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" It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited."

—VISCOUNT SANKEY, L.C., in *Maxwell v. Director of Public Prosecutions*, (1934) 50 T.L.R. 499.

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The Golden Thread in the Web of Our Criminal Law.

APART from the exception arising in the defence of insanity, the burden of proof in a murder trial never shifts from the Crown to the accused. It is, from first to last, for the Crown to establish to the satisfaction of the jury, beyond reasonable doubt on their part, that the accused committed the crime of murder (in New Zealand, as defined in ss. 182 and 183 of the Crimes Act, 1908). It is not for the accused at any stage of the trial to establish his innocence, or to show that what had happened was something less, or was accidental, or could be justified.

Trials for murder furnish no exception to the general rule that throughout a criminal trial it is for the Crown to establish the guilt of the accused, and that it is not for him to establish his innocence, subject only to the defence of insanity and any statutory exceptions. This proposition, we think, is and has always been accepted in this country. To take the most recent murder trial in New Zealand, *R. v. Price*, as an example. There, His Honour Mr. Justice Blair directed the jury—and, with respect, we say properly—on May 27 last, when he said in this connection :

" I desire at the outset to say a word or two upon the matter of onus of proof, which has already been quite fairly referred to by both Counsel for the accused and Counsel for the Crown. All criminal cases, and cases of murder are no exception, and all cases involving the liberty of the subject, have to comply with the same rule : that the onus of proof lies on the Crown to establish the charge it makes, and to establish it affirmatively, and at no time during a criminal case does it ever arise that the onus is upon the accused to establish his innocence. The position is always this, that the onus always lies upon the Crown. Sometimes an accused person relies for his defence upon weaknesses in the Crown's case, and he does not go into the witness-box or attempt to give any evidence. In this particular case, in addition to questioning the soundness of the Crown's case, the defence availed itself of the opportunity, which is always given to an accused person, of going into the witness-box. But the mere fact that the accused person has gone into the witness-box does not in any respect alter the legal position, which is that the onus always lies upon the Crown.

" If, when you retire to consider your verdict, you feel that the Crown has failed to convince you of the truth of the allegations it makes against the accused, then it is your plain duty to bring in a verdict of ' Not Guilty,' and to do so regardless of the consequences. Conversely, if as the result of your deliberations, you feel in your hearts or inner consciousness that the Crown has established to your reasonable satisfaction—that it has established affirmatively the allegations it makes, then equally it is your duty to bring in a verdict of ' Guilty,' and, as I have said, regardless of the consequences."

A further passage from His Honour's charge appears on p. 190, *post*.

At the Bristol Assizes, in February last, when one Woolmington was charged with the murder of his wife, the Crown proved homicide and the defence set up was that it was accidental. The learned trial Judge, Mr. Justice Swift, directed the jury in part as follows :

" Once it is shown to a jury that somebody has died through the act of another, that is *presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury* that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified." (*Times* (London), May 24.)

That, according to a judgment of the House of Lords delivered as recently as May 23 last by the then Lord Chancellor, Viscount Sankey—in which Lord Hewart, L.C.J., and Lords Atkin, Tomlin, and Wright concurred—was a misdirection ; and the conviction which had followed it was quashed. In that case the Court of Criminal Appeal had previously dismissed the prisoner's appeal from his conviction and sentence to death. That Court was of opinion that the learned trial Judge had laid down the law in the way in which it was to be found in the old authorities, but stated it would have been better if he had said to the jury that if they entertained reasonable doubt whether they could accept the prisoner's explanation that the happening was a pure accident, they should either acquit him or convict him of manslaughter only, and, in so dismissing the appeal, relied on s. 4 (1) of the Criminal Appeal Act, 1907, *4 Halsbury's Statutes of England*, 725, 728, which provides that the Court may, notwithstanding they are of opinion that the point raised in the appeal may be decided in favour of the appellant, dismiss the appeal if they considered that no substantial miscarriage of justice had actually occurred.

On a careful re-reading, the direction given by Mr. Justice Swift may appear to New Zealanders who are accustomed to their Judges charging juries in murder (and other criminal trials, not within the statutory exceptions as to proof) on the lines followed in the example afforded by Mr. Justice Blair in the Price trial, that the English Judge's charge seems very like telling the jury that the accused was guilty of murder unless he could satisfy the jury of his innocence of that crime, or show the happening was in fact manslaughter, or accidental. (We pause here to say that there is really no such thing as a defence of manslaughter. If the jury reduce the charge from murder to manslaughter, it follows that the Crown has not proved the major crime to their satisfaction, and not that the defence has proved it was manslaughter and not murder.)

When the Court of Criminal Appeal said that Mr. Justice Swift, in the passage cited above, had laid down the law, in the way in which it was found in the old authorities, it was misled by what has been accepted in England as authority for nearly 200 years. The matter came before the House of Lords on the fiat of the Attorney-General certifying that it involved a point of law of exceptional public importance, and that it was desirable in the public interest that a further appeal should be brought.

Before we can appreciate the effect of their Lordships' judgment in *Woolmington v. Director of Public Prosecutions*, we must go back to the year 1762, when Sir Michael Foster—in the opinion of Sir William Blackstone, "a very great Master of the Crown Law"—after his retirement from the King's Bench, to which he was appointed in 1745, published his *Crown Cases*. In that work, in an article entitled "Introduction to the Discourse on Homicide," at p. 255, he said:

> "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume."

There is similar statement in *Hawkins's Pleas of the Crown*, in the 7th Ed. (1795) Vol. 1, ch. 31, para. 32, and also in *Blackstone's Commentaries*, Vol. 4, p. 201. Sir William Blackstone and Sergeant Hawkins both give Sir Michael Foster as their authority, and the author of *Pleas of the Crown* further supports the proposition by references to *R. v. Oneby*, (1727) 2 Stra. 766, 773, 93 E.R. 835, 839; 2 Ld. Raym. 1485, 1493; 92 E.R. 465, 470: and *Legg's case* (1662) Kelyng, J., 27; 84 E.R. 1066.

In the now current text-books, both *Foster's Crown Cases* and *R. v. Greenacre*, (1837) 8 Car. and P. 35, 42; 173 E.R. 388, 391—where Tindal, C.J., summed up with a direction to the jury on similar lines—are cited as authority for the proposition, which is stated in *Russell on Crimes*, 8th Ed., Vol. 1, 615, as follows:

> "As a general rule, all homicide is presumed to be malicious, and murder, until the contrary appears, from circumstances of alleviation, excuse, or justification; and *it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him.*"

In *Stephens's Digest of the Criminal Law*, 7th Ed., p. 235, we find the following passage:

> "Every person who kills another is presumed to have wilfully murdered him unless the circumstances are such as to raise a contrary presumption. *The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shown to have killed another.*"

After quoting the passage from *Foster's Crown Cases* (*supra*), *Archbold's Criminal Pleading, Evidence, and Practice*, 28th Ed., says at p. 887:

> "Therefore the prosecutor is not bound to prove malice, or any facts or circumstances beside the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable or excusable, or that at most it amounted to manslaughter."

In *9 Halsbury's Laws of England*, 2nd Ed., p. 426, in the title *Criminal Law*, written by that great criminal lawyer and Judge, the late Mr. Justice Avory, we have the proposition stated in the following words:

> "When it has been proved that one person's death has been caused by another, there is a *prima facie* presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person to show that his act did not amount to murder."

As is usual, *Foster's Crown Cases* and *R. v. Greenacre* (*supra*) are given as supporting authority.

Professor Garrow, in his work on Criminal Law, 2nd Ed., p. 98, says of malice, as an ingredient of the crime of murder, that so far as New Zealand is concerned:

> "The specific statement in the Crimes Act of the cases in which culpable homicide is murder renders unnecessary any discussion on the various meanings of the term 'malice aforethought.'"

On the question of the onus of proof in murder trials, the learned Professor does not note any exception to the general rule; and he does not refer to the English cases, such as *R. v. Greenacre*, which, as we have shown, is invariably cited as authority for the propositions cited from the current text-books published in England.

According to their Lordships in *Woolmington's* case, the English text-books' statements are wrongly founded. The question arose, said the Lord Chancellor—as we learn from the *Law Journal* (London) to which we are indebted for its summary of the judgment (as yet unreported)—Was it correct to say, and did Sir Michael Foster mean to lay down, that there might arise in the course of a criminal trial a situation at which it was incumbent upon the accused to prove his innocence? There was no previous authority for that. The case of *R. v. Mackally*, (1611) 9 Co. Rep. 61*b*, 77 E.R. 824, was concerned with what was evidence of malice, and in no way supported Sir Michael Foster's proposition. The case of *R. v. Mawgridge*, (1706) Kelyng, J., 119, 84 E.R. 1107, was no authority for saying that the prisoner was at any time called upon to prove innocence. The passage in Sir M. Foster's text-book and the summing-up of Tindal, C.J., in *R. v. Greenacre* (*supra*), were usually relied on as authority for the proposition that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. But the presumption of innocence in a criminal case was strong: see *Taylor's Evidence*, 11th ed., Vol. 1, paras. 113 and 114, and the same paragraphs in the 12th edition; and it was doubtful whether either of the passages meant any such thing: all that was meant was that, if it was proved that the conscious act of the prisoner killed a man, and nothing else appeared in the case, there was evidence upon which the jury might, not must, find him guilty of murder. His Lordship went on to say:

> "The prosecution must prove the guilt of the prisoner, but there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence."

That was the real result of the perplexing case of *R. v. Abramovitch*, (1916) 11 C.A.R. 45. In *R. v. Davies*, (1913) 8 C.A.R. 211, it was correctly stated that where intent was an ingredient of a crime there was no onus on the defendant to prove that the act alleged was accidental.

(If His Lordship has been correctly reported, the words in the last quotation from his judgment, "and it is sufficient for him [the prisoner] to raise a doubt as to his guilt," seem, if we may say so, to be at variance with the judgment as a whole; for it is not for the prisoner to raise a doubt: it is for the Crown to allay all doubts. For, if there be a doubt as to the soundness of the case for the Crown, the prisoner must be acquitted, as was carefully explained to the jury in the Price trial by Mr. Justice Blair in the second paragraph of the passage cited above. Sometimes it seems that a Judge is tempted in a criminal trial to refer to certain evidence as "calling for an explanation by the defence"; but this is wrong: the defence is never at any time called upon for an explanation, as it always lies on the Crown to prove its case to the reasonable satisfaction of the jury, and, if the jury is not so satisfied, they must acquit.)

Coming to the point immediately before their Lordship's House, the Lord Chancellor said:

> "It is not the law of England to say, as was said in the summing-up in the present case, 'If the Crown satisfy you

that this woman died at the prisoner's hands, then he has to show that there were circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime, so that it is only manslaughter, or which excuses the homicide altogether by showing it was a pure accident.' If the proposition laid down by Sir Michael Foster, or in the summing-up of Tindal, C.J., in *R. v. Greenacre*, mean that, those authorities are wrong."

And he showed that the Crown must prove, in dealing with a murder case, (*a*) death as a result of a voluntary act of the accused, and (*b*) malice of the accused. (As to malice, see the reference to *Garrow's Crimes Act, supra.*)

The speech of the Lord Chancellor concluded with this fine passage, which summarises the fundamental principle of British justice in criminal trials:

"Throughout the web of the English criminal law one golden thread is always to be seen: that it is the duty of the prosecution to prove the prisoner's guilt, subject to the defence of insanity and to any statutory exception. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the law of England; and no attempt to whittle it down can be entertained."

Summary of Recent Judgments.

COURT OF APPEAL
Wellington.
1935.
April 2, 3;
July 5.
Myers, C.J.
Reed, J.
Johnston, J.

LOGAN
v.
THE WAITAKI HOSPITAL BOARD.

