New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"While admiring the subtlety of the old special pleaders, our Courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties."

—VISCOUNT SIMON, L.C., in *United Australia, Ltd.* v. *Barclay's Bank, Ltd.*, [1941] A.C. 1, 22.

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CONTEMPT OF COURT: NEWSPAPER COMMENT ON PENDING TRIALS.

"CONTEMPT of Court," as has often been pointed out, is as old as the law itself, and was a recognized phrase before the time of legal memory. The expression "*contemptus curiae*" is used in the treatise on the laws of England which bears the name of Glanville, the great Justiciar, and dates from the year 1187.

The different classes of contempt were classified by Lord Hardwicke, L.C., in *Roach* v. *Garvan, Re Read and Huggonson*, (1742) 2 Atk. 469, 26 E.R. 683, and the correctness of his classification has never been seriously called in question. In committing to the Fleet the printer of the *St. James Evening Post* for publishing libels against witnesses in a cause pending in Court, he said:

> Nothing is more incumbent upon Courts of Justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard . . .
>
> There are three different sorts of contempt. One kind of contempt is, scandalizing the Court itself. There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here. There may be also a contempt of this Court, in prejudicing mankind against persons, before the cause is heard.

He added that "there cannot be anything of greater consequence than to keep the streams of justice clear and pure that parties may proceed with safety both to themselves and their characters."

I.

Of the first class of contempt, we have had a recent example in *Attorney-General* v. *Blundell*: *Attorney-General* v. *Glover*, [1942] N.Z.L.R. 287, the facts and the decision in which are within recent memory.* The second class is not prolific of many examples. It is of the third class that we propose to treat here, because of the difficulties confronting newspapers generally in the present state of the law. To illustrate the position, we have the recent Christchurch case of *Attorney-General* v. *Mathison*, *ante* p. 112, where it was held that any publication of evidence before trial is not necessarily a contempt of Court; and that each case must be considered separately and must be judged of its purpose or tendency to interfere with a forthcoming trial of accused persons. The *Star-Sun* (Christchurch), first, as the defendant, began by apologizing to the Court for what it admitted to be a "technical" contempt; but the learned Judge held that contempt had not been committed. This, of itself, shows the delicate position in which newspapers find themselves with no defined standard by which to judge the effect of their usually innocent reporting. On the other hand, no feature of modern journalism has been so severely criticized as the attempt to try cases in the Press before they have been finally heard in the Courts. This is particularly true in those cases, criminal or civil, which are to be heard by a jury, for, under modern conditions, and especially in this Dominion, every juryman reads a newspaper, and it is not unlikely that he will be influenced by what it says. The Courts, have, therefore, taken a strong line in the attempt to put down this evil. On the whole, they have been successful.

Before coming to the facts of *Attorney-General* v. *Mathison*, we recall what Lord Hewart, L.C.J., said in *R.* v. *Daily Mirror* (*Editor and Proprietors*), [1927] 1 K.B. 845, 847, of the class of contempt of Court now under notice. His Lordship observed:

> The phrase "contempt of Court," as has been observed more than once, is in relation to the kind of subject-matter with which we are now concerned, a little misleading. The mischief referred to consists, not in some attitude towards the Court itself, but in conduct tending to prejudice the position of an accused person. In other words, what is really in question is nothing attacking the status of the Court as a Court, but something which may profoundly affect the rights of citizens.

* Or the case where a prisoner at the Salisbury Assizes in 1631, "Ject un brickbat a le dit justice que narrowly mist." *Anon*, 2 Dyer 188b, *n*; 73 E.R. 416.

And Lord Ellenborough in *R.* v. *Fisher*, (1811) 2 Camp. 563, 170 E.R. 1253, said :

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before, *ex parte* statements against the accused, which the latter had no opportunity to disprove or to controvert ?

Before the law of Libel Amendment Act was passed in England in 1888, it was doubtful whether the publication of preliminary proceedings before justices was legal ; but when s. 3 of that statute provided that " a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged,"† the position in regard to the preliminary hearing of an indictable offence became clarified.

In *R.* v. *Davies*, [1906] 1 K.B. 32, 38, Wills, J., after saying that the tendency of articles concerning the character of a person committed for trial is to poison the stream of justice in the higher Court, though at the time of publication the stream has not reached it, said :

> Offences of the exact kind in question in this case are necessarily of modern origin. They could not exist to any appreciable extent, if at all, before printing was freely resorted to ; and as long as it was unlawful even to publish reports of proceedings before Magistrates on account of their supposed tendency to interfere with a far trial, persons who knew that this was unlawful were not very likely to go to the further length of announcing and commenting upon supposed facts, to the prejudice of a prisoner, which had not even come before the Magistrates. From 1811 to 1888 but one case has been recorded in which the publication of reports of proceedings before justices tending to committals, or of extraneous matter connected with such reports has come under judicial cognizance.

The permission to publish reports of preliminary hearings encouraged the Press to satisfy public curiosity by extending their efforts beyond the actual evidence given in the Courts. Ever since, the Judges have done their best to discourage such efforts. In *R.* v. *Tibbits and Windhurst*, [1902] 1 K.B. 77, an enterprising newspaper employed a " Special Crime Investigator," and published, while a case was being heard before the Magistrate and before and during the trial at the assizes, evidence which would be inadmissable at the trial, though very detrimental to the prisoners. The prisoners were convicted and the editor and reporter were indicted and found guilty of attempting to interfere with the course of justice, and were sentenced to six weeks' imprisonment. This decision emphasizes the modern test which disregards the fact whether justice has been perverted ; it is sufficient to prove that the article has a tendency to do so. The essence of the offence, as Lord Alverstone, L.C.J., pointed out, is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on.

