New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"It is the province of the statesman and not the lawyer to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only, the written law from the statutes; the unwritten or common law from the decisions of our predecessors and our existing Courts, from text writers of acknowledged authority, and upon the principles to be adduced from them by sound reason and just inference; not to speculate what is best in his opinion for the advantage of the community."

—BARON PARKE, in *Egerton* v. *Brownlow*, (1853) 4 H.L. Cas., 1, 122.

VOL. XVII. TUESDAY, NOVEMBER 18, 1941 No. 21

WAR EMERGENCY LEGISLATION: INTERPRETATION.

WE are all conscious of something like a revolution in the character of a lawyer's work since the outbreak of the war. This is caused by the acceleration of a process which was gradually thrust upon us by the gathering speed of legislation which had in peace-time produced a steady flow of statutory regulations, and which, under the impact of war conditions, has created a vast spate of emergency regulations. These, while designed to meet various aspects of the present emergency, extend far and wide through the common law. Their interpretation is the common lot of practising lawyers today.

The very purpose of emergency legislation in war-time is, to a large degree, a restriction of the peace-time rights and liberties of the subject. "It is true," as Mr. Justice Smith said in *Herbert* v. *Allsop*, [1941] N.Z.L.R. 370, 374, "that the fundamental liberties of the subject are secured in the common law of England on the principle that the subject may say or do as he pleases, provided he does not transgress the substantive law; while, on the other hand, public authorities, including the Crown, may do only what they are authorized to do by some rule of law or statute." "But," he added, "the same law also recognizes that the Legislature is supreme; and the Legislature can, and in an emergency does, modify and suspend what are sometimes called the fundamental rights of the individual." It follows that, in interpreting emergency legislation, the Court—as in interpreting legislation generally—is restricted in the scope of its inquiry. In the first place, as their Lordships of the Judicial Committee said recently in *Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] N.Z.L.R. 590, 595:

> It is not open to the Court to go behind what has been enacted by the Legislature and to inquire how the enactment came to be made, or indeed, out of actual deception by some one in whom it had placed reliance.

And they went on to apply the Board's judgment in *Labrador Co.* v. *The Queen*, [1893] A.C. 104, 123, where it was said:

> The Courts of law cannot sit in judgment on the Legislature but must obey and give effect to its determination.

Coke and Blackstone expressed opinions to the contrary, but these have long ceased to carry weight; and, as Professor P. H. Winfield recently pointed out in *54 Law Quarterly Review*, 299, there is no instance of a British statute having been declared null and void. "We do not sit here as a Court of Appeal from Parliament," said Willes, J., in *Lee* v. *Bude and Torrington Junction Railway Co.*, (1871) L.R. 6 C.P. 576, 582. And, he added, "The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

I.—THE EMERGENCY REGULATIONS ACT, 1939.

With these monitory decisions before us, we proceed to consider the main task, which is the interpretation of war emergency regulations. While the principles of construction are sometimes contradictory, judicial application of such principles to the emergency legislation of the war of 1914–1928, and—in a few instances—to the emergency regulations arising out of the present war, is of considerable use at the present time.

As the learned Chief Justice pointed out in *Paterson's Tyre Service, Ltd.* v. *Evenden*, [1940] N.Z.L.R. 159, 166, a case under the now-repealed Courts Emergency Powers Regulations, 1939, the course adopted in New Zealand regarding some topics of legislation arising out of war-conditions differs from that taken in the United Kingdom, where several statutes have been passed to deal with matters that, in New Zealand, are the subject of emergency regulations. Here, the Emergency Regulations Act, 1939, empowers the Governor-General, by Order in Council, to make "emergency regulations," and several such regulations include the substantive provisions which, in the United Kingdom, are contained in a statute itself; though, of course, innumerable war regulations are in force in the United Kingdom, as here,

by virtue of Orders in Council properly made in pursuance of statutory powers.

In New Zealand, as we have said, emergency regulations derive their validity from the Emergency Regulations Act, 1939 (as extended by the Emergency Regulations Amendment Act, 1940, and the Emergency Regulations Amendment Act, 1941), and have effect as if enacted in the statute, but they may be added to, altered, or revoked by subsequent emergency regulations: Emergency Regulations Act, 1939, s. 3 (6). Consequently, if the regulation is not *ultra vires*, it carries the same authority as the parent statute, and if there is any conflict between it and a section of that statute, it must be dealt with in the same spirit as if both were conflicting sections of the same Act. If they cannot be reconciled, the regulation would probably be treated as subordinate to the section, and the regulation must give way: per Lord Herschell, L.C., in *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, 360. The truth of this view is assumed in s. 3 (4) of the Emergency Regulations Act, 1939, which provides that any emergency regulations are to have effect, notwithstanding anything inconsistent therewith contained in any enactment other than the Emergency Regulations Act, 1939, or in any instrument having effect by virtue of any enactment other than that statute.

The expressions used in any regulations made in pursuance of the powers given by the statute are, unless the contrary intention appears, to have the same meaning as in the statute itself: Acts Interpretation Act, 1924, s. 7; and, as the definition of "Act" includes all rules and regulations made under a statute, emergency regulations follow the general rules of construction set out in s. 3 of the last-named statute. By s. 4 (1) (*b*) of the Emergency Regulations Act, 1939, any provision contained in or having effect under any emergency regulation, in so far as it imposes prohibitions, restrictions, or obligations on persons, applies to all persons in New Zealand and all persons on any ship or aircraft registered in New Zealand.

The date at which emergency regulations (which may override the rest of the legislation governing the people of New Zealand) are to come into force may be of the gravest importance. Apart from any provision to the contrary, they would come into force on the day they were made under the authority of the statutory provision which gives them the force of law, whether they were gazetted on that day or not. This would be so on principle, and it may also be expressly provided by s. 8 of the Acts Interpretation Act, 1924. That section is as follows:—

> Every Act assented to by the Governor-General in His Majesty's name that does not prescribe the time from which it is to take effect shall come into operation on the day on which it receives the Governor-General's assent.

On this topic, Mr. Justice Smith, in *Scott* v. *Bank of New South Wales*, [1940] N.Z.L.R. 922, 933, said:

> It may be that the word "Act" in s. 8 just quoted can be applied distributively to a regulation and that the assent of the Governor-General in His Majesty's name covers the exercise of the Governor-General's authority at a meeting of the Executive Council when a regulation is made. That interpretation would be consistent with s. 23 of the Acts Interpretation Act, which provides how the authority of the Governor-General in Council may be exercised when the Governor-General is prevented from attending the meeting of the Council. Section 23 provides that it is sufficient if the advice and consent of the Executive Council is signified at a meeting of the Council, and the Governor-General may then exercise the authority as if he had himself been present at the meeting. Subsection (3) of s. 23 provides that every authority exercised in such manner shall take effect from the meeting of the Executive Council unless some other time is named or fixed or is expressly provided by law for the taking effect thereof. An Order in Council so made must therefore take effect from the date of its making unless some other time is fixed, and there can be no reason why a different rule should apply where the Governor-General is personally present at a meeting of the Council.

In *Scott* v. *Bank of New South Wales*, the question was whether any day other than the day of the making of the Finance Emergency Regulations, 1940, had been set for their taking effect. Reliance had been placed on s. 8 of the Emergency Regulations Act, 1939, which is as follows:—

> The publication in the *Gazette* or in accordance with the Regulations Act, 1936, whether before or after the passing of this Act, of any emergency regulations, or of any Order in Council, Proclamation, order, rule, by-law, notice, warrant, license, or other act of authority under this Act or under any emergency regulations shall for all purposes be deemed to be notice thereof to all persons concerned, and in any prosecution under this Act the liability of the accused shall be determined accordingly.

