New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

" Your danger is as you have seen : and truly sorry I am that it is so great. But I wish it to cause no despondency, as truly I think it will not. For we are British . . . it's no longer disputing, but out instantly all you can."

—OLIVER CROMWELL

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THE PROPER LAW OF THE CONTRACT.

III.

IF the parties have omitted to express the law which is to govern their agreement, a problem—often of great perplexity—arises for preliminary decision. The difficulty is enhanced by the experience that, in many cases, the possibility of a conflictual dispute was absent from their minds. English law in deciding what is the proper law of a particular contract, has treated the matter, in the words of Lord Wright, in delivering the judgment of the Privy Council in the New Zealand case, *Mount Albert Borough* v. *Australasian Temperance and General Mutual Life Assurance Society, Ltd.*, [1937] N.Z.L.R. 1124, 1131 :

> as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts.

And His Lordship went on to say :

> It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case *prima facie* their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which as just and reasonable persons they ought or would have intended if they had thought about the question when they made the contract.

It can hardly be disputed that in many cases the search for the presumed intention means actually that the Courts insert in the contract a provision which the parties would probably have inserted if " their attention had been directed to contingencies which escaped their notice " : *Dicey's Conflict of Laws*, 5th Ed. 666. As in cases of ordinary contract, a term may be implied by the Court in a proper case, and on a proper inference : *cf. Ex parte Forde, In re Chappell*, (1885) 16 Q.B.D. 305, 307. Such a provision in a conflictual dispute often follows certain maxims, or, rather presumptive rules of evidence, which are not in any degree irrebuttable, and are liable to be displaced by circumstances of any kind which in any given case influence the opinion of the Court : *ibid.*, 667. That is to say, the inquiry " must be guided, if not governed, by presumptions " : per Rich and Dixon, JJ., in *Merwin Pastoral Co., Pty., Ltd.* v. *Moolpa Pastoral Co., Pty., Ltd.*, (1933) 48 C.L.R. 565, 574.

As Lord Wright said in the *Mount Albert* case, (*cit. supra*),

> No doubt there are certain *prima facie* rules to which a Court in deciding on any particular contract may turn for assistance, but they are not conclusive. In this branch of law the particular rules can only be stated as *prima facie* presumptions. It is not necessary to cite authorities for these general principles. Sometimes their application involves difficulty.

In *South African Breweries, Ltd.* v. *King*, [1899] 2 Ch. 173, 183, a judgment which was affirmed on appeal, [1900] 1 Ch. 273, Kekewich, J., approved the observation in *Westlake's Private International Law*, 7th Ed. 302 :

> The law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which *the transaction has the most real connection*: and not the law of the place of contract as such.

However, even in these cases, the criterion of the " presumed intention " is not an empty phrase : in such a case, as the Court, when determining the " presumed " intention of the parties, also takes into account the attitude of the parties as revealed by the provisions of their agreement, it will decline to be guided only by the consideration of what men can be supposed to have reasonably intended in usual circumstances.

Consequently, all facts and incidents surrounding the contract have to be examined in order to ascertain the intention which the parties presumably had with respect to the proper law of their contract. As Bowen, L.J. (as he then was), said in *Jacobs, Marcus and Co.* v. *Crédit Lyonnais*, (1884) 12 Q.B.D. 529, 601 :

> Stereotyped rules laid down by juridical writers cannot be accepted as infallible canons of interpretation in these days when commercial transactions have altered in character and increased in complexity : and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal.

Therefore, as " the intention is objectively ascertained," as Lord Wright said in *Vita Food Products, Inc.* v. *Unus Shipping Co., Ltd.*, [1939] A.C. 277, 290, " one must look at all the circumstances," as Brett, L.J. (as he then was) said in *Chartered Mercantile Bank of India, London, and China* v. *Netherlands India Steam Naviga-*

tion Co., Ltd., (1883) 10 Q.B.D. 521, 529, and " generally, on all the surrounding facts," as Lord Wright said in the *Mount Albert* case in the passage cited *supra*; and it should not be overlooked that " the intention must be the intention of both, and not of one party alone," as Lord Russell of Killowen pointed out in *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, 557.

Among the matters which have been considered in ascertaining the proper law of the contract may be mentioned the " complexion " of the expressions in the contract: per Lord Atkin in the *International Trustee* case, *supra*, at p. 554; " the character of the contract and the nature of the transaction ": per Bowen, L.J., in the *Crédit Lyonnais* case, *supra*, at p. 601; further in the *International Trustee* case, among the relevant circumstances considered, was the position of the United States in relation to the war of 1914–18, at the time the contract was entered into, *viz.*, February 1, 1917, as Count von Bernstorff was given his passports two days later, and there was then an extreme possibility that the United States would shortly enter the war; while, in the most recent case in the Privy Council: *Vita Food Products, Inc.* v. *Unus Shipping Co.*, *supra*, at p. 290, a provision in the bill of lading for English arbitration was considered in the light of its validity and its consistency with other provisions therein.

The single facts, to which the Courts have attached importance are manifold, for example, the place where the contract was made: *Lloyd* v. *Guibert*, (1865) L.R. 1 Q.B. 115, 122; *Jacobs, Marcus, and Co.* v. *Crédit Lyonnais*, (1884) 12 Q.B.D. 589, 596, 597, 600; *Peninsula and Orient Steam Navigation Co.* v. *Shand*, (1865) 3 Moo. P.C. (N.S.) 272, 16 E.R. 103; *In re Missouri Steamship Co.*, (1889) 43 Ch.D. 321, 326; *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354, 381; the place where the contract has to be performed: *Lloyd* v. *Guibert*, (1865) L.R. 1 Q.B. 115, 122; *Hamlyn and Co.* v. *Talisker Distillery*, [1894] A.C. 202; *Chatenay* v. *Brazilian Submarine Telegraph Co., Ltd.*, [1891] 1 Q.B. 79, 83; *Benaim and Co.* v. *Debono*, [1924] A.C. 514, 520; *Adelaide Electric Supply Co., Ltd.* v. *Prudential Co., Ltd.*, [1934] A.C. 122, 145, 151; *De Bueger* v. *J. Ballantyne and Co., Ltd.*, [1936] N.Z.L.R. 511, 513, 11. 14–20; *Ralli Bros.* v. *Compania Naviera Sota y Aznar*, [1920] 1 K.B. 614, 630, 631; the nature and effect of the contract as a whole, such as the incidence of local legislation in the place where the contract was made: *Rangitikei Electric-power Board* v. *Australian Mutual Provident Society*, (1934) 50 C.L.R. 581; *Mount Albert Borough* v. *Australasian Temperance and General Mutual Life Assurance Society, Ltd.*, [1937] N.Z.L.R. 1124, 1131; the language and terminology employed by the parties: *Spurrier* v. *La Cloche*, [1902] A.C. 446, 450; *Chatenay* v. *Brazilian Submarine Telegraph Co., Ltd.*, [1891] 1 Q.B. 79, 82; the form of the documents made with respect to the transaction: *The Adriatic*, [1931] P. 241; *Royal Exchange Assurance Corporation* v. *Vega*, [1902] 2 K.B. 384; the personalty of the parties: *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, 531, 557, 574; the subject-matter of the contract—whether it is a contract relating to land (*British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354, 383); or a contract relating to a marriage settlement (*In re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573, 587); or a contract of affreightment (*In re Missouri Steamship Co.*, (1889) 42 Ch.D. 321, 327); *Chartered Bank of India* v. *Netherlands India Steam Navigation Co.*, (1883) 10 Q.B.D. 521; a submission to arbitration: *Hamlyn and Co.* v. *Talisker Distillery*, [1894] A.C. 202, 208; *Spurrier* v. *La Cloche*, [1902] A.C. 446, 450; *Maritime Insurance Co., Ltd.* v. *Assecuranz Union von 1865*, (1935) 79 Sol. Jo. 403; the special character and incidents of a bill of exchange: *Rouquette* v. *Overmann and Schou*, (1875) L.R. 10 Q.B. 525; *In re Francke and Rasche*, [1918] 1 Ch. 470; the situation of the funds which are liable for the discharge: *Spurrier* v. *La Cloche*, [1902] A.C. 446, 450, or security for the obligation, a connection with a preceding transaction: *R.* v. *International Trustee*, [1937] A.C. 500, 554, 558; and the effect attributed to the transaction by a particular legal system: *Peninsular and Orient Steam Navigation Co.* v. *Shand*, (1865) 3 Moo. P.C. (N.S.) 272, 16 E.R. 103; *In re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573.

