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"Experience in the present war must have taught us all that many things are done in the name of the Executive in such times purporting to be for the common good, which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to which might have been disputed, and that absence of contest, and even of protest, is by no means always an admission of right."

—LORD SUMNER, in *Attorney-General* v. *de Keyser's Royal Hotel, Ltd.*, [1940] A.C. 508, 563.

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THE RULE IN RUSSELL v. RUSSELL: SOME RECENT DECISIONS.

TWICE in the course of a few months, the application of the rule in *Russell* v. *Russell*, [1924] A.C 687, has come before appellate tribunals—in divorce in *Ettenfield* v. *Ettenfield*, [1940] 1 All E.R. 293, a decision of the Court of Appeal, and again in *The King* v. *Carmichael*, [1940] 2 All E.R. 165, a decision of the Court of Criminal Appeal. As these cases have some striking similarities to two decisions of our own Court of Appeal, we propose to consider the manner in which they were respectively dealt with in the appellate tribunals of England and of this country.

I.—IN CRIMINAL PROCEEDINGS.

In *The King* v. *Seaton*, [1933] N.Z.L.R. 548, the Court of Appeal (Sir Michael Myers, C.J., and Reed MacGregor, and Smith, JJ., Ostler, J., dissenting, held that the rule of law, that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock, applied in *Russell* v. *Russell*, [1924] A.C. 587, to divorce proceedings, applies in all cases.

In *Seaton's* case, father and daughter were jointly tried for incest, the relationship alleged between them being that of father and illegitimate daughter. The acts of intercourse were proved. Mrs. Bragg, the mother of the female accused was tendered as a Crown witness, after evidence had been given *aliunde* tending to prove non-access of her husband at the time the female accused must have been conceived, and there was other evidence to prove that the male accused was the actual father of the female accused. The evidence of Mrs. Bragg was admitted (subject to objection by counsel), and she testified that the male accused was the father of the female accused; that the signature to an entry in the birth register of the birth of the female accused, showing that the father was the male accused and the mother was Mrs. Bragg and that the child was illegitimate, was in the handwriting of the accused, and that he said he wanted the child to be registered in his name because he was the father. In cross-examination by counsel for the female accused, Mrs. Bragg said "Bragg [her husband] was not with me when Seaton [the male accused] first went there," referring to the place where the female accused was conceived and born.

Mr. Justice Herdman directed the jury that they were entitled to draw an inference from the evidence of another witness that no sexual intercourse could have taken place between Bragg and Mrs. Bragg by reason of the former's absence at the time when the female accused was conceived; and that, if they did draw that inference, they were then entitled to consider Mrs. Bragg's evidence for the sole purpose of determining the paternity of the female accused.

The jury found both accused guilty, and the learned trial Judge, having some doubt about the admission of Mrs. Bragg's evidence that the female accused was the illegitimate child of the male accused, reserved the point for the Court of Appeal.

Before considering the judgments of the members of the Court of Appeal, it is necessary to refer to s. 155 of the Crimes Act, 1908, which defines incest as meaning "carnal connection between—(*a*) Father and daughter . . ." This differs in a material way from s. 1 of the Punishment of Incest Act, 1908 (Eng.), which provides as follows:

> (1) Any male person who has carnal knowledge of a female person, who is *to his knowledge*, his grand-daughter, daughter, sister, or mother, shall be guilty of a misdemeanour . . .

While, in England, knowledge is an ingredient of the offence, in New Zealand it is not.

In *Seaton's* case, it was held by the majority of the Court of Appeal (Sir Michael Myers, C.J., and Reed

and MacGregor, JJ.) that the rule in *Russell* v. *Russell* makes inadmissible not only the evidence of non-intercourse with the husband, but also evidence that another man was the actual father of the child, even though there might be evidence *aliunde* of the non-access of the husband, the relationship being directly in issue and necessarily involving the question of legitimacy, the question whether the male accused was the father of the female accused connoting proof that the husband was not the father. The mother's evidence was, therefore, held to have been wrongly admitted; and, if the mother's evidence were the only evidence of non-access and illegitimacy, the proper course would be to quash the conviction.

Mr. Justice Ostler was of the opinion that the rule in *Russell* v. *Russell* applied only to divorce proceedings, and that there was no authority for extending it to criminal proceedings; and, that being so, the evidence of Mrs. Bragg, given to prove that the male accused was the father of the female accused was admissible, even though the result of that evidence was to prove that the female prisoner was illegitimate. He said that the question directly in issue was whether the male accused was the father of the female accused and therefore guilty of incest, not whether the female accused was illegitimate. His Honour observed that if the rule in *Russell* v. *Russell* were applicable in criminal proceedings, it may just as easily have the effect of preventing an innocent man from establishing his innocence, and the Court, in his opinion, should strive its utmost to prevent a rule of evidence which might work so cruel an injustice being embodied in our criminal law.

Mr. Justice Smith was of the opinion that the rule in *Russell* v. *Russell* had reference to the question whether non-access could be proved by a spouse for the purpose of rebutting the presumption of legitimacy and was not directed to the question whether actual paternity could be proved by a spouse during a trial after satisfactory evidence to rebut the presumption had been given *aliunde*; that the necessity of the case required the application of the rule laid down in relation to bastardy cases in *R.* v. *Reading*, (1735) Cas. Hard. 79; 95 E.R. 49; and that after evidence has been given *aliunde* of the non-access of the husband, the mother may give evidence of intercourse with the person alleged to be the actual father. His Honour concluded that the evidence of Mrs. Bragg was not admissible at the trial for the purpose of rebutting the presumption of the legitimacy of the female accused, who was conceived and born during the marriage of Mrs. Bragg with her husband.

Now we come to *The King* v. *Carmichael*, [1940] 2 All E.R. 165, and we must bear in mind the distinction between the crime of incest as defined in New Zealand, and in England where *mens rea* is an essential ingredient, so that the question (as in New Zealand) whether A. is B.'s daughter is totally distinct from the question (as in England) whether to B.'s knowledge she is his daughter.

In *Carmichael's* case, the appellant was charged that he "had carnal knowledge of Sonia May Carmichael, who was to his knowledge his daughter." There was little dispute as to the facts. On September 2, 1912, the appellant married his wife, and the second child—the subject of the charge—was born on May 18, 1915. Throughout the whole of the year 1914, the appellant resided in London, and his wife in Cambridge where he visited her from time to time. There was evidence that in August, 1914, the appellant's wife was associating with a man named West, but there was no evidence of any misconduct by her with West at that time. In January, 1915, the appellant enlisted, and later went on active service. While he was in France, his wife committed adultery with West, and on November 17, 1916, he petitioned for divorce and cited West as co-respondent, and in due course the marriage was dissolved. In his petition, which was of course verified by his affidavit, the appellant stated that there was living issue of the marriage two children, one of them being "Sonia May Carmichael born on May 18, 1915."

It was incumbent on the Crown to prove to the satisfaction of the jury (*a*) that the appellant was in fact the father of Sonia, and (*b*) that he knew he was her father. Proof that she was his daughter would be insufficient to justify a conviction, unless it was also proved that the appellant knew that she was his daughter. If the jury had reasonable doubt that he believed she was not his daughter, he would have been entitled to a verdict of acquittal.

At the trial, the question first arose when the appellant's counsel desired to ask the appellant's second wife, who was a Crown witness, whether it was not a fact that the appellant had informed her that he was not the father of Sonia. The learned trial Judge held that the rule in *Russell* v. *Russell* made any such question inadmissible. When the accused himself was giving evidence, his counsel asked him who had first informed him that Sonia was not his daughter. The answer would have been that it was the mother of Sonia who had so informed him, but the question was disallowed on the ground that the answer would infringe the rule in *Russell* v. *Russell*.

