# New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."


*"It was no theoretical freedom that the barons at Runnymede claimed for themselves and for a whole nation, but the truer freedom which comes from the enforcement of the law on all without regard to privilege or power, from the certainty of just and speedy decisions in the Courts."*

—The Rt Hon. L. S. AMERY, SECRETARY OF STATE FOR INDIA.


VOL. XVI. TUESDAY, AUGUST 20, 1940 No. 15.


## THE JUDICIAL TITLE OF "HONOURABLE."

"THE King is the fountain of honour, of office, and of privilege, and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them," says Blackstone, in discussing the royal prerogatives. "And, therefore," he continues, "all degrees of nobility, knighthood, and other titles, are received by immediate grant of the Crown: either expressed in writing, by writs or letters patent, as in the creation of peers and baronets; or by corporeal investiture, as in the creation of a simple knight: *1 Commentaries on the Laws of England*, 271, 272. This must be so since the King is the head and representative of the British peoples, in a truer sense, perhaps than any other ruler could ever claim to be the head and representative of the people of his realms. If this was the position of the King in our constitutional law, and in fact, in feudal and post-feudal times, it has become part of our written law in our own day, when, with the free consent of His Majesty's Governments in all the self-governing Dominions, and with ratification by their respective Legislatures, it was declared in the Statute of Westminster, 1931, that the Crown is the symbol of the free association of members of the British Commonwealth of Nations.

The Crown alone, therefore, can confer dignities and honours; and not even an Act of Parliament can create or confer them, since the Sovereign enjoys the sole right of conferring all titles of honour: *The Prince's Case*, (1606) 8 Co. Rep. 1a, 18b, 77 E.R. 496, 498: *R.* v. *Knollys*, (1694) 1 Ld. Raym. 10, 16, 91 E.R. 904, 907. The Sovereign can create any new title or dignity which did not previously exist: *Anon*, (1611) 12 Co. Rep. 81, *1 Blackstone's Commentaries on the Laws of England*, 271, and he can confer any title or precedence upon such of his subjects as he pleases: *4 Co. Inst. 361.* It is in the exercise of this prerogative that His Majesty confers the title of "Honourable" on certain of his subjects.

The title "Honourable" was conferred on the Judges of the Supreme Court of New Zealand by the King himself. Thus, in a dispatch dated December 22, 1911, the Marquis of Crewe, His Majesty's Principal Secretary of State for the Colonies, to the Governor of New Zealand, said:

"I have the honour to request you to inform your Ministers that the King has been pleased to approve of the use and recognition throughout His Majesty's Dominions of the title of 'Honourable' in the case of the Chief Justice and Judges of the Supreme Court of New Zealand": see *1912 New Zealand Gazette*, 727.

The extended notice in the *London Gazette* shows that a similar honour was conferred on the Chief Justice and Judges of the High Court of Australia, of the Supreme Court of each Australian State, of the Supreme Court of South Africa, and of the Supreme Court of Newfoundland. The notice goes on to say that a similar recognition of this title will be accorded in the case of retired Chief Justices and Judges of the named Courts who have been or may thereafter be *permitted* to bear it after retirement.

It is clear that the honour conferred by His Majesty on any of the holders of judicial office in any of the named Courts is an honour *virtute officii*, and coterminous with the holding of such office. It is not held as a right by retired Judges, and must be bestowed and enjoyed by permission of His Majesty. For example, on the resignation of a Supreme Court Judge, the form used states that "His Majesty the King has been pleased to approve of the retention of the title 'Honourable' by , Esquire, lately a Judge of the Supreme Court of New Zealand." That this is no empty formality is known to those whose duty it is to prepare and receive dispatches from the Secretary of State for the Dominions, through whom His Majesty notifies his pleasure.

It seems to be an assumption by our local newspapers that every one who holds, or has held, judicial office is entitled to the title "Honourable,"—an error into which even the Legislature has fallen when so describing the Judge of the Court of Arbitration in the Finance Act, 1940, s. 34, which by subs. 7 validates

the appointment of the present holder of the office since the date of his appointment: see, hereon, p. 105, where the validity of such appointment was doubted.

If a statute, in referring to any citizen, prefixes his name with the title "Sir," when in fact at the time of its passing His Majesty had not conferred any knighthood upon that citizen, the Statute itself could not confer the title or the knighthood; similarly, with the title "Honourable."

Section 64 (2) of the Industrial Conciliation and Arbitration Act, 1925, provides that the Judge of the Court of Arbitration, as to tenure of office, salary, emoluments, and privileges (including superannuation allowance), shall have the same rights and be subject to the same provisions as a Judge of the Supreme Court. He is described as the Judge of the Court: see, for example, ss. 63, 64 (1), 65 (2), 66 (*b*), and elsewhere in the statute.

Now, the Judge of the Court of Arbitration is not a "Chief Justice or Judge of the Supreme Court of New Zealand": see the dispatch of December 22, 1911 (*cit. sup.*) The title "Honourable," enjoyed by the Judges of the Supreme Court, is not a right, an emolument, or a privilege, since it is an honour and may be conferred only by His Majesty the King on such of his subjects as he pleases: and His Majesty has been pleased to specify Judges of the Supreme Court as the recipients of the honour under discussion. Neither the mere drafting slip in the Finance Act, 1940, to which reference has been made, nor the intention of the Legislature, can give to anyone a title of honour which may be bestowed only by the fountain of honour, the King himself. Consequently, a Judge of the Court of Arbitration, unless he is a Judge of the Supreme Court, is not entitled to the title "Honourable," either during his tenure of office or after his resignation. And, for the same reasons, the Judge of the Compensation Court, unless he be a Judge of the Supreme Court, is similarly disentitled to that honour: see the Compensation Court Regulations, 1940 (Serial No. 38), which applies to the Judge of that Court the provisions of s. 64 of the Industrial Conciliation and Arbitration Act, 1925, as above summarized.

So, too, the title of "Mr. Justice" is peculiar to members of the Supreme Court Bench. It is used in certain of the forms in the Schedule to the Judicature Act, 1908 (the Code of Civil Procedure), and has been so used in statutory forms since, at least, the Supreme Court Act, 1882, and the (consolidated) Judicature Act, 1908. And, in *Wardroper* v. *Richardson*, (1834) 1 A. & E. 75, 110 E.R. 1136, the term "Justice," it was held, could not mean anything but the Judges and Justices of the Courts at Westminster—the superior Courts of Justice in England—whence our Supreme Court derives its practice.

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# SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Hamilton.
1940.
June 22;
August 12.
*Blair*, J.

*In re* **A MORTGAGE TO THE AUCKLAND SAVINGS BANK.**

*War Emergency Legislation — Mortgages — Application under Courts Emergency Powers Regulations, 1939—Pending at time of Revocation thereof—Effect of Substituted Regulations on such Application—Courts Emergency Powers Regulations, 1939 (Serial No. 1939/176) Reg. 4 (1) (d)—Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), Reg. 6 (1).*

In this case, an application by a mortgagee for leave under the Courts Emergency Powers Regulations, 1939, was being considered by the Court and, under those Regulations, it appeared that a further application to the Court for leave would have been necessary in view of s. 3 of the Property Law Amendment Act, 1939. Before judgment could be delivered, the Regulations were revoked.

*T. J. Fleming*, for the mortgagor; *L. E. Mellsop*, for the mortgagee.

*Held*, The even if an application made under the Courts Emergency Powers Regulations, 1939, made before the revocation of such regulations, enures, it must be dealt with under the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), which make inapplicable to mortgages to which they apply the provisions of s. 3 of the Property Law Amendment Act, 1939, which was under consideration by the Court in this case in relation to the former regulations.

The course taken by the learned Judge was formally to dismiss the application without prejudice to the right of the mortgagee to move under the new regulations.

Solicitors: *McVeagh and Fleming*, Auckland, for the mortgagor; *Buddle, Richmond, and Buddle*, Auckland, for the mortgagee.

SUPREME COURT.
Wellington.
1940.
May 29, 30;
June 17, 26;
July 12.
*Smith*, J.

