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Incorporating "Butterworth's Fortnightly Notes."

"*The legal and political tradition of Bracton, and of Fortescue and of Thomas More, the tradition of the common law, broke the claim of the Stuart Kings to rule by divine right or absolutely. . . . . It was the medievalists in England,' writes Professor Plucknett, of the London School of Economics, 'armed with Bracton and the Year Books, who ended Stuart statecraft; and the Constitution of the United States was written by men who had Magna Carta and Coke on Littleton before their eyes.'*

"*On a wide view it would thus appear that the countries that are offering the most effective resistance to the totalitarian onslaught are the countries that are heirs of the medieval tradition of the Common Law: the only great system of temporal law that came out of the Christian centuries.*"

—MR. RICHARD O'SULLIVAN, K.C.

VOL. XVI. TUESDAY, DECEMBER 17, 1940 No. 23.

BREACH OF STATUTORY DUTY: CONTRIBUTORY NEGLIGENCE AS A DEFENCE.

IN this place, in April of last year (15 N.Z.L.J. 69), we discussed the conflict in views between the Court of Appeal in England in *Dew* v. *United British Steamship Co.*, (1928) 98 L.J. K.B. 88, and in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ltd.*, [1929] 2 K.B. 132, where it was held that contributory negligence, properly defined, if proved, prevents a plaintiff recovering in an action founded on a breach of statutory duty, though there is a continuing statutory breach up to the time of the accident, and the High Court of Australia in *Bourke* v. *Butterfield and Lewis, Ltd.*, (1926) 38 C.L.R. 354, where it was held that contributory negligence, unless it amounts to misconduct, is not a defence to an action to recover damages for personal injury caused by a breach of an absolute statutory duty imposed for the benefit of a class of persons of which the plaintiff is a member. And, after referring to *dicta* in the English cases in the Court of Appeal, we concluded as follows:—

> Upon principle and authority, therefore, without a fundamental change in the conceptions which have hitherto prevailed of the basis of an action founded upon a breach of statutory duty, it is difficult to see how the Courts could logically refuse to admit the defence of contributory negligence. At any rate, as Scrutton, L.J., suggested in the Court of Appeal in *Flower's* case, and Greer, L.J., in *Craze's* case, [1936] 2 All E.R. 1150, the House of Lords is now the only tribunal which is free to reopen the question, if we except the Judicial Committee in a possible review of *Bourke* v. *Butterfield and Lewis, Ltd.* (*supra*).

The recent judgment of our own Court of Appeal in *Pinner* v. *Martin's Boot and Shoe Stores Ltd.*, with its passing reference to *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722, [1940] A.C. 152, reminds us that the House of Lords has settled the question since the appearance of the article to which we have referred. Their Lordships there held that negligence of the worker causing or materially contributing to the injury is a defence in an action founded on alleged breach of the statutory duty imposed on an employer to fence machinery properly. If the decision of the High Court of Australia in *Bourke's* case is to be regarded as going so far as to lay down that, in an action for damages for breach of the statutory duty to furnish protection against dangerous machinery, no amount of negligence on the part of the plaintiff worker can ever provide a defence, their Lordships in *Caswell's* case indicated that they could not accept so absolute and far-reaching a rule when construing the section from the Coal Mines Act, 1911, which imposed the duty that was under their notice.

In the course of his speech in *Caswell's* case, Lord Atkin could not accept the view that an action for injuries caused by breach of statutory duty differs from an action for injuries caused by any other wrong. In any such action, His Lordship thought that the defendant would succeed if he proved that the injury was caused solely or in part by the omission of the plaintiff to take the ordinary care that would be expected of him in the circumstances. His Lordship proceeded to make some very interesting observations relative to the law of negligence generally:—

> The statute does not in terms create a statutory cause of action. It does not, for instance, make the employer an insurer. The person who is injured as in all cases where damage is the gist of the action, must show not only a breach of duty, but that his hurt was due to the breach. If his damage is due entirely to his own wilful act no cause of action arises as, for instance, if out of bravado he puts his hand into moving machinery or attempts to leap over an unguarded cavity. The injury has not been caused by the defendants' omission but by the plaintiff's own act. The injury may, however, be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used

by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand, if the plaintiff were negligent, but his negligence was not a cause operating to produce the damage, there would be no defence.

I find it impossible to divorce any theory of contributory negligence from the concept of causation. It is negligence which " contributes to cause " the injury, a phrase which I take from the opinion of Lord Penzance in *Radley* v. *London and North Western Railway Co.*, (1876) 1 App. Cas. 754. And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who " caused " the injury: and you must not be deterred because the word " cause " has in philosophy given rise to embarrassments which in this connection would not affect the judge. Nor is this question of contributory negligence one that arises only in cases where the defendant is charged with negligence as though the negligences belong to the same pack and one trumps the other.

A civil action for damages in respect of an accident alleged to be due to a breach of statutory duty on the part of the plaintiff's employers must, said Lord Macmillan, be based upon negligence, and be subject to the general principles of law which govern actions of damages for negligence. First, it is incumbent for the plaintiff to prove that the defendant owed a duty to him, and that the defendant failed to fulfil that duty, and that the accident was attributable to that failure of duty on the part of his employer. Where a statute imposes and defines that duty, it materially assists the plaintiff, for it absolves him from proving the nature and existence of the employer's duty. If the plaintiff can show that there has been a breach of the statute, he has established the existence of negligence. It remains for him only to prove that the accident was due to that negligence.

In a lengthy judgment, Lord Wright, after inferring from the facts that a breach by the employers of their statutory duty had caused the death of the worker, said that the onus was then shifted on to the employers to prove that the deceased man was guilty of some misconduct or negligence which would have the effect of excluding his claim if the injury had not been fatal, and which would therefore exclude the claim under the Fatal Accidents Act. For this purpose, in this connection, the same rule applied as that stated by Lord Watson in *Wakelin* v. *London and South Western Railway Co.*, (1886) 12 App. Cas. 41, 47, as applicable to an ordinary plea of contributory negligence. His Lordship went on to discuss the measure of the worker's duty to take care of himself—the quality or kind of heedlessness or inadvertance on the worker's part in regard to his own safety not amounting to contributory negligence or misconduct such as to displace the claim. But that important aspect of the judgment, which was dealt with by each of their Lordships, we must leave for consideration later.

Before concluding his speech, Lord Wright took the opportunity of expressing doubt whether an action for breach of a statutory duty, such as that relating to unfenced machinery, is completely or accurately described as an action for negligence. He said it is a common-law action based on the purpose of the statute to protect the workman, and belongs to the category often described as that of cases of strict or absolute liability. At the same time, he said, it resembles actions in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman. But he was not prepared to agree that the defence of contributory negligence should be excluded in such cases simply on the technical ground that the cause of action is not negligence in the strict sense, whereas contributory negligence presupposes original negligence.

In defining " negligence," Lord Wright said:

Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury, or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man.

Thus, a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the serene atmosphere of his operating theatre; the same holds good of the workman. It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, and where negligence begins.

On the other hand, Lord Wright dissociated himself from any suggestion that there are grades or degrees of negligence or that the plaintiff is not prevented from recovering by " mild " negligence, but only by " gross " negligence. Generally speaking, he said, in civil cases, " gross negligence has no more effect than negligence without an approbrious epithet."

Finally, His Lordship had these observations to make:

The rules of contributory negligence have been mainly developed in connection with road accidents, but at least since *Davies* v. *Mann*, (1842) 10 M. & W. 546; 152 E.R. 588, the law, in discussing contributory negligence in such cases, has disregarded as not materially contributing causes some acts of the plaintiff, which might be regarded as negligence in a sense, and treated them as of subsidiary moment in ascertaining the causation of the injury, and has fixed attention on what was judged to be the proximate or effective cause. Hence the question was stated, as it was in *Swadling* v. *Cooper*, [1931] A.C. 1, to be, what was the substantial cause?

Applying this doctrine to cases of breach of statutory duty, His Lordship said:

Contributory negligence involves two elements, negligence and contributory negligence. The policy of the statutory protection would be nullified if a workman were held debarred from recovery because he was guilty of some carelessness or inattention to his own safety, which, though trivial in itself, threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of the statute, not the act of inadvertence of carelessness, which is then the dominant or effective cause of the accident. This follows, I think, if the rules of contributory negligence in road accidents are suitably adapted to deal with breaches by an employer of his statutory duty.