This section refers to publication in the *Gazette* or in accordance with the Regulations Act, 1936. Section 3 (1) of that Act provides that all regulations (unless excepted by the Attorney-General) must, forthwith after they are *made*, be forwarded to the Government Printer, and numbered, printed, and sold by him. Section 6 of the same Act provides that publication in the *Gazette* of a notice of the regulations having been made and of the place where copies of them can be purchased shall be sufficient compliance with the requirement of any Act that regulations shall be published or notified in the *Gazette*. His Honour said:

> In my opinion, publication of this nature to which s. 8 of the Emergency Regulations Act, 1939, gives a certain effect, assumes that the regulations themselves have already the force of law unless express provision has been made to the contrary. Section 8 of the Emergency Regulations Act, 1939, is not directed to the date at which the regulations acquire the force of law. It is directed to the extension of liability under the law in certain circumstances. Ignorance of the law does not excuse, but, on the other hand, knowledge may be material to the question whether there has been a wilful or guilty breach of the regulations. In my opinion, it is the purpose of s. 8 to ensure that publication of the regulations in the manner specified shall constitute notice to all persons concerned, whether they have notice in fact or not, and so, where knowledge is material, to affect the determination of liability in both civil and criminal proceedings.
>
> This view is consistent with other provisions of the Emergency Regulations Act. The power conferred by s. 3 (1) is to "make" regulations not to make and gazette them. By s. 3 (4), any emergency regulations "duly made" shall have effect notwithstanding anything inconsistent therewith contained in any other enactment. By s. 3 (5) no emergency regulation "duly made" shall be deemed invalid on the ground that it delegates any discretionary authority. By s. 3 (7) all emergency regulations shall be laid before Parliament as soon as may be after they are "made." These provisions clearly contemplate that the emergency regulations have the force of law as soon as they are "duly made."

The regulations which the Legislature by s. 3 (1) empowers the Governor-General to make are "such regulations as appear to him to be necessary or expedient" for securing the public safety, the defence of New Zealand, &c. A regulation cannot be challenged on the ground of invalidity merely because it was not "necessary or expedient" for the purposes specified. "Those who are responsible for the national security must be the sole judges of what the national security requires," said Lord Parker in delivering the judgment of the House of Lords in *The Zamora*, [1916] 2 A.C. 77,

107. "It would be obviously undesirable," he added, "that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public." A similar view was taken by the majority of their Lordships in *R.* v. *Halliday* (also known as *Zadig's Case*), [1917] A.C. 260; and see also *Fort Frances Pulp and Paper Co., Ltd.* v. *Manitoba Free Press Co., Ltd.*, [1923] A.C. 695 (J.C.).

These words "as appear to him to be necessary or expedient," as Scott, L.J., indicated in *R.* v. *Comptroller of Patents, Ex parte Bayer Products, Ltd.*, [1941] 2 All E.R. 677, give the Governor-General, as the authority for passing the delegated legislation, a complete discretion entrusted to him by Parliament to decide what regulations are necessary for the purposes mentioned in s. 3 (1). If so, it is not open to His Majesty's Courts to investigate the question as to whether or not it was in fact necessary or expedient for the purposes named to make the regulations that were made. The principle upon which delegated legislation must rest in our Constitution, the learned Lord Justice added, is that the legislative discretion which is left in plain language by Parliament is one which is to be final, and not subject to control subsequently by the Courts. And Clauson, L.J., said that the Court has no duty and no right to investigate the advice given to the Governor-General, which moved him to the view that it was necessary or expedient for the purposes in question to make an emergency regulation, and he knew of no authority which would justify the Court in questioning the decision which the Governor-General has stated he has come to—namely, that the regulation is necessary or expedient. If the Governor-General has once reached that conclusion, that regulation is "duly made," and it is the law of the land.

The next matter for consideration is the extent to which the Court will inquire as to the exercise under a valid regulation of the sub-delegated powers which are so often found in emergency legislation.

In *Lipton Ltd.* v. *Ford*, [1917] 2 K.B. 647, it had been contended that the taking possession of a crop of raspberries under a requisitioning order could not be neeessary for the public safety or defence of the realm. Lord Atkin (then Atkin, J.), at p. 654, expressed his view of the Court's duty in respect of the exercise of powers validly given to a delegated authority under an individual regulation, as follows:

> I think that all I have to see is that the regulation is one that is reasonably capable of being a regulation for securing the public safety and defence of the realm. If it is, I do not think that the Court is entitled to question the discretion of the Executive, to whom Parliament has entrusted powers in such wide terms. I see no reason why a regulation giving powers in these general terms to important departments should not be considered advisable for securing the defence of the realm. I doubt whether I have to further consider whether, in exercising powers given in general terms by the regulation, the Army Council or other authority are in fact acting for the public safety . . . I am inclined to think that the regulation meant to give an unrestricted power to the bodies named, trusting them to exercise the powers in the public interest and leaving the subject who thought he was oppressed to his proper remedies for an oppressive use by the Executive of their legal powers.

Such a sub-delegation of powers is conferred by s. 3 (3) of the Emergency Regulations Act, 1939, which provides as follows:—

> Emergency regulations may empower or provide for empowering such authorities, persons, or classes of persons as may be specified in the regulations to make orders, rules, or by-laws for any of the purposes for which emergency regulations are authorized by this Act to be made, and may contain such incidental and supplementary provisions as appear to the Governor-General in Council to be necessary or expedient for the purpose of the regulations.

Referring to a similar regulation in the War Precautions (Commonwealth) Act, 1914–1915, in *Lloyd* v. *Wallach*, (1915) 20 C.L.R. 299, Sir Samuel Griffith, C.J., said of regulations made in pursuance of a section similar in language to s. 3 (1) of our Emergency Regulations Act, 1939, conferring general powers, and of a section corresponding with s. 3 (3), as above empowering the Minister for Defence, where he had reason to believe that any naturalized person was disaffected or disloyal, to order him to be detained, said:

> Having regard to the nature and object of the power conferred upon the Minister and the circumstances under which it is to be exercised, I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it . . . the belief is personal to himself and it must be formed on his personal and ministerial responsibility. It is quite immaterial whether another person would form the same belief on the same materials, and any inquiry as to the nature and sufficiency of those materials would be irrelevant. Further, having regard to the nature of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and, indeed, inconsistent with the character of the power itself, to allow any judicial inquiry in the subject.

Isaacs, J. (as he then was), said that the true construction of the regulation was that where the Minister from any circumstance whatever found the belief that a naturalized person was disaffected or disloyal, that was sufficient. He was the sole judge of what circumstances were material and sufficient to base his mental conclusion upon, and no one could challenge the materiality or sufficiency on the reasonableness of the belief founded upon them. Theoretically, however, the truth of the statement that he had reason to believe is examinable. The only means of disproving the essential fact is the testimony of the Minister himself; and that is subject to the recognized rules of evidence. One of the rules of evidence relevant to such a case is that, on grounds of public policy, he may decline to answer. His refusal cannot be construed into a tacit admission of what the party examining him desires to state.

The same question recently arose for consideration in relation to the current British war regulations dealing with the same topic. A comparison with the Australian decision is interesting. In *R.* v. *Secretary of State for Home Affairs, Ex parte Lees*, [1941] 1 K.B. 72, the Court of first instance had rejected an application for a writ of *habeas corpus*, following a detention order, made on the ground that the person concerned was a member of a subversive organization; and the Court (MacKinnon, Goddard, and du Parcq, L.JJ.) decided that it was not the function of a Court in any way to act as a court of appeal from the exercise of a discretion of a Minister to whom powers have been delegated by a valid regulation. Counsel had submitted that the Home Secretary did not bring before the Court what was the nature of the reports on which he had made the detention order, and, as he had not done so, the Court ought to hold that he had not satisfied it that he had reasonable cause to believe, as he had sworn that he had. In delivering the judgment of the Court, MacKinnon, L.J., said, at p. 81, that he would be almost content to say that he agreed with everything that was said in the very careful judgment of the Divisional Court, delivered by Humphreys, J., which seemed to him to cover all the ground and be manifestly correct. Dealing with the contention of counsel, as outlined above, His Lordship said, at p. 83:

> That seems to me to suggest that in every case of this sort the Court can be made to act as a court of appeal from the discretion of the Secretary of State, and inquire into the

grounds upon which he has come to the belief, and can consider whether there were any grounds for belief, or, if there were any grounds, whether it was a reasonable belief. I do not think it is the function of the Divisional Court or this Court in any way to act as a court of appeal from the discretionary decision which has to be made by the Secretary of State. He has sworn that he had grounds in the nature of those reports which were confidential, and that he did come to the conclusion that there were clear grounds for believing what he did in fact believe. I have his affidavit, and I have no reason to think that it was otherwise than honest and correct. Therefore, he has proved to my satisfaction that he had reasonable cause to believe, and did honestly believe in terms of the regulation, and, that being so, the order was validly made pursuant to the regulation.

