His Honour thought that the alleged contract was invalid and unenforceable because it was in unreasonable restraint of trade. That question was to be determined apart from the Dairy Industry Amendment Act, 1924. Section 2 (3) of that Act gave a limited protection and effect to provisions in then existing Articles of Association, purporting to oblige shareholders to supply milk, cream or other dairy produce, to a company. But the last clause of Section 2 (3) could only mean that the force of the Section was limited to a period of 6 months ensuing after the passing of the Act. The object was no doubt to enable dairy companies to put their contracts with suppliers in order, should that be necessary. Section 2 (3) had no force in the action in validating the obligation to supply milk which Articles 10 and 12 purported to impose. The validity of that obligation must, therefore, be determined irrespective of the provisions of the subsection.

The contract which His Honour assumed in favour of the plaintiff company was to supply milk to the company from one cow for every share allotted, on "a share per cow" basis, i.e., from 30 cows. No limit of time or space was fixed by Articles 10 or 12. Article 13 (d) permitted a supplier, or his representatives in case of death, to determine the contract, (1) on a sale of the land on which his cattle were running, or (2) on the termination or sale of the lease of the land on which his cattle were running, if he held his land on lease, or (3) on his or their satisfying the directors that he was or they were otherwise unable to continue to supply. But the power so given was made dependent upon payment to the company of the sum of 40s. per share for every suppliers' share held by such supplier. The shares to which such a contract with such a power of determination was attached, might be transferred subject to the power of the directors under Article 36 (c) to refuse to register any transfer "where the directors in their absolute discretion consider that the registration of such transfer would not be beneficial to the company for any reason or reasons whatsoever." The obligation to supply, though positive in form, had a restrictive effect. The milk from the 30 cows might not be supplied elsewhere. That was sufficient to permit the application of the doctrine of restraint of trade: **Shalfoon v. Cheddar Valley Co-operative Dairy Co. Ltd.,** (1924) N.Z.L.R. 561. Counsel for the plaintiff did not attempt to defend the restraint when backed by a penalty of 40s. per share, i.e., double the value of such share. But he submitted that that part of the restraint was severable from the rest, and when so severed, the rest of the restraint was reasonable. Even if such severance were possible, His Honour did not think that the restraint was reasonable. In His Honour's view, the restraint even then exceeded what was reasonably necessary for the protection of the plaintiff company. "In order to test that question—and no less test can be satisfactory—," said Lord Shaw in **McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.,** (1919) A.C. 548, 588, "it is necessary to assume that these rules may be put in force . . . . to the full extent and rigour of their terms." Upon that basis, the restraint was, in His Honour's opinion, unreasonable both in time and in space. (a) As to time—the power to determine the contract on satisfying the directors that the supplier or his representatives could not continue the supply confided too much discretion to the directors. It was a restriction of the same type as that placed on the transfer of the shares; and a restriction of that type was held to be a seriously invalidating circumstance in **McEllistrim's case,** (*cit. sup.*). Furthermore, the restriction in respect of supply in question was tinctured with an obvious bias. It contemplated that the supplier might be required to supply the plaintiff company with the milk of 30 cows so long as he was physically and financially able to do so. Under that provision, the directors might hold the supplier in thraldom. The only other power in the supplier to determine the contract depended upon the sale of the freehold or leasehold land upon which the supplier's cows were running. It seemed to His Honour unreasonable to say that a supplier who did not wish to sell his farm must continue to supply the plaintiff company with the milk of 30 cows, say for fifty years and more—indeed for his lifetime. He scarcely escaped the plaintiff company when he died, for his representatives were to continue the supply after his death. That must include his personal representatives. If the deceased's shares were specifically bequeathed, and the dairy farm specifically devised, to a son, it would appear to be open to the directors to refuse to register a transfer of the shares, and to hold the representatives to the obligation to supply the milk of 30 cows. If the directors agreed to the transfer of the shares, and the son did not desire to sell his inheritance, he would be tied to the plaintiff company by the contract attached to the shares for, say another fifty years—indeed for his lifetime—to supply the milk of 30 cows; and so *ad infinitum*. In either case, such a restriction, construed according to the rigour of its terms, was not merely unreasonable: it was absurd. (b) As to space—if the supplier did not wish to sell his farm near the factory, but wished to convert it to another type of farming, and if he bought another dairy farm, say in Taranaki, he would still be bound to supply the milk from 30 cows to the

factory near Martinborough. That restriction was, in His Honour's opinion, unreasonable: **Shalfoon v. Cheddar Valley Co-operative Dairy Co. Ltd.** (1924) N.Z.L.R. 561. The price of freedom of contract in respect of the supply of milk from cows to the extent of the shares allotted on "a share per cow" basis might well be the sale of the homestead on which the cattle were running, although the supplier had supplied for many years, and merely wished to change to another type of farming, a course which might then be both more profitable to him and more beneficial to the community. A sale might even be the price of a change from the supply of milk to the supply of cream. Reasonableness was a question of law to be determined in the special circumstances of each case: **Morris v. Saxelby,** (1916) 1 A.C. 688, 707. His Honour must assume that at some time all the shares in the company might be allotted on "a share per cow" basis. In the present case, the evidence for both the plaintiff and the defendant showed that a compulsory supply on the part of each shareholder for a period of from 5 to 10 years would be reasonably sufficient for the protection of the plaintiff company. His Honour did not feel called upon to determine precisely whether 5 years would be a reasonable period, although His Honour could not resist the impression that it was so regarded by some of the directors, at the time the defendant was induced to supply his milk to the company. In His Honour's opinion, then, even if the penalty of 40s. per share were severed from the other conditions of Article 13 (a), the remaining conditions were invalid and unenforceable as being in unreasonable restraint of trade, on the ground that they exceeded what was reasonably necessary for the protection of the plaintiff company, both in time and in space.

His Honour thought, too, that *ex facie*, neither the Memorandum nor the Articles of the plaintiff company purported to impose any obligation on the plaintiff company to take the milk of its suppliers. It might be that on the true construction of the Articles, such a mutual obligation was to be implied. On the other hand, the company might not in fact admit that its suppliers could compel it to take all the milk from their cows to the number of shares allotted on "a share per cow" basis. If there were no mutuality at all, His Honour thought that the restraint would be unreasonable. See **Victorian Onion Association Ltd. v. Finnigan,** (1922) V.L.R. 384.

His Honour concluded that the contract which the Articles purported to attach to the defendant's 30 shares was invalid and unenforceable. There could, therefore, be no default under that contract such as was contemplated by Article 13 (a), and the directors could not call up the balance "due" (or payable) on the shares, and if they did so, their action had no legal effect. The plaintiff must, therefore, fail in respect of its claim for the balance payable on the 30 shares. It was scarcely necessary to say that if, contrary to the view His Honour had adopted, the Articles did purport to attach the same obligation to supply milk to the 425 shares as His Honour had assumed they did to the 30 shares, the calling up of the moneys payable on those shares would be invalid on the same grounds.