Hospitals—Contract—Implied Contract between Hospital Board and Patient—Master and Servant—Liability of Hospital Board for Negligence of Nurse—Whether Nurse under Control of Medical Practitioner—Whether Acting Professionally or in Performance of Ministerial or Administrative Duties—Hospitals and Charitable Institutions Act, 1926.

The implied contract of a Hospital Board under the Hospitals and Charitable Institutions Act, 1926, with a patient includes a contract to nurse, and is not confined to supplying qualified and efficient nurses.

So held by the Court of Appeal (*Reed* and *Johnston*, JJ., *Myers*, C.J., dissenting) reversing the judgment of *Kennedy*, J.

Hillyer v. Governors of St. Bartholomew's Hospital, [1909] 2 K.B. 820, and the *dictum* of *Kennedy*, L.J., *ibid.*, 828-9, applied, but differently interpreted in the judgments of the majority and in the minority judgment.

Smith v. Martin and Kingston-upon-Hull Corporation [1911] 2 K.B. 775; **Nyberg v. Provost Municipal Hospital Board** [1927] S.C.R. 226; **Lavere v. Smith's Falls Public Hospital** (1915) 35 Ont. L.R. 98; **Reidford v. Aberdeen Magistrates** [1933] S.C. 276; **Lavelle v. Glasgow Royal Infirmary** [1932] S.C. 245; and **Marshall v. Lindsey County Council** [1935] 1 K.B. 516, considered.

Judgment was accordingly directed to be entered for £1,300 damages as found in the Court below.

Counsel: P. J. O'Regan and **Grater,** for the appellant; **W. H. Cunningham** and **Main,** for the respondent.

Solicitors: P. J. O'Regan and Son, Wellington, for the appellant; **Hislop and Creagh and Main,** Oamaru, for the respondent.

NOTE:—For the Hospitals and Charitable Institutions Act, 1926, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Hospitals and Charitable Institutions*, p. 725.

Case Annotation: *Hillyer v. Governors of St. Bartholomew's Hospital*, E. and E. Digest, Vol. 34, p. 26, para. 52; *Lavere v. Smith's Falls Public Hospital, ibid.*, 52*i*; *Smith v. Martin and Kingston-upon-Hull Corporation, ibid*, p. 40, para. 163; *Nyberg v. Provost Municipal Hospital*, E. & E. Digest Supplement No. 10, p. 125, para. 86*iv*; *Lavelle v. Glasgow Royal Infirmary, ibid*, para. 86*ix*; and *Reidford v. Aberdeen Magistrates, ibid*, para. 86*x*.

SUPREME COURT
Wellington.
1935.
June 26;
July 1, 2, 10.
Reed, J.

IN RE A LEASE, KENNEDY TO KENNEDY AND WIFE.

Landlord and Tenant—Hotel Lease—Lessor's Refusal to grant Renewal—Breaches of Lessees' Covenants—Considerations moving Court in Exercise of Discretion to Grant Relief—Power of Magistrate to decree Forfeiture of Lease—Effect of Convictions for Breaches of Licensing Act—Property Law Amendment Act, 1928, s. 2 (3)—Licensing Act, 1908, ss. 126, 253, 254, 255.

A lease of an hotel, granted for a term of one year, contained, *inter alia*, the following covenants by the lessees:

"That if the lessees shall have duly and punctually paid the rent and have performed and observed the covenants provisions and stipulations hereinbefore contained or implied and on the part of the lessees to be performed and observed and shall have given to the lessor one calendar month's notice in writing prior to the expiration of the term hereby created of their desire to take a further lease of the demised premises for a term of five (5) or ten (10) years at a rental to be fixed as hereinafter provided then the lessor will grant to the lessees such further lease on the terms hereinafter provided. The rent to be payable under such further lease to be fixed by . . . acting for the lessor and an accountant to be appointed by the lessees or by their umpire and for the purpose of fixing such rent the lessees shall and will appoint such accountant and produce their books for examination by the persons so appointed as aforesaid."

"That the lessees will . . . duly observe perform and keep the provisions and requirements of all laws for the time being in force relating to licensed public houses."

Due notice of desire for renewal was given to the lessor, and was refused on the ground of breaches of covenants, among them two convictions by the licensee (one of the lessees) of offences under the Licensing Act, 1908, during the term of the lease, and the lessees' books of account not being kept in such a manner as to record correctly the bar and bottle-store takings during the term of the lease, the lease containing a provision whereby the rent for the further term should be calculated in proportion to the average bar and bottle-store takings during the year of lease.

On application to the Court by the lessees for an order granting relief to the lessees against the lessor's refusal to grant a renewal of the lease,

W. Perry and **D. Perry,** in support.

P. B. Cooke and **James,** to oppose.

Held, 1, That the effect of s. 2 (3) of the Property Law Amendment Act, 1928, was to give the Court the fullest discretion, regardless of technicalities, to grant or refuse relief.

Birch v. Prouse, [1922] N.Z.L.R. 913, distinguished.

2. That a forfeiture of an hotel lease can be decreed only by a Magistrate, and, as six months had elapsed since the last of the convictions of the licensee, a renewal of the lease to the lessees would not, by reason of those convictions, put the lessor's property in jeopardy; and, as the lessor was fully protected by the Licensing Act, 1908, in the continuance of the license in the event of the conviction of the lessee, the lessor's property had not been jeopardised by the two convictions.

3. That, although there was no specific covenant by the lessees to keep books, such a covenant was implied in the provision that the lessees "shall produce their books for examination by the persons appointed"; but there was sufficient information

contained in the lessees' books to enable skilled accountants with a knowledge of the licensing trade to arrive, with reasonable accuracy, at the amount of the average weekly takings, and the powers of the arbitrators were not confined to fixing the rent by the records in the books.

An order was accordingly made granting relief and directing the lessor to grant a renewal of the lease in terms of the covenant in that behalf, the lessor's costs to be paid by the lessees, as the order was a concession.

Solicitors: **Perry, Perry, and Pope,** Wellington, for the lessees; **Chapman, Tripp, Cooke, and Watson,** Wellington, for the lessor.

NOTE:—For the Property Law Amendment Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Real Property*, p. 1141; and for the Licensing Act, 1908, *ibid*, Vol. 4, title *Intoxicating Liquors*, p. 234.

COURT OF APPEAL
Wellington.
1935.
July 3, 12.
Blair, J.
Smith, J.
Kennedy, J.

LYSNAR v. NATIONAL BANK OF NEW ZEALAND, LIMITED (No. 2).

Practice—Costs—Court of Appeal Scale—"Setting down and arguing case to judgment"—Litigant in Person—Entitled to Disbursements *only*—*Court of Appeal Rules*, R. 26.

A successful appellant in the Court of Appeal who conducted his case in person is not entitled to anything but his disbursements for the item in the party-and-party costs scale in R. 26 of the Court of Appeal Rules, "Setting down and arguing case to judgment," as virtually the whole of the item relates to counsel's fee.

So held by the Court of Appeal in applying His Majesty's Order, following the judgment of the Judicial Committee of the Privy Council, reported *ante* p. 82, which was as follows: "That this appeal ought to be allowed, the judgment of the Court of Appeal for New Zealand dated the 15th day of June, 1933, reversed *with costs in the Courts below*, and judgment entered for the appellant."

Counsel: **Buxton,** for the appellant; **Powles,** for the respondents.

Solicitors: **Bell, Gully, Mackenzie, and Evans,** Wellington, for the appellant; **Brandon, Ward, Hislop, and Powles,** Wellington, for the respondents.

SUPREME COURT
Dunedin.
1935.
June 12, 13.
Kennedy, J.

IN RE LOGAN (DECEASED), PERPETUAL TRUSTEES ESTATE AND AGENCY COMPANY OF NEW ZEALAND, LTD. v. COOPER AND OTHERS.

Will—Construction—Direction to Trustee to settle Share of Niece—Absolute Gift.

Under the following provision in a will,

"I give devise and bequeath unto Agnes Louise Logan my niece and John Boucaut Logan my nephew of Sarnia Rossett Drive Harrogate England the sum of two thousand five hundred pounds each out of my real and personal estate in Scotland to be held in trust until they attain the age of twenty-one and *in the event of my niece marrying her portion is to be settled upon her absolutely*,"

the niece takes the legacy for herself absolutely and the provisions referring to a settlement are inoperative to restrict her interest.

In re Rathbone (deceased), (1922) N.Z.L.R. 391, applied.

Counsel: **Cook,** for plaintiff company; **P. S. Anderson,** for Agnes Louise Benson Cooper; **Paterson,** for the children born and unborn of Agnes Louise Benson Cooper.

Solicitors: **Cook, Lemon, and Cook,** Dunedin, for plaintiff; **Brent and Anderson,** Dunedin, for first-named defendant.

FULL COURT
Wellington.
1935.
July 5, 12.
Myers, C.J.
Blair, J.
Smith, J.
Kennedy, J.

HEWLETT v. KELLY AND OTHERS.

Rating—Sale of Land for Non-payment of Rates for which Judgment obtained—*Other Rates* "due at the date of the sale in respect of the same Property" but irrecoverable (owing to lapse of three years)—Whether deductible from Proceeds of Sale—Rating Act, 1925, ss. 77, 79.

Section 79 (6) of the Rating Act, 1925, provides that the proceeds of a sale of land for non-payment of rates for which judgment has been obtained shall be applied,

"first, in payment of such judgment, interest, costs, and expenses; next, in payment of *any other rate due at the date of the sale in respect of the same property* . . ."

and thereafter as set out in the subsection.

Rates that are irrecoverable under s. 77, as more than three years have elapsed from the time when they first became due, cannot be deducted from the proceeds of a sale under s. 79.

So held by the Full Court in dismissing motion to review order made by *Herdman, J., ante*, p. 98.

The King v. Mayor, &c., of Inglewood, [1931] N.Z.L.R. 177, and **Oborn and Clark v. Auckland City Corporation,** *ante*, p. 2, referred to.

Counsel: **Barrowclough,** for the claimant, the Waitemata County Council, in support; **T. E. Henry,** for the second-named defendants and the Official Assignee, to oppose.

Solicitors: **Goodall and Kayes,** Auckland, for the plaintiff; **T. E. Henry,** Auckland, for the first-named defendant; **Meredith, Hubble, and Meredith,** Auckland, for the Official Assignee; **Russell, McVeagh, Macky,** and **Barrowclough,** for the Waitemata County Council.

NOTE:—For the Rating Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 7, title *Rating and Valuation of Land*, p. 977.

FULL COURT
Wellington.
1935.
July 1, 2, 12.
Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.
Kennedy, J.

JACOBS v. DOYLE.

Gaming—Lottery—Person in New Zealand taking and remitting Money for Person desirous of obtaining Ticket in Foreign Lottery—Whether guilty of Offence—Gaming Act, 1908, s. 41.

A police constable went to the shop of appellant, a tobacconist in Dunedin, and asked an employee if he could be supplied with a ticket in Tattersall's, a sweep conducted and drawn in Hobart, Tasmania. The employee handed the constable a slip of paper and told him to write thereon his name and address; he did so, and handed the slip back with 6s., and received a form of receipt for that amount. Appellant remitted the cost of the ticket, 5s. 4d., to the address of a man in Newtown, Tasmania, and retained 8d. as his commission and charges for remittance. Subsequently, the constable received a ticket in an envelope posted in Tasmania. Appellant admitted that, during the previous year, he had received from Tattersall's two bonus payments, payable to "clients' agents," in respect of winning tickets.

Appellant was convicted by a Magistrate of selling to the constable a ticket in "Tattersall's Sweep," a lottery or scheme established in Hobart, Tasmania, by which prizes of money are drawn for by a mode of chance.

On general appeal from this conviction, after evidence had been taken in the Supreme Court at Dunedin, and argument heard by the Full Court at Wellington,

J. S. Sinclair and **Warrington,** for the appellant; **Solicitor-General, Cornish,** K.C., for the respondent.

Held, by *Myers*, C.J., *Blair*, *Smith*, and *Kennedy*, JJ., That on the evidence, appellant was not an agent of the promoters of the sweep, but a buying agent of the persons in New Zealand seeking to obtain tickets.