**THE KING v. UNION STEAM SHIP COMPANY OF NEW ZEALAND, LIMITED.**

*Shipping and Seamen—Carriage of Goods—Bill of Lading—Damage to Cargo—Jury—Findings of Jury that "Perils of the sea" and Defective Stowage joint causes of Damage—No Assessment of Quantum of Damage due to one Cause or the Other—Onus of Proof—Practice—Trial—Whether Jury's findings a "special verdict"—Code of Civil Procedure, R. 290.*

In an action for damages for damage to *inter alia*, galvanized iron carried by the defendant for the plaintiff under bills of lading—the only cause of action hereinafter referred to—the jury, after the various directions by the learned Judge, set out in the judgment, found that "peril of the sea" and defective stowage were joint causes of the damage, but could not decide which was the efficient cause. The jury, asked to assess, if they could, the quantum of damage due to the peril of the sea, and the quantum due to bad stowage, said, after retirement that they could not assess how much damage was due to the one cause or the other.

On motions by counsel for plaintiff for judgment for the plaintiff for the total damage and by counsel for the defendant for judgment for defendant on the ground that a peril of the sea existed, and, in the alternative, for a new trial on the ground that the findings of the jury were defective and that the jury had been misdirected.

*Cunningham*, for the plaintiff; *Watson*, for the defendant.

*Held*, 1. That the jury's findings did not constitute a special verdict under R. 290 of the Code of Civil Procedure.

*Dawson* v. *The Queen*, (1884) N.Z.L.R. 3 C.A. 1; *Harvey* v. *Maunder*, (1896) 15 N.Z.L.R. 223; *Farrell* v. *Smith*, (1896) 15 N.Z.L.R. 348, and *McKay* v. *Corporation of Dunedin*, (1909) 11 G.L.R. 377, applied.

2. That the jury's verdict was not defective.

3. That, upon the evidence, the jury could reasonably hold that negligence in the stowage was a joint cause with a peril of the sea of the damage to the galvanized iron.

4. That, where there are two efficient causes of action for damage to goods while in the course of carriage by sea, the one excepted and the other not, the onus of proving what proportion of the damage did or did not arise from the excepted causes lies on the shipowner.

*Leyland Shipping Co., Ltd.* v. *Norwich Union Fire Insurance Society Ltd.*, [1918] A.C. 350; *The Rona*, (1884) 51 L.T. 28; *The Alexandra*, (1866) 14 L.T. (N.S.) 742; and *Adam* v. *J. & D. Morris*, (1890) 18 Sess. Cas. 153, applied.

*Muddle* v. *Stride*, (1840) 9 Car. & P. 378, 173 E.R. 877, distinguished.

*The Glendarroch*, [1894] P. 226, considered.

*Wilson, Sons and Co.* v. *Owners of Cargo per the "Xantho": The "Xantho,"* (1887) 12 App. Cas. 503; *Gosse Millard, Ltd.* v. *Canadian Government Merchant Marine, Ltd.*, [1929] A.C. 223, and *Canadian National Steamships* v. *Bayliss*, [1937] 1 D.L.R. 545, mentioned.

The defendant, not having shown what damage was or was not attributable to the excepted cause, *viz.*, the peril of the sea, judgment was given for the plaintiff for the amount claimed and agreed upon.

Solicitors: *W. H. Cunningham*, Crown Solicitor, Wellington, for the plaintiff; *Chapman, Tripp, Watson, James and Co.*, Wellington, for the defendant.

*Case Annotation: Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society, Ltd.*, E. and E. Digest, Vol. 29, p. 229, para. 1858; *The Rona, ibid.*, Vol. 41, p. 493, para. 3217; *The Alexandra, ibid.*, p. 469, para. 3009; *Adam* v. *J. & D. Morris, ibid.*, p. 496, para. 3239m; *Muddle* v. *Stride, ibid.*, p. 415, para. 2581; *The Glendarroch. ibid.*, p. 414, para. 2580; *The Xantho, ibid.*, para. 2573; *Gosse Millard, Ltd.* v. *Canadian National Government Merchant Marine, Ltd., ibid.*, p. 434, para. 2721; *Canadian National Steamships* v. *Bayliss, ibid.*, Supp. Vol. 41, p. 24, para. 2600i.

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COMPENSATION COURT.
Wellington.
1940.
July 11, 17.
*O'Regan, J.*

**WILTON v. TRESEDER.**

*Workers' Compensation—Accident Arising out of and in the Course of Employment—Hernia—When Trauma the proximate cause—Criteria to be Satisfied to Entitle to Compensation—Workers' Compensation Act, 1922, s. 3.*

Save in rare cases, trauma is not the sole cause of hernia. It may, however, be the proximate cause, where there is a congenital predisposition. In considering the effect of trauma due regard must be had to the cumulative effect of repeated effort as well as to the effort immediately preceding the onset.

In order to entitle a worker to compensation for hernia resulting from accident, the following criteria must be satisfied. The hernia must be (*a*) of recent origin; (*b*) it must appear suddenly; (*c*) it must be accompanied by pain; (*d*) it must immediately follow an accident; and (*e*) there must be proof that the hernia did not exist prior to the accident, but the fact that the hernia may have antedated the accident does not exclude the possibility of traumatic aggravation or strangulation which would entitle the patient to compensation.

The plaintiff, a carpenter, who had been working all day, when lifting a third long and heavy rimu stud or prop, felt a sudden pain in the groin and dropped the timber. Unable to do any heavy work, he continued at the light work of "dwanging," necessitating little stooping. He worked at light work, mainly "dwanging" for three more days, conscious of the increasing pain all the time. An examination disclosed a right inguinal hernia, he was operated upon and made a rapid recovery. Previous to the accident he had had no indication of the presence of any hernia.

*C. J. O'Regan*, for the plaintiff; *A. B. Buxton*, for the defendant.

*Held*, That on the evidence all the criteria had been satisfied, and that the plaintiff was entitled to compensation.

*Watson* v. *Northcote Borough Council*, [1940] N.Z.L.R. 388, G.L.R. 245, distinguished.

*Treloar* v. *Falmouth Docks and Engineering Co., Ltd.*, [1933] A.C. 481, 26 B.W.C.C. 214; *Fenton* v. *Thorley and Co., Ltd.*, [1903] A.C. 443, 5 W.C.C. 1; *Zilwood* v. *Winch*, (1914) 7 B.W.C.C. 60, and *Waters* v. *Wall and Sons, Ltd.*, (1917) 10 B.W.C.C. 667, referred to.

Solicitors: *C. J. O'Regan*, Wellington, for the plaintiff; *Bell, Gully, Mackenzie, and Evans*, Wellington, for the defendant.

*Case Annotation: Fenton* v. *Thorley and Co., Ltd.*, E. and E. Digest, Vol. 34, p. 266, para. 2264; *Zillwood* v. *Winch, ibid.*, p. 364, para. 2944; *Treloar* v. *Falmouth Docks and Engineering Co., Ltd., ibid.*, Supp., Vol. 34, No. 2317c.

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SUPREME COURT.
Wellington.
1940.
May 20.
*Ostler, J.*

**BUTTIMORE v. SYGROVE AND STANLEY.**

*Practice—Trial—Payment into Court with Admission of Liability—Whether Counsel may mention to Jury amount paid in by Defendant.*

Where in an action there is a *denial* of liability and money paid into Court, the fact that money has been so paid in may not be mentioned to the jury; but if money is paid in with an *admission* of liability, counsel for the plaintiff may mention to the jury the amount that has been so paid in by the defendant. It would, however, be improper for him to mention to the jury the fact that the plaintiff, if he does not recover more than the amount paid in, will have to pay the costs of the trial.

*Penny* v. *Skevington*, [1924] G.L.R. 43, and *Flavell* v. *Christchurch Tramway Board*, [1920] N.Z.L.R. 127, G.L.R. 64, referred to.

Counsel: *Mazengarb* and *Gillespie*, for the plaintiff; *Rollings*, for the defendants.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiff; *W. P. Rollings*, Wellington, for the defendant.

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COMPENSATION COURT.
Wellington.
1940.
July 9, 15.
*O'Regan, J.*

**MACKAY v. COMMERCIAL PRINTING AND PUBLISHING COMPANY OF NEW ZEALAND, LIMITED.**

*Workers' Compensation—Assessment—"Permanent loss of the use of" a joint of a finger, but no Physical Severance—Whether "total loss" of joint—Workers' Compensation Act, 1922, Second Schedule.*

The permanent loss of the use, for the purposes of the worker's trade, of a joint of a finger, although there has been no physical severance, is a "total loss" of that joint within the meaning of the term in the Second Schedule of the Workers' Compensation Act, 1922.