The same result was reached by holding that a contract to supply milk could not be attached by Articles of Association to shares in a co-operative dairy company, so that the contract would derive its force solely from the Articles. In that respect, His Honour ought to follow the reasoning of Salmond, J., in **Shalfoon v. Cheddar Valley Co-operative Dairy Co. Ltd.,** (1924) N.Z.L.R. 577, and the decision of Ostler, J., in **Johnson v. Eltham Co-operative Dairy Co. Ltd.,** (1929) G.L.R. 372. If then, the only contract in the present case depended on the force of the Articles, such contract would be *ultra vires*, and no default could arise under it for the purposes of Article 13 (a). The Articles might, of course, be evidence of a contract to be proved *aliunde*. In that regard, the only contract which could be established against the defendant would be a contract to supply for 5 years, and he completed a supply for that period some 4 months before the directors purported to call up the balance of his shares. No default, therefore, arose, and the calling up was invalid. The position, then, was that the defendant was the holder of 455 suppliers' shares in the capital of the company, in respect of which he was under no binding obligation to supply milk to the company. See per Hosking, J., in **Macdonald v. Normanby Co-operative Dairy Co. Ltd.,** (1923) N.Z.L.R. 122, 129. As a shareholder, the defendant retained his shares, with voting rights, and he was entitled to any interest or dividends payable under or pursuant to the Articles of the company, and also to participate in the assets on a winding-up. On the other hand, he was liable for calls when duly made in accordance with the Articles of Association of the company, but the company would not be able to deduct the calls from the advances for milk or from the monthly milk payments (Articles 22 and 23), for there would be none. In the present case, the company had not made any calls on the share capital pursuant to Article 22, and the defendant was not liable for the amount for which he was sued.

Judgment for defendant on claim, and for the plaintiff on the counterclaim.

Solicitors for plaintiff: **Gawith, Biss and Wilson,** Martinborough.

Solicitors for defendant: **Card and Lawson,** Featherston.

Kennedy, J. October 17; November 30, 1929. Dunedin.

IN RE PEARCE: BOVETT v. PEARCE.

Will—Condition—Condition Subsequent in General Restraint of Marriage—Void When Annexed to Gift of Personalty—Void When Annexed to Devise of Realty Where Intention of Testator is to Discourage Marriage and Not Merely to Make Provision Until Marriage—*Semble* Void Even if Intention is Merely to Make Provision Until Marriage and Not to Discourage Marriage.

Originating summons for the interpretation of the will of T. J. Pearce, deceased. By his will the testator provided for a specific devise to his brother, R. G. Pearce and then gave, devised and bequeathed to his sister, R. C. T. Pearce certain real estate and all his household furniture, plate, linen, china and personal household effects. The testator gave, devised and bequeathed the residue of his estate after payment thereout of his debts and funeral and testamentary expenses to his said brother R. G. Pearce and his said sister R. C. T. Pearce in equal shares as tenants in common. The will then provided as follows: "I declare that if my said sister Rebecca Catherine Tilrey Pearce shall marry at any time after my death the gifts devises and bequests to her aforesaid shall divest and she shall no longer have any estate or interest in the said property which shall go absolutely to my brother Richard George Pearce." At the date of the death of the testator, R. G. Pearce was married and lived on the premises specifically devised to him, while R. C. T. Pearce was unmarried and had resided for four years with the testator on the land specifically devised to her. She contemplated marriage and the question arising for determination was whether the condition in the will as to her marriage was null and void and of no effect.

Anderson for trustees.
Hay for R. G. Pearce.
Lloyd for R. C. T. Pearce.

KENNEDY, J., said that in his opinion the condition, which purported on her marriage to divest the sister of all interest in the estate of the testator, was void and of no effect and the original gifts stood. R. C. T. Pearce might, accordingly, in His Honour's opinion, marry without forfeiting her interest in the estate of her deceased brother. The gifts to the sister under the will were gifts of personalty, of realty, and of what might be both personalty and realty. The question, then, arose for determination, what was the effect of a condition subsequent in general restraint of marriage annexed respectively to a gift of personalty, to a gift of realty and to a gift of what might be both personalty and realty.

The bequest to the sister of household furniture plate linen china and personal household effects, might first be considered. It could not be said to appear, upon the true construction of the will, that the real intention of the testator was to benefit the brother in whose favour the legacy was limited over, or to provide maintenance for the sister until her marriage, rather than to compel the celibacy of the sister. It had long been clear that a condition in general restraint of marriage annexed to a gift of personal estate was *prima facie* void: **Morley v. Rennoldson,** 2 Ha. 570; **In re Bellamy: Pickard v. Holroyd,** 48 L.T. 212. The gift of personalty to R. C. T. Pearce accordingly would not be liable to be divested by her subsequent marriage.

There was not the same agreement amongst text writers as to the validity of a condition in general restraint of marriage annexed to a gift of realty. In **Jarman on Wills,** 6th Edn., 1539, it was said: "Even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision) that unqualified restrictions on marriage are void, on the grounds of public policy." The contrary opinion was expressed in **Theobald on Wills,** 8th Edn., 703, where

it was said: "A condition subsequent in restraint of marriage, where the estates are for life or in fee, is, it seems, valid as regards realty." It was necessary to consider the authorities in support of and against the proposition that a condition subsequent, in general restraint of marriage, annexed to a gift of realty was void. They would be found conveniently collected in **Law Quarterly Review,** vol. XII, p. 36, and in **Jarman on Wills,** 6th Edn., 1539 and 1540, note (e). His Honour referred to and discussed **Fry v. Porter,** 1 Mod. 300; **Shepp. Touch.** 132; **Harvey V. Aston,** Com. 726; **Low v. Peers,** Wilm. 364; **Keily v. Monck,** 3 Ridg. P.C. 205, 260; **Perrin v. Lyon,** 9 East 170; **Cooke v. Turner,** 15 M. & W.727; and **Egerton v. Brownlow,** 4 H.L. C.1, 125. All those authorities, as the learned editor of **Jarman on Wills,** 6th Edn., said, either expressly stated or impliedly assumed that a condition in general restraint of marriage was illegal by the rules of common law from which it followed that such a condition could not be annexed to a gift of real estate. His Honour also referred to and discussed **Jenner v. Turner,** 16 Ch.D. 188; **Allen v. Jackson,** 1 Ch.D. 399; **Earl of Arundel's Case,** 3 Dyer 342; **Bellairs v. Bellairs,** L.R. 18 Eq. 510; **Jones v. Jones,** 1 Q.B.D. 279; and **In re Hewett: Eldridge v. Iles,** (1918) 1 Ch. 458. The great weight of authority was, in His Honour's opinion, in favour of the view that a condition in general restraint of marriage was void and that such a condition subsequent, annexed to a gift of realty, was void and of no effect and the original gift of realty stood: **Egerton v. Brownlow** (*cit. sup.*). But even if such a condition subsequent were valid if an intention were shown, not of discouraging marriage and of encouraging celibacy, but of making a provision until marriage, then, upon no sound principle of construction, could such an intention be properly inferred from the present will. The Court could infer such an intention only by attributing to the testator motives which were not expressed in his will. The specific devise of land to R. C. T. Pearce, therefore, stood and the provision in the will, that purported to divest it on her marriage, was of no force or effect.

The gift of residue, which might consist of realty or of personalty or of both to R. C. T. Pearce was, it followed, likewise unaffected by her marriage.

Solicitors for plaintiffs: **Brodrick and Parcell,** Cromwell.
Solicitors for Rebecca C. T. Pearce: **Callan and Galloway,** Dunedin.
Solicitors for R. G. Pearce: **W. G. Hay,** Dunedin.

Court of Arbitration.

Frazer, J. November 8, 1929. Wellington.

ARCHIBALD v. UNION STEAMSHIP CO. OF N.Z. LTD.

Workers' Compensation—Death by Accident—Worker Found Crushed Between Two Railway Trucks Close to Place Where Working—Worker Seen at His Work Very Shortly Before Accident—No Evidence as to Reason for Worker's Going Between Trucks—Presumption of Continuance in Course of Employment.