(His Lordship had already said that the Court could not compel the Minister to produce confidential reports upon which he had come to his belief, which information might be highly prejudicial to the interests of the State.)

Notwithstanding the forthright pronouncement of MacKinnon, L.J., just quoted, the general approval given by him to the decision of the Divisional Court delivered by Humphreys, J., has raised a new difficulty. In *R.* v. *Home Secretary, Ex parte Budd,* [1941] 2 All E.R. 749, a Divisional Court (Viscount Caldecote, L.C.J., and Macnaghten and Stable, JJ.) were at variance as to the meaning of the judgment of the learned Lord Justice. The Lord Chief Justice in a judgment with which Macnaghten, J., concurred, said: "The judgment of the Court of Appeal in *R.* v. *Home Secretary, Ex parte Lees* has clearly defined the function of this Court." But Stable, J., while agreeing in substance with what the Lord Chief Justice had said of the principles which should regulate the Court in cases of this kind, came to another conclusion, not on the principles enunciated in *Lees's* case, but on the application of those principles. His Lordship said:

The function of the Court is, as I understand it, in cases such as the present one, where no irregularity in the form of the proceedings is alleged, simply to determine whether the Secretary of State entertained, and had reasonable cause for, the belief which is the basis of the decision to which he has come. Once the existence of the belief based on reasonable cause is established, it is, in my judgment, immaterial whether or not the Court would have reached the same conclusion as the Secretary of State. His decision in the matter is final.

Bearing in mind the decision of the Court of Appeal, expressed by MacKinnon, L.J., as quoted above, the following passage from Stable, J.'s judgment is of interest:

The general principle has been laid down in the judgment of the Divisional Court in *R.* v. *Home Secretary, Ex parte Lees,* where Humphreys, J., in delivering the judgment of the Court (a judgment which was expressly approved by the Court of Appeal), said at pp. 78, 79:

"Now the Court entertains no doubt that upon an application for a writ of *habeas corpus*, the Court has power to inquire into the validity of the order for detention, and for that purpose to ascertain whether the Home Secretary had reasonable cause for the belief expressed in that order . . . How then is a Court to decide the question whether the Home Secretary had reasonable suspicion for his belief? In our opinion, no general rule can be laid down, and each case must be decided on its own merits."

Substituting the word "cause" for "suspicion," with that expression of opinion, which is binding upon me, I most respectfully agree.

Without considering the difficulty so expressed in further detail, it seems that if the judgments in *Lees's* case in both Courts (they are reported together) are read carefully, it is possible to read into the Lord Chief Justice's judgment in *Budd's* case that he was satisfied that the conditions referred to in the quotation from the judgment that he so wholeheartedly approved had been fulfilled; but his general statement that the Court could not

"inquire into the grounds upon which he [the Secretary of State] has come to the belief, and consider whether there were any grounds for belief, or, if there were any grounds, whether it was a reasonable belief,"

seems at variance with the judgment of the Divisional Court, in respect of which he had said that he "agreed with everything that had been said" in that "very careful judgment," which seemed to him "to cover all the ground and be manifestly correct."

It may well be that the application of the general principle that the Court cannot sit as a Court of appeal from the discretion of a Minister to whom delegated powers have been conferred by a valid regulation, is qualified in *habeas corpus* proceedings. This view is supported, in a later judgment of Tucker, J., in which that learned Judge sitting alone follows *Lees's* case; and in it he no doubt correctly states the position of the law as it stands to-day.

In *Stuart* v. *Anderson and Morrison,* [1941] 2 All E.R. 665, 670, Tucker, J., said, concerning an emergency regulation empowering the detention of any person in pursuance of that regulation "in such place as may be authorized by the Secretary of State and in accordance with instructions issued by him,"

It is quite clear, of course, that when the regulation was made—and it is not argued that this regulation is not *ultra vires* the Emergency Powers (Defence) Act, 1939—those persons who made this regulation had to consider to whom they were going to entrust this very difficult and troublesome matter, and they decided, it is clear from the regulation, that the person to make this decision in these matters was not to be one of His Majesty's Judges. It was not to be any *ad hoc* tribunal set up for the purpose, but it was to be the Home Secretary, and the Home Secretary alone. It also makes it clear, I think—and in fact it has been so held by the Courts—that the Court has no jurisdiction to sit as an appellate Court upon any decision to which the Home Secretary has come, much less has the Court any power to try any such case itself in order to see whether it would have come to the same conclusion if the Legislature, or those having power to legislate, had entrusted the matter to a Judge.

His Lordship went on to say that the Court, in exercising the powers of *habeas corpus*, has power to see that the powers conferred on the Home Secretary had been rightly exercised, and to ensure that the powers conferred on him have been exercised honestly and *bona fide*, and not merely under the pretence of using the regulation for the purpose of detaining some person on some other grounds altogether; or to inquire if a different person to that aimed at by the order made by the Home Secretary was being detained; or to determine if the detention was unlawful and illegal because the Home Secretary had not at all stages adhered to procedure and the necessary requirements laid down by the regulations which governed his powers. But the Court had no jurisdiction to go beyond that, and inquire into a particular case on its merits and ascertain whether or not there was in fact a reasonable cause for the exercise of the powers conferred by the regulation upon the Home Secretary, except by satisfying itself that the Home Secretary had applied his mind to the necessary matters set out in the regulation, and had so applied his mind in relation to the particular case before the Court.

The burden of proof, in the cases where the Court has jurisdiction to inquire into one or more of the grounds stated, is on the plaintiff to show that a regulation is

invalid ; but if the plaintiff adduces evidence to show an invalid exercise of a power conferred by regulation, it might happen that the onus of proof may be shifted. As to the circumstances in which a Judge may make an order by way of particulars of the defendant's allegations, see the observations of the Court of Appeal in *Leversidge* v. *Anderson*, [1941] 2 All E.R. 614, 615.

In our next issue, we propose considering the application of well-known rules of construction to war emergency regulations generally.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
New Plymouth.
1941.
Sept. 2, 3, 12.
Ostler, J.

In re **AN ARBITRATION, BARR BROWN AND N.I.M.U. INSURANCE CO.**

Insurance — Motor-vehicles — Evidence — Comprehensive Policy —Proposal—Provisional Cover-note referring to Proposal and Policy—Whether Contract between Parties contained in the Three Documents—Premium not paid until after Death of Owner of Car—Whether statement in Proposal that Company under no Liability until Proposal accepted and Premium paid waivable or waived by Company—Proposal and Policy making Answers basis of Contract—Proposer warranting truth of Answers—Untrue Statement voiding Policy—Whether Evidence tending to vary Untrue Statement admissible.

C., as agent for his father G., purchased a motor-car paying for it £130 and subsequently paid various persons a total of £20 for repairing and painting it. On May 30, 1939, C. signed a proposal for a comprehensive policy insuring the car against loss or damage by fire, theft, or accident, insuring the owner against third-party risk and against death by accident to the extent of £1,000. The answers to the questions on the proposal form were written by J., an inspector for the defendant from information supplied by C.

