New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"The British are particularly reluctant to interfere in other people's business, provided always that the other people do not seek to interfere in theirs. But when the challenge in the sphere of international relations is sharpened, as to-day in Germany, by the denial to men and women of elementary human rights, that challenge is at once extended to something instinctive and profound in the universal conscience of mankind. We are therefore fighting to maintain the rule of law and the quality of mercy in dealings between man and man in the great society of civilized States."

—VISCOUNT HALIFAX, His Majesty's Ambassador to the United States.

VOL. XVII. TUESDAY, OCTOBER 21, 1941 No. 19

WORKERS' COMPENSATION: POST-MORTEM EXAMINATIONS.

FROM time to time, the Judges of the Court of Arbitration, in dealing with workers' compensation claims, have pointed out that an important factor for consideration has been whether or not a post-mortem examination had been made; and it is possible that the fact of such examination, or its absence, has been a determining factor in more than one of such cases.

In *Robertson* v. *South Canterbury Woollen Co., Ltd.*, [1919] G.L.R. 22, a heart case, the opinion of the two doctors who conducted a post-mortem examination was decisive against the plaintiff. In another case of the same year, *Lee* v. *Taranaki Farmers Meat Co., Ltd.*, [1919] G.L.R. 83, Stringer, J., said he regretted that a post-mortem examination of the body of the deceased had not been held, as that would probably have revealed the cause of death. Judgment was given for the defendant, as the plaintiff had not discharged the onus on her of proving to the Court's satisfaction that the death of the deceased was attributable, either directly or indirectly, to an accidental fall that occurred while at his work. In *Walker* v. *Penn*, [1919] N.Z.L.R. 185, a brain injury case, the injury as revealed by the post-mortem examination was decisive in the plaintiff's favour.

A very important warning as to the advisability and importance of post-mortem examinations in the case of workers' deaths has now been given by O'Regan, J. This appears in his judgment in the recent case, *Leask* v. *Palmerston North River Board*, which, he said, was a case typical of many within his experience. The facts were that the deceased worker was a powerful and apparently healthy man in the middle fifties who had been a hard worker without experiencing any disability; and he had worked for thirteen years for the defendant Board. On Thursday, May 30, 1941, while working a punt on the Manawatu River, he found it difficult to start an engine, in which he was assisted by a fellow-worker and the foreman. In doing this, he was obliged to exert himself severely in a very awkward position, and, after the engine had started, he complained of feeling unwell. He kept at work during the day, but was unable to take his midday meal. He returned to work on the following day (Friday) and again on Monday and Tuesday, but meanwhile he complained of chest pains and indigestion. On that Monday evening, he was again unwell, but he had recovered sufficiently to proceed to work on the next day on his bicycle, as was his custom. He returned home about 4.30 p.m., complaining of chest pains, sat on the sofa, and collapsed and was dead before Dr. Mitchell, who had been summoned, had arrived. There was no post-mortem examination, and no inquest, as Dr. Mitchell had certified that death was due to heart disease.

The evidence of the medical witnesses differed as to the cause of death. Dr. Mitchell considered the deceased had suffered a heart injury when he exerted himself when he started the engine, and that injury was the ultimate cause of death. Dr. Burns considered that the deceased had suffered from coronary thrombosis before the engine incident, of which he was probably unaware, and that the exertion on that occasion, plus the work he had done afterwards, brought on the fatal attack. Coronary thrombosis is not due to effort, though it may sometimes coincide with it; but, in fact, it occurs more frequently during rest. Dr. Burns explained, however, that, once coronary thrombosis has occurred, should the patient survive the attack, rest is imperative; and that, failing rest, there will be a further attack of thrombosis or angina with fatal consequences. Though Dr. Burns thought from the facts disclosed in evidence that his view of what had occurred was correct, he admitted in cross-examination that a post-mortem examination would have placed the matter beyond doubt.

The learned Judge said that here were two medical witnesses who agreed that death was probably the

result of the effort on May 30; but each had given a different reason for his view. His Honour added that he had been impressed very strongly by Dr. Burns's evidence, but, as there was no post-mortem examination, and no inquest, he felt bound to hold that the plaintiff's case had not been proved. As a result of the lack of knowledge that would have been gained from a post-mortem examination, the widow failed in her claim; because had the deceased collapsed and continued disabled, the case would have been on all fours with *Fenton* v. *Thorley and Co., Ltd.*, [1903] A.C. 72, 5 W.C.C. 1; and, if he had collapsed and died immediately, the case would be governed by the House of Lords decision in *Clover, Clayton and Co., Ltd.* v. *Hughes*, [1910] A.C. 242, 3 B.W.C.C. 275, unless the post-mortem examination had shown that the cause of death was coronary thrombosis. Here, there was an interval of five days between the exertion and the fatal collapse, and the reported cases in which the plaintiff succeeded contain no record of an interval so long. But, as His Honour observed, that interval would not necessarily have precluded the plaintiff from recovering if the medical evidence had shown beyond reasonable doubt that there was a chain of connection between the exertion on the Thursday and the death on the following Tuesday. Consequently, he had no alternative but to nonsuit the plaintiff.

His Honour concluded his judgment with these important observations:

> That there was no post-mortem examination and no inquest in this case is much to be regretted. For obvious reasons an inquest is advisable nowadays in every case of this class. It is evident here that the widow was so overcome by grief at her husband's death that she did not think of claiming compensation until some days afterwards. That an inquest was desirable did not occur to Dr. Mitchell, presumably because his opinion was not asked about the possibility of recovering compensation until after the interment. I am blaming nobody, but most certainly it would be well if everybody concerned, relatives, doctors, union secretaries, Magistrates, and coroners, realized the importance of a post-mortem examination and inquest in every case where there might possibly be a claim for compensation. An additional reason why an inquest should be held is that the memory of each witness is much more likely to be accurate at an inquest, necessarily held shortly after death, than when Court proceedings are invoked many months later.

His Honour said he made these comments for reasons of public interest, and he hoped they would receive proper publicity.

Leask's case shows the difficulty, in the absence of a post-mortem examination, of establishing a claim that death was due to effort. Where exact information exists as to the state of the heart or other organs of the body, then inferences as to the effect of effort on any disease may be reasonable and acceptable to a Court as the basis of a claim. If, as in this case, there is difference of medical opinion as to the actual state of disease which is present, the medical evidence can consist only in conjectures of a kind that do not enable the plaintiff to prove a case to the satisfaction of the Court. For this reason, the Judge's admonition to responsible persons in regard to the importance of post-mortem examinations, is timely; and, it is hoped, his observations will receive the proper publicity that he desires.

SUMMARY OF RECENT JUDGMENTS.

FULL COURT.
Wellington.
1941.
September 15.
Myers, C.J.
Smith, J.
Fair, J.

STEINHARDT v. STEINHARDT.

Divorce and Matrimonial Causes—Practice—Respondent an Enemy National—Service of Citation impossible during War Period—Whether Service should be Dispensed with—Discretion of Court—Divorce and Matrimonial Causes Act, 1928, s. 46.

The petitioner and her husband were both born and married in Germany. The petitioner left Germany in 1937 and came to New Zealand, where she had since resided. In her petition for a divorce from her husband, who remained in Germany, she alleged that in 1937 they orally agreed to live apart and that it was in pursuance of that agreement that she came to New Zealand to reside permanently. She prayed also for the custody of the three children of the marriage.

From affidavits filed in support of a motion to dispense with service upon the respondent, it appeared that the respondent's Communistic views had led to his suffering a term of imprisonment, that he was probably in a concentration camp in Germany, and that, while a state of war with Germany existed, efforts to trace him would be fruitless.