The Crippen murder case was a great temptation to newspapers to transgress, so much was the public interest and feeling aroused. Thus, in *R.* v. *Clarke*, (1910) 103 L.T. 636, 640, a newspaper published a cable that Crippen, who had fled to Canada and had been arrested there, had admitted that he had killed his wife, but denied the act was murder, and a later cable said he had confessed to the crime. Darling, J., as he then was, said :

> No assistance had been given by the newspaper to those who were attempting to unravel the crime. . . . There is no pretence that it was anything except to administer to the idle and vulgar curiosity of the people who desire to know, before it could in the ordinary course, come out in a Court of justice, what was passing behind the prison doors in Quebec.

Further, His Lordship said :

> It is most important that the administration of justice in this country should not be hampered as it is in some other countries . . . we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by jury, and those who attempt to introduce that system in this country even in its first beginnings, must be prepared to suffer for it.

He fined the editor £200 and costs.

In 1924, the *Evening Standard* (London) sent " criminal investigators " to the scene of the " Crumbles Murder " ; published some of their reports and interviewed a possible witness who had been warned by the Police not to make a statement. The editor was fined £1,000 and costs, with a warning that similar conduct in the future would be punished by imprisonment : *R.* v. *Evening Standard, Manchester Guardian, and Daily Express (Editor, Printers, and Publishers of each), Ex parte Director of Public Prosecutions*, (1924) 40 T.L.R. 833. The headnote of that case is as follows :

> When an accused person is under arrest on a criminal charge it is contempt of Court for the persons responsible for conducting a newspaper to employ amateur detection for the purpose of investigating the facts of the alleged crime and to publish the results of that investigation.

Roche, J., remarked during the argument that " a man should be tried on evidence not on investigations," and he stated the distinction between actions for libel against newspapers from contempt of Court was that the former affects the pockets of the newspaper proprietors but the latter affects the life of an individual and interferes with the course of justice.

The Lord Chief Justice, Lord Hewart, in his judgment, with which Roche and Branson, JJ., concurred, first referred to *R.* v. *Payne and Cooper*, [1896] 1 Q.B. 577, and *R.* v. *Parke*, [1903] 2 K.B. 432. He said it was apparent to the Court that the matters complained of were of such a kind as to be likely to interfere with the due administration of the criminal law. He did not propose, because he thought it might be prejudicial in the circumstances, to single out particular matters or particular phrases and show by reference to them exactly in what way each of them might be likely to affect the fair trial of the accused person. To enter upon that kind of exposition would be to inflame the mischief which might be done. But it was clear that cases of a similar kind to the present cases had recurred from time to time and had increased in number during recent years. One could not close one's eyes to what was done by the Press, and there seemed to be only too much ground for thinking that what was here complained of had come to be prevalent. His Lordship continued at p. 833 :

> It was essential in dealing with these different newspapers and different articles to discriminate. Discrimination was of the very essence of the task which that Court was now called upon to perform. It was clear that some of these newspapers, as was shown by the materials before the Court,

† *Cf.* Section 10 of the Law of Libel Amendment Act, 1910, which deems privileged in the absence of proof of malice : "(*b*) A fair and accurate report of the proceedings of any Court of justice, whether in New Zealand or elsewhere, and whether those proceedings are preliminary, interlocutory, or final, and whether in open Court or not, or of the result of any such proceedings."

had entered deliberately and systematically on a course which was described by some of them as "criminal investigation." It was urged on behalf of one respondent on the previous day that it was part of the duty of a newspaper when a criminal case was pending to elucidate the facts. If he understood that suggestion when clearly expressed it came to something like this; that while the Police or the Criminal Investigation Department were to pursue their investigations in silence and with all reticence and reserve, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the defence, it had come to be somehow for some reason the duty of newspapers to employ an independent staff of amateur detectives, who would bring to an ignorance of the law of evidence a complete disregard of the interests whether of the prosecution or the defence. They were to conduct their investigation unfettered, to publish to the whole world from time to time the results of these investigations, whether they conceived them to be successful or unsuccessful results, and by so doing to perform what was represented as a duty, and, one could not help thinking, to cater for the public appetite for sensational matter.

It was not possible for that Court, nor had it any inclination, to suggest to the responsible editors of those newspapers what were the lines on which they ought to proceed. Any such task as that was entirely beyond the province of that or any other tribunal. Those who had to judge by the results could see what a perilous enterprise this kind of publication was. It was not possible even for the most ingenious mind to anticipate with certainty what were to be the real issues, to say nothing of the more difficult question what was to be the relative importance of different issues in a trial which was about to take place. It might be that a date, a place, or a letter, or some other one thing which, considered in itself, looked trivial, might prove in the end to be a matter of paramount importance. It was impossible to foresee what was important.

In the case of the *Evening Standard*, the Lord Chief Justice said that it was apparent from the bundle of newspapers exhibited to the affidavits that on the part of that newspaper there had been a deliberate and systematic pursuit of independent and amateur investigation into a crime for which a man had been arrested and was about to undergo trial. The systematic way in which the work had been done was a fact of importance. It was also a fact of importance that there had been made plain on the part of those responsible for that newspaper a disposition to justify what had been done.

It may be admitted that the foregoing examples show a rather flagrant disregard of the essentials of a fair trial of an accused person by a jury; but the care given by the Courts to the prevention of unfairness is shown in *R.* v. *Astor*, (1913) 30 T.L.R. 10, where it was held that publication together in one article of two items of news, the one relating to pending civil proceedings in connection with a share transaction, and the other giving a report of criminal proceedings relating to the same facts, was a contempt of Court, since the jury in trying the criminal case might have their attention thus called to the civil proceedings with which they were not concerned. (There are, too, the cases dealing with the publication of photographs of accused persons at a time when the question of identity might be in issue. The law, regarding this aspect of newspaper contempt, is fully set out in *Attorney-General* v. *Tonks*, [1934] N.Z.L.R. 141, which applied *R.* v. *Daily Mirror* (*Editor and Proprietors*), *ante*. With this class of case, we are not directly concerned here.)