The grounds for the appeal were (*i*) that the trial Judge was wrong in law in holding that the rule in *Russell* v. *Russell* applied, and that no statement by the appellant or his former wife which tended to bastardize any issue of that wife born in wedlock could be admitted; (*ii*) that the Judge misdirected the jury in his summing-up when he told them to disregard all statements made by the accused or his former wife which tended to bastardize Sonia; and (*iii*) that the Judge thus wrongly excluded vital evidence tending to show that the appellant did not know that Sonia was his own daughter.

In delivering the judgment of the Court of Criminal Appeal (Charles, Macnaghten, and Oliver, JJ.), Mr. Justice Charles said that the appeal raised an interesting and important question with regard to the application, on a trial for incest, of the rule of law, affirmed by the House of Lords in *Russell* v. *Russell*, that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock.

The case for the appellant, His Lordship proceeded, was this: Conceding that there was no evidence to rebut the presumption that he was the father of Sonia, and that the Crown had proved that fact conclusively, the appellant desired to give evidence that his former wife had told him that Sonia was begotten by another man, and that he honestly believed her statement to be true; and that, so far from knowing Sonia to be his daughter, he believed the contrary.

In the course of their Lordships' judgment, delivered by Charles, J., they said:

> Evidence by the appellant that his wife had told him that he was not the father of Sonia was no evidence at all that he was not in fact her father, and was irrelevant and inadmissible on the question of the paternity of the child. In our opinion such evidence would not in any way infringe the rule in *Russell* v. *Russell*. Though it was irrelevant to the question of the paternity of Sonia, it was plainly relevant to the question whether or not the appellant knew that Sonia was his daughter, since, if the jury were satisfied, (*i*) that Sonia's mother did in fact tell the appellant that he was not the child's father, and (*ii*) that the appellant believed her statement to be true, then they would have been bound to return a verdict of acquittal. Indeed, by the exclusion of this evidence, the appellant was deprived of the right to substantiate his plea that Sonia was not, to his knowledge, his daughter.
>
> To preclude a defendant on his trial from giving evidence of his belief, and the ground for it, seems to us to deprive him of one of the most elementary rights of an accused person, and to be a negation of justice where *the proof of knowledge or no knowledge is vital to conviction or acquittal* . . . In our opinion, the rule in *Russell* v. *Russell* did not preclude the appellant from giving any relevant evidence in support of his plea that he did not believe that Sonia was his daughter, including an admission or confession by her mother.

After referring to Lord Sumner's dictum in the course of his dissenting opinion in *Russell* v. *Russell* at p. 739 on the hardship the rule would work in an incest case—which Ostler, J., cited in *Seaton's* case at p. 575—their Lordships said that, in their opinion, where knowledge is vital to the offence, the question whether A. is B.'s daughter is totally distinct from the question whether to B.'s knowledge she is his daughter.

The judgment in *Carmichael's* case does not affect the decision of the majority in *Seaton's* case, because the Court of Criminal Appeal did not hold that the rule in *Russell* v. *Russell* does not apply to criminal proceedings. The Court of Criminal Appeal merely held that, when *mens rea* is in issue, evidence of statements by a spouse bastardizing issue born during wedlock is admissible to show the effect on the mind of the person to whom the statements are made, when knowledge on his part has to be proved. But as in *Seaton's* case (*supra*), it was held that such evidence is not admissible when the relationship is directly in issue and the question of legitimacy is necessarily involved.

In an earlier incest case, *The King* v. *Hemmings*, (1939) 27 Cr. App. Rep. 46, the Court of Criminal Appeal (Charles, Atkinson, and Singleton, JJ.) assumed that the presumption of law that the child of a married woman was begotten by her husband, and the rule that such presumption can be rebutted only by extraneous evidence of absence of intercourse, applies in criminal proceedings.

At the trial it was proved that the girl alleged to be the accused's daughter was born during the time her mother was married to one Manley. On his death, accused married Mrs. Manley. The prosecution relied on certain admissions made by the accused that the girl was his daughter. Counsel for the prosecution proposed to ask the girl's mother whether the girl was in fact Manley's daughter. Croom-Johnston, J., the trial Judge, upheld the objection of accused's counsel that any such question would offend against the rule in *Russell* v. *Russell*: and he held that the rule applied to a charge of incest, but that the presumption could be rebutted by extraneous evidence, including the evidence of the paramour.

The Court, in a judgment delivered by Atkinson, J., held that the law applicable was correctly stated in *2 Halsbury's Laws of England*, p. 560, para. 768:

> The presumption of legitimacy continues notwithstanding that the wife is shown to have committed adultery with any number of men. The law will not permit any inquiry whether the husband or some other man is more likely to be the father of the child, and it must be affirmatively proved, before the child can be bastardized, that the husband did not have sexual intercourse with his wife at the time when it was conceived.

There was no evidence that Mrs. Manley had committed adultery with the appellant, or that the husband did not have intercourse with his wife when the child was conceived, and the case should have been stopped at the close of the case for the prosecution, and they should have been told there was no case for them to consider.

In *Hemming's* case, therefore, the rule in *Russell* v. *Russell* was taken for granted, both by the trial Judge and the Court of Criminal Appeal, as having application to criminal proceedings. It was not necessary to decide the point, the Court holding the evidence was inadmissible on the ground that a Court of law will not bastardize the issue of a married woman without evidence of non-access.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Christchurch.
1940.
August 21, 30.
Northcroft, J.

SMITH (OTHERWISE HITCHES) v. BOWDEN.

Family Protection—Bigamy—Widow entitled under Order to Net Income of Deceased's Estate—Subsequent Marriage in Suva to Man already Married—Action for Unpaid Income—Jurisdiction of Court in such Action to find no Marriage.

Plaintiff, widow of deceased testator, obtained an order under the Family Protection Act, 1908, that the net income of the estate be paid to her during her widowhood. Payments were made to her pursuant to the order until she went through a form of marriage at Suva with H. Subsequently, she discovered that, at the time of the ceremony, he was already married.

In an action against the administrator of the estate of the deceased for the income of the estate over a period of years,

R. Twyneham, for the plaintiff; *Upham*, for the defendant.

Held, That the Court had jurisdiction, without pronouncing a decree of annulment, to find on the evidence that there never had been a marriage of the plaintiff with H., and that she was still the widow of deceased, and entitled to the income claimed

Inverclyde (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29; *Gagen* v. *Gagen*, [1929] N.Z.L.R. 177, G.L.R. 129; *White* (*otherwise Bennett*) v. *White*, [1937] P. 111, [1937] 1 All E.R. 708; and *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator*, [1927] A.C. 641, referred to.

Solicitors: *R. Twyneham*, Christchurch, for the plaintiff; *Harper, Pascoe, Buchanan and Upham*, Christchurch, for the defendant.

Case Annotation: *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator*, E. and E. Digest, Vol. 11, No. 926a; *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, *ibid.*, No. 926b; *White* (*otherwise Bennett*) v. *White*, *ibid.*, No. 926d.

SUPREME COURT. Napier. 1940. August 20, 28. *Ostler*, J.

In re **A MORTGAGE, C. TO PUBLIC TRUSTEE.**

War Emergency Legislation—Mortgages—Stock Mortgage—First Mortgagee of Land—Mortgage of Stock—Application for Leave by First Mortgagee of Land to Exercise Remedies—Income being appropriated by Stock Mortgagee to Reduction of Interest and Principal—Power to join Stock Mortgagee—Nature of Order Made—Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), Reg. 2 (1), 6 (1) (a).