On an application to the Supreme Court to review an order made by *Johnston*, J., dismissing the application for leave to dispense with service,

Hardie Boys and *Haldane*, for the petitioner; *Taylor*, for the Solicitor-General.

Held, That the petitioner was to be treated as an alien friend, and, as such, was entitled to prosecute her suit in the Court; but that substantial justice required that the proceedings should be delayed until the petitioner was able to effect service on the respondent at the termination of the war with Germany.

Solicitors: *Haldane and Taylor*, Lower Hutt.

SUPREME COURT.
Auckland.
1940.
August 27, 28;
September 15.
Fair, J.

KILGOUR v. CUMMINGS AND ANOTHER.

Police Force—Police Force Emergency Regulations—Police Constable Resigning by giving One Month's Notice in Writing of his Intention and on Expiration thereof Refusing to perform further Duties—Resignation not accepted by Commissioner or authorized in Writing by Minister in Charge of Police Force—Whether and when Resignation took Effect—"Resign"—"Resignation"—Police Force Act, 1913, ss. 11, 15—Police Force Regulations 1919 (1919 New Zealand Gazette, *2909*), *Reg. 353* (*34*)*—Police Force Emergency Regulations, 1941* (*Serial No 1941/42*) *Regs. 2, 3.*

Under the Police Force Act, 1913 (considered alone), a member of the Police Force can lawfully terminate his office by giving to the Commissioner of Police one month's notice in writing, although the Commissioner in the case of any sergeant or constable does not accept such resignation.

Cooper v. *Wilson*, [1937] 2 K.B. 309, [1937] 2 All E.R. 726, applied.

Regulations 2 and 3 of the Police Force Emergency Regulations, 1941, are valid and effective; they do not, however, make a resignation without authority ineffective, but penalize a person who so resigns.

Williamson v. *The Commonwealth*, (1907) 5 C.L.R. 174, and *Lucy* v. *The Commonwealth*, (1923) 33 C.L.R. 229, applied.

Quaere, Whether the said regulations apply only to constables appointed after the date of their enactment.

The plaintiff, a constable in the New Zealand Police Force, on July 2, 1941, gave to the Commissioner of Police one month's notice in writing of his intention to resign and on the expiration of that notice on August 2, refused to perform any further duties in the Force. The Commissioner did not accept his resignation, and he was informed on August 4, that the Minister

in Charge of the Police Department had refused to give authority for him to resign.

On August 13, he was convicted in the Magistrates' Court of having resigned his office in the Force, not being expressly authorized in writing to do so by the Minister in Charge of the Police Force. This charge was laid under the provisions of Reg. 2 of the Police Force Emergency Regulations, 1941.

On August 14, the plaintiff was served with a summons signed by an Inspector of Police, charging him with having been convicted as aforesaid, contrary to Reg. 353 (34) of the Police Force Regulations, 1919, and commanding him to appear at the office of the Superintendent of Police in Auckland to answer to the said charge.

On the hearing of a rule *nisi* for a writ of prohibition obtained by the plaintiff against the Superintendent and Inspector of Police at Auckland proceeding with such charge,

Sullivan, for the plaintiff; *Meredith*, for the defendants.

Held, That the plaintiff on August 2 ceased to be a member of the Force, and, therefore, he was not on August 14 subject to its regulations; that the said Reg. 353 (34) under which the charge was brought applied only to members of that Force; and that, therefore, he was not liable to attend before or be bound by the decision of the Superintendent and Inspector.

Solicitors: *Sullivan and Winter*, Auckland, for the plaintiff; *Crown Solicitor*, Auckland, for the defendants.

Case Annotation: Cooper v. *Wilson*, E. and E. Digest, Supp. Vol. 27, para. 35a.

SUPREME COURT. Wellington. 1941. August 20, 27. *Ostler, J.*

STABLE SECURITIES LIMITED v. COOPER.

Rent Restriction—"Landlord"—Purchaser under Agreement entitled to Immediate Reversion of Dwellinghouse—Order for Possession in favour of such Purchaser as requiring House for his Own Use and Occupation—Possession obtained, but Sale and Purchase Agreement meantime rescinded—Vendor selling unoccupied House within Six Months "after the date when possession obtained"—Whether an Offence—Fair Rents Act, 1936, ss. 13 (1) (d) (f), 15 (3), (4)—Magistrates' Courts Act, 1928, s. 2.

The word "landlord" in the Fair Rents Act, 1936, has the same meaning as "landlord" in s. 2 of the Magistrates' Courts Act, 1928—*viz.*, "the person entitled to the immediate reversion of tenements." A purchaser of a dwellinghouse subject to a tenancy becomes the landlord of the tenant as soon as he is given by his vendor possession of the premises subject to the lease.

Where an order has been lawfully made under s. 13 (1) (*f*) of the Fair Rents Act, 1936, it is only the landlord who has obtained possession of a dwellinghouse under that order and the purchaser from him who are forbidden under penalty from selling that dwellinghouse within six months.

In November, 1939, the defendant company purchased a property then tenanted by W. and his family, and, in February, 1940, sold under an agreement for sale and purchase to A., who paid a deposit. The agreement provided that possession should be given to the purchaser subject to the existing tenancy on February 19, 1940, on which date all rent, &c., should be adjusted. A separate written agreement provided that if vacant possession could not be given by March 21, 1940, A. should have the right to rescind the agreement and to get back her deposit.

Notice to quit, in which the company joined, was given by A. to W., who was advised therein of A.'s purchase. In April, 1940, A. issued a summons for possession on the ground that she reasonably required the property for her own use and occupation, and had offered W. reasonable alternative accommodation; and on May 9, an order for possession was made. On May 14 an application by W. for a stay of execution was refused, after opposition by A.'s solicitor; and W., on May 29, 1940, left or was ejected. On May 20, A. entered into an agreement to buy a different property; she refused to complete her purchase from the company; and her deposit was refunded.

In July, 1940, the company, moving under s. 15 of the Fair Rents Act, 1936, was refused leave to sell the property formerly occupied by W. Notwithstanding such refusal, the company sold the property in October, 1940, without leave.

On an information under the Fair Rents Act, 1936, charging the company with selling the property within six months after the date when possession had been obtained upon the ground that an agreement for sale and purchase had been entered, into between the company and A., who reasonably required the premises for her own use and occupation, without first obtaining from a Magistrate an authorizing order under s. 15 of the statute, the company was convicted and fined £25 with costs of Court.

On appeal from such conviction,

E. W. R. Haldane, for the appellant; *Nielsen*, and *Birks* for the respondent.

Held, allowing the appeal and quashing the conviction, 1. That the order for possession was made by the learned Magistrate on the application of A., who had become the "landlord" and the only person who had the right to apply for the order, and did so under the provisions of s. 13 (1) (*d*) of the Fair Rents Act, 1936, on the ground that she had determined the tenancy and acquired the dwellinghouse for her own occupation; and that order could only be lawfully made and supported as made under the said para. (*d*).

2. That the order for possession was not made under s. 13 (1) (*f*), and the appellant at the time of the application for possession had ceased to be the landlord and had no right to be a party to the application; and s. 15 (1) had accordingly no application to it.

Moore v. *Hendrickson*, (1939) 1 M.C.D. 295, and *Beer* v. *Patterson*, (1941) 2 M.C.D. 127, overruled.

Solicitors: *Haldane and Taylor*, Lower Hutt, for the appellant; *Luke, Cunningham, and Clere*, Wellington, for the respondent.