Lord Porter came to the same conclusion. In the course of his speech, he said:

As against the view that contributory negligence is not a defence to a claim based on a breach of statutory duty, there are a number of *dicta* in cases beginning with *Britton* v. *Great Western Cotton Co.*, (1872) L.R. 7 Exch. 130, to the effect that it is such a defence. Perhaps the best-known is that contained in the judgment of Vaughan Williams, L.J., in *Groves* v. *Lord Wimbourne*, (1898) 2 Q.B. 402, 418, 419. Moreover, in three recent cases the Court of Appeal have decided in terms that in such a case the contributory negligence of the injured party is a defence: see *Dew* v. *United British Steamship Co., Ltd.*, (1928) 98 L.J.K.B. 88, *Craze* v. *Mayer-Dunmore Bottlers Equipment Co., Ltd.*, [1936] 2 All E.R. 1150, and *Lewis* v. *Denye*, [1939] 1 All E.R. 310 [since affirmed on appeal, [1940] 3 All E.R. 299].

But the question, though debated, has never been determined in your Lordships' House. Strictly speaking the phrase

"contributory negligence" is not a very happy method of expressing an act of the employee which may relieve the employer from liability. Probably the phrase "negligence materially contributing to the injury" would be more accurate, but if the word "contributory" be regarded as expressing something which is a direct cause of the accident, either phrase is accurate enough, and the less accurate phrase is, I think, sanctioned by long usage.

Whatever form of words be used, His Lordship saw no reason for differing from the numerous *dicta* extending over many years, or from the decision of the Court of Appeal. It was held in *Lochgelly Iron and Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1, that a breach of statutory duty is personal negligence on the part of the employer within the meaning of that phrase in s. 29 (1) of the Workmen's Compensation Act, 1925 (Eng.); and it was suggested that an action founded on breach of statutory duty was an action founded on negligence. Whether that be so, or whether a breach of statutory duty may be regarded as a cause of action in itself, His Lordship said, the question is the same. And he added that he did not see why the ordinary common-law rules should not apply, leaving the careless worker to his remedy under the Workmen's Compensation Act, and reserving the additional protection for breach of statutory duty to those who exercise such reasonable care as a reasonable man working in the particular mine or factory would exercise.

The whole of their Lordships' judgment comes back to an approval of what Lawrence, J., said in the Court of first instance in *Flower* v. *Ebbw Vale Steel, Iron, and Coal Co., Ltd.*, [1934] 2 K.B. 132, 139, when he posed the question to be determined as follows:—

> The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendants' breach of duty.

and that learned Judge's addition, at p. 140:

> I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

This, as Lord Atkin said, seems a sensible practical saying, and one which will afford all the protection which is necessary to the workman. Lord Porter agreed. Lord Wright said that he regarded Lawrence, J.'s definition of what constituted contributory negligence in such cases a valuable contribution to the law on this subject; and that the importance of that learned Judge's ruling was that he drew attention to conditions of work where men are exposed to risk when machinery is unfenced, and thereby gave a good practical direction and definition to help in deciding the issue of fact in any particular case. Again, in *Lewis* v. *Denye*, [1940] 3 All E.R. 299, 304, Viscount Simon, L.C., associated himself with the approval so expressed by Lord Atkin and Lord Wright in *Caswell's* case.

Taken all in all, the judgments in *Caswell's* case are welcome in that they finally settle an important point which has been in doubt, especially in jurisdictions which lacked any definitive decision by the Judicial Committee and had no guidance from the House of Lords. The judgment has already been applied in the Canadian Supreme Court, and referred to at least three times in judgments in our own Court of Appeal. The observations of their Lordships on the matter of contributory negligence seem to provide ample quotable material for constant use in the future.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Gisborne. 1940. November 15, 22. *Myers*, C.J.

In re **A MORTGAGE, F. TO STATE ADVANCES CORPORATION.**

War Emergency Legislation—Mortgages—Stock Mortgage—Mortgage of Land—Application of Mortgagee of Land for Leave to exercise Remedies—Jurisdiction—Whether Court has power to join Stock Mortgagee—Retention of Farm Income from Sales of Produce—"Call up or demand payment"—Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/183), Regs. 2 (1), 6 (1), (2), 7 (1), (2).

The Mortgages Extension Emergency Regulations, 1940, do not enable the Court, on an application by a mortgagee of land for leave to exercise his remedies under his mortgage, to make an order joining a stock mortgagee as a party to the proceedings, or a further order binding the latter, *e.g.*, by a pooling arrangement, where there is no substantive application by the stock mortgagee.

In re a Mortgage, C. to Public Trustee, [1940] N.Z.L.R. 810, dissented from.

Semble, An equitable result may be achieved under the Regulations by the exercise of powers under Reg. 7 (2) thereof.

To collect and retain the proceeds of sale of produce pursuant to the provisions of an instrument by way of security is not "to call up or demand payment from any mortgagor . . . of the principal sum or any part of the principal sum secured by" the instrument, and is not within Reg. 6 (1) or (2).

Counsel: *Parker*, for the mortgagee; *Nolan*, for the mortgagor.

Solicitors: *Rees, Bright, Wauchop, and Parker*, Gisborne for the mortgagee; *Nolan and Skeet*, Gisborne, for the mortgagor.

SUPREME COURT. (In Chambers). Auckland. 1940. October 22; November 5. *Fair*, J.

SHISKA v. NATIONAL TRADING COMPANY OF NEW ZEALAND, LIMITED.

Practice—Trial—Special Jury—Material to be placed before the Court on Application—Onus upon Applicant—Statutes Amendment Act, 1939, s. 37.

The Court should order a special jury only when there is satisfactory material provided on affidavit upon which the Court can form an opinion that such trial is necessary.

When application is made for a special jury under s. 37 of the Statutes Amendment Act, 1939, the questions of a scientific, technical, business or professional nature, which it is alleged are likely to arise in the action, should be definitely stated; the facts upon which it is alleged that these questions will arise should be specifically set out; and the nature of the difficulty should appear clearly.

Counsel: *Dyson*, for the plaintiff; *A. H. Johnstone*, K.C., for the defendant.

Solicitors: *Morpeth, Gould, Wilson, and Dyson*, Auckland, for the plaintiff; *R. G. McElroy*, Auckland, for the defendant.

SUPREME COURT. New Plymouth. 1940. November 4, 26. *Smith*, J.

LONG v. LONG AND HARVEY.

Divorce and Matrimonial Causes—Practice—Costs of Respondent Wife—Disallowed where Reasonable Inquiry by Wife's Solicitor would have shown no foundation for Defence.

The respondent will not be allowed the costs of her defence, where, in a divorce suit, the respondent's solicitor in her answer denied the charge of adultery contained in her husband's petition and alleged that, if adultery were found, the petitioner's conduct had induced it, and reasonable inquiries should have shown him that her denial of misconduct and her allegation as to such inducement were both without foundation.

Kay v. *Kay*, [1904] P. 382, applied.

Counsel: *N. Moss*, for the petitioner; *L. A. Taylor*, for the respondent.

Solicitors: *L. M. Moss*, New Plymouth, agent for *Young and Moss*, Stratford, for the petitioner; *L. A. Taylor*, Hawera, for the respondent.

Case Annotation: *Kay* v. *Kay*, E. and E. Digest, Vol. 27, p. 308, para. 2850.

COMPENSATION COURT. Greymouth. 1940. November 4, 7, 28. *O'Regan*, J.

Re **NICHOLLS, *Ex parte* WESTPORT COAL COMPANY, LIMITED.**

Workers' Compensation—Assessment of Compensation—Jurisdiction—Discontinuance of Weekly payments of Compensation—Lump Sum—Employers' application for conclusion of Case by Lump Sum—Jurisdiction of Compensation Court to award same irrespective of Agreement by injured Worker—Costs—Workers' Compensation Act, 1922, s. 29—Statutes Amendment Act, 1938, s. 62.

The Compensation Court, on a motion by an employer for an order diminishing or ending weekly compensation payable to a worker, possesses complete jurisdiction by virtue of s. 29 of the Workers Compensation Act, 1922, to do all that s. 62 of the Statutes Amendment Act, 1938, authorizes, except to order the payment of a penal rate of compensation—including the award of a lump sum irrespective of agreement by the injured worker.