To some of these facts the Courts have attached more weight than to others, and thus the presumptions designed to assist in the determination of the proper law of the contract have been evolved. These presumptions have one feature in common, as Lord Wright said in delivering the judgment of the Privy Council in the *Vita Food Products* case, *supra*, at p. 290, in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as *prima facie* presumptions, and they are rebuttable by the surrounding circumstances of the particular case.

Some of these presumptions are of a general character. There exists, for instance, a strong presumption in favour of the *lex loci contractus*, if the place where the contract was made and the place of its performance are identical. The parties can, further, be presumed to have subjected their agreement to the *lex loci solutionis*, if the places where the contract is made and where it is to be performed are different. In deciding these matters, however, English law has refused to treat as conclusive, rigid, or arbitrary, criteria such as *lex loci contractus* or *lex loci solutionis* as qualifications, such as, for instance, that the law of the place of performance will *prima facie* govern the incidents or mode of performance—that is, performance as contrasted with obligation: see *Mount Albert* case, *supra*, at p. 1131, 1132. Again, different considerations may arise in any particular case, as for instance, where the stipulated performance is illegal by the law of the place of performance.

Other presumptions are of a special nature, applicable to particular contracts only, *e.g.*, the presumption in favour of the law of the flag as regards contracts of affreightment; that in favour of the matrimonial domicil in the case of a marriage settlement; or that in favour of the *lex situs* as regards contracts relating to land. The persuasive force of these presumptions is a matter of degree. In some cases, it is difficult to overcome them; thus, the presumption in favour of *lex situs* in the case of contracts relating to land is cogent though not conclusive. In other cases, such as the presumption in favour of the law of the flag, the burden of proof required to rebut the established presumption is rather slight.

A new set of considerations arise when a contract has to be examined to ascertain whether all the incidents of the contract are governed, as to the proper law doctrine by one legal system; or whether, though the

transaction may in general be regulated by the law of one country, the law of another country may be applicable to parts of that transaction. In such cases, it may be established that the parties intended to subject different parts of the contract to different legal systems. But discussion of what has been termed the "split" idea of the proper law doctrine must be left for another occasion.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1940.
June 24; July 5.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

COMMISSIONER OF STAMP DUTIES v. CARD.

Public Revenue—Death Duties (Gift Duty)—Advance on Mortgage free of Interest—Whether a "Disposition of property"—Whether such Advance "liable to gift duty"—Death Duties Act, 1921, ss. 38, 39.

A loan of money made by one person to another without interest is not—within the provisions of the Death Duties Act, 1921—a gift of the principal-moneys lent; and is, accordingly, not liable to gift duty on the whole amount of such principal-moneys.

So held by the Court of Appeal (*Myers*, C.J., *Ostler* and *Smith*, JJ., *Fair*, J., dissenting), dismissing an appeal from the judgment of *Johnston*, J., on the grounds,

Per *Myers*, C.J., That such a loan is not a "disposition of property" under para. (*a*), (*c*), or (*f*) of s. 39.

Per *Smith*, J., That a loan of money, whether secured or unsecured, is a "disposition of property" within s. 39, but that an agreement to repay a loan in full constitutes a fully adequate consideration.

Per *Ostler*, J., That such a loan is not a "disposition of property" under para. (*a*), (*c*), or (*f*) of s. 39; and that, if it were, the agreement to repay it in full would constitute fully adequate consideration.

Finch v. *Commissioner of Stamp Duties*, [1927] N.Z.L.R. 807, G.L.R. 586, on app. [1929] A.C. 427, N.Z.P.C.C. 600; *Inland Revenue Commissioners* v. *Duke of Westminster*, [1936] A.C. 1; *Attorney-General* v. *Earl of Sandwich*, [1922] 2 K.B. 500; and *Foakes* v. *Beer*, (1884) 9 App. Cas. 605, referred to.

Counsel: *Broad*, for the appellant; *Evans-Scott*, for the respondent.

Solicitors: *Crown Law Office*, Wellington, for the appellant; *Menteath, Ward, and Evans-Scott*, Wellington, for the respondent.

Case Annotation: *Finch* v. *Commissioner of Stamp Duties*, E. and E. Digest, Supp. Vol. 21, p. 3, para. 45sc; *Inland Revenue Commissioners* v. *Duke of Westminster*, *ibid.*, Supp. Vol. 28, No. 674ff; *Attorney-General* v. *Earl of Sandwich*, *ibid.*, Vol. 21, p. 17, para. 106; *Foakes* v. *Beer*, *ibid.*, Vol. 12, p. 457, para. 3701.

SUPREME COURT.
Wellington.
1940.
June 11.
Ostler, J.

In re **FELL (DECEASED).**

Trusts and Trustees—Realty—Application for Leave to Sell—Prohibition in Will against Sale—Sale in Beneficiaries' Interest—Jurisdiction—Powers of the Court—Statutes Amendment Act, 1936, s. 81.

Section 81 of the Statutes Amendment Act, 1936, gives the Court power to make an order under that section, where the conditions required by that section exist, notwithstanding an express prohibition in the will of the transactions ordered.

Counsel: *Tripe*, for the petitioner; *H. E. Evans*, for all the beneficiaries *sui juris*; *A. T. Young*, for all infant and unborn beneficiaries.

Solicitors: *Hadfield, Peacock, and Tripe*, Wellington, for the petitioner; *Bell, Gully, Mackenzie and Evans*, Wellington, for the beneficiaries *sui juris*; *Young, Courtney, Bennett, and Virtue*, Wellington, for the infant and unborn beneficiaries.

SUPREME COURT.
Auckland.
1940.
June 13, 20.
Blair, J.

STATE ADVANCES CORPORATION OF NEW ZEALAND v. LEYLAND O'BRIEN TIMBER COMPANY, LIMITED.

Land Transfer—Transfer—Mortgage—Indemnity—Transfer of Land subject to Mortgage—Indemnity implied in favour of "transferor"—Sale of such Land by Sheriff—Whether Sheriff or Mortgagor the "transferor"—Land Transfer Act, 1915, s. 88.

The covenant of indemnity by the transferee to the transferor implied by s. 88 of the Land Transfer Act, 1915, in a transfer of land subject to a mortgage, is an indemnity to the person liable under the mortgage.

In the case of a sale by the Sheriff of the Supreme Court of such land under s. 87 of the Wages Protection and Contractors' Liens Act, 1908, the covenant implied by s. 88 on the transfer by the Sheriff, is one in favour of the person liable on his personal covenant in the mortgage and not in favour of the Sheriff, who is a mere conduit-pipe for the real "transferor," the mortgagor; and the Sheriff, who is under no liability under the mortgage, is *functus officio* when he has signed the transfer.

Counsel: *C. E. H. Ball*, for the plaintiff; *Rogerson*, for the defendant.

Solicitors: *C. E. H. Ball*, Wellington, for the plaintiff; *Nicholson, Gribbin, Rogerson, and Nicholson*, Auckland, for the defendant.

SUPREME COURT.
Wellington.
1940.
May 31.
Ostler, J.

SIMMONDS v. DANNEVIRKE BOROUGH.

Public Works—Compensation—Notice that Claim not Admitted—Jurisdiction—Power of Court before or after Filing of Claim to allow further Time to give Notice of Non-admission of Claim—Public Works Act, 1928, s. 53.

Section 53 (*b*) of the Public Works Act, 1928, gives the Court power, either before or after the claim has been filed in accordance with s. 53 (*a*), to allow further time within which the respondent may give the notice referred to in the section that it does not admit the claimant's claim.

Counsel: *O'Shea*, in support; *Biss*, to oppose.

Solicitors: *Gawith, Biss, and Griffiths*, Wellington, for the claimant; *City Solicitor*, Wellington, for the respondents.

SUPREME COURT.
Auckland.
1940.
June 18, 27.
Blair, J.