SUPREME COURT. Dunedin. 1941. July 26; September 8. *Kennedy, J.*

***In re* STEWART GOLD COMPANY.**

*Company Law—Winding-up—*Gazette *Notice—Late Appearance —Notice in Daily Paper and by Circular Letter—Waiver of Requirements of Winding-up Rules—Companies (Winding-up) Rules, 1934, RR. 15, 187.*

Where, owing to the non-appearance of the advertisement the hearing of a petition for the winding-up of a company in the *New Zealand Gazette* in the issue anticipated, Rule 15 of the Companies (Winding-up) Rules was not complied with, but ample notice was given to the hearing in a daily paper and by circular letter to members of the company and those interested.

F. B. Adams, and *J. M. Paterson*, for the petitioners; *E. J. Anderson*, for certain persons not opposing.

Held, That the Court, applying Rule 187 of the said Rules, might waive the requirements of Rule 15.

In re Sutherland Manure Co., (1892) 11 N.Z.L.R. 460, and *In re Gilbert Machinery Co. (No. 1)*, (1906) 26 N.Z.L.R. 47, 8 G.L.R. 489, applied.

In re Padstow Total Loss and Collision Assurance Association, (1882) 20 Ch.D. 137, referred to.

Solicitors: *Ferens and Jeavons*, Dunedin, for the petitioners, *Webb, Allan, Walker, and Anderson*, for the others.

ST. THOMAS'S HOSPITAL.

Donations Received.

Contributions to the funds of St. Thomas's Hospital, London, in response to the appeal made in the last issue of the JOURNAL, have been received from Mr. M. J. Gresson, Christchurch, and Mr. O. W. Bayly, Auckland, and are gratefully received on behalf of the Treasurer, Sir Arthur Stanley.

AUCKLAND'S NEW SENIOR MAGISTRATE.

Mr. J. H. Luxford, S.M., Farewelled.

There was a large gathering of Wellington practitioners on October 8, to say farewell to Mr. J. H. Luxford, S.M., who for the past six years had been a member of the Magisterial Bench. The profession's appreciation of Mr. Luxford's unfailing courtesy and ability was shown by the cordiality tinged with regret that marked a very representative assembly. All the Wellington Magistrates were present, and, in addition to the President and members of the Council of the Wellington District Law Society, members of the senior bar included Mr. H. F. O'Leary, K.C., President of the New Zealand Law Society, and Messrs. P. B. Cooke, K.C., and W. J. Sim, K.C., while an apology was received from Mr. C. H. Weston, K.C., whose duties required his presence elsewhere.

The President of the Wellington District Law Society, Mr. D. G. B. Morison, said that the regret of members of the profession at losing Mr. Luxford was qualified by their satisfaction that his leaving them meant well-deserved promotion. There was no doubt that Mr. Luxford would be missed in Wellington. Practitioners felt that his decisions had been sound, and that in him they had a Magistrate who had carried out his judicial functions in a very excellent way. His unfailing courtesy and consideration had endeared him to all who appeared before him.

"Besides carrying out his judicial functions, Mr. Luxford has distinguished himself by writing a book on the licensing laws, and another on Police law," the President continued. "And," he added, "judging by the way they are so frequently missing from the library, they are very much appreciated in the profession."

Mr. Morison went on to say that Wellington practitioners appreciated the fact that Mr. Luxford, apart from his duties on the Bench, had always joined in the activities of the profession out of the office, in golf tournaments and the like; and they had come to know him as a friend. He had also taken an active part in the Returned Soldiers' Association activities; and he was the author of the official history of the Machine Gun Corps of the First Expeditionary Force.

"We are very sorry to lose Mr. Luxford from Wellington, but at the same time we congratulate him on his appointment as Senior Magistrate in Auckland," the President said. "We are all very happy to see him receiving promotion. Promotion very often means a break, and a break may have its unhappy side; but, on the other hand, promotion always brings pleasures with it."

He concluded by asking Mr. Luxford to accept from the members of the Wellington profession their very heartiest congratulations on his appointment, and their regrets that he was leaving them in Wellington.

In reply, Mr. Luxford expressed his appreciation of the thought which moved the members of the profession to meet him to say goodbye, and wish him Godspeed on his return to Auckland. "I am leaving Wellington with a great and very deep regret," Mr. Luxford continued. "One cannot come to Wellington for six years, mix with the profession and get to know them, and then break that connection, without a great pang of sorrow and regret. There is only one road to success in the work of the profession: co-operation between the Bench and the Bar. The work becomes easy and pleasurable then; but, if there is no co-operation, it just becomes hard, and the system does not work."

"It is usual at valedictory functions, especially if somebody is leaving the Bench and going away, to make it the occasion to tell about something that is wrong with the legal, social, or judicial system," Mr. Luxford said; "but I have always made a point of talking as I went, and I do not think there is much left in that respect for me to say. So I am afraid I have to disappoint you, if you thought you were going to hear what is necessary to amend our traditions and system."

Mr. Luxford went on to say that there had been another great pleasure in his work in Wellington, and he thought it was somewhat unique in Magisterial history; that is, the association with the team of Magistrates with whom he had been working. Mr. Stilwell and Mr. Goulding and he had grown up together; they had had associations overseas together, and they had practised together, and were much of the same age and knew how to co-operate. He thought that they, with the senior Magistrate, Mr. Stout, had worked excellently as a team, to its own satisfaction, and to the satisfaction of the profession.

Mr. Luxford, after referring to the relationship between the profession and the Magisterial Bench from which evolved a general spirit of friendship, concluded by assuring his hearers that it had been a pleasure that he had never thought was coming into his life to have had six years on the Bench in Wellington to get to know the profession, and to work in a co-operative team. This co-operative spirit, which is so necessary for our constitution and the traditions of the profession, would always remain among his happiest memories.

RULES AND REGULATIONS.

Fisheries Act, 1908. Trout-fishing (Ashburton) Regulations, 1941. No. 1941/172.

Fisheries Act, 1908. Trout-fishing (North Canterbury) Regulations, 1937, No. 2. Amendment No. 4. No. 1941/173.

Fisheries Act, 1908. Trout-fishing (Awitaki) Regulations, 1937. Amendment No. 4. No. 1941/174.

Emergency Regulations Act, 1939. Enemy Property Emergency Regulations, 1939. Amendment No. 4, No. 1941/175.

Emergency Regulations, 1939. Public Trust Office Emergency Regulations, 1941. No. 1941/176.

Fisheries Act, 1908. Fresh-water Fisheries (Southland) Regulations, 1941. No. 1941/177.

Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934. Hop Marketing Regulations, 1939. Amendment No. 2. No. 1941/178.

Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934. Nelson Raspberry Marketing Regulations, 1940. Amendment No. 1. No. 1941/179.

Control of Prices Emergency Regulations, 1939. Price Order No. 58 (writing papers for primary schools). No. 1941/180.

Emergency Regulations Act, 1939. Transport Licensing Emergency Regulations, 1940. Amendment No. 2. No. 1941/181.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Destitute Persons.—*Affiliation Order—Made in Scotland—Enforcement in New Zealand.*

QUESTION: An affiliation and maintenance order was made in Scotland, and a certified copy of the order and birth certificate are sent to New Zealand. The defendant is in New Zealand, and is willing to admit paternity. Is it competent for a Court in New Zealand to make an affiliation and maintenace order? If so, can the complainant's solicitor here lay the complaint?

ANSWER: No. An affiliation order made in Scotland is not "an order made under this Act": Destitute Persons Act, 1910, s. 2 (definition of "affiliation order"). The order having been made by a competent Court in Scotland cannot be made again in New Zealand, so the matter is *res judicata*. That order cannot be enforced here, as an affiliation order is expressly excluded from the operation of the Maintenance Orders (Facilities for Enforcement) Act, 1921 (see s. 2, definition of "maintenance order") and to use the procedure of the Destitute Persons Act, 1910, to make another order, even if that were possible, would be against the spirit of the legislation.