*Simmons* v. *Lambert Bros.*, (1909) 12 G.L.R. 364, and *Natta* v. *Wellington Harbour Board*, [1938] N.Z.L.R. 150, G.L.R. 111, distinguished.

Counsel: *A. B. Sievwright*, for the plaintiff; *W. P. Shorland*, for the defendant.

Solicitors: *A. B. Sievwright*, Wellington, for the plaintiff; *Chapman, Tripp, Watson, James and Co.*, Wellington, for the defendant.

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SUPREME COURT.
Auckland.
1940.
July 21.
*Fair, J.*

**THE KING v. CARTMAN.**

*Evidence—Photographs of Body of Murdered Woman—Whether admissible against Accused charged with Crime—Whether Probative Value compared with Tendency to Prejudice Jury so slight that Court should suggest that Photographs should not be tendered by Crown.*

Photographs recording the gruesome circumstances in which the body of a murdered woman were found are admissible in evidence against the accused charged with the crime.

*Green* v. *The King*, (1936) 61 C.L.R. 167, and *R.* v. *O'Donnell*, [1936] 2 D.L.R. 517, *R.* v. *Patience*, *ante*, p. 37, followed.

Applying to the photographs tendered the rule of practice that even though certain evidence is legally admissible, it should not be tendered by the Crown where the Court intimates that the evidence is of slight probative value compared with its tendency to prejudice unduly the minds of the jury, the learned Judge considered that none of them should be made the subject of such a suggestion by the Court.

*R.* v. *Christie*, [1914] A.C. 545, referred to.

Counsel: *Meredith*, for the Crown; *Henry*, for the accused.

Solicitors: *Crown Prosecutor*, Auckland, for the Crown; *Henry and McCarthy*, Auckland, for the accused.

*Case Annotation*: *R.* v. *Christie*, E. and E. Digest, Vol. 14, p. 360, para. 3811.

# THE LAW OF THE LINKS.

## What Every Golfer Should Know.

By T. A. GRESSON, B.A. (Cantab.).

"Fore"—there can be few cries which provoke such instant action, and on hearing it the reasonable man inevitably adverts to the possibility of being struck. If he is a lawyer it is submitted that he ought also to have a clear grasp of his legal position, for on recovering consciousness he can then launch his claim with the minimum of delay, or if more happily his partner is the victim, he can immediately quote such an impressive array of authorities that he cannot fail to obtain the instructions!

With the currency of the golfing season therefore as our justification, let us first consider the case where plaintiff is injured by a ball driven by another player and sues him, alleging negligence: *Edwards* v. *Mehaffey*, (1935) 31 M.C.R. 45, which was argued in Wellington before the late Mr. E. Page, S.M., is a good example of this type of case.

Plaintiff, who claimed £500 for the loss of an eye, and defendant were members of the Manor Park Course, which included three holes with parallel and adjoining fairways of an aggregate width of 115 yards. Defendant was a golfer of three years' experience with a handicap of 19, and in fact, was the Club's Junior Champion. As she walked up to her ball, after driving from the 18th tee, she saw a men's four-ball approaching, which appeared to be waiting for her to play. She accordingly played her shot, a brassie, but unfortunately "pulled" it badly, and her ball struck the plaintiff who, having "pulled" his own drive on No. 1 hole, was "in the danger zone but substantially off the line."

Defendant had failed to see plaintiff at all before playing her shot, but had immediately shouted "Fore" when she appreciated the danger. After an inspection and demonstration of the relevant positions on the course, the learned Magistrate decided that there had been no lack of care on defendant's part and he gave judgment for her accordingly. The decision thus turned on the particular facts, but in giving judgment the Magistrate specifically adopted the principles laid down in *Cleghorn* v. *Oldham*, (1926) 43 T.L.R. 465, which is really the leading case on the subject.

On September 7, 1925, Miss Oldham was playing golf with Miss Cleghorn's brother on the West Runton Golf Course and Miss Cleghorn was carrying Miss Oldham's clubs. At the 13th hole Miss Oldham drove a good ball from the ladies' tee, but her opponent "duffed" his shot from the mens' tee, whereupon Miss Oldham said "This is the way to do it," and demonstrated a stroke at an imaginary ball. Unfortunately at the end of her follow-through her club struck Miss Cleghorn and inflicted severe injuries which kept the latter off work for thirteen months, and she accordingly sued Miss Oldham for damages.

Mr. Croom-Johnston, K.C. (now Mr. Justice Croom-Johnston), appeared for the defendant, and in answer to him Miss Cleghorn said that she used to play hockey, but had never played golf.

Mr. Croom-Johnston: "Is there not an element of danger in all games which adds to the enjoyment?"

Mr. Justice Swift: "You are not suggesting that people enjoy their golf more because they may be driven into? The language that one hears does not suggest that it is pleasurable."

Miss Cleghorn said that she and Miss Oldham were standing on the ladies' tee and saw Mr. Cleghorn's ball "trickling off to the right."

Mr. Croom-Johnston: "A familiar sight, at least when I play."

Miss Cleghorn went on to say that Miss Oldham did not address the ball before she made the stroke.

Mr. O'Connor (re-examining): "Is it suggested that Miss Oldham spoke to an imaginary ball?"

Mr. Justice Swift: "You do not speak to the ball before you drive; you speak to it after you drive. You are thinking of addressing a jury, which is one thing, addressing a ball is another."

In cross-examination, Miss Oldham stated that the plaintiff had been carrying her clubs for some time and had walked along beside her, but she did not expect the plaintiff to follow when she walked back towards Mr. Cleghorn's tee. "One does not always look before striking," she said, "one expects people to get out of the way. My eye was on the 'ball'."

The questions left to the jury and their answers were:

(1) Was the defendant guilty of negligence which brought about the accident?—Yes.
(2) Was the plaintiff herself guilty of negligence?—No.
(3) Did the plaintiff by going on the course as a spectator in the way she did, take the risk of such an accident?—No.
(4) Damages, if any?—£150.

Mr. Justice Swift in giving judgment said that Mr. Croom-Johnston had sought to draw a distinction between accidents arising from the playing of games and accidents occurring in other transactions of life, and it appeared to have been suggested that the ordinary rules of law in relation to negligence did not apply to the playing of games. He could not see that any such distinction existed. In playing games, as in other transactions of life, a person must abstain from doing what a reasonable person would not do, and if a jury

came to the conclusion that a person had done something which a reasonable player in the circumstances would not have done, and if injury had resulted thereby, that person was liable in an action for negligence.

He could well understand that in the playing of games, as in every transaction of life, many accidents might happen for which no one could be held responsible and the person who sustained the injury had then to bear the brunt of it. But where it could be proved that the accident was due to the negligence of the person who was sued as defendant, there was no reason why that person should be excused merely because the transaction in which the accident had taken place was recreation rather than work.

It had also been suggested that the plaintiff voluntarily undertook the risk. A person who went on to a golf course, just as a person who crossed the street, took certain risks inherent to the place where he was. A ball might be driven without negligence and strike a spectator or player. A club might break without any fault on the part of the person using it, and someone might be injured by the flying head. But if negligence could never be brought home to anybody an injured person could not recover. No authority had been cited for the proposition that a person ever took the risk of anybody being negligent unless there was an express agreement on proper facts to that effect. There was here no ground for saying that the plaintiff voluntarily undertook the risk of an accident such as she met with.

It is respectfully submitted that this case lays down the correct principles, and on the same basis spectators at cricket and football matches, and at more perilous sports, such as polo, motor-racing, and flying, take upon themselves the risk of such dangers as may be reasonably expected to arise in such sports. As Scrutton, L.J., pointed out in *Hall* v. *Brooklands Auto Racing Club*, [1933] 1 K.B. 205 :

> Spectators who pay for admission to golf courses to witness important matches, though they keep beyond the boundaries required by the stewards, run the risk of the players slicing or pulling balls which may hit them with considerable velocity and damage.

