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NEGLIGENCE: ANIMALS STRAYING ON HIGHWAY.

THE question whether there is a duty imposed by the common law on the owner or occupier of land adjoining the highway to fence his land so as to prevent animals upon it from escaping on to the highway and becoming the cause of injury to road-users, has been troubling the English Court of Appeal for some years past. Although the law would appear to have been sufficiently clear, the House of Lords was recently asked to pronounce, in the light of modern traffic conditions, the correctness of previous decisions of the Court of Appeal that negligence could not be attributed to the owner of domestic animals which strayed on to the highway and caused injury to road-users. The mere possibility of injury without negligence is not enough.

Before considering the latest and most authoritative English decision, it is interesting to note that in *Millar* v. *O'Dowd*, [1917] N.Z.L.R. 716, a Court consisting of Sir Robert Stout, C.J., and Chapman, J., had to consider whether the owner of a paddock adjoining the highway was liable in negligence to the widow and executrix of a motor-cyclist with whom the defendant's two horses had collided, and who had been fatally injured. These horses had been in the defendant's paddock, across the road from the homestead, into the yard of which they had been taken and given hay. They strayed out on to the road. The defendant's son went after them, and drove them back into the yard. The gate was not closed. The horses again went through the gate and galloped across the road. One of them came into collision with the motor-cyclist. There was no evidence that the horses were anything but quiet horses. They had been used for riding and driving. The widow sued the defendant for damages, and the jury disagreed. Pursuant to leave reserved, the defendant moved for a non-suit on the ground, *inter alia*, that, in the absence of special circumstances, there was no duty on the defendant's part to prevent the horses from straying.

In the course of his judgment, the learned Chief Justice pointed to the fact that our law differs from the English law in this: the ownership of our main roads is in the Crown where the roads are in counties, and in the borough where the roads are situate in a borough. Nothing, however, turned on the ownership of the road in any case referred to in the judgment, including *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B. 370, which, he said, was similar to the one before their Honours. That was a case of sheep straying on a highway. They had escaped on to the highway through gaps in a defective hedge, and one of them ran into the plaintiff's car and damaged it. The Court of Appeal held that the defendant was under no duty to the plaintiffs as members of the public using the road to keep his sheep from straying upon it, and that the accident was not the direct and natural consequence of the breach of any such duty. The learned Chief Justice also reviewed the following cases: *Cox* v. *Burbidge*, (1863) 13 C.B. N.S. 430; 143 E.R. 171; *Sanders* v. *Teape and Swan*, (1884) 51 L.T. 263; *Hadwell* v. *Righton*, [1907] 2 K.B. 345; *Higgins* v. *Searle*, (1909) 100 L.T. 280; *Jones* v. *Lee*, (1911) 106 L.T. 123; and *Ellis* v. *Banyard*, (1911) 106 L.T. 51. These, he added, like the *Heath's Garage* case, were very near to the one before the Court.

The decision of our Court of Appeal in *Paterson* v. *Fleming*, (1904) 23 N.Z.L.R. 676, in which the exceptions to the general rule are fully discussed, was, in the opinion of the learned Chief Justice, similar to the decisions in *Heath's Garage, Ltd.* v. *Hodges* (*supra*); and the evidence proved in the case before him merely amounted to the fact that horses driven from a paddock would seek to return to it and would gallop across a road, as sheep would run across a road. Such evidence went no further than that in the *Heath's Garage* case. He was, therefore, of opinion that there was nothing that could have led the defendant or anyone else to believe that a horse, not vicious, but quiet, if straying on a road, would collide with a bicycle; and on this ground the plaintiff must be non-suited.

The law was succinctly summarized in the judgment of Chapman, J., who concurred with the judgment of the learned Chief Justice. He said, at pp. 723, 724:

> As to the main question, there can be no doubt that the general rule is that an owner of land on which domestic animals are kept, or the owner of such animals, is not liable for injuries to persons using a highway attributable to the animals straying on the highway. The law is probably older than the practice of fencing grazing-land. To make out liability a person complaining must prove either some known vice in the domestic animal causing the injury, or something in its treatment on or with reference to the highway which amounts to the negligent handling of something liable to cause damage.

> Only two circumstances are relied on to distinguish this from an ordinary case of quiet animals straying on a public road. First, it is shown that this occurrence happened in a borough. Masterton, however, has very widely-spread outskirts running into what is, practically speaking, country land, and this occurrence happened in the outskirts. Further, what happened was not affected by the condition as to density of population. In a rural district the horses would have behaved in the same way, and there might have been the same motor traffic. Then, some evidence was called to show that horses which have once left a yard will, if driven back and not shut in, run out again. The answer is that an occupier of land is not, so far as the public are concerned, bound to have either fences or gates, and the most that can be said is that defendant at that moment had neither.

In the Court of Appeal in England, in 1943, the principle applied in the case to which we have referred, and, in particular, its application in the judgment of the Court of Appeal in *Heath's Garage, Ltd.* v. *Hodges* (*supra*), came in for some strong criticism in the light of modern conditions of road-traffic. In *Hughes* v. *Williams*, [1943] 1 All E.R. 535, the Court of Appeal (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.) found themselves bound to follow the *Heath's Garage* case; but their reluctance to do so is clear from their several judgments. The facts before them were that the appellant was driving his motor-car along a public road during the hours of darkness. Hearing the sound of approaching horses, he pulled up. Two horses collided with and damaged his stationary motor-car. One of the horses collided with the mask of his headlight, and another reared up and dropped full-weight on his radiator. The evidence showed that the horses had spent the night in the respondent's stable, which led into a yard from which a gate opened on to the highway. This gate was usually shut at night, but on this occasion it was open; and through this gate the two horses escaped into the road. There was no evidence as to any special habits or character of either of the horses: they were just ordinary, well-behaved horses. They had not previously so acted.

The appellant had brought an action for damages against the respondent in respect of the damage to his motor-car. From the decision that there was no negligence disclosed, the appeal was brought.

In the course of his judgment, the learned Master of the Rolls, at p. 536, said:

> So far as this Court is concerned, much though I dislike it, I do not think that we are able to approach the facts of this case save on the basis that we are bound by a rule of law which has been variously stated. It has been stated or assumed to exist in several pronouncements of this Court. I do not propose to examine the authorities in which that rule has been discussed.

The learned Master of the Rolls went on to refer to the exceptions to the rule, recognized in all the cases—namely, that there may be instances where special circumstances impose a duty.* Lord Greene, continuing, said, at p. 536:

> I take it as stated in the opinion of Lord Wright in *Brackenborough* v. *Spalding Urban District Council*, [1942] 1 All E.R. 34, 41. The rule stated there is this: "there is no duty on the owner or occupier of land adjoining the highway to prevent animals upon it from escaping on to the highway."

In that judgment, Lord Wright had pointed out that the rule, so far as he knew, was "a modern one." He had commented upon various matters which affect it, and indicated that the existence, meaning, and scope of the rule remained open to the consideration of the House of Lords. But, Lord Greene added, so far as the Court of Appeal was concerned, he felt bound to approach the case before their Lordships on the footing that that rule was binding upon them.

The learned Master of the Rolls expressed great dissatisfaction with the rule, which, he said, "is singularly ill-adapted to the realities of modern conditions." He continued, at pp. 536, 537:

> A farmer who allows his cow to stray through a gap in his hedge on to his neighbour's land, where it consumes 2s. 6d. worth of cauliflowers, is liable in damages to his neighbour; but, if through a similar gap in the hedge, it strays upon the road and ther by causes the overturning of a motor omnibus, with death or injury to thirty or forty people, he is under no liability at all. I can scarcely think that that is a satisfactory state of affairs in the twentieth century. If it is not open to the House of Lords to deal with that rule, I think that the attention of the Legislature might usefully be directed to considering the whole position, with a view to the safety of His Majesty's subjects using the highway.

In *Heath's Garage, Ltd.* v. *Hodges*, Lord Cozens-Hardy, M.R., said that an animal like a sheep, by nature harmless, cannot fairly be regarded as likely to collide with a motor-car, and its owner cannot be held liable on that footing.

Commenting on this dictum, Lord Greene said, at p. 537:

> That proposition appears strange when one considers the conditions of modern life. The sheep is regarded as being by nature harmless and not likely to collide with a motor-car, as, for instance, an unbroken colt might; but the fact that the motor-car is likely to collide with the sheep appears to be regarded in law as a matter of no particular importance. However, there it is: and I cannot, myself, see any ground on which we can depart from the rule.

His Lordship went on to discuss what he considered to be the illogical nature of the law, as it appeared to be, that, whereas a landowner is apparently not bound to have a gate, or to keep gaps in his fences repaired, there seemed to be a suggestion in *Ellis* v. *Banyard* (*supra*) that, if he has a gate, it may be his duty to keep it shut. In concluding his judgment, he said that, on the facts of the case, he could not find sufficient special circumstances to raise a duty on this respondent to see that the gate was shut before the horses were let out of the stable. Anything less than that would not assist him; and he could find no such duty. He left open the question of what the position might have been if the gate had been deliberately opened.

Upon the authorities binding the Court, MacKinnon, L.J., found that the plaintiff had not established any cause of action. He proceeded, at p. 538:

> I agree that the state of the authorities is not a satisfactory one; and, in particular, that they seem to ve very ill-adapted to the conditions of life in the twentieth century. It is not for us to alter the settled law as laid down in the authorities. Possibly the House of Lords may be able to review those authorities. Possibly it may need legislation to adapt the common law to the conditions ruling to-day.

The feeling of Lord Greene, M.R., and MacKinnon, L.J., that the law was unsatisfactory was shared to the full by Goddard, L.J. (as Lord Goddard then was), and he, too, hoped that it might be possible some day for the House of Lords to review it. Unless they could find that the rule of common law was what had been laid down and what was binding on the Court of Appeal, his Lordship hoped that they might be able to bring the law into what one would think would be a more just state. He stated the rule that was binding

*These will form the subject of a later article in this place.

on the Court of Appeal by reason of the previous decisions to be as follows, at pp. 538, 539 :

> An owner or occupier of land adjoining a highway is under no duty to fence so as to keep his animals off the highway. That must mean that he is under no duty to the users of the highway. If he is under no duty to keep his animals off the highway, it seems difficult to understand how negligence comes into the picture at all—at any rate, negligence with regard to the opening or shutting of the gate, because a gate is only a part of a fence. If he is under no duty to fence, I, for myself, have the greatest difficulty in seeing how it could possibly be said that he is under a duty to keep his gate shut.