The Court has power under the Mortgages Extension Emergency Regulations, 1940, to make orders binding stock mortgagees.

In re a Mortgage, W. to Union Bank of Australia, Ltd., [1932] N.Z.L.R. 1130, G.L.R. 159, and *In re a Mortgage, S. to Public Trustee*, [1932] N.Z.L.R. 1183, G.L.R. 250, distinguished.

Where a stock mortgagee appropriated first to the interest and then to the principal due to it, almost all the profits made from a farm property, while no money was made available for meeting payments to the first mortgagee of the land, who applied for leave to exercise his powers, the Court adjourned the matter to enable both mortgagees to come to an arrangement, failing which, an order would be made to join the stock mortgagee as a party.

Counsel: *Wachter*, in support; *Chamberlain*, for the mortgagor, to oppose.

Solicitors: *Public Trust Office Solicitor*, Napier, for the Public Trustee; *C. V. Chamberlain*, Wairoa, for the mortgagor.

SUPREME COURT. Napier. 1940. August 20, 28. *Ostler*, J.

In re **SCULLEN (DECEASED).**

Practice — Probate and Administration — Administration — Executrix (Widow with Life Interest) resident out of New Zealand—Residuary Beneficiaries in Dominion—Application by Attorneys in New Zealand for Administration with Will Annexed—Whether "special circumstances" for granting Administration upon Conditions—Court of Probate Act, 1857 (20 & 21 Vict., c. 77), s. 73.

A testator in the United States by his will made his wife, who resided in Seattle, executrix, and gave all his property to her for life, and after his death to his sisters all residing in New Zealand. Probate of the will was granted to the widow by the Superior Court of the State of Washington.

The testator's estate in New Zealand consisted of a sum on fixed deposit with a Bank, the term of which had expired. Five years after the grant of probate, the executrix appointed two New Zealand solicitors her attorneys, to apply for letters of administration with the will annexed, of the testator's estate in New Zealand, until she should obtain probate of the will.

Upon the application of the testator's sisters, who had lodged a caveat against the grant, but asked that such grant should only be on conditions protecting them,

Hallett, in support; *Holderness*, to show cause.

Held, That the facts constituted "special circumstances" under s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict., c. 77), and the Court had power to impose conditions in granting letters of administration with will annexed to the applicants.

Administration was then granted to the applicants, with power to administer the New Zealand assets of the estate for and for the use of the executrix until she should apply for and obtain probate in New Zealand: upon the following conditions, that the administrators would not be permitted to send any of the capital moneys of the estate out of New Zealand without the leave of the Court, and that leave would not be granted unless and until the executrix gave due security to the satisfaction of the Court for the protection of the rights of the testator's sisters, the residuary legatees.

In re Hunter (deceased), *Hunter* v. *Hunter*, [1932] N.Z.L.R. 911, G.L.R. 317, 530; *In the Goods of Samson*, (1873) L.R. 3 P. & D. 48, and *In the Goods of Grewe*, (1922) 127 L.T. 371, applied.

Solicitors: *Kelly and McNeil*, Hastings, for the applicant; *Williams, White, and Co.*, Hastings, for the residuary legatees.

Case Annotation: *In the Goods of Grewe*, E. and E. Digest, Vol. 23, p. 164 para. 1776; *In the Goods of Samson*, *ibid.* para. 1780.

SUPREME COURT. Gisborne. 1940. August 13, 15. *Ostler*, J.

In re **HARRIS (DECEASED), PUBLIC TRUSTEE v. BRODIE AND OTHERS.**

Will—Devises and Bequests—Annuities—Rights as to Property charged—Gift over of Surplus Income during life of Annuitant and of Whole of Income of Residuary Estate after his Death—Whether charge on Capital or continuing Charge on Income.

A testator by his will bequeathed his residuary estate to his executor upon trust to pay out of the net income an annuity to his widow during her lifetime; and, subject thereto (upon a trust which failed), and in the event of such failure, upon trust to divide the residue (if any) of the net income arising from his residuary estate into two equal parts, and to pay one of such parts to one sister of the testator during her life and the other to another sister, during her life. Subject to these annuities, the capital and income of the residuary estate were bequeathed to certain nephews and nieces.

On originating summons for interpretation,

Chrisp, for the Public Trustee; *Wauchop*, for the first defendants; *Whitehead*, for the second defendants; *Burnard*, for the third defendants.

Held, That by the terms of the annuities to the two sisters the testator had expressed an intention contrary to the general rule that the widow's annuity should be first paid out of the corpus of the fund or out of the income which accumulated after the death of the annuitant.

Stelfox v. *Sugden*, (1859) John. 234, 70 E.R. 410, and *Re Coller's Deed Trusts, Coller* v. *Coller*, [1937] 3 All E.R. 292, applied.

In re Ellison (deceased), *Rainbow* v. *Ellison*, [1939] N.Z.L.R. 199, G.L.R. 203, distinguished.

Solicitors: *Public Trustee*, Wellington, for the plaintiff; *Rees, Bright, Wauchop, and Parker*, Gisborne, for the first defendants; *Whitehead and Graham*, Gisborne, for the second defendants; *Burnard and Bull*, Gisborne, for the third defendants.

Case Annotation: *Stelfox* v. *Sugden*, E. and E. Digest, Vol. 39, p. 153, para. 456; *Re Coller's Deed Trusts, Coller* v. *Coller*, *ibid.*, Supp. Vol. 39, No. 457a.

SUPREME COURT. Wellington. 1940. June 28; July 25. *Myers*, C.J.

In re **AN ARBITRATION, GOVERNORS OF WELLINGTON COLLEGE AND GIRLS' HIGH SCHOOL v. JOHN DUTHIE AND COMPANY, LIMITED.**

Local Authorities—Public Bodies' Leases—Perpetual right of Renewal—Rent for Renewed Lease determined by Valuation—Reasonable Cost thereof to be paid by Lessee pursuant to Statute—Provision declared Void by subsequent Statute—Whether Valuation an Arbitration "under any other Act"—Public Bodies Leases Act, 1908, s. 5 (e), First Schedule, Cls. 8, 14—Arbitration Act, 1908, s. 2—Arbitration Amendment Act, 1938, ss. 14 (1), 20.

A lease with a perpetual right of renewal granted pursuant to the powers contained in the Public Bodies Leases Act, 1908, provided for the lessees rights of renewal on the terms set out in the lease, being the terms prescribed by the First Schedule of the Act, the rent to be determined by valuation. One of the terms prescribed by that Schedule and contained in the lease was as follows:

The reasonable cost of any such valuation as expressed shall be borne by the lessee;

and another prescribed term was that the provisions for the making of a valuation should be deemed to be a submission to arbitration under and within the meaning of the Arbitration Act, 1908.

For the purpose of determining the rental for a new term, the parties appointed arbitrators who appointed an umpire. The arbitrators having disagreed, the umpire made a valuation and (*inter alia*) awarded that the costs should be borne as to one-third by the lessor and as to two-thirds by the lessee.

On a motion to set aside the award or remit it back to the umpire so far as costs were concerned, on the ground that it was erroneous in law,

Powles, for the Wellington College Governors, in support; *Watson*, for John Duthie and Co., Ltd., to oppose.

Held, dismissing the motion, That the provision as to costs was part of the submission and the arbitration was an arbitration under the Arbitration Act, 1908, and not "under any other Act" within the meaning of that phrase in s. 20 of the Arbitration Amendment Act, 1938; and that, therefore, s. 14 (1) of the Arbitration Amendment Act, 1938, applied.

Hamill v. *Wellington Diocesan Board of Trustees*, [1927] G.L.R. 197, referred to.