2. Destitute Persons.—*Illegitimate Child—Mother's Marriage—Subsequent Divorce—No adoption Order—Maintenance.*

QUESTION: A., had an illegitimate child, and afterwards married. She was subsequently divorced and the decree absolute was sealed six months ago. The child was not adopted by A. and her husband, and its natural father cannot be traced. There is no order in existence for the maintenance of A. or her illegitimate child. Can A. now obtain an order against her former husband for maintenance of that child?

ANSWER: No. The decree absolute has ended the relationship of husband and wife, and no Court now has jurisdiction to make an order against the former husband for the child's maintenance: see s. 26 (2) (*d*) of the Destitute Persons Act, 1910, and the definition of "parent" in that section.

3. Chattels Transfer.—*Successive Securities—Loan Moneys not paid over.*

QUESTION: I recently received instructions to prepare a bill of sale to secure a loan to a lending institution. After preparing the document and having it executed and the verifying affidavit completed, the parties asked me not to proceed in the meantime, as it was quite probable the transaction would not be completed. The parties have decided to go on with the transaction, but unfortunately more than twenty-one days have elapsed since execution, and I do not want to come in conflict with the successive securities provisions of s. 34 of the Chattels Transfer Act, 1924, nor do I want to apply for an order under s. 13. Can you advise me the best course to take.

ANSWER: If you destroy the instrument by way of security and take a fresh instrument, you will not offend against s. 34. That section affects only an instrument given as security for the *same debt* as an earlier unregistered instrument. In your case the earlier instrument was not security for any debt, since no money was advanced.

4. Mortgage.—*Mortgagee in Possession—Mortgagor's right to an Account.*

QUESTION: Following default by the mortgagor, the first mortgagee of a dairy farm entered into possession in December, 1938, occupied the house, garden, and orchard himself, and has apparently permitted his brother-in-law, a neighbouring farmer, to graze the rest of the farm. He has rendered no accounts to the mortgagor. Can the latter bring an action calling on the mortgagee for accounts?

ANSWER: The mortgagor should ask the mortgagee for an account, in which the mortgagee should charge himself with an occupation rent based on the value of the part of the security which he himself occupies plus the rent which he actually received, or should have received, for the balance if he had dealt with it as a prudent owner would. If the farm could have been let more advantageously as a complete unit, then probably the mortgagee would be charged the rent which a prudent owner would have obtained for the whole if more than the rentals for the parts.

If the mortgagor is satisfied with the account, well and good. Even if he is not satisfied with it, he cannot bring an action unless he offers to redeem: see *Ball's Law of Mortgages*, 285-287.

5. Criminal Law.—*Appeal—Borstal Detention—Reformative Detention—Sentence by Magistrate.*

QUESTION: What right of appeal has a person against whom an order of detention in a Borstal Institution, or an order for reformative detention, has been made by a Magistrate?

ANSWER: The order for Borstal detention being one under s. 8 of the Prevention of Crime (Borstal Institutions Establishment) Act, 1924, subs. (3) of that section gives a general right of appeal, that is, under Part X of the Justices of the Peace Act, 1927.

If the sentence were one of reformative detention, then the offender could proceed under s. 5 of the Crimes Amendment Act, 1910, as amended by s. 5 (1) of the Statutes Amendment Act, 1937, the application being made *ex parte* to a Judge of the Supreme Court to review the sentence on the ground that the same is excessive or ought not to have been passed.

6. Auctioneers.—*Commission—Reserve price not reached—Subsequent sale to highest bidder.*

QUESTION: A trustee, with the consent of his co-trustee, instructed an auctioneer to sell land by public auction in the following terms:

> I enclose conditions of sale in respect of the freehold property situated at , which is to be offered for sale by you on September 13. The price reserved on the property is £1,000. In the event of no sale eventuating you are to be paid an offering fee of £5 5s. and in the event of a sale you are to be paid the usual commission.

The bidding did not reach the reserved price and the property was withdrawn. During the course of the sale the bidding flagged and, when it had reached £850, the auctioneer was directed to advise bidders, since there was no prospect of the reserve price being bid, that the highest bidder would be given the prior right, during the period of two weeks, of making a better offer for the property. Some days after the abortive sale, the highest bidder made an offer of £850 to the trustees, which was subsequently accepted.

The auctioneer claims commission on this transaction. Since his instructions were to sell by auction only, is he entitled to commission on the subsequent sale?

ANSWER: The question is not an easy one, but the auctioneer is entitled to the usual commission. Had the vendor accepted the £850 bid at the auction, there could have been no doubt on this point. The sale was the direct result of the auctioneer's work in preparing for and notifying the public of the sale, in conducting the auction, and making the authorized announcement which led to the vendors' acceptance of the amount bid at the auction: *Green* v. *Bartlett*, (1863) 14 C.B. (N.S.) 681; 143 E.R. 613. (*3 E. and E. Dig.* 33, 34.) The announcement was made before the auction had closed, for it was still open to any person present to make a higher bid and for the vendors to accept it. The sale was the result of the actions of the auctioneer *qua* auctioneer, and therefore s. 2 (4) of the Land Agents Act, 1921-22, applies; and the questions, whether after the auction, the auctioneer changed his status to that of land agent, and whether s. 30 of that statute applies, do not appear to arise. In view of the fact that the vendors are trustees, their advisers should give the matter careful consideration.

Students' Supplement

to

The New Zealand Law Journal.

No. 4 TUESDAY, OCTOBER 21, 1941.

" The Nazis believe that a bonfire can destroy the immortal—the poetry of Heine, the thought of Einstein. We know that only in freedom can the human race go forward, and the whole of English literature, past and present, testifies to the power and the glory of that freedom."

—MR. A. DUFF COOPER, September 11, 1940.

THE WAR AND THE LAW.

"THE world," said Roger North, " is variable, and laws have not their patent of exemption. They belong to men and their ways which always are innovating." At no time can these words have implied more than they do to-day. Our society is struggling to preserve its way of life, but in the midst of that struggle it is undergoing a transformation the exact direction of which is as yet undetermined. Even in victory we may find that we have taken the wrong turning, a turning which will take us away from those aspects of our pre-war society which it is so vital that we retain. To the lawyer, bound up as he is in the past, a period of change is always difficult, but a system of law can only adequately fulfil the needs of a society if it keeps in touch with the changing moods of that society. So the lawyer has his part to play in its transformation—he must endeavour to preserve those elements of justice and freedom which we regard as fundamental, and he must at the same time reconcile himself to the disappearance of some of his most cherished dogmas, the very continuance of which would be the negation of justice and freedom in the new society.

In the nineteenth century Maine felt himself justified in saying that the movement of the law is one from status to contract, but in this century an opposite tendency has made itself evident. With the advance of our civilization there have emerged sources of power and influence, unthought of by Maine, which have impaired that freedom of contract which was the basis of legal thinking in the nineteenth century. The Legislature and the judiciary have therefore found it necessary to protect the economically weaker members of society and to recognize that the modern purpose of law is to regulate and to participate actively in social control and industrial and commercial organization. So we find that legislation has been introduced providing for improved working conditions and the compensation of workers in cases of injury, imposing upon the community as a whole the responsibility of caring for its less fortunate members, stricken by old age, ill-health or unemployment, and securing reasonable remuneration to producers in farming and agriculture. The tendency was accelerated by the state of emergency created by the war of 1914 and this precedent has been expanded during the present war. Legislation has been enacted by the English Parliament empowering the executive by Order in Council to make provision " for requiring persons to place themselves, their services and their property at the disposal of His Majesty," and the legislation has now its New Zealand counterpart. In England the authority of the executive has been implemented by a vast system of industrial, commercial, and agricultural mobilization and control through the administrative agencies of such Government Departments as the Ministry of Labour and National Service and the Ministry of Supply. In other words it has been realized both in England and in our own country that a " total " war effort can be achieved only by the State assuming full control of the economic resources of the country, be they personal or material.