Where the employer succeeds in his application for the conclusion of the case by payment of a lump sum, costs should not be given against him.

Counsel: *W. D. Taylor*, for the employee; *A. A. Wilson*, for the employer.

Solicitors: *Joyce and Taylor*, Greymouth, for the employee; *Ramsay and Haggitt*, Dunedin, for the employer.

SUPREME COURT. Wellington. 1940. September 9; November 18. *Blair*, J.

In re **CARTER (DECEASED), CARTER AND ANOTHER v. CARTER AND OTHERS.**

Adoption of Children—Testate Natural Parent—Right of adopted Child "to take property as heir or next of kin of his natural parents . . . by right of representation"—Whether limited to Intestacy of such Parents—Infants Act, 1908, s. 21 (2).

The words of s. 21 (2) of the Infants Act, 1908,

> "Such order of adoption shall thereby terminate all the rights and legal responsibilities and incidents existing between the child and his natural parents, except the right of the child to take property as heir or next of kin of his natural parents directly or by *right of representation*"

do not limit the right of an adopted child to take property only on an intestacy of his natural parent.

Where, therefore, by the will of the natural grandfather of two adopted children, on the death of the widow of the testator, the capital of the estate became divisible equally among the testator's children living at the date of the testator's death and to the issue *per stirpes* of the children of deceased children who survived him, each of two natural grandchildren of the testator adopted out of his parent's family (one before the testator's death and the other after it) was, notwithstanding the adoption, entitled to take by right of representation from his deceased parent.

In re Taylor, Public Trustee v. *Lambert*, [1932] N.Z.L.R. 1077, G.L.R. 656, applied.

Counsel: *Tringham*, for the plaintiff; *Hay*, for the surviving daughters of the testator; *Kemp*, for M. G. Pearce, daughter of deceased daughter of testator; *Hardie Boys*, for a son and daughter of a deceased son of testator; *Virtue*, for a daughter of a deceased daughter of testator; *Willis*, for a daughter of a deceased daughter; *Croker*, for Mrs. Morgan, a grandchild of testator.

Solicitors: *Tringham and Harding*, Wellington, for the plaintiffs; *Mazengarb, Hay, and Macalister*, Wellington; *Hardie Boys and Haldane*, Wellington; *Izard, Weston, Stevenson and Castle*, Wellington; *Young, Courtney, Bennett and Virtue*, Wellington; *G. P. Purnell*, Christchurch, and *Croker and Sutherland*, Wellington, for the defendants.

SUPREME COURT. Wellington. 1940. November 5, 15. *Ostler*, J.

DUNCAN v. WAKEFORD AND ANOTHER.

Negligence — Road Collisions — Traffic Regulations — Whether Breach of any such Regulation Conclusive Evidence of Negligence —Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 17.

Practice—New Trial—Jury—Misconduct of Juror—Juror's Employer interested in Result of Trial—No Knowledge of Employer's Financial Interest—Right of such Juror to be heard in his own Defence—Juror's Financial Interest—Code of Civil Procedure, R. 276 (f).

The principle laid down by the Court of Appeal in *Algie* v. *D. H. Brown and Son, Ltd.*, [1932] N.Z.L.R. 779, G.L.R. 502, and subsequent cases, that the breach of one of the Traffic Regulations is not conclusive evidence of negligence, but only evidence upon which the jury may find negligence as a matter of fact, applies to all such Regulations.

On an application for a new trial on the ground of the alleged misconduct of a juror, such juror has the right to be heard in his own defence, except as to what took place in the jury-room or the Court.

Algie v. *D. H. Brown and Son, Ltd.*, [1932] N.Z.L.R. 779, G.L.R. 502; *Smith* v. *Otago Presbyterian Church Board of Trustees*, (1896) 15 N.Z.L.R. 680; *Conway* v. *Neuchatel Asphalt Co., Ltd.* [1923] N.Z.L.R. 1025, G.L.R. 734; *Gallagher* v. *Bicknell*, [1923] N.Z.L.R. 35, and *Nesbitt* v. *Parrett*, (1902) 18 T.L.R. 510, applied.

The fact that a juror is a clerk of a company which, unknown to him, is financially interested in the result of the case does not thereby give him a financial interest therein.

Semble, Even if a juryman has some financial interest in the result, and is unaware of the fact, he cannot be held guilty of misconduct for serving as a juror on the case.

Bailey v. *Macaulay*, (1849) 19 L.J.Q.B. 75, and *Atkins* v. *Fulham Borough Council*, (1915) 31 T.L.R. 564, followed.

Counsel: *H. Mitchell*, for the plaintiff; *Joseph*, for the first defendant; *Leicester*, for the second defendant.

Solicitors: *Treadwells*, Wellington, for the plaintiff; *George Joseph and Olphert*, Wellington, for the first defendant; *Leicester, Rainey, and McCarthy*, Wellington, for the second defendant.

Case Annotation: Bailey v. *Macaulay*, E. and E. Digest, Vol. 12, p. 535, para. 4448.

THE LAW OF SCUTTLING.

Marine Insurance Policies found wanting.

By W. P. Rollings, M.A., LL.B.

The trilogy of cases decided by Hilbery, J., on September 6, and reported under the name of *Forestal Land Co.* v. *Rickards*, [1940] 4 All E.R. 96, presents some unusual features. For a short time before the war began, British merchants were in the habit of insuring their cargoes against war risk as well as the usual marine risks, and many policies in the standard form used by Lloyds and other groups of companies, were taken out with British underwriters. A very large part of this insurance related to cargo in foreign bottoms, and much of it was on board German merchant vessels in various parts of the globe. On the outbreak of war, as we now well know, Hitler ordered these vessels to head for home. If capture by the British Navy seemed imminent, they were to scuttle themselves. Many did so. On the loss of their cargoes by scuttling, or in some cases by the successful return of the German merchantmen to Germany, British merchants who had taken out war risk insurance duly presented their claims to the underwriters. The claims were not met. The underwriters informed the surprised cargo-owners that although extra premiums to cover war risks had been paid, there was (they were advised) no clause in the standard form of policy sufficiently apt to cover scuttling. At least there was an ambiguity, and the question of the underwriters' liability to meet the claims would have to be decided by litigation.

The total value of the risks involved seems to be very high indeed. It was stated in the English daily Press at the time of the hearing before Hilbery, J., to be £10,000,000. The three cases taken were selected from the numerous claims as being those most representative of the issues in dispute, and were tried on the basis of agreed statements of facts. Counsel eminent at the Admiralty Bar were engaged in the argument, which occupied nine days. The underwriters agreed at the outset to pay the costs of both sides, whatever the result; and as the case has since gone to the Court of Appeal and is to go to the House of Lords, we have the curious spectacle of defendants financing appeals against a judgment in their own favour.

In the first of these cases, cargo in a German-owned steamship was insured for a voyage from South American ports to Hong Kong or Shanghai, including transhipment at Durban. The vessel sailed from Rio on September 6, 1939, in an attempt to reach Germany, and on September 29, in the presence of a British warship, she was scuttled by her master and crew off the Faroe Islands. In the second case, goods were shipped on a German vessel from Bremen to Capetown. On the outbreak of war the vessel abandoned her voyage, and, after sheltering for some months in a neutral port, ran the British blockade successfully and arrived in Hamburg on March 5, 1940. In the third instance, the German vessel was on a voyage from Australia to London and, after having sheltered for a short time in a neutral port, was intercepted in an attempt to reach Germany and was scuttled in the presence of a French warship on October 16, 1939.

The policies covering these three cargoes were all in the same form. They incorporated the Institute War Clauses, and they were expressly warranted free of any claim based upon loss or frustration of the insured voyage or adventure caused by arrests, restraints or detainment of kings, princes or people. To explain how the policies came to be in this form, it is necessary to go back to the Great War.