Solicitors: *Brandon, Ward, Hislop, and Powles*, Wellington, for the College Governors; *Chapman, Tripp, Watson, James and Co.*, Wellington, for John Duthie and Co., Ltd.

COMPENSATION COURT.
Wellington.
1940.
July 15, 26.
O'Regan, J.

DE BIQUE v. McGOWAN AND MAGEE, LIMITED.

Workers' Compensation—Dependency—Wife s leaving Home—Proceedings for Maintenance—Husband s whereabouts not disclosed to her—After Husband's Death claiming Compensation for herself and Children—Whether desertion of Husband without just Cause—Whether Wife's claim abrogated—Total or Partial Dependency—Workers' Compensation Act, 1922, s. 4 (2).

A worker, who was suffering from advance heart disease, and whose death was a matter of weeks, died from injury by accident arising out of and in the course of his employment. He left a wife and three children, two daughters of sixteen and twelve respectively, and a son of ten. The wife claimed compensation for herself and the three children. Nine years before the death of her husband, the wife left him, his conduct being such as to justify her in leaving him. She left with P., a lodger, and lived with the latter for seven years until his death. Since she left her husband, he had never contributed to her support, although he was able to do so. After P.'s death, she was in bad health and had to resort to charitable aid. She took proceedings for maintenance against her husband, but owing to the circumstances set out in the judgment, had not obtained an order when he died.

C. J. O'Regan, for the plaintiff; *W. P. Shorland*, for the defendant.

Held, 1. That there had not been desertion of her husband without just cause.

2. That she and her two youngest children were total dependants within the meaning of s. 4 (2) of the Workers' Compensation Act, 1922.

In the case of one child who was earning £1 a week at the date of her father's death, in view of the fact that his death must have occurred shortly had there been no injury by accident, she was awarded £20 in view of her partial dependency.

Lee v. *S.S. "Bessie" (Owners of)*, [1912] 1 K.B. 83, 5 B.W.C.C. 55, and *Potts (or Young)* v. *Niddrie and Benhar Coal Co., Ltd.*, [1913] A.C. 531, 6 B.W.C.C. 774, applied.

New Monckton Collieries, Ltd. v. *Keeling*, (1901) 3 F. (Ct. of Sess.) 775, distinguished.

Solicitors: *C. J. O Regan*, Wellington, for the plaintiff; *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the defendant.

Case Annotation: *Lee* v. *S.S. "Bessie" (Owners of)*, E. and E. Digest, Vol. 34, p. 250, para. 2146; *Young* v. *Niddrie and Benhar Coal Co., Ltd.*, *ibid.*, p. 251, para. 2151; *New Monckton Collieries, Ltd.* v. *Keeling*, *ibid.*, p. 249, para. 2143.

COMPENSATION COURT.
New Plymouth.
1940.
August 21, 26.
O'Regan, J.

GYDE v. BOON BROTHERS, LIMITED.

Workers' Compensation—Average Weekly Earnings—Overtime—Whether included in the Computation thereof—Workers' Compensation Act, 1936, s. 7 (5).

Since the passing of the Workers' Compensation Amendment Act, 1936, overtime may be included in the computation of average weekly earnings, in respect of all classes of labour, unless the weekly earnings would entitle the worker to an equal rate of compensation.

Pidwell v. *Wanganui Sash and Door Factory and Timber Co., Ltd.*, [1917] G.L.R. 346, applied.

Wilkinson and Jenkins v. *Glen Afton Collieries, Ltd.*, [1938] N.Z.L.R. 1008, G.L.R. 630, referred to.

Counsel: *H. R. Billing*, for the plaintiff; *G. Macallan*, for the defendant.

Solicitors: *Billing, Little, and Fookes*, New Plymouth, for the plaintiff; *Govett, Quilliam, Hutchen, and Macallan*, New Plymouth, for the defendant.

NEGLIGENCE, THAT FACT.

In *Hancock* v. *Stewart*, [1937] N.Z.L.R. 321, 330, Mr. Justice Ostler said that "negligence is a question of fact, not of law." In *Stewart* v. *Hancock*, [1940] N.Z.L.R. 424, 428, the Privy Council said that they agreed with "this admirable summary of the law relating to the case." There may however be some difficulty in relating these views with the previous observation of the Privy Council in *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85, to the effect that negligence, where there is a duty to take care, is a specific tort in itself—that is to say a civil injury giving rise to proceedings for damages. In other torts, after the facts have been elicited, it is for the Judge, as a matter of law, to say that liability attaches to the defendant, that the acts proved amount to a tort. If negligence be a matter of fact in each case as it arises, it is curious that so much space should be devoted to it in textbooks supposed to deal with points of law rather than matters of fact. The suggestion is offered that although negligence is a matter of fact—as no lawyer can now permit himself to deny—at least it may be a matter of fact of a unique and complicated character.

Any of the approved definitions will serve to base an examination on. "Negligence is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do." The care taken by a prudent man has always been the rule laid down. Common to all of them is the idea of a standard, that of the behaviour of the Reasonably Prudent Man. It is here that the complexity comes in.

Imagine a methodical jury jotting down its findings of the primary (or relatively primary) facts in preparation for giving its verdict in an action where A has sued B in a running-down case. The stage of unanimity has been reached, and the foreman's notes on a piece of blotting-paper read thus: Part I; What B Did.—Entered the curve *m–n* at $58\frac{7}{\frac{1}{2}}$ miles an hour. Decelerated at *n* to $42\frac{1}{\frac{1}{2}}$ miles an hour. Over the patch of gravel took the zigzag course *o–p–q–r*. Struck the telegraph-post at *s* with the near side of his vehicle. Cannoned into A's car at *t* with an impact which (although there is no evidence of its force in units of measurement) was sufficient to break A.'s leg in three places.

The next piece of blotting-paper is headed "Part II; What B Ought To Have Done." (If the foreman has been reading a textbook on Negligence, which, as a topic of fact, should be strongly recommended to

jurymen to read, his heading might be, "What the Reasonably Prudent Driver Ought To Have Done.") The notes continue:—Entered the curve at a speed not exceeding 42½ miles an hour. Left *n* at a speed not exceeding 37¾ miles an hour. After subsequent discussion, sufficient if he entered the curve at any speed from which he could decelerate to 37¾ at *n*. Braked when he reached the gravel, and took the straight course *p–r*. Continued that course, missing *s* and missing *t*.

The third step towards verdict hardly needs blotting-paper. On comparing Part I with Part II the direct conclusion is drawn that B was negligent.

Figuratively, the process may be described as building up in Part I a cinematographic picture of the accident from the evidence adduced. Part II is more like a film made, not out of photographs of real life, but from photographing a series of cartoons—a process in which, as contemplation of Mr. Disney and his imitators teaches us, success depends on the genius of the cartoonist. The final step is to project the two films side by side, and draw conclusions from their divergencies.

The foregoing simplifies a good deal the jury's real task by, in effect, reducing chiaroscuro to diagrams; and also by omitting the sheets of blotting-paper required to deal with the usual issue of contributory negligence. At some examinations the candidate is required to hand in his blotting-paper with his script. If our logical jury handed in its blotting-paper with its special verdict ("Yes." "Yes." "No." "£940."), motions for judgment might be more easily disposed of, and applications for new trials be fewer.

Now Part I of the blotting-paper contains findings of actual fact. Part II is harder to describe in terms that will not raise an argument; its contents are certainly not findings of law; nor are they inferences from the relevant facts found in Part I. Findings of hypothetical fact may be a fair term to describe them. Whatever they are, they are just as essential to a verdict as Part I. The whole essence of negligence implies a failure to do what should have been done, or a doing of what should not have been done. What should have been done, or not done, has to be ascertained just as much as what was done, or not done. A process of comparison is an essential step to the verdict.