With the foregoing examples before us, we shall, in our next issue, consider the effects of the recent Christchurch case, *Attorney-General* v. *Mathison*.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Wellington. 1942. April 20; May 25. *Johnston, J.*

MARSHALL v. COMMISSIONER OF STAMP DUTIES.

Land Transfer—Bringing Land under Act—Public Revenue—Death Duties (General)—Deductible Debts—Effect of bringing Mortgaged Land under Land Transfer Act—Such Land Part of Final Balance of Registered Proprietor's Estate for Death-duty Purposes—Memorandum of Mortgage a Gift, but Subsequent Releases and Substitutions of Mortgages not for Money's Worth but for Arrangement of Mortgagor's Finances, with Extension of Time for Payment—Whether such Arrangements make Money owing to Mortgagee a Deductible Debt—Land Transfer Act, 1915, ss. 2, 54, 102—Death Duties Act, 1921, ss. 3, 5 (a), 6 (1), (2), 9 (1), (2).

The effect of bringing mortgaged land under the Land Transfer Act, 1915, either voluntarily or compulsorily, is that the mortgagor becomes the registered proprietor of the land mortgaged and the mortgagee the chargee thereof—*viz.*, the proprietor of a mortgage having effect as security only but not operating as a transfer of the estate or interest charged thereby.

If, therefore, when land is under the Deeds system, the owner by deed of mortgage conveys it to his daughter subject to a proviso for redemption on the mortgagor paying to the mortgagee £1,000 and interest, the purpose of the mortgage being a gift, and the land is subsequently brought under the Land Transfer Act before the death of the owner, the said land is part of the final balance of the deceased and no allowance can be made for the moneys secured by the mortgage as they were not debts incurred by the deceased for full consideration in money or money's worth wholly for his own use or benefit.

Holmes v. *Commissioner of Stamp Duties*, [1927] N.Z.L.R. 753, applied.

Earl Cowley v. *Inland Revenue Commissioners*, [1899] A.C. 198, and *Lord De Freyne* v. *Inland Revenue Commissioners*, [1916] 2 I.R. 456, distinguished.

Where an original memorandum of mortgage amounted to a gift and the debt created was not for moneys worth or for the benefit of the deceased, subsequent releases and substitution of other mortgages therefor merely to enable the deceased to rearrange his finances and to preserve existing priority, even though extension of time was granted to the mortgagor for payment, were held not to render the money owing to the mortgagee a debt for consideration for the benefit of deceased deductible in the computation of the final balance of his estate.

Attorney-General v. *Smith-Marriott*, [1899] 2 Q.B. 595; *Lord Advocate* v. *Lord Lyell*, [1918] S.C. (Ct. Sess.) 125, and *Attorney-General* v. *Viscount Cobham*, (1904) 90 L.T. 816, followed.

Counsel: *R. E. Tripe*, for the appellant; *P. B. Broad*, for the respondent.

Solicitors: *Hadfield, Peacock, and Tripe*, Wellington, for the appellant; *Crown Law Office*, Wellington, for the respondent.

Case Annotation: *Earl Cowley* v. *Inland Revenue Commissioners*, E. & E. Digest, Vol. 21, p. 8, para. 27; *Lord De Freyne* v. *Inland Revenue Commissioners*, *ibid.*, p. 25, note 142 i; *Attorney-General* v. *Smith-Marriott*, *ibid.*, p. 18, para. 101; *Lord Advocate* v. *Lord Lyell*, *ibid.*, note 106 i; and *Attorney-General* v. *Viscount Cobham*, *ibid.*, p. 12, para. 50.

SUPREME COURT. Wellington. 1942. May 21, 22, 25. *Ostler, J.*

HOWELL v. HOWELL.

Divorce and Matrimonial Causes—Custody of Children—No absolute Right of Father to Custody of Child on Ground that Divorced Wife living in Adultery—Custody of Girl given to Mother subject to Supervision of Child Welfare Department.

A petitioner who has obtained a decree of dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent has no absolute right to the custody of his child on the ground that his former wife is living in adultery.

When the respondent and co-respondent were living in adultery and desired to marry but could not for the present because the co-respondent's wife had obtained a decree of judicial separation from him on the ground of his adultery, the Court gave custody of the daughter, eight years of age to the mother, but put the child under the supervision of the Child Welfare Department for five years, reserving the right to make such new order as, on that Department's report, the Court thought in the child's best interests.

Counsel: *Leicester*, for the petitioner; *Sievwright*, for the respondent.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the petitioner; *A. B. Sievwright*, Wellington, for the respondent.

SUPREME COURT. Wanganui. 1942. May 18, 29. *Smith*, J.

RICHARDS v. RICHARDS.

Divorce and Matrimonial Causes—Alimony and Maintenance—Order for Permanent Maintenance in Favour of Wife and Child—Remarriage of Husband—Application by Husband to Vary Order—Preference given to Needs of Innocent First Wife—Destitute Persons Amendment Act, 1926, s. 8—Domestic Proceedings Act, 1939, s. 17.

Where a decree absolute in a suit for divorce has been made, the guilty party is entitled to re-marry, but if he does so and his means are limited and hardship must ensue, the Court in distributing the available funds will give preference to the needs of the innocent first wife.

Semble. If one of the two women has to work to assist in keeping a home going, it should be the second wife, not the first.

Jackson v. *Jackson*, [1928] N.Z.L.R. 88, G.L.R. 6, and *Burton* v. *Burton*, [1928] N.Z.L.R. 496, referred to.

Where an order for maintenance made by the Supreme Court in which liberty to apply for a variation or cancellation of the order was reserved has been registered in the office of a Magistrates' Court under s. 8 of the Destitute Persons Amendment Act, 1926, and such order has been varied by the Magistrates' Court and a copy of the Magistrate's order of variation has been filed in the Supreme Court pursuant to s. 19 (5) of the Domestic Proceedings Act, 1939, the party dissatisfied with such variation may, instead of appealing against the Magistrate's order, ask the Supreme Court to act under the said provision reserving liberty to apply.