So much for the position of the players and spectators. What of the club itself ?

It is clear that under certain circumstances a golf course, or a particular hole, may constitute a public nuisance for which the club is liable : *Castle* v. *St. Augustine's Links, Ltd.*, (1922) 38 T.L.R. 615. In this case the 13th hole on the St. Augustine's Link's ran parallel with the main Deal to Ramsgate Road, and a sliced drive from the tee smashed the windscreen of Castle's taxi and glass entered his eye, eventually necessitating its removal. The golfer, one Chapman, had in the meantime gone to Australia, and so briefing Sir Edward Marshall Hall, K.C., and Mr. Norman Birkett, Castle sued the club.

Mr. Justice Sankey, in the course of his judgment, stated that everybody who played golf sliced at times, and although there was no evidence of it, he suspected that the very best of players occasionally sliced the ball. A very bad player did not slice at all ; he did not hit the ball. The evidence satisfied him that many a ball had been sliced on to this public road, and he did not think that that could be said to be the result of careless and bungling play. He was sure that the directors of the club knew or ought to have known that balls driven from the 13th tee frequently landed in the road, but he was not able to say that the directors received any specific complaint. On the facts he was satisfied that the tee and the hole were a public nuisance under the conditions and in the place where they were situated, and he gave judgment in plaintiff's favour for £450.

It is interesting to notice that in his judgment Mr. Justice Sankey suggested that golf clubs should insure against this sort of liability and no doubt most clubs now take this precaution.*

On similar grounds judgment was given against the Wellington City Council in *Andrews* v. *Mayor, &c., of Wellington*, (1934) 30 M.C.R. 137, for allowing play on cricket-pitches on Anderson Park within 65 yards of Tinakori Road. The evidence showed that the plaintiff on a previous occasion had had one of her windows broken by a ball from one of the pitches, and that one player had hit as many as seven balls into the road in one afternoon. It was not surprising, therefore, that when her window was broken for the second time plaintiff issued proceedings.

In the recent Irish case of *Potter* v. *Carlisle and Cliftonville Golf Club Ltd.*, [1939] 3 N.I.R. 114, one Potter, while putting on the 7th green, was hit by a ball driven by Carlisle from the adjoining 8th tee, and as a result lost the sight of an eye. The evidence showed that like a good putter Potter " was perfectly oblivious to other players on the course at that particular time," and that Carlisle unfortunately " pulled " his shot. Neither player was very familiar with the course.

Potter sued both Carlisle and the club alleging that Carlisle was negligent in playing the shot, and that the course was so constructed as to be a nuisance to persons playing thereon. Alternatively Potter alleged that the club was negligent in the construction, management, and control of its links.

The jury negatived any negligence on Carlisle's part, but found the club negligent in the design and construction of the links, and awarded the plaintiff Potter £1,500. The jury also added a rider that they considered a certain bush and saplings constituted a definite danger in that they created a false sense of security in the minds of persons putting on the 7th green or driving from the 8th tee, whilst providing practically no protection. Judgment was thus entered for Potter against the club for £1,500, and from this judgment the club appealed.

The Court of Appeal held that the case against the club should have been withdrawn from the jury on the grounds that when the plaintiff paid his green fee and received his ticket he impliedly agreed to take the course as he found it, provided it was free from

*It is possible to obtain an individual golfer's policy covering the holder in respect of personal injury whilst on any golf course in New Zealand, and in addition insuring his clubs against fire and theft, for an annual premium of 7s. 6d. For a further 5s. the insured's clubs are insured against breakage, and for a further 2s. 6d. the insured is indemnified against liability for injury done to third persons, property, or animals, with a limit of £250 in the case of any one accident.

Policies can also be arranged through the New Zealand Golf Association indemnifying the club and its members against liability for injuries to third persons or to each other. The premium is calculated at the reasonable rate of 1s. 2d. per playing member, and the liability of the insurance company is limited to £2,000 in respect of any one accident. The total yearly liability of the insurance company is also limited to £10,000. This policy, however, is clearly not a personal accident cover but is designed to indemnify clubs and their members against liability for injuries to third persons.

unusual dangers or traps, and to accept the risks of the game as between himself and the club, and that the injury he received was due to a risk of the game and not to any negligent design or construction of the course. The judgment, at p. 129, also contains a useful summary of the rules which players should observe :

> There are certain rules which it is the duty of all players, whether proficient or not, to know and observe if the game is to be played, as it apparently is played, in comparative safety.
>
> The first of these rules, we think, is that every player, when on the course, must take due care for his own safety and for the safety of others by keeping a good look out for the disposition of the various greens and tees as he is coming to them or going from them, more especially if he is a stranger to the course, and he must keep a good look out for the whereabouts of other players, whether in front or behind, in whose line he may find himself, thereby running the risk of being hit, or who may appear in his line so that he runs the risk of hitting them.
>
> The next rule is that he must act upon the knowledge so acquired and not place himself in a position where he is in danger of being hit by other players if he can avoid it, nor himself play a shot while other players are in a place where he may hit them without giving them due warning and being satisfied that they have received it. These are rules of safety very similar to the rules of the road which have to be observed by everyone who uses the highway.
>
> If all players observe them, the game can be played in comparative safety, otherwise it becomes extremely dangerous, just as a highway becomes dangerous if motorists, cyclists, pedestrians, and other road users fail to observe the rules of the road.

The Irish Court of Appeal also pointed out, at p. 137, that no golf course is dangerous *per se* unless it contains traps or concealed dangers. Danger only arises in the playing of the game and from the carelessness or ignorance of the players, and all the club is bound to do is to provide a course which is safe if properly used. Accordingly a course cannot be said to be negligently constructed merely because a green and a tee are in such proximity that it is possible from the tee to strike a person standing on the green. To so hold would set up a standard of perfection which is not aimed at by those who construct golf courses, nor one expected by those who play on them, even if it were possible of attainment without drastic changes in the game, and any such rule would impose serious limitation upon where the game could be played.

To summarize the position, therefore, it is submitted :

(1) That as between themselves, golfers and also spectators consent to run the risk of such accidental harm as is ordinarily incidental to the game, but that an action will lie against a negligent player, who can nevertheless plead contributory negligence in appropriate circumstances : *Cleghorn* v. *Oldham* (*supra*), and *Edwards* v. *Mehaffey* (*supra*).

(2) That as between themselves and the club, golfers impliedly agree to take the course as they find it, provided it is free from concealed dangers : *Potter* v. *Carlisle and Cliftonville Golf Club, Ltd.* (*supra*).

(3) That, in certain circumstances, a club may be held liable for a public nuisance if its course is dangerously constructed : *Castle* v. *St. Augustine's Links, Ltd.* (*supra*).

# THE PROFESSION AND ITS CRITICS.

## "The Butt of Stupidity."

In an address, the President of the Law Institute of Victoria, Mr. F. R. Gubbins, on retirement from office, said :

"We have been accustomed, especially in the last few years, to hear suggestions that the legal profession is deteriorating. Do not believe it. Do not imagine that sensible people think so or that the idea is new. As *Punch* has said : 'The world is going to the dogs ; it always has been' ; and our profession always has been subjected to sneering attacks by thoughtless or spiteful critics. There are innumerable tales about us, some bitter, some humorous, but all rather objectionable because they tend to convey the impression that there is something evil in the practice of the law. For example, here is an old French story of the humorous variety. The King was giving a fancy dress ball and the Devil decided to attend so he borrowed the robes of his best friend, who was of course an *avocat*, but when he presented himself at the palace gates he was refused admittance, and on the King coming forth to enquire what the dispute was about and discovering the Devil on the palace steps in the dress of a lawyer, he said to him : 'Monsieur le Diable, this is a fancy dress ball and all my other guests have done me the honour to appear in fancy attire. You alone have the effrontery to present yourself in your ordinary working clothes.'

"So it goes on. Generation after generation we are made the butt of stupidity until the thing has become as tedious as a twice-told tale or a story about the man from Aberdeen. If our critics would regard us with a little more common sense and candour they would discover that we as a profession have many admirable and undoubted virtues. They would acknowledge our loyalty to our clients, which is the mark of even the humblest solicitor. We are the safe repositories of the most confidential information. It is our practice to put the interests of our clients before our own.