In 1918 it was found possible to dispense with a large number of the controls necessitated by the emergency of war, but a different position faces the Government of England today. Post-war reconstruction offers problems more difficult even than those of war, and immediately on the cessation of hostilities it will be necessary to mobilize the whole of the country's resources in order to grapple with the new problems. The major problem will be the re-organization of the industrial commercial and agricultural life of the country, but the solution will involve drastic readjustments of pre-war life—it will involve that much feared thing: " planning." Decisions will have to be made as to the distribution of land for building or agricultural purposes and as to the location of industry; as to the rehabilitation of public services and the consolidation of transport. Bombed areas will have to be rebuilt and in addition to destruction due to war damage the accumulation of badly-planned and ill-serviced towns and the huge slum problem, both in town and country, must be met. Compensation and betterment of bombed sites must be investigated with the attendant difficulties of adjusting rights between landlord and tenant and between mortgagor and mortgagee.

Reconstruction such as that envisaged will involve the continued use by the State of those powers which it has assumed for the purpose of waging the war, and can be accomplished only by a spate of legislation, both statutory and subordinate. In 1888 Maitland was able to say, " Year by year the subordinate Government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832 : it has assuredly gone far and it will assuredly go further. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes." Maitland's prophecy has justified itself and, even before the war, subordinate legislation and increased power of administration were major factors in the life of the ordinary citizen. We can only reconcile ourselves to their becoming still more important factors.

The problem of our time is to strike a balance between the continued but seemingly inevitable extension of the powers of the State and those individual liberties of freedom of speech, association and assembly which we associate with our democratic heritage. The administrative authorities by virtue of the nature and extent of their powers are in a position to injure a private citizen far more easily than another private citizen can do. The individual therefore needs larger rights and different remedies against the administration than against his fellow citizens. The answer to this need involves, amongst other things, an examination of the immunity of the Crown and the inadequacy of the remedies afforded by petition of right and prerogative writs. It is confidently anticipated that the need will be met and that the trend noticed by Maitland will manifest itself in the development of a body of administrative law securing for us those individual liberties we value so highly. —C. C. AIKMAN, LL.B.

NUISANCE CREATED BY A TRESPASSER.

The Liability of the Occupier.

By J. SCOTT.

The question as to the liability of an occupier of land for a private nuisance created on his land by a trespasser has long been a perplexed one. Authority is scant and the number of decided cases on the subject relatively few. Some reliance was placed on isolated statements in text-books and on *Saxby* v. *Manchester, Sheffield, and Lincoln Railway Co., Ltd.*, (1869) L.R. 4 C.P. 198, and on *Job Edwards Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341, the latter case decided by the Court of Appeal. However, the House of Lords in *Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349, seems to have settled many doubts on the question.

An occupier of land is *prima facie* liable for any injury caused by an unlawful and material disturbance to another's use and enjoyment of land. A clear instance of this is the nuisance committed by an occupier of land who for his own convenience interferes with or obstructs the natural course of a stream flowing over his land so that the water overflows on to the land of his neighbour, thereby causing damage to his neighbour's land : *Broder* v. *Saillard*, (1876) 2 Ch. D. 692. What is the liability, however, of the occupier, when the nuisance has been created by another without the knowledge or consent of the occupier ? It is well settled that for a public nuisance the occupier will be liable as soon as he has knowledge of the nuisance, even though it has been created by a trespasser. He is then under an absolute duty to bring to an end the nuisance.

Attorney-General v. *Tod Heatley*, (1897) 1 Ch. 560. In such a case the occupier who " continues " or " adopts " the nuisance is as fully liable as if he had created it himself. A person " continues " a nuisance in the words of Viscount Maugham " if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so." Sir John Salmond in the sixth edition of his book on torts at p. 289 stated the general proposition of the law without making any distinction in this respect between public and private nuisances. He wrote there, " When a nuisance has been created by the act of a trespasser or otherwise without the act, authority or permission of the occupier, the occupier is not responsible for that nuisance unless with knowledge or means of knowledge of its existence he suffers it to continue without taking reasonably prompt and efficient means for its abatement."

This statement of the law was altered by subsequent editors of *Salmond* to bring it into accord with the decision in *Job Edwards, Ltd.* v. *Birmingham Navigations*, although Stallybrass in a footnote (c) on p. 246 of the ninth edition expressed the opinion that that decision was not beyond criticism and would not have approved itself to Sir John Salmond as it was based on *Saxby's* case which Sir John had described as unsatisfactory. While many Judges, to whom *Saxby's* case has been cited as a precedent, have expressed their difficulty in extracting its *ratio decidendi*, the facts and decision in *Job Edwards, Ltd.* v. *Birmingham Navigations* are plain enough. Rubbish which had been deposited by a trespasser on vacant land belonging to the plaintiffs caught fire and the fire threatened to damage a canal belonging to the defendants. The plaintiffs when called upon by the defendants to extinguish the fire refused to do so, but agreed to allow the defendants to enter on their property for that purpose and paid half the expense of so doing, but without prejudice to the legal rights of the parties. The action was brought by the plaintiffs to determine their liability to contribute towards the removal of the nuisance. A majority of the Court of Appeal held that the plaintiffs were under no liability as there was no public nuisance and no evidence that they had caused or continued the nuisance ; but a vigorous dissenting judgment of Scrutton, L.J., detracted somewhat from the strength of the decision.

Bankes, L.J., in this case attempted to draw a distinction between liability for private and public

nuisances. He said at p. 350, "It is clear that in the case of a public nuisance when once the existence of the nuisance becomes known to the occupier of the land it is his duty to abate it or attempt to abate it even though he is entirely innocent either of causing the nuisance or of allowing it to continue. I can find no authority which suggests that the same standard of duty is required of the occupier of land in the case of injury resulting from a private nuisance on his land." This view of the law was negatived in each of the five judgments delivered recently in the House of Lords in *Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 350, and the dissentient opinion of Scrutton, L.J., in the former case was approved by all.

Succinctly the facts are these. The respondents owned land adjoining that of the appellant but separated from it by a ditch belonging to the respondents. The County Council piped part of the ditch without the consent or authority of the respondents but failed to fit a grid in a proper manner over the end of the culvert so that as a result, after a heavy fall of rain, appellant's land was flooded. In an action for nuisance it was found as a fact that the respondents were affected with knowledge of the laying of the pipes and had continued the nuisance for about three years. The defence that the nuisance had been created by the act of a trespasser without the knowledge or consent of the respondents was considered very fully and rejected, the House of Lords holding the respondents liable.

In elaborate judgments Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer, and Lord Porter all professed themselves unable to agree with the proposition of Bankes, L.J., quoted above. Viscount Maugham at p. 357 says "I cannot agree with the distinction he (Bankes, L.J.,) draws between the duty of an occupier in the case of a public nuisance existing on his land and his duty if he allows a private nuisance on his land to continue so as to cause damage to an adjoining owner." Again at p. 358, "For my part following Scrutton, L.J., I prefer the proposition stated in *Salmond on Torts* which I have cited above (*sic.*)." He considered the opinions expressed in *Barker* v. *Herbert*, [1911] 2 K.B. 633, which was a case of a public nuisance, but stated that he could not agree that those opinions should be limited in their reference to public nuisances only.