It was not only with regard to animals on the highway that his Lordship thought the law to be in an unsatisfactory condition (p. 539) :

> The law with regard to the trespass of animals is also in an unsatisfactory condition, having regard to the mischief which they do. In 1906, Parliament passed a Dogs Act, under which the owner of a dog which bites sheep or cattle is liable, whether he knows the propensity of the dog or not; but a dog may still bite a human being, and if the owner can show that he did not know of its propensity, the owner is not liable. Apparently Parliament thought that a sheep requires more protection than human beings. If, as Lord Greene, M.R., stated, a cow strays on to the land of the neighbour of its owner and eats a couple of cabbages, the owner is liable in trespass; but if his dog escapes into a neighbour's house and does damage by wrecking a room, the owner of the dog is not liable, because it was laid down in 1699 (and I think earlier) that "you shall not have trespass for the act of a dog."
>
> All these matters seem to show how unsatisfactory the law is. It will be remembered that a short time ago in this Court a man who, after he had paid to go into a zoo, was bitten by a camel, was held to be unentitled to recover damages because the camel was a domestic animal, and this particular camel was not known to be ferocious.

The wish of the Court of Appeal that the House of Lords would come to the rescue of motorists, and, in the light of modern conditions, abolish or modify the doctrine they had unwillingly been bound to apply, was not fulfilled recently when *Searle* v. *Wallbank*, [1947] 1 All E.R. 12, came up for decision by their Lordships' House (Lords Maugham, Thankerton, Porter, Uthwatt, and du Parcq). This last word on the subject was that the law remains without alteration in the rule as applied in *Heath's Garage, Ltd.* v. *Hodges* (*supra*) and in *Hughes* v. *Williams* (*supra*), and by our Court of Appeal in *Paterson* v. *Fleming* (*supra*) and by our Supreme Court in the similar circumstances of *Miller* v. *O'Dowd* (*supra*). In fact, their Lordships did no more than reiterate the law which had been laid down in all the earlier authorities, and crystallize it in one authoritative judgment.

In *Searle's* case, the facts were that on a dark night the appellant was riding his bicycle along a road in the black-out, with his lamp obscured. He came into collision with a horse belonging to the respondent, which had strayed from an adjacent field in which it had been placed. The horse was a quiet animal. The means of its escape was a defective fence, which had gaps in it. The case originally was before a County Court Judge, who, following *Heath's Garage, Ltd.* v. *Hodges* and *Hughes* v. *Williams*, dismissed the action ; and that decision was affirmed by the Court of Appeal (MacKinnon, Lawrence, and Morton, L.JJ.). In dismissing the appeal, their Lordships thought fit to give leave to appeal to the House of Lords because of the expressions of opinion that we have quoted from the judgments in *Hughes* v. *Williams* (*supra*) to the effect that the state of the law laid down in other times and under different traffic conditions was not now satisfactory. The House of Lords, however, dismissed the consequent appeal.

Viscount Maugham, in his speech in *Searle* v. *Wallbank*, said he proposed to deal with each of the questions of law involved as if it were coming *res integra* before the House of Lords. These questions were : First, was the respondent, as the owner of a field or fields abutting the highway, under a *prima facie* legal obligation to users of the highway so to keep and maintain his hedges and gates (if any) along the highway as to prevent his animals from straying on it ? Secondly, assuming there is no such general duty, was he under a duty as between himself and users of the highway to take reasonable care to prevent any of his animals (not known to be dangerous) from straying on to the highway ?

After giving a summary of the long history of "the rolling English road" itself, and tracing the development of the law of highways generally, which is well worth reading, Lord Maugham, for the reasons that roads are laid out largely for the benefit of owners of adjacent land, including farmers, and that road-users cannot expect to have roads kept clear of animals, concluded that the first of his questions must be answered in the negative. He proceeded then, at p. 16, to his second question, which, in the absence of any general duty to repair fences or hedges, was based on the alleged negligence of the respondent :

> The established rule is that negligence must depend on failure to perform a duty of reasonable care to the class of persons of whom the plaintiff is one. In this case, the duty must be to exercise reasonable care to avoid an act of omission which would be likely, in the view of a reasonable and prudent man, to injure such a person as a cyclist or a motorist using the road beside the land of the respondent : *Donoghue* v. *Stevenson*, [1932] A.C. 562, and cases there cited. The very curious nature of the facts in that decision must not make us forget that mere possibility of accident is not enough to establish liability. Otherwise the many decisions as to accidents to persons caused by domestic animals (in the absence of *scienter*) would have been differently decided.

His Lordship continued that it was not irrelevant to observe that the suggested duty of the occupiers of enclosed land to the users of an adjoining highway ought to be capable of a definition intelligible to ordinary men (p. 16) :

> Is it to extend to hedges along roads such as green lanes, bridle paths, or other roads which have seldom or never been made up ? Does it apply to roads which are rarely or never used by fast traffic ? The height of the hedges ought to be mentioned, for it is obvious that young horses are often capable of jumping without difficulty over many of the existing hedge-rows as well as over the existing gates. The practice of hunting is sufficient evidence of that fact, if evidence were needed. Then the question arises as to what animals the owner is required as a matter of duty to fence in ? It is admitted that dogs, cats, pigs, and fowls cannot be prevented from straying by ordinary quickset hedges, yet accidents from their presence on roads must, I should suppose, be more frequent than those arising from straying horses or cattle. Then one must ask what standard of care is required from farmers and others ? Gaps in hedges, of course, do constantly arise, but many of them are due to trespassers in attempting short cuts on a mere country ramble or in search of mushrooms or blackberries. Gates are constantly left open by horsemen or by persons legitimately visiting a house or farm. We see every day in the country the request, "please shut this gate," but we often see the gate in question left open. A good owner of land has been in the habit of attending yearly to the operation of hedging and ditching. In wartime it was often impossible to provide the necessary labour. Even in peace-time it would scarcely be reasonable to require a farmer to examine from day to day whether there was a gap or a thinning of a hedge through which a

horse, a sow, or a bullock could force his way, and immediately to repair it. And it is plain that the liability for negligence of the owner of animals straying on a road must be subject to the condition that the road-user himself must exercise reasonable care in driving or riding along the road.

There was, His Lordship believed, no record before recent times of any accident between a vehicle of any kind and an animal straying from an adjoining enclosed field on to a road. It was only since cycles and motorcars began to move along our roads at speeds generally unthought of a hundred years ago that there had been any chance of such collisions. That they had been more common of late on unenclosed roads over open heaths and the like, was demonstrated by the notices often seen in such places, warning the motorist to " beware of cattle." The absence of accidents between vehicles and stray animals was certainly not due to the absence of the latter. The fact was, as the desuetude of the village pound showed, that " estrays " or " strays " were far commoner a hundred years ago. Summing up his elaborate consideration of the question, which, Lord Maugham observed, was occasioned by his respect for the doubts expressed by some eminent Judges, His Lordship said, at p. 17 :

> The above considerations seem to me to be conclusive to show that no such duty to road-users as the appellant relies on could possibly have existed before the advent of fast traffic on made-up roads. Hedges and fences were generally constructed and maintained in the interests of the owners of adjacent lands, and accidents to road-users arising from the animals straying on the roads were so far as one can judge practically non-existent. Since fast traffic on such roads became usual, accidents due to straying animals, no doubt, sometimes occur, but so far as we know they are exceedingly rare. Moreover, they also arise when animals are being led or driven along highways in the usual course of husbandry, and no one suggests that motorists and cyclists have a *prima facie* right of action against the person in charge of them. More frequently such accidents are caused by dogs or fowls which can get through or over any ordinary hedge, and counsel for the appellant admitted, and I think rightly, that no action would lie in such cases against the owners. No facts, in my opinion, have been established which would tend to show that farmers and others at some uncertain date in our lifetime became subject for the first time to an onerous and undefined duty to cyclists and motorists and others which never previously existed. The fact that the duty does not exist if the road is unenclosed by fences and yet that accidents are rare is, I think, strong to show that the respondent was not bound as a reasonable man to think that his failure to fill up a gap in his fence was likely to cause such an accident as the one which took place.

The other Law Lords were of the same opinion as Lord Maugham. In concluding his speech, Lord du Parcq said, at p. 21 :

> One other argument should, perhaps, be noticed. Counsel disclaimed any suggestion that the respondent was bound to maintain a fence, and he recognized that for centuries both the law and the general sense of the community have sanctioned the depasturing of cattle on unfenced land. He contended, however, that one who keeps his cattle on land adjoining the highway behind an apparently secure fence must see to it that it is, in fact, secure, for otherwise (he said) a deceptive feeling of safety will be induced in the passing cyclist or motorist. My Lords, I should have thought that, on principle, where there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is imperfect, but, however, that may be, the argument takes little account of rural conditions. A stray horse, even if it has come from the nearest field and not from one a mile or more away, may have escaped, not through a gap in the fence, but through a gate left open by a trespasser. Moreover, the suggested duty could only be to take reasonable care to maintain a reasonably secure fence, and it must be a very high fence which a horse cannot jump. Indeed, we have it on the authority of *Byles*, J., that, in or about the year 1858, it was proved that a bull had leaped over an iron fence six feet high : *Bessant* v. *Great Western Railway Co.*, (1860) 8 C.B.N.S. 368 ; 141 E.R. 1208.

The truth was, His Lordship added, that, at least on country roads and in market towns, users of the highway, including cyclists and motorists, must be prepared to meet from time to time a stray horse or cow, just as they must expect to encounter a herd of cattle in the care of a drover. An underlying principle of the law of the highway is that those lawfully using the highway, or land adjacent to it, must show mutual respect and forbearance. The motorist must put up with the farmer's cattle : the farmer must endure the motorist. It is commonly part of a man's legal duty to his neighbour to tolerate the untoward results of his neighbour's lawful acts. Those observations were, he thought, relevant not only to the issue of negligence, but also to the allegation of nuisance. The stray horse on the road does not seriously interfere with the exercise of a common right, and is no more a nuisance in law, merely by reason of its presence there, than the fallen carthorse or its modern analogue, the lorry which has temporarily broken down. The same considerations which guided the Court of Appeal in *Maitland* v. *Raisbeck*, [1944] 2 All E.R. 272, were, he thought, applicable here. (In that case, Lord Greene, M.R., with whose judgment the other members of the Court concurred, said that the user of the highway is entitled to use it in a reasonable manner, and he is entitled to expect other people to do the same. But, he added, on the highway accidents happen when both parties have been reasonable and neither has misused the highway. If damage arises in these circumstances, and there is no negligence, the person injured must put up with it.)