Action by a widow for compensation in respect of the death of her husband, a waterside worker, aged 78, who was killed by accident on the Railway Wharf, Wellington, on August 15th, 1929. The defendant Company's steamship, "Kaimai," was moored on the western side of the wharf, and on the opposite side was another of the defendant company's vessels, the "Komata." Coal was being discharged from each, that from the "Kaimai" being lifted into trucks which were pushed along an overhead trolley-way and tipped into lorries below. On either side of the wharf were metal crane-ways, and a width of 30 feet intervened between the inner ways. Within this intervening space deceased was employed to sweep up the coal droppings from the baskets as they were tipped from the overhead trolley-way, and shovel them into the lorries. On either side and between the crane-ways was a railway truck extending the full length of the wharf, and on each of these was a train of waggons standing. A locomotive, pushing a number of empty waggons, backed down the wharf on the railway track on the eastern side, the object being to connect with the several waggons standing there, between two of which deceased was found fatally injured in close proximity to the locality of his employment. It was admittedly no part of his duty to go between the waggons, but there was evidence that workers frequently went there at night to urinate, and, as the night was windy, it was suggested that he might well have gone between the waggons to pick up his hat or to light his pipe. Apparently there was no person who witnessed the accident.

O'Regan for plaintiff.
Levi and Virtue for defendant.

FRAZER, J. (orally) delivering the judgment of the Court said that the deceased was employed to sweep up coal droppings from the deck of the wharf and shovel them back into lorries as they were being filled. No coal would fall beyond the crane-ways on either side. That did not necessarily conclude the matter, however, because the Court had evidence that the deceased was certainly seen at his work very shortly before the accident. As nobody witnessed the accident, it was impossible to say definitely why he got between the railway trucks, but there was a presumption that he continued in the course of his employment. **Astley v. R. Evans and Co. Ltd.,** (1911) A.C. 674. That case established the rule that where the last acts before the death of a worker were known to be consistent with the continuance of employment, it was for the defendant to prove the cessation thereof. The presumption did not continue in every possible circumstance, however, and hence where a deceased worker, a shackler in a coal-mine at the pit bottom, was found dead under a cage in a part of the mine where he had no right to be, and there was no evidence how he got there, it was held that to be within the Act the deceased must have been acting consistently with the continuance of his employment a reasonable time before his body was discovered: **Prosser v. Graham Navigation Colleries,** 14 B.W.C.C. 42. In the present case there was no doubt that the deceased was seen very shortly before his death in a position consistent with the continuance of his employment. The Court's greatest difficulty was presented by **Highley v. Lancashire and Yorkshire Railway Co.,** (1917) A.C. 352. There, the deceased met his death through being run over while crawling under a train, but in that case the train of waggons was "alive" and the immediate cause of the accident was the sudden starting of the locomotive. Moreover, there were several routes by which the deceased in **Highley's case** might have got to the other side of the train. In the present case the waggons were unconnected with the locomotive when the deceased got between them, and his death was caused by a locomotive unexpectedly pushing a rake of waggons against the standing waggons and putting them in motion. There were several possible explanations for the deceased getting into the position in which he was found, and the presumption that he continued in the course of his employment took the case beyond the region of conjecture. It would be different had he walked a considerable distance to get into the fatal position. The evidence made it clear that he was killed in very close proximity to the locality of his employment.

Judgment for plaintiff for £1,000 compensation.

Solicitor for plaintiff: **P. J. O'Regan,** Wellington.
Solicitor for defendant: **Wilford, Levi and Jackson,** Wellington.

The Prisoner's Name.

A man who turned out, according to police records, to be Eddie Guerin, who escaped from Devil's Island while undergoing a life sentence passed upon him by a French Court, in 1901, appeared at the County of London Sessions recently, to stand trial on a charge of larceny. A brief announcement had appeared in at least one paper that a man of that name had been arrested. When next day he appeared in the dock in the police court he gave his name as Edwin Edwards admitting that that was not his whole name. Counsel for the defence then urged that his full name should not be published because it might prejudice his trial. The learned Chairman of the London Sessions approved, saying: "I think your view is quite right. It would have been unfair if the jury had known his name."

Drunkenness.

Pathological Conditions Akin to Alcoholic Intoxication.

By T. E. MAUNSELL, S.M.

The vast increase in motor vehicular traffic with its attendant rapid transportation has brought in its train in this country, as well as in all civilised countries throughout the world, a correspondingly great increase in collisions on the highways. An unduly large proportion of these collisions and other motor accidents are alleged, rightly or wrongly, to be due to excessive indulgence in alcoholic liquor. In the great majority of cases the allegation has been held to be proved—at least when the defendant has been apprehended. Many of these accidents result in personal injuries, and not infrequently the member injured is the head. The question under consideration in this article is as to whether there is or is not a grave danger that a person suffering from head injuries may not so act as to be mistakenly believed to be intoxicated.

Some few months ago one F. was prosecuted in Wellington for being in charge of a motor vehicle while in a state of intoxication. The charge was a sequel to F. having run into a stationary motor car with his own car. The evidence of the owner of the stationary car, in so far as it is relevant to this article, was that at about 9.50 p.m. he parked his car on Marine Parade, Island Bay, on the left-hand side of the street, hard against the footpath, opposite a house which he entered. His car's head and tail lights were alight. Hearing a crash he came out and saw that his car had been run into by another car which was making off down the road. He hailed another passing car, the driver of which was Dr. Slater, who, at his request, took him in pursuit of the offender. A short distance down the road they found a stationary car in a damaged condition with no lights. F. was in the front seat without a hat. When he was asked how the accident happened, F. asked what had happened. He then asked how the other owner hit him and suggested that it was about "fifty-fifty." The car owner was of opinion that F. was under the influence of liquor because he could not walk properly, he was staggering and tottery, and was drowsy. Under cross-examination he stated that F. had a mark on his forehead and the glass of the windscreen was cracked. Constable Baker deposed that when he arrived on the scene F. was in the back seat, and when asked to account for the accident had said that the other car ran into him. To further questions F. refused to reply. At the constable's request F. got out of the car and in walking round he supported himself by holding the sides of the car. In stating that he was satisfied that F. was intoxicated the constable mentioned that F.'s breath smelt of spirits, he appeared by the look of his eyes to have had liquor, he was thick of speech, and could not answer questions coherently. The constable then conducted F. to the police station, stating that his gait was "none too steady." At the station, at the request of F., Dr. Slater was called to test him for drunkenness. Dr. Slater arrived at 11 p.m. and proceeded with the tests, the results of which the constable described, and all of which indicated intoxication, but which were more fully set out by Dr. Slater in his evidence. Under cross-examination the constable stated that he noticed some blood on F.'s forehead. Dr. Slater corroborated the evidence of the car-owner and was of opinion at the scene of the accident that F. was intoxicated as he was incoherent and dazed. When called to the police station he explained to F. that he had come to test him for drunkenness, but F. did not appear to understand. Dr. Slater gave the following reasons why he was satisfied that F. was intoxicated: (a) his breath smelt of alcohol; (b) he was morose and stupid in answering questions; (c) he refused at times to answer; (d) he was irritable; (e) his speech was slurred; (f) he had no idea of the time of the accident saying that it happened at 4 p.m. two days ago; (g) his face was hot and flushed; (h) his pupils were moderately and equally dilated; (i) he had a full bounding pulse; (j) his eyelids were inflamed; (k) he was uncertain and staggering in his gait. There were signs of minor head injuries, but he was satisfied that F.'s condition was due to over-indulgence in alcohol. If the trouble were due to shock he would expect the pulse to be feeble and rapid; he would be pale with a sighing respiration, and his skin would be cold. Under cross-examination Dr. Slater said that there was a resemblance at times between a drunken man and a man suffering from head injury; but it was unlikely that the symptoms that he had described would all be present in combination in the case of a head injury. A blow on the head would accentuate intoxication. Constable Strawbridge, who went to the scene of the collision, gave evidence that he noticed F. was unsteady on his feet, he smelt of alcohol, and could not account for the accident, stating that the other car ran into him. He was so muddled with drink that it was hopeless to get any explanation from him. He was staggering and certainly intoxicated. This was the evidence for the prosecution, and it appeared to be absolutely overwhelming.