The writer will not be accused of seeking to profane the secrets of the jury-room if he affirms that no jury ever did, and no jury ever will, proceed in the manner described above. They probably do indeed work out bits of Part I with as much particularity as they think the case requires. Part II however is replaced by some mental process of intuitional integration, resulting in the vague, but sufficient, vernacular conclusion that B "had no right to do" whatever it was that he was negligent in doing.

The logician may observe with some interest that though necessary findings of fact should be based on evidence, whether the facts are actual or hypothetical, whether the question is what profit X made or what profit he would have made, yet juries in running-down cases rarely have the benefit of such evidence. No experts assist them by demonstrating how the Reasonably Prudent Man should handle a complicated machine in a difficult situation. Cross-examining counsel are deprived of what would be a particularly joyful interlude. No plaintiff is ever nonsuited for failing to lead evidence to enable the jury to construct Part II of the blotting-paper. Sometimes such evidence is incidentally wrapped up with the evidence of actual facts; if not, nobody minds. Counsel may be eloquent about what the defendant ought to have done; he is never interrupted with the objection that there's no evidence of that before the jury. The plain English of it is that in the majority of cases such evidence would be futile. This is another instance of the unique position that arises through basing liability upon negligence as the law for the time being understands that term.

When an application for a new trial is made on the ground that the verdict is against the weight of evidence, it would appear proper to invite the tribunal hearing the application to examine the evidence not only of what happened, but also of what ought to have happened if there had not been negligence; and here the evidence of eye-witnesses is of particular value—*Brott* v. *Allan*, [1939] N.Z.L.R. 345, 355, 356. If, as often happens, evidence on the latter part of the issue is notably scanty, the Court must do what it can in the matter, by drawing what inference of fact are available; for example, "reasonable men might legitimately conclude . . . ." (*Goodwill* v. *Saulbrey*, [1938] N.Z.L.R. 114, 121). If the reported judgments of such cases do not as a rule indicate any much more formal arrangement of findings than may be imagined to be formulated in a jury-room, this may be due to the Court's opinion that it would not materially assist the understanding of its conclusions.

The position of negligence in its bearing on the ordinary rules of evidence is also interesting. A witness may not of course be asked a question of law, but he may be asked any relevant question of fact, including a fact to be found by the jury; which is free to disregard his answer if they think it incorrect or unreliable. It may therefore be that in a running-down case it is permissible to ask a witness: "Was or was not B negligent?" Or "In pulling out of the traffic lane as you and other witnesses have described, was B taking the care he ought to have taken?" Subject to the distinction between fact and opinion, which in New Zealand is not strictly applied, it may be permissible to ask: "Do you think that B was acting negligently; and if so, why?" Answers to such questions, given in a judicial fashion and supported by reasons, should have a considerable value in jury cases.

The boundaries between what is conventionally fact and what is conventionally law are drawn in different places according to the subject-matter. Sometimes the more elementary facts alone are for the jury, and the inferences to be drawn therefrom matters for the Judge. Sometimes, for convenience or through the inevitable nature of the facts, the jury is invited to go further and make its own synthesis. If it be found by the jury that C has executed a certain writing, attested and delivered to D, the Court will take the matter up at this stage and declare as law that C has demised Whiteacre to D. If the jury finds that C has removed his goods from Whiteacre and handed D the front-door key, and that D is living there, the Court will declare that D is lawfully in possession under his lease. On the other hand, whether a contract of carriage is common or special, *i.e.*, whether a carrier is a common carrier or not, has been held to be conventionally a matter of fact; that is to say, the

jury is directed not only to examine the primary facts available, but to go further and, by any mental process it likes to follow, logical deduction, induction, intuition, or jumping at conclusions, to pronounce that these facts make a common contract of carriage or a special contract.

It can hardly be contended that there is anything very logical about the conventional distinctions of fact and law. Practically, however, they work, and re-arrangements of them probably would not work. The imaginary analysis of evidence given above is meant to suggest how impracticable it would be to limit a jury in a negligence case to findings of the primary actual facts and their corresponding primary hypothetical facts, leaving the conclusion about negligence to be drawn by the Judge. Even if the learned word " negligence " were kept out of the jury's hearing like " detinue," " trover," and " conversion," and some homelier phrase like " lack of due care " permitted to the jury for use in its synthesis, the Judge's function of saying that lack of due care, found as a fact, imported negligence in law would be an empty one. As long as juries try negligence cases, it is difficult to see how their functions can be limited except by the rule that the Judge shall at least decide whether there is any evidence at all to go to the jury.

A modest reconciliation of theory and practice may be effected by saying that negligence, as a fact, is in fact a unique fact. To distinguish it from more elementary kinds of fact it may be called a compound fact, a synthetic fact, or a conventional fact. The old rule was " fact for the jury, law for the Judge." A more accurate present-day statement might be, " what is for the jury is called fact, what is left for the Judge is called law."

The law of negligence has been developed and modified in the last generation probably more than any other branch of Judge-made law. It would seem that further changes are almost inevitable. It will be interesting to see whether the principles of the common law are sufficiently elastic to enable the Judges to produce such further development as will put the topic on a satisfactory practical basis, or whether the assistance of the Legislature will have to be invoked.

DEFAMATION.

Proceedings before Quasi-judicial Tribunals.

By R. T. Dixon.

In the intricacies of modern Government, tribunals of a quasi-judicial character, both in this country and overseas, play a part of increasing importance. Noteworthy, therefore, is a recent decision whereby it was held that, in lack of special statutory provision to the contrary, the proceedings before one type of quasi-judicial tribunal are not the subject of absolute privilege, and the question of qualified privilege in such case was considered.

The decision mentioned was reported by the *New Zealand Herald* (Auckland), August 22, 1939. Here, Mr. Justice Blair, on appeal, upheld the finding of Paterson, S.M., as reported in *Kendall* v. *Mathews*, (1939) 1 M.C.D. 172. The headnote to the latter report reads :—

> A Licensing Authority constituted under the provisions of the Transport Licensing Act, 1931, is not such a quasi-judicial tribunal as to afford to its proceedings the cover of the cloak of absolute privilege, as its powers are administrative and it does not exercise judicial functions.

The facts were that a witness before the Licensing Authority made statements, held to be defamatory, concerning plaintiff whose application was under consideration by the Authority. The Magistrate cited *O'Connor* v. *Waldron*, [1935] A.C. 76, 81, 82, as his principal authority for holding that the proceedings were not of a nature to provide absolute privilege and that damages were recoverable in the circumstances. This decision as mentioned above, was upheld by Blair, J., on appeal.

In *O'Connor* v. *Waldron* it was stated to be immaterial to the question of privilege whether the tribunal is armed with the powers of a Court of Justice in summoning witnesses, administering oaths, and punishing disobedience to its orders : " The question is whether the tribunal has similar attributes to a Court of Justice and acts in a manner similar to that in which such Courts act " (p. 81).

The chief purpose of this article is to consider a question left undetermined by the *Kendall* v. *Mathews* decision (*supra*)—namely, whether members of and witnesses or counsel before tribunals of a quasi-judicial nature may be held liable for defamation, even if they are not actuated by malice or do not otherwise abuse the occasion. More generally, the question is to what extent the proceedings before a quasi-judicial tribunal may be the subject of qualified privilege.

Although in the final result not necessary to his decision, the learned Magistrate in *Kendall* v. *Mathews* (*supra*) gave attention to this point and stated, at p. 178 :

> It is doubtful whether the occasion was the subject of qualified privilege. I base this conclusion broadly upon the grounds that, I think (to apply the principle laid down by Parke, B., in *Toogood* v. *Spyring*, (1834) 1 C.M. and R. 181, 193, 149 E.R. 1044, 1049) the defendant's statement was not fairly warranted by the occasion or exigency, and I can see no common convenience or welfare of society to be promoted by extending the defence of privilege to the occasion.

