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" I have always felt that the Bar was inseparable from our national life and the security of our national institutions."

—Gladstone.

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The Court of Arbitration.

The Government is to be congratulated upon its action in setting up a committee to investigate the operation of the Workers' Compensation Act, for there is no doubt that there are very many anomalies in the law as it now stands. For an inquiry into whether or not this or that provision relating to the assessment of compensation requires amendment, and, if so, how, the committee as constituted ought to prove a satisfactory tribunal, but if it is to handle any of the major issues it may find itself very much handicapped by the total absence from its personnel of members of the legal profession. Much more is involved in the inquiry, or ought to be involved if it is to be of any real value, than a mere consideration and adjustment of the *quantum* of compensation recoverable in such and such a case.

In the opinion of many the most pressing question, and certainly a most important one, is as to whether or not it is in the public interest that the present system of the determination of claims for compensation by the Court of Arbitration, at all events as that Court now functions, should continue. No doubt when that Court was originally given exclusive jurisdiction over such cases it was considered that there were then good reasons for the step ; but it is difficult to see that any such reasons now exist. One might just as usefully, and just as logically, set up a separate Court of exclusive jurisdiction to hear, say, actions for wrongful dismissal or actions as between servant and master for damages for negligence at common law. It may be objected that it is not correct to describe the Court of Arbitration as having exclusive jurisdiction in claims for compensation under the Act, for the Magistrate's Court has, by S. 20, where both parties agree or in any case where the amount claimed does not exceed £50, jurisdiction in cases of injury not resulting in death, and both the Supreme Court and the Magistrate's Court have power to assess compensation in any case where a worker brings unsuccessfully an action at common law in those respective Courts. But these exceptions serve only to emphasise the fact that there is no real reason for not giving to the ordinary Courts jurisdiction in all cases under the Act.

Not only, however, does there seem to be no real reason for not placing matter of workers' compensation within the jurisdiction of the ordinary Courts but there is at present ample reason why those cases should not continue to be dealt with by the Court of Arbitration, at all events as that Court is at present functioning. The public has been exceptionally fortunate in having at the head of the Court of Arbitration His Honour Mr. Justice Frazer who has a wide and probably unrivalled knowledge of the law relating to compensation to workers. But the Court has other business to attend to and a great deal of its time is taken up in the determination of industrial cases. When the Court of Arbitration opened its sessions at Wellington at the beginning of this month a protest was made by Mr. W. Bromley, the President of the Wellington Trades and Labour Council as to the recent delays in the transaction of the business of the Court—delays due not, of course, to the Court itself, but simply to the increasing work of the Court both as regards compensation and industrial cases. The present position is that the Court is now sitting at Wellington for the first time for over eight months and the pressure of business there is such that the sitting will take twice as long as anticipated with the consequent disorganisation of fixtures already made for sittings in other parts of the Dominion. In reply to Mr. Bromley's protest His Honour Mr. Justice Frazer is reported as having said :—

> " Amendments which have been made to the Workers' Compensation Act have very largely increased the work of the Court. There are other factors, of course, including the increase of the population, the number of medium-sized towns, and the large number of what might be called small industrial disputes, such as interpretations, breaches of awards, apprenticeship matters. These take up a vast amount of time. But the principal increase has arisen under the Workers' Compensation Act. I know the suggestion has been made to separate the industrial work from the workers' compensation business, and I understand that that matter is under consideration of the Government at the present time. The members of the Court hope that something will be done shortly to relieve the position and enable all business to receive prompt attention."

It is plain from His Honour's statement that something must be done, and done at the earliest opportunity. Some may suggest the appointment of an additional Judge to the Court of Arbitration, and others a simple severance of its jurisdictions, having one Court to deal with the industrial cases and a separate Court to deal with the compensation claims. But the best solution of all difficulties may well be, as many of the profession think, to place matters of workers' compensation within the jurisdiction of the ordinary Courts—perhaps increasing for this purpose the limits of the jurisdiction of the Magistrate's Court to some extent—and for the work of the Court of Arbitration to be restricted to industrial cases.

If, however, the existing system, or some similar system is to continue, there is another matter which requires consideration. At present by virtue of S. 22 (2) of the Act, no appeal lies from the decision of the Court of Arbitration. What valid reason there can be for depriving of the usual right of appeal a litigant who, rightly or wrongly, feels that justice has been denied to him is difficult to imagine. No doubt the idea behind S. 22 (2) of the Act is to prevent workers from being taken on appeals by employers from Court to Court with the consequent swallowing up of their compensation in costs. But, whether the Court of Arbitration is to continue to exercise jurisdiction or not, injustice in this respect could easily be prevented by requiring an intending appellant to obtain, preferably from the higher Court, leave to appeal, and that Court could be given wide powers as to the imposition of terms as to costs. The right of appeal is one of the most valuable bulwarks of British justice and it should be denied to a litigant only in the most exceptional circumstances.

Supreme Court

Myers, C.J. November 20, 1929; February 27, 1930. Wellington.

HENDERSON v. BRICE.

Mortgage—Purchase by Mortgagee—Default by Mortgagor—Notice by Second Mortgagee of Intention to Sell Land comprised in Mortgage Through Registrar of Supreme Court—Agreement by Mortgagor to Transfer Land and Chattels to Second Mortgagee in Consideration of Mortgagee Paying Certain Debts of Mortgagor, and Discharging Second Mortgagee—Transfer of Land Accordingly—Property Not Held by Defendant in Trust for Plaintiff Subject to Payment of Debts—Recitals Operating as Covenant When Clear That Parties so Intended—Transaction Not an Unfair or Oppressive Purchase by Mortgagee.

In 1925 the plaintiff purchased from the defendant a house property in Orchard Street, Wellington, together with the furniture therein for £3,750, £3,500 being the price of the land and £250 that of the furniture. The plaintiff paid £2,820 in cash giving the defendant a second mortgage for the balance, being £930. In order to finance the transaction she raised £2,250 on first mortgage of the land purchased and £300 from one Smart on third mortgage of such land, giving also to the third mortgagee as collateral security an instrument by way of security over the furniture in the Orchard Street property and a submortgage of a mortgage over certain property in Kelburn. She bought other furniture with her own monies and commenced a boarding establishment on the premises purchased by her. She failed to pay the first quarter's interest (£73 2s. 6d.) and the fire insurance premiums (£22 19s. 5d.) which she was liable to pay under the first mortgage, and also a portion of the interest due under the second mortgage. The defendant was compelled to make the two payments of £73 2s. 6d. and £22 19s. 5d. in order to protect his own interests. The solicitors for the defendant, the second mortgagee, on 19th June, 1925, sent by registered post a notice that the defendant had on that date paid the overdue interest and premiums under the first mortgage, and that default having been made in payment of the same as well as in payment of interest on the second mortgage, they proposed to apply to the Registrar of the Supreme Court to sell the land pursuant to the power comprised in the mortgage. On 29th June an account was sent to the plaintiff of the amount owing to the defendant in respect of the overdue interest and premiums paid by him. After receiving the letter the plaintiff saw the defendant's solicitors and made certain payments to them amounting to £15. The plaintiff then entered into negotiations with the defendant which culminated in his executing certain documents dated 15th July, 1925. The first document was an agreement between the plaintiff and the defendant which after reciting that the plaintiff was the proprietor of the Orchard Street property subject to three memoranda of mortgage, that she had made default under those mortgages, that she was indebted to Smart in the sum of £225 which sum was secured by the third mortgage and by an instrument by way of security over the furniture, and that she was also indebted to various named creditors in various sums amounting in all to £343 6s. 0d., further recited "that the defendant had agreed to discharge the debts thereinbefore mentioned in consideration of the plaintiff's transferring to him all the chattels, goods, and effects in the said dwellinghouse, other than the actual personal belongings, together with the said land in Orchard Street, subject only to the first mortgage." The document contained no operative words and was completed with the usual testimonium clause and was executed by the parties. On the same day the plaintiff executed a memorandum of transfer whereby she transferred the Orchard Street property, subject to the first mortgage, to the defendant for £3,180 being the total amount of the first and the second mortgages. Shortly after the execution of the documents the plaintiff left the house and the defendant took possession of the house and furniture and remained in possession of the same. The plaintiff commenced the present proceedings on 19th May, 1927, claiming firstly that the assets in connection with her business as boardinghouse-keeper were assigned to the defendant in trust to pay her creditors, including the defendant, and to pay her the surplus, and on that basis demanded an account of the administration of the trust. At the trial the plaintiff's solicitor also contended that the transaction should be set aside as being a fraudulent and oppressive purchase by the second mortgagee of the assets comprised in his security.

Dunn for plaintiff.

C. A. L. Treadwell for defendant.

MYERS, C.J., said that, curious as the agreement of 15th July was, it was a fundamental rule that, to interpret a deed, the expressed intention of the parties must be discovered; and it appeared to be plainly established that recitals in a deed might operate as covenants where it appeared to have been the intention of the parties that they should so operate: **Norton on Deeds,** 2nd Edn., 50, 215, 537; **10 Halsbury's Laws of England,** 463, 476. Unless in the present case the recitals were construed in that way, the agreement would be wholly inoperative. In addition to the debts amounting to £343 6s. 0d. which the defendant undertook to discharge it was necessary for him to clear, and in fact, as already stated, he did clear, Smart's mortgage by paying Smart the sum of £225, Smart foregoing any arrears of interest that were due to him. His Honour thought, indeed, that the agreement must be construed as binding the defendant to pay Smart, the debt to him being one of the "debts hereinbefore mentioned." He had already paid to the first mortgagee for overdue interest and for the fire insurance premium the sum of £96 1s. 11d., and in addition there was a small amount on interest in arrear to himself on the second mortgage. He also undertook the liability of £2,250 under the first mortgage and in effect released his own second mortgage for £930. The total amount of consideration, therefore, which the defendant gave, assuming that he paid in full the creditors of the plaintiff who were named in the agreement, was about £3,850. In point of fact he did not pay the trade creditors in full, but made arrangements with them, excepting in two cases where the amounts owing were negligible, that they should accept lesser amounts than those which were due; and he succeeded in settling with the creditors for the sum of £201 15s. 4d., instead of the total sum of £343 6s. 0d. Upon a careful consideration of the evidence His Honour concluded that the plaintiff had not proved her case, and had failed to establish a trust. His Honour stressed the fact that but for the transaction between the parties the defendant was in a position to sell the land through the Registrar, and it was practically certain that he would have had to buy it in. The plaintiff would have had her furniture, it was true, subject to Smart's mortgage, but it was tolerably plain that she could not possibly have carried on; and the furniture would have had to be sold and in all possibility would have realised insufficient to pay her creditors. As it was there were left free certain debts which were owing to her, and her mortgage over the Kelburn property by reason of the release of Smart's mortgage.