Where the plaintiff has succeeded against the owner of straying animals, there has always been some element besides mere straying—in other words, some special circumstances importing negligence. This may be seen not only from the English cases, for instance, in *Jones* v. *Owen*, (1871) 24 L.T. 587, two greyhounds were coupled together and let loose upon a highway ; in *Turner* v. *Coates*, [1917] 1 K.B. 670, 79, an unbroken colt was being driven along a highway ; and in *Pinn* v. *Rew*, (1916) 32 T.L.R. 451, a cow and a calf were being similarly driven. In these, as in the New Zealand cases, for example, *Lysnar* v. *Binnie*, (1904) 24 N.Z.L.R. 241, and *Paul* v. *Rowe*, (1904) 24 N.Z.L.R. 641, special circumstances were present : in the last-named, it was negligent to turn a mob of horses into a public road in an inhabited district without proper control or guidance while in the other case a horse was turned out to graze with its harness still upon it.

In concluding his judgment in *Hughes* v. *Williams* in 1943, Lord Goddard, at p. 539, expressed his hope that, when the Law Revision Committee met again after the War, if the House of Lords had done nothing in the matter in the meantime, that Committee would review the law relating to animals, and, if necessary, have it altered by legislation.

The matter has been before our own Revision Committee, having been referred to it by motoring interests ; but it decided not to take any action. It may be well, however, that the present state of the law in New Zealand be left as it is ; so that if, notwithstanding their Lordships' confirmation of the existing rule of law, any legislative action be taken in England to modify or overcome it, then our Law Revision Committee, if it be so minded, could in the interests of uniformity, adopt the terms of the legislation as enacted in England.

SUMMARY OF RECENT JUDGMENTS.

THE KING v. KAHU.

COURT OF APPEAL. Wellington. 1946. October 15; December 12. O'LEARY, C.J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Criminal Law—Appeal—Misdirection—Murder—Manslaughter—Provocation—Burden of Proof—Direction by Judge liable to lead Jury to Belief that Verdict of Murder proper if Jury not clear whether Crime Murder or Manslaughter—Verdict of Murder—Substantial Miscarriage of Justice—Crimes Act, 1908, s. 184—Criminal Appeal Act, 1945, s. 4 (1).

Criminal Law—Practice—Appeal—Substitution of Verdict for Lesser Crime—Duty of Court of Appeal—Whether to direct New Trial or substitute Verdict of Manslaughter for Verdict of Murder—Criminal Appeal Act, 1945, ss. 4 (2), 5 (2).

Section 184 (1) of the Crimes Act, 1908 (which provides that culpable homicide, which could otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation), deals merely with definition, and not with burden of proof.

Packett v. *The King*, (1937) 58 C.L.R. 190, applied.

Therefore, the common-law principle that the burden is upon the prosecution to establish that the crime is murder and not manslaughter, applies in New Zealand.

Woolmington v. *Director of Public Prosecutions*, [1946] A.C. 83, and *Mancini* v. *Director of Public Prosecutions*, [1935] A.C. 462, applied.

Kwaku Mensah v. *The King*, [1942] A.C. 1; [1941] 3 All E.R. 272, referred to.

The appellant was accused in the one indictment of the murder of his wife and of one Amundsen. The learned Judge's direction to the jury contained the following two passages:

"This is a criminal case, and in all criminal cases the onus lies upon the Crown affirmatively to establish the guilt of the accused person, so that if the case as presented to you leaves you in doubt as to whether or not this killing was due to provocation as recognized by the statute,—if you are in doubt as to whether that is or is not the case, the accused would be entitled to an acquittal."

"This case resolves itself into deciding the question whether this man is guilty of manslaughter or murder. If you are satisfied that he did kill them when acting under the influence of passion which arose as the result of something which occurred suddenly and caused him to lose his head, you would be entitled to reduce the charge to manslaughter. Otherwise, your plain duty would be to bring in a verdict of murder."

The prisoner was convicted of the two murders, and sentenced to life imprisonment.

On an appeal against conviction,

Held, by the Court of Appeal, 1. That as, on the above directions, both or either of the verdicts of murder might have been given in the belief that a verdict of murder was the proper verdict if it was not clear whether the offence was murder or manslaughter, the verdicts of murder could not stand.

2. That s. 5 (2) of the Criminal Appeal Act, 1945, authorizing the Court to substitute for the verdict found by the jury a verdict of guilty of another offence, did not apply in the present instance; and, therefore, the proper course was to direct a new trial.

R. v. *Hopper*, [1915] 2 K.B. 431, and *R.* v. *Barilla*, [1944] 4 D.L.R. 344, distinguished.

R. v. *Harrison*, [1945] 3 D.L.R. 122, applied.

Semble, Section 4 (2) of the Criminal Appeal Act, 1945, indicates that where an appeal against conviction succeeds, the normal course will be a verdict of acquittal or a new trial, and that some sufficient reason should be shown for the exercise of the power conferred by s. 5 (2).

Counsel: *N. I. Smith*, for the appellant; *Currie*, for the Crown.

Solicitors: *King, McCaw, and Smith*, Hamilton, for the appellant; *Crown Law Office*, Wellington, for the Crown.

THE KING v. BLYTH.

COURT OF APPEAL. Wellington. 1947. March 28. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; CALLAN, J.; FAIR, J.; CORNISH, J.

Criminal Law—Appeal—New Trial or Acquittal—Evidence at Trial Subject to Contradiction if New Trial granted—Conviction on Second Trial improbable—Entry of Verdict of Acquittal—Criminal Appeal Act, 1945, s. 4 (2).

Where a conviction on a second trial is improbable, because it has been shown that the witnesses for the prosecution at the trial could be contradicted on a new trial, and the Crown has brought forward matters in support thereof, the Court, in exercising the discretion given it by s. 4 (2) of the Criminal Appeal Act, 1945, in allowing the appeal and quashing the conviction, should direct a judgment and a verdict of acquittal to be entered.

Counsel: *O. G. Stevens*, for the appellant; *A. E. Currie*, for the Crown.

Solicitors: *Stevens and Stevens*, Dunedin, for the appellant; *Crown Law Office*, Wellington, for the Crown.

In re RAGLAN ELECTION PETITION.

ELECTION COURT. Wellington. 1947. March 3, 12. SIR HUMPHREY O'LEARY, C.J.; BLAIR, J.

Elections and Polls—Parliamentary Election Petition—Production and Inspection of Documents—Maoris (other than Half-castes) alleged to be illegally on Roll of European Electorate and to have voted—Application for Inspection of Applications for Voting-papers in respect of Maori Electorate in same area as European Electorate and List, if any, of Votes allowed—Whether Order should be made—Electoral Act, 1927, s. 199.

In New Zealand, the area of a Maori electorate is made up of a number of European electorates, with the result that two separate elections, in the Western Maori Electorate and the Raglan Electorate, took place in the same area. The election petition contained an allegation that certain persons were illegally registered or illegally retained on the roll of the Raglan Electoral District, and voted as electors notwithstanding that they were Maoris (other than half-castes).

On a motion asking, *inter alia*, for the Election Court to order production and inspection of all applications for voting papers made in respect of the Western Maori Electorate election and the list, if any, of votes allowed,

Held, 1. That, as there was no allegation of double voting in the two electorates, Raglan and Western Maori, but merely an allegation that Maoris were illegally on the Raglan roll and voted in the Raglan election, the Court was prohibited by s. 199 of the Electoral Act, 1927, from inquiring into any other complaint than that alleged in the petition.

Re Northern Maori Election, (1915) 34 N.Z.L.R. 296, applied.

Petersfield Case, Stowe v. *Jolliffe*, (1874) L.R. 9 P.C. 446, referred to.

2. That, if Maoris had voted in the Raglan election, this should be capable of proof without inspection of the Western Maori Electorate documents, and that meanwhile the order should be restricted to the production of the documents.

(Consequently, the application for inspection was refused, with leave to the parties to renew the application later before the hearing of the petition or at the hearing itself, if further grounds for making it should arise.)

3. That, even though the documents be produced, if no case be made out for their inspection, the Court should refuse the application in that behalf.

Quaere, Whether, before the hearing of the Raglan election petition, there was jurisdiction to allow even the production of the Western Maori election documents. (These, however, in unopened packages, in any event would be in the custody of the Court.)

Counsel: *Sim*, K.C., and *Tripe*, for the petitioner; *Cleary*, for the respondent; *A. E. Currie*, for the Clerk of the House of Representatives and other official parties.

Solicitors: *Tompkins and Wake*, Hamilton, for the petitioner; *Barnett and Cleary*, Wellington, for the respondent; *Crown Law Office*, Wellington, for the Clerk of the House of Representatives and other official parties.

In re WIDDOWSON (DECEASED), *Ex parte* JAMESON AND ANOTHER.

SUPREME COURT. Christchurch. 1946. December 11. 1947. March 17. SMITH, J.

Trusts and Trustees—Commission—Settled Land—Settlement created under the Settled Land Act, 1908, from a Settlement created under a Will—Commission allowable to Trustee of such Settlement out of Assets comprised therein—Administration Act, 1908, s. 20.

The trustee of a settlement created under the Settled Land Act, 1908, from a settlement existing under a will, and, therefore, affecting the assets of a deceased person, may, on the passing of his accounts, be allowed commission under s. 20 of the Administration Act, 1908, out of the assets comprised in the settlement of which he is trustee.

In re Pharazyn, Brown v. *Guardian, Trust, and Executors Co. of New Zealand, Ltd.*, [1946] G.L.R. 463, followed.

In re Rathbone, [1929] N.Z.L.R. 122. *In re Kerr, Johnston* v. *Kerr*, [1929] N.Z.L.R. 689, *Re Powell, Permanent Trustee Co. of New South Wales, Ltd.* v. *Powell*, (1907) 7 N.S.W. S.R. 874, *Perpetual Trustee Co., Ltd.* v. *Tasker*, (1913) 13 N.S.W. S.R. 322, referred to.

Counsel: *Lascelles*, for the petitioning trustees; *A. L. Wright*, for certain beneficiaries under the will, to oppose.

Solicitors: *Weston, Ward, and Lascelles*, Christchurch, for the petitioning trustees; *Duncan, Cotterill, and Co.*, Christchurch, for certain beneficiaries under the will, to oppose.

KERSEY v. THOMSON (BRADLEY, THIRD PARTY).

SUPREME COURT. Auckland. 1946. December 10. 1947. March 12. CALLAN, J.