MEULI v. NALDER.

Medical Practitioner—Endocrinologist—Unregistered Person practising any Branch of Medicine under "any description implying" that he is "specially qualified to practice . . . any branch of medicine"—Whether such a Description "Specially qualified"—Medical Practitioners Act, 1914, s. 23.

The words "endocrinologist, glands, nerves, mental disorders" on a name-plate are a "description" implying that the person named is "specially qualified to practice . . . a branch of medicine," within the meaning of those terms in s. 23 of the Medical Practitioners Act, 1914.

Jutson v. *Barrow*, (1935) 52 T.L.R. 49, and *Whitwell* v. *Shakesby*, (1932) 48 L.T. 489, applied.

Royal College of Veterinary Surgeons v. *Kennard*, [1914] 1 K.B. 92, and *Emslie* v. *Paterson*, (1897) 24 R. (Ct. of Sess.) 77, distinguished.

The words "specially qualified" refer to a qualification by diploma or degree or something in its nature external to the

person, and are not merely indicative of his own personal accomplishments or skill.

Bellerby v. *Heyworth*, [1910] A.C. 377, followed.

Counsel: *Bainbridge*, for the appellant; *G. S. R. Meredith*, for the respondent.

Solicitors: *Anderson, Sneddon and Bainbridge*, Auckland, for the appellant; *Crown Solicitor*, Auckland, for the respondent.

Case Annotation: Emslie v. *Paterson*, E. and E. Digest, Vol. 34, p. 562, para. 211e; *Bellerby* v. *Heyworth*, *ibid.*, p. 563, para. 217; *Royal College of Veterinary Surgeons* v. *Kennard*, *ibid.*, p. 566, para. 238; *Whitwell* v. *Shakesby*, *ibid.*, Supp. Vol. 34, No. 132a; *Jutson* v. *Barrow*, *ibid.* No. 132b.

COMPENSATION COURT
Napier.
1940.
April 4, 5.
O'Regan, J.

EDWARDS v. RICHARDSON AND COMPANY, LIMITED.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Pneumonia contracted as result of ordinary Risk in course of Employment—Whether "accident"—Workers' Compensation Act, 1922, s. 3.

Death of a worker from pneumonia contracted as the result of an ordinary risk in the course of his employment—*viz.*, prolonged and repeated exposure to cold in a freezing-chamber of a lighter carrying frozen meat to be loaded on a ship, aggravated by a severe wetting while tying up the lighter to the ship—is the result of an accident arising out of and in the course of his employment.

Glasgow Coal Co., Ltd. v. *Welsh*, [1916] 2 A.C. 1, 9 B.W.C.C. 371; *Walker* v. *Bairds and Dalmellington, Ltd.*, [1935] S.C. (H.L.) 28, 28 B.W.C.C. 213; *Public Trustee* v. *Waitaki County*, [1932] N.Z.L.R. 1496, G.L.R. 642; *Kelly* v. *Auchenlea Coal Co., Ltd.*, [1911] S.C. 864, 4 B.W.C.C. 417; and *McGuire* v. *Union Steam Ship Co. of New Zealand, Ltd.*, (1920) 27 C.L.R. 570, applied.

Counsel: *Nash*, for the plaintiff; *L. W. Willis*, for the defendant.

Solicitors: *C. W. Nash*, Napier, for the plaintiff; *Kennedy, Lusk, Morling, and Willis*, Napier, for the defendant.

Case Annotation: Glasgow Coal Co., Ltd. v. *Welsh*, E. and E. Digest, Vol. 34, p. 268, para. 2286; *Kelly* v. *Auchenlea Coal Co., Ltd.*, *ibid.*, p. 275, para. 2314*l*; *Walker* v. *Bairds and Dalmellington, Ltd.*, *ibid.*, Supp. Vol. 34, No. 2737c.

RESIDUAL INTEREST IN LIFE INSURANCE: PROTECTED POLICIES.

Method of Selection of Policies to be Protected.

By J. GLASGOW.

It appears, from the fact that inquiries on the subject have been received by the writer (who was engaged in the case) from practitioners in different parts of New Zealand, that the decision in *In re Coote, Coote* v. *Public Trustee*, [1939] N.Z.L.R. 457, has aroused considerable interest, and that it is not easy from the report in the *New Zealand Law Reports* to ascertain exactly the implications of the decision or to reconcile the headnote with the judgment. These difficulties are not due to any lack of lucidity in the judgment itself, but to the fact that certain figures and calculations which were before the Court are not set out fully either in the judgment or in the statement of facts in the report. As regards the headnote the writer must take the major part of the blame for this, because it was submitted to him for approval or amendment before publication.

It is not proposed to make any comment on that part of the judgment relating to the State Advances Corporation and the King's prerogative right to pre-eminent payment of debts beyond referring, in passing, to *Smith and Smith, Ltd.* v. *Smith, State Advances Corporation, and Others*, [1939] N.Z.L.R. 588, in which Fair, J., arrived at a similar conclusion before the judgment in *Coote's* case was reported.

The point to which attention is directed in this article is that concerning the method which the person entitled to protection can adopt in selecting the policies to be protected.

In *Coote's* case the point in dispute between the unsecured creditors, on the one hand, and the widow, on the other, was whether, in selecting policies to be protected, the widow was to be restricted to policies of a *face value* of £2,000, or whether she could select "residual interests" to the value of £2,000. The creditors contended that the widow must select policies of which the original face value without bonuses did not exceed £2,000 and that all she could get was what was left of those policies with their bonuses after any loans on the policies had been deducted. The widow contended that the limit of £2,000 was to be computed by adding up what was left of the policies after deducting loans; that is to say, she contended that she need only count the "equity" or "residual interest" in the policy until she reached the £2,000 limit. Now it is perfectly clear from the judgment that the widow's contention was upheld, but what is not so clear is the question, how is the amount of the residual interest to be arrived at?

There are three possible ways in which the matter could be viewed.

Method 1.—The whole loan on each policy could be deducted from the original face value of the policy and the balance treated as "residual interest" which the widow could go on selecting until she had reached the £2,000 limit, and in addition she would take all the bonuses.

Method 2.—The whole loan on each policy could be deducted from the original face value of the policy, and the balance treated as residual interest, and, in addition, the widow could take not all the bonuses but a proportion thereof bearing the same ratio to the total bonuses as the residual interest in the face value bears to the face value.

(Assuming that the whole loan may be deducted from the original face value of the policy, it would seem that method (2) is more likely to be correct than method (1) because s. 66 (3) refers to "an amount of insurance of £2,000 together with accrued or allotted profits *thereon*," and it would seem that "thereon" must refer to the "amount of insurance" selected—*i.e.*, the residual interest—and not to the face value of the policy.)

Method 3.—A proportion only of the loan could be deducted from the face value of the policy to arrive at the residual interest, the rest of the loan being deducted from the bonuses; these deductions to be proportionate to the amounts of the face value and bonuses respectively.

To illustrate these three methods by concrete example, suppose there is a policy for £1,000, with bonuses of £1,000, and a total loan of £900. Then by method (1) the widow gets £100 residual interest, £1,000 bonuses: total, £1,100. By method (2) she gets £100 residual interest, £100 bonuses: total, £200. By method (3) she gets, by deducting the loan proportionately—the bonuses and face value in this particular case being the same—£550 residual interest, £550 bonuses: total, £1,100.

Looking only at one policy at a time it would appear that methods (1) and (3) lead to the same result, but suppose there were twenty exactly similar policies each for £1,000 face value with £1,000 bonuses on each and a £900 loan on each—

Then by method (1) the widow would get

	£
Twenty residual interests of £100 ..	2,000
Plus twenty bonuses of £1,000	20,000
	£22,000

Whereas by method (3) she would get

	£
Three residual interests of £550 each ..	1,650
£350 out of one other residual interest ..	350
	2,000
Plus proportion of bonus on each of first three policies (£1,000 – £450) 3	1,650
Plus proportion of bonus on last policy selected—*i.e.*, $\frac{£350}{550}$ of £550	350
	£4,000

It will now be seen that if method (2) is adopted the widow would get

	£
Twenty residual interests of £100 each ..	2,000
Twenty proportionate parts of bonuses of £100 each	2,000
	£4,000

Now in fact the method propounded in *Coote's* case on behalf of the widow was method (3), but this does not appear in the judgment.