On variation by the Supreme Court of the order of that Court as varied by the Magistrate, the order as so varied will then be forwarded pursuant to s. 17 (6) of the Domestic Proceedings Act, 1939, to the Clerk of the Magistrates' Court; and the order so varied will for the time being become the effective order between the parties.

Counsel: *Currie*, for the petitioner; *Treadwell*, for the respondent.

Solicitors: *Watt, Currie, and Jack*, Wanganui, for the petitioner; *Treadwell, Gordon, Treadwell, and Haggitt*, Wanganui, for the respondent.

SUPREME COURT. Wellington. 1942. March 5; May 29. *Sir Michael Myers*, C.J.

SIMMONS AND ANOTHER v. COMMISSIONER OF STAMP DUTIES.

Public Revenue—Death Duties (Gift Duty)—Commissioner's Duty to state Case under s. 62, where Question of Gift and Exemption thereof involved—Remedy of Administrator on Commissioner's Failure to do so—"Final and conclusive"—Whether Commissioner's Determination that Gift not entitled to Exemption examinable by Supreme Court—Death Duties Act, 1921, ss. 44, 62.

Although s. 44 of the Death Duties Act, 1921, makes the determination of the Commissioner of Stamp Duties that a gift is not entitled to exemption under that section "final and conclusive," the Commissioner has a duty under the statute, on receipt of notice pursuant to s. 62, to state a case for the opinion of the Supreme Court on the question whether a payment was a gift, and whether his determination that it was not entitled to exemption from duty is examinable by the Court.

The Commissioner cannot increase the dutiable estate by holding something to be a gift which is not a gift, and an appeal lies from his decision on this point.

Commissioner of Stamps v. *Pearce*, [1924] G.L.R. 338, applied.

But, if the payment be a gift, the onus of proving the contrary is on the party alleging. If the Commissioner in good faith determines that such gift is not entitled to exemption under s. 44 (1) (*b*), his determination is not examinable by the Court.

Murphy v. *The King*, [1911] A.C. 401, referred to.

Counsel: *Hay*, for the plaintiffs; *Broad*, for the defendant.

Solicitors: *T. E. Roberts*, Paraparaumu, for the plaintiffs; *Crown Law Office*, Wellington, for the defendant.

SUPREME COURT. Hamilton. 1942. May 14. *Johnston*, J.

IRETON v. WHYTE AND HANCOCK AND COMPANY, LIMITED.

Negligence—Road Collisions—Traffic Inspector in pursuit of Motor-car Driving at excessive Speed and in Dangerous Manner—Inspector injured while taking Bend at High Speed—Whether resulting Bodily Injury Actual Consequence of Driver's Negligence—Whether Risk in Course of Duty.

The plaintiff, a Traffic Inspector, when sitting in his car, was passed by a car driven by the first defendant (hereinafter called "the defendant"), and an employee of the defendant company, at an excessive speed and in a dangerous manner. Plaintiff started his own car and followed defendant, for the purpose (he claimed) of attempting to rid or reduce the danger created by the defendant. In a pursuit, for a distance of about three miles, he reduced the defendant's lead, and was therefore himself travelling faster than the plaintiff. After traversing that distance, owing to the high speed at which he was travelling and his failure to slow down on turning a bend in the road, his car skidded and overturned. His car was damaged and he was injured. During the course of his pursuit, plaintiff saw no one on the road other than the defendant.

In an action by the plaintiff against the defendant and the defendant company for damages for the injuries sustained by him, evidence was tendered for the plaintiff to establish dangerous driving by the defendant more than three miles beyond the bend where the plaintiff's car overturned. The learned Judge refused to admit the evidence as irrelevant, withdrew the case from the jury, and entered judgment in favour of defendant.

On a motion by plaintiff to set aside such judgment on the ground that such evidence was wrongly disallowed.

W. J. King and *N. H. Smith*, for the plaintiff; *Strang*, for the defendant.

Held, 1. That, where in consequence of another's negligence a person exposes himself to danger in order to attempt to save a third person from the risk to which the former apprehends the latter to be threatened by the effects of such negligence and is injured in consequence, in order to entitle him to recover damages for such negligence, he must show that his voluntary intrusion into the danger-zone was the natural consequence of such negligence—*viz.*, that there was connected with such negligence some circumstance to raise a reaction that in an ordinary man would induce him voluntarily to incur danger.

2. That evidence, therefore, of matters subsequent to the reaction that caused the assumption of risk, and that could not by any possibility have contributed to that reaction, are irrelevant.

3. That, as the plaintiff saw no pedestrian or vehicle driver in imminent danger, or other danger that would raise any natural impulse to protect, there was no need for him to drive at an excessive speed himself and his turning a bend at such an excessive speed to cause his car to overturn was a *novus actus interveniens*.

Haynes v. *Harwood*, [1934] 2 K.B. 240, aff. on app. [1935] 1 K.B. 146, and *Hallett* v. *Warren*, (1926) 93 J.P. 225, distinguished.

Observations as to a Traffic Inspector's duty.

Solicitors: *King and McCaw*, Hamilton, for the plaintiff; *Strang and Taylor*, Hamilton, for the defendant.

PROFESSOR JAMES WILLIAMS.

Dean of the Law Faculty, University of Sydney.

The University of New Zealand and the legal profession of this country have recently lost to Australia the services of Professor James Williams. Until May of this year Professor Williams occupied the Chair of English and New Zealand Law at Victoria University College, a post he had held for just over seven years. He has now left to fill a chair of law in the University of Sydney, where he will be Head of the Law School. His work in New Zealand has made an enduring impression both on the students of law in his own college, and on legal education generally. He will undoubtedly fill the Chair of Law at Sydney, as he did his previous post, with dignity and distinction.