The case of *British and Foreign Marine Insurance Co., Ltd.* v. *Sanday and Co.*, [1916] 1 A.C. 650, decided questions as important in their day to merchants and insurers as those decided in the *Forestal* case. In July, 1914, the plaintiffs (Sanday and Co.) insured large shipments of wheat and linseed for voyages by two British ships from ports in the River Plate to Hamburg, in Germany. On August 4, 1914, war broke out between the United Kingdom and Germany, and Proclamations of the King against trading with the enemy were issued on August 5, and September 9. On August 9 the vessel *St. Andrew*, with part of the plaintiffs' cargo aboard, was approaching the Lizard when she was stopped by a French cruiser and told to go to Falmouth. There she received directions to proceed to Liverpool, where she berthed and discharged her cargo. The plaintiffs accepted their goods and stored them. The remainder of the plaintiffs' goods was on board the steamship *Orthia*. When this vessel called at St. Vincent on August 7, to replenish her bunkers, her captain received a cable from the owners directing him to proceed to Glasgow instead of continuing his voyage to Hamburg. The cable had been sent at the suggestion of the Admiralty, which by reason of the King's Proclamations would have acquired the power in due course to back up its request by force. The vessel returned to Glasgow and the plaintiffs again accepted delivery of their goods and stored them. They were thus in secure possession of all the goods, the safe carriage of which they had insured with the defendants. But under a marine insurance policy it is not the goods only that are insured, but their safe arrival at the port of destination. The subject-matter of the insurance is the adventure of the goods on the voyage. Although, therefore, the plaintiffs had received their goods safe and sound, the voyage for which they were insured had not been completed and the market for which they were destined had been lost. The plaintiffs accordingly gave notice that they abandoned the goods to the underwriters and then presented a claim for indemnity on a constructive total loss.

The claim was originally heard in the King's Bench Division, before Bailhache, J., who found for the plaintiffs, and whose judgment ([1915] 2 K.B. 781) was not only affirmed by the House of Lords, but was adopted in its entirety by Lord Shaw ([1916] 1 A.C. 650, 666). The goods had been expressly insured against losses by restraint of kings, princes or peoples; and the House unanimously held in the circumstances of the case that the declaration of war by His Majesty on August 4, 1914, constituted, in view of its effect on trading with Germany, a restraint of princes. The fact that actual force was not exerted made no difference because, as Earl Loreburn put it, "force is in reserve behind every State command." The

abandonment of the voyage was, therefore, due to an insured peril. Now, it was decided as long ago as 1808, in *Barker* v. *Blakes*, 9 East 283; 103 E.R. 581, that even if the impossibility of prosecuting the voyage to the place of destination arose from the prolonged detention of the ship and cargo and not from their destruction, it might properly be considered a loss of the voyage; and according to received principles of marine insurance law a loss of the voyage is a total loss of the goods if the loss is followed by a sufficiently prompt notice of abandonment. The diversion of the ships from their destination being due to restraint of princes, which was an insured peril, the loss of the goods was, therefore, within the terms of the policy.

This decision seems to have startled the underwriters and steps were at once taken to avoid a repetition of such a contretemps. A clause was drafted excluding from the risk accepted by insurers loss of the voyage or frustration of the adventure caused by arrests restraints or detainment of kings, princes or people, and this exception became in due course a sanctified part of the standard marine policy. Frustration of the adventure through other causes remained part of the risk. It is perhaps likely that this exception had appeared in policies for so many years before this war began, that on war insurance again coming into vogue its effect was overlooked. The war-risk clauses by themselves were undoubtedly apt to cover loss by scuttling. Hilbery, J., expressly held that at the time of being scuttled the German ship was engaged in a "warlike operation" within the meaning of the Institute War Clauses, cl. 1 (*b*). But, since the exception introduced after *Sanday's* case was a general warranty applicable to the whole policy, the scope of the war risk clauses was cut down accordingly. When the German captain sailed from Rio in an attempt to reach Germany, he was acting as the agent of the German Government and the adventure was there and then frustrated by restraint of princes. In *Sanday's* case, the restraint was that of the British Government, while in the present case it was that of the German Government. The exception applied and the plaintiffs were not entitled to recover. It might be true that the subsequent loss of the cargo was due as well to other causes which were within the policy; but it has been decided that where there are shown to be two causes of the one loss, one of them being a peril insured against and the other a peril of which the policy is warranted free, the insured cannot recover: *Miller* v. *Law Accident Insurance Co.*, [1903] 1 K.B. 712.

Counsel for the plaintiffs submitted several other grounds in support of their claim and by request of the parties His Lordship expressed his views on them, though they were not essential to his decision. They said that at the time of scuttling the insurance was still in force under the "held covered" clause, whereby the underwriters had agreed to hold the plaintiffs covered at a premium to be arranged in case of deviation or change of voyage. No, said Hilbery, J., this was not a deviation within the meaning of those words; in fact, the attempt to run the blockade was not a commercial voyage at all. Then it was contended that on the German captain's deciding to leave Rio for Germany there was a "taking at sea," against which the policy insured the plaintiffs. The defendants' answer that when the master weighed anchor and set sail for Germany he was in harbour and, therefore, not at sea, was held by Hilbery, J., to be the correct one. The policy also indemnified the plaintiffs against "non-delivery"; but this expression must be construed *ejusdem generis* with its context and could not be extended to cover an entirely new risk. Finally, it was suggested that the act of the German master was barratry; but the authorities (save one) are uniform in deciding that barratry is something done by the master in breach of his duty to the owners of the ship, and here the master had acted with the approval of the German Government, who had assumed the rights of owners on the outbreak of war.

In the case of the ship which successfully returned to Germany, the Court held that up till she left the neutral port where she took shelter, there was a possibility that the plaintiffs might have recovered their goods, and it could not be said that there was a constructive total loss. In fact, letters had passed through neutral channels showing that, on certain terms, the cargo might have been available. Immediately the ship left the neutral port for Germany, there was evidence of a frustration of the adventure caused by restraint of princes, and the subject matter of the insurance was gone. The case of the third ship was decided by parallel reasoning. Until she left the neutral port there was no evidence of any loss due to an insured peril, and when she did, the adventure was immediately frustrated.

The judgment of Hilbery, J., has now been affirmed by the Court of Appeal, although the text of the judgments in that Court will not reach New Zealand for some time. An appeal to the House of Lords has already been announced. The case well illustrates how provisions drafted to meet certain specified conditions may be the cause of widespread grief among policyholders of a later generation, if not revised to meet the needs of changing times. As an English journal puts it: "The last war gave underwriters an unpleasant surprise. This war gives the assured an equally unpleasant surprise."

Criminal Appeals.—At a time when the Empire is nearer to us than ever before, what is of moment to them is of interest to us. I am therefore glad to record the setting up of a Court of Criminal Appeal in Ceylon. The first President of the Court was the Chief Justice, Mr. Justice Keuneman, and in what may be called his inaugural address he recalled the political and financial difficulties which had to be overcome by himself and his predecessor, Sir Sidney Abrahams, before the necessary legislation could be passed. Criminal appeals are now so ordinary a part in the machinery of justice that we are apt to forget that it was only in 1907 that the Criminal Appeal Act gave us our own system. Previous to that the system had been much as it was in Ceylon, where there was no right of appeal, but a point of law might be reserved by the trial Judge for consideration by a full Court (the old Court for Crown Cases Reserved). In one point at least Ceylon has been able to profit by our omission. As was regretfully stated in *R.* v. *Dyson*, [1908] 2 K.B., 454, 458, the Court of Criminal Appeal in England has no power to order a new trial. In Ceylon, on the other hand, it is provided that "the Court of Criminal Appeal may order a new trial if they are of opinion that there was evidence before the jury or the Judges, as the case may be, upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed." Our lack of such a provision has meant that technicalities have often baulked obvious justice.—APTERYX.

STATUTORY LAND CHARGES.

Indefeasibility of Title.

By E. C. ADAMS, LL.M.

The recent Australian case, *South-Eastern Drainage Board* v. *Savings Bank of Australia*, (1940) 62 C.L.R. 603, shows the wisdom of the New Zealand Legislature in enacting the Statutory Land Charges Registration Act, 1928.