In an affidavit filed by one of the executors in Coote's estate, the selection made by the widow and rejected by the creditors was stated as follows:—

The executors contend that the widow and children are entitled to have protected against the creditors a total of £2,000 of residual interests in policies together with accrued or allotted profits thereon.

The following table shows the policies existing at the date of Mr. Cooto's death:—

No.	Amount.	Bonus.	Total.	Loan.	Net.
	£	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1	500	262 3 10	762 3 10		
2	750	324 11 1	1,074 11 1	1,364 10 11	1,549 17 5
3	750	327 13 5	1,077 13 5		
4	500	113 18 0	613 18 0	373 6 3	240 11 9
5	500	165 2 0	665 2 0	111 2 6	553 19 6
6	501	..	501 0 0	3 2 8	497 17 4

In order to ascertain how much of the residual interests in the policies represents the residue of the policy itself, and how much represents residue of accrued profits, it is necessary to make an apportionment by deducting from the policy-moneys and from bonuses respectively a proportion of the debt on each policy. The executor's calculation of this is as follows:—

Policies.	Net Values of Policies.	Proportion of Residue of Policy.	Proportion of Bonus.
	£ s. d.	£ s. d.	£ s. d.
1, 2, 3	1,549 17 5	1,062 12 0	487 5 5
4	240 11 9	195 19 0	44 12 9
5	553 19 6	416 11 10	137 7 8
6	497 17 4	497 17 4	..
		£2,173 0 2	£669 5 10

As the total of the residual interest in the six policies amounts to more than £2,000, an election under s. 66 (4) becomes necessary, and Mrs. Coote elects to take policies Nos. 1, 2, 3, 4, and 5, and the sum of £324 17s. 2d. out of policy No. 6 together with the residue of accrued profits on policies 1 to 5 inclusive, making a total sum of £2,669 5s. 10d.

The reason that policies 1, 2 and 3 are bracketed is that they were all assigned to a bank to secure an overdraft of £1,364 10s. 11d.

Now it so happens that in this particular case if the policies selected by the widow—namely, 1, 2, 3, 4, and 5, and £324 17s. 2d. out of No. 6—are taken and worked out by deducting the whole loan from the face value of the policy and giving the widow the whole of the bonuses—method (1)—exactly the same total is arrived at as by method (3)—namely, £2,669 5s. 10d. It is, however, obvious that this is not the method that was in fact intended by Reed, J., because worked according to method (1) the widow would not have got £2,000 of residual interests, but only £1,438 10s., and so could have selected the whole of No. 6 instead of only £324 17s. 2d.

It is equally obvious that method (2) was not adopted, because whatever total sum might have been obtained that way it must certainly have come to far less than £2,669 5s. 10d., and is also open to the objection that it would have absorbed only £1,438 10s. of the allowable limit of £2,000.

It seems, therefore, quite certain that the judgment proceeded upon the assumption that the proper method is to deduct the loan proportionately from the face value and the bonuses. It seems equally certain that no Court would adopt a method which leads to such an absurd result as method (1), and as it does not seem that method (2) could ever give any better results than method (3), and as the protected person is entitled to the most favourable selection possible, it is submitted that the law is that method (3) is the proper one to adopt.

It is also clear that para. 4 of the headnote is not justified by the contents of the judgment. *

The case raised a further question, which only arose if the decision had been that policies to a total face value of £2,000 and not residual interest to a total of £2,000 had to be selected. Reed, J., dealt with this alternative in case the case were taken further, but as that part of the judgment does not require any

* Reference to the *Corrigenda* in the 1939 Volume of the *Reports* shows that users of the volume are directed to delete this paragraph from the headnote—Ed. N.Z.L.J.

explanation from facts that do not appear in the report, it is not proposed to comment thereon.

The case was heard at the end of November, 1938, and if any reader has waded thus far through this article he will not be surprised to learn that his Honour when reserving judgment, remarked " Well, gentlemen, I am afraid you have spoilt my Christmas holiday for me."

LANDLORD AND TENANT.

Liability for Nuisance.

(*Concluded from p. 157*).

TRESPASSERS.

There may yet be a third class of visitor, namely, a trespasser. But even a trespasser is not " fair game." " As respects trespassers," the occupier: " is only bound not to inflict intentional harm on them or to act with reckless disregard of their presence " see *Bird* v. *Holbrook*, (1828) 4 Bing. 628, 130 E.R. 911; *Hounsell* v. *Smyth*, (1860) 7 C.B. (N.S.) 731, 141 E.R. 1003; *Batchelor* v. *Fortescue*, (1883) 11 Q.B.D. 474; *Excelsior Wire Rope Co., Ltd.* v. *Callan*, [1930] A.C. 404; *Mourton* v. *Poulter*, [1930] 2 K.B. 183 (C.A.); *Liddle* v. *North Riding of Yorkshire County Council*, [1934] 2 K.B. 101 (C.A.); *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ltd.*, [1936] A.C. 65, 70; *Lowery* v. *Walker*, [1911] A.C. 10.

RYLANDS *v.* FLETCHER.

In some of the cases relating to nuisance arising from ruinous premises the well-known decision of *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330, has been cited. Although it has now been expressly laid down in the *Wringe* v. *Cohen* case (*supra*) that knowledge is not a condition precedent to liability for nuisance, it is submitted that cases falling within the doctrine of *Rylands* v. *Fletcher* are distinguishable from cases of nuisance as follows:

(1) *Rylands* v. *Fletcher* has no application to the normal use of land, *e.g.*, by the erection of dwelling-houses, factories, or other usual buildings: see *per* Scrutton, L.J., in *St. Anne's Well Brewery Co.* v. *Roberts*, (1928) 140 L.T. 1, 6; *per* Lord Blackburn in *Wilson* v. *Waddell*, (1876) 2 App. Cas. 95, 99; and *per* Lord Cairns in *Rylands* v. *Fletcher* (*supra*) at p. 338.

(2) In cases of nuisance proof that the defect giving rise to the nuisance was a latent one is a sufficient defence. But in cases where the *Rylands* v. *Fletcher* rule applies it matters not that the defect in the " dangerous thing " was latent. If a man causes to be constructed on his land a large reservoir, which, owing to some undiscovered defect, collapses or bursts, the fact that the defect was latent is no defence to an action by an adjoining owner whose buildings are injured.

It has been said that where the rule in *Rylands* v. *Fletcher* applies there is " absolute " liability; but this is not strictly true. It is true that the defendant may be liable although he has been as careful as it was possible to be. In that sense the liability is absolute; but, on the other hand:

(1) If the damage is caused by *vis major* or Act of God, such as an extraordinary rainfall: *Nichols* v. *Marsland*, (1875) L.R. 10 Exch. 255, (1876) 2 Ex. D. 1, 5, the owner of the dangerous thing is not liable.

(2) If the damage is caused by the act of a third party the owner is also free from liability: *Box* v. *Jubb*, (1879) 4 Ex. D. 76.

In these respects, therefore, liability in respect of nuisance and dangerous things is on a similar footing.

CONCLUSION.

In conclusion it is submitted that, as a result of *Wringe* v. *Cohen* (*supra*), as read with *Sedleigh-Denfield* v. *St. Joseph's Society* (*supra*), certain *dicta* in at least the following cases must be treated as either overruled or modified: *Pritchard* v. *Peto*, [1917] 2 K.B. 173; *Barker* v. *Herbert*, [1911] 2 K.B. 633; *Payne* v. *Rogers*, (1794) 2 Hy. Bl. 350 (Headnote), 126 E.R. 590; *Palmer* v. *Bateman*, [1908] 2 I.R. 393; *St. Anne's Well Brewery Co.* v. *Roberts*, (1928) 140 L.T. 1; *Wilchick* v. *Marks and Silverstone*, [1934] 2 K.B. 56; *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K.B. 551; *Wilkins* v. *Leighton*, [1932] 2 Ch. 106; *Noble* v. *Harrison*, [1926] 2 K.B. 332.

