New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes."

Say not the struggle nought availeth,
The labour and the wounds are vain,
The enemy faints not, nor faileth,
And as things have been they remain.

If hopes were dupes, fears may be liars;
It may be, in yon smoke concealed,
Your comrades chase e'en now the fliers,
And, but for you, possess the field.

For while the tired waves, vainly breaking,
Seem here no painful inch to gain,
Far back, through creeks and inlets making,
Comes silent, flooding in the main.

And not by eastern windows only,
When daylight comes, comes in the light.
In front, the sun climbs slow, how slowly,
But westward, look, the land is bright.

—A. H. CLOUGH, *Hope*, quoted by the Rt. Hon. Winston Churchill.

VOL. XVII. TUESDAY, MAY 6, 1941 No. 8

SOME RECENT CRIMINAL APPEALS.

SEVERAL cases stated for the opinion of the Court of Appeal under s. 442 of the Crimes Act, 1908, were heard at the last sittings of that Court, and all were of general interest.

In *The King* v. *Harrison*, a case stated by Mr. Justice Fair, Harrison and one Talbot had been arraigned together on one indictment, which contained eight counts. The first four counts against Talbot charged him with (1) negligently driving a motor-vehicle and causing bodily injury to one Nixon; (2) being the driver of the said motor-vehicle, and an accident arising directly or indirectly from the use of it having occurred to Nixon, failing to stop; (3) being the driver of the said motor-vehicle, failing to ascertain whether he had injured Nixon; and (4) being the driver of the said motor-vehicle, failing to render all practicable assistance to Nixon. The other four counts were against Harrison and these charged him as follows: (5) while in a state of intoxication, being in charge of a motor-vehicle and by an act or omission in relation thereto causing bodily injury to Nixon. The other three counts 6, 7, and 8, were, *mutatis mutandis*, the same as 3, 4, and 5 against Talbot. The first and fifth count were laid under s. 27 of the Motor-vehicles Act, 1924, and the other counts under s. 5 of the Motor-vehicles Amendment Act, 1936. Both Harrison and Talbot pleaded "Not Guilty."

The evidence led by the Crown established that shortly after 6 p.m. on July 16, 1940, Nixon, while riding on a pony along the main road at Kumeu on his correct side of the roadway, was run down and injured by a motor-truck which was travelling in the opposite direction, and which failed to stop after the accident. There was ample evidence to establish (*a*) that Talbot was the driver of this vehicle at the time of the accident; (*b*) that such vehicle was owned by, and in the possession of, Harrison at the time of the accident; (*c*) that Harrison was at the time a passenger in it; (*d*) that immediately before the accident Harrison had been taken by Talbot from a nearby hotel in an intoxicated condition, and was sitting alongside the latter at the time of the accident; and (*e*) that the truck failed to stop till it had proceeded more than half a mile from the accident, and neither of the accused ascertained whether Nixon had been injured or rendered any assistance to him. The defence set up by Talbot was that he was not in the truck at the time of the accident, but had a short time before left it, and it had been driven away by Harrison.

The jury returned a verdict that Talbot was guilty of negligently driving a motor-vehicle, thereby causing bodily injury to Nixon, and acquitted him on counts 2, 3, and 4. Harrison was acquitted on the fifth count, and was convicted on counts numbered 6, 7, and 8.

The Court was asked to determine whether Harrison could properly be convicted on counts 6, 7, and 8 in view of the fact that the jury had found Talbot to be the driver of the car at the time of the accident and in view of the fact that Talbot was acquitted by the same jury on counts similar, *mutatis mutandis*, to counts 6, 7, and 8 against Harrison.

The learned Chief Justice, Sir Michael Myers, said that he should have had no hesitation, apart from authority, in holding that the conviction of Harrison on the sixth, seventh, and eighth counts could not possibly stand, upon the grounds that the driver of a

vehicle is the principal who is liable under s. 5 of the Motor-vehicles Amendment Act, 1936; that the jury found that Talbot, and not Harrison, was the driver and therefore the principal; and that, in order to convict Harrison, it must be shown that he was aiding the principal. But, as was said by one of the learned Judges in one of the English cases to which later reference is made, a person cannot aid another in doing something which that other has not done, and in this case the jury had expressly held that Talbot, the driver, did not do or omit the things which constitute the offences under s. 5 of the Motor-vehicles Amendment Act, 1936. The jury found that Talbot was the driver and was guilty of negligent driving causing bodily injury to Nixon, but they expressly acquitted him on the counts charging him with the offences under s. 5 of the statute of 1936. In these circumstances, His Honour said, apart from authority, that the conviction against Harrison could not stand. But the matter was not devoid of authority. On the contrary there were two English decisions precisely in point: *Morris* v. *Tolman*, [1923] 1 K.B. 166 (under the Roads Act, 1920) and *Thornton* v. *Mitchell*, [1940] 1 All E.R. 339 (under the Road Traffic Act, 1930) in both of which it was pointed out that a person cannot aid or abet another in doing something which that other has not done or in not doing something which he ought to have done. Consequently, in the opinion of the learned Chief Justice, Harrison could not properly be convicted.

Mr. Justice Ostler, in agreeing that the conviction of Harrison must be quashed for the reasons given by the Chief Justice, said:

> But even if Talbot had been convicted of the offences of failing to stop, &c., in my opinion the conviction against Harrison for the same offences could not have stood for the reason that there was no evidence whatever to go to the jury that there was any aiding or abetting on his part. The mere presence of the owner of a vehicle as a passenger does not entitle a jury to draw the inference that he aided and abetted the driver in the offence of failing to stop after an accident. In order to establish such aiding and abetting, there must be evidence of some overt act done or words used by the owner. In this case there was no such evidence.

Smith, Johnston, and Fair, JJ., concurred, the last-named adding that he had been of the same opinion at the time the question was raised in the Supreme Court; but, as counsel had requested that it be reserved for argument before the Court of Appeal, and there were other considerations making that course desirable, he complied with the request, although it appeared to him that it was doubtful whether it was reasonably arguable that the conviction should be sustained. The conviction was accordingly quashed.

In *The King* v. *Martini*, an indictment charged the prisoner, under s. 240 (1) of the Crimes Act, 1908, with common theft of moneys paid to him by way of deposit by proponents to a company for life insurance of which he was a commission agent; and not, under s. 242 of the statute, with theft in having received money on terms requiring him to account for or pay the same to any other person, and with having fraudulently converted the same to his own use, or fraudulently omitted to account for or pay the same. Counsel for the prisoner, assuming from the way that the case was presented by the Crown that the provisions of s. 242 were being invoked, contended that the proviso to that section afforded a defence to the charge. The learned Judge directed that, as the accused had admittedly appropriated the moneys to his own purpose, that in law constituted theft, without explaining to the jury that the appropriation was not theft unless it was fraudulent.

The jury returned the following verdict: "Guilty, with recommendation for leniency, as we believe the crime to be a technical breach of agreement without intention permanently to retain the moneys."

The Court of Appeal was asked (*a*) whether the direction of the learned trial Judge was correct, and (*b*) whether the verdict of the jury was one of "guilty" or of "not guilty."

The learned Chief Justice, in a judgment with which Mr. Justice Ostler concurred, pointed out that what the prisoner was charged with was common theft, and, so far as material, theft or stealing is defined by s. 240 (1) of the Crimes Act, 1908, as being the act of fraudulently and without colour of right converting to the use of any person anything capable of being stolen, with intent to deprive the owner, or any person having any special property of interest therein, permanently of such thing or of such property or interest. Under s. 247 (*d*) the maximum term of imprisonment for what might be called common theft is two years, and the indictment referred in the margin to s. 247 (*d*), showing that the intention was to indict the prisoner for common theft.