At the trial, although not pleaded, Mr. Dunn suggested that the plaintiff should succeed, and that the transaction should be set aside, upon another ground. He referred to **Coote on Mortgages,** 9th Edn., 24, stating the proposition that a sale or release to the mortgagee of the equity of redemption would be valid if it were a fair transaction and if it were subsequent to and independent of the mortgage transaction but that the transaction would be invalid if oppressive or unfair. He also referred to **21 Halsbury's Laws of England** 144 (and the cases cited in the notes) and relied upon the proposition there stated in somewhat similar terms that a sale of the mortgaged property to the mortgagee or a release of the equity of redemption was liable to be set aside if there had been any oppression or unfairness on the part of the mortgagee. The fraud or oppression required must apparently, however, be such as would invalidate a sale between an ordinary vendor and purchaser: **Fisher's Law of Mortgage,** 5th Edn. 663; **Melbourne Banking Corporation Ltd. v. Brougham,** 7 A.C. 307, approving **Knight v. Majoribanks,** 2 Mac. & G. 10. The present case was something more than a mere purchase by the mortgagee or release of the equity of redemption. It involved the acquisition by the mortgagee not only of the mortgaged property but also of the chattels over which he had no security. But not only did he release his mortgage he also undertook the payment of the money secured by the first mortgage: he paid the interest under the first mortgage; he paid the amount of the overdue insurance premium: and he undertook to discharge debts aggregating a considerable amount. Mere inadequacy of price was not in itself ground for setting aside the transaction; there must be unfairness or oppression as well on the part of the mortgagee. His Honour was not at all satisfied that the consideration could be definitely said to have been inadequate. Certainly it could not, His Honour thought, be definitely said to have been inadequate if the debts mentioned in the agreement had been paid in full as well as the other amounts that the defendant

had to pay. It was claimed, and there was evidence to support the claim, that the land was worth about £4,000. But the evidence also showed that it had not appreciated in value from the time that the plaintiff purchased it from the defendant and she purchased it for £3,500. His Honour was satisfied from the evidence that the property was a particularly difficult one to sell, and he doubted very much whether it could be sold at a price in excess of the last-mentioned sum. Mr. Dunn also contended that the transaction was unfair and oppressive because, he said, on the authority of **Official Assignee of Marr v. Chick,** 9 N.Z.L.R. 622, the transaction could have been attacked as being against the policy of the bankruptcy laws: see also **Ford v. Olden,** L.R. 3 Eq. 461. Perhaps it could have been successfully attacked if the plaintiff had become bankrupt, though His Honour was not so deciding and had not before him in any case the material upon which to decide the point. The plaintiff denied that she was in a bankrupt condition and said that she had other assets. But be that as it might, the plaintiff did not become bankrupt, and all His Honour had to consider was the position as between the parties themselves. Then Mr. Dunn said that the defendant did not pay all the debts in full. His Honour was unable to see that that afforded a ground for setting aside the transaction. The defendant agreed to discharge the debts and did discharge them. If he was unfair to anyone in this respect it was to the creditors, not to the plaintiff. On the whole, therefore, His Honour concluded that even if that cause of action had been pleaded the plaintiff could not have succeeded upon it.

Judgment for defendant.

Solicitor for plaintiff: **Alexander Dunn,** Wellington.
Solicitors for defendant: **Treadwell and Sons,** Wellington.

Ostler, J. February 8; 14, 1930.
Palmerston North.

OFFICIAL ASSIGNEE OF HOWELL v. HOWELL.

Practice—Bankruptcy—Costs—Depriving Successful Defendant of Costs—Action by Official Assignee Against Wife of Bankrupt for Accounts and Motion Declaring Certain Transactions Void—Action Failing and Motion Dismissed—Wife Not Deprived of Costs Merely Upon Ground that Proceedings Might Not Have Been Taken if She had made Clearer Statement to Official Assignee.

Question of costs reserved.

The bankrupt and his wife were examined before the Deputy Official Assignee with regard to certain dealings in land. They gave an account of those dealings which was substantially true. Mrs. Howell could not remember all the details but she did not deliberately make any misstatement of facts, or endeavour to mislead her husband's creditors. The Deputy Official Assignee then commenced an action against Mrs. Howell for accounts and for judgment for such amount as would be found to be due by her to her husband. The accounts were taken with Mrs. Howell's consent and showed she owed nothing to her husband but he owed her a considerable sum. The Deputy Official Assignee also filed a motion for an order declaring certain transactions between the bankrupt and Mrs. Howell void. He had to abandon that action having found that her statements with regard to the transactions were true. He then asked that Mrs. Howell be deprived of the party and party costs of the proceedings upon the ground that had she given a clearer statement to the Deputy Official Assignee he might not have brought the proceedings.

Cooper for Deputy Official Assignee.
Baldwin for Mrs. Howell.

OSTLER, J., said that he was asked to deprive Mrs. Howell of the party and party costs of the proceedings upon the ground that had she given a clearer statement to the Deputy Official Assignee he might not have brought such proceedings. In His Honour's opinion that was not a sufficient ground for depriving her of her costs as a successful defendant. She had not been guilty of misconduct and His Honour could see no justification for departing from the ordinary rule in her case.

Motion dismissed.

Solicitors for Deputy Official Assignee: **Cooper, Rapley and Rutherfurd,** Palmerston North.
Solicitor for Mrs. Howell: **P. Baldwin,** Palmerston North.

Ostler, J. February 7; 18, 1930.
Palmerston North.

PAHIATUA COUNTY v. AKITIO COUNTY.

River—County—Non-Navigable River Wholly Within Boundaries of Plaintiff County—Wide Powers of Control Granted to Plaintiff County by Statute—Defendant County Removing Gravel from Bed of River—Impossibility of Exercise of Plaintiff's Statutory Powers of Control if Unable to Restrain Removal of Gravel by Private Owners of Bed of River—*Semble* No Power to Restrain Removal of Gravel by Crown or its Licensees from Portion of Bed Owned by Crown—Injunction Granted Restraining Defendant County from Removing Gravel—Liberty Reserved to Defendant to Apply for Variation or Rescission of Injunction if and when Proof of License Granted by Crown to Remove Gravel from Portion of Bed Owned by Crown—Public Works Act, 1928, Ss. 260, 261, 265—Land Drainage Act, 1908, S. 61.

Motion by plaintiffs for an order making perpetual an interim injunction granted on 9th December, 1929, and a motion on behalf of defendants for an order rescinding the interim injunction. The interim injunction restrained the defendant Council, its servants and workmen from removing gravel from the bed of the Makuri River and from in any manner interfering with the bed or banks or course of that river. A number of affidavits were filed by both of the parties. The plaintiffs were of the opinion that the removal of gravel by defendants from the bed of the Makuri River might cause that river to change its course, or erode its banks, and might cause damage to the roads and bridges and to private property in the locality. The defendants' engineer denied that such results were likely to follow.

O'Leary for plaintiffs.
Lloyd for defendants.

OSTLER, J., said that it was unnecessary for the Court to determine the disputed question of fact, because His Honour was convinced that as a matter of law the plaintiffs could prevent the defendants from taking gravel from the bed of the river, for the following reasons: The river was a non-navigable river and lay wholly within the boundaries of the Pahiatua County. By virtue of S. 260 (2) of the Public Works Act, 1928, therefore it was a public drain, and as such by virtue of S. 261 it was under the control of the plaintiff. S. 265 specified the powers possessed by the County Council in respect of the river, and it would be seen that wide powers of control were granted. Similar powers were granted to the plaintiff under S. 61 of the Land Drainage Act, 1908. The general rule was that a duty imposed by Parliament carried with it the necessary powers for its proper performance: see **27 Halsbury's Laws of England,** 149; **Lee Conservancy Board v. Button,** 12 Ch. D. 383; **London County Council v. South Metropolitan Gas Co.** (1903) 1 Ch. 76, 84, 85. In the present case the measure of control granted to the plaintiff included the erection of banks and dams, the diversion of water, the removal of obstructions to its flow, and the altering of its course. It would be impossible for the plaintiff to carry out its statutory duties in respect to the river if it did not have sufficient control over it to be able to restrain the removal of gravel from its bed, even by riparian owners and their licensees. Therefore, in His Honour's opinion it had such power, just as a river board was held to have such power in **Kingdon v. Hutt River Board,** 25 N.Z.L.R. 145, and the Commissioners under the Taieri Land Drainage Act, 1910, in **Broderick v. Blackie,** 34 N.Z.L.R. 1113, 1118. His Honour could see no distinction between the last-mentioned case and the present one. It was held in that case that the Commissioners by virtue of being given statutory control over the stream were entitled to prevent the owners of the bed of that stream from taking gravel from it. Similarly in the present case the statutory control given to the plaintiff was sufficient to enable it to prevent any private owner of the bed of the river from removing gravel from it. His Honour expressly used the words "private" owner because it appeared from the affidavits that the Crown owned a part of the bed of the Makuri River. The Crown was apparently not bound by the Acts giving the control of that river to the plaintiff. If that were so the Crown could not be restrained from taking gravel from its own land or presumably from granting licenses to do so. That point was not argued, and His Honour, therefore, refrained from expressing a concluded opinion upon it. The plaintiffs were entitled to an injunction restraining the defendants from taking gravel from the bed of the Makuri River until the further

order of the Court, and an order was made accordingly. Liberty was reserved to the defendants to apply to the Court to vary or rescind the order if and when they could prove that they had been granted permission by the Crown to take gravel from that part of the bed of the river vested in the Crown.

Solicitors for plaintiff: **Smith and McSherry,** Pahiatua.
Solicitors for defendant: **Lloyd and Lloyd,** Dannevirke.

Ostler, J. November 22, 1929; January 6, 1930.
Gisborne.

IN RE TELFORD.

Bankruptcy—Mortgage—Voluntary Settlement—Fraudulent Conveyance—Fraudulent Preference—Payment by Bankrupt to Wife in Discharge of Debt to Her and Assignments in Consideration of Debt Not Voluntary Settlements—Not Impeachable as Fraudulent Conveyances—Sale of Land by Mortgagee Through Registrar of Supreme Court to Nephew of Bankrupt at Undervalue—Mortgage Genuine and Power of Sale Exercised *bona fide* **by Mortgagee—Sale Not Set Aside—Bankruptcy Act, 1908, S. 75—Statute 13 Eliz. c. 5.**

Motion by the Official Assignee in bankruptcy of the estate of Hugh Telford for an order setting aside certain transactions between the bankrupt and his wife and the Bank of Australasia. The relevant facts of the case were as follows: The bankrupt from 1904 had carried on a farming business near Gisborne in partnership with one Scott. The partnership ran its stock on some 3,300 acres, partly freehold and partly leasehold. It was successful, and in 1920 a profit of £1,900 was made. In July, 1920, when land had reached its most inflated price, the firm purchased as a going concern a farm of about 1,660 acres and the stock thereon from one Kirkpatrick. The price of that farm was over £40,000. They paid about £10,000 cash and gave a mortgage for £31,850. Immediately afterwards came the slump and they got into trouble about keeping up their payments of interest. They managed to do so for some years by drawing on their capital. On one occasion Kirkpatrick remitted the payment of £1,500 overdue interest, but he steadily refused to make any reduction in the amount of the mortgage. In June, 1927, the partners were £2,528 in arrears in their interest. Kirkpatrick issued a writ in December, 1927, and judgment was eventually signed for that amount with costs. On 18th May, 1928, they paid Kirkpatrick £2,604 5s. 2d. in satisfaction of that judgment. Telford said that they were led to believe that if they paid that sum Kirkpatrick would then consider making some reduction in the mortgage, without which it would be impossible for them to carry on. He refused, however, to grant any concession. In May, 1928, there was another instalment of interest overdue on the mortgage, and unpaid. In that month Telford having received part of a legacy from Australia made a payment to his wife of £1,000. It was claimed on behalf of the Official Assignee that that payment was a gift. On 2nd June, 1928, Telford executed a deed of assignment of a one-twelfth share of the residuary estate of Peter Wright Telford deceased, to his wife. That share amounted in value to about £1,250. The assignment recited that he was indebted to his wife, and it was expressed to be an assignment upon trust after payment of the costs of realisation to pay herself the amount owing to her (that amount not being stated) and to repay the surplus (if any) to her husband. On 24th November, 1928, Telford and his wife joined in executing an assignment to the Bank of Australasia of that one-twelfth share which had previously been assigned to his wife. The deed of assignment recited the previous assignment to the wife, and went on to recite that Telford was indebted along with his partner Scott to the Bank in the sum of £4,952, and that Telford's wife was a guarantor in respect of that debt. The assignment was to the Bank upon trust to collect the money, to pay the debt to itself, and to pay the surplus (if any) to the wife. There was no surplus. On 3rd November, 1928, the whole of the land owned and leased by the firm (with the exception of the land purchased from Kirkpatrick) and also the whole of the stock owned by the firm was sold through the Registrar by a mortgagee and bought in by one Richmond, a nephew of Telford. When the Bank took the assignment three weeks later it must have been aware that this mortgagee's sale had taken place. The two assignments were also attacked by the Official Assignee. On 4th September, 1928, there being then a year's interest amounting to £2,528 due on his mortgage, Kirkpatrick issued a writ claiming that amount from Telford and Scott. Judgment against Scott was entered on 16th November, 1928, but Telford was not served in time for judgment to be entered against him at that session. Judgment for that sum was, however, subsequently entered against Telford. A bankruptcy notice was served on him and he was adjudicated a bankrupt on 21st May, 1929, the bankruptcy relating back to 15th April, 1929, the date of the first available act of bankruptcy committed by him. In April, 1928, Telford's wife purchased a new Essex motor-car giving for it an old car and £210; this car was also claimed by the Official Assignee as part of the estate of the bankrupt.