The *dicta* referred to are those which suggest:

(*a*) that knowledge is a condition precedent to liability for nuisance (*sed quære* as to nuisances caused by natural objects, such as trees, which do not normally require periodical inspection in the same way as buildings or things suspended from buildings: see *Noble* v. *Harrison*, *supra*).

(*b*) That the tenant is discharged from liability to third parties in respect of nuisance arising from the non-repair of the property where his landlord has agreed to keep the property in repair; or

(c) that where a third party has wrongfully caused the nuisance the occupier must remedy it within a reasonable time.

According to the Court of Appeal none of these propositions can be supported. Admittedly, *want* of knowledge of a latent defect is material; but that is tantamount to saying that the defect must be latent not only in the sense that it is not apparent, but also in the sense that it is not known to the occupier or owner (as the case may be). And it is submitted that (apart from liability for dangerous things within the *Rylands* v. *Fletcher* rule) an occupier (or an owner who has undertaken to keep the property in repair) is entitled to a reasonable period within which to make good a latent defect, after it comes to his knowledge.

A consideration of the cases may leave the impression that it may sometimes be difficult to determine whether proceedings should be grounded upon negligence or nuisance, or both. That impression is correct; but in strictness private nuisance is confined to "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another": *3 Blackstone's Commentaries*, 216. The term hereditaments here includes corporeal and incorporeal hereditaments, *ibid.*, p. 218; and see *per curiam* in *Cunard* v. *Antifyre, Ltd.* (*supra*). But if the claim is in respect of physical injury to the person or to personal property, then the action will be for negligence, or will rest upon the doctrine of (so-called) absolute liability in respect of dangerous things, as laid down in *Rylands* v. *Fletcher* (*supra*).

It will not have escaped the reader's notice that, as the law now stands, the liability of an occupier of ruinous premises for damage caused by those premises to adjoining property is on a higher plane than his liability for damage similarly caused to persons lawfully within such adjoining property. Thus, for some purposes, the law would appear to value rights of property higher than life.

FINANCE EMERGENCY REGULATIONS, 1940 (No. 2).

Validity of Securities Unlawfully Issued.

In the last issue of the JOURNAL, *ante*, p. 159, the opinion was expressed that a security issued in contravention of Reg. 12 (1) of the above-named regulations (Serial No. 1940/118) is void, notwithstanding the words of Reg. 12 (4).

Regulation 12 (1) says:

> (1) Except with the consent of the Minister *it shall not be lawful* for any person, other than a local authority, to make an issue of capital in New Zealand, or to make in New Zealand any public offer of securities for sale.

On the other hand, Reg. 12 (4) provides as follows:

> (4) A security *shall not be invalid* by reason that the consent of the Minister has not been given thereto, but nothing in this clause shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent.*

Similar language is used in the corresponding English regulations, the Defence (Finance) Regulations, 1939, Reg. 6 (1) and (4) respectively.

In this apparent conflict, resort should be made, *in New Zealand*, to the judgment of a Full Court (Stout, C.J., Sim, Reed, Adams, and Ostler, JJ.) in *Official Assignee of Bowen* v. *Watt and Lowry*, [1925] N.Z.L.R. 896, where a similar statutory conflict arose.

Section 72 (1) of the Native Land Amendment Act, 1913, provided:

> (1) *It shall not be lawful* for any person to acquire any Native freehold land as the beneficial owner, lessee, or sublessee thereof (whether at law or in equity, and whether solely or jointly or in common with any other person) if the land so acquired by him, together with all other land (whether Native, European, or Crown land) owned, held, or occupied by him under any tenure of more than one year and six months' duration (whether at law or in equity, and whether severally or jointly or in common with any other person), would exceed a total area of five thousand acres, calculated in manner provided by section ninety-seven of the Law Act, 1908, and sections one hundred and ninety-four to one hundred and ninety-eight (inclusive) of the principal Act.

This section was enacted in substitution, with slight amendment, for s. 193 of the Native Land Act, 1909, and it now appears, with some amendment, as s. 234 of the Native Land Act, 1931.

But s. 205 of the Native Land Act, 1909, which is re-enacted as s. 254 of the Native Land Act, 1931, said:

> 205. *No alienation*, acquisition, or disposition of Native land, or of any interest therein, *shall be invalid* because of any breach of the foregoing provisions of this Part of this Act, but every person who wilfully commits, aids, or abets any breach of those provisions shall be guilty of an indictable offence, punishable in any case in which the defendant is a body corporate by a fine not exceeding one thousand pounds and in any other case by a fine not exceeding five hundred pounds, or by imprisonment with or without hard labour for a term not exceeding two years.

There is a striking similarity between the paragraphs of Reg. 12 of the Finance Emergency Regulations, 1940 (No. 2), and the quoted sections of the Native Land legislation.

In *Official Assignee of Bowen* v. *Watt and Lowry*, the judgments of Adams, J., and Ostler, J., were concurred in by the other members of the Court; and it was held that the combined effect of the sections quoted was to render liable to indictment a person wilfully committing a breach of s. 205 of the Native Land Act, 1909: but the validity of the alienation under which the Native Land was so acquired was not affected by a breach of s. 72 (1) of the Native Land Amendment Act, 1913.

The matter was dealt with fully by Mr. Justice Ostler in his judgment, at p. 904, where he says:

> If s. 72 had stood alone, then I think that there could be little doubt that the contract would be void on the ground of its illegality, for the general rule is that where a statute has expressly declared the making of a contract illegal it is contrary to public policy that it should nevertheless be enforceable, and the Courts will hold that it is void: see *Bisgood* v. *Henderson's Transvaal Estates*, ([1908] 1 Ch. 743). "The Court is bound, in the administration of the law, to consider every act to be unlawful which the law has prohibited to be done": *Cannam* v. *Bryce* (3 B. & Ald. 183); *Bensley* v. *Bignold* (5 B. & Ald. 341). *A fortiori* is this the case where, as in this instance, the statute has provided a punishment for the very act of making the contract: see *Leake on Contracts*, 6th Ed. 517, and cases there cited. See also the judgment of our Court of Appeal in *J. B. McEwan and Co.* v. *Ashwin*, ([1916] N.Z.L.R. 1028). The only possible exception to this rule is where the penalty is imposed merely for the purpose of protecting the revenue: see *Smith* v. *Mawhood* (14 M. & W. 452).

But, as His Honour went on to point out, the statute in this case had provided that, though the making of such a contract as this was unlawful and punishable by heavy fine and the liability of forfeiture of the land to the Crown, at the same time the contract itself was valid. His Honour then quoted the words of s. 205 of the Native Land Act, 1909 (*cit. sup.*), and said that the word "alienation" was defined in the Act so as to include a contract of sale. So that here

* See the observations of Cooper, J., in *Meyer* v. *Milburn and Co.*, [1918] N.Z.L.R. 714, 717, on s. 345 of the Land Act, 1908, which provided that no disposition of land "shall be invalid" merely because such dispositions were contrary to the provisions of the statute. This, the learned Judge said, "is a provision which I confess I do not understand . . . it is very difficult to give any reasonable meaning to it."

there was the very unusual case of the Legislature explicitly providing that the making of a contract should be illegal and punishable, but at the same time providing equally explicitly that that contract if and when made should be valid. As the learned Judge said: "It is a contract which is illegal but not void."

Later on, His Honour, at p. 906, said:

> The Legislature has in plain terms provided that every person who enters into such a contract does so at his peril. He renders himself liable to heavy penalties if he does so wilfully, but nevertheless, whether he enters into the contract wilfully or not, his contract is not invalid. It is not common for the Legislature to make such provision, but counsel for plaintiff cited one somewhat similar case, *Lewis* v. *Bright* (4 E. & B. 917; 119 E.R. 341). It is true that in that case the Legislature, while declaring the contract illegal, declared at the same time that it should be not only valid but enforceable. In my opinion, however, even if such a contract had merely been declared to be valid, the case must have been decided the same way. If a contract is valid it is enforceable, subject to all the defences which may be pleaded to a valid contract. It may be voidable on the ground that it was induced by fraud, or, being executory, by innocent misrepresentation; or it may be one which can be enforced only by an action for damages for its breach, and not by specific performance. But if the contract is valid—as this contract, although illegal, has been expressly declared to be—then, for the reasons stated, the claim of the plaintiff snaps at the first link; for, as has been pointed out, the whole claim is based on the invalidity of the contract in its inception.