Held, by *Myers*, C.J., and *Blair*, J., 1. That the words "any such lottery or scheme" in para. (*c*) of s. 41 of the Gaming Act, 1908, refer back to para. (*a*), and refer only to a lottery or scheme promoted in New Zealand.

Harrison v. McGrath, (1903) 22 N.Z.L.R. 676, followed.

2. That, even if it could be said that para. (*c*) refers to lotteries whether promoted in New Zealand or not, the words, "or canvasses for subscribers to or receives any money or valuable thing for tickets . . . ," do not include persons who are not agents of the promoters.

Norris v. Woods, (1926) 26 N.S.W.S.R. 234, referred to.
Macnee v. Persian Investment Corporation, (1890) 44 Ch. D. 306, applied.

Quaere, Whether, even though para. (*c*) means any lottery or scheme of the nature referred to in para. (*a*), that could include a foreign lottery without the words "whether promoted in New Zealand or elsewhere."

Held, by *Herdman*, J., That, on the facts, appellant could not be convicted under paras. (*a*), (*b*), or (*c*) of s. 41.

Held, by *Smith* and *Kennedy*, JJ., dissenting, 1. That para. (*c*) of s. 41 applies to a lottery or scheme whether promoted in New Zealand or elsewhere.

Harrison v. McGrath, (1903) 22 N.Z.L.R. 676, referred to.

2. That there is nothing in s. 41 to limit the application of the words in para. (*c*) to receipt of money as agent for the lottery—that is, to a person who must be regarded as the agent, whether *de jure* or *de facto*, appointed by the proprietors of the lottery.

Norris v. Woods, (1926) 26 N.S.W.S.R. 234, distinguished.

3. That the appellant should be convicted for receiving money for a purpose connected with Tattersall's lottery or scheme.

The appeal was accordingly allowed, and the conviction quashed.

Solicitors: J. S. Sinclair, Dunedin, for the appellant; **Crown Law Office,** Wellington, for the respondent.

NOTE:—For the Gaming Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Gaming and Wagering*, p. 516.

SUPREME COURT
In Chambers.
Auckland.
1935.
June 10.
Fair, J.

WALKER v. HENNESSEY.

Magistrates' Courts—Practice—Delivery of Draft Case on Appeal—Application to Supreme Court for Extension of Time for Delivery—"If . . . the justice of the case so requires"—Grounds for Exercise of Court's Discretion—Magistrates' Courts Act, 1928, s. 167.

Section 167 of the Magistrates' Courts Act, 1928, deals with appeals on points of law from a Magistrate's decision, subs. 2 being as follows:—

"If in the opinion of the Supreme Court the justice of the case so requires, that Court may on application of either party enlarge the time appointed by this section for doing any act or taking any proceeding, on such terms (if any) as it thinks fit; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed."

The words therein, "if in the opinion of the Supreme Court the justice of the case so requires," give the Supreme Court jurisdiction to exercise discretion upon wide general grounds on the merits of the case.

The decisions given under R. 19 of the Court of Appeal Rules that that Court is bound to give leave to appeal when the justice of the case so requires, although the time has expired, cannot be taken to apply directly to the words in s. 167 (2) of the Magistrates' Courts Act, 1928, "the justice of the case so requires," in the context in which the latter are found.

Where the applicant seeks an indulgence and the amount in dispute is not large, the application must be supported on clear and convincing grounds.

The fact that a suggestion was made to the applicant by the solicitor for the other party that a settlement might be arranged, is not such a ground.

Dillicar v. West, [1921] N.Z.L.R. 617, referred to.

Counsel: Tuck, in support; **Barrowclough,** to oppose.

Solicitors: Neumegan and Neumegan, Auckland, for the appellant; **Russell, McVeagh, Macky, and Barrowclough,** Auckland, for the respondent.

NOTE:—For the Magistrates' Courts Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Courts*, p. 98.

FULL COURT
Wellington.
1935.
Mar. 19, 20;
July 5.
Myers, C.J.
Reed, J.
Smith, J.
Johnston, J.
Fair, J.

IN RE MACLEAY (DECEASED), TREADWELL AND ANOTHER v. MACLEAY.

Will—"Heir-at-law"—Whether Heir at Common Law or the Successors to the Real Estate of the Deceased upon his Dying Intestate subsequent to the Administration Act, 1874—Administration Act, 1879, ss. 6, 10.—Administration Act, 1908, ss. 4, 11.

Testator, after appointing trustees and executors, devised all his real estate unto his trustees upon trusts declared as follows:

"UPON TRUST to pay the rents profits and emoluments thereof to my said brother Alexander and his said son John in equal shares for their absolute use and benefit and upon the death of either of them my said brother and nephew UPON TRUST to pay the whole of the said rents profits and emoluments to the survivor for his absolute use and benefit AND UPON FURTHER TRUST at the expiration of twenty-one years after the decease of such survivor to convey and transfer the whole of my real estate absolutely to the heir-at-law of such survivor his heirs and assigns the true intent of this my will being that the heir-at-law of such survivor shall ultimately take the whole of the corpus of my real estate AND UPON FURTHER TRUST until such conveyance and transfer to pay the said rents and profits and emoluments after the death of such survivor to such heir-at-law for his absolute use and benefit."

At the date of the will, as also at the date of the testator's death, the Administration Act, 1879, was in force.

On originating summons for the determination of questions arising out of the foregoing clause,

B. C. Haggitt, for plaintiffs; **Evans,** for defendant; **G. W. Currie,** for all the next-of-kin other than the defendant.

Held by the Full Court (*Smith*, *Johnston*, and *Fair*, JJ., *Myers*, C.J., and *Reed*, J., dissenting), 1. That the Administration Act, 1874, established a new rule of succession to real estate, establishing the administrator or executor of a will as trustee heir, and that where in a will such trustee heir holds for those who are described as heirs reference must be made to the new rule of succession to find out who are within the description of the will.

2. That, therefore, "heir-at-law" meant the person or persons who would have succeeded to the real estate of the deceased upon his dying intestate subsequent to the passing of the Administration Act, 1874, *viz.*, the widow and children of deceased survivor, who took as tenants in common, in the shares prescribed by the statute.

Held, by *Myers*, C.J., and *Reed*, J., dissenting, 1. That the testator had clearly expressed his intention that the real estate should devolve upon one *persona designata* absolutely, and that

"heir-at-law" meant the heir at common law, *viz.*, the person who would have succeeded by blood to the testator's real estate upon his dying intestate prior to the passing of the Administration Act, 1874, *i.e.*, the defendant, the eldest son of the survivor mentioned in the will.

Per *Reed*, J., referring to *Hillier v. Hiscock*, [1900] S.A.L.R. 1, 6 (and with *Myers*, C.J., distinguishing *Re Crane, Crane v. Crane*, (1908) 8 N.S.W.S.R. 132), 1. That, in the wills considered in the New Zealand and Australian cases, it did not appear that there was a context tending to rebut the presumption that when the testator used the word "heir" his intention was that his next-of-kin under the Administration Act should take. That the only cases in which the words "heir-at-law" were under consideration were *Re Crane, Crane v. Crane*, (1908) 8 N.S.W. S.R. 132, in which the devise was to "the heir-at-law *and next-of-kin*," and *In re Chapman (deceased)*, [1913] S.A.L.R. 173, where the question of the effect of the Statute did not arise.

2. That the provision that the transfer is not to be made until the expiration of twenty-one years after the decease of the life tenants was ineffectual, and that the defendant as heir-at-law would be entitled to an immediate conveyance or transfer.

Wentworth v. Humphrey, (1886) 11 App. Cas. 619, 625; **In re Goodman's Trust Estate,** (1880) 6 V.L.R. Eq. 181; **Morrice v. Morrice,** (1893) 14 N.S.W. L.R. Eq. 211, and the Australian cases following that case, including **In re McDonald's Settlement, O'Callaghan v. O'Callaghan,** [1928] V.L.R. 241, discussed and applied.

In re Gundry, (1892) 11 N.Z.L.R. 444, **Matheson v. Atkinson,** (1906) 26 N.Z.L.R. 145, **Shaw v. Medley,** (1909) 28 N.Z.L.R. 397, **Nicholson v. Nicholson,** [1923] G.L.R. 59, **In re Williams, Campbell v. Hill,** [1926] N.Z.L.R. 762, **Rushbrook v. Pearman,** (1913) 32 N.Z.L.R. 680, and **Re Hussey and Green's Contract,** [1921] 1 Ch. 566, referred to.

Solicitors: Treadwell, Gordon, Treadwell, and Haggitt, Wanganui, for the plaintiffs; **Bell, Gully, Mackenzie, and Evans,** Wellington, for the defendant; **Watt, Currie, and Jack,** Wanganui, for all the next-of-kin other than the defendant.

Case Annotation: *Wentworth v. Humphrey*, E. & E. Digest, Vol. 18, p. 5, para. 16 *e*; *Re Hussey and Green's Contract, ibid.*, Vol. 44, p. 926, para. 7826.

NOTE:—For the Administration Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Executors and Administrators*, p. 125.

SUPREME COURT
Hamilton.
1935.
April 29;
June 12.
Fair, J.

IN RE A WAIPA COUNTY BY-LAW: EX PARTE DEPOSIT AND FINANCE COMPANY, LIMITED.

By-law—County—By-law prescribing Minimum Area and Frontage of Building Sections—Reasonableness—Motion to Quash By-law—Whether an "action or proceeding"—By-laws Act, 1910, s. 12—Health Act, 1920, s. 67 (1)—Counties Amendment Act, 1927, s. 14.

The company proposed to subdivide a certain area of land, and submitted to the County Council a subdivisional plan of such land, for its approval of the proposed subdivision, which comprised two sections containing an area of not less than 23 perches, and twelve sections containing an area of not less than 29 perches, all of which sections had a frontage of not less than 53 feet to a public road. The Council refused to approve of the proposed subdivision on the ground that it failed to comply with ss. 15, 16, and 17 of the Waipa County By-laws, which are as follows:

"15. No person shall after this by-law comes into force erect a dwellinghouse in the County upon any site unless such site has an area of at least one rood with a frontage of not less than 66 feet to a public or private street or road or an area of at least two roods with a frontage of not less than 30 feet to a public or private street or road: Such site in either case shall be free from all buildings save the dwellinghouse and its out-buildings and domestic offices.

"16. No person shall use or occupy as a dwellinghouse within the County any building erected after the coming into force of this by-law unless the site of such building has the area and frontage required by s. 15 of this by-law.

"17. No person shall after this by-law comes into force erect or suffer or permit to be erected any building on any land within the County whereby the site of any dwellinghouse shall be reduced in area or frontage below the requirements of s. 15 hereof."

Evidence was given by applicant that a sewer through one of the sections of the subdivision served an area of the Hamilton Borough which adjoined, and could be made available for the use of the occupiers by arrangement between the local authorities, and that water, gas, and electricity could be made available for the area proposed to be subdivided. The Hamilton borough engineer deposed that a frontage of 50 feet is ample for a dwelling-site, provided a properly-constructed septic tank were fitted to each house, and a larger section tended to become a serious danger to public health. The Hamilton town clerk deposed that a refuse service could be made available to the occupiers of the land.

In opposition, the Medical Officer of Health at Auckland and the Health Department Inspector deposed that a quarter-acre section was necessary for the proper disposal of night-soil, garbage, and household refuse, and that the prescribed minimum frontages were reasonably necessary to prevent overcrowding and the creation of insanitary areas. The County Clerk's evidence showed that the County itself did not supply drainage, sewerage, night-soil or refuse collection.

A preliminary objection was taken to the hearing of the motion proceeding, upon the ground that the applicant had not complied with the provisions of s. 14 of the Counties Amendment Act, 1927.

Harkness, in support; **H. A. Swarbrick,** to oppose.