The defendant in evidence explained his movements during the night. He had consumed some alcoholic liquor, but in such moderate quantities that it could not produce even slight intoxication with a man of normal health. While proceeding along Marine Parade he was temporarily blinded by dazzling headlights approaching him. Suddenly he found himself practically on top of the stationary car and promptly pushed both feet. The next thing he could remember was standing in front of his car in acute physical distress. He had some recollection of seeing Constable Baker. He did not completely regain his senses until he was in the Central Police Station. His neck was very stiff, he had a bruise on his head, and his legs were sore. Dr. Luke stated that he attended F. next morning. He had a large contusion on the forehead, the result of a blow, which was severe enough to cause slight concussion. A photograph of the car was produced, which showed distinctly that to the left of the steering wheel the windshield had four converging cracks, and at the point of convergence there was a round blurred mark which might have been caused by the skin of a man's forehead. The Court's attention was called to F.'s natural florid complexion. Counsel for F. mentioned to Dr. Luke all the symptoms detailed by Dr. Slater and asked whether they could be due to mild concussion, and the witness replied with a positive affirmative, except in regard to the smell of the breath. He was of opinion that, in view of the nature of the wound when he saw it, it would not be possible to say whether F.'s condition was due to mild concussion or

intoxication. Dr. Giesen corroborated this evidence with perhaps more emphasis. "There is no means known to the medical profession," he stated, "whereby mild concussion can be distinguished from intoxication." Excessive consumption of alcohol confuses the brain and a blow producing concussion does precisely the same.

The writer has had the opportunity of perusing an article in the *Medical Annual*, of 1928, by a Dr. Prentice, B.A., M.D., D.P.H., which strikingly supports the medical evidence for the defence. Dr. Prentice refers to the fact that the British Medical Association set up a Committee in 1925 to consider and report on the present tests for drunkenness with recommendations as to modification or improvement. The Committee consisted of well-known general practitioners, police surgeons, magistrates, scientists and others. Having arrived at an approved definition of the word "drunk" they concluded that the principles underlying all tests might be arranged in three groups, one of which is whether the state is due wholly or partially to a pathological condition, which causes symptoms similar to those of alcoholic intoxication. The report states that there is no single symptom due to the consumption of alcoholic liquor which may not be a sign of some other pathological condition. It then enumerates fifteen of such conditions, one of which is the result of head injury and another sudden nervous shock. Dr. Priestly says that the report leaves things "as you were." "Of all medico-legal subjects," he says, "testing for drunkenness is one of the most difficult, being beset with well known pitfalls on all sides. The day is long past of the 'chalked line' or the saying of such words as 'truly rural.' These simple tests were in connection with drunkenness in its infancy." After referring to the fact that the Committee's report suggests nothing fresh he says that each case must be judged on its merits after a careful clinical inspection and after taking into consideration all the evidence. In this way the final decision as to drunkenness may become one of the most difficult duties of a medical practitioner. A typical Yankee scheme has been propounded in America, viz., to collect the expired air of suspects in a bag and analyse it as to the amount of alcohol present! "It must be admitted," says Dr. Priestly, "that it is difficult to differentiate between 'drunks' and other pathological conditions. Injustice has been done in the past and will be repeated in the future unless the necessary care is taken by the medical practitioner. The day for extremist views has gone by and each case must be judged on its individual merits." He laconically observes: "The lawyers again come in financially." Referring specially to drunken motorists' tests he says that they are in the nature of a specialism of the main subject. The British Medical Association at its February meeting in 1927 shelved the question, and Dr. Priestly says wisely so "having regard to all available facts and medical (and other expert) opinions and views upon what is a very wide and not yet properly understood subject." His concluding words show that he is strongly against even moderate consumption of alcohol by motorists, though he says it has to be acknowledged that some drivers drive better after they have had a nerve steadier.

Dr. Luke referred, in the case mentioned, to the fact that men arrested for drunkenness have, in fact, been suffering purely from injuries to the skull, from which they have died in the cell. This fact was commented on by Dr. Taylor, the editor of Taylor's *Medical Jurisprudence* over fifty years ago.

The evidence in F's case indicates that a medical practitioner may perhaps fail to estimate the extent of a recent injury to the head, in which case a police constable would be more readily mistaken. It would therefore, appear to be a very desirable precaution with police officers, upon making arrests for drunkenness, to make an examination for head injuries not only upon arrest, but periodically during detention if return to normality appears to be protracted.

In the case before me the charge of being in charge of a motor car while intoxicated was withdrawn upon the defendant pleading guilty to negligent driving.

Annual Legal Conference.

Preliminary Arrangements.

Arrangements are now well in hand for the forthcoming Legal Conference at Auckland, in April. The dates originally chosen were the 23rd, 24th, and 25th of that month. It was pointed out, however, that the last of these dates fell on Anzac Day, and accordingly it has been decided to make an alteration and to hold the Conference on the 22nd, 23rd, and 24th of April.

A strong Executive Committee has been set up, and is receiving excellent support from practitioners in and around Auckland. It is hoped that it will be possible to maintain the high standard which was set by Christchurch and by Wellington.

The joint secretaries are Professor R. M. Algie and Mr. A. M. Goulding, whose address is C/o Messrs. Goulding & Rennie, Campbell's Building, High Street, Auckland. Practitioners throughout the Dominion are invited to communicate with the secretaries upon any question affecting the Conference as to which they would like information or assistance.

District Societies have been notified of the dates for the Conference, and it is hoped that those who desire to lay before the Conference any remits for discussion, will submit them at an early date.

Practitioners who contemplate attending the Conference and who seek information on the important matter of accommodation, would be well advised to communicate with the secretaries at an early date, as the question is a difficult one at Easter-time in Auckland.

"The profession stands nowadays—not as it used to, between the subject and the Bench—but between the subject and the executive and administrative power, which now opposes a danger to individual liberty through a stream of enactments and orders. The profession must stand together if it is to gain victory in this conflict."

—Mr. R. M. Montgomery, K.C.

London Letter.

Temple, London,
6th November, 1929.