Lord Wright at p. 365, speaking of *Barker* v. *Herbert* said that although in that case the nuisance was a public nuisance and as such might in many respects differ from a private nuisance, yet where the defendant did not create the nuisance he could distinguish no difference in respect of his liability if he continued the nuisance. He pointed out further that he could see no difference on the question of liability between a private nuisance and a private action for a public nuisance and in this respect he concurred with the statements made by Scrutton, L.J., in *Job Edwards* case.

With reference to the statement of Bankes, L.J., that the right of a person injured by a private nuisance created by the unauthorized act of a trespasser was a right to enter and abate the nuisance, Lord Wright said at p. 369, "No doubt there may be a common law right to abate extrajudicially but that is a right which involves taking the law into a man's own hand and which is much to be discouraged, particularly if it involves entering on the other party's land. In any case it cannot exclude a claim for damages suffered."

The result of this decision seems to be that the statement of the law on this question quoted as it appeared in *Salmond on Torts*, 6th Ed., is substantially the correct one at the present day.

FRUSTRATION OF CONTRACTS.

The Principal Theories, and the Onus of Proof.

By A. T. Relling.

The general doctrine of frustration has been described by Lord Dunedin as "A device by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

There are two principal theories of frustration:

(*a*) The theory of an implied term which the law imputes to the parties in order to regulate a situation brought about by unexpected circumstances. The law presumes that the parties would have agreed about this condition if the necessity had occurred to them, and therefore the law merely fills in that term.

(*b*) The theory of the disappearance of the basis or the foundation of the contract.

The above classification leaves out Lord Wright's theory that the parties not having dealt with the matter, the Courts must determine what is just and find a reasonable solution for them. But in the cases cited by Lord Wright to show how the Court gave effect to the presumed intention of the parties, it seems that the Court did so merely by implying certain terms, which leaves little difference between Lord Wright's theory and that which is stated above in (*a*).

Many learned Judges and text writers have supported each of these principles.

(*a*) There were numerous cases of frustration after the last war, the following judgments supporting the implied term theory: Lord Parker and Earl Loreburn in *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-American Petroleum Products Co., Ltd.*, [1916] 2 A.C. 397; Lord Sumner in *Bank Line, Ltd.* v. *A. Capel and Co.*, [1919] A.C. 435, and in *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497.

In this last case the opinion of the Privy Council is expressed by Lord Sumner—"Frustration is explained in theory as a condition or term of the contract implied by the law *ab initio* in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable having regard to the mutual interests concerned and of the main objects of the contract."

(*b*) The theory, that the doctrine of frustration rests on the disappearance of the basis or foundation of the contract, was also held by several learned Judges. Viscount Haldane in the *Tamplin* case thought that

the occurrence was of so sweeping an extent that the foundation of the contract had disappeared and the contract itself had disappeared with that foundation.

In the recent case of *Tatem* v. *Gamboa*, [1939] 1 K.B. 132, Goddard, J., quotes Viscount Haldane's acceptance of the basis of the contract theory and says, " That seems to me to be the surest ground on which to rest the doctrine of frustration and I prefer it to founding it on implied terms."

Thus the two theories have each been supported by several learned Judges. The question now seems to have been settled by the case of *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.*, [1941] 2 All E.R. 165.

The facts of the case are as follows: The " Kingswood " owned by the appellant shipping company was chartered by the respondents to load a cargo. On the day before she should have proceeded to her berth (thus not making her an " arrived " ship) an explosion occurred which made it impossible for her to undertake the voyage. The cause of the explosion could not definitely be ascertained and the arbitrator could not decide whether or not the shipowners were negligent. The charterers claimed damages from the shipowners for failure to load the cargo. The defence was based on a plea of frustration of the contract.

The question as to the legal theory on which frustration is based is not the most important matter in this case but the general opinion of the Judges seems to favour the theory of the implied term.

After mentioning the various theories Viscount Simon states (p. 171), " Whatever way it is put the legal consequence is the same. The most satisfactory basis, I think, upon which the doctrine can be put is that it depends on an implied term in the contract of the parties."

Lord Wright in his judgment agrees with Viscount Simon when he says (p. 187) " The explanation which has generally been accepted in English law is that impossibility or frustration depends on the Court implying a term or exception and treating that as part of the contract." He also adds that it is unnecessary to embark on the inquiry as to whether this is the correct view.

Although it has not settled and did not intend to settle the question discussed above, this case seems to lead to the conclusion that English legal opinion now favours the theory of the implied contract as being the basis of the doctrine of frustration.

Another point which the House of Lords decided in the above case was where the burden of proof lay.

In the first place it is essential that the frustration is not self induced. Up to this point no difficulty arises, but in respect of the question whether the party setting up the plea must disprove default on his part or whether the other party must prove the default of the party setting up the plea, there was formerly an absence of direct authority but the matter is now settled.

When the corporation was suing the steamship line in the King's Bench Division ([1940] 2 All E.R. 46), Atkinson, J., decided the principle that it was for the plaintiff to prove his case. Thus if the defendant sets up frustration and the facts proved are equally consistent with the frustration being due to the defendant's negligence and with it not being so due, the plaintiff must fail.

In the Court of Appeal, ([1940] 3 All E.R. 211), the decision of Atkinson, J., was reversed and it was held that the person setting up the plea of frustration must affirmatively prove that the frustration occurred without his default.

In the House of Lords the decision of the Court of Appeal was reversed and that of Atkinson, J., restored. Thus it is now settled that the party denying the frustration must prove negligence or default by the party setting up that plea. In this case negligence or default was not proved and the contract was therefore frustrated.

All the Judges in the House of Lords were agreed on this point. Lord Wright thus states it (p. 190), " The defence (of frustration) may be rebutted by proof of fault, but the onus of proving fault will be on the plaintiff. . . . This rule which is sometimes described as the presumption of innocence is no doubt peculiarly important in criminal matters, but is also true in civil disputes."

It is essential that the frustration should not be self induced, and this brings us to the question of what amounts to self-induced frustration.

The most usual form of self-induced frustration would of course be where a party has intentionally done away with the subject-matter—*e.g.*, the master of a ship who opens the sea cocks to scuttle his vessel.

But the question whether negligence can amount to self inducement is still indefinite. Where there has been a " default " by one party, that party cannot set up the plea of frustration, and it is in this connection that Viscount Simon says (p. 173), " 'Default' in many commercial cases dealing with frustration is treated as equivalent to negligence."

However Lord Russell said (p. 182), " I wish to guard against the supposition that every destruction of a corpus for which a contractor can be said to some extent or in some case to be responsible, necessarily involves that the resultant frustration is self induced within the meaning of the phrase." By this statement he seems to mean the case of a prima donna with a contract to sing, who sits in a draught and thereby loses her voice. Lord Porter says in his judgment (p. 197), " I imagine that an accidental injury to a contractor preventing performance, though resulting from his own negligence would be regarded as an accidental consequence or one of the ordinary incidents of life, rather than as caused by the default of the party."

We may sum up the results of the judgments in *Constantine Line* v. *Imperial Smelting Corporation* under three heads:

(1) The question of the basis on which the doctrine of frustration rests is not of great practical importance but it seems to be the general opinion that frustration rests on an implied term in the contract.

(2) The party denying the frustration must prove negligence or default by the party setting up that plea.

(3) There is no definite decision as to what is self-induced frustration, but the following seems to be the opinion of the Judges:

(*a*) A party cannot set up the plea of frustration if he has deliberately destroyed the subject-matter.

(*b*) A party to certain commercial transactions cannot set up the plea of frustration if he has negligently caused the destruction of the subject-matter.

(*c*) A party to a personal contract of performance could probably set up a plea of frustration if performance was prevented even by that party's negligence.

POLICE ENTRY ON PRIVATE PREMISES.