Landlord and Tenant—Negligence—Liability for Repairs—Notice—Lessee not Liable for Repairs due to Depreciation without Lessee's Neglect—Lessee not liable to comply with Notice involving "structural repairs"—Lessor to comply with all requirements "of . . . municipal . . . authorities"—City By-law requiring all means of Egress to be "maintained in good safe usable condition"—Whether such By-law a "requirement" within the meaning of Lease—Whether Compliance therewith inter partes *Responsibility of Lessee—Accident to Guest of Lessee caused by Defect in Stairway—No Notice of Defect given by Lessee to Lessor—Whether Lessor liable to Indemnify Lessee.*

The third party granted a lease of a private hotel, and, with his consent, the lessee's interest became vested in the defendant, who carried on the business of a private-hotel keeper therein.

Clause 3 of the lease excused the lessee from repairing such depreciation as might arise from fair wear and tear, weather, and natural causes, without neglect of the lessee.

Clause 8 of the lease provided as follows:

"The lessee will from time to time and at all times during the said term duly and punctually comply with all the requirements of the health, municipal and other authorities and will observe, perform and keep all by-laws and regulations from time to time in force in the city of Auckland in any way appertaining to the demised premises or the use thereof by the lessee Provided always that the lessee shall not be under any obligation or liability to comply with any notice involving the expenditure of moneys towards structural repairs and/or structural alterations to the said premises Provided that if structural repairs and alterations are required as aforesaid by reason solely of the fact that the lessee desired to accommodate more than sixteen persons in apartments then such structural alterations shall be the liability of the lessee."

Clause 11 of the lease was as follows:

"The lessor will comply with all requirements and notices received by him and/or the lessee from the Government, City Council, Fire Board or other authority within their respective jurisdictions which are not the responsibility of the lessee under cl. 8 hereof."

A by-law of the Auckland City was in the following words:

"All means of egress shall at all times be maintained in good safe usable condition and shall at all times during occupancy be kept free and clear from obstruction and be readily accessible."

When the plaintiff, a boarder in the defendant's hotel, was descending the external wooden back stairs, a step gave way, and he fell to the ground and suffered injuries. He claimed damages from the defendant, the lessee, who claimed indemnity from the lessor, as third party.

All three parties agreed upon the amount of damages payable to the plaintiff, and the only question for decision was whether the lessee was entitled to indemnity from the third party, the lessor.

Held, 1. That the Auckland City by-law, set out above, applied to the premises; and the money expended in repairing the stairway in any way in which it could have been properly repaired so as to cure the defect that occasioned the accident would be money expended upon "structural repairs" within the meaning of that term as used in cl. 8 of the lease.

2. That the by-law was a "requirement" (within the meaning of that word in cl. 11 of the said lease) of the Auckland City Council made within its jurisdiction that such a stairway as the one upon which the accident took place should be maintained in good safe usable condition.

3. That, *inter partes*, compliance with the by-law in the present case was not the responsibility of the lessee under the lease, because such compliance involved work of a "structural nature"; and therefore such compliance was the responsibility of the lessor under cl. 11 of the lease.

4. That the repairs contemplated by cl. 3 of the lease included those repairs which were necessary to prevent such an accident as befell the plaintiff; and, under that clause, considered alone and apart from other provisions of the lease, the lessee would not be liable to the lessor to do the repairs or bear their cost, but it did not thereby follow that the lessor would be liable to the lessee to do the repairs or bear the cost.

Collins v. *Winter*, [1924] N.Z.L.R. 449, applied.

5. That, accordingly, at the date of the plaintiff's accident, the external staircase was not in good safe usable condition, and that its deficiency was of such a nature that, as between the lessee and the lessor, it was the business of the lessor, and not that of the lessee, to put it in such good safe usable condition.

6. That, as, on the evidence, the defect which occasioned the accident was unknown to the lessor and had not been pointed out to him by any one before the accident, and, as the lessor had covenanted to do repairs, the condition was implied that the lessee had to give notice of want of repair before the lessor's obligation arose; and, in the absence of such notice, the lessee was not entitled to indemnity from the lessor.

Makin v. *Watkinson*, (1870) L.R. 6 Ex. 25, *Torrens* v. *Walker*, [1906] 2 Ch. 166, *Morgan* v. *Liverpool Corporation*, [1927] 2 K.B. 131, *Murphy* v. *Hurly*, [1922] 1 A.C. 369, and *Beaumont* v. *Whitcombe and Tombs*, (1897) 16 N.Z.L.R. 133, followed.

Counsel: *Kiff*, for the plaintiff; *Finlay*, for the defendant; *Trimmer*, for the third party.

Solicitors: *Glaister and Ennor*, Auckland, for the plaintiff; *A. M. Finlay*, Auckland, for the defendant; *Trimmer and Teape*, Auckland, for the third party.

SOUTHEE v. SOUTHEE.

SUPREME COURT. Auckland. 1947. April 22, 24. CALLAN, J.

Divorce and Matrimonial Causes—Separation as a Ground of Divorce—Social Security Benefits—Exercise of Discretion—Whether Court should refuse Decree to Husband merely on Ground of resulting Financial Loss to Wife—Divorce and Matrimonial Causes Act, 1928, s. 18—Social Security Act, 1938, s. 22—Social Security Amendment Act, 1943, s. 13—Social Security Amendment Act, 1945, s. 19.

The Supreme Court, in exercise of the discretion given to it by the first portion of s. 18 of the Divorce and Matrimonial Causes Act, 1928, where relief is sought on the ground specified in s. 10 (*i*) of that statute—namely, an agreement for separation in force for three years—should not refuse to grant a husband petitioner a decree merely upon the ground that a divorce may, on the making of the decree absolute, without fault on the part of the petitioner, cause financial loss to his wife—*e.g.*, where she would lose the deserted wife's benefit payable under s. 22 (as amended) of the Social Security Act, 1938, that she had been enjoying up to the date of the making of such decree.

Mason v. *Mason*, [1921] N.Z.L.R. 955, applied.

Observations as to the possibility of the exercise of such discretion against a husband petitioner where his default in payment of maintenance to his wife was wilful.

Counsel: *Cleal*, for the petitioner; *Robinson*, for the respondent.

Solicitors: *Meredith, Meredith, Kerr, and Cleal*, Auckland, for the petitioner; *Watt, Currie, and Jack*, Wanganui, for the respondent.

NEWMAN BROS., LTD. v. SPITTAL.

SUPREME COURT. Nelson. 1947. March 17, April 2. FLEMING, J.

Negligence—Tortfeasors—Contribution—Action for Recovery—Action by Passenger in one of Two Colliding Vehicles against Owners of both Vehicles—Jury finding that each Driver's Negligence caused or materially contributed to the Cause of the Collision—Jury's Rider that Defendant's Driver contributed 90 per cent. to the Cause of the Accident—Judgment for Damages fixed by Jury—Action by Unsuccessful Defendant against other Party to Collision—Jury's Rider disregarded—Assessment of Contribution—Law Reform Act, 1936, s. 17.

A passenger in a service-car received injuries in a collision with the present plaintiff company's service-car and claimed damages from both the parties to the present action. The jury, after answering two issues materially contributing to the cause of the collision, awarded damages, and added the following rider to their findings: "The jury are of opinion that [the plaintiff's] driver contributed 90 per cent. to the cause of the accident." The learned Judge gave judgment against both defendants for the damages awarded and costs, disbursements, and witnesses' expenses. The plaintiff company, having paid the whole of the said amounts, claimed under s. 17 of the Law Reform Act, 1936, from its co-defendant such amount by way of contribution as the Court should consider just and equitable.

Held, 1. That the jury's rider must be disregarded, because the jury was not the tribunal to decide the question of contribution.

Stevens v. *Collinson*, [1938] N.Z.L.R. 64, referred to.

2. That, after an analysis of the evidence, it was impossible to say that either driver's negligence contributed more to cause the accident than the other's.

3. That, therefore, judgment should be for the plaintiff company for one half of the amount it had paid to the passenger.

Smith v. *Bray*, (1939) 56 T.L.R. 200, followed.

Counsel: *T. P. McCarthy*, for the plaintiff; *Scantlebury*, for the defendant.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the plaintiff; *Scantlebury and Noble-Adams*, Blenheim, for the defendant.

In re TRAVIS (DECEASED), YOUNG AND OTHERS v. OTAGO UNIVERSITY AND ANOTHER.

SUPREME COURT. Christchurch. 1946. October 10; December 9, 23. SMITH, J.

Religious, Charitable, and Educational Trusts—Charitable Trust—Testamentary Trust for assisting Individuals proved Capable in Prosecution of Scientific Investigations relating to Consumption and Cancer—Whether "and" to be read as "or"—Whether Trust included the Provision of Plant and Equipment—Whether Trustees Empowered to assist Paid Employee engaged on Scientific Investigation by arrangement with and Payment to his Employer—Jurisdiction—Whether Carrying out of Trust had become "impracticable, impossible, or inexpedient"—Religious, Charitable, and Educational Trusts Act, 1908, s. 15.

A testator by his will made the following provisions:

> "It is my desire and I hereby declare that the income "of my residuary trust property shall be applied in assist- "ing individuals who to the satisfaction of my trustees "for the time being have proved themselves as capable "therein in the prosecution of scientific investigations in "New Zealand which may be or are likely to result in "substantially alleviating or preventing the sufferings of "humanity in the discovery of remedies or cures for and "in the resisting and eradicating of such diseases as are "commonly known as consumption and cancer."

(The further provisions of the will relating to the trust, and as to the appointment and duties of trustees of the trust fund are set out in the judgment).

The trustees of the will applied to the Court for the approval of a scheme under Part III of the Religious, Charitable, and Educational Trusts Act, 1908.

Held, 1. That the words "consumption and cancer" must be read as if "and" were "or," and that the trustees had power to assist an investigator who had proved himself capable in respect of either consumption or cancer.

2. That the words "assisting individuals" included the provision of not only income for the individual investigator, but also the provision of plant and equipment.

3. That the language of the trust empowered the trustees to assist an individual who was the paid employee of a University, research institute, or hospital by making arrangements with and payments to his employer whereby his investigations could be carried on or be extended by reason of the payments made.

4. That the trusts upon which the income of the residuary estate were held had not been shown to be impracticable or inexpedient or otherwise ineffective so as to bring the trusts within the operation of s. 15 of the Religious, Charitable, and Educational Trusts Act, 1908.

As the trusts had not been shown to be within the jurisdiction of the Court under the Religious, Charitable, and Educational Trusts Act, 1908, the application was dismissed.

Observations as to application of the trust income, and as to conditions of investigations that may be laid down by the trustees of the fund.