My dear N.Z.,

The Judicial Committee of the Privy Council still sits in three Divisions, but all of them seem to be pre-occupied now with Indian Appeals. I had to settle an Appellant's Case with Dunne, K.C., last week, who is a recognised leader in the Indian Appeals and who certainly impressed me more than favourably with his ability and industry. In parenthesis, is there higher appreciation a man can earn at the Bar, than a Junior's unqualified praise of a Leader? There is certainly no more formidable critic than is a Junior of a Leader, as I think you must agree. However that may be, Dunne told us that the sitting in three divisions was causing the most appalling inconvenience from a professional point of view, in that it necessitated the returning of countless briefs since cases now so frequently clash. As you well know, the retaining of counsel for Privy Council Appeals is almost always, as it works out, done a year before the hearing, so that we have not only very valuable time to become intimate with the case but also the occasion to get closely in touch with the views at least of our whole "side." Thus, whereas the returning of briefs at the last moment is always an invidious and tiresome affair, since the same knowledge and contact cannot possibly be achieved by the substitute, it is doubly and trebly tiresome in this instance; and apparently it is being so felt. There is the particularly unfortunate, and by no means infrequent, instance where the Far End of the side has made at the outset of matters an occasion to be in England and to get into complete sympathy with the Near End . . . . and the whole of that expedient may now prove fruitless and wasted, inasmuch as the Near End has to be changed at the last! It is an uncommon good wind that blows no one any ill! I know of no other matter of technical importance, of which I am under duty to inform you; let us turn to the gossip and enjoy ourselves in remarkably good company.

First, Merriman has gone to Palestine to appear for the Jewish community at, it is authoritatively rumoured, 20,000 guineas on his brief (paid up before he started) and 100 guineas a day refresher. What dint he will make on the tribunal, I do not know. Sir Walter Shaw, the President of it, I know well. He was Chief Justice in the Straits Settlements during the short period I was there: I was much before him as Public Prosecutor as a start and as Solicitor-General, appearing for a government with which the Courts were then firmly determined to quarrel all day and every day (for reasons I know not, but suspect to have been purely personal), and having much to do with Sir Walter in all branches of law—in Chancery, especially as appearing for the Attorney-General in Charity matters which were well worth the fighting out there, in Common Law, and in Criminal. I do not think I ever moved him an inch from the way he intended to go himself. I do not think any one else ever did. I do not think any one ever will. He is as, shall I say "firm" and avoid the other word, as they are made. My own view is that all participants in the controversy might just as well have saved their money and left the advocate at home . . . . though let me add I know of no man more set upon justice and more permanently aloof from any approach from the unjust than Sir Walter. Ascetic of appearance, he is ascetic of mind in this aspect: if I may speak a paradox, I know of many men with greater judicial qualities but I know of few men more qualified, as men, to be judge in this or any other wide issue. Whether or not his colleagues matter, I am sure I do not know.

Next, to "*The New Despotism.*" If the Press was the final judge in this matter, between our Lord Justice and me, then indeed it would be dirt I should now be eating. The book has been accepted with an unanimity, an outburst, a positive uproar of approval, in every paper you can think of. Hardly a one thinks there is any point in the crabbed criticism that a Lord Chief Justice ought not to be writing books at all, least of all books about other sides of the Permanent Service. A few, here and there, turn aside to comment upon the criticism for a moment, but only to observe that the critic is a worm and possibly not a disinterested worm . . . . I therefore, beg pardon. I thought it was rather a good point. If I have a right of reply and am expected to make use of it, then I have only this to say: it is of course the fact that the Lord Chief Justice is himself a pressman by origin, has never let diminish the happy association between himself and other pressmen, and was, in fact, dining with them, speaking kind things of them just about the time they were called upon to say what they thought about him . . . . And that, no doubt, loses me my case finally; your Lordships find for the Lord Chief Justice and order me to pay all the costs and the papers to be sent to the Director of Public Prosecutions, to see for how long I can be got rid of. Let me say, none the less, that it's a good book and, having read it, I'm thinking of buying a copy.

Last to India, itself. The so-called scandal developed its climax on Sunday last, November 3, and yesterday, November 5, the anti-climax began in the House of Lords, as it now transpires. However, at 1.35 p.m. yesterday it was not yet known what was going to happen, and the enthusiastic, among the Fools, predicted a terrible to-do and most evil consequences as to the unwarrantable insult, made by Lord Irwin's pronouncement and the Government's attitude towards it, to the Simon Commission. Affairs standing in this position, I and mine resorted (in the total number of three) to the Inner Temple Hall, where lunch was still to be had but the lunchers were thinning out. Arrived Sir John Simon himself; he sits down to lunch, at our otherwise empty table, with the three of us and told us much about it. The short and long of his expressions was regret that the fuss should ever be made and aired in Parliament. In a thousand years, he said, it might be that no one would know and no one would be able to find out who or what Baldwin or Benn ever was. But it would be known where India was and is and what its three hundred millions of population matter! I think that expressed the view of all of us. The truth is that Sir John Simon is, on the whole, the greatest man of our day of the Bar, and he is, moreover, the only, wholly, intellectually honest man of any public size in our politics: hence his failure to achieve, as a politician.

We passed on to other matters, at the end of our invaluable half-hour; but his opinion, on a long experience, of the chances of successful appeal to the House of Lords or the Privy Council will most interest

you. It is that the value of the first word is above the price of rubies: as soon as the Court has finished sharpening its pencil, settling into its seat and bending back the stiff cover of its book, then it is more readily capable of capture and indeed amenable to permanent persuasion, without hearing a word from the other side, than any tribunal in the world. I don't know whether I ought to say this; but you must let it go no further, and there is no doubt it will afford far more comfort than discomfiture, for it will encourage, as well as intending appellants, many a learned Judge and not a few learned counsel . . . . And there is this to be remembered for Sir John's summing up: it is founded upon so long and intimate an experience that it cannot reflect upon the personnel of the Ultimate Bench of our world, but must demonstrate a quality inherent in the tribunal, of whatever eminents composed.

Yours ever,

INNER TEMPLAR.

Land Transfer Act.

Amendment to Regulations as to Fees.

The Schedule of fees to the Regulations of 22nd January, 1914, has been amended by Order in Council dated 17th December, 1929, and published in the New Zealand Gazette of 19th December. The effect of the alterations made is as follows:—

CERTIFICATES OF TITLE.

No fee is now payable in respect of the issue of the following certificates of title:

(a) Any certificate of title in lieu of Crown grant issued for the land comprised in a road closed under the provisions of subsection (7) of section 12 of the Land Act, 1924, and disposed of otherwise than by way of sale as Crown land.

(b) Any certificate of title in lieu of Crown grant issued for any land granted under the provisions of section 99 of the Public Works Act, 1928.

(c) Any certificate of title in lieu of Crown grant issued for any land granted or given by the Crown pursuant to any contract for the exchange of land authorised by any Act.

For every leasehold certificate of title where the rent reserved by the lease does not exceed £20 per annum the fee is 10s.

OTHER DOCUMENTS.

For registering discharge of any charge not elsewhere provided for: 5s.

For registering any instrument varying the provisions of a mortgage in any manner provided for in section 104 of the Act: 5s.

"The mutual encroachments of the Legislature, the Judiciary and the Executive are, after all, of less importance at the present time than the encroachments of all three on individual liberty."

—Lord Eustace Percy.

The Last Word.

The Attorney-General's and Solicitor-General's Privilege.