The South-Eastern Drainage Amendment Act, 1900, of South Australia, provides that the amount of drainage construction costs apportioned to a land-owner under the Act shall be a first charge on the land of the land-owner and that such charge may be enforced by the Commissioner of Crown Lands (to whom the South-Eastern Drainage Board has succeeded under the South-Eastern Drainage Act, 1931), as if he were a mortgagee under the Real Property Act, 1886. (This last Act is the South Australian registration provision corresponding to our Land Transfer Act, 1915). In 1912 the registered proprietor executed a mortgage in favour of the Savings Bank of South Australia, and the mortgage was duly registered under the Real Property Act, 1886. But in 1908 a charge for drainage construction costs had attached to the land under s. 14 of the South-Eastern Drainage Amendment Act, 1900. In 1912 when the mortgage was registered, there was no notice on the Register Book of this statutory land charge. Counsel for the mortgagee, in claiming that the mortgage had priority over the prior but unregistered land charge, relied *inter alia*, upon the well-known principle of indefeasibility of title, which is fundamental to the Torrens system of registration. Counsel's claim, however, was unanimously rejected by the highest Court in Australia. First, as the statutory charge was constituted by an Act later in date than the registration statute, the provisions as to indefeasibility of title had to be read subject to the provisions of such later Act. (As the Torrens system originated in South Australia itself, we may well wonder what Torrens himself would have thought of this reason). Secondly, as the charge for drainage-construction costs did not depend for its efficacy on registration, being in fact incapable of registration, it was not possible to apply the principle of such cases as *Assets Co., Ltd.* v. *Mere Roihi*, [1905] A.C. 205; N.Z.P.C.C. 275, and to regard the statutory charge as being something intended to be brought into conformity with the general registration system. (This second reason is consistent with the principles of such leading New Zealand cases as, (*a*) *Staples and Co., Ltd.* v. *Corby*, (1900) 19 N.Z.L.R. 517 (holding that Land Transfer land is subject to the rule in *Tulk* v. *Moxhay*, because restrictive covenants—excepting fencing covenants—are not registrable), (*b*) *Carpet Import Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37 (where the Full Court held that Land Transfer land continued to be subject to prescriptive easements existing before the land was brought under the Act, because such prescriptive easements were not registrable), and (*c*) *In re Fell to Moutere Amalgamated Fruit Lands Ltd.*, (1913) 33 N.Z.L.R. 401 (where Chapman, J., held that Land Transfer land remained subject to the statutory restrictions against aggregation of land, although through a blunder the District Land Registrar had not carried out his statutory duty of making the certificate of title subject to such restrictions). (The rule in *Re Fell* (*supra*), though correct in principle, is inconvenient in practice, as the case of *Schollum* v. *Francis*, [1930] G.L.R. 159 shows, and may cause injustice and loss to an innocent purchaser or vendor, contracting *bona fide* on the strength of the Register Book, and it is submitted that the rule in this case should be abrogated by the Legislature).

The case of *South-Eastern Drainage Board* v. *Savings Bank of South Australia* (*supra*) (in so far as it deals with the charge for drainage construction costs) would have been decided differently in New Zealand, for s. 5 of the Statutory Land Charges Registration Act, 1928 (as amended), provides that every charge to which that Act applies shall so far as regards any land affected thereby be void as against a "purchaser" (which includes a mortgagee or lessee for valuable consideration) under any deed, contract, or instrument which being executed after the creation of the charge, is duly registered before the registration of such charge. Section 3 exempts certain charges—*e.g.*, rate charges—from the operation of the Act. Also recently the Farmer's Loans Emergency Regulations, 1940 (Serial No. 1940/153) have excepted from the Act charges under those regulations. The Act does apply to a drainage charge of the type dealt with in the South Australian case and appears to affect all statutory charges (except rate charges) in favour of local authorities. The effect of failure to register promptly a charge to which the Act applies may indeed be very drastic (more drastic perhaps than the Torrens principles of indefeasibility of title and priority according to registration, really require), for the proviso to s. 3 (2) of the 1930 Amendment provides that, if before registration a statutory land charge becomes void against a subsequent "purchaser" (as defined) in accordance with the provisions of s. 5 of the principal Act, *it shall thereupon lose its priority* over all mortgages, encumbrances, charges, and interests (if any) that have priority over the interest of such subsequent "purchaser." Thus, if a statutory land charge loses priority over a second mortgage executed after the creation of the charge but registered before it, it also loses any previous priority it may have enjoyed by reason of its nature or by force of statute, over a first mortgage registered before the creation of the charge. But there appears to be one curious omission in the Statutory Land Charges Registration Act, 1928; it does not apply to estates or interests in land registrable under the Mining Act, 1926; to such land apparently the principle of the South Australian case applies in its entirety.

South-Eastern Drainage Board v. *Savings Bank of Australia* (*supra*), is also useful as illustrating an important and far reaching feature of many classes of statutory land charges, and that is, as the charge is created upon the land itself, it affects all the estates

and interests of the owners of the land (excepting the Crown, unless the Crown is by statute expressly bound by the charge). Thus, it has been held in England in *Paddington Borough Council* v. *Finucane*, [1928] Ch. 574, that the charge constituted by s. 3 of the Housing Act, 1925, for expenses incurred by a local authority for work done to premises to make them reasonably fit for human habitation, is not a charge on the interests of the rack rent only, but is a charge upon the entirety of the interests in the premises. Thus, if the charge has been incurred by a sub-lessee, it will extend to the superior and prior estates or interests of the head-lessor and head-lessee, and to the interests of all mortgagees of any estate or interest in the land. The reason for this is that statutory charges are often for work done to land which is an improvement to the property itself, benefiting not only the owner of some particular estate or interest but every owner of the land. Therefore there is no good reason in the world why there should not be a charge on the property itself—that is on the respective interests of every owner of the property according to the value of his interest—(see for instance the judgment of Chapman, J., in the *Mayors, &c., of Wellington and Miramar* v. *Attorney-General and the Public Trustee*, (1913) 33 N.Z.L.R. 392, 400, where it was held that a charge for street improvements abutting on land, effectively charged the interest of the mortgagee of a lease for 999 years of the land). But, if a statutory land charge has to be recovered by a sale of the premises, the sale will not extinguish the interest of the owner of easement or of the person entitled to the benefit of a restrictive covenant, for such are negative interests, which are not enhanced in value by improvements to the land: (*Paddington Borough Council* v. *Finucane* (*supra*), and *Guardians of Tendring Union* v. *Dowton*, [1891] 3 Ch. 265).

South-Eastern Drainage Board v. *Savings Bank of South Australia* (*supra*) has one feature which will be of importance to New Zealand practice under the Statutory Land Charges Registration Act, 1928. At the time the charge for construction costs attached, the land was held under a Crown lease with a right of purchase but no Crown Grant had been issued. Afterwards, on the acquisition of the fee-simple by the Crown lessee, a Crown Grant was issued, which naturally contained no reference to the statutory charge, and afterwards the mortgage to the Savings Bank was registered against the freehold title. At page 621, Starke, J., said:

> The Crown lease in the present case had incident to it a statutory right to purchase. Subject to any special provision of the Crown Lands Act, the lease with the right incident to it would form part of the estate of the lessee; it would be assignable and also the subject of disposition by will. It may be compared to a contract for the purchase of land, which, we are told, in general terms, makes the purchaser the owner in equity of the land. The statutory charge is upon the land, upon the whole of the proprietary interests in the land. The conversion of the lease-hold interest into a fee-simple interest pursuant to the statutory right enlarges, no doubt, the interest of the land-holder in the land, but it does not extinguish the charge.

This shows that where a Crown lease is subject to a statutory land charge, a new lease issued pursuant to a right of renewal is also subject to such charge. Where the lease subject to the statutory charge is not issued by the Crown or by some authority on behalf of the Crown, all new leases (whether in pursuance of a right of renewal or otherwise) will be subject to such charge, for the charge is binding on the lessor, from whom the lessee derives title.

Starke, J., left undecided a very nice point which may well crop up in practice in New Zealand. "It is not necessary to consider how far, if at all, a statutory charge could be enforced against the Crown in case of forfeiture or surrender of the lease to the Crown." If in such circumstances, the Crown subsequently issued a new lease, would the new lease be subject to the statutory land charge? It would appear from the reasoning of *Wanganui-Rangitikei Electric-power Board* v. *The King*, [1933] N.Z.L.R. 1005, that the new lease would be free of the charge, but the writer desires to express no decided opinion on the point.