Held, overruling the preliminary objection, 1. That the proceeding authorised under s. 12 of the By-laws Act, 1910, is not in the nature of an "action or proceeding . . . against" the County Council, and, consequently, the words of s. 14 of the Counties Amendment Act, 1927, as to notice of intended proceedings, do not apply to an application to the Court to quash by-laws under s. 12 of the By-laws Act, 1910; and that construction is confirmed by the language of s. 12 (1) of the By-laws Act, 1910.

Broad v. County of Tauranga [1928] N.Z.L.R. 702, and **McLachlan v. Marlborough County Council** [1930] N.Z.L.R. 746, followed.

R. v. Port of London Authority, Ex parte Kynoch, Limited [1919] 1 K.B. 176, referred to.

2. That, on the evidence, the fixing of a minimum area of a quarter of an acre and minimum frontages of 66 ft. and 30 ft., in respect of a new subdivision to be built upon, is not unreasonable.

Islington Estate Company, Limited v. Mt. Roskill Road Board (1910) 30 N.Z.L.R. 91, and **Repton School Governors v. Repton Rural District Council** [1918] 1 K.B. 26; on app. [1918] 2 K.B. 133, distinguished.

Semble, there may be particular sections of land to which it is unreasonable to apply the by-law in question; and such an objection does not necessarily invalidate the by-law: **Salt v. Scott Hall** [1903] 2 K.B. 245, referred to.

3. That whether or not the requirement as to a frontage of 66 ft. in the case of an area of less than 2 roods, and 30 ft. in the case of sections of 2 roods and over, is unreasonable, is a question of fact in each case, and the evidence in the present case did not show that the prescribing of such frontages was such as could find no justification in the minds of reasonable men: **Takapuna Borough Council v. Napier** [1922] N.Z.L.R. 141, applied.

4. That although the particular area in which the proposed subdivision was situate was surrounded for almost three-quarters of its borders by the Borough of Hamilton and had facilities available to the rest of the County and the by-law failed to make any special provision in respect of this particular area, the by-law should be supported, as, having regard to the uncertainty as to sewerage and refuse services being available to the area, or being used, if available, the evidence left the question of the validity of the by-law in doubt, and reduced it to one of the mere opinion of the Court: **Kruse v. Johnson** [1898] 2 Q.B. 91, **Grater v. Montagu** (1904) 23 N.Z.L.R. 904, **McCarthy v. Madden** (1914) 33 N.Z.L.R. 125, and **In re a By-law of the Auckland City Council** [1925] N.Z.L.R. 583, applied.

Semble, the by-law on the face of it is unreasonable in forbidding all additions to existing houses on land of a smaller area, and in that respect it might be amended if it were found

unreasonable, but that did not afford a sufficient ground for quashing the whole by-law.

The application was accordingly refused.

Solicitors: **Seymour and Harkness,** Hamilton, for the applicant; **Swarbrick and Swarbrick,** Hamilton, for the Waipa County Council.

Case Annotation: *R. v. Port of London Authority, Ex parte Kynoch, Limited*, E. & E. Digest, Vol. 38, p. 121, para. 885; *Repton School Governors v. Repton Rural District Council, ibid.*, p. 196, para. 324; *Salt v. Scott Hall, ibid.*, p. 196, para. 327; *Kruse v. Johnson, ibid.*, Vol. 30, p. 196, para. 643.

NOTE:—For the By-laws Act, 1910, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Local Government*, p. 512; Health Act, 1920, *ibid.*, Vol. 6, title *Public Health*, p. 1061; Counties Amendment Act, 1927, *ibid.*, Vol. 5, title *Local Government*, p. 274.

SUPREME COURT
In Chambers.
Palmerston North
1935.
April 16;
June 21.
Blair, J.

IN RE TOMS (DECEASED).

Probate and Administration—Practice—Codicil containing Error in Date of Will—Affidavit of Search—Explanatory Addendum to copy of Codicil attached to Probate.

Where in a codicil there is an erroneous reference to the date of the will, an affidavit of search must be filed to show there is actually no other will to which the codicil can refer.

In the order granting probate of will and codicil, an explanatory note was ordered to be added to the copy of the codicil correcting the error made in the original codicil as to the date of the will.

Solicitor: **G. C. Petersen,** Palmerston North, for the executors.

SUPREME COURT
Hamilton.
1935
June 6.
Reed, J.

IN RE QUICK (A BANKRUPT).

Bankruptcy—Discharge—Application for Discharge—Advertisement of Notice "At least two weeks prior to the day proposed"—Form of Advertisement to Comply with Statute—Bankruptcy Act, 1908, s. 125 (2).

Section 125 (2) of the Bankruptcy Act, 1908, is as follows:

"Notice of the day on which the bankrupt proposes to make the application for discharge shall be advertised by the bankrupt and sent to the Assignee and all the creditors at least two weeks prior to the day so proposed."

An advertisement purporting to be in compliance with that subsection stated:

"I hereby give notice that I propose to make application to the Supreme Court of New Zealand at Hamilton sitting in Bankruptcy at the session of the said Court commencing on Tuesday, the 28th day of May, 1935, for an order of discharge."

This advertisement was published on May 14, 1935, and the application came on for hearing on June 1.

King, for the bankrupt applying.

Held, 1. That "notice of the day" was not given, as it was not advertised "at least two weeks prior to the day" on which it was proposed to apply.

2. That the Act would be sufficiently complied with by specifying, as the day, the date of the first day of the Session, adding "or as soon thereafter as counsel can be heard," an addition that is not necessary but is desirable.

In re McGuire (1914) 16 G.L.R. 497, referred to.

Solicitors: **McCarter, Preston, and Edmonds,** Te Awamutu, for the applicant.

NOTE:—For the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 1, title *Bankruptcy*, p. 466.

COURT OF ARBITRATION
Wellington.
1935.
May 13, 15.
Page, J.

TIKEY v. AMALGAMATED BRICK AND PIPE COMPANY (WELLINGTON), LIMITED.

Workers' Compensation—Assessment—Lump Sum Award—Whether Defendants entitled to Credit for Weekly Amounts Paid since Date of Accident.

Where a lump sum is awarded by way of compensation, credit must be given to the defendants for all payments made to the plaintiff since the date of the accident.

Counsel: **O. C. Mazengarb,** for the plaintiff; **Virtue,** for the defendant.

Solicitors: **Mazengarb, Hay, and Macalister,** Wellington, for the plaintiff; **Young, Courtney, Bennett, and Virtue,** Wellington, for the defendant.

SUPREME COURT
Auckland.
1935
June 26;
July 4.
Callan, J.

CARR v. CIVIL.

Mortgage—Principal to become Due unless Covenant obtained from Purchaser—Waiver of Requirement of Covenant on Sale of Equity by Mortgagor—Implied Covenant to Indemnify Vendor of Equity—Assignment of same from Original Mortgagor to Mortgagee—Whether Mortgagee debarred by Waiver from Suing on Assignment.

A mortgage, the mortgagee's interest in which became vested in plaintiff, contained a clause that the principal, etc., should at the option of the mortgagee become due on the mortgagor selling the land mortgaged unless the mortgagor procured the execution by the purchaser of a covenant making the mortgagor directly liable to the mortgagee.

On the sale of the land to the defendant, the mortgagee did not insist on her rights, and the solicitors for the mortgagee and the vendor gave to the solicitors for the purchaser the following written undertaking:

"On behalf of the first Mortgagee of the property it is agreed that Clause 9 in the said mortgage does not apply to the present sale from S. (mortgagor) to C. (purchaser)."

The property was afterwards sold again (subject to the mortgage) to M. Default having been made, the plaintiff bought from the original mortgagor for £50 and a promise not to sue him for five years, the benefit of the covenant implied by s. 88 of the Land Transfer Act, 1915, by the defendant with the original mortgagor to pay the principal, etc., under the mortgage. This transaction was embodied in a deed of assignment, notice of which was given to defendant. Plaintiff, basing her claim on this assignment, sued defendant for principal and other moneys.

Burt, for the plaintiff; **Inder,** for the defendant.

Held, That the solicitor's undertaking did not amount to a promise by plaintiff not to take steps by other means the law allowed to procure defendant's personal liability, and that she was not estopped by her conduct, and that plaintiff was entitled to judgment.

Beyer v. Hingley and Guest and Keyes, [1929] N.Z.L.R. 18, applied.

Solicitors: **Blampied and Hayman,** Auckland, for the plaintiff; **W. P. Hopkins,** Auckland, for the defendant.

Employees Who are Not "Workers."

Employments to which the Workers' Compensation Act does not apply.

By E. S. Smith, M.A., LL.B.

Of the arguments against compulsory insurance against liability under the Workers' Compensation Act, one of the most popular is that such insurance would largely discourage casual employment in the cities and so injure the very persons it was designed to benefit. To what extent the fear of being made liable to pay compensation restrains the more cautious householders from giving occasional employment to a gardener or handyman it is not possible to estimate; however, few men in the street realise that, provided the gardener or handyman is kept off the roof and out of the trees and generally free from risk of injury by falling more than twelve feet, it is very difficult for him to sustain an injury which will impose legal liability on his employer.

Employment about a private house is not unique in this respect; other employments in which the master cannot be made liable for injuries to his servant are fairly numerous. Where no contract of service or apprenticeship exists there is no relationship of master and servant, and accordingly persons employed in a professional capacity—such as doctors, architects, and nurses—do not fall within the provisions of the Act, though reference to decided authorities shows how difficult it may sometimes prove to distinguish employment in a professional capacity from employment under a contract of service.

The Workers' Compensation Act excludes from its operation certain classes of persons employed under contracts of service, the principal classes being:—

(1) Persons in receipt of remuneration in excess of £400 per annum and not employed by way of manual labour: section 2; *Jaques v. Steam-Tug "Alexandria"* [1921] 2 A.C. 339; *Smillie v. Rangitikei Co-operative Dairy Co., Ltd.* [1934] N.Z.L.R. 238.

(2) Persons employed in the naval or military service of the Crown, or in Crown employment other than with the Government of New Zealand (Section 12).

(3) Persons employed in illegal employments: A contract of service which is illegal and void, and not merely voidable, cannot give rise to a claim for compensation: *Pountney v. Turton*, [1917] W.N. 353; 10 B.W.C.C. 601; *Hardcastle v. Smithson*, (1933) 26 B.W.C.C. 152. Common examples are employments infringing the provisions of the Truck Act or Factories Act.

(4) Persons employed under a contract of service but not in and for the purposes of the employer's trade or business, or in a schedule employment (Section 3).

Employments of the fourth of the types mentioned fall into one or other of three groups. The first group embraces employment in activities conducted by the employer for profit, but which do not amount to a trade or business; as, for example, employment by a professional man who on one occasion only indulges in a subdivisional speculation and employs men to improve the land being subdivided—here no liability would attach under the Act unless, of course, the work undertaken by the employees was such as to make the employment fall within the "schedule" employments: *cf. Nimmo v. Thomas Jones (Estates) Limited*, (1929) 22 B.W.C.C. 642; similarly in the case of a man of independent means living upon rentals from properties owned by him and who employs men to repair such properties: *Nash v. Nani (No. 2)*, (1932) 25 B.W.C.C. 275. The second group embraces employment in activities which are connected with the employer's trade or business but which are not undertaken for the purposes of that business—as, for example, employment by a solicitor of a charwoman to clean his offices; or by an hotelkeeper of a tradesman to execute repairs to heating arrangements in his hotel: *Botfield v. Davies* (1913) 16 G.L.R. 208; *Alderman v. Warren* (1916) 9 B.W.C.C. 507. The third group embraces employment in activities wholly unconnected with any trade or business, such as activities undertaken for purposes of sport or recreation, or for religious objects, and the like.

It is, however, not proposed to discuss those difficult questions which arise as to whether, in any particular case, a trade or business is being carried on and, if so, whether the employment is in that business and for its purposes, but to draw attention to the more important employments which clearly are not schedule employments or employments for the purposes of the employer's business.