On June 1, the company issued to G. a provisional cover-note signed by J., which, after empowering the company to cancel it at any time, declared that G. was held covered for the sum of £150 on the said car "described in the proposal dated 30.5.39 for one calendar month from date hereof, unless cover is previously determined, and concluded :

"This cover is granted expressly subject to the terms and conditions appearing on back hereof and to the terms and conditions of the company's policy which are to be taken as part hereof.

"Premium received £ : : (see back hereof). "

As the premium had not been paid, the company, on June 12, issued to G., who was killed in a motor-accident in which the car was destroyed on June 13, a debit note, expressed to be "To premium under comprehensive policy No. Due ." The premium was paid by plaintiff, the administrator of G.'s estate on August 29, and was received by the defendant without prejudice to and without waiving any of its rights.

A claim by plaintiff against defendant was referred to arbitration, and, the arbitrators being unable to agree, the dispute was referred to the umpire, who stated a special case for the opinion of the Court on questions of law under s. 11 of the Arbitration Act, 1938.

Harding, for the plaintiff ; *Moss*, for the defendant.

Held, on the facts set out in the judgment, 1. That the proposal was for a comprehensive policy, the cover-note was for the benefits given by such a policy for the time that the cover-note should be in operation and was expressed to be granted subject to the terms and conditions appearing on the back of it, and to the terms and conditions of the defendant's policy which were to be taken as part of it.

The contract between the parties at the date of deceased's death, therefore, was embodied in all three documents.

2. That the term at the foot of the proposal "Unless and until this proposal has been accepted by the company, the premium has been paid, the company is under no liability," had been waived by the issue of the cover-note, so framed as to be a receipt for the premium.

Equitable Fire and Accident Office Ltd. v. *The Ching Wo Hong*, [1907] A.C. 96, distinguished.

3. That the defendant by its conduct had waived the condition on the back of the policy which provided that "No provision or requirement of this policy requiring any matter or thing to be done . . . shall be deemed waived by reason of any alleged notice or waiver which has not been written or endorsed hereon," &c.

4. That the proposal form and the policy made the statements made to the defendant by or on behalf of the insured in the proposal the basis of the contract, the answers given to the questions in the proposal were warranted by the proposer and any untrue statement gave the defendant the right to avoid the contract.

One question in the proposal form was "Amount actually paid for vehicle by proposer ? " The answer in the proposal was £185.

At a sitting at which the arbitrators sat alone, it having been agreed that the umpire, in case they disagreed, should be at liberty to use the notes of evidence taken by the arbitrators, the following evidence by C. was taken, after objection by counsel for defendant and an agreement that the question of admissibility should be reserved :

"*Question :* When you answered the question about price what did you say ?

"*Answer :* I explained to the agent that the car was worth £185, but that I did not actually pay that amount, that it was made up by work and by certain discounts and concessions that I had received because of my special relations with the people concerned. He agreed to fill in the amount at £185, telling me that the car was well worth that amount. He went and had a look at the car before he went to see me."

J., recalled, swore that C. in answer to the said question said £185, and that he did not say that the amount was made up of work and discounts and concessions for personal reasons.

The umpire did not decide whether he accepted the evidence of C. or of J. on this point, but referred to the Court the question of the admissibility of such evidence.

Held, That the evidence given by C. as to what he said in answer to the question as to what he actually paid for the car was inadmissible as tending to contradict or vary a contract that had been reduced to writing by the parties, that the proposer had made an untrue answer and warranted its truth, and that the defendant had the right to void the contract.

Newsholme Bros. v. *Road Transport and General Insurance Co., Ltd.*, [1929] 2 K.B. 356, followed.

Bawden v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q.B. 534, distinguished.

Solicitors : *Meek, Kirk, Harding, and Phillips*, Wellington, for the plaintiff ; *L. M. Moss*, New Plymouth, for the defendant.

SUPREME COURT.
Wellington.
1941.
October 31 ;
November 3.
Ostler, J.

L. (OTHERWISE I.) v. L.

Divorce and Matrimonial Causes—Alimony and Maintenance —Power of Court to order Payment of a Gross Sum by way of Maintenance by Husband to Wife, without consent of Parties—Divorce and Matrimonial Causes Act, 1928, s. 33.

The Court has power, under s. 33 of the Divorce and Matrimonial Causes Act, 1928, to order a gross sum by way of maintenance to be paid by a husband to a wife, whether the parties consent or not.

Dictum of *Edwards*, J., to this effect in *Georgetti* v. *Georgetti*, (1908) 28 N.Z.L.R. 597, 601; 11 G.L.R. 319, 322, followed.

Counsel: *J. A. Scott*, for the petitioner; *F. W. Ongley*, for the respondent.

Solicitors: *J. A. Scott*, Wellington, for the petitioner; *Ongley, O'Donovan, and Arndt*, Wellington, for the respondent.

SUPREME COURT. Auckland. 1941. October 9. *Fair*, J.

STURROCK v. MARRINER AND OTHERS.

Practice—Trial—"Conveniently tried"—Judge alone or Judge with Jury—Action involving Amount exceeding £500—Only issue question of Fact—Bequest to named Person if not married or engaged at time of Testator's Death—Whether such Person engaged to someone else—Judicature Amendment Act, 1936, s. 3.

On a motion for a trial, before a Judge and jury, of an action, involving a sum exceeding £500, on which the only issue was the question of fact whether J. was at the time of M.'s death engaged to be married to any person other than M.,

Grierson, for the plaintiff; *Henry*, for the first-named defendant; *North*, for the remaining defendants.

Held, That, for the reasons set out in the judgment, the trial would be more convenient in the sense of being more just and leading to a correct conclusion more speedily with less expense and delay, if held before a Judge alone.

Solicitors: *M. R. Grierson*, Pukekohe, for the plaintiff; *Henry and McCarthy*, Auckland, for the first-named defendant; *Earle, Kent, Massey, North, and Palmer*, Auckland, for the second-named defendants.

SUPREME COURT. Wellington. 1941. September 3; October 9. *Myers*, C.J.

PATTINSON v. GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED AND OTHERS.

Insurance—Accident—Comprehensive Motor-car Policy—Passenger Indemnity—Maximum Liability under Policy £2,000 (including costs incurred with written consent of Insurer in defending Action against Insured)—Judgment against Insurer for Damages exceeding £2,000 and Party and Party Costs—Whether Insurer entitled to Deduct such Costs from £2,000—Whether Plaintiff entitled to recover from Insurer (a) *Party and Party Costs*, (b) *Interest—Law Reform Act, 1936, s. 9—Code of Civil Procedure, RR. 304, 305.*

By a comprehensive motor-car policy the defendant corporation agreed to indemnify the insured, *inter alia*, against compensation in respect of injuries sustained by a passenger in the car, such compensation to "include legal costs incurred with the written consent of the corporation in defending any action at law which may be brought against the insured in respect of any claim for which the corporation may be liable under this policy," but the total liability of the corporation was not to exceed £2,000.

The plaintiff, whose husband died as the result of injuries received while being conveyed as a passenger in the motor-car of the insured, in an action against, *inter alios*, the insured recovered damages exceeding £2,000 together with party and party costs for which judgment was entered in her favour.

On an originating summons issued by arrangement between all parties to determine the questions arising out of the litigation referred to in the judgment,

O. C. Mazengarb, for the plaintiff; *Sim*, K.C., and *Bergin*, for the defendant corporation; *Leicester*, for the defendant, J. F. Dowman.

Held, 1. That, reading together the policy and s. 9 of the Law Reform Act, 1936, giving a charge to the injured person or his representative upon the insurance moneys and providing that no insurer should be liable for any sum beyond the limits fixed by the contract of insurance between himself and the insured, (*a*) The defendant was not entitled to deduct from £2,000, the maximum amount of the policy, costs of the litigation incurred with the written consent of the defendant; and (*b*) The plaintiff could not recover party and party costs in addition to £2,000, the maximum liability of the defendant being £2,000.