"Let our critics bear these things in mind and let them also remember the numerous instances in which we protect the rights of people from whom we know we cannot expect to receive a fee. And above all, let them take heed of the hundreds of disputes each year which we insist on settling when by raising an eyebrow we could involve our client in a lawsuit which would be profitable to us but possibly disastrous to him.

"I say, let them reflect and be thankful for the strong sense of professional duty which is our heritage.

"Then perhaps they will take less pleasure in defaming all of us because a very few fail to measure up to our common standard of professional conduct."

# LONDON LETTER.

By Air Mail. Somewhere in England,
My dear EnZ-ers,— July 29, 1940.

In his speech on the War situation in the House of Commons on June 25, the Prime Minister referred to the uncertainty of the British relations with the French Government which exists, it may be said, by German sufferance at Bordeaux. Nothing which has happened since appears to make the position more clear, and there is no available information as to the substantial nature of any effort which may be made by Frenchmen outside the immediate sphere of German domination nor—which is perhaps more important—as to the destination of the French Fleet. Assuming the Bordeaux Government to have an independent existence in international law, its relations with the British Government, in view of the breach of the agreement not to conclude a separate peace, present problems of an unusual if not unprecedented character. But it has hitherto been an axiom of foreign policy that an independent France is necessary for the security of Great Britain. Meanwhile, the occupation of the Channel Islands by Germany is an unwelcome—though perhaps not over-important—incident. Their ultimate destiny will await the end of the war. But since, to save useless defence, they were already demilitarized, the air attacks by Germany, as well as similar attacks elsewhere, have served to show how Germany is carrying on the war in defiance of the rules which, according to international practice, should govern aerial warfare.

**The Perfect Liar.**—The poet Congreve invented the admirable expression, or copied it from someone else, "liar of the first magnitude." We meet them in the Courts, but they are rare. There are plenty of the second and third magnitudes down to the liar patent. In a recent case in the Divorce Court, Mr. Justice Langton had before him "a woman of great audacity, monumental self-possession and colossal self-assurance." But her case "was plainly moonshine. She is a woman who cannot be believed. She has two of the qualities that might go to the making of a successful liar—great industry and great, if misguided, courage, but she has never mastered the third requisite of success in this ignoble art. Apparently she does not understand the meaning of the word 'plausibility'."

Speaking of liars, one feels that some injustice is done to that great propagandist, Goebbels. He is considered not to be of the first magnitude because he makes statements inconsistent with one another, but we are apt to forget that he has—and he knows he has—a domestic audience of almost infinite gullibility. Mere inconsistency does not put the willingly deceived German public on inquiry, or rather—for inquiry would be highly dangerous—on doubt. So that Mr. G.'s industry, audacity and self-assurance do not need to be backed by plausibility. The case against him of being of lesser magnitude than the first is therefore not proved, but to keep on dispensing with plausibility tends to produce a carelessness inconsistent with safe political untruthfulness. He forgets Lincoln's great maxim, that though you can deceive all the people some of the time, and some of the people all the time, you cannot deceive all the people all the time. His guiding principle is the statement attributed to von Kiderlen-Waechter, the German Foreign Minister from 1910-1912, "A press campaign of four months will convince the German people of the rightness of any idiocy you like to suggest." The only weakness is that G. tells number two lie when number one, inconsistent with number two, is but a few hours old.

**The Law Society's Report.**—The Annual Report of the Council of the Law Society, presented to the General Meeting of members on Friday, July 5, contained, as is usual, an interesting record of the various activities of the Council, as well as a statement of special matters which have been dealt with by the Council during the past year. The most important was the question of defalcations by solicitors. The methods which have been adopted for stopping such misconduct—notably the introduction of the Solicitors' Accounts Rules, 1935—has not proved completely successful, and the Report contains an account of the genesis of the further measures proposed by the Solicitors' Bill which has been introduced in the House of Lords by Lord Wright, and is now awaiting consideration. The Bill, with the Explanatory Memorandum, is printed in the Appendix to the Report, and its principal feature is that it includes two proposals which have long been discussed, but have till recently failed to meet with acceptance—the establishment of a compensation fund, out of which grants may be made to relieve or mitigate losses which have been thus caused, such as you have in New Zealand, and compulsory membership of the Society.

**Justice in Emergency.**—There is no opportuinity at the moment to do more than give a brief outline of the new Defence (Administration of Justice) Regulations, which were passed on June 19. In some cases, they override the Administration of Justice (Emergency Provisions) Act, 1939. If, because of hostile operations, a Judge or commissioner going circuit thinks it necessary, he may direct the assize not to be held, or to be held elsewhere. Quarter sessions may be moved or postponed by the Home Secretary, or the chairman or his deputy. Those charged with indictable offences before justices may be directed to be tried at assizes or quarter sessions elsewhere. The venue and jurisdiction of petty sessions may be transferred elsewhere by the Home Secretary, and the justices for any area may perform their functions in any adjoining area. No person indicted for treason or felony has any right of peremptory challenge of jurors, and if at assizes or quarter sessions there are not enough jurors, the Court may direct the sheriff to return a *tales de circumstantibus* (between the ages of 21 and 70) who would not otherwise be entitled to serve. A criminal trial or an inquest may continue in spite of the death, discharge or illness of a juryman, so long as the number does not fall below ten, or, in any other case, below five. Statutory declarations may be used on an indictment before examining justices unless the offence is dealt with summarily. Where a person has been committed for trial, and any witness whose deposition was taken before justices so that the accused could cross-examine cannot attend because of service with the Forces, urgent public work or hostile operations, then if the deposition is signed by the examining justice or his clerk it may be given in evidence without further proof.

**Not a Reasonable Excuse.**—A daily paper reports that an Essex mother living in a " safety zone," refused to send her child to the village school because there was no shelter there. For this she was summoned before the justices who made an attendance order. The correctness of this decision admits of little question. Whether a school needs or does not need an air raid shelter must be determined by authorities and not by individuals. Government departments and local authorities are the better judges, because they have more information and expert advice. They cannot guarantee any of us immunity from attack by air, but they have done their best to classify areas according to the probability of danger and have taken extensive measures of evacuation from those thought most vulnerable. Individual parents may approach the local education authority or the Board of Education. Blank refusal to send a child to school is neither the right nor the reasonable remedy.

**In an American Court.**—A young lawyer got his first client recently, and had to appear on his behalf at the City Court. This fledgling attorney waited with bride-like excitment for his case to be called. When the word finally came, he laid his hat and coat on a bench and stepped before the Judge. " Young man, I assume that this is your first experience in this Court," the Judge said sternly.

With that awful what-have-I-done feeling, the lawyer said, " Yes, Sir."

" I thought so," the Judge said, fretfully. " Before we proceed, get your hat and coat and put them where you can watch them."

Yours as ever,
APTERYX.

# RULES OF PROCEDURE.

## Recent Amendments.

Amendments of the rules of the Court of Appeal and Supreme Court have recently been made by the Court of Appeal Amendment Rules, 1940 (Serial No. 1940/181) and the Supreme Court Amendment Rules, 1940, No. 2 (Serial No. 1940/182). The Court of Appeal amendments were enacted and came into force on August 14. The Supreme Court amendments bear the same date, but the principal alterations, those relating to probate and administration, come into force on September 2, 1940.

### PAPER-SAVING.

Three new rules make provision for the use of double-sided documents. Being prefaced by the words " whilst this rule remains in force," they are apparently intended to be a temporary expedient.

For the Court of Appeal, R. 15A authorizes printed matter for the Court to be printed on both sides of the paper, so long as reasonably stout and opaque paper is used and the lines on both sides of a sheet are printed so as to register back to back. Reference to the " india paper " editions of text-books such as *Halsbury's Laws of England* or *Fisher and Lightwood on Mortgages*, or to the " thin paper " edition of the *New Zealand Law Reports*, will show that with good printing a perfectly legible result can be obtained on light-weight paper. A minor change is that the text of cases so printed is to be numbered at every tenth line in the margin, instead of every fifth. Documents thus printed will comply exactly with the printing requirements of the Privy Council (*Stout and Sim's Supreme Court Practice*, 8th Ed., 704, 729), so that if an appeal goes further no resetting will be necessary —another slight saving.