Employment about a private house: The fact that a gardener or handyman employed about a private house to perform odd jobs such as cutting hedges, cleaning windows, and keeping grounds in order, etc., is not normally a "worker" has already been mentioned: *Allison v. Milsom* [1923] N.Z.L.R. 776; *McFetridge v. McGill* [1931] N.Z.L.R. 1089; *Gough v. Chapman* [1930] N.Z.L.R. 81. Where, however, the duties of the employees are such as to make them domestic servants the Act will apply, but only if the employment is for not less than three days; these days must be *consecutive* days, so that a woman employed as a house assistant but only for one or two specific days each week is not a "worker," and her employer will not be liable to pay compensation in respect of any accident happening to her in the course of her employment.

Employment for purposes of sport and recreation: A business man who employs a golf caddie, or professional sports coach, or a seaman on his pleasure yacht, clearly does not do so for the purposes of any trade or business, and will normally not be liable for compensation in respect of accidents happening to these employees, though it is conceded that a yacht owner would incur liability if the seaman were injured by falling from the mast or whilst in charge of machinery. Persons employed as professional pianists or musicians, or as entertainers at private or public functions, are not the servants of those employing them, nor apparently is a film actress the servant of the motion-picture corporation which has engaged her: *Armour v. British International Pictures*, (1930) 23 B.W.C.C. 367.

Employment by unincorporated associations: An incorporated body is by the Act deemed to be carrying on a trade or business when exercising its powers and functions, and persons employed by it are accordingly "workers." Unincorporated bodies, such as clubs formed for non-commercial objects and which exist solely to supply social amenities to members, normally do not carry on a trade or business, and cannot be made liable as "employers"; however, very slight circumstances, such as the receipt of green fees from the guests of the golf club, have been held to constitute the conduct by such a body of a trade or business: *Carlisle and Silloth Golf Club v. Smith* [1913] 3 K.B. 75; presumably a green-keeper employed by such a club would

be a " worker," as also would be the club's professional coach if guests could avail themselves of his services. Unincorporated bodies which carry on a trade or business are, of course, in the same position as ordinary employers: see *Beel v. Bruhns and Others* [1932] N.Z.L.R. 1374, where cemetery trustees were made liable for compensation to an employee who suffered injury by accident.

Employment by property owners: The fact that employees of owners of property who do not carry on a trade or business are not " workers " has already been mentioned; but it is important to remember that in some cases the employees may be engaged upon work to which the first Schedule of the Act applies. Thus a painter engaged to paint a house may fall more than twelve feet; a carpenter employed to erect a fence is engaged in the " erection of a structure "; and a labourer employed to clear a section may possibly be employed " in the cutting of scrub." If, while so engaged, these employees sustain injury by accident, the property owner would be liable notwithstanding the fact that the work being performed was not performed for the purpose of his business.

Employment by religious organisations: Ecclesiastics have on numerous occasions been held not to be employed under a contract of service. However it seems clear that caretakers of church premises and vergers would be so employed, though as their employers are normally unincorporated church trustees not carrying on a trade or business they would not, save in exceptional circumstances, be able to bring themselves within the provisions of the Act. An organist engaged to play in a church would seem clearly engaged under a contract for the performance of professional services, and not under a contract of service.

A Branch of Sociology

The New Approach to the Law.

Lord Macmillan recently spoke at the Annual Reception of the Law Society's School of Law to its past and present students. His Lordship pointed out the great interest to be found in the law studied from its human aspect. He said:

" Few people realise the extent to which their daily lives are enmeshed in the law. Every morning when a man travels up to his office in town he makes a contract with the railway company for safe carriage to his destination. If he meets with an accident, interesting questions at once arise of whether his remedy is in contract or in tort. If he has an accident on the stairs of his office through tripping over a bucket left by a careless charwoman, the question arises, was it a trap, or was the man a willing sufferer who could not recover? Throughout the day the simplest transactions carry the most momentous legal consequences. Only recently the House of Lords was much concerned with the question of a snail in a ginger-beer bottle, and the result of that case has been to rock the foundations of the common law of England to their very base. At least three professors at Oxford have been compelled to rewrite large portions of their treaties on tort."

Lord Macmillan continued that he would like to see law made much more interesting to the student than it generally was. When he recalled his own experiences of forty years ago, they were not exhilarating. Blackstone had realised long ago that law was an attractive humane study, and had educated the gentry of England to appreciate it, so that his Commentaries had been found in practically every gentleman's library—though whether they were always read was another matter. If the law were studied with a true appreciation of its bearing on social life, its full and genuine interest would be discovered. Few citizens realised that the present trend of law-making reflected the bloodless social revolution that was taking place in their midst. He proceeded to say:

" While the Statute Book of 40 or 50 years ago was largely concerned with the law of real property, succession, contract, and such familiar topics, legislation nowadays is almost exclusively occupied with social reforms—the welfare of the people and public-health questions. Immense statutes, generally rather badly drafted, fill page after page of the Statute Book, showing that the centre of gravity of the law has shifted almost entirely from the old technique. The law has become a vehicle of the social revolution and a means—the only possible one in a democratic state—of carrying out great reforms. For this reason its study requires a totally different approach from that of the old days. Formerly a lawyer could become successful by mastering the technique of the law. Now he needs a far wider range of interest, for he must realise the manner in which the law permeates every social relationship until it has become a branch of sociology. Approached from this angle, the law is no longer a crabbed study, a dismal collection of statutes and cases, but a system with a real purpose in life, which in its scientific operation might be of enormous moment to the welfare of the people, and one which is worth mastering because of the power, the value, and the zest which it gave the student in his life as a citizen."

This human aspect of the law had, said Lord Macmillan, been expressed very happily by George Eliot through her hero, Daniel Deronda:

> " I don't see that law rubbish is worse than any other sort. It is not so bad as the rubbish in literature that people choke their minds with. It does not make one so dull. Our wittiest men have often been lawyers. Any orderly way of looking at things, as cases and evidence, seems to me better than a perpetual wash of odds and ends bearing on nothing in particular. And then, from the higher point of view, the foundations of the growth of law make the most interesting aspects of philosophy and history."

" This realisation of the philosophy and the history of law is well worth cultivating," His Lordship continued. He recommended the study not only of law, but also of books about law; books which discussed law in a philosophic spirit and which brought to the surface the implications and the essence of law.

In conclusion, Lord Macmillan said that he hoped before long to see in London an institute of legal research and advanced legal studies, with scholarships and fellowships. London contained priceless treasures for the legal historian, and such a school would enable them to be studied adequately. He suggested that some of the students of the Law Society School of Law, when their immediate anxieties about examinations and the arrangement of their career were overcome, should tune their minds in the direction of higher legal studies, which would make them greater masters of their profession, and would link up their daily life with the absorbing interest of the evolution of law through the centuries. They would thus become great benefactors of the law, because through such students men had learnt to pay the law greater honour.

Circumstantial Evidence: Its Cumulative Effect.

The Chain, the Faggot, and Functions of the Jury.

In his comprehensive charge to the jury in the murder trial, *R. v. Price*, Mr. Justice Blair made some cogent observations as to the considerations to be applied by the jury to the question whether the Crown had presented such a case that satisfied them that the accused was guilty of the crime with which he was charged. As the matter is dealt with in a practical way that is of value to practitioners who appear for the defence in criminal trials, the following extract from His Honour's direction to the jury is reproduced from the transcript of the official shorthand report.

Addressing the jury, the learned trial Judge said, in part:

We often hear the expression ' chain of evidence." Possibly you have heard lots of people use those words, and it is frequently argued in Court, although not in this particular case, that such a chain is no stronger than its weakest link. To refer to evidence as in a chain is a very inapt illustration; because if you take a link away from a chain, or add a link, you only make it shorter or longer as the case may be, but do not make it weaker or stronger.

A much more apt illustration when considering the question of weight of evidence is to use as an illustration the idea of a faggot. A faggot consists of a number of sticks, and let us assume that each material piece of evidence in a case may be taken as constituting a stick, or something that may be added for the purpose of ultimately building up a faggot. Some of the sticks may be so light as to be only a hair's breadth in dimension, and you may be satisfied that others are thicker, and some may not in your view be worthy to be treated as sticks at all.

The questions you will possibly ask yourselves in a case like this, depending as it does upon circumstantial evidence (and it is the duty of the jury to say in a case such as this), are whether each piece of evidence produced by the Crown—whether that evidence when added to the Crown's other pieces of evidence, whether all the pieces of evidence that you consider material—produce a faggot of evidence strong enough to bear the weight that must be borne in order to support the Crown's case. That, I think, is a fair way of putting it; and, when I say that, I am not by any means the inventor of that particular illustration, because it has been used by other Judges in other cases, and has been looked upon as a fair illustration for jury purposes: for the purpose of explaining to a jury what is meant by the cumulative effect of evidence.

Understand, I am not saying anything about the weight of the evidence produced in this case because that is a matter for you. The illustration applies to any case. The question a jury is asked to consider at the end of a case depending on circumstantial evidence is whether the Crown has built a faggot of evidence strong enough to support its case. In any particular faggot you can take sticks out, and when you take them out separately some may be so strong you cannot break them. But the question that always will be asked is: Whether the faggot composed of various pieces of evidence, some weak and some stronger, when taken as a whole is strong enough to establish the Crown's case?

I will give you an illustration of one way that a decision can be arrived at in a criminal case such as this is. When you come to consider the case, you can take all those portions of the evidence that you are prepared to accept as evidence supporting the Crown's case, and reject all those portions of the evidence you are not satisfied with. You can reject portion because you do not believe it, or because you accept the view put forward by the defence, or because you are not satisfied with it; or you can reject it even if you believe it, but think it of no help to the Crown's case—that is, that it has no probative value. Then you place together such portions of the evidence as you accept as having probative value, even if of small probative value; and you place them all together, the small and the larger. If, in the result, you consider that the Crown has established a case sufficiently strong to discharge the onus lying upon the Crown, then the jury is asked by the Crown to find the accused guilty. The Crown must be able to say: " We have presented a case which with the cumulative matter constitutes sufficient weight of evidence to discharge the onus which the Crown is bound to bear in all cases like this and other criminal cases."

I should give you a little illustration of what is meant by cumulative evidence. I always endeavour to use simple illustrations in order to make my meaning clear, because we Judges have a little habit of getting obscure without knowing we are getting obscure, especially when explaining intricate cases. What is meant by accumulation of evidence? Supposing that in Napier, say, where I understand there are 20,000 people, the police were informed that a crime had been committed by a man there with red hair, six feet in height, who wore grey check trousers and had a mole on his right cheek. Taking these particulars one by one, the police would first of all have to look for a man, not a woman or a child. Out of those 20,000 people in Napier, a great many are women and a large number are children. Say there are 7,000 men in Napier: that would reduce the 20,000 to 7,000; because it is a man we are looking for, and not a person. Next, he is a man six feet high; that further reduces the 7,000 down to, say, 1,000. Next, he has got red hair; that reduces the 1,000 to, say, 200, or whatever it may be; and then when we get to the final matter—that he has a mole on his right cheek—we are getting down to the description of a particular man who answers that description. Then we have to remember (I forgot it) that the particular man was wearing check trousers, and when we find a person fulfilling each item of the description we have a case where the evidence is such that there is material upon which the man can be identified.

That is a mere illustration of the cumulative effect of evidence. I am not asking you to accept that as the perfect illustration; I do not say that it is the sort of case that is always presented in cases of this kind. The Crown says it has produced certain matters, some mere straws, some possibly entitled to be called light sticks, and some substantial sticks; and it claims that, carefully making them together into one bundle, it is strong enough to support its case. As to all the items that go to make up a particular faggot of evidence, it is true in most criminal cases that you can take every one stick of evidence separately out of the bundle and break it. Mr. Averill, with very great ability and tact. has taken every stick out of the faggot separately . . , There may be other points made by the Crown that you

will treat in the same way. The Crown, in cases of circumstantial evidence, builds a case in such a way that it claims to be able to say that, when you look at the body of the evidence as a whole, it drives you to a definite conclusion. It suggests that that principle is applicable to this case.