National Insurance Co. of New Zealand, Ltd. v. *Wilson*, [1941] N.Z.L.R. 639; G.L.R. 394, applied.

2. That, either on the basis of damages or on the basis of the corporation having been as from the date of plaintiff's judgment practically a trustee for her and having had the use of what was in effect the plaintiff's money as from that date, the defendant should pay interest at £6 per cent. per annum on £2,000 as from that date.

Dominion Coal Co., Ltd. v. *Maskinonge Steamship Co., Ltd.*, [1922] 2 K.B. 132, applied.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiff; *Brandon, Ward, Hislop, and Powles*, Wellington, for the defendant corporation; *Leicester, Rainey, and McCarthy*, Wellington, for the defendant, J. F. Dowman.

COURT OF ARBITRATION. Wellington. 1941. Sept. 1; Oct. 9. *Tyndall*, J.

INSPECTOR OF AWARDS v. EMPIRE PRINTING AND BOX MANUFACTURING COMPANY, LIMITED.

Factories—Forty-hour Week—Overtime—Extension—"Limits of working-hours"—"Prescribed working-hours or times"—Whether Order of Court necessary before Overtime may be worked—Factories Act, 1921-22, s. 21 (1), (3)—Factories Amendment Act, 1936, ss. 3 (1) (3), 5, 6.

Section 21 of the Factories Act, 1921-22, as amended, provides for overtime or "extension," and requires no order of the Arbitration Court before such overtime may be worked. Section 3 (5) of the Factories Amendment Act, 1936, makes provision for the "extension" only of working hours—*i.e.*, working hours to which ordinary rates of pay apply—and it is only in respect of this latter "extension" that an order of the Court of Arbitration is required.

The first portion of s. 21 (3) of the Factories Act, 1921-22, as amended by s. 6 (1) of the Factories Amendment Act, 1936, provides for the payment of overtime rates either on a weekly or a daily basis, and the first proviso means that in the case of certain persons employed in or at bush sawmills there is no alternative, the overtime being payable on a weekly basis. Hence, the section excluded payment of overtime on a daily basis for certain specified workers, but does not exclude the payment of overtime on a weekly basis for all other workers.

Clauses in an award provided as follows:—

"2. The hours of work shall not exceed forty per week to be worked on five days of the week, Monday to Friday inclusive, between the hours of 7.30 a.m. and 5.30 p.m.

"8. Work performed in excess of the hours specified in clause 2 hereof shall be paid at the rate of time and a half for the first three hours and double time thereafter."

The daily clock-hour limits in cl. 2 cannot be regarded as fixing the daily number of ordinary working-hours, and the word "hours" in cl. 8 means the weekly number of hours specified in cl. 2.

In re Otago General Electrical Workers' Award, (1921) 22 Bk. of Awards, 504, and *Auckland Engine Drivers, &c., Union* v. *Auckland Farmers Freezing Co., Ltd.*, (1938) 38 Bk. of Awards, 3239, followed.

Crown Crystal Glass Co., Ltd. v. *Scott*, (1935) 35 A.R. (N.S.W.) 1, distinguished.

Counsel: *Inspector of Awards*, in person; *W. J. Kemp*, for the defendant.

Solicitors: *Izard, Weston, Stevenson, and Castle*, for the defendant.

THE RIGHT-HAND RULE.

The Test for its Application.

By C. EVANS-SCOTT.

For the purpose of reducing intersection collisions, the respective duties of approaching vehicles were defined by the rule generally known as the "right-hand" or "off-side" rule, first introduced in New Zealand in the Motor-vehicles Regulations, 1928. The rule has been slightly amended from time to time and the present rule is Reg. 14 (6) of the Traffic Regulations, 1936, which is as follows:—

> Every driver of a motor-vehicle when approaching *or crossing* any intersection the traffic at which is not for the time being controlled by a police officer, traffic inspector, traffic-control lights, or the presence of a compulsory-stop sign, and to *or over* which any other vehicle (inclusive of trams) is approaching *or crossing* so that if both continued on their course there would be a possibility of collision shall if such vehicle (being other than a tram) is approaching, from his right, or if such vehicle (being a tram) is approaching from any direction, give way to such other vehicle, and allow the same to pass before him, and, if necessary for that purpose, stop his vehicle. No driver of a motor-vehicle shall increase the speed of his vehicle when approaching any intersection under the circumstances set out in this clause.

For convenience of reference some of the words, added to the rule for the first time in 1936, are shown in italics.

It is unfortunate that a rule introduced to clarify the duties of motorists at intersections should have led to so much conflict and confusion in the Courts which are mainly responsible for its enforcement.

As decisions upon the application of the rule have been largely confined to Magistrates' Courts, it is proposed to refer to these along with such other decisions and authorities as are available.

In 1935, it was decided in *Police* v. *Kennedy*, 30 M.C.R. 87, that the rule does not apply in favour of a vehicle which enters a T intersection from the "leg" and turns right. Later in the same year it was held, in identical circumstances, that the rule did apply: *Laird* v. *O'Leary*, 31 M.C.R. 26.

In 1940, it was decided in *Hartigan* v. *Mackie*, 1 M.C.D. 461, that the rule applied against a vehicle which entered a T intersection from the leg but turned left, and approval of *Laird* v. *O'Leary* was expressed.

In 1941, in *Twiss* v. *Titshall*, 2 M.C.D. 21, the same opinion was expressed as in *Police* v. *Kennedy* (*supra*) but mainly upon a different ground.

Finally, in *Schramm* v. *Radford*, (1941) 2 M.C.D. 201, the Magistrate adopted the opinions expressed in *Laird* v. *O'Leary* and *Hartigan* v. *Mackie*, and expressed disagreement with the opinions expressed in the other two cases.

The confusion has been in part caused by the following statement in the Road Code (a publication issued by the Transport Department in May, 1937) at p. 28: "If you are changing direction yourself, give way to all other traffic."

The above conflict of opinion among the Magistrates as to the application of the rule where a vehicle enters a T intersection from the leg and turns right must at present be deemed settled by an oral judgment of Mr. Justice Fair in *Mortlock* v. *Sheldon* an unreported case decided at Auckland in September, 1940. It will be submitted, however, that the ground upon which the rule was there applied, although sufficient for the case in question, would in other circumstances fail as a proper test for the application of the rule.

It is proposed to examine the various opinions expressed and endeavour to ascertain the true test. Before doing so, a brief reference should be made to the definition of "intersection." This term is defined in the Traffic Regulations, 1936, as follows:—

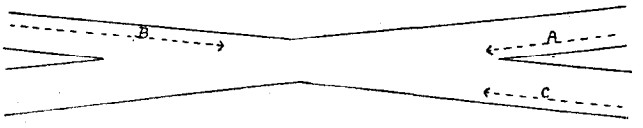
> "*Intersection*," in relation to two intersecting or meeting roadways, means that area embraced by the prolongation or connection of the lateral boundary-lines of each roadway.

It will be noted that the definition covers intersections of all types. It applies to streets which "meet," as in a T intersection, as well as to streets which cross one another. Nor is there any limitation on the angle at which the streets must meet or intersect.

Mr. Justice Johnston in summing up to a jury in *Jennings* v. *Pearson* (unreported) heard at Wellington on June 24, 1941, said in reference to the right-hand rule:

> Juries should not be encouraged by the fact that the angle is not a right angle but an oblique one, to whittle down the rule. The rule applies in such cases as much as in a right angled intersection.

ILLUSTRATION I.



The streets in this illustration clearly form an intersection. It must follow that a vehicle would be "approaching from the right" of another vehicle even though, due to the acute angle of the streets, it is approaching the other vehicle almost directly ahead as B. approaching A., or on an almost parallel line as A. approaching C.