An Examination of Thomas v. Sawkins.

By R. L. MEEK, LL.M.

Until the case of *Thomas* v. *Sawkins*, [1935] 2 K.B. 249, the law as to the right of Police to enter private premises had, it was thought, been perfectly clear. In certain specific cases, a restricted right had been given by statute; the general rule rested on common law, an admirable formulation being given in *Stone's Justices' Manual, 1935*, p. 208, as follows:

> A constable may break open doors to take a felon if he be in the house, and entry be denied after demand, and notice given that he is a constable; or where a felony has been committed, and there be reasonable ground to suspect a particular person to be the offender, or where a felony has not been committed but is likely or about to be so, in the house, in order to prevent its occurrence, or where a constable hears an affray in a house he may break in to suppress it and may in pursuit of an affrayer, break in to arrest him.

Likewise, before *Thomas* v. *Sawkins*, the right of the chairman of a meeting held on private premises to demand that any person present shall leave was guaranteed by common law, and had been thus guaranteed for over a century. This is how the rule is expressed by *Luxford and Gallagher's Police Law in New Zealand:*

> A public meeting convened for any purpose—such as a political meeting—is merely an invitation to the public to be present. There is no contract or license whereby any person attending is entitled to be present during the whole meeting. Consequently, any person who is ordered to leave by the chairman must do so or be treated as a wilful trespasser. The chairman may not be the "owner" of the premises, but to him has been delegated the duty of conducting the meeting. Any order to leave given by him is deemed to have been given on behalf of the person or body who has hired the hall for the purpose of the meeting.

The learned authors proceed to suggest that the law is different in the case of Police officers attending public meetings, and the implication that this differentiation is due to the decision in *Thomas* v. *Sawkins* is no doubt correct.

These two principles of the common law had ensured that British citizens should have the right of peaceably meeting together for discussion and the airing of grievances, without interference from officers of the King. Quite clearly, if one of the latter were to present himself at a peaceable meeting, and were asked to leave and did not, he could be forcibly compelled to do so.

The judgment in *Thomas* v. *Sawkins* has made a serious inroad into this democratic right, and it is submitted that an entirely new principle has been grafted on to the body of the common law.

In 1934, the Incitement to Disaffection Bill was placed before the British Parliament, meeting with strong opposition from a number of working-class organizations throughout the country. On August 17, 1934, a public meeting was held at the Large Hall of the Caerau Library, South Wales, to protest against this Bill, and to demand the dismissal of the Chief Constable of the County of Glamorgan. It was only a small meeting; between five hundred and seven hundred people attended to exercise the right of criticism bestowed upon them by the English common law.

The man who was to speak at the meeting had addressed similar meetings in the locality during the week before, in the course of which he had made a number of remarks concerning the presence of Police at the meetings. It was alleged that he had at one meeting asked the Police officers to withdraw, and, upon their refusal to do so, had lodged a complaint at the local Police station; at another meeting he had threatened that the Police would be ejected if they attended the meeting on August 17. There was no allegation made that there had been any breach of the peace, or any seditious statements made, at these meetings.

The public were invited to attend the meeting on August 17, which was advertised largely by means of chalked notices in the street. Three Police officers went to the meeting, and were informed by the doorkeeper that he had been instructed not to admit Police officers. Notwithstanding this, the three officers went in and sat down in the front row.

When the appellant arrived at the hall, he asked the Police to leave, which they refused to do. He then proceeded to the Police station where he lodged a complaint, and, upon his return to the hall, read the complaint over to the officers, stating that if they did not leave they would be ejected. The Police still refused to leave, and the appellant used force against the respondent in order to eject him. The force used, it was agreed, was reasonable in order to eject a trespasser, and the force used by the officer to resist ejectment was also reasonable. There was no question about the legality of the meeting or the fact that no breach of the peace had occurred: the question on which the appeal rested was this—did the Police have a right of entry on private premises if they merely anticipated that a breach of the peace might occur?

The common law rules would seem to have been conclusive on the point, and doubtless the appellant had been advised as to his legal rights before he endeavoured to eject the Policeman. And, indeed, only two months before the incident described, the common law rules had been upheld by no less an authority than the Home Secretary. In June, 1934, the British Union of Fascists held a rally at Olympia, London, in the course of which a number of serious assaults and injuries were inflicted upon members of the audience by the stewards. The Police refused to enter the hall to protect the public, and the Home Secretary, in answer to a question put in the House of Commons, gave the following reasons to justify the Police's action—or rather inaction. (House of Commons Debates: June 11, 1934, columns 1343–1345):

1. The Police had no legal authority to enter the premises except by leave of the convenors unless they had good reason to believe that a breach of peace was being committed.

2. The meeting was held in private premises.

3. The Police were not summoned by the convenors.

4. They were acting on the assumption that the stewards would not indulge, in violence or illegal conduct.

Unsatisfactory as the application of these principles may have been in the particular instance, there was no doubt that the principles themselves represented, with some limitations, what was generally believed to be the common law on the subject.

The judgment in *Thomas* v. *Sawkins*, however, appeared to amend these principles materially. Let us analyse the arguments propounded by the learned Judges in support of their decision.

Lord Hewart, C.J., commenced by stating that there was ample evidence upon which the Police might base an assumption that a breach of the peace might take place. And, he maintained, if the Police reasonably anticipated a breach of the peace, they had a right to be present at the meeting. This right, of course, nullified the common law right of the chairman to ask them to leave, and to eject them if they refused. Now this doctrine of " reasonable apprehension " of a breach of the peace appeared to contradict the common law rules, as expressed in the passages quoted above from *Stone's Justices' Manual*. However, on the basis of some passages from *Blackstone's Commentaries*, two old Irish cases, and some dicta of Avory, J., in a later English case, Lord Hewart, C.J., decided that the right of entry could be exercised where in cases there was merely a reasonable expectation that a breach of the peace might take place, or that some other offence, such as the speaking of seditious words, might be committed.

The two Irish cases cited by his Lordship do not appear to justify this important modification of the common law rules. The first, *Humphries* v. *O'Connor*, (1864) 17 I.C.L.R. 1, concerned a lady who walked down a public thoroughfare wearing an orange lily, an emblem likely to be distasteful to a large section of the local population. A small but menacing crowd followed her down the road, until a constable stopped her, and, fearing that she would be attacked, ordered her to remove the lily. When she refused, he removed it forcibly, committing a technical assault. It was held that he was acting within his rights in doing so, as a breach of the peace was imminent. The second case, *O'Kelly* v. *Harvey*, (1883) 14 L.R. Ir. 105, arose over a projected land meeting to protest against rents. The local Orangemen publicly called on their local members to rally in their thousands and break up the meeting, and, fearing a breach of the peace, the authorities stopped the land meeting. It was held that they were legally correct in doing so.

These two cases, together with the vague dicta in *Blackstone's Commentaries* and certain equally vague dicta in *Lansbury* v. *Riley*, [1914] 3 K.B. 229, 236, 237, constituted the precedent marshalled in support of the judgment of the Lord Chief Justice. In *Lansbury* v. *Riley* it had been laid down that " where a Court of summary jurisdiction is satisfied that a person who is brought before it has been guilty of inciting others to commit breaches of the peace and intends to persevere in such incitement, the Court may order him to enter into recognizances and to find sureties for his good behaviour or to be imprisoned in default of so doing." It will be seen that the actual decision had no real relevance to the facts in *Thomas* v. *Sawkins*; Lord Hewart was relying on the approval of Avory, J., of certain dicta of Fitzgerald, J., in *Reg.* v. *Justices of Queen's County*, (1882) 10 L.R. Ir. 299, to the effect that judicial officers, in pursuance of their powers of " preventive justice " are invested with large judicial discretionary powers for the maintenance of order and preservation of the public peace.