Only in a very rare case indeed is there direct evidence. It is quite exceptional for the police to be fortunate enough to get a person who saw a burglary or theft. The evidence is generally circumstantial, such as proving that the accused was in the vicinity at the time, and that he was trying to sell the proceeds. You are asked to infer from the circumstances as proved that the particular crime was committed. It sometimes does happen that circumstantial evidence is very much better than the evidence given by eye witnesses, because of the fallibility of human observation, and the liability a person has, quite unconsciously, to be a little prejudiced towards his friends, and perhaps not so much towards his enemies. I will take a simple case, where circumstantial evidence is better. Three witnesses say that they saw a motor-car proceeding on its wrong side of the road, and a photograph is taken immediately after the accident, which shows the tracks of the car to be well on its proper side of the road. Those three witnesses might have made an honest mistake. But that is the best of circumstantial evidence such as that piece of track on the road. The circumstantial evidence of the track on the road is much more important than the evidence of the people who saw the car.

Bench and Bar.

Mr. L. E. Sowry, New Plymouth, was recently admitted as a barrister by Mr. Justice Callan, on the motion of Mr. C. H. Croker.

Mr. M. P. Eales, of Christchurch, was recently admitted as a solicitor by Mr. Justice Northcroft, on the motion of Mr. F. D. Sargent.

Mr. W. J. Robertson, lately of the firm of Messrs. Turnbull and Robertson, of Wanganui, has commenced practice on his own account in Invercargill.

Mr. C. V. Leston, Christchurch, who was a successful candidate in the May municipal elections for the New Brighton Borough Council, has since been appointed Chairman of its By-laws Committee.

Mr. G. G. Rose, Solicitor to the Treasury, has been appointed Second-assistant Secretary to the Treasury, and also he is to act as Superintendent of the State Advances Department.

Mr. W. P. Baker, LL.B., for some years a member of the legal branch of the Public Trust Office at Auckland, and latterly in charge of various branch offices of that Department in the Auckland district, has commenced practice at Southern Cross Buildings, Chancery Street, Auckland.

London Letter.

Temple, London,
My dear N.Z., June 1, 1935.

The Jubilee celebrations are now a thing of the past, and we have settled down to normal working again. But not for long, for the Whitsun Vacation will commence at the end of next week, after what must be one of the shortest terms on record.

The Jubilee.—You will no doubt have read many accounts of the Jubilee, and will perhaps have been struck by many outstanding features, such as the extent and variety of the decorations, the wonderful enthusiasm with which Their Majesties were received, the vastness of the crowds, and so on, all of which I endorse. But there were two other features which were to me even more striking because they were less expected, and they were (1) the weather, and (2) the ease with which people, and in particular people in vehicles, were able to move about London. As regards weather, Jubilee day itself, preceded and followed as it was by cold winds and grey skies, was a day of warmth and unbroken sunshine, comparing favourably with a fine day in high summer. For myself, I drove up to London from the country that morning, without any suspicion of a traffic jam, right into King's Bench Walk and watched the proceedings, first in Fleet Street, and afterwards on the Embankment, where from the vantage point of the Inner Temple Garden, which is raised by some three or four feet above the roadway, I obtained an excellent view of the processions on their return from St. Paul's Cathedral. The Inner Temple Garden was a remarkable sight that day. Something approaching 2,000 persons, including many women and children, were admitted to the Garden, and, as we had not sported a "stand," seating accommodation was provided by the most heterogeneous collection of articles of furniture I think I have ever seen, ranging from Chippendale chairs to Library steps, all brought out from the neighbouring chambers. It was generally agreed, however, that this proved a most satisfactory arrangement, and that altogether it was a wonderful day.

Cases of the Month.—An appeal to the House of Lords in a criminal matter is a comparatively rare occurrence. You may call to mind to case of *Maxwell v. Director of Public Prosecutions*, which came before the House last year, and in which an important judgment was given on the question of the admissibility of evidence against a prisoner of previous charges of which he has been acquitted. Now another important point of criminal law has come before the House of Lords in *Woolmington v. Director of Public Prosecutions*, and a judgment of profound importance has just been given, which appears to alter in a material particular what had for centuries been thought to be the common law of this land. The point concerned was the burden of proof in a prosecution for murder. The trial Judge, following the law laid down in *Foster's Crown Cases* and in other old and modern authorities, had directed the jury that by the law of this country all homicide was presumed to be malicious and murder unless the contrary appeared from circumstances of alleviation, excuse, or justification, and that, the fact of the killing having been proved, it was for the prisoner to prove that, by reason of accident, necessity, or infirmity, what happened was something less than murder. During the argument before the House of Lords, many authorities were cited from the earliest times, even including legal propositions dating back to the reign of King Canute, and reliance

was placed by the Crown not only on the law laid down in the old text-books, but also on the dictum of Tindal, C.J., in *R. v. Greenacre*, but the House of Lords held that the principle of the common law, that the prosecution must prove the guilt of the prisoner, and that there was no burden on the prisoner to satisfy the jury of his innocence, was an overriding principle, and no attempt to whittle it down could be entertained. When dealing with a murder case, the Lord Chancellor said, the Crown must prove (1) death as the result of a voluntary act of the accused, and (2) malice of the accused, proof of malice being either express or by implication. The House therefore allowed the appeal, and quashed the conviction.

Another recent criminal case of interest was that of *R. v. Binney*, which came before the Court of Criminal Appeal on a reference by the Home Secretary—a procedure permitted by our Criminal Appeal Act. The prisoner in this case had been convicted of sending threatening letters, and sentenced to seven years' penal servitude. The case had rested largely on the evidence of handwriting experts, who at the trial gave their opinion that the letters were in the handwriting of the prisoner. However, after the prisoner had commenced to serve his sentence, the threatening letters continued to be received, and it became perfectly clear that the prisoner could not possibly have written any of them. The case was therefore referred to the Court of Criminal Appeal, who held that if the evidence then available had been available at the trial, it could not be said that the jury would have convicted the prisoner, and he was released. The moral of this case seems to be that too much reliance should not be placed on the evidence of experts.

Another case of interest decided during this month, *Tattersall v. Drysdale*, concerned a point of motor-car insurance law. The plaintiff had an accident while driving a car which was not his own, but had been lent to him, and, as a result of proceedings, had become liable to pay a large sum by way of damages. The car was insured by its owner under a policy which contained a clause extending the insurance to persons driving the insured car with the assured's permission, but it was contended that in view of previous authorities this did not give the plaintiff a cause of action against the insurance company. There is, however, a provision in our Road Traffic Act, 1930, by which an insurer under the Act is liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover, and Goddard, J., who tried the case, held that this statutory provision had altered the law, and made the insurance company directly liable to the plaintiff for indemnity in respect of the damages to which he has become liable.

Our Summer Vacation.—It has just been announced that the long vacation, which for the past two years has been cut by a fortnight, will this year be cut by only a week, and that the new legal year will commence on October 7 next. This would seem to indicate that, in the view of His Majesty's Judges at any rate, the pressure of work in the Courts is decreasing. It also indicates, I think, a desire not to create a precedent, so that it may be recognised that the matter is in the discretion of the Judges, and however much the length of our vacations may be criticised, the latter arrangement seems to be highly desirable. The question whether the Bench and the Bar in this country are overworked might perhaps be answered in the words of the witness who, when asked if he were married, replied "Nothing to speak of."

Yours ever, H.A.P.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Transfers of Life Estates, Power of Appointment, and Estates in Remainder.

1. Transfer of estate for life to transferor, estate for life *in futuro* to his daughter, with remainder to the daughter's children living at her death.
2. Transfer of a life estate to the daughter of the transferor with a power of appointment in favour of her issue and with reversion in default of appointment to the transferor.
3. Transfer from administratrix of the estate (the widow) of the deceased of a life estate to herself with remainder to the children of the deceased as tenants in common in commutation of the shares of one-third and two-thirds respectively in the estate to which the parties are entitled upon the intestacy.

1. Transfer of estate for life to transferor, estate for life *in futuro* to his daughter, with remainder to the daughter's children living at her death.

Under the Land Transfer Act, 1915.

MEMORANDUM OF TRANSFER.

WHEREAS A.B. of etc. (hereinafter called "the transferor") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT etc. AND WHEREAS the transferor is desirous of transferring to himself an estate for life in the said land and to his daughter C.D. of etc. an estate for her life therein with remainder to her children living at the time of her death as tenants in common in equal shares

NOW THEREFORE IN CONSIDERATION of the premises and of the natural love and affection borne by him towards his daughter the said C.D. the transferor DOTH HEREBY TRANSFER unto himself the transferor an ESTATE OR INTEREST FOR LIFE in possession in the said land above described and unto the said C.D. an ESTATE OR INTEREST FOR LIFE therein expectant upon the death of the transferor WITH REMAINDER to the children of the said C.D. living at the time of her death as tenants in common in equal shares whether the said children are now living or shall hereafter be born TO THE INTENT that the transferor shall immediately henceforth have and enjoy the said land for and during his life AND that the said C.D. shall have an estate for life expectant on the termination of the said estate for life of the transferor WITH REMAINDER to her children living at the time of her death as tenants in common in equal shares whether the said children are now living or shall hereafter be born.

IN WITNESS etc.
SIGNED etc.
Correct etc.

2. Transfer of a life estate to the daughter of the transferor with a power of appointment in favour of her issue and with reversion in default of appointment to the transferor.

Under the Land Transfer Act, 1915.

MEMORANDUM OF TRANSFER.

WHEREAS A.B. of etc. (hereinafter called "the transferor") is registered as proprietor of an estate in fee-

simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT etc. AND WHEREAS the transferor is desirous of transferring the said land to his daughter C.D. of etc. (hereinafter called " the life tenant ") for her life with a power of appointment in favour of her issue and with the reversion in default of appointment to the transferor

NOW THEREFORE IN CONSIDERATION of the natural love and affection borne by him towards his daughter the life tenant the transferor DOTH HEREBY FREELY GIVE AND TRANSFER unto the life tenant an ESTATE OR INTEREST FOR LIFE in possession in the said piece of land above described TO THE INTENT that the life tenant shall henceforth have and enjoy the said land for and during her life AND for the consideration aforesaid the transferor DOTH HEREBY TRANSFER AND GRANT unto the life tenant ALL THAT the full and free power of appointment of the said land and any part or parts thereof from and after her death by memorandum of transfer or will or codicil thereto to and among such one or more of the issue of the life tenant for such estates or interests at such time or times and in all respects in such manner as the life tenant shall by such memorandum of transfer or will or codicil thereto appoint RESERVING unto the transferor all estate and interest in the said land in default of and until any such appointment and so far as no such appointment shall extend TO THE INTENT that the life tenant shall have a special power of appointment of the said land after her death to and among her issue as aforesaid WITH THE REVERSION in the said land to the transferor.

IN WITNESS etc.
SIGNED etc.
Correct etc.

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3. Transfer from administratrix of the estate (the widow) of the deceased of a life estate to herself with remainder to the children of the deceased as tenants in common in commutation of the shares of one-third and two-thirds respectively in the estate to which the parties are entitled upon the intestacy.

Under the Land Transfer Act, 1915.

MEMORANDUM OF TRANSFER.