First Motion:

O'Leary and Coleman for Official Assignee.

Cooke and Wauchop for Mrs. Telford.

Burnard for Bank of Australasia.

Second motion:

O'Leary and Coleman for Official Assignee.

Cooke and D. Chrisp for Richmond.

Wauchop for Bennett.

Bull for Palairet.

OSTLER, J., said that counsel for the Official Assignee did not at the hearing of the motion call either Telford or his wife but put in the evidence given by the bankrupt at his public examination before the Official Assignee. In that evidence the bankrupt swore that the £1,000 paid to his wife in May, 1928, was not a gift, but to repay advances she had made to him. He explained that payment further by stating that he had an agreement with his wife under which he had promised that if she would spend her money in paying for the education of their children he would repay her the money so expended. He said that under that arrangement she had expended over £1,700, and the £1,000 was paid as part of that debt which he owed her. There was no evidence contradicting his statement, and His Honour was prepared to hold that the payment of the £1,000 was not a gift but the payment of a debt. That being so it could not be a settlement under S. 75 of the Bankruptcy Act, 1908, nor could it be void under the Statute 13 Eliz. C. 5: see **In re Pope,** 98 L.T. 775; **In re McGrath,** 17 N.Z.L.R. 646; **Glegg v. Bromley,** (1912) 3 K.B. 474. It was admitted that it could not be a fraudulent preference, because the debt was paid more than three months before the bankruptcy, and therefore there was no ground upon which it could successfully be attacked. The bankrupt stated that he understood it to be the usual thing for a partner to protect his private creditors before his partnership creditors. In this His Honour thought he was right: see **Reeves v. Official Assignee of Reeves,** (1919) N.Z.L.R. 385. With regard to the two assignments, unless the later one could be successfully attacked it would be useless to attack the first, because the bankrupt's wife got no benefit out of the first assignment, but joined with the bankrupt in assigning the whole of the property comprised in the first assignment to the Bank. So far as the assignment to the Bank was concerned, it was unquestionable that it was made in consideration of a debt for which both the assignors were liable. Therefore it was not a settlement, and it was not void under the Statute 13 Eliz. C. 5. If it had been made within three months of the bankruptcy it might have been attacked as a fraudulent preference, but it was made nearly five months prior to the date of bankruptcy, and therefore, could not be attacked on that ground. With regard to the motor-car, it was undoubtedly the fact that the bankrupt's wife owned separate property. The bankrupt's evidence was that she kept a separate bank account at a different bank from his. He sometimes paid moneys into that account. There was no evidence whatever before the Court to show that either the money she paid or the old motor-car that was given in part payment for the new car were the property of the bankrupt, and the bankrupt swore that both belonged to his wife. His Honour had no reason for refusing to believe him, and that being so the motor-car belonged to the wife.

The motion also asked that the sale by the Registrar on 3rd November, 1928, of the whole of the partnership property with the exception of the land purchased from Kirkpatrick should be set aside. That part of the motion was by consent heard separately. The suggestion on behalf of the Official Assignee was that the mortgage to Palairet, and the sale were

sham transactions, and that the property had been bought by the bankrupt's nephew at a gross undervalue as the secret agent of the bankrupt. It was admitted by counsel for the Official Assignee that that was purely a question of fact. After hearing the evidence of Mr. Burnard His Honour intimated at the hearing that he was satisfied that the mortgage to Palairet was a genuine business transaction, and that Palairet had *bona fide* exercised his power of sale and therefore there was no ground upon which that transaction could be set aside, notwithstanding that the property had been sold at very much less than its true value.

Motion dismissed.

Solicitors for Official Assignee: **Coleman and Coleman** Gisborne.

Solicitors for Mrs. Telford, Richmond, Palairet, and Bank of Australasia: **Burnard and Bull,** Gisborne.

Solicitors for Bennett: **Rees, Bright, Wauchop and Parker,** Gisborne.

Ostler, J. February 10; 17, 1930. Wellington.

GUILDFORD TIMBER CO. LTD. v. WRIGHT.

Magistrate's Court—Vendor and Purchaser—Practice—Appeal—Claim for Moneys Due Under Agreement for Sale and Purchase of Land and for Stamp Duty thereon within Jurisdiction of Magistrate's Court—Splitting Demands—Vendor Entitled to Sue for Deposit and Stamp Duty Alone Although Whole Purchase Money Due Under Agreement—Vendor's Remedies in Respect of Purchaser's Default Not Limited to Express Powers Conferred by Agreement—Point Not Taken in Magistrate's Court and Curable by Evidence Not Allowed to be Raised on Appeal—Magistrate's Court Act, 1928, Ss. 27, 32—Stamp Duties Act, 1923, Ss. 28, 32, 80, 88.

Appeal in law from the decision of E. Page, Esq., S.M., at Wellington. The facts of the case were that the appellant company on 6th June, 1929, entered into an agreement in writing under which they agreed to sell and the respondent agreed to purchase some seven acres of land for £450. The respondent agreed to pay a deposit of £20 and the stamp duty on the signing of the agreement, and the balance by specified monthly instalments. The appellant agreed to execute a transfer of the land to respondent upon payment of the whole of the purchase money. Clause 18 of the agreement was in the following terms: "Should the purchaser fail or neglect to observe or comply with any of the conditions stipulations or agreements herein contained or implied or make default in payment of any moneys by these presents agreed to be paid and such default or neglect shall continue for the space of fourteen days then and in any such case the vendor may forthwith or at any time thereafter at his option: (a) Fourteen days after notification to the purchaser by registered letter sent to the address set out in his agreement of the vendor's intention so to do cancel these presents whereupon all moneys theretofore paid by the purchaser to the vendor shall be deemed to be absolutely forfeited to the vendor as and for liquidated damages, provided however that this right shall not be exercisable if at the time of his default the purchaser shall have paid to the vendor fifty per centum of the purchase money payable hereunder. (b) Enforce specific performance of this agreement, or (c) Enforce payment of all moneys payable under these presents in which case the whole of the unpaid purchase money shall be deemed to have become due and payable to the vendor, or (d) Without being obliged to tender a transfer conveyance or other legal assurance to re-sell the said lands and premises either by public auction or private contract in such lots and upon and subject to such conditions as to the payment of purchase money as the vendor shall think fit and the deficiency (if any) arising on any such re-sale together with all expenses whatsoever attending the same shall be forthwith made good and paid by the purchaser to the vendor as liquidated damages and if at the time of such re-sale the purchaser shall not have paid fifty per centum of the purchase money any surplus on such re-sale shall belong to the vendor, but otherwise shall belong to the purchaser." The respondent did not pay the deposit or the stamp duty, and he repudiated the agreement claiming that it was not binding on him because of the non-performance of a condition precedent. The appellant thereupon got the agreement stamped, and brought an action in the Magistrate's Court for £25 12s. 6d. being the deposit agreed to be paid and the stamp duty. Counsel for the respondent asked for a nonsuit, contending that the Magistrate's Court had no jurisdiction to entertain a claim for part of the purchase money of land. The learned Magistrate declined the nonsuit upon that ground but nonsuited the appellant upon two grounds raised by himself. The first ground was that by reason of clause 18 (c) of the agreement the unpaid purchase money amounting to £450 together with interest thereon had all become due, and a claim to recover it was, therefore, beyond the jurisdiction of the Magistrate's Court; it was true that only £25 12s. 6d. had been claimed, but the whole debt was due in one sum and the plaintiff was not allowed to divide his cause of action for the purpose of bringing two or more actions and so bring his claim within the jurisdiction. The second ground was that the plaintiff was not entitled to sue for the purchase money under that clause prior to and independent of the execution of a conveyance.

Hanna for appellant.

Spratt for respondent.

OSTLER, J., said that he agreed with the learned Magistrate in his decision that the Magistrate's Court had jurisdiction to hear the claim. S. 27 of the Magistrate's Court Act, 1928, gave that Court jurisdiction to hear (*inter alia*) any claim for debt not exceeding £300. Counsel for respondent contended that the word "debt" should be limited to cases where the old common law action for debt was maintainable, but His Honour saw no reason for construing the word in any narrower sense than its popular meaning. A debt was a sum certain payable in respect of an immediate liability by a debtor to a creditor, and immediately recoverable. If a purchaser by instalments of land agreed to pay a deposit on the signing of the agreement, in ordinary language that liability would create a debt. If by the express terms of a contract for the sale and purchase of land it was provided that a deposit or part of the purchase money should be paid on the signing of the agreement or on a fixed date, which was not the agreed date for the completion of the contract, then the deposit or portion of the purchase money when due was a debt, and if within the monetary jurisdiction of the Magistrate's Court could be recovered in that Court: see **Ruddenklau v. Charlesworth,** (1924) G.L.R. 417 and the cases there cited: **Ruwald v. Halling,** 27 N.S.W. S.R. 334. The stamp duties which were sued for were also a debt. The effect of Ss. 28, 32, 80 and 88 of the *Stamp Duties* Act, 1923, was to make a purchaser of land a statutory debtor to the vendor for the amount of the stamp duty due on the agreement of sale which the vendor had paid. That was admitted by counsel for the respondent. But the learned Magistrate seemed to have thought that because by the terms of clause 18 upon a default all unpaid purchase money should be deemed to be due, and because the claim was only for the deposit and the stamp duty, the appellant ought to be nonsuited because it was splitting its demand. Surely it was premature to decide that. If a creditor sued for part only of the money due to him it could not be foretold that he had any intention of splitting his demand and bringing another action for the balance. It was only if and when a second action was commenced for the balance that the point could be properly taken. It was not till then that a demand had been split. Therefore that ground of nonsuit was erroneous in law.

With regard to the other ground it appeared that the learned Magistrate was wrong in holding that the appellant was strictly confined to the remedies for default specified in clause 18. Such a contention was put forward in the Court of Appeal in **Dee v. Montgomery,** (1927) N.Z.L.R. 628, and was rejected by that Court. His Honour saw no indication in the present contract that the parties intended that either should be deprived of any remedy available to him apart from the contract. The contract provided that the deposit and the stamp duty should be payable by respondent on the signing of the contract: they had not been paid; therefore they were debts which appellant company was entitled to recover.

A point was raised in the Supreme Court by the respondent which was not raised in the Court below, viz., that by virtue of clause 17 of the agreement the sale was subject to the approval of the subdivision by the Lands and Survey Department and by the Hutt County Council and that there was no proof by appellant that that condition precedent had been performed. The rule established as to points on an appeal which were not taken in the Court below was that they would only be allowed to prevail if they went to the root of the matter and, if raised in the

Court below, they could not have been cured by evidence: see **Public Trustee v. Loasby**, 27 N.Z.L.R. 801, 808, where the question was discussed and the cases collected. In the present case if the point had been raised it might have been cured by evidence. Consequently His Honour did not think it would be right to consider the point for the first time in the Supreme Court.

Appeal allowed and case remitted to the Magistrate's Court.

Solicitors for appellant: **Duncan and Hanna**, Wellington.
Solicitors for respondent: **Brodie and Keesing**, Wanganui.

Ostler, J. February 2; 8, 1930.
Palmerston North.

RICHARDS v. RICHARDS.

Husband and Wife—Public Trustee—Application by Wife for Order for Possession of Lands Used and Occupied by Husband—Wife Tenant for Life Under Will of which Public Trustee the Trustee—Consent of Public Trustee Not Obtained Before Commencement of Proceedings But Obtained Before Hearing—Proceedings Valid—Public Trust Office Amendment Act, 1921, S. 59—Married Women's Property Act, 1908, S. 23.