The role of a professor of law in relation to the legal profession is one which in English-speaking communities has yet to reach its full status. In some European countries the professors of law hold a rank of unsurpassed authority in the profession. (At least, they did so before the impact of war.) A similar state of affairs is rapidly being reached in America, where the Law Schools have established their position in incomparable fashion, justly earning world-wide recognition for their methods and achievements. But in New Zealand, as in England, a different attitude still prevails. In 1932 a writer in England observed :

> It is much to be desired that the legal profession should cease to permit litigation to monopolize its field of vision, to the extent to which it does so at present, and should realize its responsibility for legislation, for the criticism of existing laws, and for the investigation of present needs which are the indispensable instruments of progress.

This writer felt that the universities were institutions from which an essential spring of vitality could be drawn, and he added :

> In organizing itself for this neglected but capital function, the legal profession must, I am convinced, learn to rely in an ever-increasing degree, upon the scientific training and critical attitude of the professor of law.

Whether this change will occur in New Zealand depends almost entirely upon the standards and viewpoints of those actually engaged in the task of legal education, for it is upon their achievements and teaching, more than on anything else, that University influence in legal matters must depend. The half-concealed suspicion of what is labelled " academic," will not cease to be prevalent throughout an eminently practical profession until law teachers themselves demonstrate (as they are doing so effectively in the United States) that in the fields of legal exposition and research the University is rendering a service of real and practical value to the community, and that among the ablest of practitioners and Judges are men who early in their careers obtained lasting benefit from " the scientific training and critical attitude of the professor of law."

It is for this reason that Professor Williams's tenure of the Chair of Law at Victoria College has been especially significant. Before his appointment he had published his work on the Statute of Frauds, which gained immediate recognition as an exposition (in Professor Winfield's words) " as complete and scholarly as any lawyer could expect." During his period at Victoria College he has written an extensive new work on the law of Contract—a work of which the profession is deprived only by the exigencies of war and consequent delays in publication.

More important still, Professor Williams has taken a leading role, ever since his appointment, in the reform of our system of legal education. The contents of the degree course and the methods of examining have been vitally changed, with a view to widening the mental horizon of the future lawyer, and removing the reproach, heard some sixteen years ago, that the phrase " my learned friend " was in danger of becoming a term of gentle sarcasm. This reform movement was not only inspired by Professor Williams, but was carried into effect largely through his energetic and persevering activities as a member of the Council of Legal Education and as a representative on the Academic Board of the University. Throughout his tenure of the Chair at Victoria College he has also consistently encouraged those standards of accuracy and fidelity which every student must learn to respect before he can be entrusted to undertake professional responsibility and to embark on the paths of legal analysis and constructive thought.

The law students of Victoria College and the Professor's colleagues in the teaching of law will immediately feel the loss they have sustained ; but what Professor Williams has accomplished in furthering the cause of legal education has already made its mark in the academic sphere, and will influence for the better the future character of the profession.

At Sydney his new post will afford scope and opportunities which this country could not offer, and our very best wishes go with him for success in guiding the destinies of the greatest law school in this hemisphere.

LAND TRANSFER OFFICE.

Hours for Receiving Documents.

In accordance with the Land Registry Office Regulations, 1942 (Serial No. 1942/172), and the Deeds Register Office Regulations, 1942 (Serial No. 1942/173), the Land Transfer and Deeds Register Offices will, as from June 22, 1942, be open for the transaction of business daily between 9 a.m. to 12.30 p.m. and 1.30 p.m. and 4 p.m., except Sundays, Saturdays, and holidays.

Applications to bring land under the Act and instruments, dealings, and other instruments required to be registered in the Register-book or deposited must be presented at the Land Transfer Office between the hours of 10 a.m. and 12.30 p.m., or between the hours of 1.30 p.m. and 3 p.m. ; and no instrument will be received in the Deeds Register Office except between the same hours.

BENEFICIAL OWNERSHIP OF LIFE INSURANCE POLICIES.

Effected ostensibly in Favour of Nominees.

By E. C. ADAMS, LL.M.

The above topic has already been adequately dealt with in the pages of the NEW ZEALAND LAW JOURNAL: see (1934) 10 N.Z.L.J. 264, an article by Mr. G. R. Powles, LL.B., and (1937) 13 N.Z.L.J. 324. In view, however, of several English and New Zealand cases which have been decided in the interim, a further discussion appears opportune.

An excellent summary as to the relevant law is to be found in *Green's Death Duties*, 83. *Mutatis mutandis* Green's summary may be thus stated:—

> A provision in a policy, for a payment to a person other than the contracting party, does not *per se* confer any legal right on the other person, nor does it amount to a declaration of trust by the contracting party. *Prima facie* the policy belongs to the person who paid for it, unless either (*a*) the case is governed by s. 16 of the Married Women's Property Act, 1908; or (*b*) the other person was a party to the contract with the insurance company; or (*c*) the policy was effectually assigned to the other person; or (*d*) an express trust was declared in favour of the other person.

Section 16 (2) of the Married Women's Property Act, 1908, provides that a policy of assurance effected by any man or woman on his or her *own* life, and expressed to be for the benefit of his or her spouse, or children, shall create a trust in favour of the objects named. In *Re Gladitz, Guaranty, Executor, and Trustee Co., Ltd.* v. *Gladitz*, [1937] 3 All E.R. 173, it was held that the corresponding statutory English provision applied to an *accident* insurance policy effected by a man on his own life. Where the policy comes within s. 16 (2) of the Married Women's Property Act, little difficulty will be experienced in practice; the beneficial ownership thereof is vested in the nominee and not in the assured. But said s. 16 (2), be it noted, does not apply to a policy effected by a man or woman on his or her *child's* life: it applies only to a policy effected on a man's or woman's *own* life, and expressed to be in favour of the persons mentioned in the section.