Rule 15B of the Court of Appeal Rules makes similar provision for documents which are permitted to be placed before the Court in typescript.

In the Supreme Court documents may be hand-written, typewritten, or printed (R. 597A), although in practice typewriting is at present virtually universal. The new rule, R. 597C, permits papers in any of these forms to be prepared on both sides of the sheet—including the inside of an indorsement-sheet.

These three rules are permissive only, but it is probable that practitioners with a realization of the paper shortage that has overtaken the United Kingdom will, with a view to conserving local stocks, avail themselves of the permission. The use of both sides of the paper has of course been for many years mandatory in the High Court of Justice in England. The habit of not turning to the back of a page when perusing a document will take a little getting out of, and the management of carbon copies of double-sided matter will require care from typists.

### SPECIAL LEAVE TO APPEAL.

Rule 19 of the Court of Appeal rules receives a short but important amendment, to the effect that " the power of the Court to grant special leave may be exercised in such cases and on such terms as the justice of the case may require." Some explanation is advisable. Rule 19 in its previous form followed in effect the English rule (O. 58, r. 15) as enacted in 1883. A note to the rule in *Stout and Sim's Supreme Court Practice*, 8th Ed., 486, reads :

> It is not a ground for granting special leave that a mistake as to the time for appealing has been made by a solicitor's clerk : *In re Helsby*, [1894] 1 Q.B. 732 ; or by counsel : *In re Coles*, [1907] 1 K.B. 1 ; or by the plaintiff's solicitors ; *Pitcher* v. *Dimock*, (1913) 16 G.L.R. 57 ; even though the erroneous impression as to the effect of the rule is shared by counsel and solicitor for the respondent : *Wilson* v. *New Zealand Loan and Mercantile Agency Co., Ltd.*, [1934] N.Z.L.R. 115, G.L.R. 280.

Obviously such cases worked considerable hardship, and the Judges in England expressed their dissatisfaction with the inflexibility of the rule. In *Baker* v. *Faber*, [1908] W.N. 9, Cozens-Hardy, L.J., suggested that the matter be brought to the attention of the Rules Committee. In 1909 the English rule was altered—probably as a result of the case last-cited—and the effect of the alteration is adverted to in *Gatti* v. *Shoosmith*, [1939] Ch. 841. The New Zealand alteration necessarily takes another form ; the Code of the Supreme Court and the Court of Appeal Rules being separate enactments, rules of the Code do not automatically apply to Court of Appeal proceedings.

The New Zealand alteration will, however, no doubt enable the Court of Appeal in the future to disregard in a proper case the previous New Zealand decisions and those earlier English decisions on which they were based, and to proceed on lines similar to those premitted by *Gatti* v. *Shoosmith*.

PROBATE AND ADMINISTRATION.

The alteration made, though elaborate in form, is simple in its nature. Rules 531o and 531P are replaced by one new rule, 531o, and consequent alteration is made in relevant forms. Heretofore every executor and administrator has been nominally charged with the duty of filing in the Supreme Court, within three months after the grant, an inventory of the estate; and within twelve months after the grant, his accounts in the estate. In practice the requirement has not been insisted on, and the sworn undertaking in the affidavits to lead grant has been read in a Pickwickian sense. To require a person to swear to do what nobody expects that he will do is, however, obviously unsatisfactory. Under the new rule the executor or administrator may file these documents if he wants to, and must file them if the Court so orders; but not otherwise. An order for filing accounts must be applied for within three years of the grant. At a later date the beneficiary no longer has the benefit of this special rule. He is, of course, not without remedy; he may seek his relief by the ordinary method of an administration action; in many cases its simpler equivalent, an originating summons under R. 538 (*c*), will probably give him all he wants.

The paragraphs in the affidavits to lead grant, and the references in the forms of grant and administration bond, are modified accordingly. The reference in R. 531P to 10 per cent. interest disappears entirely; it was out of harmony with the regular course taken by the Court when, in an administration action or its equivalent, a similar situation arises. Slight further alterations are also made in some of the forms. In particular, accounts, when filed, are to distinguish between capital and income (*sc.* revenue) payments and receipts.

# MAGISTRATES' COURTS AMENDMENT RULES, 1940.

## Interpleader Proceedings other than Under an Execution.

(*Concluded from p. 176.*)

The Magistrates' Court has jurisdiction in interpleader cases generally, when the value of the subject-matter in dispute does not exceed three hundred pounds: (Magistrates' Courts Act, 1928, s. 27 (*g*)). As interpleader proceedings are included in the definition of an action (see s. 2, *ibid.*), and no special procedure applicable thereto has been prescribed by the Act, a person seeking relief by way of interpleader had to file a plaint and proceed in all respects as if he were prosecuting an action. This cumbersome method of obtaining relief has been superseded by R. 7 of the Amendment Rules, 1940. This rule amends the principal rules by inserting, next following R. 55 thereof, a new rule designated R. 55A, containing twelve paragraphs and providing a code to regulate practice and procedure in interpleader proceedings other than under an execution. It is based on the practice and procedure of the County Court in England: see O. 28, rr. 16–22, *1940 County Courts Practice*, 602 *et seq.*

SHORT ANNOTATION OF NEW RULE.

*Para. 1.* Where a person (in this rule called the applicant) is under a liability for any debt or other cause of action, money, or goods, for or in respect of which he is or expects to be sued by two or more persons (in this rule called the claimants) making adverse claims thereto in a matter within the jurisdiction of the Court, he may apply for relief by way of interpleader.

An application for relief by way of interpleader is not commenced in the manner prescribed for interlocutory or originating applications, but by filing an affidavit in the Form No. 22: see annotation of para. 3, *infra*.

The provisions of para. 1 are almost identical with those of O. 57, r. 1 (*a*), which have been discussed in detail in the *1940 Annual Practice*, 1230 *et seq.* The following is an extract from the learned authors' comments:—

(*a*) Applicants may get relief who claim a lien upon the subject-matter but have no interest in the corpus.

(*b*) "*Is under any liability for any debt, &c.*" These words prescribe the subject-matter in respect of which "stakeholder's" interpleader is applicable.

(*c*) A debt due but not yet payable is apparently within the words of the rule.

(*d*) A defendant cannot interplead as to a sum for which the plaintiff has already got judgment against him.

(*e*) Unliquidated damages are not a subject for interpleader.

(*f*) "Making adverse claims thereto." These words mean that the claims themselves must be in respect of the same subject-matter.

*Para. 2.* The application shall be made to the Court in which the applicant is sued or if he has not been sued, to any Court in which he might be sued.

A difficulty might arise if two or more actions are commenced in different Courts by the various claimants. The common defendant is required to file his affidavit within five days after the service of the summons upon him, and by so doing may prejudice his right to apply for a change of venue to enable all the claims to be determined by the same Court. It would seem that he must file his affidavit in each Court. It would be advisable, however, to add a paragraph setting out particulars of the other action or actions and to file an application for a change of venue at the same time as he files the affidavit.

If no action has been commenced, the person seeking relief should file his affidavit in the Court nearest his place of residence.

*Para. 3.* The applicant shall file in the Court an affidavit in the Form No. 202, showing that—

(*a*) He claims no interest in the subject-matter in dispute other than for charges or costs; and

(*b*) He is sued or expects to be sued by the claimants in respect of the subject-matter; and

(*c*) He does not collude with any of the claimants; and

(*d*) He is willing to transfer the subject-matter into Court or dispose of it as the Court may direct; and

(*e*) The subject-matter does not exceed in value the sum of three hundred pounds—

together with as many copies of the affidavit as there are claimants.

The following comments have been made on the corresponding High Court rule by the authors of *1940 Annual Practice* :

(*a*) "*Expects to be sued.*" A vague rumour or expectation that a claim will be made, does not justify an application for relief; thus where the applicant had satisfactory information that the rival claimants proposed to settle their differences by litigation, relief was refused.

(*b*) "*Claims no interest in the subject-matter.*" The applicant has none the less an interest though it be one of which the value cannot be definitely assessed. But a lien for storing goods claimed by a warehouseman upon the goods stored; or a lien upon the proceeds of goods sold at auction, claimed by way of commission by an auctioneer, is not an interest in the subject-matter and so does not disentitle the applicant.