The interests of the Crown with respect to statutory land charges requires special and careful consideration. Section 10 of the Statutory Land Charges Registration Act, 1928, provides that the provisions of the Act shall bind the Crown, but that nothing in the Act shall be construed as rendering land owned or occupied for the purposes of the Crown subject to any charge to which independently of that Act it would not be subject. Thus, if the statutory land charge is in favour of the Crown and it is not excepted from the operation of the Statutory Land Charges Registration Act, 1928, the Crown is under the same obligation as any other person or corporation to register its charge. But where the statutory charge is not in favour of the Crown, and has accrued subsequently to the acquisition by the Crown of its ownership, estate or interest, then it is not binding against the Crown, unless the Crown by statute is expressly bound by the charge. This rule applies whether the Crown's prior ownership, estate or interest was legal or merely equitable. If, on the other hand, the statutory charge has been created and registered *before* the Crown acquired its ownership, estate or interest, then the Crown takes subject to the charge. (*The King* v. *Mayor, &c., of Inglewood*, [1931] N.Z.L.R. 177; G.L.R. 63, and *Wanganui-Rangitikei Electric-Power Board* v. *The King*). Thus, if A., the owner in fee-simple, agrees to give the Crown a mortgage, and afterwards incurs a statutory land charge, which is registered promptly *before* A. gives the Crown a mortgage in pursuance of the antecedent agreement to mortgage, the statutory land charge is postponed to the Crown's mortgage, ranking only like a second mortgage, and, if the Crown eventually exercises its power of sale under its legal mortgage, the statutory land charge is extinguished, whether the Crown or any other person or corporation is the purchaser at such sale. But, if in the above example, there had been no prior agreement to mortgage, then the Crown's mortgage would be subject to the statutory land charge, and the Crown could not confer a clean title on a purchaser without first paying off the charge.

"It is not a criminal offence in this country to differ from a K.C.'s opinion."

—The Rt. Hon. P. Fraser, Prime Minister, referring in Parliament, on November 26, to Practice Notes, p. 275, *ante*.

A MID-DAY BROWSE.

In An Old Volume of Reports.

By STEPHEN H. MOYNAGH.

The austerely-clad exterior of Volume 1 of *Crompton and Meeson's Reports* of the Michaelmas and Trinity Terms of the third year of William IV, does not indicate that much of human interest will be found within, still, having half an hour to spare, I thought I would try to see if anything would be found to while the leisure forced on me and many others by the activities of the egregious Mr. Hitler and his men.

The case of *Harrison* v. *Bennett* reported at p. 203 provided grounds for some little speculation. The headnote is as follows:

> This cause was tried before Bollard, J., at the Summer Assizes at Chester, 1831. The jury having retired to consider their verdict returned and found a verdict for the plaintiff with no damages. The learned Judge directed the jury to reconsider their verdict, and as they were retiring one of the jury absconded. After diligent inquiry he could not be found and the defendant proposed to take the verdict of eleven jurors. The plaintiff would not consent and the other jurors were accordingly discharged.
>
> The case was again tried at the following Spring Assizes before Bosanquet, J., and the jury found a verdict for the plaintiff. The Master doubted whether he could allow the costs of the first trial on which the matter came before the Court on application by plaintiff for a rule to review the disallowance of the cost of the first trial.

Defendant's counsel contended that as neither party was in fault the costs should be borne equally between them, more particularly as the defendant had offered to take the verdict with the eleven jurors. He referred to the case of *Rowe* v. *Brenton*, MSS., in which the trial had miscarried in consequence of the illness of a juror and each party had borne his own costs. On the other hand, plaintiff's counsel contended that the finding of the jury at the second trial showed that the plaintiff had a just demand and, as by resisting that demand, the defendant had driven the plaintiff to trial, he was in fault and was answerable for the consequences. Judgment was delivered by Lord Lyndhurst, C.B., as follows:

> The plaintiff was not bound to take the verdict of eleven jurors and as the finding of the second jury shows that the defendant by resisting the demand of the plaintiff was the cause of the litigation he must be answerable for the consequences and pay the costs of the first trial.

Unfortunately, the report does not tell us what amount of damages was awarded at the second trial, but it is submitted a fair deduction from the jury's verdict is that the plaintiff's case was a border-line one or that his merits were not exactly overwhelming. But the real interest is, (*a*) Why did the juror abscond? (*b*) How did he get out of the jury-box or the Court? (*c*) Where did he go to? and (*d*) At whose behest did he abscond, plaintiff's or defendant's? The report says, "After diligent inquiry he could not be found." Those were not the days of motor-cars, aeroplanes, or even, to any extent, railways. Chester is even now a comparatively small place, and an "absconding" juror should be easily found. (The writer once went there and served a summons on an Irish cattle thief, which would appear a matter of considerably more danger and difficulty.) The report tells us nothing more, but surely a rather inexplicable chain of facts is disclosed and the Editor might well offer a prize for the best solution of these various queries.

The point at issue recalls that, in a case from Wairarapa, Mr. Justice Hosking was confronted with a somewhat similar difficulty; the first jury was discharged owing to some irregularity amongst themselves quite unconnected with either party to the case. The second trial resulted in substantial damages to the plaintiff. Defendant's counsel argued as regards the costs of the first trial along the lines of defendant's counsel in *Harrison* v. *Bennett*, but Hosking, J. disposed of the matter by the remark "the tree must lie as it fell," and defendant had to pay the costs of both trials.

The second case, of *Luntly* v. ————, provides comfort in these uncertain days of stress and, incidentally, a useful reminder of the courtesy that prevailed at the Bar in the days when crow did not eat crow, for the defendant's name was not published in the report. The headnote here is:

> The defendant, a practising barrister, was arrested at Newington on his return from Sessions where he had been engaged as counsel in prosecuting and defending several prisoners; whereon Mansel referring to *Meekins* v. *Smith* obtained a rule calling on the plaintiff to show cause at the rising of the Court the next day why the defendant should not be discharged.

Plaintiff duly showed cause and produced an affidavit which did not deny that the defendant was returning from Sessions home; but showed at the moment of arrest the defendant was in a picture shop. This, he contended, was a deviation which deprived the defendant from his privilege of arrest. It must be a matter of regret that this revolting contention was urged by a counsel bearing the Irish name of Comyn, but the Court with admirable brevity was not impressed. This is the judgment:

> *Per curiam*: a practising barrister is privileged from arrest *eundo, morando, et redeundo*. Here he was privileged as returning from the place of business. If he had remained an "unreasonable" time in the shop this privilege might have been lost; but that is not shown and the defendant must therefore be discharged from custody.

Speculation: Suppose it had been, say, the Midland or Occidental Hotel bars, what would have been a "reasonable" time, and could any Damocletian Sword of "Public Policy" be invoked by plaintiff? Anyhow, counsel's versatility at the Sessions should have saved him this annoyance.

Hodson v. *Terrill* at p. 797 deals with the lighter side of life.

At the trial before Denman, C.J. (*clarum et venerabile nomen*) at the last Spring Assizes for the County of Warwick it appeared that the Birmingham Cricket Clubs had agreed to have a match of cricket on the following terms:

> The Birmingham Union Club agree to play at Warwick on Monday next October the 8th a match at cricket for twenty sovereigns aside with the Warwick Club. A deposit of £5 is placed in the hands of Mr. Terrill on behalf of the Warwick Club. Wickets to be pitched at 10 or forfeit the deposit. Wickets to be struck at half-past five unless the game is

finished before. To be allowed to change three men according to the list sent this morning; J. Cookes and H. Terrill. A deposit of £5 is placed in Mr. Terrill's hands on behalf of the Birmingham Club.