There has been little if any difficulty in applying the rule where vehicles continue on a straight course across an intersection. The conflict of opinion has arisen where one or both vehicles change direction in the area of the intersection.

Notwithstanding the conflict in their conclusions, Magistrates seem to generally recognize the fact that the test is not the actual course of the vehicles but the hypothetical continuation of the approaching course:

> The purpose of the particular regulation was to prevent collisions between vehicles where "if both continued on their course there would be a possibility of a collision." The course referred to means the original course on which the intersection is approached . . .

per Stilwell, S.M., in *Police* v. *Kennedy* (*supra*).

> It must be remembered that it is the result of the hypothetical continuation of the approaching course that is to determine the obligation.

per Lawry, S.M., in *Hartigan* v. *Mackie* (*supra*).

> Moreover the language is hypothetical. The question is not whether M. discontinued his course; it is, would there have been a possibility of a collision *if* M. had continued his course?

per Maunsell, S. M., in *Laird* v. *O'Leary* (*supra*).

The contrary view is expressed by Goulding, S.M., in *Schramm* v. *Radford* (*supra*):

> Now the weight of those decisions appears to lean in favour of a construction of the word "course" as used in the Regulation, which fixes the vehicle's course over the intersection on the same line as that on which it approaches the intersection. That involves in many cases consideration by the Courts of a hypothetical course different from the actual course taken by the vehicle. I do not think it is desirable that the Courts should be called upon to consider, or speculate upon, or adjudicate upon the hypothetical course of vehicles over intersections if that can be avoided.

If, of course, the correct test is the hypothetical or approaching course it must follow that the conclusions arrived at in *Police* v. *Kennedy* and *Twiss* v. *Titshall* are wrong.

In *Mortlock* v. *Sheldon* (*supra*) the circumstances were the same as those in *Police* v. *Kennedy*, *Laird* v. *O'Leary* and *Twiss* v. *Titshall*. The learned Judge said:

> I have heard argument on the question as to whether the regulations apply in this case, and it appears to me that the language of Reg. 14, (6) extends to cover such a case as the present one. Here we have a person coming on to a main road from a side road, and who is going to turn to his right and proceed along the main road. This seems to me to fall within the very words used by the regulation, for both drivers did in fact continue on their courses, although Sheldon did not continue on exactly the same course as he started upon as he was turning into the road.

It will be noted that Mr. Justice Fair bases his judgment on the actual and not on the hypothetical course of the vehicles. It is submitted with respect that the test applied is not in accordance with the wording of the regulation.

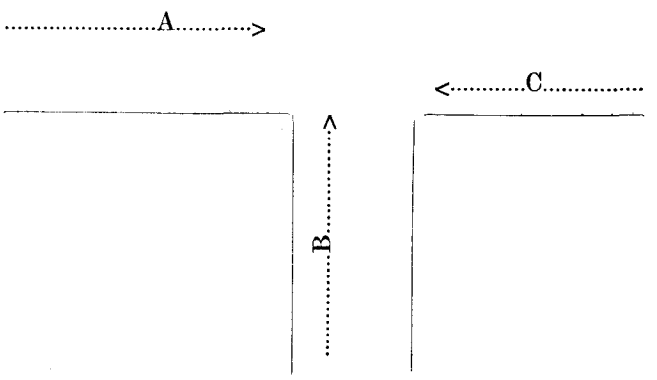
It would in fact appear that in *Police* v. *Kennedy* the correct test was applied to arrive at the wrong conclusion, while in *Mortlock* v. *Sheldon* and *Schramm* v. *Radford* the wrong test was applied to arrive at the correct conclusion.

The distinction between the actual and the hypothetical courses is not important where either course would create the possibility of a collision, as was the case in *Mortlock* v. *Sheldon* and *Schramm* v. *Radford*. Where, however, such possibility arises only by virtue of the actual—*i.e.*, the changed—course, the distinction is vital.

On the plain wording of the regulation the correct test for the application of the rule is found in the words "so that if both continued on their course"—*i.e.*, whether they in fact do so or not. If the vehicles are approaching an intersection so that *if* both continued on their course there is a possibility of a collision, the rule applies whether or not the approaching course is in fact continued or changed. In other words the test is a hypothetical continuation of each vehicle's approaching course.

The test may be expressed in the form of the question: Are the vehicles *approaching* the intersection on conflicting courses? If the answer is in the affirmative, the rule applies and a subsequent change in direction by either or both vehicles will not alter the obligations of the drivers unless a collision is thereby rendered impossible. Conversely, if the answer is in the negative, the rule does not apply even though, as the result of a change in direction by either or both vehicles, a collision becomes possible or even takes place.

ILLUSTRATION 2.



In Illustration 2, vehicles A. and B. are approaching the intersection on conflicting courses and the rule applies even though B. on entering the intersection changes its direction by turning right. If, however, vehicle B. changed its direction by turning left on reaching the intersection then assuming, as we must for this purpose, that each vehicle keeps on its correct side a collision becomes impossible and the obligation of A. to observe the rule automatically ceases.

In the same illustration, vehicles A. and C. are not approaching the intersection on conflicting courses and the rule does not apply even if vehicle A. turns to the right across the course of vehicle C. It is in this event that the distinction between the hypothetical and the actual course becomes vital to the proper application of the rule. If the *actual* course is adopted as the test, the rule would in this case apply because, when the actual course of vehicle A. is changed, it is then crossing the intersection on the right of vehicle C. As we shall see, however, the rule does not and should not apply in such case.

Before the addition of the words "or crossing" to the regulation in 1936, it was established by judicial decisions that in this instance vehicle A. is not entitled to the benefit of the rule as against vehicle C. On the contrary it was held that if vehicle A. turns right it should give way to vehicle C.

In 14 NEW ZEALAND LAW JOURNAL, 13, there is set forth an extract from the summing up of Mr. Justice Smith in a jury case *Sheffield* v. *McCallum* (unreported). He is reported to have said,

> In my opinion and I have to take the responsibility for this direction, and all you have to do is to act upon it, this regulation applies when the two vehicles are in *different* roads. My view is that the *course* which is there referred to is the course which will enable each driver to determine whether there is a possibility of a collision. That can only mean conflicting courses. It does not mean the course which is in the mind of the driver when he is going to make the turn but the course which if continued will lead to the possibility of a collision. This regulation does not apply in the circumstances of this case because the defendant was making the turn from this road in the ordinary line of traffic.

In *Commerer* v. *Stratford Carrying Co.*, [1934] N.Z.L.R. 551, a vehicle had turned right at an intersection across the route of another vehicle approaching it *in the same street*. Although this report does not show whether the application of the rule was argued, it was well known and nevertheless the learned Chief

Justice expressed the opinion that the vehicle turning right had no right of way against the approaching traffic.

In a South Australian decision, *Drew* v. *Gleeson*, [1937] S.A.S.R. 380, the course of the vehicles was the same as in *Commerer* v. *Stratford Carrying Co.* (*supra*). The right-hand rule in question was very similar in effect to the New Zealand regulation. Richards, J., said, at p. 382:

> It is clear that the subsection did not apply in the present case, for at no time when the two vehicles were *approaching* the junction were the circumstances such that the possibility mentioned in the subsection existed. It arose because Smith, when *on* the junction, altered his course. Again, when they were approaching the junction, the driver of each vehicle had the other vehicle "on his right."

These authorities show that the rule as contained in the regulations prior to 1936 did not apply unless the vehicles were approaching an intersection on conflicting courses. If the vehicles are approaching one another in the same street they are not deemed to be on conflicting courses, and the rule does not in such circumstances apply. Whether the vehicles are in fact in the same or different streets is a question of fact, which will require to be determined on the circumstances of each case.

What, then, is the effect of the addition to the rule of the words shown in italics in the definition (*supra*)?