(*c*) "*Does not collude.*" Where an applicant has taken an indemnity from claimant A., claimant B. can successfully object to his application.

Collusion exists where the applicant agrees to "play the game" of claimant, by promising to do what he can to oppose claimant B.; or if he gives helpful information to claimant A. when he ought to be silent; or if he can exact an indemnity though not actually indemnified at the time of applying.

(*d*) "*Is willing to pay or transfer the subject-matter into Court.*" These words import that the applicant must have possession of the subject-matter. Shares in a company are treated as choses-in-action and it has been held that they come within the word chattels and that the holder of a share certificate may interplead because the certificate being essential for the enjoyment of the shares, a claim to the shares was in effect, a claim to the certificate.

*N.B.*—The word "chattels" does not appear in para. 1 of R. 55A. The Magistrates' Court has no jurisdiction to enforce claims for the recovery of shares, *qua* shares, as they are not "moveable property" within the meaning of s. 27 (*e*) of the Magistrates' Courts Act, 1928. A share certificate is, however, specific moveable property and so may be the subject-matter of interpleader proceedings in the Magistrates' Court.

*Para. 4.* Where the applicant is a defendant, the affidavit shall be filed within five days after the service of the summons on him.

As there is no general power to enlarge the time for doing any act, it would seem that a defendant loses his right to seek relief by way of interpleader unless he files his affidavit within the prescribed time, or the claimants waive the objection.

*Para. 5.* The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of each other.

In *Meynell* v. *Angell*, (1863) 32 L.J.Q.B. 14, it was held that where the plaintiff was being sued for work done under a contract and A. claimed that the plaintiff had contracted as his agent, the defendant was allowed to interplead.

*Para. 6.* On the filing of the affidavit—

(*a*) Where the applicant is a defendant—

(i) The Clerk shall issue for service on the claimant an interpleader summons in the Form No. 203, to which shall be attached a copy of the summons and statement of claim in the action and a copy of the affidavit; and

(ii) The Clerk shall issue for service on the plaintiff a notice in the Form No. 204, together with a copy of the affidavit; and

(iii) The action shall stand adjourned without further order to the day fixed for the hearing of the interpleader proceedings.

(*b*) Where the applicant is not a defendant, the Clerk shall issue for service on the claimants interpleader summonses in the Form No. 205, attaching to each summons a copy of the affidavit.

*Para. 7.* The Magistrate may at any time after the issue of an interpleader summons direct the applicant to bring the subject-matter into Court or dispose of it in such manner as the Magistrate thinks fit.

This paragraph appears to authorize the Magistrate to give directions of his own motion, but in practice he would not act except upon the application of one of the claimants or the person seeking relief. The necessary directions would be obtained by a claimant on an interlocutory application made on notice, and by a person seeking relief on an *ex parte* interlocutory application.

*Para. 8.* An interpleader summons shall be served in accordance with the provisions of the Act and these rules relating to the service of summonses.

The words "or these rules" refer to the principal rules.

*Para. 9.* A claimant shall, within three days of the service of the summons on him, file in the office of the Court either—

(*a*) A notice that he makes no claim; or

(*b*) Particulars stating the grounds of his claim to the subject-matter, and shall send a copy to each of the other parties:

Provided that the Magistrate may, if he thinks fit, hear the proceedings although particulars have not been filed.

The proviso gives the Magistrate discretionary power to hear the proceedings notwithstanding a claimant's failure to file particulars of his claim. The words "may hear the proceedings" are inapt, but are, no doubt, meant to give a claimant who has not filed particulars of his claim the right to appear and prove his claim.

*Para. 10.* On the day fixed for the hearing of the proceedings—

(*a*) Where the applicant is a defendant—

(i) If the plaintiff does not appear, the action, including the interpleader proceedings, shall be struck out; or

(ii) If the claimant does not appear, the Magistrate shall hear and determine the action as between the plaintiff and the defendant, and may make an order barring the claim of the claimant; or

(iii) If both the plaintiff and the claimant appear, the Magistrate shall, whether the defendant appears or not, hear the proceedings and give judgment finally determining the rights and claims of all parties.

(*b*) Where the applicant is not a defendant—

(i) If any claimant does not appear, the Magistrate shall make an order finally determining the claim as between the applicant and any claimants who appear, and may make an order barring the claim of any absent claimants; or

(ii) If both or all the claimants appear, the Magistrate shall, whether the applicant appears or not, hear the proceedings and make an order finally determining the rights and claims of all parties.

The provisions of this paragraph are clear and self-explanatory. No mention has been made as to costs, nor the powers of the Magistrate to adjourn the hearing or summon witnesses. Interpleader proceedings are, however, actions within the meaning of the Act, and the Magistrate may therefore exercise all the powers that may be exercised by the Court in hearing and determining an action.

*Para. 11.* An order barring the claim of a claimant shall declare that the claimant and all persons claiming under him be for ever barred as against the defendant or applicant and all persons claiming under him and also (where the claimant has filed notice that he makes no claim) as against the plaintiff or the other claimant and all persons claiming under him.

*Para. 12.* Where the claimant has not filed notice that he has no claim, an order barring the claim shall not affect the rights of that claimant and the plaintiff or other claimant as between themselves.

# PRACTICE NOTES.

By W. J. SIM, K.C.

## Appeal from Judge's Discretion.

The House of Lords decision in *Evans* v. *Bartlam*, [1937] A.C. 473, [1937] 2 All E.R. 646, is probably the most important practice decision in recent years. It disturbs what has been a popularly accepted axiom that a Judge in giving judgment in a matter of discretion left himself open to appeal, only if he exercised his discretion on a wrong principle or had refused to exercise his discretion at all.

The case turned upon the discretion exercised by a Judge in Chambers (Greaves-Lord, J.) pursuant to the rules permitting a judgment obtained by default to be set aside. The rules under consideration were O. XIII. r. 10, O. XXVII. r. 15 and O. LIV. r. 12. These were as follows :—

> *XIII. r. 10*: Where judgment is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court, or a Judge to set aside or vary such judgment upon such terms as may be just.
>
> *XXVII. r. 15* : Any judgment by default, whether under this order or under any other of these rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit, &c.
>
> *LIV. r. 12* : In the King's Bench Division a master, and in the Probate Divorce and Admiralty Division a Registrar, may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act or these rules may be transacted or exercised by a Judge at Chambers except, &c.

The facts of the case were that the action was to enforce indebtedness arising out of betting transactions, and judgment was entered by default. In reply to an application by the plaintiff's solicitor for payment of the amount of the judgment, the defendant asked for time so that he could make arrangements to pay, and time was given to him. Subsequently the defendant entered an appearance to the writ, applied to have the judgment set aside and for leave to defend. The master dismissed the application, but Greaves-Lord, J., in Chambers, set aside the judgment and gave leave to defend upon terms.

The matter went to the Court of Appeal ( [1936] 1 K.B. 202) which unanimously reversed Greaves-Lord but upon differing grounds. Slesser and Scott, L.JJ., who formed the majority, held that the Judge's order should be reversed and leave to set aside the default judgment refused, on the ground that the appellant had by his conduct shut himself out of any right to claim to have the judgment set aside. These learned Judges held that the appellant was estopped from contesting the validity of the judgment, or must be deemed to have elected not to do so, since otherwise he would be approbating and reprobating the judgment. Greer, L.J., dissented from the other members of the Court, but took the view that the Court ought not to interfere with the order of the Judge made in the exercise of his discretion, and so upheld Greaves-Lord, J. He thus reached the conclusion finally held by the House of Lords, but also upon grounds which that Court rejects.

The latter Court has occasion in its judgments (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Roche) to examine both the question of appeal from the master's discretion to a Judge, and of appeal from the Judge's discretion to a Higher Court. In reference to the former, Lord Atkin, at p. 478, stated the position as follows :—

> I only stay to mention a contention of the respondent that the master having exercised his discretion the Judge in Chambers should not reverse him unless it was made evident that the master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a Judge, the Judge in Chambers is in no way fettered by the previous exercise of the master's discretion. His own discretion is intended by the rules to determine the parties' rights and he is entitled to exercise it as though the matter came before him for the first time. He will of course give the weight it deserves to the previous decision of the master but he is in no way bound by it. This in my experience has always been the practice in Chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper* v. *Cooper* with which I entirely agree.