It follows from the judgment in *Watt and Lowry's* case that the commentator, on p. 159, *ante*, while being correct in his view as based on English authority, had overlooked that case when he expressed the opinion that a security issued in contravention of Reg. 12 (1) is void. To paraphrase the words of Mr. Justice Ostler in a judgment with which all five members of the Full Court agreed:

A security issued in contravention of Reg. 12 (1) of the Finance Emergency Regulations, 1940 (No. 2) is illegal and punishable, but at the same time that issue, if and when made without the consent of the Minister of Finance, is not void.

LONDON LETTER.

By Air Mail. Somewhere in England,
June, 23, 1940.

My dear EnZ-ers,—

It seems that Appeals from the Supreme Court of Canada take some time to come on for hearing in Downing Street. It was on March 1, 1937, that the highest court in the Dominion gave its decision in *MacMillan* v. *Brownlee*, which as usual is admirably reported in the Dominion Law Reports, [1937] 2 D.L.R. 273. That Court decided that an Act of the Parliament of Alberta which dealt with the subject of actions for seduction provides two separate courses of action, one to the seduced female and the other to her parents; and that the last is maintenable without proof of special damage or loss of service. Where, therefore, a man (in this case a married man) stole away and lived for several years with a young woman hitherto chaste, the Court upheld a verdict awarding her heavy damages, and also substantial damages to her father. Against this judgment, which had reversed a decision of the Supreme Court of Alberta, the appellant appealed in vain. The Judicial Committee held, without hearing the respondent (who, indeed, did not appear), that the Parliament of Alberta had given her a right of action quite apart from any question of loss of service. When the Court of Common Pleas in *Grinnell* v. *Wells*, (1844) 7 Man. & G. 1033, settled that an action for seduction cannot be maintained without loss of service, the reporter, Sergeant Manning, added a caustic note on the state of the law. The Parliament of Alberta, by its modern legislation have now, as Lord Thankerton said, closed the gap.

Wireless in Cars.—A new Order (1940, No. 828) has amended (*inter alia*) Reg. 8 (3) of the Defence (General) Regulations, which deals with wireless. Now, unless he is exempted by an order from the Postmaster-General, no person shall use or have in his possession or under his control any wireless receiving apparatus installed in any road vehicle. This does not apply to any servant of His Majesty or a constable acting in the course of his duty. The Order goes on to answer the obvious query as to the meaning of "installed" by providing that the apparatus shall, notwithstanding that it is not fixed in position, be deemed to be installed in the vehicle if it is in the vehicle in circumstances in which it can be used or readily adapted for use. The Order is necessary, not so much to prevent the reception of messages, as to forestall the conversion of receiving into transmission sets—not a difficult matter if a short radius of transmission is required. Private persons who have sets installed to beguile the tedium of long journeys will therefore have to forgo them. But the Order works real hardship on commercial firms who deliver sets by road, whether for sale or after repair. Sets which work off the electric main can be carried, because they cannot be adapted for use in a vehicle. But a set which is self-contained, whether "portable" or not, cannot be carried merely because the battery, valves or other essential part have been removed by the person in control, and are carried with the set. Apart from operations by hostile aliens, that person could readily adapt the set for use and pursue such peripatetic Fifth Column activities as he had a mind to. It seems that any one wishing to carry a set by a road vehicle must take part of it one day and part the next, or at any rate by such different vehicles or means as will prevent circumstances arising in which the set may be readily adapted for use. It is some comfort to know that those who go into the country for peace will no longer find even the remote parts of this isle full of anything but sweet sounds—or it would be a comfort if there were leisure to appreciate it.

Pedestrian Crossings.—We have now the judgments of the Court of Appeal in the pedestrian crossing case: *Wilkinson* v. *Chetham-Strode*, [1940] 2 All E.R. 643. The decision did not turn on the fact that the fatal crossing was controlled by traffic lights, and, therefore it would not necessarily be the same in a case where there were no lights of that kind. Undoubtedly there were lights at the crossing of Victoria Street and the minor streets which opened into it; but their presence had little effect on the matter. In the Court below, Asquith, J., was con-

fronted with conflicting evidence about them, but finally came to the conclusion that he could not trust the plaintiff's story that the green light was in his favour at least until he was halfway over the crossing and had reached the refuge. The learned Judge entirely acquitted him of deliberate attempt to mislead the Court. The true basis of the judgments, both below and above, is that the plaintiff was careless in moving off the island and that the island was a spot where, in law, he *could* be careless because it was not part of the crossing. Meanwhile, as leave was given to appeal to the House of Lords in this case, it is proper to refrain from any criticism.

"Strength Through Joy."—A communication from Rotterdam, which the reader can believe or not as he likes, says that the German Minister of the Interior has made a decree that "German boys and girls under eighteen will not be allowed out after dark without their parents." Similarly they will not be allowed to frequent licensed premises, dance halls, cinemas and theatres after 9 p.m. unaccompanied by adults. Spirits and tobacco are also not to be sold to young people under eighteen. These regulations have presumably been issued in consequence of the great increase in juvenile crime which has taken place during the war, and of which there is abundant evidence in the newspapers.

Things must be getting complicated for father in the Fatherland. The under eighteens are the more likely members of the community to be ardent Nazis, ready to outdo Brutus and denounce, ideologically, erring parents. One pictures the boy or girl delinquent of seventeen dragging a reluctant parent to the theatre or the drink shop under a threat of denunciation to the party leaders for anti-Hitler thoughts. The weariness of Victorian chaperons becomes insignificant beside that of a tired Hausvater or Hausmutter doing the night life of Berlin with active and naughty offspring. Perhaps it has to be both parents, one to hold each hand of cocktail Carl or light-toed Lottchen. Later, we learn that there will be "strength through joy" cruises for victorious Germans this summer to Southern England. The under-eighteens will have to be kept under the strict surveillance of their elders, lest they wet their feet in an orgy of paddling, or build sand castles of other than the Berchtesgaden pattern.

Appeals from Canada.—Some time in the future we shall have a great decision from the Judicial Committee of the Privy Council on appeals from Canada to itself. As a result of the Statute of Westminster appeals in criminal cases have already gone. The reasons which founded the judgment in *Nadan* v. *The King*, [1926] A.C. 482 were cut away when that statute repealed the Colonial Laws Validity Act, 1865, so far as Dominions were concerned, and permitted Dominions to make laws with extra-territorial operation. This Canada did as to criminal appeals to the Committee. All this was made clear in the later criminal appeal of *British Coal Corporated* v. *The King*, [1935] 51 T.L.R. 508. The question whether a Dominion statute can abolish *all* appeals to the Judicial Committee has now come upon the carpet. A Bill to effect that abolition has been introduced at Ottawa and has got a first reading; but the Governor-General asked the Supreme Court of Canada to advise him whether that Bill is *intra vires* the Canadian Parliament. The Supreme Court have said that it is *intra vires*, but not without strong dissenting judgments from some of the Judges. They said that it amounted to a change of the Constitution. The objectors to the Bill who appeared before the Supreme Court are four Provinces who rely on a provision in s. 92 of the British North America Act, 1867. This gives to them the exclusive right to make laws about the administration of justice in these provinces, including the constitution of Provincial Courts and all procedure in civil matters in them. Those who favour the Bill rely on the authority of the Dominion Parliament, under s. 91 of the Fundamental Act, to make laws for the peace, order and good government of Canada and, on the express power given by s. 101, to provide for the constitution and organization of a general Court of Appeal for Canada. It will be an interesting point to decide which provision should prevail. Professor Kennedy, of Toronto, in his fine book on Canada which reappeared at Oxford in 1938, reminds us that Edward Blake tried in the last century to abolish all appeals. No Englishman wants to retain the right if its existence is really unpopular in Canada.

Muzzling the Loudspeaker.—Lest the truth should prevail in Germany, German ears are forbidden to listen to foreign broadcasts. Very heavy sentences of imprisonment are reported to have been inflicted upon persons who have committed this offence. But it is apparently being found difficult to deter people from listening-in to foreign stations.