It seems that Paterson, S.M., in making this statement, was in doubt whether the defendant (the secretary of a union) was properly entitled to give evidence before this particular sitting of the Licensing Authority, and it appears from the newspaper report also that the learned Judge was strongly of the opinion

that the witness was present without just cause. In such a case it is probable in the light of the principles applied in *Toogood* v. *Spyring* (*supra*) that the statements of the witness stand on their own merits as to whether they are privileged communications.

These principles have been quoted many times with approval and are to the effect that a privileged occasion is one when the publication is " fairly made by a person in discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society.

There still remains for consideration the question of privilege when the person making the statements is a witness or counsel appearing before the tribunal according to law and with proper cause, or is a member of the tribunal. There seem to be good grounds for considering that in such a case the statements would be the subject of qualified privilege.

A leading authority is that of *Royal Acquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson*, [1892] 1 Q.B. 431. In this case the defendant was a member of the London County Council, and, while the Council was considering an application for renewal of a music-hall license, made allegations (later proved to be unfounded) of indecency concerning one of the " turns."

The Court of Appeal found that the occasion was not one of absolute privilege, and that, as the statement complained of was an abuse of the occasion, the award of damages should be upheld. The learned members of the Court, in the course of their judgments, gave consideration to the question of qualified privilege, and the following extracts on this point are relevant.

At p. 443, Lord Esher, M.R., said :

> In the case of duties properly administrative, such as that of granting licenses, their action was consultative, for the purpose of administration and not judicial,

and therefore there was absolute privilege, but in

> the duty imposed upon them, of deciding a matter of public administration, which interests not themselves, but the parties concerned and the public, it seems to me clear that the occasion is privileged . . . provided the person . . . is acting *bona fide* in the sense that he is using the privileged occasion for the proper purpose and is not abusing it.

And at p. 454, Lopes, L.J., said :

> The occasion was privileged and the learned Judge so held. Not only must the occasion create the privilege, but the occasion must be made use of *bona fide* and without malice.

It seems, therefore, that this case would provide support for the view that the proceedings before Transport Licensing Authorities and similar quasi-judicial bodies would as a general rule be the subject of qualified privilege. In this connection, as stated in *London Association, &c.* v. *Greenlands Ltd.*, [1916] 2 A.C. 15, 23, " it is important to keep distinct matter which would be solely evidence of malice and matter which would show that the occasion itself was outside the area of protection."

The privilege extends only to a communication upon the subject with respect to which privilege exists and it does not extend to a communication upon any other extraneous matter which the defendant may have made at the same time : *Adam* v. *Ward*, [1917] A.C. 309, 318.

It is interesting to note that a military tribunal, called to consider charges against an officer, has been held to be the occasion of absolute privilege, as being a tribunal acting in a manner similar to that in which Courts of Justice act : see *Dawkins* v. *Lord Rokeby*, (1873) L.R. 8 Q.B. 255, affirmed on appeal, (1875) L.R. 7 H.L. 744.

Also, in the case of many tribunals the absolute privilege provided by ss. 3 and 6 of the Commissions of Inquiry Act, 1908, is invoked by statute. In fact, these provisions are so invoked for certain proceedings of the Transport Licensing Authorities : see s. 36 of the Transport Licensing Act, 1931.

To sum up, unless special statutory protection is invoked, proceedings before Licensing Authorities and similar tribunals of an administrative, rather than a judicial, nature are not the occasion of absolute privilege ; but it seems that statements made by members of the tribunal, or by witnesses and counsel properly appearing before it, would be privileged if relevant, fairly warranted by the occasion, and honestly made. The question is one of law for the Judge to decide : *Adam* v. *Ward*, [1917] A.C. 309, 318.

LEGAL LITERATURE.

The Law of Contract during and after War. By WILLIAM FINLAYSON TROTTER, M.A., LL.D. 4th Ed. Pp. xli + 727. Butterworth & Co. (Pub.), Ltd.

The first and second editions of this work were published during the Great War in 1914 and 1915, and the third edition appeared early in 1919. The quick sequence of these editions showed not only appreciation of the subject-matter, but also the pressing need in wartime for an up-to-date exposition of a rapidly expanding subject.

It was over sixty years since Great Britain was engaged in a European war. In the time of the Crimean War, steam-driven ships were in their infancy, automobile traction was unheard of, the telegraph was undeveloped, and telephones were unknown ; international shipping rings and trade combinations did not exist ; trade-unions were illegal ; and the great modern development of company law had not taken place. During these hostilities international commerce was hardly affected. In the Franco-German war, in 1870, England was neutral, her maritime trade scarcely suffered, and few points of commercial importance arose. The South African war was too remote from England and too localized to affect our commerce to any extent, and, until 1914, there was no occasion in recent times for the Courts to examine this branch of legal knowledge. In the years of the Great War,

however, when the greater part of the nations of Europe were belligerent, and all the neutral countries of Europe and America were affected by blockade regulations, legal and commercial problems of the greatest importance and nicety arose for consideration. Almost immediately there came up for discussion a number of new questions affecting alien enemies; and these were considered by the Courts in a number of differing sets of circumstances.

With the present prospect of a long war ahead and so many countries either occupied or threatened by an alien enemy, the fourth edition of this work, brought up-to-date, is a welcome addition to the lawyer's library. It not only includes in the text many references to decisions during and since the Great War, eighty leading American and British cases, which show that the main principles laid down during the Napoleonic wars are still applied and each of which is preceded by a terse statement of the point decided, but also all the principal statutes, statutory rules and orders dealing with aliens, trading with the enemy, Courts Emergency Powers, Rent and Mortgage Interest Restrictions Act, &c., and references to the relevant cases. American doctrines are considered and compared with English.

Among the points of interest that catch the eye of the reviewer are the following:—

The exhibition of sound common sense displayed by the English Court of Appeal in disregarding the "new technique of certain States in declaring a war in fact not to be a war in law," and holding in *K.K.K.K. of Kobe* v. *Bantham Steamship Co.*, [1939] 2 K.B. 544, [1939] 1 All E.R. 819, that "war" in a commercial document means a contest between States carried on by arms, and that, therefore, war existed between China and Japan, although the latter called it "only a major conflict."

The hard plight of the mortgagor in *Moorgate Estates Ltd.* v. *Trower*, [1940] 1 All E.R. 195, who had covenanted in 1936 to keep the holdings insured "against loss or damage by missiles, or projectiles from or fired at aircraft." While such insurance had been possible in 1936 it had become impossible in 1939. Although the mortgagees had never objected to the mortgagor's omission to insure against these risks from 1936 to January 1939, when they intimated that the mortgage had become repayable because of his failure to do so. Farwell, J., held that there had been no waiver of this term, and if there was, there was no consideration for it, and that there was no evidence of an implied term that such insurance was not to be enforced unless it could be effected. The case illustrates the caution that is necessary in advising on the effect of war in creating impossibility of performance or causing frustration of adventure—two doctrines, which the author says are really one, and which he treats thoroughly in his chapter on the effect of war on contracts. He finds the true principle underlying those doctrines to be the expressed or implied intention of the parties.

One is struck in glancing at the leading cases by the fairness and consideration shown to enemy aliens registered under the Aliens Act, such registration operating as a license to the registered person to reside in the country, and therefore entitling him to the protection of the Courts. In *Scheffenius* v. *Goldberg*, [1916] 1 K.B. 284, a German who was registered was held entitled to sue in a lawful contract made after the outbreak of war despite his internment.