Application by plaintiff, a married woman, under S. 23 of the Married Women's Property Act, 1908, for an order granting her possession of certain real property against her husband, the defendant. The property was a house and land in Palmerston North which had been devised by one Isabella Hopkins Sly deceased to the Public Trustee upon trust to permit plaintiff to have the free use, income, occupation and enjoyment thereof for her lifetime with remainder to her children. The defendant was a son of the testatrix: instead of giving him any portion of her estate she had provided for his wife and family by the devise. The testatrix died in 1929 but for many years before her death she had allowed defendant with his wife and family to occupy the house and land. The area of the property was more than 2¼ acres, and the defendant had used it for some years as a poultry farm. He had been making a net income from the use of the land of £2 10s. 0d. a week, but had contributed practically nothing towards the support of his wife who had had to rely for her living upon the moneys paid by such of her children as were boarding with her. The plaintiff and the defendant had been living in the same house, but not as man and wife for some time. The plaintiff demanded that her husband pay a rental of 30s. a week for that part of the land which he used as a fowl run, so that she could have a fund with which to keep the house in repair, as she was bound to do under the terms of the devise. The husband had declined to pay anything for the use of the land, and was continuing to use it without payment. The plaintiff, therefore, asked for an order for possession.

Fitzherbert for plaintiff.
Cooper for defendant.

OSTLER, J., said that the counsel for the defendant had raised a preliminary objection to the proceedings, viz., that they were bad because plaintiff did not before commencing them obtain the consent of the Public Trustee under S. 59 of the Public Trust Office Amendment Act, 1921. That section provided that where any person was tenant for life of any lands comprised in an estate being administered by the Public Trustee, such person should not be entitled to the use, occupation and enjoyment of such lands except with the consent of the Public Trustee. At the hearing of the case counsel for plaintiff stated that he had obtained the consent of the Public Trustee to the motion and to plaintiff having possession of the land, and counsel for the Public Trustee was present and confirmed that statement. In His Honour's opinion the proceedings were not invalid because they were commenced before such consent was obtained. The consent having been obtained before the hearing, at the hearing there was no valid objection to an order for possession being made. That preliminary objection therefore failed. An order was made in favour of plaintiff giving her possession of the land in question.

Solicitors for plaintiff: **Hankins, Fitzherbert and Abraham**, Palmerston North.
Solicitors for defendant: **Cooper, Rapley and Rutherfurd**, Palmerston North.

Blair, J. November 6, 1929; February 10, 1930.
Palmerston North.

LANKSHEAR v. FAIR.

Trespass—Joint Tort—Feasors—Dogs—Sheep-worrying — Dogs Acting Together Causing Damage to Sheep—Dogs Owned by Different Owners—Each Owner Liable for Whole Damage—Onus on Owner to Show What Particular Damage Due to His Own Dog—Dogs Registration Act, 1908, S. 27.

Appeal from the decision of the Stipendiary Magistrate at Feilding, the sole question at issue being that of damages. The appellant was a farmer whose sheep were worried by dogs. The respondent's dog was one of five dogs which on the evening of 7th June, 1929, and also on the morning of 8th June, were chasing and worrying appellant's sheep. The total damage to appellant's sheep was assessed by the Magistrate at £58 5s. 0d. The Magistrate held that the respondent was liable only for one-fifth of the damage.

Cullinane for appellant.
Cooper for respondent.

BLAIR, J., said that the respondent's dog was identified as the particular dog which worried three sheep, but there was no direct evidence as to the precise extent of respondent's dog's depredations as distinguished from the depredations of the other four dogs. The evidence, however, showed that the respondent's dog took more or less of a leading part in the raids, and it appeared also, from what was seen of them, that the raids were joint affairs, although the efforts of some of the dogs were more modest than those of the others.

Piper v. Winnifrith and Leppard, 34 T.L.R. 108, on which the learned Magistrate had relied, at first blush looked like a case on all fours with the present. Two dogs owned respectively by a father-in-law and a son-in-law residing in the same house worried the plaintiff's sheep. The defendants appeared in person before the County Court. One of them paid into Court half the damage and pleaded that it was sufficient to cover any damage by his dog. Judgment was given against each defendant for half the damages, and the County Court awarded against the plaintiff costs to the defendant who had paid half the damages into Court. From that judgment the plaintiff appealed. Lawrence and Atkin, JJ., refused to disturb the verdict, holding that there being no evidence of a joint trespass and to make each defendant liable, there must be evidence of a joint wrong. Atkin, J., went further and said that to make the owners of the dogs jointly liable some connected action by the owners together must be proved; for instance they might have been shown to have both set the dogs on to attack the sheep together. Each owner, he said, might be liable for the whole damages if it could be shown that the dogs had so worked together that each caused the whole of the damage. With the greatest respect to Atkin, J., His Honour was unable to follow his reasoning. His Honour could not conceive a case where two dogs could so work together that both caused the whole damage. If the statement had been that the whole damage must be attributed to each dog's owner only if the two dogs' actions had been so interwoven as to render it impossible to separate them, His Honour could understand it, although doubting its soundness. But His Honour could not understand the statement that two could do a thing and yet each do all. The basis of the judgment as stated by Lawrence, J., was that there was no evidence of a joint wrong, and on that basis, the judgment, if His Honour might be permitted to say so, seemed to be sound. Two dogs could go out worrying the same night, and each go at separate times to the plaintiff's farm and worry sheep separate and independent each of the other. If such a case were proved the damage of each dog would be the liability of each dog owner. But if two or more dogs belonging to different owners went together and jointly partook in a raid on the plaintiff's sheep, then the raid was a joint affair and on proof of that surely it lay upon the owner of each dog to establish affirmatively the particular part of the damage his dog did, and establish also that his dog acted independently of the others and not in concert with them. Where the evidence of the plaintiff established a *prima facie* case of joint raiding by dogs, the onus would be shifted to the defendant, if he could, to individualise his own from the other dogs' efforts. In the present case there was clear evidence of a joint wrong by the five dogs and the evidence went further by showing that the respondent's dog took a more prominent part than the others. If **Piper v. Winnifrith and Leppard** (*cit. sup.*) were good law then it was clearly distinguishable from the present case in that in the present case there was clear evidence of a joint trespass. His Honour, must however respectfully dissent from Atkin, J.'s

statement that to make dog owners liable proof must be given by plaintiff of some connected action by the dog owners each with the other. If that were the law it would be in practice a matter of impossibility to establish liability on dog owners in any case where more than one owner's dog participated in a raid. The statute said that neglect on the part of the owner need not be proved and that portion of the statute must have been overlooked by Atkin, J.

His Honour quoted Section 1 of the Dogs Act, (1906), 6 Edw. VII, C. 32, the statute in England dealing with dog owners' liability, and pointed out that the term "cattle" was defined in that Act as including (*inter alia*) "sheep." The corresponding section in the New Zealand Act was Section 27 of the Dogs Registration Act, 1908, which contained almost identical wording; the liability of an owner was for "injury done by his dog." Both statutes imposed liability because of the fact of ownership in the offending dog. That liability did not depend on any act or neglect on the owner's part. All the plaintiff had to prove was damage done by the dog and ownership by the defendant of the dog. Where two or more persons acting in concert did damage then each was responsible for the whole damage. His Honour could see no reason why the same rule should not apply to damage done by dogs. But even if that were not the position it appeared to His Honour that, once it were proved that several dogs acting together committed damage, that was sufficient proof to justify the imposition on any owner of any one of the dogs of the whole of the damage committed by all the dogs, leaving it to each owner if he could to exculpate his dog from complicity in some particular portion of the damage. In **Murray v. Brown and Porteous,** 19 Sc.L.R. 253, the Court of Session held that the owners of two dogs jointly concerned in worrying sheep were severally as well as jointly liable for the whole damage. His Honour preferred that decision to **Piper v. Winnifrith and Leppard,** (*cit. sup.*).

Appeal allowed.

Solicitors for appellant: **Kelly and Cullinane,** Feilding.

Solicitors for respondent: **Cooper, Rapley and Rutherfurd,** Palmerston North.

Smith, J. August 8, 1929 (oral judgment); February 17, 1930 (written judgment). Palmerston North.

IN RE CAVANAGH.

Family Protection—Application by Married Sons and Daughter in Poor Circumstances for Provision Under Will of Father—Sons Working Without Wages for Several Years Building Up and Improving Father's Farm—Promises by Father That Farm Would be Left to Such Sons—Father Leaving Whole of His Estate to Widow, Daughter and Two Younger Sons—Deserts of Claimants a Relevant Factor—No Rule That Testator Owes No Moral Duty to Adult Son Capable of Earning Own Living—Testator's Moral Duty to Sons Not Fulfilled—Provision Made For Married Sons and Married Daughter.

Originating summons under the Family Protection Act, 1908. John Cavanagh died on 19th January, 1911, leaving a will dated 25th November, 1910. The effect of the will, so far as it was material to the present application, was that the testator gave the whole of his property upon trust to pay the net income to his widow and his then unmarried daughter Esther, in equal shares, during the widow's lifetime, and until the death or marriage of Esther. Upon the death or marriage of Esther, the wife was to receive the whole of the net income during her life. Upon the death of the wife, the trustees were to set aside and invest £3,000 free of duty, and to pay the income thereof to Esther during her life, and after her death to hold the corpus for such person or persons as she might appoint, and in default of appointment for such persons as would have taken the same, had it been the absolute property of Esther, at the time of her death. The testator declared that such legacy should be deemed to vest in Esther immediately upon his death notwithstanding that his daughter might predecease his wife. After making provision for payments of £25 per annum to Esther after the expiration of a period of five years from the death of his wife, such payments to be charged against the principal of the legacy of £3,000, the testator directed his trustees to hold the remainder of his estate in trust for his sons C. E. Cavanagh and R. K. J. Cavanagh in equal shares as tenants in common.

Probate of the will was granted on 25th February, 1911. The present net value of the estate, exclusive of a small amount of accrued interest, was £3,739 12s. 0d.; but no amount had been paid as executors' commission. The estate had not been distributed. The testator John Cavanagh left him surviving his widow, Lucy Annie Cavanagh, and eleven adult children viz., five sons and six daughters. The youngest daughter Esther and the two younger sons C. E. Cavanagh and R. K. J. Cavanagh for whom the testator made provision in his will were the children who were still at home when the will was made. Of the remaining eight children, two daughters married husbands in good circumstances. They made no application to the Court. The other six children were the plaintiffs named in the present originating summons. At the hearing it was explained that the plaintiff W. G. Cavanagh, and the defendant trustee E. J. Smith, had died, and that the plaintiff A. M. Wolland did not wish to apply. Their names were accordingly struck out of the proceedings. The facts relative to the application are fully set out in the report of the judgment.

G. H. Smith for plaintiffs.

T. M. Page for defendant trustees.

H. R. Cooper for objecting beneficiaries.

SMITH, J., said that the question for the Court was whether the testator died without making adequate provision in his will for the proper maintenance and support of the plaintiffs. The view of the Act upon which the Court acted to-day was, His Honour thought, that expressed by Salmond, J., in **Allen v. Manchester,** (1922) N.Z.L.R. 218, at pp. 220, 221. That view seemed to have been approved in the Court of Appeal in **Welsh v. Mulcock,** (1924) N.Z.L.R. 673, and was expressly applied by Stringer, J., in **In re Smith,** (1927) N.Z.L.R. 342 and in **In re Wakelin,** (1927) N.Z.L.R. 846. In the latter case, the learned Judge described the view expressed by Salmond, J., as "the now accepted view of the Family Protection Act." It might appear to be a more liberal view of the Act than was expressed in **Allardice v. Allardice,** 29 N.Z.L.R. 959, 969, but it was, His Honour thought, only an expansion of the meaning of the test proposed by Edwards J. in the Court of Appeal in that case, at page 973. It was clear that one of the relevant circumstances was the deserts of the claimants. Their part in building up the estate of the testator, and his promises to them in respect thereof, if any, should, it seemed, be taken into account, just as much as habitual disrespect on their part, idleness, or criminality. The Court safeguarded itself by having regard to the principle that, although the Act was something more than a statute to extend the provisions of the Destitute Persons Act, it was not an Act empowering the Court to make a new will for the testator. The Court, therefore, endeavoured to ensure that any provisions which it made should be adequate, but no more than adequate to repair the testator's breach of duty. By so doing, the Court paid deference to the testator's intention as expressed in his will. Again, the Court would, in general, look with more favour upon the claim of a widow than upon the claims of children. Where the claims of children were in issue, it had sometimes been supposed that **Allardice v. Allardice** established that an adult son capable of earning his own living could not succeed in a claim under the Act. As to that, it was said by Salmond, J., in **Allen v. Manchester,** (*cit. sup.*) at page 221: "Nor is it (**Allardice v. Allardice**) a decision that a testator owes no moral duty to an adult son capable of earning his own living. It is merely a decision as to the just and proper method of distributing between the various claimants an income not adequate to meet in full the moral claims of all of them." It was to be noted also that the sons referred to in **Allardice v. Allardice** were able-bodied men capable of earning their own living, unmarried and without burdens. It was now necessary to apply those rules of guidance to the position of the present plaintiffs.