Counsel: *Lascelles*, for the trustees of the Travis Estate; *R. A. Young*, for the Otago University and Professor C. E. Hercus; *H. R. C. Wild*, for the British Empire Cancer Society (Inc.).

Solicitors: *Weston, Ward, and Lascelles*, Christchurch, for the plaintiffs; *R. A. Young and Hunter*, Christchurch, for the defendants.

HOGG v. HERRALD.

SUPREME COURT. Christchurch. 1947. March 27. FLEMING, J.

War Emergency Legislation—Mortgages Extension Emergency Regulations—Purchaser seeking Specific Performance of Agreement for Sale and Purchase from Vendor—Whether Leave of Court necessary before Action—Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), Reg. 6 (1) (2) (c).

Practice—Pleadings—Service of Unsealed Duplicate of Writ—Waiver of Irregularity—Code of Civil Procedure, RR. 21, 26.

Rules 21 and 26 of the Code of Civil Procedure require the service of a sealed duplicate of the writ of summons in an action; but this requirement may be waived by a defendant, who, having full notice of the contents of the writ and of the statement of claim, acts upon the service of the unsealed copy of the writ and of the statement of claim in such a way as to waive the irregularity of the unsealed document.

In re Invercargill North Licensing Committee, Cameron's case, (1892) 11 N.Z.L.R. 507, and *Hannan* v. *Ikaroa District Maori Land Board*, (1912) 32 N.Z.L.R. 657, applied.

The Mortgages Extension Emergency Regulations, 1940, protect a mortgagor or lessee, or a purchaser under an agreement for sale and purchase, within the scope of those regulations by requiring the leave of the Court before a mortgagee or any other person can do any of the acts specified in Reg. 6 (2). These regulations do not, however, contemplate any action taken by a mortgagor or purchaser against a mortgagee or vendor. Consequently, as the regulations do not apply where the purchaser is seeking specific performance of an agreement for sale and purchase by the vendor, no leave of the Court is necessary before the purchaser can bring an action for that purpose.

Barr-Browns Limited v. *Green*, [1942] N.Z.L.R. 72, mentioned.

Counsel: *Lester*, for the plaintiff; *Lascelles*, for the defendant.

Solicitors: *Bishop, Godfrey, Muff, and Lester*, Christchurch, for the plaintiff; *Weston, Ward, and Lascelles*, Christchurch, for the defendant.

WITNESSES' EXPENSES.

A Plea for Revision of the Scale.

By HAMILTON MITCHELL, LL.M.

Pursuant to R. 555 of the Code of Civil Procedure, the Court has a general jurisdiction to allow costs, but R. 568 determines the scope of such jurisdiction, as this latter rule declares that costs shall be in accordance with Table C in the Third Schedule.

By para. 36 of Table C, "witnesses' expenses actually paid" may be allowed, but "according to the allowance fixed by Table E." Table E provides a maximum allowance for the witness's time, travelling and other expenses.

Table C, with its satellite Tables, was fixed by Order in Council of July 4, 1921. It is common knowledge that NZ.£1 in 1921 had a purchasing power far greater than NZ.£1 in 1947. Some go so far as to assert that NZ.£1 1921 had the same power as NZ.£2 1947. In any event, in 1947 a minimum wage is decreed by law. It is 2s. 7½d. per hour, plus two cost-of-living bonuses of 5 per cent. and 5s. per week, making 2s. 9d. per hour, or £1 2s. per day.

Now, Table E provides a maximum of 10s. 6d. per day for the lowest-paid class of witness—*i.e.*, police constables, labourers, and seamen—gradually rising through journeymen mechanics at 12s. 6d., farmers and master tradesmen at 15s. to 21s., to professional men, bankers, and other gentlemen at £2 2s. Thus, it is clear that every witness, if he receive only the allowance provided by Table E, comes to Court at a substantial financial loss. If he is forced to spend a night away from home, he receives the princely allowance of 5s.

The scale is hopelessly out of date, and should be amended immediately. Last year, the Government recognized the inadequacy of the scale for payment of jurymen, and granted them an increase. In common decency, a litigant cannot ask a fellow-worker to be a witness at a substantial loss of wages to the witness. The litigant, even though successful, must at present pay his witnesses as much as, and sometimes more than, twice the allowance he recovers from the unsuccessful party.

In a recent case, witnesses travelled eighty miles by car in the early morning (they were required at 10 a.m.), spent all day at the Court (the last witness finished at 5.30 p.m.), and returned to their homes at midnight, having travelled by rail. Each of these men lost £2 5s. for a day's wages, travelled 160 miles in the day, and had three meals away from home.

The successful party will have to pay each man: loss of wages, £2 5s. 0d.; rail fare, 7s. 6d.; and three meals, 9s. 0d. The car which carried them and another witness did not return till two days later, and a claim of 1s. per mile one way is made for the car. The unsuccessful party contends that he is bound to pay only 16s. in lieu of wages, plus rail fare. In other words, these three men will carry to their wives a net 7s. for their day's toil.

Illustration after illustration of the hardship caused by Table E could be given for each Supreme Court sessions. The Magistrates' Court scale is even more inadequate. Why should the witness be even worse off because he happens to give his evidence in the lower Court? The scale should be the same in every Court.

I suggest the basis of the scale at the least should be the minimum wage—*i.e.*, £1 2s. per day. In reality, almost every man earns a minimum of £6, if not £6 10s., per week; certainly every skilled man does.

I would suggest that modern conditions do not call for the differentiation in Table E. Almost every member of the community works under a scale, be it fixed by the Arbitration Court as a minimum wage or under an award or a scale of costs approved by his profession. Should not the same scale operate in the Courts? Table E should empower the Registrar to allow the same rate for the witness for the time he was absent from his employment as he would have received under his award or scale of fees.

Again, where a witness is forced to take a meal away from his home other than lunch, he should be allowed the cost thereof. Similarly, if he is necessarily absent from his home overnight, then he should be allowed a reasonable sum, according to his needs, to cover the cost of his board and lodging. I would suggest there be an allowance of 15s. to 25s., in the discretion of the Registrar.

Public transport should be used and allowed where available, but often private transport has to be used. My recollection is the Public Service Commissioners allow 8d. per mile to Civil Servants who use their own cars on public business. Is there any reason why the same scale should not apply in the Courts?

To amend the Rules is a comparatively simple matter. But it is not one which is in the province of the Law Revision Committee. I respectfully suggest that the Rules Committee should review Table E at the earliest opportunity, and abolish, or at least alleviate, a burden which every successful litigant has felt increasingly heavy for some years past.

The question of re-adjusting to modern needs the amounts received as witnesses' allowances in criminal cases has recently been the subject of a report by a committee appointed in England by the Home Secretary, in response to general complaints that the amounts they receive not only do not compensate them in any way for the inconvenience of having to be away from their ordinary occupations, but sometimes leave them actually out-of-pocket. The committee recognizes that there is some justification for these complaints.

This report is summarized in 111 *J.P. Journal*, 144 (received since the above was written), to which reference should be made for the committee's detailed recommendations. The following extracts from that report may, however, be some guidance in an understanding of the general views underlying the proposed reforms. It should be pointed out that the existing scale in England is contained in regulations made in 1904, amended in 1908; while in 1920 the maximum allowances to professional witnesses were increased by 50 per cent. and those to ordinary witnesses by 100 per cent. No further material alterations had been made.

No provision is made for any payment to Police or to prison officer witnesses. Dealing with this question, the report states :

> it is considered that, as they are public officials acting in the course of their duty, they should not receive any allowances other than from their employing department and authority.

It is further pointed out that any allowances at present drawn by such witnesses are paid over to the employing authority and that the Act provides for compensation for a witness, and not for his employer for loss of the witness's services.

The report is arranged in very convenient form. Each section starts with the relevant regulation as it now stands, and there follow paragraphs setting out arguments which were put forward to the committee and their views on those arguments, their conclusions and recommendations.

The British Medical Association asked for a higher scale of allowances at Assizes and Quarter Sessions than at summary Courts, but the committee were not in favour of any such differentiation. They did feel, however, that provision should be made (it is not at present) for the payment of a night allowance to professional witnesses necessarily detained overnight at the same rate as to an ordinary witness. They also agreed that there should be an increase in the maximum permitted allowance, and they recommend, therefore, that a professional witness who is necessarily detained away from his home or place of practice for less than four hours should be eligible for an allowance of not more than fifty shillings, and if he is so detained for more than four hours an allowance of not more than five pounds. If the witness, although detained for less than four hours, gives evidence on the same day in two or more cases, it is recommended that, as at present, he should be entitled to an allowance within the permitted maximum for a whole day.

Finally the committee considered that no allowance as a professional witness should be paid to a salaried professional officer who does not lose income by attendance at Court—he should be regarded for the purposes of the regulations as an ordinary witness—and the committee were of opinion that this exception should apply to full-time prison medical officers. They considered, however, that part-time prison medical officers are in an essentially different position on account of their less frequent appearances at Court and the fact that these may well cause, in their cases, some loss of income.

There is at present no scale of allowances in England for expert witnesses, and the committee did not think it practicable to fix one. They did consider, however, that as in the case of the professional witness there should be specific provision for the payment of a night allowance in appropriate cases.

A suggestion was made to the committee that a list should be drawn up of those who could properly be considered experts, but the committee preferred to add to the appropriate regulation the following definition :—

> For the purpose of this regulation an expert witness means a witness otherwise unconnected with the case who because of his special scientific or professional knowledge, or other special qualifications, is called to give in evidence his expert opinion, either based on facts, or on the result of examination of material or data, submitted to him for the purpose.

The allowances payable are recommended to be, as at present, such as the Court considers reasonable for attending to give evidence and where necessary for qualifying to give evidence, and it is further recommended that the test of reasonableness should be the nature and difficulty of the case and the work necessarily involved.

The committee did not accept a claim made on behalf of doctors, particularly Police surgeons, that they are frequently called upon to express opinions which render their evidence more that of an expert witness than of a professional witness, and that by reason of their frequent appearances in Court, and the time they devote to the study of matters constantly arising there, it is proper that they should be regarded as expert witnesses.

We are glad to see (says the *J.P. Journal*) that the committee consider that the present subdivision of ordinary witnesses into various categories is not appropriate to modern conditions and they propose a simple regulation as follows :

> There may be allowed to witnesses other than those mentioned in regs. 1–3 who do not lose wages, earnings, or income by attendance a sum not exceeding five shillings a day in respect of subsistence. To those who lose wages, earnings, or income a sum not exceeding twenty-five shillings a day, of which not more than twenty shillings shall be in respect of such loss, and not more than five shillings in respect of subsistence.