WHEREAS A.B. of widow (hereinafter called " the transferor ") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT etc. AND WHEREAS the transferor is registered as aforesaid as administratrix of the estate of C.B. of etc. (hereinafter called " the deceased ") by virtue of letters of administration granted to the transferor by the Supreme Court of New Zealand at on the day of 19 under number /19

AND WHEREAS the deceased died at intestate and by virtue of the provisions of the Administration Act 1908 the transferor his widow and the following persons (being all the children of the deceased) namely D.B. (*spinster*) E.F. (*married woman*) G.B. and H.B. (*both merchants*) all of are entitled to the said land in the shares and proportions of one-third to the transferor and two-thirds to the said D.B. E.F. G.B. and H.B. (hereinafter together called " the successors ") AND WHEREAS all debts duties and funeral and testamentary expenses in the estate of the deceased have been duly paid and discharged AND WHEREAS it has been agreed by parol between the transferor and the successors that the transferor shall take in lieu of her one-third share of the said land a life estate therein and that in consideration thereof the transferor shall transfer to the successors as tenants in common an estate in remainder in the said land expectant upon the death of the transferor in lieu of their two-thirds share therein

NOW THEREFORE IN CONSIDERATION of the premises and in pursuance of the said agreement the transferor at the request and by the direction of the successors (testified by their being parties to and executing this transfer) DOTH HEREBY TRANSFER unto herself the transferor an ESTATE OR INTEREST FOR LIFE in possession in the said piece of land above described TO THE INTENT that the transferor shall henceforth have and enjoy the said land for and during her life and the successors DO and each of them DOTH HEREBY RATIFY AND CONFIRM the foregoing transfer

AND FOR THE CONSIDERATION aforesaid AND in further pursuance of the said agreement the transferor DOTH HEREBY TRANSFER unto the successors as tenants in common in equal shares an ESTATE OR INTEREST in remainder in the said piece of land expectant upon the termination of the said estate for life of the transferor TO THE INTENT that the successors shall from and after the death of the transferor have and enjoy an estate in fee-simple in the said piece of land as tenants in common in equal shares.

IN WITNESS etc.
SIGNED etc.
SIGNED etc.
Correct etc.

Wellington Law Students' Society.

Moot : The Bottle-Oh Manufacturing Co., Ltd. v. Smiffkins.*

In a recent Moot, held in the Supreme Court, Wellington, *cor.* Mr. W. H. Cunningham, the following were the facts as agreed upon by counsel :

Smiffkins was going to give a party for his daughter Jean on her " twenty-first " and for the purpose ordered 12 dozen bottles of Ginger Ale. Now, Smiffkins was an enthusiastic maker of " home-brew," although none of this was sent to the party. In his desire to do further research in the process of making good home-brew he wanted some clear bottles in which to carry out his observations of the effervescence. He accordingly ordered his ginger ale from the Jubilee Hotel, telling the proprietor (with whom he was well acquainted) that he wanted clear bottles on account of the above purpose. The proprietor said, " I'll make sure you get 'em." He accordingly accepted payment at the rate of 4d. per bottle, which was the same price as was paid for a similar drink of the contents in a glass on the spot.

There afterwards came a bottle shortage and the Bottle-Oh Manufacturing Co., Ltd., claimed from Smiffkins the return of the 12 dozen bottles on the ground that they had embossed or engraved on them the legend " This bottle always remains the property of The Bottle-Oh Manufacturing Co. Ltd., and is never sold," and alleged that the property in the said bottles had never passed from them. They also proved that they issued notices to this effect to the hotel-keeper with instructions to him to inform all customers, but it was admitted that he had failed so to do in this case. There were

* See article, " Meditation among Bottles," p. 13, *ante*.

many other cases somewhat similar to the present one, and the matter became of very considerable importance.

The Bottle-Oh Manufacturing Co., Ltd., sues Smiffkins for specific return of the bottles and alternatively for damages for conversion.

H. J. Bishop and *J. C. White* for the plaintiff.

C. N. Armstrong and *P. Miles* for the defendant.

H. J. Bishop, for the plaintiff: (*a*) There is a bailment to the publican determined by his wrongful dealing, and defendant is guilty of conversion: *1 Halsbury's Laws of England*, 2nd Ed., 775; *Cantrell and Cochrane v. Neeson*, [1926] N.I. 107; *Barlow v. Hanslip*, *ibid.*, 113 *n*; *Curtis v. Perth and Fremantle Bottle Exchange Co., Ltd.*, (1914) 18 C.L.R. 17, 26; *New Zealand Breweries Ltd. v. Grogan*, [1931] G.L.R. 412; (*b*) The publican can give no better title than he himself possesses.

No question of estoppel arises: (*a*) Plaintiff has done all he could to make the position apparent; (*b*) Defendant must have had or be presumed to have had knowledge; (*c*) Knowledge of the agent is knowledge of the principal. The publican was defendant's agent for purpose of obtaining bottles: *Spencer Bower on Estoppel by Representation*, p. 171; (*d*) *William Leitch and Co., Ltd. v. Leydon*, [1931] A.C. 90; *Commonwealth Trust, Limited v. Akotey* [1926] A.C. 72; *Pickering v. Busk* (1812) 15 East 38; 104 E.R. 758, are distinguishable; the case is governed by *Farquharson Bros. and Co. v. King and Co.*, [1902] A.C. 325, 329.

As to the moment at which ownership passed, see *Barlow v. Hanslip* [1926] N.I. 113, 115; *Leake on Contracts*, 8th Ed., p. 484; *Wilkinson v. Verity* (1871) L.R. 6 C.P. 206. Demand is necessary only to establish knowledge and is unnecessary where knowledge exists or is to be presumed.

J. C. White, in support: The only possible defence is estoppel which may be raised under two heads:

(*a*) Sale, see Sale of Goods Act, 1908, s. 23. Assuming the transaction was a sale in the mind of the defendant, the plaintiff's conduct did not preclude him from denying the seller's authority to sell: *Galyer v. Massey-Harris Co., Ltd.*, (1914) 33 N.Z.L.R. 1392.

(*b*) Agency: *1 Halsbury's Laws of England*, 2nd Ed., p. 270, para. 451, and for a qualification of the principal's liability see p. 274, para. 457. The principal who has taken every precaution is not to be estopped: *Heap v. Motorists' Advisory Agency, Ltd.*, [1923] 1 K.B. 577.

Once the question of estoppel is disposed of, it is clear on the authorities that the property remains in the plaintiff: *New Zealand Breweries v. Grogan, [1931] G.L.R. 412; Curtis v. Perth and Fremantle Bottle Exchange Co., Ltd.*, (1914) 18 C.L.R. 17; *William Leitch and Co., Ltd. v. Leydon* [1931] A.C. 90.

C. N. Armstrong, for the defendant: Plaintiff's contentions that (*a*) there was no sale, and (*b*) the hotelkeeper was agent of defendant for the purpose of buying bottles, and that knowledge of agent is deemed knowledge of principal, are not supported by facts. The evidence points to a definite contract for sale. Defendant admits that there was a bailment between plaintiff and publican, and, therefore, the general rule applies: Sale of Goods Act, 1893, s. 23. Plaintiff was by his conduct precluded from denying publican's authority to sell. For general principles of estoppel in pais see: *Pickard v. Sears*, (1837) 6 A. & E. 469; 112 E.R. 179, followed and enlarged in *Freeman v. Cooke*, (1848) 2 Ex. 654; 154 E.R. 652. For the law with regard to this kind of estoppel see: *Pickering v. Busk*, (1812) 15 East, 38; 104 E.R. 758; and *Curtis v. Perth and Fremantle Bottle Exchange Co., Ltd.*, (1914) 18 C.L.R. 17. The bottles were placed in publican's hands with apparent authority in the ordinary course of trade to sell but with secret limitations on sale and under circumstances which would entitle a purchaser to assume his right to sell. Plaintiff knew the hotelkeeper would have to sell contents to consumers and give them possession of the bottles although only in a limited right and the onus is on the plaintiff to give notice to the public of the restriction on sale: see *Isaacs*, J., in *Curtis v. Perth and Fremantle Bottle Exchange Co., Ltd.*, (1914) 18 C.L.R. 17, at p. 29. There was no notice to the defendant by the hotelkeeper and the only possible notice was the embossed wording on the bottles. There was no evidence that the defendant knew of this wording at the *time* of sale. In ordinary course the purchase of 12 dozen bottles would not be over counter. The discovery of wording after delivery when sale completed is too late to take effect. The onus is on the plaintiff to show that the defendant knew of the notice at the time of sale. Even if defendant knew of wording at time of sale, this is not necessarily notice. The Courts are concerned with what the contract is, and not what the parties say it is: *Weiner v. Harris* [1910] 1 K.B. 285, 292. There is a denial by the conduct of the publican of the truth of the wording on the bottles.

From the foregoing, it follows that (*a*) it is the normal course of trade for retailers to sell bottles: (*b*) unless otherwise notified apparent authority must be presumed to be real authority: *Pickering v. Busk*, (1812) 15 East, 38; 104 E.R. 758; (*c*) there is a duty on plaintiff to notify consumers of limitations of title and onus of proof that notice has been given has not been discharged. The only notification is lettering, which is not conclusive: *Weiner v. Harris*, [1910] 1 K.B. 285, and in this case is impliedly denied by the hotelkeeper, and (*d*) defence of estoppel from denying hotelkeeper's authority to sell.

P. Miles, in support. The following cases are distinguishable: *New Zealand Breweries, Ltd. v. Grogan* [1931] G.L.R. 412; *Curtis v. Perth and Fremantle Bottle Exchange Co., Ltd.*, (1914) 18 C.L.R. 17; *William Leitch and Co., Ltd. v. Leydon*, [1931] A.C. 90; *Cantrell and Cochrane, Ltd. v. Neeson*, [1926] N.I. 107; and *Barlow v. Hanslip*, [1926] N.I. 113 *n*.

Judgment was delivered by Mr. *W. H. Cunningham*, as follows:

I intend to give judgment now, and I intend to do so on the arguments which have been addressed to me. I have not had time to go into the matter myself and I must rely on the very excellent arguments which have been submitted by counsel.

It is a very difficult case. It is necessary to get a clear conception of the facts. The bottles were in the possession of the hotelkeeper with instructions from the owner that they were not to be sold; and there was a notice on the bottles that they were the property of the Bottle-Oh Manufacturing Co., Ltd., and were never sold.

I think it is a fair inference from the facts that the defendant contracted with the hotelkeeper for the purchase not only of the beer but also of the bottles. He asked for clear bottles when ordering, and the hotelkeeper said, "I'll make sure you get 'em." With such a large number as twelve dozen it is unlikely that they were delivered over the counter, and there is no specific proof that the defendant knew the bottles had the inscription on them when he purchased them. The plaintiff submits that the bottles were bailed to the hotelkeeper and therefore that he could give no title to the defendant. I think the plaintiff is forced to rely as against the defendant on the notice marked on the bottles.

The defence is based on estoppel on the ground that the hotel proprietor had given no notice to the defendant who was buying in the ordinary course of trade, and the purchaser was entitled to assume that he was getting a good title.

Several cases have been cited. In *Grogan's* case, [1931] G.L.R. 412, there were many more notices. I think *Kennedy*, J., has pointed out that the notice can only be relied upon where the purchaser is aware of it. I think that case can be distinguished, as there is no evidence here that the defendant was aware of the notice on the bottles.

In *Leitch's* case, [1931] A.C. 90, it must be noticed that there were alternatives open by which the bottles could become the property of the purchasers: Deposit paid for the bottles, etc. The expressions of the Law Lords are helpful, however, in dealing with the question of estoppel. The Irish case and the English case noted in that report are very meagre in their facts, and in neither case was it made out that there was a straight-out sale.

I think the *dictum* of Lord Ellenborough relied on by Mr. *Armstrong* covers the case. The hotelkeeper was in possession by consent of the true owner. The apparent authority of the hotelkeeper to deal in the ordinary way of trade must be taken as the real authority.

I think under the circumstances that the plaintiff's claim should be dismissed.

Judgment for the defendant.

A little Asperity Now and Then.—This is but the salt which gives savour to life, said Lord Tomlin to the United Law Clerks' Society recently. He said there was no ill feeling behind incidents such as the retort of counsel to an Australian Judge who had complained that he had listened to argument for two hours and was no wiser than when it began. Counsel had replied: "That, Your Honour, I can well believe; but I hope Your Honour is better informed."