His Honour proceeded:

> The real position was, as it seems to me, that the money was paid by the two proponents to the prisoner as agent for the insurance company, and, if so, the moneys were in the prisoner's hands, not as the property of the two proponents, but as the property of the insurance company. In these circumstances (or indeed even if the money remained the property of the proponents but was received from them by the prisoner to be paid to the insurance company) the prisoner should have been indicted under s. 242, which so far as material enacts that everyone commits theft, who, having received any money on terms requiring him to account for or pay the same to any other person, though not requiring him to deliver over in specie the identical money received, fraudulently converts the same to his own use or fraudulently omits to account for or pay the same. The maximum punishment for such theft is provided for by s. 247 (*c*), and is seven years imprisonment with hard labour.
>
> In *R.* v. *Kirk*, (1910) 20 N.Z.L.R. 463, the prisoner was charged with an offence under s. 220 of the Criminal Code Act, 1893, which is now s. 242 of the Crimes Act, 1908. The question arose as to whether the prisoner was not also a servant of the person whose moneys he was charged with stealing, and the maximum punishment for the theft of anything stolen by a clerk or servant which belongs to or is in the possession of his employer is under para. (*b*) of s. 247 of the Crimes Act, and was under the corresponding provision of the repealed Criminal Code Act, fourteen years. The Judges of the Court of Appeal said that if it is sought to charge the accused with theft as a servant and so to render him liable to fourteen years imprisonment instead of the seven years to which he was liable for the offence as charged against him it should be so stated in the indictment. In other words, as was said by Stout, C.J., there are various kinds of thefts with various punishments and the particular crime should be specified in the indictment if there is a variation in the punishment. Williams, J., in his judgment said: "We are, I think, unanimously of opinion that, if it had been sought to charge the accused as a servant, and so render him liable to fourteen years' imprisonment instead of the seven years to which he is liable for an offence under s. 220, he should have been so charged in the indictment."

His Honour also referred to *R.* v. *Goodman*, (1906) 9 G.L.R. 37, where the prisoner was charged with common or simple theft of two sums of £260 and £200 the property of the persons from whom he actually received the money. He was convicted on these

charges, but the evidence disclosed fraudulent misappropriation of moneys under the section which is now s. 244 (misappropriating moneys held under direction). In that case, Mr. Justice Cooper had said:

> The maximum punishment which may be inflicted differs in degree according to the nature of the theft committed. I agree with what was said in *R.* v. *Kirk* by the Chief Justice and Mr. Justice Williams, that, as there are various kinds of theft with various degrees of punishment, the particular class of theft should be specified in the indictment, if there is a variation in the punishment. But where a prisoner has pleaded to the indictment, knowing from the depositions the particulars of the charges against him, and has taken no objection to the indictment as charging theft generally, and has not asked for particulars or details, it is too late after conviction to question the power of the Court to inflict the appropriate punishment. It is sufficient under s. 363 if the indictment contains in substance the statement that the accused person has committed a crime. Here, the indictment states the crime as the crime of theft. The evidence discloses fraudulent misappropriation of money under the circumstances defined in s. 222 of the Code, and this is "theft." In my opinion, therefore, the Court has jurisdiction to inflict punishment up to the maximum prescribed in s. 222, namely, seven years imprisonment.

But this view did not appeal to the learned Chief Justice who doubted its correctness. In the present case, His Honour thought that the proper course was to have charged the prisoner with an offence under s. 242 with an alternative count for common theft in case the ingredients prescribed by s. 242 should not be proved. That course however, was not adopted, and, as already stated, the prisoner was charged with common theft of the moneys of the two proponents for insurance. Nevertheless it was competent for the Crown to prove all the facts, and to show (and reference to the exhibits did show) that the money had been paid to and received by the prisoner on terms requiring him to pay or account for it to the insurance company. Inasmuch as that offence is also theft, it would have been competent for the jury to find a verdict of guilty on the indictment as it stood. But if the moneys were really the moneys of the two proponents, and the prisoner had received the moneys from them in some private capacity, different considerations might apply from those which would apply if the offence were under s. 242. The terms upon which he received the money would have to be shown, and the distinction between criminal liability and civil liability would be an important matter for the jury to consider under proper direction from the Court. As a matter of fact, however, a contract of employment as between the company and the prisoner was proved by the Crown.

Turning to the direction of the learned trial Judge, the Chief Justice said that the learned trial Judge directed the jury that that proviso had no application to the facts in the case; and that direction was right. The learned Judge, however, had stated that he then proceeded to direct the jury as follows:—

> There was no dispute that the moneys allegedly stolen had been paid to the accused by persons proposing insurance as deposits on the premiums payable upon such insurance if such proposals were accepted by the insurance company, nor was there any dispute that such moneys had never been accounted for by the accused to the insurance company in terms of clause 6 of his employment agreement. The accused, however, claimed that he had always had an intention to repay these moneys, but he admitted that he had used such moneys for his own purposes. I directed the jury that as the accused had admittedly appropriated these moneys to his own purposes that in law constituted theft; and I further directed the jury that, if the accused when he used for his own purposes moneys which he held in trust for his employer, the fact that he might have an intention to repay those moneys did not in law constitute any defence, and that the crime of theft was complete when he appropriated to his own purposes moneys he so held in trust. I actually made use of an illustration to the effect that if an employee, without his employer's knowledge, "borrowed" moneys of his employer for the purpose of backing a horse and fully intended to repay such moneys when the horse won, was guilty of theft immediately he so borrowed the money.

If the jury had been properly directed, the learned Chief Justice thought it would have had to be held that the verdict was a verdict of "Guilty": *Reg.* v. *Trebilcock*, (1858) 7 Cox C.C. 408; *Reg.* v. *Johnson*, (1867) 6 N.S.W.S.C.R. (L.) 201. But in his opinion the direction was not correct. He added:

> If the charge was to be treated as one under s. 240, then the jury should have been directed that in order to convict they must find that the money had been converted by the prisoner to his own use fraudulently and without colour of right and with intent to deprive the owner permanently of the money. If the charge was to be treated as one under s. 242 it was still necessary to direct the jury that before they could convict they must find that the prisoner fraudulently converted the money to his own use or fraudulently omitted to account for it. What the learned Judge says is that he directed the jury that as the accused had admittedly appropriated the moneys to his own purposes that in law constituted theft. That to my mind is not necessarily the position at all, as the appropriation is not theft unless it is fraudulent, and that should have been explained to the jury. That the jury may have been confused is shown I think by what they say in their finding, namely that they believe the crime to be a technical breach of agreement without intention to permanently retain the moneys. If they had been directed with regard to the requirement that the conversion should be fraudulent, then, as I have said, I think that the verdict of guilty would have to stand, but, inasmuch as they were not so directed, their finding is capable of being read as connoting an opinion on their part that the act of the prisoner was not fraudulent but that they had to find him guilty on the learned Judge's direction because his mere appropriation of the moneys to his own purposes, without more, constituted theft.

In a separate judgment, with which His Honour, Mr. Justice Johnston concurred, Mr. Justice Smith said that the direction set out was a direction upon s. 242 of the Crimes Act, 1908. As it was stated, it did not inform the jury that the accused was not guilty of the offence of theft under that section unless he acted fraudulently. In other words, the jury was not permitted to determine whether the accused appropriated the moneys dishonestly or by mistaken assumption of right or acquiescence by the company in his conduct. This omission amounted to a misdirection, and clearly it may have affected the jury's view of the case if the verdict which they returned was one of "guilty." On that topic, His Honour had this to say:

> The verdict is, I think, one of "guilty." A perusal of the evidence both for the Crown and for the accused shows that the accused had no right to appropriate the moneys contrary to the terms of the agreement. The jury must therefore have considered that the accused knew he was taking moneys which did not belong to him but their recommendation shows that they also considered that in the circumstances he had an intention or a hope that he would at some later stage be able to repay the moneys to the persons entitled to them and that this made "the crime" a "technical breach." A recommendation of this kind does not prevent the verdict from being one of "guilty": *Reg.* v. *Trebilcock*, (1858) 7 Cox C.C. 408.

Their Honours all agreed that a new trial must be ordered. Section 445 of the Crimes Act empowers the Court if of opinion that the Judge's ruling was

erroneous and that there has been a mistrial in consequence, to direct a new trial, or to make such other order as justice requires. There is however, a provision which says, *inter alia*, that no conviction shall be set aside nor any new trial be directed, although some misdirection was given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial. Having regard to the finding of the jury, their Honours thought it impossible to say what verdict the jury would have reached had a full direction been given, or that a miscarriage may not have been occasioned, and, consequently, there must be a new trial.