It is proposed that there should no longer be any requirement that a certificate from an employer should be produced to show the amount of wages lost by a witness. This is without prejudice to the right of the Court to give due weight to any such certificate which a witness may choose to produce, or, in any case where they think fit, to call for a certificate.

The question of night allowances is dealt with, in the draft new regulations, in a separate regulation to apply in the case of *any* witness necessarily absent from his home for the night for the purpose of giving evidence, and it is proposed that he be paid an amount not exceeding either the expense reasonably incurred for his night's board and lodging or twenty shillings, whichever is the lesser amount.

The proposed new regulation is in a much shorter form than the existing one. It preserves the requirement that not more than one half of the maximum full day allowance shall be paid to a witness who is necessarily detained from his home or place of business for not more than four hours, unless the Court is satisfied that, although detained for that shorter period, he necessarily loses a whole day's wages or income because of his attendance.

The existing provision for payment to a prosecutor or to any other person who must attend for the prosecution other than as a witness it is proposed should be extended so as to read :

> There may be allowed to any person, who in the opinion of the Court, necessarily attends otherwise than as a witness, the same allowances as to an ordinary witness.

This would cover, for example, any person necessarily accompanying an invalid or young witness, and no doubt other instances will occur to our readers. The provision applies to the defence as well as to the prosecution.

The Committee saw no reason for any radical alteration in the regulation governing travelling-allowances and they did not accept the view put forward by the

British Medical Association that for professional witnesses first-class railway fares should be paid, except when disallowed by the court for special reasons. They see no reason, under modern conditions, for restricting the payment of an allowance to witnesses who travel by private car to those for whom no railway or other public conveyance is available.

As a consequence the proposed regulation provides for the payment of fares actually paid by those who travel by railway or other public conveyances. Except for special reasons allowed by the Court, however, only third-class railway fare is allowed, and only return rates for the double journey where return tickets are available.

Where no public transport is available and one or more witnesses travel necessarily by a hired vehicle, the sum paid for the hire may be allowed, subject to a maximum of one shilling and sixpence a mile each way. If two or more witnesses attend from the same place, the total allowance for their joint travelling shall not exceed one shilling and sixpence a mile each way unless the Court is satisfied that it was reasonable to hire more than one vehicle.

Witnesses travelling on foot or by private conveyance can claim a sum not exceeding threepence a mile each way.

Where a witness is suffering from serious illness, or where heavy exhibits have to be carried, sums in excess of these rates may be allowed if the Court is satisfied that further expense was reasonably incurred.

It is to be noted that the new regulation proposes the abolition of the existing two-mile minimum distance, so that bus and other fares or allowances for shorter distances will be properly payable.

It is proposed that there should be two notes to the regulations, one calling attention to the fact that no allowance is payable to Police or prison officers attending in the execution of their duty, and the other stressing the fact that the allowances specified are maximum, and should not be paid in full unless the circumstances justify it.

The foregoing recommendations are quoted for the purpose of enabling practitioners to appreciate what is being done by way of improvement in England, and not as a scale to be adopted in the different conditions obtaining in this country.

OBITUARY.

Mr. E. C. Smith, Gore.

The death occurred at Gore, on April 30, of Mr. Ethelbert Cann Smith, of the firm of Messrs. Smith and Dolamore, one of the best-known practitioners in Southland and the senior member of the profession at Gore. Mr. Smith, who was seventy, had suffered from ill health for some time, but continued to attend his office.

Closely associated with the public life of Gore, and a man with an unusual gift of oratory, he became known throughout New Zealand for his contributions to Freemasonry and the Rotary movement. Becoming a member of Lodge Harvey, No. 49, Gore, in 1909, he served terms as Master in 1915 and 1916, rising to Grand Steward in 1919, Assistant-Provincial Grand Master from 1922 to 1924, Provincial Grand Master from 1925 to 1927, and deputy-Grand Master for New Zealand in 1943. Later his appointment came as Pro-Grand Master, and the highest honour of Grand Master was bestowed on him in 1945. He assumed the office from Sir Cyril Newall and held it for a year. Royal Arch Masonry also claimed his attention. As a student of craft history and a lecturer, he was known throughout the territory. For many years he was also a member of the Manchester Unity, I.O.O.F.

A member of the Gore High School Board of Governors since 1911, he was appointed chairman in 1915–16. His reappointment as chairman came again in 1921, and he had held the position up to the time of his death. In debating contests among the pupils, and many other phases of the life of the school, he gave generously of his talents.

His interest in elocution and other expressions of art found an outlet in the Gore Competitions Society, of which he was president for a number of years. A foundation member of the Rotary Club at Gore, he was a regular attender at the weekly luncheons and was a past president of the movement. A few years ago he visited Japan as a delate to an International Rotary conference, and on another trip he studied educational methods in America.

For twenty-five years Mr. Smith was superintendent of the Sunday school at the Gore Methodist Church, acting as lay preacher on occasions. Other bodies with which he had been associated at some time in his career were the Gore Temperance Society, the Gore Literary and Debating Society, the Gore Chamber of Commerce, of which he was president for a term, and the Gore Carnegie Library, of which he was chairman of the committee and a trustee of the Matheson section.

A member of the Gore Bowling Club, he was interested in most forms of sport, and in his youth was a keen tramper and cyclist.

Mr. Smith is survived by his wife, two sons—Messrs. Hallam L. Smith, of Gore, and Ralph E. Smith, of Christchurch—and one daughter—Mrs. A. K. Ibbotson, of Dunedin.

Tributes to the late Mr. E. C. Smith, were made at the Gore Court-house, when representatives of the Bench and Bar, the Police and the Justice and Traffic Departments met. The gathering was presided over by Mr. R. C. Abernethy, S.M.

" The late Mr. Smith, who was admitted to the profession as long ago as 1899, came to this district in 1901, and had practised here ever since," said Mr. R. B. Bannerman, speaking for the practitioners of Gore. " During that period, nearly half a century, he earned a reputation for ability, sound judgment, and straight dealing which made his name an honoured one in his profession. He always made his client's case his own, and he never spared himself where his client's interests were concerned. His extreme loyalty to his clients was shown very clearly at the last Court here, only a few days before his death, when, although a very sick man, he left his bed to attend the Court in the interests of a client. The act was typical of the high standard he set himself in his profession, in which he always placed his clients' interests before his own.

" While the late Mr. Smith was a very busy man in his profession, he used his amazing energy and his great ability for the benefit of the district in public life in a very wide sphere of activities. His unselfishness with his time and his talents in the interests of his fellow-men will be a lasting memorial to him.

" The members of the legal profession at Gore wish to extend to the late Mr. Smith's family sincere sympathy in their bereavement, but hope that they will derive comfort from the knowledge that he bore a very honoured name in his profession and that his great and unselfish public work in the district will long be remembered."

Mr. Abernethy, S.M., then spoke. " Shakespeare said: ' The evil that men do lives after them; the good is oft interred with their bones,' " he proceeded. " As I travel about the country, I often find that there are many men about regarding whom this is true, but there are other men who have good in them, in their lives, and this lives after them. As Mr. Bannerman said, Mr. Smith practised here for a long time. He would not have us say that he was perfect; none of us is; but he was a good man, and it will be a comfort to his family to know that he lived a full life and left behind him a record to be proud of. He will be much missed."

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Land Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 101.—S. TO A. BROTHERS, LTD.

Urban Land—Potentiality Value—Fair Value between Parties—How ascertained—Servicemen's Settlement and Land Sales Act, 1943, s. 54.

(*Concluded from p. 154.*)

It is clear as in *Clay's* case that even at the agreed sale price the land would be of greater value to the purchaser than any other piece of land not so conveniently situated. It is also clear that had the property been offered for sale at the crucial date by a vendor willing to sell at the best price he could reasonably expect to obtain, such a vendor in the present case, as in *Clay's* case, might reasonably have expected to realize a sum substantially in excess of the normal value of his land. In short, he might reasonably have expected to receive a potential value in addition to the normal value. The Court is of opinion that on the authority of *Clay's* case such potential value must be deemed, for the purposes of the Land Sales Act, to be part of the value of the land. It is now necessary to consider how the potential value is to be assessed.

"The first question is whether the total value of the land is to be limited to the amount which an 'average' buyer might be willing to pay for it. The Committee deemed itself bound by dicta relating to an average buyer in *In re a Proposed Sale, Lehmann's Trustees to Beamish*, but in the view of the Court the dicta in question are inapplicable where, as in *Clay's* case, there was at the crucial date a particular buyer prepared to pay more than the normal value for the property. In *Lehmann's* case the Court held that the adjoining owner was not a prospective buyer except at a normal price in December, 1942. In the absence of a particular buyer with a special interest in the property, it is clear that the proper course is to ascertain the amount which an average buyer would be likely to give. That was in fact the position which obtained in *Lehmann's* case. In the present case, however, the references found in the English authorities to the position where there is in fact a particular buyer willing to pay for the potentiality at the crucial date are directly apposite and should be applied.

"On the authority of *Inland Revenue Commissioners* v. *Clay* it is conceived that the primary duty of the Committee and now of the Court is to ascertain the amount which the vendor might reasonably have expected to obtain for his land had he sold it on December 15, 1942. It must be assumed that he was then a willing seller in the sense defined by the authorities quoted—namely, that he was willing to sell at such a price as he could reasonably expect to obtain at that date. In the present case, the fact that the property was obviously required either immediately or at an early date by A. Brothers, Ltd., in the normal develpoment of their business and that the firm would undoubtedly have been prepared to pay a substantial sum for the potential value thus created are factors to be considered.

"The Committee appears to have held that the valuation of £1,705 made by Mr. B. included the value of the potentiality. This is not in accord with Mr. B.'s evidence which was that in his opinion £1,705 was the normal value of the property but that to A. Brothers, Ltd., its value was not less than £2,500. The Committee has not indicated on what basis it arrived at the view that £1,705 included the value of the potentiality and on the evidence we are agreed that on whatever basis the Committee proceeded, its assessment of the potentiality must have been too low.