Up to a point everything seems to have gone along amicably, for the parties met as arranged and what might have been a source of some trouble did not occur, for the remaining £15 was deposited by each party with the defendant as stakeholder. The £20 paid by the men of Birmingham, was paid on their behalf by the plaintiff, and this explains Mr. Hodson's appearance on the stage. The weather was apparently all right and the game was played to the end of the first day, when the Warwick team was 16 runs ahead and had eight men to go in. No objection was then made to any of the players, but during the night the apple of discord was duly produced from the Birmingham sports bag and duly delivered to the Warwick Club in the morning in the guise of an objection to one of the Warwick eleven stating that he belonged to another club, and human nature not being much different then from now, Birmingham refused to play out the game. Everything was done in solemn form, the wickets were pitched and the umpire appointed by the Warwick Club called " Play " at eleven o'clock. Then in this solemn moment was evolved the Birmingham " touch " and its Club refused to play, and the plaintiff with commendable caution gave the defendant notice not to pay over their deposit to the Warwick Club but to repay it to him. But before the commencement of the action the whole of the money was paid over by Terrill to the Warwick Club on their entering into an agreement to indemnify him. The learned Judge nonsuited the plaintiff but gave leave to enter a verdict for £20 if the Court should be of opinion that the action was maintainable, and the stage was duly set. The second section of 9 Anne, c. 14, was invoked as follows :

> That any person or persons whatsoever who shall at any time or selling by playing at cards, dice, tables, or any other game or games whatsoever and by betting on the sides or hands of such as do play at any of the games aforesaid lose to anyone or more person or persons so playing or betting in the whole the sum or value of £10 and shall pay or deliver the same or any part thereof the person or persons so losing and paying or delivering the same shall be at liberty within three months then next to sue for and recover the goods so lost and paid or delivered or any part thereof from the respective winner and winners thereof with costs of suit by action of debt founded on this Act.

There was a lot of argument about it and about, which we cannot analyse here, but in the result the report summarizes the decision

> A match at cricket for £20 is within the meaning of s. 2 of the 9th Anne and therefore illegal. And an action for money had and received to recover back the sum deposited may be maintained against the stakeholder who has paid over the money after notice not to do so.

The judgment is interesting for its reference to that nebulous constitutional Frankenstein " the intention of the Legislature " in whose name so many sins have been committed. But it would be interesting to know what brought about the change of attitude on the part of the men of Birmingham during the night. Would it be sinning against the virtue of charity to suggest that the cider of Warwickshire was the Circean wine on this occasion ?

And lastly, *Mullett* v. *Hunt*, at p. 752, brings us to something practical and very interesting.

The plaintiffs were suing one John Hewitt for damages in trespass, and in the course of his preparations for trial, issued a subpoena to the defendant to attend, which was served on him in due and proper form " causing to be made known to and shown to the said defendant and then and there caused a copy to be left with the said defendant and then and there paid to the said defendant a certain sum of money to wit the sum of one guinea being a reasonable sum of money for his costs and charges in and about his attendance as a witness." At the trial in Westminster Hall the defendant witness did not appear on his subpoena. He appears to have acted contumaciously and sent no excuse for his absence but " wholly refused neglected and declined " to attend the Court. The plaintiff considered in the witness's absence he could not safely proceed to trial, and was forced to withdraw his case and obliged to pay the costs of the other side. The plaintiff recovered judgment from a Court consisting of Lord Lyndhurst, C.B., Bayley and Jurney, Barons. The importance of the decision is " That an action will lie against a witness for non-attendance in pursuance of a subpoena although the plaintiff was nonsuited but withdrew his record in consequence of the absence of a witness." This still appears to be the law, and *Mullett* v. *Hunt* is referred to in *Halsbury* with approval. We are not told in the report why the witness did not attend. If it were merely from caprice then his action proved very expensive to him.

These are just a few cases culled at random from a report that on first view appears as impersonal as a refrigerator. That rather likeable and winsome person, the devil, contrasted with his Northern and Middle Europe later day associates, whom I hope won't spoil him by too constant an association, is said to have exclaimed when he first saw the Ten Commandments " They are a rum lot." So perhaps these old-world cases, selected as they were, may appear in the same category, but they serve to prove that the problems of living and of law that confronted the barristers of 1833 do not differ materially from those of our own day.

Holiday Pay as " Earnings."—A point in workmen's compensation law came before Judge Finnemore at Birmingham recently (*Winnett* v. *Tamworth Colliery*), which is of wide importance. The applicant was employed at a colliery, and was in receipt of compensation for partial disablement, based on the difference between his pre-accident wage and his present actual earnings. There was an arrangement whereby all employees (subject to some qualifications) were entitled to a week's holiday with pay. We know that though payments which the applicant has received as a result of contracts with third parties are not to be taken into account (even though those contracts have resulted from the employment), yet tips and bonuses may be regarded as earnings : *Willis's Workmen's Compensation*, 32nd Edn., p. 338. In this case the principle was obscured because there was a scheme whereby the profits of the colliery were divided between the owners and the employees on a percentage basis, and the cost of the holiday wages was deducted from the gross profits before they were divided. But the Judge found the matter reasonably clear. The money was received by the workman from his employers in pursuance of his contract of service with them for work done thereunder during previous periods of the year. It was in fact deferred pay, and the workman could have sued his employers for it. That being so, he could not contend that holiday pay was not earnings when it came to assessing his compensation.

PRACTICE NOTES.

Review of 1940 Practice Decisions.

By W. J. Sim, K.C.

There appear to have been no practice decisions of outstanding importance during the present year, and no accepted principles have been disturbed.

The authority of most general interest is probably *Wallace* v. *Gough, Gough and Hamer Ltd.*, [1940] N.Z.L.R. 814; G.L.R. 505, which has settled the question of whether the amount of damages paid into Court, in a case uncontested as to liability, may be mentioned to the jury. In recent years, the practice had grown with the Judges of refusing to permit reference to the subject; but in *Buttimore* v. *Sygrove*, [1940] G.L.R. 372, Ostler, J., permitted the payment in to be mentioned, upon the principle that this, in the learned Judge's view, had been the New Zealand practice for many years, differing from England, where a rule expressly forbade it. In *Wallace* v. *Gough, Gough and Hamer Ltd.*, (*supra*), Northcroft, J., followed the existing English practice, emphasizing the view that such communication is irrelevant and is calculated to influence the jury prejudicially to the party making the payment. The learned Judge delivered judgment after conferring with their Honours the Chief Justice, and Blair, Kennedy, and Johnston, JJ., and Mr. Justice Ostler is also recorded as accepting the latter view for future practice. It is apprehended that the practice of not mentioning the damages to the jury will be welcomed by the profession, since it now permits a safe use of the process of payment into Court.

The only other decision affecting the conduct of trials is *Mc Kenzie* v. *Robertson*, [1940] N.Z.L.R. 252; G.L.R. 215, which settles the sequence of counsel in cross-examination and addressing the jury, in a motor collision case when two defendants are before the Court, each alleging negligence against the other, and also contributory negligence by the plaintiff. The practice approved by Northcroft, J., at the conclusion of the plaintiff's case, was for counsel for the first defendant to open and lead his evidence. Counsel for the second defendant should cross-examine first, followed by counsel for the plaintiff. Counsel for the second defendant should then open and lead his evidence, counsel for the first defendant and for the plaintiff then cross-examining in that order. The sequence of addresses was settled by reference to the burden of proof each had assumed and the evidence each had called, so that by analogy with R. 268, the addresses were in reverse order to the order of openings.

Appellate matters were dealt with in *Palmer* v. *Baigent*, [1940] N.Z.L.R. 309, G.L.R. 209; *Biggs* v. *Woodhead*, [1940] N.Z.L.R. 276, G.L.R. 202; *Park Davis Trading Co., Ltd.* v. *Morrow*, [1940] G.L.R. 379; *Leahy* v. *Henderson*, [1940] N.Z.L.R. 433, G.L.R. 269, and *The King* v. *Tearaia Marsters*, [1940] N.Z.L.R. 911, G.L.R. 542.