In *The King* v. *Norman*, a case stated by Mr. Justice Blair, the Court of Appeal held that where a Stipendiary Magistrate has acted within his jurisdiction in committing an accused person for trial, even if the depositions contain no evidence against the latter on the charge upon which he has been so committed, the Crown is within its rights in framing an indictment against him upon the information for that charge.

It was further held that whether or not the depositions contain any evidence against the accused, the trial Judge has a discretion under s. 408 (3) of the Crimes Act, 1908, whether he will make a written order that any witness may be sworn before and examined by the Grand Jury, although that witness has not been called in the preliminary hearing and his name has not been endorsed on the indictment. Section 425 of the statute gives sufficient protection to an accused who is taken by surprise by this course.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1941.
March 17, 18, 20;
April 3.
Myers, C.J.
Smith, J.
Johnston, J.
Fair, J.

THE KING v. OSTLER AND CHRISTIE.

Criminal Law — Practice — Trial — Attempt — Public Safety Emergency Regulations, 1940—Information charging Publication of Subversive Statement—Attorney-General's consent to Prosecution endorsed on Information before same sworn—Whether properly given—Accused electing Trial by Jury—Indictment for publication of Subversive Statement and for Attempt to Publish same—Acquittal on count of Publishing, Conviction on count of Attempt to Publish—Whether Accused could be convicted of attempt, although Attorney-General's consent not specially given to prosecution for Attempt—Crimes Act, 1908, ss. 93, 350, 351, 357, 387, 389, 394, 395, 396, 407, 445—Justices of the Peace Act, 1927, s. 124—Emergency Regulations Act, 1939, ss. 3 (1) (4) (6)—Public Safety Emergency Regulations, 1940 (Serial No. 1940/26) Reg. 2.

The Attorney-General's consent to a prosecution for an offence, as required by s. 2 (1) of the Public Safety Emergency Regulations, 1940, is properly given before the swearing of the information on which it is endorsed, as the swearing of the information constitutes the commencement of the prosecution.

Bowron Bros. v. *Bishop*, (1910) 29 N.Z.L.R. 759, and *R.* v. *Willace*, (1797) 1 East P.C. 186, followed.

Where the consent is given to a prosecution for a complete offence against any of the Public Safety Emergency Regulations, 1940, punishable summarily, and the offence becomes an indictable offence pursuant to s. 124 of the Justices of the Peace Act, 1927, by the accused's electing to be tried by a jury, the consent must be deemed to extend to an attempt to commit that offence.

On such offence becoming an indictable offence, as aforesaid all the provisions of the Crimes Act, 1908, applicable to indictments, and the procedure in relation to indictable offences, apply, including s. 394 of the statute; and, although the Attorney-General's consent is given to an information for the complete offence, the accused may be convicted of an attempt to commit such offence, whether or not the separate count for the attempt has been inserted in the indictment, and whether or not the regulation makes an attempt, as well as the completed act, an offence.

Reg. v. *Brown*, [1895] 1 Q.B. 119, and *R.* v. *Eager*, (1903) 23 N.Z.L.R. 552, 6 G.L.R. 236, followed.

Moss and Phillips v. *Donohoe*, (1915) 20 C.L.R. 580, and *Berwin* v. *Donohoe*, (1915) 21 C.L.R. 1, referred to.

R. v. *West*, [1898] 1 Q.B. 174, mentioned.

Section 407 (1) of the Crimes Act, 1908, must be read together with s. 3 (4) of the Emergency Regulations Act, 1939, and Reg. 2 (3) of the Public Safety Emergency Regulations, 1940, (which makes the Attorney-General's consent a condition precedent to a prosecution). A conviction on any count in the indictment charging a different offence from that in respect of which the Attorney-General has given his consent is bad, and must be quashed.

R. v. *Bates*, [1911] 1 K.B. 964, and *R.* v. *Fuidge*, (1864) Le. & Ca. 390, 33 L.J.M.C. 74; 9 Cox C.C. 430, applied.

R. v. *O'Keefe*, (1909) 28 N.Z.L.R. 502, 11 G.L.R. 603, and *R.* v. *Davis and Haines*, (1910) 12 G.L.R. 700, mentioned.

So held by the Court of Appeal on a case stated by Northcroft, J., under s. 442 of the Crimes Act, 1908.

Counsel: *Taylor*, for the Crown; Prisoners in person.

Solicitors: *Crown Law Office*, Wellington, for the Crown.

Case Annotation: R. v. *Willace*, E. and E. Digest, Vol. 14, p. 154, para. 1286; *R.* v. *Brown*, *ibid.*, p. 132, para. 1040; *R.* v. *West*, *ibid.*, p. 151, para. 1267; *R.* v. *Bates*, *ibid.*, p. 171, para. 1483; *R.* v. *Fuidge*, *ibid.*, p. 209, para. 1915.

COURT OF APPEAL.
Wellington.
1941.
March 18.
Myers, C.J.
Ostler, J.
Smith, J.
Johnston, J.
Fair, J.

THE KING v. NORMAN.

Criminal Law—Trial—Indictment—No Evidence on Depositions of any Crime committed by Accused—Whether Crown may frame Indictment against him—Witness not called in Preliminary Hearing—Name not endorsed on Indictment—Judge's Discretion to order Examination of Such Witness before Grand Jury—Crimes Act, 1908, ss. 408 (3), 425.

Where a Stipendiary Magistrate has acted within his jurisdiction in committing an accused person for trial, even if the

depositions contain no evidence against the latter on the charge upon which he has been so committed, the Crown is within its rights in framing an indictment against him upon the information for that charge.

Whether or not the depositions contain any evidence against the accused, the trial Judge has a discretion under s. 408 (3) of the Crimes Act, 1908, whether he will make a written order that any witness may be sworn before and examined by the Grand Jury, although that witness has not been called in the preliminary hearing and his name has not been endorsed on the indictment. Section 425 of the statute gives sufficient protection to an accused who is taken by surprise by this course.

So held, by the Court of Appeal in a case stated by Blair, J., under s. 442 of the Crimes Act, 1908.

Counsel: *Cornish*, K.C., Solicitor-General for the appellant; *Strang*, for the respondent.

Solicitors: *Crown Law Office*, Wellington, for the appellant; *Strang and Taylor*, Hamilton, for the respondent.

COURT OF APPEAL.
Wellington.
1941.
March 31;
April 9.
Myers, C.J.
Ostler, J.
Smith, J.
Johnston, J.

THE KING v. MARTINI.

Criminal Law—Theft—Indictment for Common theft—Case presented as if Charge for Theft by Person receiving Money on Account of Another—Direction that Accused's admission of Appropriation of such Money constituted Theft—No Explanation that Appropriation must be Fraudulent—Jury's Verdict—"Guilty with Recommendation for leniency, as we believe the crime to be a technical breach of agreement without intention "to permanently retain the moneys"—Misdirection that might have occasioned Miscarriage—New Trial—Crimes Act, 1908, ss. 240 (1), 242, 445.

An indictment charged the prisoner, under s. 240 (1) of the Crimes Act 1908, with common theft of moneys paid to him by way of deposit by proponents to a company for life insurance of which he was a commission agent, and not with theft in having received money on terms requiring him to account for or pay the same to any other person, and, under s. 242 of the statute, with having fraudulently converted the same to his own use or fraudulently omitted to account for or pay the same.

Counsel for the prisoner, assuming through the way that the case was presented by the Crown that the provisions of s. 242 were being invoked, contended that the proviso to that section afforded a defence to the charge.

The learned Judge directed that, as the accused had admittedly appropriated the moneys to his own purpose, that in law constituted theft, without explaining to the jury that the appropriation was not theft unless it was fraudulent.

The jury returned the following verdict: "Guilty, with recommendation for leniency, as we believe the crime to be a technical breach of agreement without intention permanently to retain the moneys."

On case stated by *Blair*, J., under s. 442 of the Crimes Act, 1908, asking whether such direction was correct and whether the jury's verdict was one of "guilty" or "not guilty."