On the main question, as to the right of appeal from a Judge's discretion to a Higher Court, their Lordships were unanimous. They overruled the view of Slesser and Scott, L.JJ., that the defendant had by his conduct estopped himself from making the application, and they also disagreed with Greer, L.J., that the Judge's discretion is not open to review. They held that such a judgment was open to review, but that upon review Greaves-Lord, J., was right. The breadth of their decision is contained in the headnote ( [1937] A.C. 473) as follows :—

> While the Court of Appeal will not normally interfere except on grounds of law with the exercise of the Judge's discretion, if it is seen that on other grounds his decision would result in injustice being done, the Court of Appeal has *both the power and the duty to remedy it.*

The words are those of Lord Atkin, and before enunciating the general principle he addressed himself to Greer, L.J.'s ruling that a discretion could not be reviewed in such circumstances :

> I consider it to be a mistake to hold, as Greer, L.J., seems to do, that the jurisdiction of the Court of Appeal on appeal from such an order is limited, so that as the Lord Justice said, " The Court of Appeal have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law." Appellate jurisdiction is always statutory : there is in the statute no restriction upon the jurisdiction of the Court of Appeal.

There is no qualification in the judgments to the generality of these principles. For instance, at p. 486, Lord Wright states his view as follows :—

> It is clear that the Court of Appeal should not interfere with the discretion of a Judge acting within his jurisdiction unless the Court is clearly satisfied that he is wrong. But the Court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. *The Court must if necessary examine anew the relevant facts and circumstances* in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the Judge might be regarded as independent of supervision. Yet an interlocutory order of the Judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal.

The authority, then, reduces the question to the avoidance of injustice, and permits a freedom of review, at which few will take exception. There is also a gratifying observation which fell from Lord Atkin at p. 479, concerning the presumption that we all know the law. In order to involve the unfortunate defendant in an estoppel or election of some sort, certain knowledge as to his rights was, so it was said, to be attributed to him. But Lord Atkin dispelled this, and cleared up a generally-accepted half-truth:

> For my part I am not prepared to accept the view that there is in law any presumption that any one, even a Judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

Although the appellate Court is free to decide a discretionary matter so that injustice shall not be done, it may be noted that the appellant must discharge the onus of showing that the Judge was wrong on the merits. Lord Wright so stated the position at p. 488; and again in *Holland* v. *German Proprietary Administrator*, [1937] 2 All E.R., 807, at p. 815, that learned Judge said in reference to a discretionary matter:

> It (the appellate Court) must consider the position from the point of view of the requirements of justice and reasonableness. *While not bound by what the Court below has done*, it will, however, not depart from that course unless for reasons which appear to require a reversal of the exercise of the discretion of the Judge.

*(To be continued.)*

# RECENT ENGLISH CASES.



DIVORCE.

Intervention after Decree *Nisi*—Discretion of Court—Petitioner Living in Adultery Prior to Presentation of Petition—No Rule of Universal Application Requiring Petitioner to Separate from Illicit Partner Pending Suit—Adulterous Association not Disclosed—Public Policy.

*There is no universal rule that a petitioner must break off an adulterous association before presenting a petition; but it must depend on the circumstances in each case.*

ANDREWS *v.* ANDREWS (KING'S PROCTOR INTERVENING), **[1940] 3 All E.R. 87. P.D.A.D.**

As to discretion of Court: see HALSBURY, Hailsham edn., vol. 10, pp. 689–690, par. 1022; and for cases: see DIGEST, vol. 27, pp. 359–367, Nos. 3443–3538.

EMERGENCY LEGISLATION.

Taking Possession of Property—Judgment for Delivery up of Chattel to Which Plaintiff Contractually Entitled—Issue of Writ of Delivery—Whether Leave of Court Necessary Before Obtaining Judgment and Issue of Writ—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (*a*).

*A plaintiff, having obtained judgment in an action for the recovery of a chattel, does not need leave under the Courts (Emergency Powers) Act, 1939, to issue execution by applying for a writ of delivery.*

S. AND A. SERVICES, LTD. *v.* DICKSON, **[1940] 3 All E.R. 98. C.A.**

As to the Courts (Emergency Powers) Act, 1939, s. 1 (2): see BUTTERWORTHS' EMERGENCY LEGISLATION, Statutes Volume, p. 207.

Trading with Enemy—English Company Guaranteeing to Another English Company Debt of Enemy—Action on Guarantee—Performing or Discharging Obligation of Enemy—Transaction under which all Obligations Performed by Plaintiff Before Commencement of War—Trading with the Enemy Act, 1929 (c. 89), s. 1 (2) (*a*) (iii).

*An English company, having guaranteed a German company's debt to another English company, does not trade with the enemy by paying under the guarantee, as the obligation of the German company is thereby transferred and not discharged.*

R. AND A. KOHNSTAMM, LTD. *v.* LUDWIG KRUMM (LONDON), LTD. **[1940] 3 All E.R. 84. K.B.D.**

As to trading with the enemy: see HALSBURY, Hailsham edn., vol. 1, pp. 460–462, pars. 779, 780; and for cases: see DIGEST, vol. 2, pp. 169–173, Nos. 379–392.

# RULES AND REGULATIONS.

**National Service Emergency Regulations, 1940.** General Reserve Classification Order, 1940. Amendment No. 1. August 8, 1940. No. 1940/164.

**Noxious Weeds Act, 1928.** Noxious Weeds Act Extension Order, 1940. August 8, 1940. No. 1940/165.

**Stock Act, 1908.** Stock (Cattle-tick) Regulations, 1940. August 8, 1940. No. 1940/166.

**Emergency Regulations Act, 1940.** Meat-exporters' Accounts Emergency Regulations, 1940. August 8, 1940. No. 1940/167.

**Industrial Efficiency Act, 1936.** Industry Licensing (Used Oil Refining) Notice, 1940. August 8, 1940. No. 1940/168.

**Labour Legislation Emergency Regulations, 1940.** Clothing Trade Labour Legislation Suspension Order, 1940. August 8, 1940. No. 1940/169.

**Labour Legislation Emergency Regulations, 1940.** Northern Industrial District Tanning Industry Labour Legislation Suspension Order, 1940. August 8, 1940. No. 1940/170.

**Cook Islands Act, 1915, and the Samoa Act, 1921.** Dependency Emergency Regulations (No. 2), 1939. Amendment No. 3. August 8, 1940. No. 1940/171.

**Contraband Proclamation.** August 8, 1940. No. 1940/172.

**Emergency Regulations Act, 1939.** Transport Licensing Emergency Regulations, 1940. Amendment No. 1. August 8, 1940. No. 1940/173.

**Order in Council for Restricting the Commerce of Italy.** August 8, 1940. No. 1940/174.

**Order in Council for Restricting Enemy Commerce.** August 8, 1940. No. 1940/175.

**Emergency Regulations, 1940.** Delivery Emergency Regulations, 1940. August 8, 1940. No. 1940/176.

**Labour Legislation Emergency Regulations, 1940.** Cheese-factories Labour Legislation Suspension Order, 1940. August 9, 1940. No. 1940/177.

**Harbours Act, 1923.** General Harbour Regulations, 1935. Amendment No. 2. August 15, 1940. No. 1940/178.

**Fisheries Act, 1908.** Trout-fishing (Wellington) Regulations, 1936. Amendment No. 4. August 15, 1940. No. 1940/179.

**Fisheries Act, 1908.** Sea-fisheries Regulations, 1939. Amendment No. 6. August 15, 1940. No. 1940/180.

**Judicature Act, 1908.** Court of Appeal Amendment Rules, 1940. August 15, 1940. No. 1940/181.

**Judicature Act, 1908.** Supreme Court Amendment Rules, 1940, No. 2. August 15, 1940. No. 1940/182.

**Emergency Regulations Act, 1939.** Alien Control Emergency Regulations, 1939. Amendment No. 4. August 15, 1940. No. 1940/183.

**Control of Prices Emergency Regulations, 1939.** Price Order, No. 6. August 16, 1940. No. 1940/184.

**Control of Prices Emergency Regulations, 1939.** Price Order, No. 7. August 16, 1940. No. 1940/185.