The English Solicitor-General has announced in the House of Commons in reply to a question as to whether the Attorney-General "would take steps to withdraw the exceptional privilege of reply given to the Law Officers of the Crown when conducting a prosecution, so that the Law Officers of the Crown might be placed on an equal footing with other counsel as to the order of precedence in the final address to the jury," that although, since the privilege of reply was a prerogative right of the Crown, the Law Officers were not at liberty to abandon it, yet, as at present advised, neither the Attorney-General nor himself intended to exercise the right. The rule that a Law Officer of the Crown has the right to address the jury last in cases in which any other member of the Bar has no such right applies apparently to civil as well as to criminal cases—*Rowe v. Brenton* (1828, 3 Man. & Ry. 304); but in practice the point only arises in criminal cases of great importance in which either the Attorney-General or the Solicitor-General appears to prosecute. And, of course, it only arises then in cases in which the defence adduces either no evidence or no evidence beyond that of the accused. The right of the Crown to the last word being therefore dependent on the question of whether or not a Law Officer appears in person to prosecute, it has been generally felt that, except in the rarest cases, there was no justification for its continuance. But the privilege has very rarely been waived; the only case of recent years, which we remember, in which it has not been exercised was that of *Rex v. Vaquier* in 1924, when the then Attorney-General, Sir Patrick Hastings, waived it, on the ground that the accused being a foreigner he was anxious that he should feel that he had been treated with every possible fairness (Trial of Vaquier, *Notable British Trials*, p. 149). If, as is the opinion in England, the rule is out of date and opposed to present-day notions as to the way in which justice ought to be administered, a general declaration of intention on the part of the Law Officers would seem to be better than an *ad hoc* waiver whenever the occasion arises; and although the present Law Officers cannot, of course, bind their successors, probably the announcement marks the end of a privilege for which it is difficult to find any logical justification. So far as we in New Zealand are concerned the matter is one of academic rather than of practical importance. Here the Attorney-General now seldom appears at all in Court and the Solicitor-General appears in criminal matters only in the Court of Appeal.

"I believe it still is very difficult to get any criminal conviction against a motorist from a jury."

—Lord Justice Scrutton.

"Litigation, though in the literal sense of the word a dis-ease, is historically an alternative for much worse diseases."

—Professor E. Jenks.

Australian Notes.

By WILFRED BLACKET, K.C.

Mr. Justice Harvey, C.J.Eq., New South Wales, in reviewing taxation in *Jones v. Buxton*, an originating summons, spoke some words that are of great import to members of the Bar of that State. Hitherto the unwritten rule followed by senior counsel has been to accept a minimum of thirty guineas in Banco and jury cases, and twenty guineas in other matters with proportionate refreshers. Acting on this practice the briefs for the defendant were marked twenty and thirteen guineas. The taxing officers disallowed the senior's fee and allowed the junior twelve guineas. Mr. Justice Harvey allowed a senior's fee of twelve guineas and laid down the rule that a senior might sometimes in an originating summons be briefed and his fee allowed out of the estate, but that no more than twelve guineas should be allowed. He expressly stated that such a senior might mark whatever fee the client agreed to but that it should be made clear to him that any excess above the fee limited, and even the whole fee in cases where a senior was not allowed, would have to be paid out of his own pocket. The decision undoubtedly will have considerable influence with taxing officers on the common law side and some of our forty-two King's Counsel are much perturbed thereat; but there are many others who would be glad of a reduced standard, for the thirty guinea minimum has been somewhat of a burden to them as the fees on hearing with senior counsel briefed now amount to fifty guineas, plus clerks' fees, but with a junior leading only amount to from twenty to twenty-five, and with a junior alone only to twelve or fifteen. Silk has been very easily obtained in recent years and has not blessed him who takes it in every instance.

Bakewell v. Bakewell, in divorce, at Sydney ran for thirty-three days and then tumbled down in the mud. Mrs. Bakewell, respondent, was formerly Mrs. Bruell: she obtained a decree *nisi* against her husband but the Crown Solicitor, acting as King's Proctor, intervened and the decree was set aside. Then her husband Bruell obtained a divorce on the ground of her adultery with Bakewell. She then married Bakewell and in the suit just concluded he sued for divorce on the grounds of her adultery with her former husband—morality in this case being not a matter of geography but of chronology—and with one Tobias. She had a cross petition for divorce on the grounds of his adultery with four ladies. Fortunately for all the legal gentlemen engaged in the case the petitioner was a man of ample means. Under the order of the Court he paid thirty guineas a day for his wife's costs for thirty-three days, and under the orders of counsel appearing for him paid them a good deal more than that. In giving judgment Owen, J., stated a considerable part of the opinions he had formed of the eight parties to the suit and their witnesses and in dismissing both petitions said: "The evidence has satisfied me that neither Bakewell nor his wife has in the past regarded the marriage tie binding upon them, and their conduct offers no guarantee that in the future either of them will lead decent lives. Bakewell's amours have been frequent and disreputable and there is no suggestion that he is now desirous of remarrying and there are no circumstances established which can be regarded as mitigating his offences; there are no persons connected with Bakewell whose interests have to be taken into consideration except Mrs. Bakewell and I cannot see that she deserves any assistance from the Court." He in accordance with these findings and comments dismissed both petitions. The case is a notable instance of the exercise of the discretion vested in a Judge in divorce and also illustrates the verity of the proverb that "the course of true love never did run smooth."

Long Innes, J., drew public attention to the hardship of the law relating to defendants in defamation arrested for default in payment of damages and costs for which they have become liable. In ordinary cases where a judgment debtor is arrested for his default he obtains release from custody by sequestrating his estate, but if defamation constituted the cause of action he cannot be released, except upon payment of the judgment debt, until he has endured twelve months imprisonment. Sequestration of his estate gives him no relief. His Honour pointed out that if defamation was to be deemed a crime punishable by twelve months imprisonment the poor man alone would suffer the penalty: the rich would escape. This injustice however, if it is one, is quite in line with the ordinary rule in cases where magistrates impose a fine, with an alternative of imprisonment, but His Honour was on much more solid ground in asserting that the law was *damnosa hereditas* from the ancient times when imprisonment for debt was sanctioned by the law. An amending Bill will, it is promised, be presently introduced by the Attorney-General, who upon strong representations as to the necessity for an amendment of the law by Long Innes, J., and by the Chief Justice twelve months ago, has during the intervening period had the matter under his close consideration; but no promise has been made as to another matter of much greater importance, i.e., the imprisonment of husbands for non-payment of arrears of money ordered to be paid for maintenance. These poor wretches have no chance of earning money while imprisoned so that, unless they have great expectations from relatives whose health is such as to be a cause of anxiety to their friends, it is of no benefit whatever to their wives to keep them in prison. Perhaps, however, it may be a cause of satisfaction to the deserted wives. This matter has recently become of much greater consequence than formerly for under the amending Divorce Act arrears of alimony are put, in all respects, on the same footing as arrears of maintenance.

December 20th will see "the rising of the Court"—the Supreme Court of New South Wales—in all its jurisdictions. For some time past there have been five jury Courts constantly sitting but there will be a long list of remands on the common law side and also in divorce. *Bakewell v. Bakewell* is largely responsible for the congestion in divorce, and the lengthy hearing in Admiralty of the Greycliffe-Tahiti case caused some delay in the determination of Common Law matters, but in the Equity, Bankruptcy and Criminal jurisdictions the Courts have been able to keep up with their work. The vacation will mean about eight weeks cessation to barristers, but the solicitors have no share in this holiday, which fact is said by barristers to be vivid illustration of the truth that "there is no rest for the wicked"—a saying that loses its point in the Dominion where you have so few 100% barristers and so many of the fifty-fifty kind. May I suggest that

your exceedingly energetic Law Society might give the question whether it is desirable that there should be "amalgams" their tensest attention. In Victoria some years ago there was a very lengthy inquiry which revealed some of the iniquities of the amalgam system, but that system was allowed to continue with the result that its abuses and the scandalous waste of time and money under the Judicature rules and practice have frightened litigants from the Courts. I have seen in a suburb of Melbourne a double fronted shop where you could get steak and oysters from a Greek at one counter and obtain advice as to rights in Equity from a "barrister and solicitor" at the other. This arrangement may have merit from a quick lunch point of view, but I think that "*timeo Danaos*" is a classic phrase that should have been honoured by observance, although it may well be urged that there is a natural affinity between the rule in *Shelley's case* and oysters. Our Acts and rules relating to legal practitioners and their division of labour work admirably in practice. The effect of those rules is precisely as follows: 1. Barristers, robed when their appearance is before a Judge in Court, cannot do any professional work except upon instructions by a solicitor. Their work is restricted to advocacy, opinions and drafting. (2) Solicitors have the right of audience in all Courts in their own cases, but may not compete with barristers in the acceptance of briefs and when appearing in their own cases may not brief themselves at their client's cost. (3) Barristers and solicitors alike may, by motion as of course, change over as often as they choose after seven years practice in either branch of the profession.