Held, by the Court of Appeal, 1. That the verdict was one of "Guilty."

Reg. v. *Trebilcock*, (1858) 7 Cox C.C. 408, and *Reg.* v. *Johnson*, (1867) 6 N.S.W.S.C.R. (L) 201, referred to.

R. v. *Kirk*, (1901) 20 N.Z.L.R. 463, 3 G.L.R. 404, and *R.* v. *Goodman*, (1906) 9 G.L.R. 37, mentioned.

2. That the Judge's misdirection might so have influenced the jury in arriving at this verdict that a miscarriage might have been occasioned.

A new trial was ordered.

Counsel: *Taylor*, for the Crown; *Ongley*, for the prisoner.

Solicitors: *Crown Law Office*, Wellington, for the appellant; *Ongley, O'Donovan and Arndt*, Wellington, for the respondent.

Case Annotation: Reg. v. *Trebilcock*, E. and E. Digest, Vol. 15, p. 887, para. 9739.

COURT OF APPEAL.
Wellington.
1941.
March 31;
April 9.
Myers, C.J.
Ostler, J.
Smith, J.
Johnston, J.
Fair, J.

THE KING v. HARRISON.

Motor-vehicles—Offences—Duties of Drivers thereof in Cases of Accident—Driver Acquitted of Offences under s. 5 of Motor-vehicles Amendment Act, 1936—Passenger also indicted—Whether liable to Conviction for such Offences either as Principal or of Aiding and Abetting—Motor-vehicles Amendment Act, 1936, s. 5.

The language of s. 5 of the Motor-vehicles Amendment Act, 1936, shows that it is limited to the *driver* of a motor-vehicle, and that a person who is not a driver is not liable to be convicted of an offence thereunder.

Where the driver of a motor-vehicle and a passenger therein are indicted for offences under s. 5 and the driver is acquitted, the passenger cannot be convicted as principal because he was not the driver or of aiding and abetting the principal in doing something that the latter had not done.

Morris v. *Tolman*, [1923] 1 K.B. 166, and *Thornton* v. *Mitchell*, [1940] 1 All E.R. 339, applied.

Counsel: *Cornish*, K.C., Solicitor-General, for the appellant; *Cleary*, for the respondent.

Solicitors: *Crown Law Office*, Wellington, for the appellants; *Barnett and Cleary*, Wellington, for the respondent.

SUPREME COURT.
New Plymouth.
1941.
March 4;
April 7.
Smith, J.

HERBERT v. ALLSOPP.

War Emergency Legislation—Public Safety Emergency Regulations—Interpretation of Statute—Function of Court—Validity of Regulation—Emergency Regulations Act, 1939, s. 3—Public Safety Emergency Regulations, 1940 (Serial Nos. 1940/26; 1940/122) Reg. 2A.

In interpreting s. 3 (1) of the Emergency Regulations Act, 1939, the function of the Court is simply to inquire whether the Legislature has used adequate language to achieve its object. In determining this question the Court will give due weight to the paramount fact that the object of the legislation is the preservation of the State, which confers what are sometimes called the fundamental rights of the individual.

The generality of the powers conferred by s. 3 (1) are not limited by the provisions of s. 3 (2), and no further express power is required for interference with a fundamental liberty of the subject.

E. H. Jones (Machine Tools) Ltd. v. *Farrell and Muirsmith*, [1940] 3 All E.R. 608, distinguished.

Regulation 2A of the Public Safety Emergency Regulations, 1940, is valid being reasonably capable of being a regulation for the purpose of securing the public safety or the defence of New Zealand, or the maintenance of public order, or the efficient prosecution of the war.

Lipton, Ltd. v. *Ford*, [1917] 2 K.B. 647; *R.* v. *Halliday* [1917] A.C. 260; *The Zamora*, [1916] 2 A.C. 77; and *Nelson*, v. *Braisby* (*No. 2*), [1934] N.Z.L.R. 559; G.L.R. 433, applied.

Counsel: *Parry*, for the appellant; *Macallan*, for the respondent.

Solicitors: *G. L. Ewart*, New Plymouth, for *Horner and Burns*, Hawera, for the appellant; *Govett, Quilliam, Hutchen and Macallan*, New Plymouth, for the respondent.

JUDICIAL MARTYRS.

The Case of the Norwegian Supreme Court.

By ROLAND BURROWS, K.C.

The resignation in a body of the members of the Norwegian Supreme Court, announced in *The Times* of December 24, 1940, marks the latest phase of the heroic stand taken by the Judges of Norway in the cause of freedom and justice.

In common with all other civilized countries, Norway desires justice and respects the law. Her Judges have carried out their duties with independence and dignity, and their reputation stands high in the opinion of other countries. The Norwegian Constitution entrusts them with the duty of deciding upon the validity both of statutes and of administrative decrees. But the Germans are in occupation of Norway. This violation of the neutrality of a peaceful nation, though wholly unjustifiable, is nevertheless a fact which cannot be ignored. The Hague Convention of 1907, by which Germany would be bound—if she were to consider herself bound by anything but regard for her own selfish and misguided aims—has provided for such an occupation. The occupying troops must respect the laws in force in the country which they occupy, except of course in so far as they are inconsistent with such occupation.

When the Germans occupied Norway which, it will be remembered, was on the pretext of saving Norway from an invented invasion by Great Britain—a project of which no one has ever heard either before or since—the validity of this principle was expressly admitted by the German Decree of April 24, 1940, which is still in force, and declares that the existing laws of Norway shall remain in operation so far as they are reconcilable with the German occupation.

THE GERMAN AIM.

Respect for their own or anyone else's pledges has never been a German vice. As the pretext for the occupation itself was a lie, so also has the German administration given the lie to their formal statement of the policy to be followed during their occupation. The Reich's Commissioner is not there merely to administer. His real object is to reduce Norway to a subordinate state dependent in every way upon Germany, and to render all Norwegians subservient for all time to German ideas and to German interests. In pursuance of this objective he has deliberately exceeded the powers of an occupying State as recognized by international law. There is no excuse; as the Germans know from their experience of the British occupation of part of their own country that such an occupation can be carried out with due respect to the local law and to the rights of local inhabitants. Various decrees and orders have been made by the Commissioner, and so far as they are compatible with international law have been respected, albeit reluctantly, by the Supreme Court. This, however, is not enough. Norway has not yet proved as pliable as Germany demands, and further decrees have been made conferring on the puppet who masquerades as Minister of Justice in Norway the power to remove and replace at will all persons who are concerned with the administration of justice, and even setting up under the guise of a "People's Court" a rival organization staffed by willing traitors who can be relied upon to carry out the orders of their German masters.

GERMAN JUSTICE.

We in England have had our own struggles with authority, but such authority has been of like blood and allegiance as ourselves. We have no conception of the difficulties which arise from foreign domination and can form little idea of the present German notion of the judicial office which the Commissioner is endeavouring to impose on the unhappy Norwegians.

Germans by their race, contaminated as it is by servile elements, and by their unhappy history, are unduly prone to submit to the will of whoever happens to be in authority. This proclivity has been made a solemn obligation since the Nazi party on a minority vote came into power as a result of an obscure and discreditable intrigue. Before then their Judges were independent in name, and sometimes in fact, and, though respect for law as such was not regarded as a duty of the government, nevertheless the standard of administration of justice was high. Since then degeneration has gone on apace. No person of legal eminence and moral standing could accept the position which a Judge now has to occupy in Germany. The statute law has become a mere matter of administrative decrees, and justice at any moment may find that in Germany it is nothing more than the expression of the mere wishes of the executive. The Judge may hear and determine the case, but he must be prepared to operate as the instrument of the executive, merely contriving, while preserving the appearance of a trial, to bring about a decision which has been predetermined by some unknown official of more or less importance, who is actuated by reasons having no relation to the justice of the cause, much in the way that Jezebel practised on the Judges of Naboth in order that Ahab might confiscate the vineyard he coveted.