The writer of an article in 14 NEW ZEALAND LAW JOURNAL, 13, expresses the opinion that, as a result of the added words, the opinions expressed in *Sheffield* v. *McCallum* and *Commerer* v. *Stratford Carrying Co.* are no longer applicable. This, it is suggested, is incorrect. If it had been intended to alter a well-established common law rule, much more explicit language would be necessary. If reasonable effect can be given to the words without imparting such an intention, this will be done. Is there some other reasonable explanation of the words?

As the rule stood prior to 1936 it might have been suggested that the obligation to observe the rule applied only while vehicles were "approaching" an intersection and ceased when they *entered* the intersection. Such a submission would no doubt have been doomed to failure, but the words may well have been added, *ex abundanti cautela*, to meet such a contention.

The following explanation was given in *Hartigan* v. *Mackie* (*supra*) by Lawry, S.M., who said at p. 118:

> Further the insertion of the words "or crossing" in the places where such occur only enlarged if anything the group of persons controlled by the regulations. A driver might not at any material time have been "approaching" an intersection. He may have been parked right at the intersection. The effect of the words "or crossing" would be to control his attempt to cross in front of any traffic from his right. Prior to 1936 he may have been able to contend that at no material time was he approaching the intersection, but he would be included in the category of any one crossing. The same would apply in the case of a motorist on his right parked at the intersection line. He would not be "approaching" the intersection and what might be termed the give-way motorist might have said this was not a vehicle approaching on his right but he could not say that it was not crossing on his right.

This appears to be a satisfactory explanation of the reason for the added words.

It is not without significance that the regulations in which the added words first appeared contain for the first time the regulations requiring motorists to give way to pedestrians on authorized pedestrian crossings. It would be well known that a large proportion of such crossings would be situated on or at the entrance to an intersection. Consequently, there would be a substantial increase in the number of occasions on which a motor-vehicle would stop on, or at the entrance to, an intersection.

In such cases there may have been some doubt as to whether a vehicle, moving off from such a position could be said to be "approaching" the intersection, but there could be no doubt that it was "crossing" the intersection.

It is significant that the same words are included in Reg. 25 (5), which imposes on vehicle traffic, other than motor-vehicles and bicycles, the duty of giving way at an intersection to other traffic approaching from *any* direction. If the words were added to Reg. 14 (6) for the purpose of changing the rule laid down in *Commerer* v. *Stratford Carrying Co.*, there would have been no necessity to include them in Reg. 25 (5).

It is also significant that the words, "or crossing," in Reg. 14 (6) are not inserted after the word "approaching" in the phrase "approaching from his right." This lends support to the view that the test is still the "approaching," and not the "crossing" course.

For these reasons it is submitted that the added words do not alter the application of the rule where vehicles change direction at an intersection.

It is convenient to here mention the question which may well arise as to what is meant by continuation of course where the vehicle stops at or inside an intersection, having already partly changed direction for the purpose of effecting a turn to left or right at the intersection. It seems clear that the fact that one or both vehicles may have stopped at or inside the intersection should be disregarded and the course of the vehicle must be treated as continuous. The test of the application of the rule will then be the same as if neither vehicle had stopped. Unless this be so, the respective duties of vehicles at an intersection may be reversed by a momentary stop of one vehicle to give way to a pedestrian or for some other purpose.

There remains to consider the effect of Reg. 14 (5) upon Reg. 14 (6).

Regulation 14 (5) provides as follows:—

> Every driver of a motor-vehicle intending to turn at an intersection from any roadway into another roadway to his right shall, when approaching and turning, maintain his position to his left of the centre-line of the roadway out of which he is turning until he enters the area of the intersection, and shall then turn into the roadway into which he is entering as directly and quickly as he can with safety.

In *Twiss* v. *Titshall* (*supra*) Luxford, S.M., relied mainly upon this regulation in arriving at the conclusion that the right-hand rule does not apply when a vehicle turns right at an intersection. He said:

> If the driver intends to turn into the street to his right, he must do so as soon as his vehicle enters the intersection "as directly and quickly as he can with safety." (See Reg. 14 (5)). The words "with safety" are paramount. They mean that the driver must not proceed if his vehicle is likely to cross the course of any other vehicle. That is to say, he must give way to all other vehicles in the vicinity, otherwise there would be the possibility of a collision. It is not possible to find a better explanation of Reg. 14 (5) than that given in the Road Code issued by the Transport Department in May, 1937, p. 28—namely, "If you are changing direction yourself, give way to all other traffic."

In *Schramm* v. *Radford* (*supra*) Goulding, S.M., expressed the contrary view. He said:

Now as to Reg. 14 (5) in its relation to Reg. 14 (6).

When a motorist in whose favour the off-side rule operates, and who proposes to make such a turn as the plaintiff did in this case, does make that turn, then under Reg. 14 (5) he is bound to keep to his correct side of the road until he enters the intersection, and then he has to make his turn "as directly and as quickly as he can with safety."

If my view of Reg. 14 (6) is correct, then so far as the motorist on his left is concerned he can make that turn "with safety" since the motorist on his left ought to give way to him.

When consideration is given to these conflicting opinions it will be seen that the latter is the correct view.

The intersection under consideration in *Twiss* v. *Titshall* was a T intersection, but the principle is equally applicable to a four-sided intersection. If a vehicle turns to the right at a four-sided intersection, *to avoid another vehicle* which should have given way, it could not be suggested that the rule is thereby rendered inapplicable. According to the principle laid down in *Twiss* v. *Titshall*, however, the rule ceases to apply in such circumstances if the vehicle turns to the right, not for the purpose of avoiding the other vehicle but for the purpose of proceeding in the same direction as the other vehicle. The necessity to give way would then depend upon the state of mind of the driver in turning his vehicle to the right. The first driver will have to divine the reason for the turn. If the turn is made to avoid his vehicle, the rule will apply and he must give way; but, if the turn is made for the purpose of proceeding in the same direction as his vehicle, the rule does not apply, and he need not give way. A result so paradoxical could not have been intended by the regulation.

Moreover, there is no practical reason why a motorist should in such circumstances lose the benefit of the rule. The only effect of the turn to the right is to give the other motorist further time and opportunity to observe the rule by giving way. It would be strange if a movement of a vehicle which facilitates the observance of a rule by another vehicle should deprive the first vehicle of the benefit of the rule.

If the above is the correct interpretation of Reg. 14 (5) and (6) it must follow that the statement in the Road Code referred to by Luxford, S.M., is too wide and should be limited by the rule in *Commerer* v. *Stratford Carrying Co.*

To sum up:

(1) The right-hand rule applies only when the courses of vehicles *on approaching* an intersection are conflicting.

(2) The same test applies even though one or both vehicles may stop at or within the intersection.

(3) A change in direction by either or both drivers does not alter their respective obligations unless a collision is thereby rendered impossible.

CORRESPONDENCE.

PETITION FOR ORDER TO SEND IN CLAIMS.

The Editor,

NEW ZEALAND LAW JOURNAL.

Sir,

Section 74 of the Trustee Act, 1908, empowers an executor, &c., to distribute the estate of a deceased person after an order has been obtained directing creditors to send in their claims. When there are persons entitled to provision under the Family Protection Act, 1908, regard must be had to the decision of *In re Barber* (*deceased*), [1928] N.Z.L.R. 113, G.L.R. 62. The addition that *In re Barber* requires to be made to an order under s. 74 of the Trustee Act, 1908, is as follows:—

> And I do further order that notice be given by registered letter to the widower (if alive) and each of the children of the testatrix that if any claim is contemplated under the Family Protection Act, 1908, such claim must be filed in the Supreme Court having jurisdiction within thirty days of receipt of this notice, after which date it is proposed to distribute the estate.

Although great store has been set on *In re Barber* for some years now, it must surely be a decision of doubtful validity.

Section 33 (9) of the Family Protection Act, 1908, gives an applicant under that Act twelve months from the date of the grant of probate within which to bring his claim, subject to an extension of time in certain circumstances. That is a statutory right. If an applicant should receive such a notice by registered letter as is directed to be given by *In re Barber*, surely such applicant may ignore it and rest on his statutory right.