The circumstances to which the Court must have regard were those arising at the death of the testator, together with the reasonable probabilities as to future changes in those circumstances. At the time of his death, the testator was the owner of a fully improved farm completely stocked. The claimants who were sons alleged that they were in poor circumstances, that the wealth which the testator then possessed was practically created by them, that their father in his lifetime recognised this, and that he stated on various occasions that the estate would be left to them, and that the harder they worked in improving the estate, the more would be left to them on his death. It appeared that the testator went from the Lower Hutt to Hamua, in 1888. According to the affidavit of John Thomas Cavanagh, he appeared to have been then worth about £200, but Mrs. Johanson, in cross-examination, said that she heard her mother say that they had £500 when they went to Hamua. The testator took up two bush sections comprising 126 acres, on one of which about 40 acres of bush had been felled and on the other about 15 acres. From the

evidence, His Honour deduced that in 1888 J. T. Cavanagh was 18, H. Cavanagh 12, W. Cavanagh 9, Mrs. Sedcole 6, Mrs. Johanson 4, C. E. Cavanagh 3, and R. K. J. Cavanagh 1 year of age. His Honour found also on the evidence that by 1901, the farm had been fully improved and stocked. The period required for that purpose was therefore about 13 years. His Honour thought that the father had the guiding and directing brain, but since 1886 had been in poor health and unable to do heavy work, although, being a carpenter, he took part in building a house. The heavy work required for converting the farm from its bush state to one of full improvement was done by the elder sons.

It was necessary to say something separately about the part played by each of the sons in improving the farm, and the promises made to them by their father, although His Honour's remarks in the first claim would necessarily cover much of the ground in the others :—

(1) As to J. T. Cavanagh His Honour found that he worked for his father without wages until he was 27. It followed that he worked as an adult without wages for 6 years. During the period of 13 years, His Honour found that J. T. Cavanagh, with his brothers Henry and William, worked in clearing the land, fencing, sowing grass seed, and in helping to erect the buildings and carry out the other improvements to the farm. He also, with those brothers, carried out contracts taken by the father with neighbours for the purpose of obtaining additional money for the development of the land and the purchase of additional stock. His Honour was satisfied that practically the whole of the work was done by the elder sons, of whom J. T. was one, and that the testator did tell the sons who were plaintiffs that the estate would belong to his children after his death, and that they would be well repaid for the work done for him, without wages, as such work would eventually mean an increased share in the estate for each of them.. J. T. Cavanagh had never had any property or means. He had reared nine children, and his life had been one continual struggle. At the time of his father's death, His Honour was satisfied that it was reasonable to expect that his future would be of that nature. He was at present 59 years of age, and had a wife and a delicate daughter of 15, and a younger daughter of 12, dependent upon him. He was at present share-milking, and the total earnings of himself and his son amounted to about £5 per week. His own earnings appeared to be £2 per week. He had no accumulated property. The question was whether the father failed in his duty to this son, when he completely omitted him from the will. At the time of the testator's death in January, 1911, the testator was living at home with his wife, who was in delicate health, his daughter Esther (since Mrs. Johanson), and his two younger sons. His first duty was undoubtedly to provide for his widow. The widow was an invalid, and not expected to live long. On the other hand, she might linger on, as in fact, she did. Esther might be expected to attend to her. The widow should, on an estate of £4,000, be entitled, His Honour thought, to the benefit of the whole income, and that was, in effect, provided for her. On the other hand, after the widow's death, could the testator do what he willed with his own, by disposing of his estate entirely to Esther and the two younger sons, without overlooking his promises to the older sons, who had by their labour founded his estate, and who were then in poor circumstances, with dependents, and without any prospect of the alleviation of those circumstances, except by some gift under the father's will ? The two younger sons were in no need of provision as compared with the elder sons, but Esther had an undoubted claim. She was then 27, and unmarried, and she had the prospect of having to care for her mother. During the widow's lifetime, that could be met by making the whole of the income available to the mother and Esther. After the widow's death, which might be soon or late, Esther might expect to receive a substantial portion of the estate. After giving due weight to her opposing claim, His Honour thought that the testator could not without some breach of moral duty, wholly omit the elder sons from his will. In so doing, he failed to make in his will adequate provision in the particular circumstances for their proper maintenance and support. The explanation was, His Honour thought, that the testator had at the time of his will regard only to those who remained at home. It was significant that both the younger sons married 6 months after their father's death. There appeared to have been no disrespect or family trouble between the father and his sons. As the claim of the widow was not in competition with the other claims, His Honour thought that some small lump sum award should be made to J. T. Cavanagh, and he accordingly awarded him £250, the same to be paid out of the £3,000 directed to be set aside for Mrs. Johanson and her children.

(2) As to Henry Cavanagh—Henry was 12 years of age when the family went to Hamua, and he left home when he was 25. That son had had no education and could just sign his name. His Honour was satisfied on the evidence that he worked on the farm and on contracts taken by the father from 1888 to 1901, when the farm became fully developed ; he was an adult during the last four years. In 1901, Henry was going to get married and leave home. His Honour found that the same promises were made by his father to him, as were made to J. T. Cavanagh, and that he received no wages for the work which he did. In 1901, Henry was going to get married, and leave home, but the father apparently provided him and the other son William with a lease of one section, and stocked it with 20 milking cows. The two brothers were there for 18 months, and then went bankrupt. After that, Henry went to work in sawmills. When his father died, Henry had a wife and three children, and the reasonable expectation was, His Honour thought, that his circumstances would not improve. He had had 6 children in all, of whom 2 were still dependent upon him, aged 9 and 7 respectively. Neither husband nor wife had any accumulated property. He was at present cutting sleepers, and his average earnings were 16/- per day, on fine days. In His Honour's opinion, he was entitled to the same allowance as his brother J. T. Cavanagh.

(3) As to William Cavanagh—he was 9 years of age when he went to Hamua. He went to school when 16, and left when 17. Apart from that period at school, he appeared to have worked on the farm until early in 1901, when he was 22 years of age. The same promises were made by the father to him as to his brothers. On attaining his majority in 1900, or 1901, he appeared to have left home owing to some small difference with his father. In 1901, when 21, he returned to his father's home and took up the lease of the section offered to him and his brother Henry by his father. That partnership ended by both becoming bankrupt. After that William worked on his father's property on a share basis, but he made no money out of that. He stayed with his father until 1907, when he was aged 28. He then left home, and leased a property on which he did not do well. He was burned out at Waipukurau. At the time of his father's death, he had a wife and three children dependent upon him, and did not have £100 worth of assets. He had been able to keep his family, but had not been able to save anything. He was a labouring man. Although he had a motor car, (but what kind of car and the value of his interest in it was not disclosed), neither he nor his wife had any accumulated property. At the time of his father's death, he had worked for his father for 13 years (although for only about one year as an adult) in developing the bush farm, he was then in poor circumstances with no reasonable prospect of their improvement, he had had practically no education, and his father had made the same promises to him as to his elder brothers. In all the circumstances, His Honour thought he should award the same amount to him as to his brothers.

(4) As to Mrs. Sedcole—she was but 6 years of age when the family went to Hamua. She was married in 1902. She was at home doing house work prior to her marriage. She had had 4 children. Two were married, and two, aged respectively 22 and 16, lived at home with their parents when they were out of work. Her husband was at one time in a bakery business, but had apparently to give it up. Her husband's property was a small house in Wairoa which with the furniture was worth £250, but against that there was a liability of £145, leaving a net asset of £105. The husband was a roadman, and his wages were 14s. per day. Neither he nor his wife had been able to save anything or make any provision for the future. In **Allardice v. Allardice,** one of the married daughters was allowed £60 a year out of an estate worth about £20,000. The present estate was worth about one-fifth of that amount, and if the measure adopted in **Allardice v. Allardice** were applied to Mrs. Sedcole, she might be awarded £12 per annum. His Honour thought, however, that so small an annuity should be capitalised, in order that it might become really effective in her interest. His Honour, therefore, awarded her £250, to be paid as the other lump sums had been directed to be paid.

His Honour pointed out that the foregoing orders would leave Mrs. Johanson with a very substantial preference under the will, a preference which the testator intended. She was, His Honour thought, in satisfactory circumstances, although the extent of the income of herself and her husband and of her investments was not placed before the Court. The amount which the two younger sons would receive was not large, and His Honour did not think that he should charge any of the payments upon the provision made for them under the will.

Order accordingly.

Solicitors for plaintiffs : **Smith and McSherry,** Pahiatua.

Solicitor for trustees : **T. M. Page,** Eketahuna.

Solicitors for objecting beneficiaries : **Cooper, Rapley and Rutherfurd,** Palmerston North.

Recent English Cases.

Some of the Latest Decisions of Dominion Interest.

(*Continued from p. 10.*)

NEGLIGENCE.

Service v. Sundell, 46 T.L.R. 12, is a decision of the Court of Appeal holding that where in an action for damages for personal injuries alleged to have been caused by the defendant's driving of a motor car, the jury found that there was negligence on both sides but were unable to agree as to whose negligence was really responsible for the accident judgment cannot be given for either party. *Cooper v. Swadling*, 46 T.L.R. 73, should be studied closely by all who go into Court on "running down" actions. It deals with the question of the proper direction to juries in such actions and was discussed in the editorial column of our last issue.

Chapman v. Saddler and Co., (1929) A.C. 584, will probably come to be regarded as the leading case on the subject of the liability of an owner of defective plant who permits its use by another. A firm of stevedores employed by a shipowner and a porterage company employed by the consignee of the ship's cargo were engaged in unloading a ship. The cargo consisted of bags of maize which were made up into loads by the stevedores and held together by rope slings provided by the stevedores, and the bags were then raised by the stevedores from the hold to a steelyard on the deck. The stevedores' duty ended with the deposit of the bags on the steelyard, from which they were transported to the dock by the porterage company by means of a dock crane. The stevedores gratuitously permitted the porterage company to use their slings, which were already round the bags, for the transport of the bags to the dock, and it was a matter of mutual convenience that the same slings should be used throughout. The stevedores employed a servant specially charged with the duty of inspecting the slings and, as the stevedores knew, the porters relied on the care of the stevedores for the safety of the slings. A sling broke while the bags were being transported from the steelyard to the dock, and the bags fell and killed a servant of the porterage company. His dependants brought an action for damages against the stevedores and the House of Lords held that in the special circumstances of the case the firm of stevedores owed a duty to the porters to see that the sling was in a fit condition to take the weight of the load entrusted to it and held also, on the facts, that the Lord Ordinary's finding that they had failed to discharge that duty ought not to be disturbed.

NUISANCE.

In *Vanderpant v. Mayfair Hotel Co. Ltd.*, (1930) 1 Ch. 138, Luxmoore, J., decides two points in this branch of the law: (1) that a private individual who seeks to restrain the obstruction of a public highway must, in order to maintain his suit, prove that he has sustained particular and substantial and direct damage beyond the general inconvenience and injury to the public; (2) that noise will create an actionable nuisance only if it materially interferes with the ordinary comfort of life, judged by ordinary plain and simple notions, and having regard to the locality, the question being always one of degree.

POWER OF APPOINTMENT.

In *In re Williams Settlement, Greenwell v. Humphries*, 45 T.L.R. 540, a woman who had been given a power of appointment in favour of "any husband who may survive her" made an appointment in favour of her then husband if he should survive her. The parties were subsequently divorced. The Court of Appeal held that the appointment was of no effect as, upon the woman's death, the appointee had ceased to be her husband.