The Judge has no independence. He is merely one of the members of a bureaucracy who must obey orders. Such a tendency always exists in every civil service, and it is always necessary to watch and guard against its extension, as Lord Hewart has more than once pointed out. We have successfully resisted that tendency in the past and may have to do so again. But our Constitution has recorded over and over again the principle that the rights of the people exist by law and can only be altered in accordance with law. The administration of justice demands an upright and independent judiciary. Magna Carta and the Bill of Rights—to name only two famous statutes—embody the principles that the right of access to the Courts shall be open to all, and that they shall lay their complaints before Judges who shall do right to all manner of men without fear, favour, affection, or ill-will. The Judge knows that his position is secure so long as his conduct is pure, and that no inconvenience to the government can or will justify his removal from office.

The advocate knows that the fearless discharge of his duty to his client will in no way endanger his

liberty or his career, but on the contrary that it will enhance his reputation. For the lawyer is no mere journeyman doing the routine legal work of the public. He shares with the Judge the duty of maintaining the principles of justice and securing the liberty of the people. Under the present *régime* in Germany both Judge and advocate who so act would find their reward in disciplinary treatment or a concentration camp.

RESPECT FOR LAW.

Respect for law is essential to true civilization. Without it liberty is impossible and life must be miserable, even for the tyrant who shivers in his underground retreat and hides behind his duplicates because in his heart he knows that, as neither he nor his slaves have any respect for law, neither he nor they are safe from one another. When misery overcomes the desire to live, he is doomed. Without respect for law men are but brute beasts: with it and by it we become men living in amity together because each regards the rights of his neighbour. Such a conception is foreign to the German mind, which is so obsessed with the efficacy of power that it ignores the lessons of the past. No Nazi could be the author of those eloquent words of Hooker: "Of law it can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage, the very least as feeling her care and the greatest as not exempt from her power."

The Norwegian Judges have refused to bow the knee to Baal. They have made their stand and protest for the liberties of the people of Norway, and we salute them as the latest martyrs in the cause of liberty. When the present oppression has passed away in the inevitable defeat of the Nazi domination, they will reap their full reward. But part of it they have already. Now and for all time they have earned the respect and admiration of those who respect justice and love their fellow men.

LONDON LETTER.

Somewhere in England,
March 1, 1941.

My dear EnZ-ers,—

When the war is over and the Grand Inquest which must follow is held, the question of the legitimacy of bombing from the air will be the chief matter to be settled. In the years between the two great wars, when the League of Nations was waiting in vain for the support from the Great Powers which was required to make it effective, attempts were made to abolish the use of fighting aircraft. Why and how they failed it is useless now to inquire. Even had they in appearance succeeded, no safeguards then contemplated would have been effective against Hitler's schemes of conquest. But they were abandoned and air warfare left to a devilish freedom. Some of its effects we have noted from time to time. To the list of towns which have suffered most have to be added Portsmouth and Southampton. Portsmouth has lost its Guildhall; Southampton its Civic Centre, a group of buildings completed two years ago at a cost of £750,000. But these are only items in the vast destruction which involved churches, chapels, hospitals, commercial buildings and private houses. It may be granted that both cities contained or adjoined military objectives, but obviously the attacks were not aimed at these. They were aimed at the civil population and at civil buildings, and were intended to undermine the courage of the people. That they have not done; but what will the Grand Inquest say?

The Norwegian Judges.—I am sending you an article by Mr. Roland Burrows, which appeared in the *Law Journal* here, and which has aroused great interest. It is, unfortunately, necessary to add some further details. The Chief Justice and some of his colleagues had been arrested, but on the request of the Bishops had been released. The Bishops have protested against the deceit practised upon them. They had been induced to exhort their congregations to remain quiet on the faith of solemn promises that the Church would be unmolested and the administration of justice undisturbed. They have been bitterly disillusioned. Last week, I regret to say, these Judges were again arrested. The persons who have been nominated to assume the role of Judges by the creature Minister of Justice in Norway as successors to those who were so improperly dismissed have declared, in an action, that neither Art. 43 of the Hague Convention, nor the declaration of Hitler, nor the constitution (as explained by Mr. Burrows in his article) entitle a party to dispute the validity of an order of the Reich's Commissar, nor, what is more, that of any ordinance issued by any of the puppet Ministers who are now posing as the Government of Norway. This decision, which is manifestly contrary to the law of Norway, will no doubt be followed by them, but cannot survive revision when Norway has regained her freedom. It will, no doubt, form an item in the claim that Norway will make in respect of Germany's many and notorious violations of international rights. The adventurers who now hold Germany in thrall are not likely to be disturbed by such considerations. If Germany were by chance to win, and it must now be with them a case of hope against hope, then no such claim would be entertained. When they have lost the war they will not be there to meet the consequences, which will fall upon the German people as a punishment for their failure to develop any true sense of self-government.

Offices and Parliament.—We are often thankful for the fact that England has no constitution, or, at the most, a constitution so elastic that it can be stretched or varied at any time. Now the Prime Minister and other Ministers have introduced a Bill to provide that His Majesty's High Commissioner in Canada shall continue to be a member of Parliament, and the Bill is so drawn as to cover the case of Sir Samuel Hoare, who is to remain member for Chelsea, though he is His Majesty's Ambassador at a foreign Court. The Bill, as it now stands, is to remain in force for one year; but contains a reference to the Interpretation Act, 1889, which will preserve privileges enjoyed before its lapse. The new measure appears to be in direct conflict with s. 25 of the Succession to the Crown Act of 1907. To this the indispensable *Erskine May* (p. 634) points as the source of the rule that if a member accepts an office of profit under the

Crown his election is voided *ipso facto*. The avoidance takes place as soon as the honourable member accepts the appointment and before the formalities are complete. Readers with historical tastes may like to look at the case of Sir Paul Methuen, an interesting figure of the Queen Anne and early Georgian days. The D.N.B. confirms our recollection that he was member for Brackley and Ambassador at Madrid at the same time. Horace Walpole condemned him as a "dull, formal, romantic braggadocio"; but, like his successor, Sir Samuel Hoare, he was a man of much versatility.

Concurrent Rights to Damages.—The Court of Appeal gave a decision last week on damages for the dead which settles an interesting point on a much debated subject (*Yelland* v. *Powell Duffryn Collieries*, [1941] 1 All E.R. 278). The plaintiff widows (there were two) sued for the death of their husbands, who were miners, both under Lord Campbell's Act and under the Law Reform, &c., Act of 1934. The Judge on circuit gave them and their children substantial sums under the later Act, but gave the widows trifling sums under Lord Campbell's Act. It seems to have been admitted that the learned Judge's reasoning was that the widows were well provided for under the later Act, and that this fact should be considered when the damages to be given under the earlier measure were being settled. On appeal the widows contended that this was a wrong view of the law, and relied on a provision in the later Act which declares that the rights which it confers are to be in addition to and not in derogation of "any *rights*" conferred by Campbell's Act. What does this mean? The widows said that it meant that the rights given by the two Acts were entirely separate, both on matters of law and on matters of amount. The Court of Appeal would not accept that view. The 1934 Act abrogates no right given by Campbell's Act; but it does, as things have turned out, alter the pecuniary position of those who can vicariously recover under it, and therefore affects the amount which, under the earlier Act, they can justly claim.

America and the Temple.—Mr. Wendell Willkie, himself a lawyer, visited the Temple in the course of his brief visit to this country. Before lunching with the Lord Chancellor on January 30, he was welcomed by Sir Claud Schuster, Sir Charles Doughty, Mr. T. Hollis-Walker, K.C., Mr. Roland Burrows, K.C., and Mr. Paley Scott, K.C., and he was shown the damage to that shrine especially dear to American pilgrims. Of all the Inns of Court, perhaps the Middle Temple may be said to have the closest associations with the United States by reason, among other facts, of the number of Middle Templars who were signatories of the Declaration of Independence and of the Constitution, the eminent Americans who have been Honorary Benchers of the Inn, and the very considerable collection of American legal literature which forms part, and a very considerable part, of its great library. Again, Blackstone is a subject of profound veneration among the American common lawyers, a fact to which the presentation of the statue of that great Middle Templar to the law Courts from America abundantly testifies. But the Inner Temple shares with the sister Inn the devotion of a veritable shrine, for the Temple as a whole, as it more and more became essentially the home of the common law, secured a unique place in the affection of those fellow legatees in the United States who enjoy with us not only the great heritage of the common law as a body of principles, but the common law mentality in the relation of law to daily life.