The cases which have caused trouble in the past are those not covered by that statutory provision but where it appears that the person who took out the policy desired to benefit a nominee, usually a child. It may be stated as a general rule that the beneficial ownership is in the person who took out the policy and not in the nominee, unless a valid declaration of trust has been made by such person (either at the time the policy was taken out or subsequently) in favour of the nominee. Unless (as already recommended in England: see (*1939*) *55 Law Quarterly Review*, 13) the law is altered, future cases will mostly be confined to the question, Has a valid declaration of trust been created? It is suggested by Mr. Powles, in the course of his article, that if the legal ownership of the policy becomes vested in the nominee—*e.g.*, by the nominee becoming the legal personal representative of the person who took out the policy—the nominee could successfully invoke the doctrine of *Strong* v. *Bird*, (1874) 18 Eq. 315, and keep the insurance moneys on the ground that a gift had been intended and the intended gift perfected by the vesting of the legal ownership in the intended donee. This suggestion will greatly intrigue all equity lawyers, but this aspect of the question does not appear to have been considered yet in any New Zealand or English case. It might be possible to prove in some cases that a gift had been intended, but as the average industrial policy which a person takes out, is frequently not used for the benefit of a child, it would, it is conceived, often be very difficult to bring a case within the category of an incomplete gift. The cases show that in order to invoke successfully the rule in *Strong* v. *Bird*, there must have been an unmistakable intention to make a gift: the evidence must not be equivocal.

In determining whether a declaration of trust has been made *after* the policy has been taken out, it is perhaps well to bear in mind what His Honour Mr. Justice Blair said recently in the unreported (but most important) case of *In re Wilson, Alexander* v. *Wilson*:—

> I am not concerned with the deceased's intentions, but only with the question as to whether in his lifetime he divested himself of the legal ownership of these policies and created himself a trustee of them for the respective children named in them. There is plenty of evidence of intention, but none that I can see of carrying that intention into effect in a form recognized by the law.

The evidence which His Honour held was insufficient to establish a trust was an affidavit by deceased's widow wherein she said:—

> My husband mentioned these policies to me from time to time and I have always understood from him that the policies belonged to each of the children for whom or on whose lives they were taken out and that he had no interest in them except that he had assumed an obligation to pay the necessary premiums.

In this respect this case may be compared with the decision of His Honour Mr. Justice Smith in *Walker* v. *Walker*, [1940] G.L.R. 450, where certain conversations which a husband had had with his wife, were held sufficient to establish a valid trust in favour of the child nominee.

The leading case, as to the beneficial ownership of policies taken out in the names of nominees, is *Engelbach's Estate, Tibbetts* v. *Engelbach*, [1924] 2 Ch.D. 348, and the cases which have been reported in England since the two articles in the NEW ZEALAND LAW JOURNAL, purport to follow the principle of that case. It was held in this leading case that an endowment policy taken out by A. in his own name for the benefit of his daughter, to mature on her attaining a certain age, created no legal estate in the daughter and that the assured did not thereby constitute himself a trustee so as to vest the beneficial ownership of the policy in the daughter. Moreover the daughter being a stranger to the contract could not sue on it. The cases decided since show that in order to determine the question whether a valid trust was created at *the time the policy was taken out*, it is necessary to examine carefully the wording both of the proposal and of the policy itself.

The first case which may conveniently be examined is *Re Sinclair's Life Policy*, [1938] 3 All E.R. 124. This was a policy from which it may be inferred that Sinclair, the applicant, intended to benefit his godson, H. C. R. Hopwood, who was named as the nominee in the proposal. The other relevant portions of the proposal are set out in the law reports thus ([1938] 3 All E.R. 124, 127):

> In the event of the death of the under-signed applicant, the policy is to be continued to maturity, except as provided in provision B, without further payment of premiums. In the event of the death of the child named in Question 6, whether occurring before or after the death of the applicant, all premiums paid, together with simple interest, shall be payable to the said applicant if living, or if not living, to his legal representatives and the policy shall cease to be in force.

Then it provides:

> The policy shall at the termination of the endowment period, be payable either to the applicant signing the application, or the child named in Question 6.

Then the question is asked: "Is the policy to be payable at the end of the endowment term to the applicant signing this application, or to the child named in Question 6?" In the answer the word "applicant" is struck out, and the words "to the child" are put in.

The policy itself was as follows:—

> Know all men by these presents that the Shanghai Life Insurance Co., Ltd., Shanghai, China, relying upon the statements contained in the written and printed application for this policy and on the medical report, and in consideration of various other things, promises to pay on November 1 in the year 1936 to the assured's godson, Hervey Cecil Rowan Hopwood (hereinafter referred to as "the nominee") the sum of £750 sterling together with any profits which may be apportioned to this policy. In the event of the death of the nominee before the maturity of this policy, whether before or after the death of the assured, the company will return to the said assured if living, otherwise to his executors, administrators or assigns, the gross amount of premiums paid. In the event of the death of the assured before the maturity of this policy, provided same is then in force, no further premiums except any unpaid portion of the premiums for the then current policy year, shall be payable thereunder, but the policy shall continue.

One of the conditions to the policy set out an option whereby after payment of three years' premiums, the assured could on giving written notice to the company at its Head Office within two months after any default in payment of premium, but not later, surrender the policy to the company and receive its cash value or a non-participating paid up assurance.

The Court held that the beneficial ownership of the policy was vested in the legal personal representatives of the deceased assured or applicant and not in his infant god-child, and in the course of his judgment Mr. Justice Farwell said at p. 128:—

> In the present case, I can see nothing which would have obliged Mr. Sinclair, for instance, to keep up the policy. Had he allowed the policy to lapse, by failing to pay the premium at any time, I can see no possible ground upon which the infant, or anyone on behalf of the infant, would have been entitled to sue him for damages, or require him to continue to keep up the policy. Indeed, had Mr. Sinclair changed his mind and surrendered the policy, and received the money in consideration of the surrender—as so far as I can see, he was amply entitled to do—that money would have been his money, and the infant would have had no sort of claim to it.