Lord Campbell's "Lives."

Lord Campbell is far and away the liveliest and most readable of the legal biographers; but it would seem that he achieved his effects by means ill-pleasing to those who in all matters will have the Truth and nothing but the Truth, as verified by full references to contemporary written authorities. But whatever may be said of Campbell's "Lives," they are entertaining and full of information. In the "Dictionary of National Biography," his "Lives" are described as "among the most censurable publications in our literature . . . . the tone of laborious research which pervades every volume is delusive . . . . no writer ever owed so much to the labours of others who acknowledged so little." In Gardiner and Mullinger's "Introduction to English History," the following uncomfortable words occur concerning Campbell's masterpiece: "The whole work is wanting in a due sense of the obligations imposed by such a task, is disfigured by unblushing plagiarisms, and, as the writer approaches his own times, by much unscrupulous misrepresentation." And, of course, his contemporaries did not suffer his lively portraits or caricatures without a protest. Lord St. Leonards published a pamphlet, "Misrepresentations in Campbell's Lives of Lyndhurst and Brougham, Corrected by St. Leonards," and Lord Denman, C.J., was so annoyed by what he believed to be references to himself that he was all against resigning the Chief Justiceship in Campbell's favour.

Nowadays, the cautious biographer waits till his man is dead and the sting of the law of libel is withdrawn. Autobiography is rife, but incredible.

—"Outlaw," in the "Law Journal."

Bench and Bar.

In the New Year Honours List, His Honour the Chief Justice becomes a Knight Commander of the Most Distinguished Order of St. Michael and St. George. The Hon. T. K. Sidey, Attorney-General, is made a Knight Bachelor.

His Honour Mr. Justice Reed has returned to New Zealand and has taken up his duties at Wellington. His Honour Mr. Justice MacGregor has been granted twelve months' leave of absence.

Mr. H. H. Cornish, M.A., LL.M., of the firm of Webb, Richmond, Cornish & Swan, Wellington, has been appointed Professor of English and New Zealand Law at Victoria University College. The appointment carries with it the right of private practice as a barrister.

Reference to the late Mr. T. F. Martin, of the firm of Martin and Martin, Wellington, was made last Friday in the Wellington Supreme Court. His Honour the Chief Justice and His Honour Mr. Justice Blair were on the Bench, and there was a large attendance of members of the profession.

Mr. C. G. White, president of the Wellington District Law Society, said that the late Mr. T. F. Martin was called to the English Bar in 1874, and came to New Zealand five years later. Since 1879, he had been in active practice in New Zealand, and 45 years of that time he had practised in Wellington. For 20 years he held the office of City Solicitor, and part of the time he also held the office of Town Clerk. It must have been of inestimable value to the city authorities to have had the counsel and advice of one so learned in the law, and at the same time so sound in judgment, and so just in all his dealings. He was a zealous guardian of the city's interests, and yet he did not over-ride the rights of its citizens. It was well known that he specialised in local government law, and his opinions in this branch of law were sought by his brother practitioners, and by municipal officers throughout the length and breadth of New Zealand. His reputation in this connection was so well recognised that in 1895 he was entrusted with the preparation of a Bill dealing with local government law, and the result of his labours fully justified the confidence reposed in him. Mr. Martin had made valuable contributions to the legal literature of the Dominion, his books on conveyancing and land laws, and local government law being widely read and quoted. He held office on the council of the Wellington District Law Society, and was elected president in 1901. In the practice of his profession Mr. Martin was always courteous and kindly, and his strict integrity and high ideals, earned the respect and esteem of all with whom he was brought into contact. He had left behind him no resentments and no enmity, but a memory of an unassuming manner and a modest personality, a memory of a man who had given long and valuable service in the profession of the law.

His Honour the Chief Justice said that those who had known the late Mr. Martin regarded him as a man

of the highest standing in the legal profession. He was one of the old school of conveyancers and real property lawyers, of whom, unfortunately, so few now remained. He was always held in the highest respect by the clients whom he served, and particularly by the local bodies. Not only was he esteemed by them, but also by all his brothers in the legal profession, who had the most complete confidence in him, and who knew that his word was always his bond.

Mr. P. J. O'Regan, Wellington, has admitted his son, Mr. C. J. O'Regan, LL.B., into partnership. The practice will be carried on under the style of O'Regan and Son.

Messrs. Ongley & O'Donovan, Wellington, have admitted into partnership Mr. C. H. Arndt, LL.B., who has been for some years on their staff. The firm will practise under the style of Ongley, O'Donovan and Arndt.

Mr. T. U. Ronayne, Wellington, has taken into partnership Mr. A. M. Hollings, LL.B., his managing clerk. The practice will be carried on under the name of Ronayne and A. M. Hollings.

Messrs. Fotheringham and Wily, practising at Auckland and Pukekohe, have dissolved partnership. Mr. H. J. Wily will carry on the practice under the same style as formerly.

Mr. W. Heine, M.A., LL.B., has commenced practice at Wellington. He was from 1921 until the firm's dissolution last year, a member of the staff of Messrs. Luke & Kennedy, and subsequently until the end of last year a member of the staff of Messrs. Luke, Cunningham & Clere. Prior to joining Messrs. Luke & Kennedy he was for some years in the employ of Sir Kenneth Douglas.

Mr. C. B. Walker, of the firm of Walker and Evans-Scott, Wellington, has retired from general public practice. The practice will be continued by Mr. C. Evans-Scott in his own name.

Mr. Ll. K. Wilson has left the Common Law staff of Messrs. Chapman, Tripp, Cooke and Watson, and is now practising as a barrister in Wellington.

Mr. R. E. Tripe, LL.B., lately associate to His Honour Mr. Justice Blair, has commenced practice on his own account at Wellington.

Mr. H. R. A. Vialoux, who has been for several years on the staff of Messrs. Earl, Kent, Massey and Northcroft, has commenced practice on his own account at Auckland.

Judicial Appointments.

Politics and the Bench.

The Lord Chancellor, Lord Sankey, in his speech at the Guildhall Banquet, replying to the toast of "The Lord Chancellor and Judges of the Bar," dealt in words with which all will agree with the subject of political appointments to judicial office. "One of the most difficult and delicate duties of a Lord Chancellor," he said, "is that of advising as to judgeships and making justices of the peace. In my view, politics should not enter into these appointments. I say with emphasis that the mere fact that a man belongs to the Labour Party or the Liberal Party or the Conservative Party is not a qualification for the High Court, County Court, or the Magisterial Bench, but I want to say with equal, if not more, emphasis that the mere fact that a man is a member of the Labour Party, Liberal Party, or the Conservative Party is not a disqualification. The truth is that you can find men in all these great parties with character and temperament admirably suited for judicial responsibility, and it is neither statesmanlike nor fair to forget this fact. Violent partisanship does not fit a man for judicial preferment, and is a real hindrance to the cause of justice."