The Probate Registry.—The Administration of Justice (Emergency Provisions) Act, 1939, empowered the Lord Chancellor to make orders directing the removal of the Court of Appeal and the High Court, or any Division of the High Court, to any place specified in the order; and also to direct the removal of the Central Office and the Principal Probate Registry. Fortunately it has not been found necessary to remove any of the Courts, and these have continued to sit in London, notwithstanding that "the dusty purlieus of the law" appear to have been one of the main objects of enemy attack. But in September of last year it became necessary to remove the Principal Probate Registry from London to Llandudno, and this involved the closing of the Personal Application Department. In answer to a question in Parliament on February 4, by Mr. R. C. Morison, calling attention to the inconvenience caused in the case of small estates, the Attorney-General said that the removal was due to the damage caused by enemy action to the Estate Duty Office, with the work of which the Probate Registry is closely connected. He added that there was no hope of the decision being reversed, and pointed out that there were five district probate registries—Ipswich, Oxford, Winchester, Lewes and Northampton—within seventy miles of London, at each of which facilities for personal application were still provided. But even this generous variety of choice does not meet London requirements, and it is not quite intelligible why the Principal Probate Registry cannot itself carry on an essential service.

Family Protection.—The Judges of the Chancery Division have had a very difficult jurisdiction imposed on them by the Inheritance (Family Provision) Act, 1938. This is emphasized by the decision of Farwell, J., in *Re Joslin*, [1941] 1 All E.R. 302. It is the duty of a testator to make reasonable provision for his "dependants," including, of course, his widow, and if he has not done so, the Court may perform that duty for him at the expense of his estate. Such is the effect of the Act, but the Court is to take into consideration all the circumstances of the case, and this gives a very wide field for the exercise of the judicial discretion. In the present case the testator had left his wife—by whom he had had a child who had died—and had lived with another woman by whom he had had two children. He made his will in favour of the other woman, but the net estate was under £400. The wife had a small income of her own; the other woman, it seems, had none. Mr. Justice Farwell appears to have been largely influenced by the smallness of the estate. There was not enough to satisfy the conflicting claims of the widow and the other woman, and saying that the widow's application ought not, in the circumstances, to have been made, he dismissed it with costs, so as to leave the provision for the other woman undiminished. Seeing, however, that the statute virtually invites the widow to make the application, the mistake lies in not providing for small estates a less expensive tribunal than the Chancery Division.

Solicitors and the Forces.—Last week the Minister of Labour and National Service made a fresh announcement about the calling up of solicitors and their clerks

for service ; a subject for comment. Its effect seems to be that the candiates for exemption are divided into two classes. The dividing line separates those who were under thirty years of age on June 22, 1940, from those who are older. In the case of the younger class, whether the applicants are solicitors or their clerks, they must first get their application recommended by the Law Society. If the Committee of that Society approves it, the application has still to be "specially examined in the Lord Chancellor's Department" before the Lord Chancellor advises the Minister on it. In the case of the older class the applicants who are approved by the Law Society will go before the Minister without reference to the Lord Chancellor's Department. Without any disrespect towards that department, one may doubt whether it is necessary to bring it into the matter at all. Either the Minister trusts the Law Society or he does not. In neither case, so far as we can see, is any other adviser badly needed. It can only increase delay.

"**Regulation 18B.**"—The clause in the General Defence Regulations which is numbered 18B is now so well known that it can be quoted without reference to the general code in which it appears. It is the detention clause which gives the Home Secretary power to insist that anybody, British subject or not, may be detained if he has reasonable cause to think any one of a number of things about him. The exercise of the great powers given to Ministers has sometimes been challenged in Court, but only once, so far as we can find, with success (*Jones* v. *Farrell*, [1940] 3 All E.R. 608). There are, however, two safeguards in Reg. 18B—the Advisory Committees and the monthly report which the Secretary of State must make to Parliament saying what has been done. Now only fourteen people were detained by order made in the last month of last year, of whom one was an alien, but no enemy. The remainder were all British subjects, though some of them were of alien origin, either enemy or non enemy. The Secretary of State also said that in one hundred and fifty-five cases he confirmed the Committees' advice to release, and overruled them in fewer than twenty cases, which shows, we all think, that his advisors deserve much gratitude from the persons concerned.

Poets in Limbo.—"The iniquity of oblivion blindly scattereth her poppy," but not upon the Sitwells—or at any rate not yet ; and those who said it have had to pay £350 to each of the three authors bearing that name : *Sitwell* v. *Co-operative Press*. Nothing can be said for the criticism complained of. It was defamatory, it was not fair comment, and it was malicious. It is permissible to doubt whether such comment, appearing where it did, would have done much harm. But there is no doubt that it hurt the feelings of the plaintiffs who, before they attained their present established position in contemporary literature, had not disdained to call attention to their undoubted merits by the most vigorous controversy and publicity. They refused an apology and a cash settlement, preferring to go into the witness-box, and thereby obtaining heavier damages and more publicity. It is a pity that we are so much more thin-skinned than our grandfathers, in whose days robust comment was made and accepted as a matter of course. Our present sensibilities have been made more delicate by the tendency of the Courts to award what most people have considered exaggerated damages.

Yours as ever,
APTERYX.

FLOGGING AS A PUNISHMENT.

The View of the Court of Appeal.

When O'Hehir and Silva, two prisoners who had been sentenced to flogging as part of their punishment for an attack on prison warders, applied for leave to appeal against sentence, the Court of Appeal (Sir Michael Myers, C.J., Ostler, J., Smith, J., Johnston, J., and Fair, J.) in refusing such leave, said that in these cases the punishment imposed was undoubtedly severe, but the circumstances equally without doubt called for severity.

These two prisoners with others concerted a plan for escape the execution of which involved—as the prisoners knew and anticipated—a violent attack upon three prison warders, and it was a ferocious and murderous attack. The prisoners used for the purpose certain implements, namely two hammers, a sling weight, and a baton wrested from one of the warders. All of them were used as lethal weapons. All three warders were injured, and it is a miracle that one of them (Crawford) was not killed. Had he been killed nothing could have saved these men and their associates from liability to the extreme penalty of the law. He has in fact survived, but these men have made of him a physical wreck.

Continuing the judgment, their Honours said that the punishment of flogging is very rarely imposed in this country. It is never imposed by any Judge save in most exceptional circumstances and after anxious consideration. These cases are very exceptional, and the Judge could not properly do otherwise than make a measure of corporal punishment part of the penalty. If that punishment were not imposed here as a deterrent to these and other prisoners who might be similarly minded, prison warders would not be sufficiently protected. In England, where recently the question of flogging has been the subject of general discussion, a Bill was introduced to abolish flogging but at the stage reached before the Bill was abandoned on the outbreak of war, provision had been made for the retention of flogging in cases of this kind.

Their Honours added that the law provides that flogging shall not be inflicted, if in the opinion of the medical officer the prisoner is not physically able to bear it.

In conclusion, the Court said that the term of imprisonment in these cases was also a lengthy one, but in view of all the circumstances and of the obviously dangerous character of these men the Court feels that in the public interest the sentence could not with propriety be interfered with. The matter of their release after they have served a substantial portion of the sentence is largely in their own hands : they must by their conduct in prison satisfy the Prisons Board that in the public interest it would be safe to allow them to be at large.

PRACTICE NOTES.

Remedies in Revenue Matters.

By W. J. SIM, K.C.

The Court of Appeal had occasion in a recent death duties appeal to make critical observations with regard to the manner in which the facts under review were brought before the Court, and a discussion of the procedure in revenue appeals may be of practical use, having regard to the importance that these matters assume at the present moment. When it is sought to challenge the Department's ruling, whether upon death or gift duties or income-tax "Case Stated" comes immediately to mind, not, however, without an accompanying measure of uneasiness with regard to times, the form of the case, the presentation of facts, the conclusiveness of the Commissioner's rulings in certain matters and so forth. It will not be time wasted, therefore, to attempt to present these matters in simplified form.