For the first time apparently in these life assurance cases, s. 56 of the Law of Property Act, 1925, was invoked to support the child nominee's claim. This section is represented by s. 44 of our Property Law Act, 1908, which provides that any person may take an immediate benefit under a deed, although not named as a party thereto; it does not appear to have been cited by counsel in the New Zealand cases. His Honour held that said s. 56 did not operate in favour of Sinclair's godson, as against Sinclair's estate.

The next case we shall consider is *In re Foster, Hudson* v. *Foster*, [1938] 3 All E.R. 357. In 1908 one Robert John Foster insured the life of his son William Edward Foster, then thirteen years of age. There was nothing in the proposal to indicate a trust for the benefit of the infant, but the policy definitely provided that the sum of £5,000 and bonuses were to become payable to the representative or assigns of William Edward Foster (the child) on his death provided that such death should occur after September 26, 1916. His death did occur after that date—to wit in the year 1936, but in spite of that provision the Court held that the moneys payable under the policy beneficially belonged to the father's estate, who had previously died in 1925. Again s. 56 of the Property Law Act, 1925, was unsuccessfully invoked by counsel for the nominee's estate. Mr. Justice Crossman at p. 365 dealt with that point thus:—

> I think that Mr. Stone's contention really amounts to this, that a contract by A. with B. to pay money to C. gives C. a right to sue A. on the contract. I am not prepared to hold that s. 56 has created such an enormous change in the law of contract as would be involved in that proposition. I hold, following what I understand to have been the views expressed by Mr. Justice Luxmoore in *In re Ecclesistical Commissioners for England's Conveyance*, [1936] Ch. 430, 438, by Mr. Justice Simonds in *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610, 625, by Sir Wilfrid Greene, M.R., in the same case on appeal, [1938] 1 Ch. 351, 365, and by Mr. Justice Farwell in *In re Sinclair's Life Policy*, [1938] 3 All E.R. 124, that s. 56 of the Law of Property Act, 1925, can only be called in aid by a person who, although not a party to the conveyance or other instrument in question, is yet a person to whom that conveyance or other instrument purports to grant something or with whom some agreement or covenant is thereby purported to be made. In my judgment, s. 56 does not apply to the present case because the representatives of William Edward Foster are not, on the true construction of the document, the persons to whom the policy purported to grant the legal right to receive the policy moneys or with whom a contract to pay the policy moneys is made by the policy. The representatives of William Edward Foster are, in my judgment, only the nominees of Robert John Foster, who is the person and the only person to whom rights are given and with whom a contract is made by the policy.

This case again went to the Chancery Division because the premiums had been paid by the father up to the date of his death and thereafter by the son under the mistaken belief that the latter was the beneficial owner of the policy. It was held that the son's estate was entitled to a *lien* on the policy moneys for all the premiums paid by him. That appears to be an eminently fair decision: [1938] 3 All E.R. 610.

In the recent unreported New Zealand case of *Re Wilson, Alexander* v. *Wilson*, Mr. Justice Blair had to deal with three policies on the lives of deceased's three children.

In the first policy involved the proposal signed by the parent contained the following declaration:—

> Being desirous of effecting an assurance with "the Mutual "Life and Citizens Assurance Company, Limited, on the "life and for the benefit of" the insured. The proposal required the insurer to initial the particular table under which the insurance was to be effected and the deceased placed his initials alongside Table c. 3 or c. 4 which provided *inter alia* that "Policy and all its benefits to be held by the "person effecting the policy as trustee for the person upon "whose life the policy is issued."

And the policy itself recited that the assurance "has been declared by the assurer—*i.e.*, the father—to be held in trust for the assured"—*i.e.*, the child. It was held by His Honour that a valid declaration of trust had been created and that the policy was consequently not an asset in the deceased parent's estate.

The other two policies on the other hand were declared to belong to the parent's estate, because there was no valid trust expressed in favour of the child. These two policies did not differ materially from the form of the policy in the leading case, *Re Engelbach's Estate, Tibbetts* v. *Engelbach* (*supra*).

The last case to be considered is one recently decided in England, *Re Webb, Barclay's Bank, Ltd.* v. *Webb*, [1941] 1 All E.R. 321. The policy recited that the father was desirous of effecting the assurance for and on behalf of his son, then aged one year. It is clear from the authorities previously cited that that *per se* was not sufficient to create a trust in favour of the infant. But there was another rather unusual provision which turned the scales the other way. This was to the effect that on the son attaining twenty-one all rights and powers of the father, his personal representatives and assigns, were to cease and the son was to be solely interested in the policy. The Court held that this provision read in conjunction with the other provisions in the policy established a trust in favour of the son.

From all these cases there emerges the clear rule that the mere fact that the policy moneys are expressed to be paid to somebody other than the person who contracted with the insurance company, does not make that person a trustee of the policy or of the policy moneys for the person so nominated. In *Engelbach's* case it was submitted by counsel, on the authority of *Gandy* v. *Gandy*, (1885) 30 Ch.D. 57, that such a provision was a mere mandate, which was ended with the death of the person who conferred it—*i.e.*, the person who contracted with the insurance company. If this is so, then no question of gift duty could arise in New Zealand, until such mandate had been exercised by the nominee.

Another question of great practical importance arises from these cases. Where the child nominee is really the beneficial owner of the policy, is the parent who effected the insurance legally bound to keep up the policy? Farwell, J., in *Re Webb, Barclay's Bank, Ltd.* v. *Webb* (*supra*) says:

> Of course I must bear in mind what Romer, J., said—namely, that it is unlikely that a person would enter into a contract which bound him to pay premiums on behalf of, and as agent for, an infant of very tender years—and that observation no doubt applies in the present case.

But the Judge went on to say that when the child attained the age of twenty-one years, he would be the person to pay the premiums.

It will be recollected that in *Re Wilson, Alexander* v. *Wilson* (*supra*), Mr. Justice Blair held that one policy belonged beneficially to the child nominee. Dealing with the question as to the person liable for payment of future premiums on that policy, His Honour said:

> A great many questions were asked in the originating summons some of them relate to the payment of future premiums. In the case of the eldest son's policy I have already indicated how that can be disposed of. The policy being no part of the estate assets, the estate has no interest in keeping up the policy and it will be for Mr. Joseph Liston Wilson (*i.e.*, the nominee) to make his own arrangements in that respect.