However, be that as it may, since the amendment of s. 33 of the Family Protection Act, 1908, by s. 26 of the Statutes Amendment Act, 1936, clearly something more than the notice directed to be given by *In re Barber* is required to put the matter beyond peradventure. It would seem that a further advertisement should be inserted, if not in every newspaper in New Zealand, and perhaps Australia, at all events in every metropolitan newspaper in both countries, calling upon all persons claiming to be the illegitimate children of the deceased to bring forward their claims under the Family Protection Act, 1908, within a limited time, or else forever to hold their peace.

I am, &c.

Wellington, J. S. H.
October 30, 1941.

Conscientious Objectors.—It is well to recall at this time what that distinguished Judge, Lord Justice Scrutton, said in an address to the University of London, in January, 1918:

"Conscientious objection is said to be an application of the text, 'Render unto Caesar the things that are Caesar's, and to God the things that are God's,' but Caesar and Caesar's Judges may be excused for taking the view that if a man or woman desires to remain a citizen of Caesar's State, and enjoy its protection, he must conform to the civil laws of Caesar, and do the duties for the civil maintenance of that State which those laws impose; that if he breaks the laws of the State he cannot complain if the State punishes him; and that a world in which an individual recognizes no duties as a citizen, except those which his conscience approves of, is a world of anarchy."

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. Workers' Compensation.—*Compensation moneys—Agreement approved by Stipendiary Magistrate—Variation of Magistrate's Order.*

QUESTION: An agreement between an employer and a worker, who is under the age of twenty-one years, for compensation for an injury suffered by the worker having been approved by a Magistrate under s. 18 (4) of the Workers' Compensation Act, 1922, it is desired later, owing to a change in circumstances, to vary the Magistrate's order, which, *inter alia*, provided for payment of practically the full amount of the compensation moneys to the Public Trustee to be held for the benefit of the worker. There is no provision in the order or under the said section for variation, and there is doubt as to whether the proceedings for variation can be instituted before a Magistrate. Is there any provision enabling the application to be made in the Compensation Court?

ANSWER: The Compensation Court has jurisdiction; and a notice of motion for variation could be filed, using the provisions of R. 27 of the Workers' Compensation Rules, 1939.

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2. Letters of Administration.—*Administration Bond—Dispensing with Sureties—Requirements.*

QUESTION: In the case of an application for letters of administration and for an order to dispense with sureties to the administration bond can the application to dispense with sureties be included in the motion for administration, and what is the practice with regard to dispensation?

ANSWER: The application can be included in the motion for letters of administration, and the endorsement on the motion should show the double application.

The general practice is not to dispense with sureties unless in the following circumstances:

1. Where all the next-of-kin are *sui juris* and join in consenting to sureties being dispensed with, but not where there are infants.

2. Where there are no debts in the estate unless sufficiently secured.

To warrant sureties being dispensed with both these conditions as a rule should exist: *In re Morrison*, (1931) 7 N.Z.L.J. 115; *In re Sixtus*, (1912) 14 G.L.R. 440.

Further, the application must show that no child of the deceased predeceased him, leaving issue who would be entitled to share in the estate, under s. 49 of the Administration Act, 1908; *In re Brown*, [1939] N.Z.L.R. 93.

The necessary information as to the above requirements could be included in the affidavit supporting the motion, and any consents should be annexed as exhibits.

3. Chattels Transfer.—*Bill of Sale over "stock"—No Sheep described in Schedule—Subsequent Bill of Sale over Sheep—Priority between Instruments as to Proceeds of Sale of Sheep.*

QUESTION: My client took a bill of sale over a farmer's stock. The bill of sale purported to assign "all and singular the stock mentioned and described in the First Schedule hereto and branded and marked as follows: . . . and also all and singular the stock which shall at any time hereafter during the continuance of this security be in, upon, or about the lands mentioned in the First Schedule hereto . . . "

The stock described in the Schedule to the instrument were cattle and horses. No sheep were mentioned.

Subsequently the farmer acquired a small flock of sheep over which he gave a bill of sale to another grantee. The sheep have now been sold and this grantee is claiming the proceeds as against my client. Who is entitled to these proceeds?

ANSWER: Your client held a first charge over the sheep, and has the first right to the proceeds. His instrument by way of security is perfectly valid as between himself and the grantor, and valid also as against everyone else except in so far as its validity is specifically affected by the Chattels Transfer Act, 1924. The only provision in the Chattels Transfer Act which could affect your client's security is s. 28, which makes an instrument void as against the persons mentioned in s. 18 so far as regards stock not described. The persons mentioned in s. 18 are the Official Assignee in Bankruptcy, a trustee for creditors, and an execution creditor. The holder of the second instrument by way of security is not one of these, and by virtue of the general words of assignment in the body of his instrument, your client has a security prior to that of the second grantee notwithstanding that no sheep are described in the schedule to your client's instrument.

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4. Mortgage.—*Sale through Registrar—Stranger purchasing at less than Estimate—Amount to be allowed in Account.*

QUESTION: A mortgagee recently sold a property under conduct of the Registrar of the Supreme Court, his estimate of value being the amount of the mortgage debt together with estimated costs. At the sale, a stranger bid an amount £50 less than the estimate, and the property was knocked down to him at that price. On making up accounts, the mortgagee finds that his deficiency was £59. Can the mortgagee now recover anything on the personal covenant, and if so, what amount?

ANSWER: While authority on this question is scant, it would appear from a *dictum* of Reed, J., in *Bank of Australasia* v. *Scott and Others*, [1926] G.L.R. 274, p. 280, that if a stranger becomes the purchaser at a Registrar's sale, the price at which the purchaser buys is to be substituted for the mortgagee's estimate in mortgage accounts. From this it would seem that the mortgagee could get judgment for the whole of the deficiency—*viz.*, £59.

RULES AND REGULATIONS.

Shipping and Seamen Act, 1908. Masters and Mates Examination Rules, 1940. Amendment No. 1. No. 1941/198.

Opticians Act, 1928. Opticians Regulations, 1930. Amendment No. 4. No. 1941/199.

Samoa Act, 1921. Samoa Quarantine Amendment Order, 1941. No. 1941/200.

Samoa Act, 1921. Samoa Immigration Amendment Order, 1941. No. 1941/201.

Sale of Food and Drugs Act, 1908. Sale of Food and Drugs Amending Regulations, 1941. No. 1. No. 1941/202.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices District Regulations, 1941. Amendment No. 3. No. 1941/203.

Fisheries Act, 1908, Whitebait Regulations, 1932. Amendment No. 7. No. 1941/204.

Air Force Act, 1937. Royal New Zealand Air Force Regulations, 1938. Amendment No. 7. No. 1941/205.

Labour Legislation Emergency Regulations, 1940. Agricultural Workers Labour Legislation Suspension Order, 1941. No. 1941/206.

Emergency Regulations Act, 1939. Government Service Grading Regulations, 1941. No. 1941/207.

Industrial Efficiency Act, 1936. Industrial Efficiency (Radio) Regulations, 1941. No. 1941/208.

Education Act, 1914. Ceremony of Honouring the Flag Regulations, 1941. No. 1941/209.

Emergency Regulations Act, 1939. National Service Emergency Regulations, 1940. Amendment No. 7. No. 1941/210.

Emergency Regulations Act, 1939. Teachers Emergency Regulations, 1941. No. 1941/211.

Emergency Regulations Act, 1939. Suspension of Apprenticeship Emergency Regulations, 1939. Amendment No. 3. No. 1941/212.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Hawke's Bay-Wairarapa) Regulation, 1937. Amendment No. 5. No. 1941/213.

Electoral Act, 1927. Electoral Regulations, 1928. Amendment No. 2. No. 1941/214.