PRACTICE.

In the *Kinch v. Walcott*, (1929) A.C. 482, the Privy Council has re-affirmed what seems always to have been clear law, viz., that an order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose.

RESTRAINT OF TRADE.

Express Dairy Co. Ltd. v. Jackson, 46 T.L.R. 147, is a most interesting case dealing with this branch of the law. The defendant, when he was an infant, entered the service of a dairyman as a milk roundsman under a written agreement binding him not at any time within two years from the termination of the contract to interfere with the trade or the "customers belonging to the business or served by the employer his successors or assigns" nor to serve solicit or canvass "any of the said customers" with milk or dairy produce either for his own benefit or that of any other person or company. The business was sold to the plaintiffs with the benefit of the agreement. The defendant left their employment and immediately began to work for another dairyman close by, calling on the plaintiffs' customers and serving them. McCardie, J., held that as the word "customers" in the agreement included persons who first became customers after the defendant had left the employment the restrictive clause was (apart from other objections) too wide and, therefore, unenforceable, that the doctrine of severability was not applicable and that, therefore, the action failed.

VENDOR AND PURCHASER.

Another case dealing with the much-litigated question of contracts for sale expressed to be "subject to contract" is *Wilson v. Balfour*, 45 T.L.R. 625. The plaintiff wrote to the defendant an offer to sell a house to her for a certain sum subject to certain unspecified covenants, and the defendant signed at the foot: "I accept the above offer subject to contract." The solicitors of both parties approved a draft formal contract but the defendant refused to execute it. In an action for specific performance, Eve, J., held that the words "subject to contract" did not mean that the defendant bound herself if the parties' solicitors approved a formal contract, but meant, in the circumstances, "subject to the execution by the parties of a formal contract," and, therefore, the action failed.

WILL.

Another decision on the word "money" is to be found in *In re Gates, Gates v. Cabell*, (1929) 2 Ch. 420. A testator made his will in the following terms: "I leave all my money to A.B." His estate included cash in the house, in his solicitors' hands, and on current account at his bankers, furniture, stocks and shares,

and an equity of redemption in freehold property. The Court of Appeal held that the word "money", in the absence of any context, must be construed in its strict sense, and that the will, therefore, only passed the cash in the house, in his solicitors' hands and on current account at his bank. With this case should be compared the recent but earlier decision of our own Court of Appeal in *Horton v. Public Trustee*, (1929) N.Z.L.R. 325; 4 N.Z.L.J. 37.

Ganapathy Pillay v. Alamaloo, (1929) A.C. 462, is a decision of the Judicial Committee on appeal from the Court of Appeal of the Federated Malay States on the subject of accruer. A will provided that at the expiration of twenty-one years from the death of the testator a trust fund should be divided into five shares, that one of such shares should be paid to each of the testator's four sons, and that in the event of any of his sons dying before the period expired leaving a child or children such child or children should take the share to which such son would have been entitled if he had survived, and in default of issue of any son the share of such son should be payable to the surviving sons equally. It was held by their Lordships (the English rules of construction being admitted to be applicable) that the child of a son who died before the expiration of the period was entitled only to the one-fifth share which his father would have taken, and was not entitled to participate in the share of a son who died before the expiration of the period without issue.

Divorce Statistics.

Last Year's Record Figures.

The February number of the *Monthly Abstract of Statistics* contains last year's figures in matters of divorce. They show a substantial all-round increase over those during previous years, the total number of petitions filed, decrees *nisi*, and decrees absolute each being the highest yet recorded.

The number of petitions filed during 1929 was 843, a figure 58 in excess of that for 1928. As to decrees, 635 decrees absolute and 718 decrees *nisi* were made during last year as against 572 and 653 respectively during 1928.

Separation for a period of not less than three years ranked as the principal ground on which petitions for dissolution of marriage were filed in 1929; desertion came next, and then adultery. Adultery is still the principal ground so far as petitions by husbands are concerned.

Only two petitions for judicial separation were filed during 1929, as compared with five in 1928 and four in 1927; neither of these petitions was heard during the year.

Petitions for restitution of conjugal rights filed during the year numbered 130 as compared with 109 in 1928, 91 in 1927, 86 in 1926, and 73 in 1925. During the year 112 cases were disposed of, including 10 where the petition had been filed prior to 1929. Decrees were granted in 107 cases, and the petition was dismissed or withdrawn in the remaining five.

Injuries by Dogs.

A Recent English County Court Decision.

Although the dog as a source of litigation is now by no means as popular as in the past, and has been completely eclipsed by the motor-car, there have been of late several very interesting decisions dealing with the liability of dog owners for injuries done by their animals. In *Lankshear v. Fair*, a recent decision of our own Supreme Court, Blair, J., has dealt with the question of the extent of the liability of one dog-owner for injuries caused to sheep by his dog and other dogs acting together. This decision is reported in this issue of this Journal and it is sufficient here to refer readers to that report.

Another recent decision is that of *Pirie v. Gauler*, in the English County Court, reported in the *Law Journal County Courts Reporter* of January 25th last; it deals with the interesting and, it is believed, novel question as to the liability of a dog-owner in respect of injuries done by his dog to another dog. In the case referred to the plaintiff was the owner of a whippet dog, and the defendant the owner of a bull terrier. On May 15th, 1929, the dogs, with their owners, met in the "Oyster" public-house and, to quote the facts as found by the learned County Court Judge, notwithstanding the mellowing atmosphere of the *venue*, the dogs showed no particular liking for each other and used language of a regrettable character. The bull terrier was taken out and, after an interval, the plaintiff followed with the whippet which was on the lead. Not far from the public-house the bull terrier again appeared on the scene, attacked the whippet in the road and hurt it rather severely, causing some depreciation in value: hence the action. The question which the learned County Court Judge had to decide was whether, given *scienter*, as to which in the case before him there was evidence, the owner of a dog is liable in a civil action for the consequences of injury caused by it on a public highway in combat with or an attack upon another dog. So far as we in New Zealand are concerned the question of *scienter* can be disregarded for s. 27 of our Dogs Registration Act, 1908, removes the necessity of proving a mischievous propensity in the dog or the owner's knowledge of such propensity.

The learned County Court Judge in the course of his judgment said that he had been unable to find any case where the civil liability alleged had been established or (with one exception) contended for, and he was always suspicious about a cause of action to which *Bullen & Leake*, 1st Edn., lent no countenance. In order to succeed the plaintiff had to establish the proposition that the owner of a dog was liable for damage of any kind which the dog caused and which to his knowledge it was likely to cause. Not only could His Honour find no warrant in law for a proposition so wide, but the cases of *Manton v. Brocklebank*, (1923) 2 K.B. 212, and *Buckle v. Holmes*, (1926) 2 K.B. 125, which had been before the Court of Appeal in the last few years, and the Divisional Court case of *Clinton v. Lyons*, (1912) 3 K.B. 198, negatived it. The only case which His Honour had found where damages were claimed for injuries by dog to dog was *North v. Wood*, (1914) 1 K.B. 629, but that action failed on another ground and did not

lend countenance to a claim such as that before His Honour. "Being no longer at the Bar," said His Honour, "I shudder at the consequences which would follow a ruling that the plaintiff has discovered a new cause of action and do not see my way to accept authorship for it. If the appeal from this judgment succeeds, broken tulips and the untimely decease of cherished mousers will assume a prominence in the cause lists which they do not appear to have hitherto enjoyed. As far as this Court is concerned, so long as they confine themselves to their brothers and cousins—

'let dogs delight to bark and bite
for 'tis their nature to,'

but as regards protection they are in no better case than cats and pigeons. The action is to my mind a novelty. It fails and must be dismissed with costs."

It is apprehended that on this point our law is the same as that of England. It is true that s. 27 of our Dogs Registration Act, 1908, opens with the words: "The owner of every dog shall be liable in damages for injury done by his dog," but the object of the section is simply to remove the necessity for proof of *scie ter*; it can hardly have been intended to make a dog-owner liable for injuries for which he was not liable at common law even when *scienter* was proved.

Trust Funds.

Position in Queensland.

The Queensland Law Society has under consideration, says the *Brisbane Courier*, the question of fidelity guarantees and has appointed a sub-committee to consider the matter in all its phases and to report to the Council with a view to appropriate action being taken. At the present time solicitors in Queensland are required to take out a fidelity bond to a minimum of £500 and to a maximum of £5,000 in respect of trust moneys. The Law Society has power to appoint an agent to enter a solicitor's office and to investigate the whole of his business and for that purpose to impound and examine any documents in his office.

The Thousand-guinea Fee.

Mr. Norman Birkett, K.C., has, it has been stated, acquired the title, in England, of "the thousand-guinea counsel." While it would appear that he has at the moment a better claim to the title than any other counsel practising on the King's Bench side, it would be grossly inaccurate to say that one thousand is his usual fee. In the King's Bench Division during the six months from June to December last it is said that there were only six instances of counsel appearing with a brief so highly marked. Three went to Norman Birkett, two to Sir Patrick Hastings, and one to Stafford Cripps. Two more such briefs are known to be in the offing, and there is an Indian appeal to the Privy Council in which the brief of one counsel will be marked at the record figure for such cases—five thousand guineas. But of the fashionable English silks of the day it may be said that the common fee is a hundred; the five hundred fee is rare; and an annual total of twenty thousand is high indeed.

English Bar Council.

Some Recent Rulings.

While very many of the meetings of the General Council of the English Bar have little or no application in countries such as ours where fusion of both branches of the profession prevails some of them apply just as much here, despite the different conditions, as they do in England. From the latest report of the Council we reprint as apparently of the latter category its rulings on the following subjects:

COUNSEL IN CONTRACT CASE APPOINTED ARBITRATOR.

The opinion of the Council was sought as to whether it would be proper for a barrister to accept the position of arbitrator in the following circumstances: The barrister advised a contractor as to his claims under a certain contract and subsequently the parties went to arbitration under a clause in the contract. The clause provided that both parties should appoint their own arbitrators, also that an umpire be appointed, and that no counsel should be heard before the arbitrators or umpire. The contractor nominated as arbitrator the barrister who had advised him as to his claims.

The Council replied that in the circumstances there was no objection to the barrister accepting the position of arbitrator therein.

OPINION OF COUNSEL IN COMPANY PROSPECTUS.

The Council was requested to express a view whether there was any objection to the opinion of counsel, with name attached, on the validity of a patent being printed in a prospectus of a company and published in the newspapers.

The Council was of opinion that there was no objection.

BARRISTER CIRCULARISING HIS BOOK.

A practising barrister inquired whether there would be any objection to his sending letters signed by himself to various companies announcing that a further edition of his late father's book on questions of law in shipping matters was about to be issued—edited by himself.

The Council replied that it was undesirable that the barrister should sign letters, but that there would be no objection to this being done by the publishers.

The Growth of Law.

"Law is not a complete and perfect system of pre-existing and unchangeable rules, handed down on some Sinai in the dark infinity of the past. Instead it is an ever-changing and developing system of rules, every judicial decision as well as every legislative act being a part of the never-ending process of creation. Every stated rule can be traced to some specific human inventor of the formula. Step by step, its life history can be traced, with every change in its wording created by a new jurist, and with every variation caused by the judicial decisions respecting new facts."

—Professor Arthur L. Corbin.

Agents Provocateurs.

The Police as Participators in the Commission of Offences.

Two recent English police court cases attract attention to the subject of "agents provocateurs," a term, by the way, for which our language seems to have no exact equivalent.