Rule 19 of the Court of Appeal Rules, dealing with the time within which appeals must be brought, now expressly provides by the 1939 amendment that an order dismissing an application for a new trial shall be deemed to be a final judgment in an action. This reversed the rulings of *Black and White Cabs, Ltd.* v. *Anson*, [1928] N.Z.L.R. 613, 617; G.L.R. 306, 308, and other authorities. In *Baigent's* case (*supra*), the point came up for decision as to whether (judgment having been entered in the action), an order refusing an extension of time, made under R. 594, in which to apply for a new trial, was a final or an interlocutory order. The point was not expressly decided, but all three Judges (Myers, C. J., Blair, and Kennedy, JJ.), expressed views that the same was interlocutory and the appeal on that point was out of time; Mr. Justice Blair with a reservation that he could conceive of a case, *e.g.*, where fraud or misconduct could be discovered some time after judgment, and resort might properly be had to R. 594. The basis of the argument that the order was final was that a refusal of an extension of time to move for a new trial is equally the refusal of a new trial and was within the rule. In *Biggs* v. *Woodhead*, the decision of a question of law in a motor collision case was not regarded by the Court of Appeal as a matter of great general or public importance and justifying leave to go to the Privy Council. *Park Davis Trading Co., Ltd.* v. *Morrow*, was an illustration of a refusal of an application under s. 67 of the Judicature Act, 1908, for leave to appeal to the Court of Appeal, the Supreme Court decision being in an appeal from a Magistrate. An appellant, it was ruled, is not entitled to leave to appeal in every case where a difficult question of law is involved; and the particular case raised at the most a question of academic interest and difficulty in circumstances which were unusual. *Leahy* v. *Henderson* brought to light a case where Magistrate's Notes of Evidence were lost, and the point for decision by the Supreme Court was the question of law as to whether there had been any evidence to support one of the Magistrate's findings of fact. Mr. Justice Smith held that in cases involving £50 or under there is no statutory duty cast upon the Magistrate to make notes of evidence and that his recorded findings of fact must stand, as he could equally have made them without the assistance of notes of evidence. In *The King* v. *Tearaia Marsters*, it was held that the Supreme Court has jurisdiction to grant special leave to appeal (to that Court)under s. 162 of the Cook Islands Act, 1915, in a matter of the length of sentence in a criminal case. Under the section the power is to grant special leave to appeal against " any final judgment " of the High Court of the Cook Islands. The Court, in the circumstances, reduced the sentence.

Probate practice received attention in the following cases: *In re Montgomery*, [1940] N.Z.L.R. 950, G.L.R. 373, and in the Court of Appeal (*ibid.* 569); *In re Scullen*, [1940] N.Z.L.R. 746, G.L.R. 449; *In re Lundon* [1940] N.Z.L.R. 976, G.L.R. 561; *In re Ante Mravicich*, [1940] N.Z.L.R. 886, G.L.R. 545, and *In re Sims*, [1940] N.Z.L.R. 743, G.L.R. 441. In *Montgomery's* case, leave to swear death was given by Johnston, J., and confirmed by the Court of Appeal, where the facts were held to establish death by drowning. In *Scullen's* case, probate of an American will involving estate in New Zealand had been granted to the widow of the testator in America, she taking

a life interest only under the will. Upon application by her attorneys in New Zealand for Letters of Administration with will annexed (for the New Zealand estate), Ostler, J., held that the Court had power under s. 73 of the Court of Probate Act, 1857, Imperial to impose conditions in making the grant for the protection of the New Zealand legatees, and directed the executrix to give security for the protection of their rights. *In re Lundon* illustrates the Court's powers under the same section to grant Letters of Administration to a creditor or a nominee of a creditor in lieu of granting them to the next of kin where special circumstances warrant such a course, and this extends to both real and personal property. In *In re Ante Mravicich*, Smith, J., had to decide how to deal with a will made in the Jugo-Slav language, by a testator who was a naturalized British subject domiciled in New Zealand. He followed the English practice when a will is written in the Welsh language, namely that the original be sworn to, with a translation properly verified as to the contents, and the competency of the deponent. *In re Sims* is a decision relating to the lodging of a caveat before "grant" of probate, and as to whether in New Zealand the grant takes place at the time of the Judge's order, or when probate is formally sealed. In the circumstances of the case, delay having occurred, a re-grant was necessary and the caveat was in time in any case.

Among miscellaneous decisions during the year may be noted *State Advances Corporation of New Zealand* v. *Robertson*, [1940] N.Z.L.R. 219; G.L.R. 149, where it was held that on a mortgagee's application by originating summons under R. 550, no application for directions as to service is necessary, the necessary parties being already defined by R. 552, namely, such persons as would be the proper defendants to an action for like relief as that specified by the summons. In *Pateriki Hura* v. *Native Minister and Aotea District Maori Land Board*, [1940] N.Z.L.R. 259, G.L.R. 173, Johnston, J., affirmed that *certiorari* would not lie to the Native Land Court when the matter dealt with was within its jurisdiction, and allegations that the Court was misled, or that the order was induced by fraud were not substantiated. He did order, however, that parts of affidavits should be removed from the file, amounting, as they did in His Honour's opinion, to no more than loose suggestions of improper motive. In *Young* v. *MacDonald*, [1940] N.Z.L.R. 360; G.L.R. 216, Fair, J., held that on a motion to set aside a judgment, the evidence must be by affidavit, not *viva voce*; and in *The King* v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1940] N.Z.L.R. 754, G.L.R. 399, the Court reviewed a verdict of a jury and found that it did not amount to a special verdict within the meaning of R. 290 of the Code of Civil Procedure.

ACTS PASSED AND IN OPERATION, 1940.

No. 28. Small Farms Amendment Act, 1940. (December 6).
No. 30. Finance Act (No. 4), 1940. (December 6).
No. 29. Agricultural Emergency Regulations Confirmation Act. (December 6).

LOCAL.

No. 5. Mokau Harbour Act, 1940. (October 1, 1940).
No. 6. Waitara Harbour Act, 1940. (April 1, 1941).

RECENT ENGLISH CASES.

Noter-up Service
FOR
Halsbury's "Laws of England"
AND
The English and Empire Digest.

PRACTICE.

Writ—Service—Substituted Service—Partnership with Head Office in Enemy-Occupied Territory—Service on Manager of London Office—R.S.C., Ord. 48A, r. 3.

Where a firm in enemy-occupied territory has a branch in England under a manager to whom a license to carry on the business has been given by the Board of Trade, a writ against the firm may be served on the manager under R.S.C., Ord. 48a, r. 3.

MEYER *v.* LOUIS DREYFUS *et Cie.*, **[1940] 4 All E.R. 157. C.A.**

As to substituted service: see HALSBURY, Hailsham edn., vol. 26, pp. 29, 30, pars. 42, 43; and for cases: see DIGEST, Practice, pp. 331–334, Nos. 491–514. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 872–874.

WORKMEN'S COMPENSATION.

Course of the Employment—Termination—Accident on Way from Work—Private Halt Owned by Railway but Completely Enclosed by Colliery Premises—Collier Injured While Boarding Train—No Duty or Obligation to Use Train—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

If an accident occurs to a workman making use of facilities provided by his employers for leaving the place of employment, and before he has left it, the accident happens in the course of the employment.

WEAVER *v.* TREDEGAR IRON AND COAL CO., LTD., **[1940] 3 All E.R. 157. H.L.**

As to course of employment: see HALSBURY, Hailsham edn., vol. 34, pp. 825–827, par. 1164; and for cases: see DIGEST, vol. 34, pp. 279–282, Nos. 2358–2371. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd edn., pp. 24–35.

RULES AND REGULATIONS.

Emergency Regulations Act, 1939. Shipping Requisitioning Emergency Regulations, 1939. Amendment No. 3. December 5, 1940. No. 1940/303.

Emergency Regulations Act, 1939. Finance Emergency Regulations 1940. Amendment No. 2. December 10, 1940. No. 1940/304.

Social Security Act, 1938. Social Security Contribution Regulations, 1939. Amendment No. 2. December 12, 1940. No. 1940/305.

Reciprocal Enforcement of Judgments Act, 1934. Reciprocal Enforcement of Judgments Order, 1940, No. 2. December 12, 1940. No. 1940/306.

Legitimation Act, 1939. Legitimation Regulations, 1940. December 12, 1940. No. 1940/307.

War Pensions Act, 1915. War Pensions Regulations, 1940. December 12, 1940. No. 1940/308.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Bay of Plenty) Regulations (No. 2), 1940. December 12, 1940. No. 1940/309.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Taranaki–Wellington) Regulations, 1937. Amendment No. 1. December 12, 1940. No. 1940/310.

Chattels Transfer Act, 1924. Chattels Transfer (Customary Hire-purchase) Order, 1940. December 12, 1940. No. 1940/311.

Emergency Regulations Act, 1939. Freezing Industry Emergency Regulations, 1940. December 12, 1940. No. 1940/312.

Emergency Regulations Act, 1939. Superannuation Emergency Regulations, 1940. December 12, 1940. No. 1940/313.

Fisheries Act, 1908. Sea-fisheries Regulations, 1939. Amendment No. 7. December 12, 1940. No. 1940/314.