Legal Literature.

New Zealand Justice of the Peace and Police Court Practice, by T. E. MAUNSELL, S.M., pp. xvi + 207, including Index. Butterworth & Co. (Aus.) Ltd., Wellington and Auckland.

It should be said at the outset that this is a full-dress text-book in twenty-four chapters on the practice of the Courts of summary jurisdiction, and the matters with which they deal in New Zealand. It fills a void that has hitherto existed, as the somewhat rambling provisions of our Justices of the Peace Act do not lend themselves to the prompt discovery and quick application of authority on the point in issue, so often needed in practice in the lower Courts, where instructions are often belated and time is usually pressing for the assimilation of the relevant law involved. With this need before him, the learned Magistrate responsible for this handy text-book fulfills all reasonable needs of those whose practice lies in those Courts.

The author keeps in mind the material differences under English statutes corresponding with the local Acts with which his main purpose lies; and, if it were only for his careful selection of those English decisions which are applicable to the provisions of our statute law, and his rejection of all that are not so applicable, he would have performed a valued service to New Zealand practitioners. But he goes much further: his unusually concise commentary on the various topics with which he deals, illustrated by all relevant New Zealand and overseas decisions, makes the task of the practitioner easier still.

The work is produced in chapters which deal in turn with the appointment of Justices and the limitation of their jurisdiction: here, it may be asked, Who can say authoritatively offhand what should be done if two presiding Justices disagree? But the answer is given, with supporting authority by the author. Sureties of the Peace; Summary Jurisdiction, from the preparation of the information to the objections sustainable in respect of those which are defective; the course of the hearing, and difficulties ensuing therein; the Decision, with its various phases; Convictions, and Principles of Punishment; Proceedings after the Hearing and Conviction; Complaints and Orders; Rehearings when obtainable, and their effect, and recognisances upon rehearings; Indictable Offences, with the right of accused to be tried by a jury, and the summary trial of indictable offences; Appeals, and Extraordinary Remedies—all these are carefully dealt with from a practical viewpoint. In addition, Children's Courts; Actions against, and Protection of Justices; Inquests; procedure in respect of obtaining reception orders in respect of Mental Defectives; Fugitive offenders; and Reformatory Institutions, all form the subject of chapters of a useful nature dealt with in simple and handy arrangement. The work also contains a digest of the law of evidence applicable to Police Court Practice; and English and New Zealand decisions on topics dealt with in our Police Offences Act, serve a very useful purpose. The index is well arranged, and should aid materially the saving of time, the necessity for which the author has ever kept before him.

Mr. Maunsell's *Justice of the Peace* is a much more ambitious work than his *Licensing Law in New Zealand*, and he is to be congratulated on the service he has rendered to practitioners and to all whose duties take them to our Lower Courts by the provision of this practical and comprehensive, yet well digested text-book, on a subject with which his years of experience as a Magistrate have made him familiar.

There is one omission in Mr. Maunsell's book: it is the quotation of Lord Birkenhead's speech at the inaugural meeting of the Magistrates' Association (England) in which he warned those presiding in inferior Courts against prematurely making up their minds before all the facts of a case have been heard.

Practice Precedents.

In Bankruptcy: Warrant of Arrest of Debtor, and Discharge from Custody.

(*Concluded from page* 180.)

The last Practice Precedent, p. 179, *ante*, provides for the arrest of an absconding debtor pursuant to s. 88 of the Bankruptcy Act, 1908. The same section provides that after arrest debtor shall be "kept in custody until . . . he is discharged by the Court."

The following set of forms relates to the discharge of a debtor who has paid the amount of the debt upon which the bankruptcy proceedings have been founded, the application for discharge being made by the creditor.

MOTION FOR RELEASE OF DEBTOR.

(*Same heading as in previous precedent.*)

Take notice that Mr. of counsel for the above-named [*Creditor*] WILL MOVE this Honourable Court (In Chambers) before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Courthouse on day the day of 19 at the hour of 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER DIRECTING THE KEEPER of His Majesty's Prison at TO DISCHARGE out of custody the above-named debtor AND for such further or other order as to this Court shall seem meet UPON THE GROUNDS that the said [*Debtor*] has paid the amount of the debt upon which the bankruptcy proceedings are founded AND UPON THE FURTHER GROUNDS appearing from the affidavit of filed herein.

Dated at this day of 19 .

Solicitor for the above-named creditor.

Certified pursuant to rules of Court to be correct.

Counsel moving.

To the Registrar.

NOTE.—The debtor consenting, a formal consent may be endorsed on the motion as follows:—

I consent to an order as within.

Solicitor for debtor.

AFFIDAVIT IN SUPPORT OF MOTION FOR DISCHARGE.

(*Same heading.*)

I, of law clerk make oath and say as follows:—

1. That I am a law clerk in the employ of of solicitor for the above-mentioned creditor.

2. That I am familiar with the bankruptcy proceedings herein.

3. That the said [*Creditor*] has filed a petition herein for an order that the above-named [*Debtor*] be adjudged a bankrupt upon the grounds set forth in the said petition filed in this Court.

4. That to the best of my knowledge and belief the said [*Creditor*] is the only creditor on the above-named debtor.

5. That on the day of 19 a warrant of arrest issued out of this Honourable Court and telegraphed to the Sheriff of the District of was executed and the said debtor was arrested and lodged in His Majesty's Goal at .

6. That hereunto annexed and marked "A" is a telegram from the said Sheriff at stating that the said debtor was arrested as hereinbefore set forth.

7. That I have received from the solicitor for debtor sufficient moneys to pay the claim of the said [*Creditor*] in full and also the costs of these proceedings.

8. That it is now desired that the said debtor should now be released from custody aforesaid.

Sworn etc.

ORDER FOR RELEASE OF DEBTOR.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the motion filed herein and the affidavit of filed in support thereof and the consent on behalf of the debtor filed herein AND UPON HEARING Mr. of counsel for by consent IT IS ORDERED that the keeper of His Majesty's Prison at DO DISCHARGE out of custody the above-named [*Debtor*] AND IT IS ORDERED that this order may be transmitted by telegraph.

By the Court.

Registrar.

NOTE.—The amount of the debt having been paid, application should be made separately for leave to withdraw the bankruptcy petition: see s. 30 of the Bankruptcy Act, 1908.

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

COMPANIES.

Company—Management Vested in Another—Management Share—INVESTMENT TRUST CORPORATION, LTD. *v.* SINGAPORE TRACTION CO., LTD. (Ch.D.).

The credit of a company cannot be pledged to raise capital moneys to pay off a contingent income debt.

As to borrowing and securing money by companies: see HALSBURY, 2nd Edn., 5, para. 752 *et seq.*; DIGEST 10 p. 730 *et seq.*

CRIMINAL LAW.

Criminal Law—Homicide—Intent—Onus of Proof—WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (H.L.).

In a charge of murder the prosecution must prove not only the death as the result of a voluntary act of the accused but also malice on the part of the accused; there is no point at which it becomes incumbent on the accused to prove his innocence.

As to presumption in cases of murder: see HALSBURY, 2nd Edn., 9, para. 731; DIGEST 15, p. 769.

DIVORCE.

Divorce—Nullity—Scottish Irregular Marriage—Subsequent Marriage of both Parties—SQUARE (otherwise BEWICKE) *v.* SQUARE; COWAN (otherwise YOUELL) *v.* COWAN (P.D.A.).

Where parties have contracted a valid, irregular Scottish marriage, the concurrence of a third party in a statement that there has been no such marriage does not stop him from subsequently alleging that marriage in nullity proceedings.

As to nullity proceedings: see HALSBURY, 2nd Edn., 10, para. 934 *et seq.*; DIGEST 27, p. 38, *et seq.*, 264.

HUSBAND AND WIFE.

Breach of Promise—Promise in Event of Divorce—After Decree *Nisi*—FENDER *v.* MILDMAY (K.B.D.).

The rule that a promise to marry by a person already married is against public policy, and will not support an action, applies to a promise made between decree nisi *and decree absolute of divorce.*

As to promises to marry by a person already married, see HALSBURY, 2nd Edn., 16, para. 816; DIGEST 27, p. 26 *et seq.*

INCOME TAX.

Income Tax—Surtax—Covenant to Pay Annuity to Employee—INLAND REVENUE COMMISSIONERS *v.* DUKE OF WESTMINSTER (H.L.).

A payment under a covenant with an employee for payment to him of an annuity may be a proper deduction for surtax purposes although the payment is to be taken in pro tanto discharge of wages.

As to surtax generally: see HALSBURY, Vol. 16, para. 1416 *et seq.*; Supp. for 1934, *ibid.* p. 143 *et seq.*; DIGEST 28, p. 104, *et seq.*

INFANTS.

Infant—Custody—Illegitimate Child—Rights of Mother—*Re* CRICHTON (K.B.D.).

A mother of an illegitimate infant is prima facie *entitled to its custody.*

As to the rights of parents to custody of infant children: see HALSBURY 17, para. 251 *et seq.*; DIGEST 28, p. 256 *et seq.*

Rules and Regulations.

Health Act, 1920. Amending Regulations as to Bottling of Milk.—*Gazette* No. 46, June 20, 1935.

Dangerous Drugs Act, 1927. List of Dangerous Drugs extended.—*Gazette* No. 46, June 20, 1935.

Mortgagors and Tenants Relief Act, 1933. Transferring to the Court of Review of Mortgagors' Liabilities certain Functions of the Supreme Court and of a Stipendiary Magistrate.—*Gazette* No. 46, June 20, 1935.

Public Service Superannuation Act, 1927. Amending Regulations under the Act, *re* Meetings of Board, Teachers' Superannuation Fund.—*Gazette* No. 47, June 27, 1935.

Cook Islands Act, 1915. Regulation abolishing Export Duty on Copra exported from the Cook Islands, other than Niue.—*Gazette* No. 47, June 27, 1935.

Mortgage Corporation of New Zealand Act, 1934-35. Incorporation of the Mortgage Corporation of New Zealand.—*Gazette* No. 47, June 27, 1935.

Hunter Gift for the Settlement of Discharged Soldiers Act, 1921. Amending Regulations under the Act.—*Gazette* No. 49, July 11, 1935.

Fisheries Act, 1908. Additional Regulations under the Act.—*Gazette* No. 49, July 11, 1935.

Animals Protection and Game Act, 1921-22. Extending Open Season for taking and killing Opossums, South Canterbury Acclimatization District.—*Gazette* No. 49, July 11, 1935.

Harbours Act, 1923. The General Harbour (Safe-working Load) Regulations, 1935.—*Gazette* No. 49, July 11, 1935.

Workers' Compensation Act, 1922. Reciprocal application of Act to Irish Free State.—*Gazette* No. 49, July 11, 1935.

New Books and Publications.

Elements of Insurance Law, 1935. By M. P. Picard. (Sweet & Maxwell Ltd.). Price 10/6d.

Wertheimer's Law Relating to Clubs. Fifth Edition. By M. Turner and A. S. Wilson. (Sweet & Maxwell Ltd.). Price 15/-.

Legal Essays in Tribute to McMurray. By Max Radkin and A. M. Kidd, 1935. (Cambridge University Press). Price 42/-.

Law Relating to Employers' Liability and Workers' Compensation in I.F. State. By B. Shillman, 1935. (John Falconer). Price 27/-.

Wigram's Justices, Note-Book, 13th Edition. By R. W. H. Fanner. (Stevens & Sons). Price 17/6d.

Interpreting the Constitution (A Politico-Legal Essay). By T. C. Brennan, K.C. (Oxford University Press). Price 28/-.

Civilisation and the Growth of Law, 1935. By W. A. Robson. (MacMillan & Co.). Price 17/6d.

International Law in Peace and War, 1935, Part 2. By Axel Moller. (Stevens & Sons). Price 27/-.