In the first case, heard at the Sheffield petty sessions, on 28th November last, was an information against a licensed victualler for suffering his premises to be used in contravention of the Betting Act, 1883 (Eng.). The evidence of two police officers, accepted by the bench, showed that a great deal of betting was going on, and each stated that he himself made bets with a bookmaker on the premises. When the first police witness began to describe one of the bets made by himself, counsel for the defence interposed and said he objected to the witness being asked questions of this sort until it was clear that he realised what was his position. Counsel went on: "The suggestion was that he, a police constable, was going to say that he, knowing that the licensee knew all about this, made a bet himself. In other words, that he aided and abetted in the commission of the offence. If he did that he stood in exactly the same position as anybody else, no matter whether he did it by the instruction of his superiors or not. It was not part of the English law that he could escape by a statement that he was acting on the instructions of his superiors. He was therefore supplying the evidence which could convict him of being an accessory before the crime. The officer was entitled to have it made clear that he need fear nothing from refusing to answer, was not bound to answer, and if he did his answer might be used for his own prosecution."

The police officer, unshaken by counsel's warning, continued his evidence, and counsel when he came to address the bench on the whole case made a further strong protest. He said: "I speak here on behalf of my client, but I speak here also as a member of the Bar of England, and I say that there is no right in anyone, be he police officer or other, to commit a crime. I make no protest whatsoever against any policeman going inside licensed or other premises for the purpose of detecting crime. I make no protest against any officer disguising himself for that purpose. I make no protest if, in a crime that is being committed, he himself joins the party in order to collect the evidence. But when he steps further than that, and when he procures the commission of a crime that would not have been committed if he had not instigated it, I say there is no authority from His Majesty downwards that can justify what he has done."

A second police officer finding he was suspected as such when he entered the licensed premises, assured the licensee and another defendant that he was "a traveller in biscuits." It was said for this other defendant that the value of the policeman's evidence was destroyed. "Whether a witness is a civilian or a policeman there can be only one standard upon which to judge whether or not his evidence is to be believed. When a witness comes and makes a statement on oath, and it is found that that statement disagrees with previous statements, then confidence is lost in that witness, all stability is destroyed. You get a police officer making a statement which he has admitted is untrue."

In a case at Leeds before the stipendiary magistrate on December 6th the licensee of an inn was summoned for selling intoxicating liquor in non-permitted hours. A constable said that he went into the bar at 9.40 p.m. At 10 o'clock—not four hours earlier as he would be required to do in New Zealand—the licensee called time but nobody left. At 10.15 the constable ordered half-a-pint of beer with which he was served. There were six persons in the bar at the time and the landlady was present, but no drink was served to them while he was there. The magistrate: "That will not do. Why did a police constable go in and ask for a drink after hours? It is entirely wrong. I have laid it down before that an officer is not entitled to act as agent provocateur unless he has evidence of a previous breach of the law. Here, without evidence of previous breaches of the law, an officer comes in and asks the landlady to break the law."

There is, of course, a clear distinction between the Leeds case and the Shefficld casc. In the latter the constables saw the law actually being broken before they themselves took any part in the proceedings, and it was open to them to say, and we assume that it is the position which both they and their superiors would take up, that their making bets was not to provoke a breach of the law but merely to enable them to sustain the character of ordinary customers and not police officers seeking evidence.

The Royal Commission on the Police which reported in March last year, among the many difficult questions which it had to take up, considered where the line should be drawn by officers investigating the conduct of places where the law is alleged to be being broken. The Commission (page 41 of its report) made the following observations: "It is the bounden duty of the police to enforce the law notwithstanding the difficulties which may be encountered in the obtaining of evidence on which prosecutions can be instituted . . . The police cannot expect to obtain evidence from those who take part in these offences. It is also unlikely that persons who are present when these offences are committed, but who did not participate in them, will, except in rare instances, be willing to give evidence on which a prosecution can be based. It is therefore necessary that the police should be present at the time when these offences are committed, without their identity being known. The issue which at once presents itself is what action, if any, a policeman may properly take beyond concealing his identity and observing what goes on. We have found two clearly marked schools of thought on this subject which are reflected in a division of opinion among the police themselves. One school holds that the duty of the police should be strictly confined to observation only and that they should not participate in the offences committed. . . . The other school holds that it is necessary that the police should participate in offences although they should not in any event initiate them."

The Commission observes that neither school holds with enticing persons to commit breaches of the law, and any such enticement, even where there is good reason to suspect offences, would be highly improper and place any police officer in difficulties in any court of justice. The report recommends that as a general rule "the police should observe only without partici-

(*Continued at foot of next column*)

Easter Legal Conference.

ARRANGEMENTS TO DATE.

With the approach of Easter the interest of the profession throughout the country will naturally centre upon the Conference to be held in Auckland. It appears likely that it will again be the means of bringing together a very representative gathering of members of the profession. Already a very considerable number of practitioners from other districts have intimated that they intend to visit Auckland for the occasion.

It will be a matter of general approbation that Mr. A. Gray, K.C., of Wellington, the President of the New Zealand Law Society, has consented to preside at the Conference.

A very attractive programme is being arranged for the entertainment of visitors, while the serious side of the Conference is receiving a proper measure of attention. It has been decided to limit the number of papers to be read at the Conference to four. In the next issue of this Journal it is hoped to be able to announce the names of the gentlemen who will read papers.

Already some remits for discussion have been submitted to the executive, but the Conference Committee reminds those who are anxious to place remits before the Conference that they should submit them as early as possible. Last year time was all too short for the discussion of papers and remits and the Committee feels that it will not be advisable to overload the programme with subjects for discussion.

The Secretaries are naturally anxious to know as soon as possible the names and addresses of those who intend to visit Auckland for the Conference. A great deal of detail work is involved in running a Conference such as this, and if practitioners who are going to Auckland can do so, they will certainly assist the executive towards success by intimating as soon as possible their intention to be present.

At a later date, it is hoped to be able to publish some details of the programme.

Refusing Promotion.

Wilmot, C.J., probably holds the record for legal modesty. He was offered a silk gown in 1753 and refused it, preferring to practise in Derby as a "local." He was made a Judge of the King's Bench two years later, but he quickly clamoured to be allowed to retire. But in 1766, by reason of his great merits, he was coerced into accepting the Chief Justiceship of the Common Pleas. Three times during his Chief Justiceship he was offered the Lord Chancellorship but would have none of it. And when he resigned, in 1771, it was only after much persuasion that he agreed to accept a pension of £2,400 a year.

(*Continued from p. 28.*)

pating in the offence," but they had to make exceptions in cases where "observation without participation is from the nature of the case impossible."

Contributory Negligence.

Since the publication of our last issue in which, in our editorial column, the recent English cases of *Service v. Sundell*, 46 T.L.R. 12, *Cooper v. Swadling*, 46 T.L.R., 73, and *Hargrove v. Burn*, 46, T.L.R. 59, were discussed, the *Law Quarterly Review* for January has come to hand. From it we reprint the following paragraph dealing with the question:

> "In his article on 'Contributory Negligence' ((1922) 38 L.Q.R. 17) Lord Justice O'Connor, after discussing the conflicting dicta which have made this branch of the law so difficult and uncertain, suggested that question put to the jury should be: 'Was the defendant's negligence the "real" cause of the accident? or, perhaps better still, try the case by the one question: Whose fault was it? If the jury find that it was mainly and substantially the defendant's, that is a verdict for the plaintiff.' In *Service v. Sundell*, (1929) W.N. 182, 45 T.L.R. 569, the Lord Chief Justice took this course when he asked the jury to consider the question 'Whose negligence was really responsible for the accident?' The Court of Appeal, (1929) W.N. 241, 46 T.L.R. 12, held that this direction was inadequate. Everything turned on a proper direction on what in the chain of causes contributing to the accident was the cause which contributed to it so as to debar the plaintiff from recovering. In commenting on this decision the learned editor of the *Law Journal*, in one of his interesting notes, said (Vol. 68, p. 284): 'In such cases as these, we cannot help feeling that a direction to the jury to determine, if they can, whose negligence was the real cause of the accident, is far more likely to lead to a just verdict than an elaborate direction as to proximate and remote causes, last opportunity of avoiding the result of the other's negligence, and so on.' Whether we agree with this view or not, it is obvious that it is highly desirable that a definite and authoritative declaration, in terms which a jury can understand, as to what are the rules governing the question of contributory negligence should be made in the near future. In view of the fact that so much of modern litigation is concerned with accident cases the present uncertainty is to be deplored. It is not even clear that the rule in *Loach's case*, (1916) 1 A.C. 719, is applicable to English law."

This paragraph would seem to have been written before *Cooper v. Swadling* was reported and before the Lord Chief Justice in *Hargrove v. Burn*, 46 T.L.R. 59, directed a jury in the light of *Cooper v. Swadling*, but as these later cases, while clarifying the legal position, would seem to have done really very little towards the enunciation of a direction in such cases "in terms which a jury can understand," the force of the paragraph is unaltered.

"The Court will not grant a decree of restitution of conjugal rights because a husband spends a holiday away from his wife."

Mr. Justice Hill.

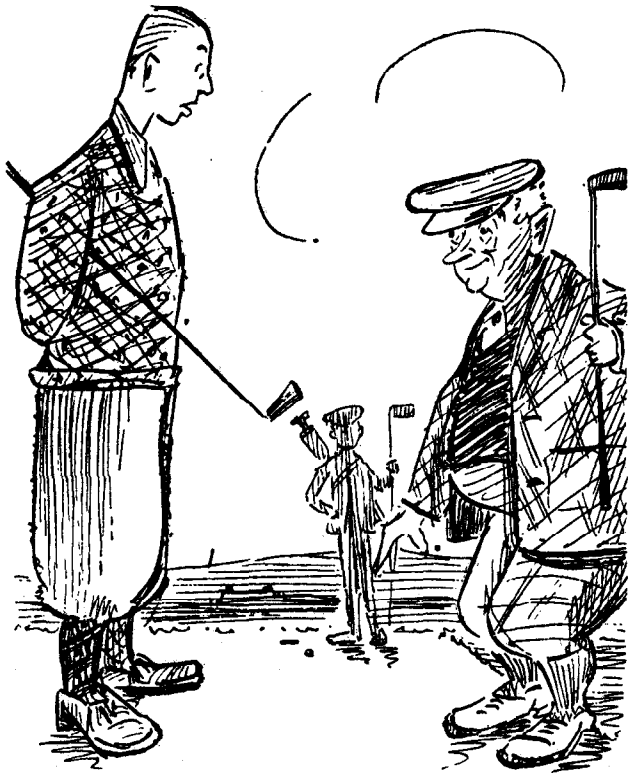
"It is always a difficult question what a judge ought to know and what he is allowed to know and what he is supposed to know."

—Lord Justice Scrutton.

Forensic Fables.

MR. SLASHER, MR. JUSTICE FOOZLE, AND THE HALVED SEVENTEENTH.

Mr. Slasher, of Plum Tree Court, was a Promising Advocate and an Admirable Golfer. His Handicap was Four. Mr. Justice Foozle, though a Profound Lawyer, was an Indifferent Performer at the Royal and Ancient Game. He had Taken to Athletics Late in Life. His Handicap of Twenty-Four Seldom Enabled him to Secure a Victory. One Easter at the Annual Bench and Bar Tournament, Mr. Slasher Found himself Drawn as the Opponent of Foozle, J. The Committee, he was Informed, Considered that he Ought to Concede to the Learned Judge a Stroke a Hole. Mr. Slasher was Undismayed by the Burden so Put upon him. Indeed, he Backed himself to Win,



Laying as Much as Three to One with Various Learned Friends. The Day of the Contest Arrived. Mr. Slasher, being a Tactful Person, Held Himself in Reserve. He Permitted Mr. Justice Foozle to Win Eight of the first Sixteen Holes, Confident that he could Get the Seventeenth and Eighteenth on his Head. Thus he would Inflict on Foozle, J., a Defeat which Carried with it no Humiliation. But at the Short Seventeenth an Unexpected Event Occurred. Foozle, J., was on the Extreme Edge of the Green with his Third. Mr. Slasher, as the Result of a Beautiful Iron Shot, Laid his Ball Dead with his Second. As the Learned Judge's Ball was a Good Three Yards from the Pin it was Clear that Only a Miracle could Save him. After Examining the Position Closely, Mr. Justice Foozle, with a Look of Extreme Innocence, Uttered the Word "Halved" and Picked up his Ball. Mr. Slasher was so Taken Aback by the Tactics of Foozle, J., that he Topped his Drive to the Eighteenth, Sliced into the Rough with his Second, Was out of Bounds with his Third, and Ultimately was Down in Nine. Whereas Mr. Justice Foozle, Greatly Heartened by the Halved Seventeenth, Did a Magnificent Five and Won the Match. The Result of it all was that Mr. Slasher Lost Twenty Odd Pounds that he could Ill Afford. Did Foozle, J., Exhibit Any Remorse? None whatever. And when Mr. Slasher next Appeared in Judge's Chambers, Mr. Justice Foozle Addressed him as "Mr. Tompkins," and Ordered him to Pay the Costs in Any Event.