Dictatorships have certain inherent advantages. They can plan aggression in silence and strike unannounced. They can eliminate the friction of criticism, and put opponents at home out of action. But these advantages can be bought at too high a price. A few detected lies make the intelligent suspicious of all official news, and when the time comes that things go badly and truth gets out the danger of collapse is in direct proportion to the preceding deceit.

Democracies have a lot of loose ends in their harness and are painfully slow in getting under way, but, contrary to the teaching of the totalitarians, their nerves are under better control than those of the tame followers of "a representative man" who keeps them in the dark as to events and plays on their emotions for his own purposes. These become overstrung and when fate plays a discord or two on the all too facile instrument it is apt to get suddenly and completely out of tune. We saw it happen in 1918—it will infallibly happen again in 194 (— ?). Meanwhile, *we* can twiddle our knobs to any wave-length *we* choose, even listening to Hitler himself if opportunity arises, though he is too strident to be easy to follow, and it is sometimes difficult to discover whether his speech is being marred by atmospherics or hysterics.

Collectors are Human.—It is constantly Assumed that Collectors have Hard Hearts, and Evidence of such Cardiac Callosity is not Entirely Absent. But. A Territorial had a Final Demand from a Collector of Taxes. Being a Man of some Humour the Territorial when Explaining his Delay, remarked that We Territorials are in a Sad Way, and that the Gift of a Dart Board would be kinder than a Tax Demand. Whereupon the Collector and his Staff made a Hasty Collection of their private Moneys and Rushed out to Purchase and Despatch to the Territorial a Magnificent Dart Board. Which shows that Collectors of Income Tax are really Pleasant Fellows. Sometimes. Let us also Remember that They Too have to pay Income Tax. Further, let us all be Cheerful and Kind to the Fighting Services whenever we get Half a Chance.

Yours as ever,
APTERYX.

PRACTICE NOTES.

The New Third-party Rules.

By W. J. Sim, K.C.

By new RR. 95 to 99Q inclusive, a new code has been enacted, which extends the practice with regard to third parties, and co-defendants. It represents great procedural progress in simplifying and producing finality when three or more different parties are concerned.

The former rules were RR. 95 to 99 inclusive, and were the reproduction of English O. XVI of 1875, rr. 17 and 18. The wording of r. 17 gave rise to great practical difficulties, as to which see the observations of Pollock, B., in *Pontifex* v. *Foord*, (1884) 12 Q.B.D. 152; but the English practice was affected by r. 48 of O. XVI passed in 1883, which confined the practice to cases where a defendant claimed to be entitled to indemnity or contribution over against any person not a party to the action. The New Zealand R. 95 did not have the English limitation of 1883, but covered cases where a defendant claimed to be entitled to contribution, indemnity, or other relief, or where from any cause it appeared to the Court that a question in the action should be determined not only as between the plaintiff and defendant but as between the plaintiff, the defendant, and any other person, or between any or either of them.

In England the rules were widely extended in 1929 by O. XVIA, which is practically repeated in New Zealand by the present new RR. 95 to 99Q. The New Zealand provision is wider in that it carried forward the following provision, not found in England, R. 95 (*c*), that a notice may issue when it appears that *any* question or issue in the action should properly be determined not only as between the plaintiff and the defendant, but also as between the plaintiff, the defendant and the third party, or as between any or either of them.

The purpose of these rules is stated by Scrutton, L.J., in *Barclays Bank* v. *Tom*, [1923] 1 K.B. 221, 224, to be as follows:—

> The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions.

To this may be added the observation of Lord Esher, M.R., in *Baxter* v. *France* (*No. 2*), [1895] 1 Q.B. 591, 593, that the procedure is directed to prevent a multiplicity of actions and to enable the Court to settle disputes between all the parties to them in one action.

Without elaboration, the third party procedure now applies when as against a third party a defendant claims:—

(*a*) Contribution or indemnity.

(*b*) Any relief or remedy connected with the subject-matter of the action.

(*c*) To have any question in the action tried also as against the third party.

Having regard to the Rule, it is interesting to note the range of occasions on which a right to indemnity may arise. The general principles were stated by the Privy Council in *Eastern Shipping Co., Ltd.* v. *Quah Beng Kee*, [1924] A.C. 177, 182, as follows:—

> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring* v. *Ward* (7 Ves. 332, 336); a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation" of the vendor. These considerations were all dealt with by the Lords Justices in *Birmingham and District Land Co.* v. *London and North Western Railway Co.*, (34 Ch.D. 261).

Leave to serve the third party notice may be applied for *ex parte* unless the Court directs notice to be given to the plaintiff, and forms of notice are provided in the first schedule. The third party is entitled to service of a sealed copy of the third party notice, together with copies of the writ of summons and statement of claim. The plaintiff has also to be served with a sealed copy of the notice. As from the time of service of the third party notice, the third party is deemed a party to the action "with the same rights in respect of his defence against any claim made against him *as if he had been made a defendant* to an action instituted against him by the defendant." Provision is made for the third party being bound in the event of his default and judgment against him (RR. 99D to 99F); but in the event of a defence being filed by the third party then the plaintiff, the defendant and the third party and any other party are each entitled to apply to the Court for directions as to the mode of having the matters put in issue in the third party notice determined, and upon such application the Court has the widest powers as to the disposal of matters in issue (R. 98I). The important change in the practice appears, however, in R. 99J whereby the Court is empowered at or after trial to

(*a*) Order such judgment as the nature of the case may require for or against the defendant giving the notice against or for the third party.

(*b*) Grant to the defendant or to the third party any relief or remedy which might properly have been granted, if the third party had been made a defendant to an action duly instituted against him by the defendant.

The object of the previous New Zealand rule was not to enable a defendant to obtain any actual present relief against the third person, but only to secure a binding decision with a view to future relief—*Balting* v. *Sharp, (Adams, Third Party)*, (1909) 11 G.L.R. 703—although as between co-defendants there was ground for suggesting that in appropriate cases, the whole matter could be worked out in the same action—*Butler* v. *Butler*, (1880) 14 Ch.D. 329. The new rule is clear as to the Court's powers to work out all questions between the defendant and third parties, and since it was introduced in England in 1929 (O. XVIA, r. 9) seems not to have raised any difficulties.

Incidental matters are that a third party may bring in a fourth party; R. 99L. The third party may set up a counterclaim against the defendant who brings him in: *Barclay's Bank* v. *Tom*, [1923] 1 K.B. 221, and the view is expressed (*1940 Yearly Practice*, 268) that he could probably now counter-claim against the plaintiff. It has been a long established practice in England to permit discovery and interrogatories against the third party or by the third party against the defendant: *Bates* v. *Burchell*, [1884] W.N. 108; and where the order for directions has made them opposite parties by the plaintiff against the third party: *Eden* v. *Weardale Iron and Coal Co.*, (1887) 34 Ch.D. 223; *Mac Allister* v. *Rochester* (*Bishop*), (1880) 5 C.P.D. 194, or the third party against the plaintiff: *Eden* v. *Weardale Iron and Coal Co.*, (1887) 35 Ch.D. 287. By R. 99K the Court is given a wide discretion as to the costs of all parties.

Procedure for the trial of rights between co-defendants is provided by almost identical provisions to those governing defendants and third parties. The defendant may, however, serve the notice on the co-defendant *without leave*, but nothing in the procedure as between defendants is to prejudice the rights of the plaintiff against any defendant.

It appears that the question of whether the case is one to which third party procedure is applicable should be raised in the application for directions and not by an application to set aside service of the notice: *Baxter* v. *France*, [1895] 1 Q.B. 455. Where the question between co-defendants is not proper to be tried in the action, directions will be refused: *Baxter* v. *France* (*No. 2*), [1895] 1 Q.B. 591.

THE MAGISTRATES' COURTS RULES.

The New Amendments.

Important additions to the rules of the Magistrates' Court have been made by the Magistrates' Courts Amendment Rules, 1940 (Serial Number 1940/142), which come into force on August 1, 1940. The new rules go beyond the powers conferred on the Governor-General by s. 3 of the Magistrates' Courts Act, 1928; but, as they have been made pursuant to the Emergency Regulations Act, 1939, as well, no question as to their validity is likely to arise.