It is submitted that the cases cited do not warrant the interpretation thus placed upon them. In both of the Irish cases a breach of the peace was certain to take place, considering the conditions in Ireland at the time, and in one case it was on the point of taking place. The important point is, however, that there is no suggestion in the judgments of any of the cases that the Police have the right *to enter on private* premises to prevent an anticipated breach of the peace or to exercise their functions of " preventive justice."

Lord Hewart concluded his judgment by asking how the action of the Policemen in remaining could constitute them trespassers when the public were invited to attend the meeting ? With great respect, it is submitted that the common law on the subject is quite clear, and that, as stated in the extract quoted above from *Police Law in New Zealand*, " any person who is ordered to leave by the Chairman must do so or be treated as a trespasser."

Avory, J., in *Thomas* v. *Sawkins* relied mainly on authorities establishing the right of " preventive justice " on the part of Police officers. He quoted *Reg.* v. *Queen's County Justices*, (1882) 10 L.R. Ir. 299, as confirming the right of the authorities to bind persons to be of good behaviour. And, he argued, " in principle I think there is no distinction between the duty of a Police constable to prevent a breach of the peace, and the power of a Magistrate to bind persons over to be of good behaviour to prevent a breach of the peace." In support of this he cited *Wise* v. *Dunning*, [1902] 1 K.B. 167, a case in which a fanatical Protestant preacher incited his audiences to commit violence against the Roman Catholics, and was bound over to keep the peace.

Again it is submitted that this right of " preventive justice " cannot reasonably be extended to give a right to the police to enter on private premises to prevent an apprehended breach of the peace.

Avory, J., was not impressed by counsel's assertion that certain statutes had given specific rights of entry and, therefore, it must be assumed that the common law did not give such a right. The statutes, he said, were all cases where a breach of the peace " was not necessarily involved." With all respect, was not the case under consideration clearly one where a breach of the peace was not necessarily involved ?

Lawrence, J., merely stated that he agreed with his colleagues, but added that if a constable can commit an assault to prevent a breach of the peace (*Humphries* v. *O'Connor*), he can also commit a trespass. Again with great respect, it is submitted that this argument is manifestly illogical.

Thomas v. *Sawkins* is an authoritative case, and the principle enunciated therein must henceforth be taken as part of the British common law. Policemen are henceforth constituted as their own authorities to justify their infringement of an old common law right, and it is hoped that they will use their new powers with discrimination and sympathy.

DISPATCHES FROM THE FRONTS.

Law Students' Experiences.

Former law students, qualified and unqualified, are now to be found in the Armed Forces in every part of the world. Some of them, if they were not answering a more pressing need, would have contributed articles to this Supplement so we have taken the opportunity of obtaining contributions from Wellingtonians in the unusual form of extracts from letters telling of their life and experiences in new surroundings. We thank those who have made available the letters from which these "contributions" have been garnered.

Our representatives in England include last year's student editor of the Supplement, Harold Evans. He has been able to get time off from wireless operating to visit some of his old haunts:—

> My Associate friend took me into the only Court sitting, Langton, J.'s. The three undefended divorces weren't very spectacular in themselves: what struck and amused me was the feeling of being absolutely at home there, even down to minute details of procedure. The same kind of people going for divorces, too, the same boloney by the petitioner about still loving the respondent and wanting him or her to return, the same formal questions now and again from the Bench just to create the impression that the said Bench is not going to let petitioner get away with it *too* easily. All this sort of thing makes you realize the unvarying nature of the British character, whether it finds itself in London or Wellington.

Dick Ongley is also in England, training for the Navy. He took the opportunity while on leave to visit Eire and his steps inevitably led him to the Law Courts at Dublin.

> I inspected the Law Courts, but it is all new. The Library is not as good as the Wellington one but the Courts are great. They all run off a central entrance hall, circular in shape. I heard a poor exhibition by one of the locals before the Court of Criminal Appeals. There are four hundred barristers in Dublin and most of them freeze. The Courts are absolutely English in so far as the procedure I saw went.

We are well represented in the Middle East. Tanu Jowett writes of his experiences during the Grecian campaign, in the course of which he was commissioned on the field.

> My conception of a Greek had always been a greasy big fish and chip merchant. I changed that opinion quick and busy. They are a truly great people in a truly great little country. As we dragged our guns through Athens every single person from toddlers of three and four to old folk gave us the thumbs up sign. We soon found out the Greeks knew how to brew wine. We could buy a bottle of champagne for 4s. We didn't waste too much time round Athens but got going for the front up near Salonika.
>
> Talk about a war effort, you've got to hand it to the Greeks. The roads were in bad condition, so while their men folk were up at the front the women turned out and laboured on the roads with pick and shovel.

Derek Christensen has very definite ideas of the Egyptian climate:

> I can quite understand why the Bedouins live in tents and muffle themselves up the way they do. They live in tents because that is the coolest way and they swathe themselves up to the tips of their noses to keep the sand out. . . . They say of this country that there are three maxims that a white man must follow: never hurry, never drink until after sundown, and never lose your temper. Of these I think the third is the hardest.

Life in the Army has its serious side, and Dick Wild was in thoughtful mood when he wrote this:

> There are lots of things about the Army life which help to make it tolerable—community life in the fullest sense, sharing experiences together. I often think that if I'd been twenty-one and unmarried (and, perhaps I should add, hadn't thought much about War) I would have been having the time of my life now—as I am sure many of the younger chaps are. But, no, at bottom I know the whole thing is all to blazes, for all the real values of comradeship and hard living these chaps are getting a false set of values—waste, destruction, and so on—which must affect the world till our generation is gone. We really must have another go at winning a peace which will end war.

Vic Palmer was a later arrival in Fgypt and gives us a picture of the tougher side of life there.

> Greetings from the desert! . . . Apart from the heat, sand, flies, snakes, scorpions, complete absence of vegetation, and dysentry it's not such a bad place. . . . During my infantry days over here we had a strenuous time marching around this cursed desert. Route marching is a gruelling business in this part of the world, and the scenery never varies—mile upon mile of sandy wastes. Trudging along in the loose sand with full pack up in temperatures ranging from 110 in the shade and upwards, the old throat gets parched, the eyes filled with sand, and the lips cracked. You've heard the expression "too dry to spit"—well, its literally true over here.

To the above, and to all our ex-members in the various branches of the Services we extend our best wishes, and our fervent hope that it will not be long before they discard their Army Manuals for the old familiar Halsbury.

THE STUDENTS' SUPPLEMENT.

The fourth issue of the Students' Supplement, like its predecessor, shows by the very paucity of its articles the difficulties attendant upon such a publication in times like the present. The few articles submitted have however impressed upon us the necessity for maintaining continuity in a publication which can be the voice of students and younger members of the profession not only in peace but in war.

The hope expressed by the Wellington Committee in the 1940 issue that the Supplement would in future represent more truly a Dominion-wide effort has not been realized. For this the present Committee has to some extent been to blame in that a late start precluded the publicity measures Committees have been able to take in the past. Nevertheless the failure once again to receive support from other centres, more particularly the University Colleges, has been disappointing.

The small number of articles submitted led to their being considered by a smaller Editorial Board than usual. The work fell upon Professors Williams and McGechan, of Victoria University College, and we have to thank these gentlemen for that enthusiasm and support which has enabled us to keep the Supplement alive.

Finally we would thank the Editor of the NEW ZEALAND LAW JOURNAL for making publication of the Supplement possible and for his ever ready assistance and encouragement.

—C. C. AIKMAN,
For the Wellington Committee.