MORAL: *Play Up.*

Soliciting Business.

The *Law Society's Gazette* (London) reports recent disciplinary action by the Statutory Committee of the Law Society in a case of "touting."

Noah Augustus Rigby, of Toll Bar, Prescot Road, St. Helens, in the County of Lancaster, was found guilty of professional misconduct and suspended from practice for a period of six months and ordered to pay the taxed costs of the application and inquiry. The allegations as formulated by the complainant's counsel in opening this case were as follows: (1) Soliciting professional business in a manner calculated to bring the profession into disrepute; (2) Refusing without any sufficient justification to deliver up documents; (3) Demanding sums as the price of returning client's documents which were exorbitant in view of any professional services rendered; (4) Undertaking professional work for remuneration lower than the scale fee, and so low and in such circumstances as to bring the profession into disrepute; (5) Assuming a legal degree to which he was not entitled; (6) Advertising himself in the public press.

The Statutory Committee found:—

1. That the solicitation of professional business is inconsistent with the dignity of an honourable profession, and tends to bring it into disrepute.

2. That when and under what circumstances solicitation amounts to professional misconduct is a question of degree and each case must be considered separately.

3. That in this case the solicitation by the respondent was not an isolated instance, but amounted to a practice persisted in after refusal of employment and with the knowledge that other solicitors were retained.

4. That in support of his practice of solicitation the respondent not only paraded his past professional efforts and urged the moderation of his charges as compared with those of other solicitors, but untruthfully held himself out as a bachelor of laws.

The Committee, therefore, found the respondent guilty of professional misconduct, but taking into consideration all the circumstances of the case, they were of opinion that justice would be done by making the above order.

"People may say what they please about the House of Lords being obstructive; in its judicial capacity it has long ceased to be so, if it ever was."

—Sir Frederick Pollock.

The Profession's Independence.

THE SOLICITOR IN PUBLIC LIFE.

Speaking at the annual dinner of the Plymouth Law Society the Solicitor-General (Sir James Melville) had something to say on the profession's independence. "Our profession," he said, "is often said to be an independent one, but it one thing for our profession to have achieved the independence of being able to say what is proper to be said on behalf of a client who has rewarded us for it. There is another kind of independence which I value as greatly and that is the independence of a member of the Bar in being able to say what he likes and what he thinks proper to say in public matters without fear of professional prejudice. Our profession, one side of it or the other, will never be a truly independent profession until every member of it feels able to devote himself to public causes with the same independence as he is obliged by his profession to devote to private causes. I think as far as your side of the profession is concerned you are surely entitled to ask for that kind of trust from members of the public. The Englishman has learned by generations of experience that if you want to trust anybody and if you are in a position where you have to trust somebody, a solicitor is the person and the only person you can trust. A man may go to an unknown solicitor and entrust to him the whole of his fortune, the whole of his assets. If a man acted like that with any other member of the community he would be certified as being mentally unfit to have control of his affairs. So I say to your profession: 'You may ask for trust in public matters where you give it in private matters.'"

Hotel Divorces.

That class of divorce suit in which adultery is proved by means of evidence that on such and such a date the respondent and a woman not his wife occupied the same bed in a hotel has become in recent years extremely popular in England. The evidence is, of course, generally that of an employee of the hotel, and inconvenience is frequently in such cases caused to the hotel proprietor. In a recent undefended divorce tried in London, counsel for the petitioner drew attention to the fact that the management of an hotel had refused to give the petitioner any information or facilities for securing evidence, with the result that a certain charge could not be proved. Mr. Justice Hill in the course of his judgment said that hotels often found themselves in a very unfortunate situation. In one way he sympathised with the hotel proprietors. They had to take in people who went there to commit adultery, and the hotels had no option. On the other hand, he did not sympathise with them if they wanted to stand in the way of the administration of justice. Some day somebody would subpoena the whole staff and hold up the business of an hotel. Hotels were put in an unfortunate position, but they had to face the consequences of a refusal.

Legal Literature.

The Complete Statutes of England.

Classified and Annotated in Continuation of Halsbury's Laws of England and for ready reference entitled "Halsbury's Statutes of England."
(Twenty Volumes: Butterworth & Co. (Publishers) Ltd.)

The idea of the publishers of *Halsbury's Laws of England* was to cover the whole of English law, statute law as well as case law. Then came the *English and Empire Diges*', a monumental work just completed, and now we have a fitting and useful companion work, *Halsbury's Statutes of England*, under the general editorship of Sir Willes Chitty, Bart., K.C.

The New Zealand lawyer when considering the law on any given point has to rely largely, and in many cases entirely, upon English text-books. In cases where the common law is solely in question such works suit his purpose admirably, but difficulties at once arise when the subject is one that has been dealt with or affected by legislation either in England or in New Zealand. No statement in an English text-book can be accepted with safety without a preliminary inquiry as to whether or not the matter is affected by some English statute to which there is no corresponding Act in New Zealand. Again, even where there the subject is one that has been dealt with both here and in England by legislation, the statute law of both countries has to be carefully scrutinised. Word with word the corresponding statutes have to be compared. No New Zealand practitioner can use an English text-book, except, of course, treatises dealing solely with the common law, without asking himself and satisfying himself on such questions as these: Is there any English legislation on the subject? How does the English Act compare with our Act? What are the actual words of the English statute? Has the section ever been the subject of judicial interpretation? To all such questions *Halsbury's Statutes of England* will be found to provide an instantaneous answer.

The first ten volumes of the work have already been published and it is to be completed in another ten volumes which will make their appearance in October. When finished it will comprise all the public general statutes of England from the earliest times down to May 10th, 1929, in force at the present day. No attempt has been made at a mere selection—still less at any abridgement. The arrangement of titles made familiar by *Halsbury's Laws of England* has been followed, but at the same time the endeavour has been to be practical and to weigh the advantage of having all relevant Acts and parts of Acts collected in one title against that of finding the whole statute with all its annotations in one place. As a general rule the whole statute is to be found in the title in which it would naturally be looked for, adequate cross-references being made in all relevant places. Where it has been thought desirable to divide an Act references are given to the volume and title where the remainder is to be found.

As to the method of treatment it should, perhaps, first be observed that the text of the Acts shows distinctively all repeals, substitutions and additions. At the commencement of each main title there is added

a preliminary notes giving a short account of and explaining the statute law relating to the subject-matter and, where necessary, tracing its historical development. To every section of the statutes comprised in the work—or rather to every section requiring it—an annotation is appended. These annotations give shortly the point of each case or the subject-matter of each section, Act, or order referred to, and show the reader at a glance whether the line of inquiry is, for his purposes, worth pursuing. Frequent and detailed references for fuller information are found to the volume and page of *Halsbury's Laws of England* and to the *Encyclopaedia of Forms and Precedents*. Besides the usual tables of cases, statutes, etc., each volume contains an analytical index of the subject-matter of the titles in that volume. A general index and a chronological table of statutes will, it is understood, be published as soon as the rest of the work is complete. Tables of cases and statutes and indexes are an unusual feature in an edition of statutes. The advantage they give in speed and ease of reference can hardly be overestimated. A treatise, it may be mentioned, on the interpretation of statutes will be included within the scope of the preliminary note to the title, "Statutes."

One of the most important features, and one which assures that the work will never become out-of-date, is the adoption by the publishers of the now familiar cumulative annual supplement. These supplements will be issued as early as possible at the commencement of each year in the same manner as is now done with *Halsbury's Laws of England*. For this purpose each section of a statute set out in the work has at the end of it a figure in brackets. In the supplement, under a figure corresponding with that included in each bracket, will be found a note of all subsequent legislation or case law affecting the section in question.

Halsbury's Statutes of England should be in every lawyer's library and is absolutely indispensable to an intelligent and accurate use of English legal text-books.

A Digest of the Law of Partnership.

Twelfth Edition: By the Rt. Hon. Sir Frederick Pollock, Bart., K.C., D.C.L.
(pp. xxiv; 246; xxiv: Stevens & Sons Ltd.)

No doubt in that part of the law relating to partnership *Lindley* is generally regarded as the leading treatise, but Sir Frederick Pollock's *Digest*, a much smaller work, is certainly next in the field. In 1877 Sir Frederick Pollock was asked to write a concise work on the law of partnership and he determined to follow the example of Sir James Stephen in his *Digest of the Law of Evidence* and to frame the book on the pattern of the Anglo-Indian Codes. This digest became the groundwork of a bill introduced in 1879 and ultimately passed, with some modifications, in 1890. In its fifth edition the work then became, while preserving most of its substance, an edition of an Act of Parliament. Our Partnership Act of 1908 is almost identical with this English Act and any English text-book on the subject is thus of the fullest value to the New Zealand practitioner. Sir Frederick Pollock's work stands in the realm of legal literature as a model of conciseness, and as to its authority there can be no better indication than the name of the author.

New Books and Publications.

Halsbury's Complete Statutes of England. Classified and Annotated in continuation of Halsbury's Laws of England. Complete in twenty volumes. Volumes 1—10 covering "Agency" to "Local Government," now available. (Butterworth & Co. (Pub.) Ltd.). Price: Thick Paper Edition, 35/- per volume. Thin Paper Edition 37/- per volume.

Butterworth's Index to the New Zealand Statutes, 1929. By H. J. V. James, Barrister-at-Law. (Butterworth & Co. (Aus.) Ltd.). Price: 20/-.

Goodeve's Personal Property. Seventh Edition. Revised and partly re-written, by David T. Oliver. (Sweet & Maxwell Ltd.). Price 26s.

Gas Undertaking Acts, 1920 and 1929. By H. Royston Askew. With Chapters on the Finance of Standard Price Revision by George Evetts. (Sweet & Maxwell Ltd.). Price 35s.

Sweet and Maxwell's Law Finder. A guide to the contents of current law books. (Sweet & Maxwell Ltd.). Price 1s. 3d.

Buckley's Companies Acts. By Rt. Hon. Lord Wrenbury (Buckleys). Eleventh Edition. By W. Gordon Brown, B.A., LL.B., R.J.T. Gibson, M.A., LL.B., and Hon. D. B. Buckley, B.A. (Stevens & Sons, Ltd). Price 58s.

Preliminary Scheme of the Italian Penal Code. Compiled by the Italian Minister of Justice, Rome. 1929. (Stevens & Sons Ltd.). Price 12s.

Law in the Making. Second Edition. Revised and Enlarged. By C. K. Allen. (Oxford Press). Price 24s.

The Law of Town Planning. Second Edition. By Archibald Safford and Graham Elver. (Hadden Best & Co.). Price 24s.

Cambridge Studies in English Legal History. By H. Dexter Hageltine, Litt.D., F.B.A., Anglo Saxon Notes translated by Dorothy Whitelock, M.A. (Cambridge Press). Price 18s.

International Relations of Manchuria. By C. W. Young. (Cambridge Press). Price 19s.

State Advances Figures.

During 1929, 3,612 advances to settlers aggregating £4,382,640 were authorised by the State Advances Department, as against 1,948 aggregating £2,484,610 in 1928. The amount advanced to settlers during 1929 was £3,271,670 as against £1,928,465 in the previous year.

As to workers, 4,212 loans were authorised during 1929, and these aggregated £3,583,325; the corresponding figures for 1928 were 1,843 and £1,591,870 respectively. £3,189,559 was actually advanced to workers during 1929 as against £1,238,988 in the previous year.

Of the total number of loans authorised during the year, 4,809 were for the erection of dwellings for an aggregate amount of £4,069,135, and an average advance of £846. The corresponding figures for 1928 were—loans, 1,981; total amount £1,695,360; average advance, £855.