They deal with the plaint and minute book to be kept by Clerks of Court, originating and interlocutory applications, and interpleader proceedings other than under an execution. It is proposed to discuss, in this article, the provisions relating to originating and interlocutory applications, and, in a subsequent article, those relating to interpleader proceedings.

The draftsman is to be congratulated upon producing such a clear and precisley-worded set of rules to assist Magistrates and legal practitioners when dealing with applications under many different statutes.

Originating and Interlocutory Applications.

(*a*) *General Explanation of New Rule.*

The principal rules are amended by adding a new rule containing thirty-seven paragraphs and designated "Rule 44A." The object of R. 44A is to set out a code of practice and procedure in every originating or interlocutory application to a Magistrates' Court, or to a Magistrate, or to Justices "under any Act, rule, or regulation . . . in so far as no other form of procedure is prescribed."

The Legislature has conferred upon the Magistrates' Court, and upon Magistrates, jurisdiction to hear and determine certain matters. In some cases where a special jurisdiction is conferred by statute, it is expressly enacted that for the purpose of exercising such jurisdiction, the Court shall have all the powers vested in it in its ordinary civil jurisdiction, and that the procedure shall be in accordance with its ordinary practice—*e.g.*, ss. 22, 23 of the Land and Income Tax Act, 1923. More frequently, however, the Legislature has conferred on Magistrates (as distinct from the Magistrates' Court) power to hear and determine certain matters, but has not prescribed any form of procedure, nor given power to summon witnesses, take evidence on oath or award costs. An application to fix the fair rent of a dwellinghouse is one example. A Magistrate has, first of all, to determine whether the tenement is a dwellinghouse within the meaning of the Fair Rents Act, 1936; then he has to consider all the relevant circumstances, including the value of the premises, and the financial position or ability of the parties. This often involves difficult questions of fact. Yet, until the new rule comes into force, the Magistrate has to decide the facts in issue on the unsworn statements of the parties. An application for a certificate of fitness under s. 85 (2) of the Licensing Act, 1908, is another example. In *R.* v. *Aitken*, (1913) 32 N.Z.L.R. 1185, the Court of Appeal set aside a conviction for perjury arising out of the pensioner's false evidence in support of his application for a certificate, on the ground that the Magistrate had no power to hear evidence on oath in order to decide whether the applicant was a fit and proper person to hold a publican's license.

Under the new rule, all statutory applications to a Magistrate for which no procedure has been prescribed, become originating applications and subject to the provisions of the rule. This is an important alteration, and remedies an unsatisfactory position.

(*b*) *Form of Application, Filing, and Service.*

The procedure for making an application is set out in paras. 5 to 12 of R. 44A, and appropriate forms (Nos. 200 and 201) are prescribed for *ex parte* applications and applications on notice respectively. Every application must set out the grounds on which it is made, but the Magistrate may make an order on any grounds appearing from the evidence (*para. 16*).

An interlocutory application must be filed in the Court in which the action to which it relates was filed (para. 8). An *ex parte* originating application is to be filed in the Court nearest to the place of residence or business of the person applying, or to the place where the subject-matter of the application is or arose (para. 9). The place of filing an originating application of which notice must be given to another party, is determined as if the proceeding were an action and the other party was the defendant to the action (para. 10).

An *ex parte* application must be filed six hours before the time appointed for hearing, unless otherwise authorized by the Magistrate or Clerk of Court (para. 11); other applications must be filed and served (unless the Magistrate otherwise permits) three days before the time appointed for hearing, if the place of hearing is nearest to the place of residence of all the parties, but seven days in any other case (paras. 12 and 13).

The provisions as to service are substantially the same as those contained in the Act and the principal rules (paras. 14 and 15).

(*c*) *Evidence.*

Evidence may be given by affidavit or *viva voce* on oath (paras. 17 and 21); any deponent who has made an affidavit may be called upon to attend for cross-examination (para. 23); witnesses may be summoned (para. 21) and those resident or about to go more than 20 miles from the Court of hearing may be examined on commission in the same way as in an action (para. 22).

The power to take evidence on commission will be helpful in proceedings under the Courts Emergency Powers Regulations, 1939; also under the Imprisonment for Debt Limitation Act, 1908, where the debtor is able to allege as a reasonable excuse for his non-attendance, that he has moved to another town after being served with the summons, and is unable to afford the expense of travelling to the Court of hearing.

(*d*) *Costs.*

It is provided by paras. 32–33, as follows, that:

> 32. Unless otherwise provided in any Act, regulation, or rule, any scale of fees payable or allowable to solicitors, witnesses, or interpreters for the time being in force in respect of proceedings under the Act shall, as far as may be, apply to any proceedings before a Magistrates' Court, or a Magistrate under this rule, and the Magistrate may award or allow costs accordingly.
>
> 33. The costs of an application shall be in the discretion of the Magistrate. If in disposing of an application no order is made as to costs, each party shall pay his own costs, and no subsequent application shall be made for them.

These provisions remove an anomaly which has been commented upon from time to time; namely, that neither the Magistrates' Court nor a Magistrate has power to award costs in any proceedings within its or his jurisdiction unless the proceedings arise out of matter within or deemed to be within the ordinary jurisdiction of the Court, and the necessary provision has been made in the gazetted scale of costs, or unless the statute, or regulation under which the proceedings have been taken specifically authorized the Court or Magistrate to award costs.

(*To be concluded.*)

COURTS EMERGENCY POWERS REGULATIONS, 1939.

Practice Note.

The purpose of the Practice Note issued by their Honours the Judges of the Supreme Court, and dated April 29, 1940, published *ante*, p. 107, is to settle any conflict of authority which may have arisen, and to take the place of any judgment dealing with the matter.

Notwithstanding, therefore, the provisions of Reg. 4 of the Courts Emergency Powers Regulations, 1939, it is necessary that in future all notices required under the provisions of the Property Law Amendment Act, 1939, and of the Mortgagors' and Lessees' Rehabilitation Amendment Act, 1937, be given, and the time thereunder expire before application is made to the appropriate Court for leave to proceed.

It is understood that, in framing the Note, their Honours intended it to cover the practice under the above Acts only.

RULES AND REGULATIONS.

Control of Prices Emergency Regulations, 1939. Price Order No. 5. June 28, 1940. No. 1940/138.

Emergency Regulations Act, 1939. Arms Emergency Regulations, 1940. July 2, 1940. No. 1940/139.

Supply Control Emergency Regulations, 1939. Amendment No. 1. Breadmaking Industry Control Notice, 1940. June 27, 1940. No. 1940/140.

Emergency Regulations Act, 1939. Licensing Act Emergency Regulations, 1940. June 26, 1940. No. 1940/141.

Magistrates' Courts Act, 1928, and the Emergency Regulations Act, 1939. Magistrates' Courts Amendment Rules, 1940. June 26, 1940. No. 1940/142.

Emergency Regulations Act, 1939. Naval Dockyard Emergency Regulations, 1940. July 3, 1940. No. 1940/143.

Air Force Act, 1937. Royal New Zealand Air Force Regulations, 1938. Amendment No. 5. June 26, 1940. No. 1940/144.

Cook Islands Act, 1915. Cook Islands Fruit-control Regulations, 1937. Amendment No. 1. July 3. No. 1940/145.

Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934. Egg Marketing Regulations, 1940. July 3, 1940. No. 1940/146.

Industrial Efficiency Act, 1936. Industry Licensing (Fish Retailing) Notice, 1939. Amendment No. 1. July 3, 1940. No. 1940/147.

Industrial Efficiency Act, 1936. Industry Licensing (Fish Wholesalers) Notice, 1939. Amendment No. 1. July 3, 1940. No. 1940/148.

Fisheries Act, 1908. Sea-fisheries Regulations, 1939. Amendment No. 5. July 3, 1940. No. 1940/149.

Fisheries Act, 1908. Trout-fishing (Nelson) Regulations, 1937. Amendment No. 2. July 3, 1940. No. 1940/150.

Industrial Efficiency Act, 1936. Industry Notification (Fruit and Vegetable Retailing) Notice, 1940. July 9, 1940. No. 1940/151.