First, as to death and gift duties, and the subject's powers of resisting present claims, or of overtaking mistakes of the past, when too much duty has been paid.

It is clear upon the authorities that the taxpayer in a claim for duty may sit back like any other debtor and challenge the claim of the Commissioner when he sues for the duty, as eventually he must if other forms of pressure fail him. In death duties, the latter are liable to the penalty of five per cent. if not paid within three months of assessment, and interest at six per cent. or at such less rate as the Governor-General by Order in Council may determine (as provided by s. 26 of the Death Duties Act, 1921) and this must not of course be overlooked. Singularly enough there is no provision for the payment of interest on unpaid gift duty. Section 57 makes provision for a penalty not exceeding two pounds per day or one hundred pounds in all for default in delivering to the Commissioner any statement or other document which a donor, beneficiary or trustee is required to deliver, or in furnishing the Commissioner with any evidence which he is required to furnish; and in the case of such default *with intent to evade or delay the payment of gift duty*, or the continuance of such default *with like intent*, the gift duty shall be increased by one half, such penal duty being in addition to and not in substitution for any fine to which the donor or other person is liable under the Act.

The right of the taxpayer to await the Commissioner's writ and raise thereon all objections to the assessment was established in the *Commissioner of Stamps* v. *Erskine*, [1916] N.Z.L.R. 937. The procedure was an action by the Commissioner claiming the sum of £59 2s. 6d. by way of gift duty, upon a transaction, which it was claimed for the defence was an incomplete gift and not assessable as such. The Court examined the whole circumstances of the alleged gift and Mr. Justice Sim summarized the conclusion of fact and law by stating: "I think, therefore, that the plaintiff has failed to prove that there was in the present case any gift within the meaning of the Act." It may be noted, in passing, that the delivery of a gift statement does not raise an estoppel against the donor, the judgment holding in express terms that the alleged donor is not precluded from denying that there was a gift by reason of the fact that he delivered such a statement to the Commissioner.

The case is chiefly of importance from a practice point of view, as it was sought to argue that defences could not be raised to the action, since the opportunity had been ignored of applying to have a case stated to determine the points in issue. Section 60 of the 1909 Act at that time permitted any administrator who was dissatisfied *in point of law* with any assessment of death duty, and any donor who was dissatisfied *in point of law* with any assessment of gift duty, to deliver a notice within twenty-one days requiring the Commissioner to state a case. This had not been done and it was argued that the assessment must then be treated as final and conclusive. The Court, however, rejected the argument upon the principle that this was not one of the cases which *by the Act* was made final and conclusive. Such cases occurred in s. 21 (now s. 21 of the 1921 Act) relating to the Commissioner's valuation of contingent interests for the purpose of succession duty, and s. 80 (now s. 83 of the 1921 Act) relating to native succession duty. There being no such provision with regard to s. 69 of the Act (now s. 72) it was open to the defendant to defend the present action on the ground that the assessment was not properly made. It was sought in *Luttrell* v. *Commissioner of Stamp Duties*, [1940] N.Z.L.R. 23, to differentiate the reasoning of *Erskine's* case as being inapplicable to the procedure under the 1921 Act, upon the ground that s. 60 (now s. 62) of the Act had been amended so as to permit a case stated *on a question of fact*. The section as it now exists in subss. (1) and (2) is as follows:—

> (1) Any administrator who is dissatisfied in point of law *or of fact* with any assessment of death duty made by the Commissioner and any donor who is dissatisfied in point of law *or of fact* with any assessment of gift duty so made, may, within twenty-one days after notice of the assessment has been given to him, deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Supreme Court.
>
> (2) The Commissioner shall thereupon state and sign a case accordingly *setting forth the questions of law or fact in issue* and the assessment made by him, and shall deliver the case so signed to the administrator or donor (hereinafter referred to as the appellant). In this subsection the term "Commissioner" does not include a Deputy Commissioner.

The italicized words indicate the amendments. Mr. Justice Northcroft held, however, that these amendments made no difference, the *ratio decidendi* of *Erskine's* case being that the assessments were not made conclusive by the Act, and the failure to apply for a case stated did not advance the matter in favour of the Commissioner. *Luttrell's* case (to be discussed further later) was an action by trustees in an estate to *recover back* from the Commissioner duty paid in excess. It opened up questions of fact as to whether certain assets had not been over valued by the Commissioner, and the point was taken for the Commissioner that an estoppel existed in his favour because no case stated had been asked for. These questions were held,

however, to be open to trial in the action, and eventually judgment was entered for the plaintiff for the excess duty overpaid, including interest which the Commissioner had collected on his excessive valuation. The assets under review were debts owing to the estate which the Commissioner had taken in at their face value.

In this case Mr. Justice Northcroft observes at p. 26 :

> It is suggested that it is inconvenient and disturbing to the certainty of the revenue to have these alternative methods of appeal from an assessment. Upon that matter I am not required to express an opinion. Since *Erskine's* case this phase of the statute has twice been reviewed by the Legislature—in 1921 and again in 1925—and on neither occasion did it interfere with the effect of that decision. It may well be that as s. 72 gives the Department the right to review an assessment at any time thereafter the Legislature has thought it not unreasonable to allow the taxpayer at least three years, according to s. 74, within which, on his part, to challenge the assessment. It is not difficult to conceive of circumstances arising after the very short period of twenty-one days provided in s. 62 upon which it would be unjust to deny a right to ask this Court to review the assessment.

Luttrell's case involved a considerable sum of money, and as the case was not taken on appeal, it may be taken that the Department accepts the law to be correctly interpreted.

Another instance of matters of fact and law being determined by action, and not by case stated, is *Commissioner of Stamps* v. *Begg*, [1916] G.L.R. 534, a Court of Appeal decision. The points of law involved arose under s. 5 (*j*) (ii) of the Death Duties Act, 1909, (now subs. 5 (*j*) (ii) of the 1921 Act). The issues were summarized by Mr. Justice Stringer at p. 545 as follows, the Commissioner being the appellant :

> In order to succeed in this action the onus was upon the appellant to establish that the allotment, in July 1908, of 51,998 shares in Charles Begg and Co., Ltd., to the four children of Mrs. Jessie Begg (now deceased) in pursuance of the nomination of the latter was a disposition of property which in terms of subs. (*j*) (ii) of s. 5 of the Death Duties Act, 1909, was accompanied by a contract for the benefit of the deceased for the term of her life.

The Court had to decide various questions of fact and of law, and did so all in favour of the trustees of the deceased estate, upholding the decision of Mr. Justice Chapman.

It is to be noted that as the taxpayer is not estopped in the defence because no request was made for a case stated, the Crown is equally at liberty at a later stage to reopen the Commissioner's own assessment if too little duty has been claimed. This follows from s. 72 of the Act which is as follows :—

> 72. (1) Notwithstanding any assessment or payment of any duty under this Act, or any certificate of the Commissioner that no such duty is payable, it shall be lawful for the Commissioner at any time thereafter, if it is discovered that any duty payable has not been fully assessed and paid, to make a further assessment of the duty so unpaid, and to recover the same in the same manner as if no previous assessment or payment had been paid.
>
> (2) Except in the case of fraud, an administrator shall not be personally liable for any death duty under any such further assessment by reason of having administered or distributed the estate of the deceased without retaining sufficient assets to satisfy the duty.
>
> (3) Nothing in this section shall affect the operation of any settlement of a claim for duty expressed to be made by way of composition under the provisions of this Act in that behalf.

(*To be continued.*)

OBITUARY.

Mr. E. P. Bunny, Wellington.

The esteem in which the late Mr. E. P. Bunny, who died on April 8 after a brief illness, was held by his professional brethren was shown by the large attendance of practitioners at his funeral and also at the Supreme Court on April 10 when tributes were paid to his memory.

At the Supreme Court, His Honour the Chief Justice, Sir Michael Myers, presided. With him on the Bench were Mr. Justice Ostler and Mr. Justice Blair.