In *Volkl* v. *Governors of the Rotunda Hospital*, [1914] 2 I.R. 543, Gibson, J., showed a very different spirit of justice and humanity from that which would be experienced by an English alien at the hands of a Nazi judge:

> It was the interest of the State that the alien should continue to earn his livelihood, and not be added to the ranks of the unemployed. It would be a cruel kindness to leave him a restricted liberty and deprive him of the means of enjoying it . . . That wrongs, however outrageous, [the plaintiff's claim was for alleged negligence when she was in the hospital] could be perpetrated on such an alien with practical impunity during war, and that his redress should be confined to the chance of his surviving the war . . . appeared a most unlikely intention.

The value of this book lies in the clarity with which the principles are enunciated, and the way in which the cases in support of them are marshalled.

—H. F. VON HAAST.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A Meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, at 11 a.m. on Friday June 21, 1940.

The President, Mr. H. F. O'Leary, K.C., occupied the Chair.

The following Societies were represented: Auckland, Messrs. W. H. Cocker, H. M. Rogerson, J. B. Johnston, and A. H. Johnstone, K.C.; Gisborne, Mr. J. V. W. Blathwayt; Hamilton, Mr. H. J. McMullin; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. A. E. L. Scantlebury; Otago, Mr. A. N. Haggitt (proxy); Taranaki, Mr. J. H. Sheat; Wanganui, Mr. A. A. Barton, and Wellington, Messrs. H. F. O'Leary, K.C., G. G. G. Watson, and S. J. Castle.

Mr. A. T. Young, Acting Treasurer, was also present, as was also Mr. N. H. Good, secretary of the Auckland Society, who attended at the invitation of the Council.

Apologies were received from all South Island members who were unable to attend on account of the cancellations of the ferry service.

Loan to Government.—The President pointed out that the Society, though not a wealthy body, should do what it could to assist the Government in its war effort. After some discussion of ways and means, it was unanimously decided that the Society should make to the Government a loan of £1,000 free of interest for the duration of the war and six months thereafter.

Election of Member of Council of Law Reporting.—Mr. C. L. Calvert, whose term of office expired on March 4, 1940, was unanimously re-elected.

Election of Members of Council of Legal Education.—Messrs. A. H. Johnstone, K.C., and P. Levi, the retiring members, were unanimously nominated for re-election.

History of Legal Profession.—The President inquired if it was the wish of the Council that the publication of a legal history should be proceeded with, and the reply was unanimously in the affirmative.

A draft contract received from Messrs. Butterworth and Co. (Aus.) Ltd., was referred to Messrs. W. H. Cocker, A. H. Johnstone, K.C., and N. H. Good, with power to settle.

Mr. N. H. Good wrote inquiring if the Council had any objection to his use in connection with a lecture to law students of some of the material to be included in the legal history. It was decided to inform Mr. Good that there was no objection provided that he obtained the permission of Messrs. Butterworth and Co. (Aus.) Ltd., for the use of the material mentioned.

Death Duty Procedure.—Mr. Young reported that the Wellington Society had now prepared a summarized report to the Attorney-General, which would be presented with a request that it should be brought before the Minister of Finance and that a copy should be sent at once to the Commissioner of Stamp Duties for his information. Even if no action were taken by the Minister, it would be in the power of the Commissioner to alleviate some of the troubles mentioned.

Motor-vehicles: Noting Conditional Purchase Agreement on Registration Cards.—Mr. A. B. Buxton, of Wellington, forwarded a lengthy memorandum on this matter, setting out the practice in California. The Marlborough Society wrote as follows:—

> We have now read with interest the letter of Mr. A. B. Buxton to the New Zealand Law Society which deals with the matter very comprehensively and covers our views on the matter. We would like however, to add the following observations:—
>
> 1. *Reasons for Suggestion:* Existing difficulty of ascertaining authoritatively whether or not a motor-vehicle is the property of the person or firm purporting to deal with it. Elimination of risk attending transactions affecting the transfer of ownership of motor-vehicles. Providing a safe and certain source of information backed by authority similar to that afforded under the Chattels Transfer Act.
> 2. When a car is registered a registration certificate is handed to the owner which constitutes a record that the car is registered.
> 3. All transfers of ownership are now noted on this registartion certificate.
> 4. In our opinion very little additional work would be cast on the Registrar of Motor-vehicles if he were asked in addition, to register any encumbrances.
> 5. Our object was chiefly to cover conditional hire-purchase agreements, registration of which is not compulsory under the Chattels Transfer Act.
>
>   All transfers are advised to the Registrar of Motor-vehicles by lodging with him a notice in the prescribed form signed by the transferor and giving the name and address of the new owner and a fee of 5s. is payable on lodging this notice: See s. 17 of the Motor-vehicles Act, 1924, and regulations thereunder. (The section makes the lodging of such notice compulsory).
> 6. *Suggested Procedure:* Whenever a motor-vehicle is purchased on a conditional or hire-purchase agreement, that fact that it is so purchased and the names of the parties to the transaction, showing their respective interests in the vehicle, to be included in the form of application to register or to transfer the registration of the vehicle, and to be recorded on the record card and the certificate of registration. A certificate of registration, showing the respective interests of the parties, to be issued to each of them by the Registrar, and both to be produced when any further dealings with the vehicle, while it is still subject to the agreement, are registered. The making of the one or two additional entries on the record card would take practically no time at all.
> 7. On payment of all moneys under the agreement necessary for the purpose of completing the purchase and vesting the ownership of the vehicle in the hirer or conditional purchaser, the final receipt, evidencing that fact, to be produced to the Registrar, who would note it on the record card, and the two outstanding certificates of registration, and return one to the new owner, showing him as the owner, retaining the duplicate in the office. For this service 5s. is suggested as a fair charge.
> 8. Following this procedure provision could be made for a similar notice to be lodged in the case of any encumbrance even although created by means of an instrument registered under the Chattels Transfer Act or the Companies Act. Such notice would show whether the encumbrance was a conditional hire-purchase agreement, or whether it was by way of security, and the form could contain information on the following points:—
>   (*a*) Name of party holding charge.
>   (*b*) Whether charge is in writing and, if registered under the Chattels Transfer Act, registration number.
>   (*c*) If not so registered, an address where the document evidencing the encumbrance can be inspected and where notices can be served.
>
>   In a similar way discharges of the encumbrance could be noted in due course.
> 9. We suggest that persons should have the right to search the Register of Motor-vehicles, in the same way as they can now search under the Chattels Transfer Act, on payment of a search fee of 1s. per vehicle searched, this to include access to the nominal index of vehicles registered for the purpose of ascertaining the name of the owner of a vehicle having a particular registered number.

It was decided to forward the reports to the Law Revision Committee with a recommendation that a scheme on the lines indicated should be adopted.

Solicitors: Debt Collecting.—The following ruling, drafted by the Wellington delegates, was adopted for circulation:—

> The Auckland Society has notified the Council of the practice of certain solicitors carrying on the business of debt collecting in such a way that the accounts of such business are not subject to solicitors' trust account audit.
>
> In one case the solicitor carried on the business under a trade name. In other cases companies have been formed wherein the solicitor or his wife owns the bulk of the shares, the solicitor acting as managing director or a director of the company. In no case was there an audit as required by the regulations governing solicitors' trust accounts.
>
> The Council considers that the practice resorted to is most undesirable and strongly disapproves of same. The Council recognizes the necessity of practitioners conducting debt collecting on behalf of clients as part of their ordinary professional business which is, of course, subject to the usual audit, but such practices as are referred to by the Auckland Society should be discontinued forthwith.
>
> In the interests of practitioners it is pointed out that on the authority of *In re A Solicitor*, [1912] 1 K.B. 302, it might be held that such practice as is complained of constitutes professional misconduct.