"Upon a full consideration of the facts, the Court is of opinion that even in December, 1942, it would have well paid A. Brothers, Ltd., to buy this property for £2,350 and that had negotiations then been proceeded with and had the firm been satisfied that Mr. S. would not sell for less, the firm might well have paid that amount for it. From another angle it might well be said, and the Court is of opinion, that Mr. S. on December 15, 1942, might reasonably have expected to receive somewhere in the vicinity of £2,350 and certainly not less than £2,000 from A. Brothers, Ltd., had he been willing but not anxious to sell and had they been prepared to buy at a price which in view of their needs it would have been reasonable for them to pay. It follows that in accordance with the principles laid down in *Inland Revenue Commissioners* v. *Clay* it would have been competent for the Committee with propriety to assess the value of this property with its potentiality at December, 1942, at £2,000 or more and possibly at as high a figure as £2,350.

"The value of the property including its potentiality, as at December 15, 1942, does not necessarily constitute the 'basic value' at which a sale may properly be approved under the Land Sales Act. The duty of the Court in fixing a basic value under the Act is first to determine the value of the land as at December 15, 1942, and then to consider whether the value so found should be increased or reduced in order to make it a fair value. It may be interpolated at this stage that the value of land at December, 1942, includes any potentiality pertaining thereto. The value of the potentiality therefore is not something added to the value of the land but is part of the value itself at the crucial date. Section 54 then directs the Committee (after finding the value as at December 15, 1942) to consider *inter alia* 'such other matters affecting the land as the Committee considers relevant.' An increase or reduction in the extent or value of a potentiality pertaining to land is certainly a matter affecting the land, and the Act does not stipulate nor does it seem reasonable to suppose the Legislature intended that consideration of such matters should be limited to matters existing at December 15, 1942. In the present case it is clear that by virtue of the normal development of its very substantial business, the company's urgent need to acquire this property, although it existed in fact in December, 1942, existed to a much greater degree at the date of sale. Apart from the restraining provisions of the Land Sales Act, therefore, it is clear that by reason of the increasing urgency of the company's requirements, the adjoining land would consequentially enjoy a greater potential value at the date of sale than in December, 1942. In the normal course of business a vendor would be entitled to benefit by such an increase in the value of his land.

"In assessing a fair value it is conceived that the Court must endeavour to fix a value which in all the circumstances is fair to both parties. It is clear that the Court must have regard in terms of the Act to the settlement of returned servicemen, the prevention of undue increases in the price of land, the undue aggregation of land and its use for speculative or uneconomic purposes. It is not, however, the intention of the Act to impede normal progress or commercial development and we think the Court is entitled under s. 54 (2) (c) to take into account an increase—or for that matter a decrease—since December, 1942, in the potentiality attaching to any particular piece of land. The extent however to which such an increase in potential value may justify an increase in the basic value must be governed by the circumstances of the particular case, having regard always to the general intention of the Act to stabilize land values as at December 15, 1942, and to prevent undue increases in the price of land, but subject to the overriding consideration that the value so fixed shall be, in all the circumstances, fair to both parties.

"In the present case we are satisfied that had the business of A. Brothers, Ltd., in December, 1942, been developed and extended to its existing state at the date of sale, the firm would have been glad to pay £2,350 for Mr. S.'s adjoining property at that date. We are also satisfied that the vendor by reason of his knowledge of the valuable potentiality attaching to his property would not have been a willing seller at any less sum. We are satisfied that in so far as the sale price represents an increase in potential value which has accrued since December, 1942, that increase is due entirely to normal business develop-

ment and is in no degree attributable to inflationary influences. If the price is reduced there is little likelihood that the vendor will sell and little likelihood that the purchaser will secure the property and so be relieved of its immediate difficulties. The probability is rather that the vendor will hold the property in the belief that at some future date he will obtain an even higher price from A. Brothers, Ltd., while the firm for a period of years will be forced to carry on its business under grave disadvantages.

"Taking all these matters into account, we are of opinion that notwithstanding that the value of the land with its potentiality at December 15, 1942, may have been a little less than £2,350 (upon which we find it unnecessary to come to a final opinion) it is competent for the Court to approve of the sale at that figure on the ground that it represents a fair value as between the parties. It is perhaps desirable to point out that the sale of this property with its substantial potential value sets no standard of value in respect of other properties where no potentiality is involved and furthermore that should A. Brothers, Ltd. (whose need to acquire the property has created the potentiality), subsequently desire to sell, it is quite possible, and indeed probable, that the present potentiality will no longer be deemed to pertain to the property in respect of a subsequent purchaser. The present purchaser must therefore recognize that on a resale the value of the property would have to be reassessed in accordance with all the relevant facts and circumstances arising in connection with such resale.

"It may also be desirable to point out that the added value attributable to a potentiality pertaining to land is not to be measured by an assessment of so-called 'special value' to the purchaser nor by what a particular purchaser may be willing to pay for the land, save to the extent that such considerations add actual value to the land in the sense that they increase the amount, assessed as hereinbefore provided, which the land might reasonably be expected to realize. The Court can have regard only to 'matters affecting the land' and the personal desires, needs, and circumstances of a purchaser, unless they may fairly be deemed to affect the land, must be disregarded. It is both unnecessary and undesirable to attempt to define or delimit the circumstances, as concerning a purchaser, which may 'affect the land,' but while on the one hand there is the highest authority for the view that the requirements of an adjoining owner may affect and add value to the property it is conceived that the mere desire to acquire a certain property, or even the urgent need to acquire a house, cannot in general be accepted by the Court as being matters affecting and so adding to the value of land.

"For the reasons given the Court is of opinion that the appeal should be allowed and consent is granted to the proposed transaction accordingly."

No. 102.—P.G.G.P. & S.A., LTD., TO McK.

Urban Land—Industrial Site—Special Value—Suitability for Purchaser's Requirements—Refusal of Consent alleged to be Prejudicial to Establishment of Industry—Matters for Court's Discretion—Prices in Excess of Basic Value.

Appeal, heard with the appeal in respect of the Dominion Compressed Yeast Co., Ltd., to be reported.

The land particularly involved in the present case was an area of 53 acres 2 roods 29.4 perches situated at Upper Riccarton. It was triangular in shape, having considerable frontage to the Main South Road and to Curletts Road and a short frontage at the apex of the triangle to the main south railway. The property was claimed to be particularly suitable for the requirements of the Cotton Textile Corporation of New Zealand, Ltd., for which it had been purchased, by reason of its size, situation, water-supply, drainage, access to the railway, and the availability of labour and transport. A portion of the land adjoining the railway was zoned for heavy industrial and the balance for light industrial purposes.

The Court (per *Archer*, J.) said: "At the time of its purchase the land was not intersected by roads, but it was known to the parties that the Crown intended to extend Blenheim Road through the property so as to provide a subsidiary main highway from Sockburn to Christchurch, and the land required for the extension of Blenheim Road has now been taken by proclamation. The effect of the extension of Blenheim Road is to cut off a small triangular area of some two and a half acres adjacent to the railway from the balance of the land, but the improved access due to the development of Blenheim Road as a main thoroughfare should benefit the property as a whole.

"At the hearing, considerable stress was laid upon the similarity between the needs and requirements of the Cotton Textile Corporation and those of Patons and Baldwins, Ltd., which were apparently given great weight by the Committee when it recently consented to a price of £700 per acre for similar land purchased by Patons and Baldwins, Ltd. As indicated in our judgment in the said appeal, we are of opinion that it is not competent for us to allow a so-called special value because of the special needs or requirements of the purchaser.

"We are satisfied, however, upon the evidence, that the area now in question is eminently suitable for industrial development and for the requirements of an industry of the magnitude contemplated by the purchaser company. In common with the land purchased by the Dominion Compressed Yeast Co., Ltd., the present area has entirely different characteristics today from those which were readily evident in December, 1942, and we are entitled to take into account the present character of the land in fixing its value for the purposes of the Land Sales Act.

"The valuers called for the vendor and for the Crown all assessed the value of the small triangular area adjoining the railway as heavy industrial land with siding access available, and the balance of the land upon a subdivisional basis for residential purposes, but giving a somewhat higher value for the back land by reason of its suitability for commercial use. In view of the fact that the land is eminently suitable for industrial purposes and is so zoned, we are of opinion that the proper basis of valuation is as a single area of industrial land, and that the basis on which the sale price was fixed by the parties—namely, at a price per acre over the whole of the area—is preferable to the more artificial method of envisaging a subdivision for residential purposes. In fixing a price per acre, we think that we must be guided by the sales of other industrial properties in Blenheim Road, and particularly by the standard of value which we have attempted to establish in the case of the land sold to the Dominion Compressed Yeast Co., Ltd. In that case, we arrived at a basic value of £375 per acre, having regard to all the other sales of industrial land in Blenheim Road, but treating the true value of the land sold to Patons and Baldwins, Ltd., as £425 per acre instead of the much higher figure at which the land was actually sold. The present property is a short distance further from the city, but we are of opinion that the part which is zoned for heavy industry may properly be valued by comparison with other similar lands lying between Blenheim Road and the railway at £350 per acre. The balance of the land is in a somewhat different category. It will shortly be cut off from the railway by the extension of Blenheim Road, and, though zoned for light industrial use, it is probable that, but for the advent of the Cotton Textile Corporation, it might well have been some years before, in the ordinary course of development, the whole of the land would have been required for industrial purposes. We are unable, therefore, to agree that the whole of the area can properly be valued at £350 per acre, as was agreed between the parties. The main portion of the land, comprising some fifty acres, cannot, in our opinion, be properly assessed for the purposes of the Land Sales Act, even taking into account all its potentiality for commercial use and its other advantages as disclosed by the evidence, at more than £250 per acre. As the higher priced land is but a fraction of the total area, we consider that the fair value of the land as a whole is £260 per acre, and that the basic value will be calculated accordingly.

"Considerable stress was laid by witnesses and counsel upon the importance to Christchurch and to New Zealand of making available this particular land for the Cotton Textile Corporation, and upon the possibility that, if by reason of a reduction in price the vendors refuse to sell, the promoters of the corporation may be gravely prejudiced in their plans to establish a cotton industry in New Zealand, and may, indeed, decide to abandon the project. Were the matter one in which the Court was empowered by the Act to exercise a discretion, such submissions would be entitled to be received with great weight, but, for reasons which the Court has already stated in decisions by which it is now bound, it is our considered view that the Act allows us no discretion in the matter, and that our duty thereunder is to fix a basic value and to limit the price at which consent is given under the Act to the basic value so found. If our interpretation of the statute is contrary to the intention of the Legislature, or if the Legislature should deem it necessary to make provision for land to be bought in special cases at prices which are in excess of its basic value arrived at in the normal way in accordance with the Act, the matter may readily be remedied by legislative action. As the law now stands, we conceive that we have no power to deviate from general principles in the case of the present sale, and accordingly the appeal must be allowed.