Rules and Regulations.

Copyright Act, 1913.—Extension of provisions of Act to Portuguese Colonies and Spanish Colonies.—Gazette No. 2, 16th January, 1930.

Defence Act, 1909.—Amendments to General Regulations.—Gazette No. 85, 19th December, 1929.

Fruit Control Act, 1924.—Amendment of regulations *re* levy on fruit.—Gazette No. 85, 19th December, 1929.

Government Life Insurance Act, 1908.—Amended regulations *re* premiums.—Gazette No. 85, 19th December, 1929.

Government Railways Act, 1926.—Alterations to scale of charges.—Gazette No. 85, 19th December, 1929.

Immigration Restriction Act, 1908.—Immigration Restriction Regulations.—Gazette No. 2, 16th January, 1930.

Land Transfer Act, 1915.—Amendments to regulations of 22nd January, 1915, *re* fees, etc.—Gazette No. 85, 19th December, 1929.

Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929.—Rules made by Council of New Zealand Law Society.—Gazette No. 83, 12th December, 1929.

Marriage Act, 1908. Births and Deaths Registration Act, 1924. Abolition of existing marriage districts known as Tirau, Putaruru and Rotorua Districts, and constitution in lieu thereof of four new marriage districts, to be known as the Mamaku, Tirau, Putaruru, and Rotorua Districts.—Gazette No. 81, 5th December, 1929.

Naval Defence Act, 1913.—General regulations.—Gazette No. 82, 6th December, 1929.

Orchard and Garden Diseases Act, 1928.—Regulations relating to registration of orchards.—Gazette No. 83, 12th December, 1929.

Plumbers Registration Act, 1912.—Amended regulations.—Gazette No. 2, 16th January, 1930.

Public Trust Office Act, 1908.—Amended and additional regulations.—Gazette No. 85, 19th December, 1929.

Rural Intermediate Credit Act, 1927.—Additional regulations.—Gazette No. 2, 16th January, 1930.

Samoa Act, 1921.—Samoa Maintenance and Affiliation Amendment Order, 1929; Samoa Public Trust Office Amendment Order, 1929.—Gazette No. 83, 12th December, 1929. Samoa Seditious Organisations Regulations, 1930.—Gazette No. 2, 16th January, 1930.

Rural Intermediate Credit.

Amendments to Act and Regulations.

The following article dealing with the operations of the Rural Intermediate Credit Board and with the amending Act and amending regulations of last year has been supplied to this Journal by the Commissioner of Rural Intermediate Credit (Mr. J. W. Macdonald, C.M.G.) :—

"Under the provisions of the Rural Intermediate Credit Act of 1927, which established a system for granting short-term loans on mainly chattels securities being mortgages on live and dead stock, implements, crops and produce with, in suitable cases, collateral security in the form of mortgages over land, personal guarantees and the like, the maximum amount of loan which could be obtained by any farmer was fixed at £1,000, and the original idea was that loans granted should be liquidated by equal payments over a period of five years from the granting of the loan. It was found in practice that this limit, while adequate for the requirements of a dairy farmer in regard to the classes of securities which may be taken by the Rural Intermediate Credit Board, was not sufficient for the average sheep-farmer, grain-grower or mixed farmer. It was demonstrated to the Board that there was a substantial demand upon the part of these classes of farmers for financial accommodation of the description provided by the Board and, upon representations by the Board, the Government introduced legislation providing mainly for the increase of the limit for loans from £1,000 to £2,000. This legislation took effect as the Rural Intermediate Credit Amendment Act, 1929.

"In the Board's report for the year ended 30th June, 1929, reference was made to the fact that the majority of loans granted by the Board had been made to dairy farmers and one cause, apart from the lower limit which then obtained, was stated to arise from the fact that, whilst a fixed loan to be liquidated over a period of years is usually suited to the requirements of a dairy farmer who is able to pay his interest and the instalments of principal required by the Board by deductions from his milk cheques throughout the productive season, such a loan is not equally applicable to the circumstances of the sheep-farmer or grain-grower, whose indebtedness steadily increases during the major portion of the year and is then rapidly liquidated either in whole or in part during the productive season. Accordingly, with the increase of the limit for the individual loans making the system more suited to the needs of grain-growers and sheep-farmers the Board has considered the best means of providing for the credit requirements of these classes of farmers and has decided upon the following system :—

(a) It will fix limits for the individual farmers proportionate to the value of the security proffered in each case, whether by way of charges over stock, crops, land, or otherwise.

(b) Borrowers who have arranged for such limits will be entitled to draw up to the limits fixed in their cases as and when they require the moneys to meet current expenditure or other farming purposes generally :

(c) Interest will be charged by the Board at 6½ per cent. per annum only on amounts outstanding :

(d) The limits fixed will be subject to annual review by the Board :

"The main methods by which the Board is authorised to invest its funds in advances to farmers are the following :—

(a) By advances to farmers as members of a special class of limited liability company termed 'co-operative rural intermediate credit associations' (Part II of the Act).

(b) By advances to farmers individually, the loans being additionally secured by the partial or entire guarantee of a company or private individual (Part III of the Act).

"As it appears generally unlikely that sheep-farmers will have the same facilities at their disposal for obtaining guarantees of loans to enable the provisions of Part III of the Rural Intermediate Credit Act to be utilised as was the case with the dairy farmers whose dairy companies, both co-operative and proprietary, have in numerous instances assisted applications under the Act by giving the guarantee required by that part of the Act, it is probable that the bulk of the lending under this new system for 'limits' will be transacted through the medium of the co-operative rural intermediate credit associations referred to. It is interesting to learn, therefore, that twenty-eight associations have now been formed and are in operation in different parts of the Dominion, thus providing farmers with the opportunity of making an application to the Board for financial accommodation.

"The Regulations issued under the provisions of the Rural Intermediate Credit Act on the 21st December, 1927, and amended on the 17th September, 1928, control the administration of the Board's business in regard to matters of procedure and detail and, in addition, they prescribe the scale of legal charges for the preparation of securities taken by the Board or by co-operative rural intermediate credit associations. The new Regulations issued in the New Zealand Gazette of the 16th January, 1930, follow the scale generally, extending it to apply to the larger loans which may now be granted by the Board."

New Books and Publications.

Reminders for Companies' Secretaries. By F. J. Varley. (Effingham Wilson.) Price 4/6.

Smith's Summary of Company Law. Fourteenth Edition. By William Higgins. (Sweet & Maxwell Ltd.). Price 9/-.

Company Law and Precedents. Third Edition. (Two volumes). By A. Stiebel, M.A. (Sweet & Maxwell Ltd.) Price 92s. 6d.

The Secretarial Handbook. By E. Westby-Nunn, B.A., LL.B. (Solicitors' Law Stationery Society). Price 7s.

English Government and Politics. By Frederick Austin Ogg, Ph.D., LL.D. (MacMillan & Co. Ltd.). Price 21s.

Australia and the British Commonwealth. By the Hon. J. S. Latham, K.C., M.A., LL.B., Attorney-General of the Commonwealth of Australia. (MacMillan & Co. Ltd.). Price 9s.