Scale of Fees for Renewal of Leases.—The Conveyancing Committee (Messrs. C. H. Weston, K.C., E. F. Hadfield, and R. H. Webb) reported as follows:—

> Expressing our personal opinion, we think the suggested scale is not unreasonable.
>
> We assume that the mortgage referred to is the mortgage over the lease under consideration, and that the incidental costs of searching, stamping and registering mentioned are *agency* costs.
>
> We suggest where the costs of a new lease would be less than the costs of an extension together with the costs of the consent of the mortgagee of the lease to the extension, that a new lease should be executed.

It was resolved to adopt the scale suggested by the Hamilton Society.

(To be Concluded).

PRACTICE NOTES.

Appeal from Judge's Discretion.

By W. J. Sim, K.C.

(*Concluded from p. 204*).

In the preceding article on this subject, attention was given to the recent House of Lords decision of *Evans* v. *Bartlam*, [1937] A.C. 473, [1937] 2 All E.R. 646, and it was pointed out that the overriding consideration in all cases now appears to be—will injustice result from the decision? In the present article some attempt will be made to examine the application of the doctrine in practice.

One result is that it cleared up doubts surrounding two decisions of the English Court of Appeal, which, if not contradictory to one another, were certainly at variance. These were *Stevens* v. *Walker*, [1936] 2 K.B. 215, [1936] 1 All E.R. 892, and *Culver* v. *Beard*, [1938] 2 K.B. 292, [1937] 1 All E.R. 301. Both were appeals from the exercise of a Judge's discretion under s. 2 of the County Courts Act, 1919, which authorizes an order, (having regard to all the circumstances of the case), that the plaintiff in any action commenced in the High Court should give security for the defendant's costs to the satisfaction of the Court or Judge, failing which the action should be transferred to a County Court.

In *Stevens* v. *Walker* (*supra*), du Parcq, J., had made an order, which the Court of Appeal reversed, holding that in exercising his discretion the Judge ought to have had serious regard to the gravity of the case and the magnitude of the interests involved, and to the question whether the defendant had *prima facie* a good defence to the action. The authority, in anticipation of *Evans* v. *Bartlam*, recognized wide grounds for the interference with the discretion. Lord Wright, at pp. 222–23, stated the position:

> It is perfectly true that this Court will always be very loath to interfere with the discretion of a learned Judge who has made an order one way or the other under s. 2 of the County Courts Act of 1919. The Judge has a judicial discretion but a discretion which he has to exercise on all the circumstances of the case, and that statement undoubtedly gives him a very considerable latitude in exercising his discretion; but the authorities that have been cited show that quite clearly on occasion this Court may interfere with the discretion of a learned Judge in a case of this character, just as in every other case. There are well recognized grounds on which the Court may come to the conclusion that the Judge has exercised a wrong discretion, and in that case it would be bound to give effect to its view. One ground which is peculiarly important is if it is satisfied that the Judge acted on "irrelevant and extraneous" or on insufficient materials. I refer to what was said by Lord Sumner in *Société des Hôtels Réunis* (*Société Anonyme*) v. *Hawker*, (1913) 29 T.L.R. 578, *affd.* (1914) 30 T.L.R. 423. That is merely one very striking and important instance in which the Court would be disposed to override the discretion of a Judge. There are various other circumstances which may be illustrated from the cases, but I do not think it necessary to refer to them.

Generally, the basis of the decision was that du Parcq, J., had exercised his discretion on insufficient material and "therefore that gives to the Court of Appeal the right to interfere."

In *Culver* v. *Beard* (*supra*), a similar order had been made by Horridge, J., transferring the action to the County Court, unless the plaintiff gave security. The Court of Appeal dismissed an appeal from the exercise of this discretion. Greer, L.J., at p. 294, summarized the matter:

> In those circumstances I find it impossible at the present day to say that because we differ from the view that the learned Judge took, if we do so differ, we should therefore allow the appeal and make an order overruling his order, when the statute has said that the power of making the order is a power which is vested in the Judge, provided he considers all the circumstances of the case.

In explaining *Stevens* v. *Walker*, Greer, L.J., at p. 295, said:

> Those are questions which he was bound to consider, and as he had not considered them, the Court of Appeal came to the conclusion that they were entitled to interfere with his order, because by not considering those questions *he had gone wrong in principle.*

and as showing how far the consideration was still dominant that the Judge must be shown to have acted on a wrong principle, Greer, L.J., further at p. 286:

> I am not therefore satisfied by the argument that in the present case the learned Judge exercised his discretion upon wrong principle.

Slesser, L.J., at p. 297, stated the practice as follows:

> Nevertheless there remains by statute a discretion in the Judge which can only be disturbed in the Higher Court on the recognized principles, and on its being shown by the appellant complaining of the exercise of this discretion that the learned Judge has done something which he ought not legally to do, so that in effect he has not been exercising a judicial discretion at all.

It appears that these two authorities, being decided by different branches of the Court of Appeal, were subsequently considered by all members of the Court of Appeal in consultation, and it was determined that both branches should act upon the same principle of which *Stevens* v. *Walker* is an example, namely "upon the principle that where we come to the conclusion that the learned Judge has not given adequate weight to the considerations that ought to weigh with him, then the Court may exercise their own discretion and reverse the order made by the learned Judge": see *Phillips* v. *A. Lloyd and Sons, Ltd.*, [1938] 2 K.B. 282, 288, [1938] 1 All E.R. 266. *Evans* v. *Bartlam* (*supra*) is cited, and obviously further influenced the Court of Appeal away from the confined doctrines of *Culver* v. *Beard*. *Phillips* v. *Lloyd* was another case relating to the transfer of an action from the High Court to the County Court, and the Judge of first instance had made an order. The Court of Appeal reversed this, holding that the application raised for consideration important matters of both fact and law, that the Judge in making the order to transfer the action had apparently exercised his discretion without having given due consideration to all these matters.

The wide doctrine received further recognition in *Holland* v. *German Property Administrator*, [1937] 2 All E.R. 807, 815. In referring to the Appellate Court's functions, it was said :

> It 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.

Further, in *Dennehy* v. *Bellamy*, [1938] 2 All E.R. 262, the Court of Appeal applied *Evans* v. *Bartlam*. The Court in that case upheld the Judge's discretion in refusing a stay in an action in which an arbitration clause was pleaded. Greer, L.J., at p. 263, stated the position :

> This is a matter for the discretion of the Judge, and we cannot interfere with his discretion unless we come to the conclusion either that he has exercised his discretion upon some wrong principle of law, or to use the words which have been quoted from the recent opinion of Lord Atkin in *Evans* v. *Bartlam* in the House of Lords, if the order is one which produces an injustice. Nobody has ever suggested that it would be right to uphold an order the result of which would be to do an injustice to one or other of the parties, merely on the ground that the matter under decision is one for the discretion of the Judge.

Berridge v. *Everard*, [1938] 1 All E.R. 718, and *Metropolitan Properties Co., Ltd.* v. *Purdy*, [1940] 1 All E.R. 188, 190, conclude this line of authority up to the moment. In the former case the Court of Appeal again overruled the Judge's discretion, holding that, as the case raised difficult questions of law, the latter had misdirected himself.

No doubt *Evans* v. *Bartlam* will be further applied. It directs that the avoidance of injustice is to be the dominant consideration, and it is immaterial whether the discretion under review is that of a Registrar or Judge in Chambers, a Court of first instance, or the Court of Appeal.

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