"Consent will be granted to the sale upon condition that the price is reduced to £13,960, being at the rate of £260 per acre."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Minor Gamblers.—According to the published report, Brigadier Goffin (of the Salvation Army), in giving evidence before the Gaming Commission, has ascribed many of the ills to which the world is heir to the dreadful habit of many people of playing games for money in their homes. To this, as indeed to all forms of gambling, the Army, he declares, had an uncompromising hostility —that is, the Salvation, not the regular Army. These views, however, would not commend themselves to all the members of the Judiciary. The late Sir Charles Skerrett, who held the reins of office as Chief Justice for so tragically short a period, was not averse from playing bridge for a shilling or two a hundred, although his inability to keep his mind on the game prevented him from reaching Culbertson class. Probably the best judicial exponent of recent years has been Sir John Reed, whose skill still affords him pleasure in his retirement. It was this game that brought upon Lord Ellenborough the merited but startling rebuke when once playing at his club with a young subaltern as his partner. Stung beyond endurance by the stream of acid comment Ellenborough levelled at his manner of playing, the subaltern retaliated by insisting that the L.C.J. kept his criticisms to himself. "You know, Sir," he said, "you're not in your wretched little Police Court now."

The Embarrassing Past.—One of the remits at the first Annual Legal Conference held at Christchurch on April 11, 12, and 13, 1928, was: "That the present salaries and pensions of the Supreme Court Judges are quite inadequate and require revision." It was moved by H. H. Cornish (now Cornish, J.), who thought as a matter of abstract justice the salaries should be increased, and observed that the remit was put forward in an obviously disinterested manner, as the majority there would never be elevated to the Bench. The seconder, R. Kennedy (now Kennedy, J.), referred to the agitation to increase the salaries of Judges in England, where it was recognized that £5,000 was inadequate. At that time, New Zealand salaries received by puisne Judges were £2,000 a year, low by comparison with £3,500 a year paid in Northern Ireland, £3,000 a year in the Supreme Court of the Irish Free State, £2,600 in New South Wales, and £2,500 in Victoria. When Lord Birkenhead gave up £10,000 a year while his Chancellorship lasted, and a life pension of £5,000, to go "into the City," the *Law Journal* (London) commented: "It is not for us to criticize, but if Sir Conan Doyle could get into touch with Lord Hardwicke, or Lord Thurlow, or Lord Eldon, or Lord Cairns, or Lord Shelborne, or better, with them altogether, what would they say? Surely, in chorus, *O tempora, O mores.*"

Constructive Desertion.—In a post-war world, the problem of constructive desertion has become a difficult one for divorce practitioners. Once, it involved primarily questions of drunkenness or physical cruelty; to-day, the questions it poses are more complex. In *Buchler* v. *Buchler*, [1947] 1 All E.R. 319, it was found that during the material years the husband had formed a close association with one H. to the exclusion of any other person. With him, he spent all his spare time, evenings, and holidays, and took him to theatres and other entertainments, neglecting his wife entirely and causing her distress and humiliation in the village in which they lived. Sexual impropriety between the two men was not alleged. Upon complaining, the wife was told that, if she did not like the situation, she could clear out and live with her mother; and, after warning him several times that he must choose between H. and herself, she eventually left him. Upon these facts, most practitioners would be likely to advise that the husband's conduct amounted to constructive desertion within the principles laid down in *Sickert* v. *Sickert*, [1899] P. 278, and adopted by our Courts. This was the view taken by Warrington, J., the trial Judge. The Court of Appeal (Lord Greene, M.R., Asquith, L.J., and Vaisey, J.), however, held that there was nothing in the evidence to suggest that, on the side of the husband, his friendship with H. was other than a genuine attachment of a clean nature, and his refusal to give it up was not conduct equivalent to driving his wife from the matrimonial home with the intention of bringing consortium to an end. It did not amount to constructive desertion on his part, but desertion on hers. True enough, this may be a man's world, with a man's code of justice, but one would have thought that, in the light of the facts, his conduct had brought matrimonial consortium to an end before she departed with justifiable degree of high dudgeon from his bed and board.

Conjugal Rites.—The typist who recently introduced a note of novelty into divorce procedure by describing a backing-sheet as "Petition for Congenial Rights" may well have been unconsciously rebelling against the days when the last of conjugating verbs was both wearisome and unprofitable. On the other hand, if she conformed more closely to the legal typist of to-day, her thoughts probably had lightly turned less to grammar than to personal adornment, and what she had in mind was the restoration of that "connubial felicity" which Boswell regards as appropriate to sum up the marital relationship of Dr. Johnson and his wife, Tetty. Certainly the term "connubial" has a warmth of feeling about it that "conjugal" lacks: indeed, to demand in writing a return to conjugal cohabitation from a partner in wedlock for whom the joys of matrimony have lost their savour seems to Scriblex an almost sure means on the part of the non-erring spouse of insuring that no such return will in fact take place. The expression in Court of the required "sincerity" is often glib but rarely impressive. Upon this topic, our legal predecessors could be refreshingly cynical. Tomlin's Law Dictionary (1835), citing 3 Comm. 94, says: "A suit for restitution of conjugal rights (or rites) is brought when either the husband or the wife is guilty of the injury of *subtraction* or lives separate from the other without sufficient reason, in which case the ecclesiastical jurisdiction will compel them to come together again, *if either party is weak enough to desire it*, contrary to the inclination of the other."

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

Landlord and Tenant.—*Transfer of Lease—No Consideration passing between Transferor and Transferee—Consent of Land Sales Court not necessary.*

QUESTION: A. purposes transferring to B. a lease, the original term of which is for ten years, and the unexpired term thereof exceeds two years. There is no consideration passing between A. and B. other than the implied covenant by B. to pay the rent and keep the covenants of the lease. Will the consent of the Land Sales Court be necessary?

ANSWER: The consent of the Land Sales Court will not be necessary, unless there is a purchasing clause, or an option to purchase, in the lease. The liability to pay rent and to observe the other covenants in the lease is inherent in the lease itself: *Swayne* v. *Inland Revenue Commissioners*, [1900] 1 Q.B. 172. Section 43 (2) (*b*) of the Servicemen's Settlement and Land Sales Act, 1943, applies. X1.

Divorce and Matrimonial Causes.—*Marriage in Scotland—Separation Agreement contemplated in New Zealand—One Spouse returning to Scotland—Whether same Grounds for Divorce available as in New Zealand.*

QUESTION: Our client was married in Scotland but has acquired New Zealand domicil, and proposes entering into a separation agreement with his wife, who is returning to Scotland. The question then arises whether the wife will have the same rights in Scotland as in New Zealand to sue for divorce under the agreement at the expiry of three years.

ANSWER: Up to the end of 1945, the fact that a petitioner was a party to a separation agreement did not exist in England as a ground for divorce, and no amendments to that effect appear to have been enacted. An important procedural amendment has been made on the recommendations of the Denning Committee set up in June, 1946, and others are to follow. But the grounds on which decrees of divorce or nullity of marriage might be granted were outside the Committee's terms of reference.

Such a ground for divorce would not avail the person mentioned in the question, because she will retain her New Zealand domicil. This is one of the questions considered by the Denning Committee, and, in referring to its recommendations, the *Law Journal* (London) of February 14, 1947, says: "As to jurisdiction, they consider that the Courts should have jurisdiction in certain cases where now, owing to the wife taking the domicil of her husband, and the jurisdiction not extending to cases where the parties are domiciled abroad, the Courts have none." G.2

Partnership.—*Land Sales—Partnership Agreement granting Option to Surviving Partner to Purchase Share of Partnership Property—Whether Purchase in Pursuance to Option with Servicemen's Settlement and Land Sales Act*, 1943.

QUESTION: A partnership agreement, dated January 25, 1942, contains a provision that, if either partner should die during the currency of the agreement, the surviving partner shall have the right to purchase the share of the deceased partner in the assets of the partnership at a valuation to be agreed upon or settled by arbitration. One of the partners has died during the currency of the agreement, and the surviving partner now desires to purchase the share of the deceased partner. Would the proposed purchase be exempt from the provisions of the Servicemen's Settlement and Land Sales Act, 1943, by virtue of s. 43 (2) (*a*) of the said Act?

ANSWER: Although not explicit from the question, it is assumed that the partnership assets include land. When the partnership agreement was entered into in January, 1942, each partner granted to the other an option to purchase his share of the partnership property in the event of his dying during the currency of the agreement, and, although the price is left to be fixed by arbitration, it is clearly "an option granted before the commencement of the [Servicemen's Settlement and Land Sales] Act": *cf. Dunedin City Corporation* v. *Commissioner of Stamp Duties*, [1944] N.Z.L.R. 851. A.2.

Vendor and Purchaser.—*Fire Insurance—Absence of Agreement as to Transfer of Policy on Settlement of Sale and Purchase—Whether Insurance Premium an "Outgoing."*

QUESTION: In a transaction recently concerning the sale of a house, the purchaser's solicitor did not require a transfer of the existing fire policy, having taken out fresh cover in another company nominated by the purchaser's mortgagee. As solicitor for the vendor, I claimed in the settlement statement a proportion of the premium for the unexpired term of the vendor's policy, relying on the clause in the agreement "up to date of settlement all outgoings and incomings shall be apportioned and pending possession being given to the purchaser the vendor shall hold all insurances in trust for the purchaser." The purchaser's solicitor contended that the insurance premium was not an "outgoing." Are such fire insurance premiums apportionable? Is the position the same where an existing mortgage is being repaid by the vendor on settlement?

ANSWER: A purchaser, in the absence of agreement to the contrary, is not bound to take over his vendor's insurance of the purchased property against loss by fire: see *Goodall on Conveyancing in New Zealand*, 443. Moreover, the benefit of the policy of insurance will not pass to the purchaser under the contract for the sale of a house unless expressly assigned to him, for the policy of insurance is a collateral contract: *Rayner* v. *Preston*, (1881) 18 Ch. D. 1.

It does not appear from the question that there was any agreement by the purchaser to take over the insurance, or any assignment of the policy.

It seems clear, therefore, that the purchaser was under no liability in respect of the insurance premium, which had ceased to be an outgoing on settlement: see *Tubbs* v. *Wynne*, [1897] 1 Q.B. 74, and *Barsht* v. *Tagg*, [1900] 1 Ch. 231.

The position is unaltered where an existing mortgage is being repaid by the vendor on settlement. A.2.

RULES AND REGULATIONS.

Patents and Designs (United States of America) Regulations, 1947. (Patents, Designs, and Trade-marks Amendment Act, 1943.) No. 1947/70.

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