In addressing their Honours, Mr. D. G. B. Morison, President of the Wellington District Law Society, said that the members of the legal profession were gathered to pay a tribute to the memory of Mr. Edmund Percy Bunny, who had passed away a few days ago. Mr. Bunny was one of the oldest and most highly respected members of the profession in Wellington, a sound lawyer, and one who had always upheld the honour and dignity of the profession. He had practised in Wellington for more than fifty years, since he was admitted to the Bar in 1890 ; and he continued in active practice up to the time of his death.

" Mr. Bunny was a sound lawyer and a capable advocate ; until comparatively recent years he was frequently engaged before this Court, as will be seen from the *Law Reports*," the President continued. " He was born at Wellington in 1864. He was the son of the late Mr. Henry Bunny, who was Provincial Secretary and Deputy-Superintendent of the Province of Wellington. He was educated at Nelson College and Canterbury College and was articled to the old Christchurch legal firm of Izard and Loughnan. When he graduated he returned to Wellington and joined his elder brother, Mr. C. E. Bunny, who was then practising here."

Mr. Morison went on to say that Mr. Bunny had a wide knowledge of the law, and acquired a reputation particularly in regard to the law relating to local government and the Native Land laws. He served for several years on the Council of the Wellington District Law Society, from 1916–1922, and was President in 1920, these being the years in which the profession was settling down after the disturbance of the Great War. He also had a long record of public service, principally connected with the Hutt Valley, where he lived for about fifty years. He was Mayor of Lower Hutt for several years and served for many years as a councillor.

It was largely due to Mr. Bunny's foresight that the river protection works in the Hutt Valley were carried out, without which the Hutt Valley could not have developed into the prosperous city that it is to-day. It was largely as a result of his efforts that the Hutt

River Board was formed, and so the long-sighted plan for River Protection was enabled to be carried out. As a young man Mr. Bunny was well-known as a footballer. He played for Canterbury College in the first match between that College and Otago University. He maintained his interest in football, cricket and other sports right up to the time of his death.

"In the passing of Mr. Bunny the profession has lost one who was held in the highest regard of all, and the members welcome this opportunity of paying this tribute to his memory," the President concluded. "On behalf of all the members of the profession I wish to tender to Mrs. Bunny and her family the deepest sympathy of the profession in their sad loss."

The Chief Justice said: "The members of the Bench have also heard with deep regret of the death of one who for half a century practised in this city the profession of the law, and who, during the whole of that period, by reason of his personal qualities, his strict integrity, and his rigid sense of moral values, commanded and earned the highest esteem and respect of not only his fellow members of the profession but of the community generally.

"Modest and unassuming in disposition, the late Mr. Bunny nevertheless by his innate force of character, ability and industry built up and maintained a substantial and successful practice which he conducted with scrupulous regard for the honourable and traditional standards of a great profession. Some of the Judges knew him for many years—I myself for close on fifty—and worked side by side with him in the profession, and are therefore able from personal knowledge to testify to the qualities which have earned for him at the close of his career on earth this tribute from his fellow practitioners which you are to-day paying to his memory and in which it is fitting for the members of the Bench to join."

In conclusion His Honour asked Mr. Morison to convey to Mrs. Bunny and the members of the family the expression of their Honours' sincere and respectful sympathy with them in their great loss.

RECENT ENGLISH CASES.

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

CARRIERS.

Carriage of Passengers — Passenger Ticket — Conditions — Notice to Passenger—Notice Obliterated by Date Stamp.

The words "for conditions see back" on a railway ticket are not sufficient to bring the conditions to the notice of a passenger if they are obliterated by the date stamp.

SUGAR *v.* LONDON, MIDLAND AND SCOTTISH RAILWAY CO., **[1941] 1 All E.R. 172. K.B.D.**

As to conditions on tickets: see HALSBURY, Hailsham edn., vol. 4, pp. 72, 73, par. 109; and for cases: see DIGEST, vol. 8, pp. 103–105, Nos. 687–697.

CHARITIES.

Charitable Purpose—Such Charitable Institution or Institutions or other Charitable or Benevolent Object or Objects—"Or Benevolent"—Validity.

The words "charitable or benevolent" in a will must be construed in their natural sense, and are not apt to describe a valid charitable bequest unless there is something in the will when read as a whole which imposes a different meaning on them.

Re DIPLOCK: WINTLE *v.* DIPLOCK, **[1941] 1 All E.R. 163. C.A.**

As to alternative charitable or other purposes: see HALSBURY, Hailsham edn., vol. 4, pp. 167–169, par. 221; and for cases: see DIGEST, vol. 8, pp. 294–297, Nos. 719–740.

CONTRACT.

Agreement for Sale of Goods—Price to be Discharged "on Hire-purchase Terms"—Hire-purchase Terms not Settled by Parties—Whether Concluded Agreement—Whether Transaction Sale of Goods—Sale of Goods Act, 1893 (c. 71), s. 4.

The statement in an agreement for the sale of goods that the price is to be discharged "on hire-purchase" terms is too vague to constitute a concluded agreement.

SCAMMELL *v.* OUSTON, **[1941] 1 All E.R. 14. H.L.**

As to essentials of agreement: see HALSBURY, Hailsham edn., vol. 7, pp. 65, 66, par. 83; and for cases: see DIGEST, vol. 12, pp. 51–53, Nos. 277–298.

INSURANCE.

Fire Insurance—Ignition—Goods Placed in Grate for Safety—Fire Lighted Forgetting Goods There.

If valuables are hidden in a fireplace, and thereafter a fire is lit there and the valuables are accidentally damaged, that is damage by fire within the meaning of an insurance policy.

HARRIS *v.* POLAND, **[1941] 1 All E.R. 204. K.B.D.**

As to construction of fire policy: see HALSBURY, Hailsham edn., vol. 18, pp. 480, 481, pars. 724–726; and for cases: see DIGEST, vol. 29, pp. 321, 322, Nos. 2633–2647.

NEGLIGENCE.

Highways—Collision During Blackout—Duty of Pedestrian to Look Behind—Bus Using Sidelights Placed too High and no Headlights—Bicycle not Provided with Red Rear Lamp.

In blackout conditions there is an added duty on a pedestrian in the road to take all reasonable steps to minimise the difficulty of overtaking traffic.

FRANKLIN *v.* BRISTOL TRAMWAYS AND CARRIAGE CO., LTD., **[1941] 1 All E.R. 188. C.A.**

As to negligence on highways: see HALSBURY, Hailsham edn., vol. 23, pp. 637–644, pars. 894–906; and for cases: see DIGEST, vol. 36, pp. 59–66, Nos. 366–428.

RULES AND REGULATIONS.

Primary Industries Emergency Regulations, 1939. Dairy Supply Control Order, 1941. No. 1941/55.

Control of Prices Emergency Regulations, 1939. Price Order No. 28 (Beehive safety matches). No. 1941/56.

Control of Prices Emergency Regulations, 1939. Price Order No. 29 (oats). No. 1941/57.

Control of Prices Emergency Regulations, 1939. Price Order No. 30 (raw tobacco). No. 1941/58.

Board of Trade Act, 1919. Board of Trade (Raw Tobacco Price) Regulations, 1941. No. 1941/59.

Cook Islands Act, 1915. Cook Islands Local Defence Force Regulations, 1941. No. 1941/60.

Pharmacy Act, 1939. Pharmacy Board Fees Regulations, 1941. No. 1941/61.

Emergency Regulations Act, 1939. Daylight Saving Emergency Regulations, 1941. No. 1941/62.

Shipping and Seamen Amendment Act, 1924. Shipping and Seamen Act Wireless Regulations, 1925. Amendment No. 4. No. 1941/63.

Emergency Regulations Act, 1939, and the Naval Defence Act, 1913. Shipping Control Emergency Regulations, 1939. Amendment No. 1. No. 1941/64.

Animals Protection and Game Act, 1921-22. Opossum Regulations, 1934. Amendment No. 3. No. 1941/65.

Social Security Act, 1938. Social Security (Pharmaceutical Supplies) Regulations, 1941. No. 1941/66.