The case shows that the nominee at the date of the case was twenty-four years of age. There is thus nothing inconsistent in this ruling with the *dicta* of Farwell, J., on the similar point in *Webb's* case (*supra*).

It is suggested by a writer in (*1941*) *191 Law Times Journal*, 157, that the real reason why in England since *Engelbach's* case, there have not been more policies embodying declarations of trust, or more declarations of trust afterwards made, is the high stamp duty payable. It would appear that in England under s. 104 of the Stamp Act, 1891, the stamp duty on the settlement of a policy is based not on the surrender value as at date of trust, but on the nominal amount of any policy *plus* any bonus which may have been declared in the interim. Parents and others taking out policies for the benefit of children naturally hesitate to pay such duty, and the insurance companies do not recommend a form which involves such a large initial expense, and which consequently would be calculated to drive business away from the companies.

It is submitted, however, that such an objection would not apply in New Zealand. The maximum amount of stamp duty payable in New Zealand would in most cases be only 5s. 6d. under s. 101 of the Stamp Duties Act, 1923. And no gift duty would be payable, unless the amount of the premiums each year, *plus* any other gifts made by the parent in the same year, exceeded £500 (s. 40 of the Death Duties Act, 1921).

The Inner Temple Library.—The current (April) number of *The Law Quarterly Review* contains a very interesting note by Lord Justice MacKinnon on the losses sustained by the library of the Inner Temple during the nocturnal air-raids on London between September, 1940, and May, 1941. Three times was the library damaged during that period—at the beginning, in the middle, and in the last heavy raid of all. The staircase turret and clock tower of the library were hit and damaged on September 19, 1940, a number of books being destroyed. Then, on December 29, the night of the attempt to destroy the City of London by fire, the roof of the Inner Temple Library was set on fire, some books being burned, but naturally enough, far more being hurt by water. Many were, says Lord Justice MacKinnon, frozen where they stood. Another calamity occurred whilst some of the library's books were being moved into the country, for a lorry met with an accident, and its load of valuable books was destroyed. And then on May 10, the night of the last heavy raid on London, when thirty-three enemy planes were destroyed, the Temple was again seriously damaged and again the Inner Temple library was hit by incendiary bombs, and this time totally destroyed. It is a tragic story, but we are very glad to know that the library's chief treasures had been removed, and to see from the list of the principal losses, which is appended to the Lord Justice's note, that most, if not all, of what the Inner Temple library has lost can either be replaced, or will be available in other collections.

ROAD TRAFFIC AND THE WAR EMERGENCY REGULATIONS.

VI. Recent Regulations.

By R. T. Dixon.

Some important emergency regulations relating to road transport have been enacted since the publication of the last article in this series, *ante*, p. 53.

1. Stock Transport Emergency Regulations, 1942 (*Serial No. 1942/62*). This authorizes the Minister of Transport to divide New Zealand into Stock Transport Districts and to appoint a committee for each district whose principal function will be to authorize the carriage of live-stock by motor-vehicle (whether for hire or reward or not) within the respective Districts. There is right of appeal to the respective Transport Licensing Authority against the committees' decisions; and, if the stock is carried for hire or reward, then the operator must also hold a goods-service license under the Transport Goods (Applied Provisions) Order, 1942 (Serial No. 1942/21). The regulations also authorize the setting up of Stock Transport Pools for the purpose of assisting the committees in the allocation of the orders. The object of the regulations is to regulate the cartage of stock so as to save petrol and tyres to the fullest possible extent.

2. Taxicab Emergency Regulations, 1942 (*Serial No. 1942/91*). These regulations contain provisions relating to the hiring of taxicabs. "Doubling up" on the hire of a cab is permitted but only (*a*) for a maximum of two hirers; (*b*) for distances of less than ten miles; (*c*) over a route substantially the same for both hirers, and (*d*) subject to each hirer paying his own usual fare less a discount of sixpence up to a fare of three shillings and one shilling for fares over three shillings. A hirer has the right to have companions with him, and may if he chooses, insist on having the exclusive use of the cab.

3. Motor-vehicles (*Registration-plate*) *Regulations, 1934, Amendment No. 8* (*Serial No. 1942/110*). These regulations relate to number-plates for cars of diplomatic representatives, but have, with others, been suspended by Serial No. 1942/152 mentioned hereunder.

4. Delivery Emergency Regulations, 1940, Amendment No. 1 (*Serial No. 1942/146*). This is an amendment to the regulations concerning the zoning of deliveries of household commodities. The amendment authorizes the setting up of committees to assist in administration of the schemes.

5. Motor-vehicles Registration Emergency Regulations, 1942 (*Serial No. 1942/152*). These regulations suspend the former regulations relating to the annual licensing of the motor-vehicles and make provision to avoid the necessity of the annual changing of number-plates. Instead of changing the plates, the existing black and white ones will be retained (new plates of these colours being issued for newly-registered vehicles only). As an indication that the current license fees and third-party insurance have been paid, windscreen "stickers" will be issued each year. The "stickers" will have different colouring for each licensing period. The regulations also reduce the license fees for private cars from £2 to £1 15s. A motorist may on licensing his vehicle be required to supply particulars of motor-vehicle tyres and tubes in his possession.

6. Motor-vehicles Insurance (*Third-party Risks*) *Regulations, 1939, Amendment No. 2* (*Serial No. 1942/153*). No doubt on account of the restrictions in running necessary under the petrol rationing system these regulations reduce the compulsory insurance premiums for many classes of motor-vehicles.

7. Road Transport Emergency Regulations, 1942 (*Serial No. 1942/145*). These regulations are an interesting example of the very wide powers which it is necessary for the Government to take under war conditions, and which, perhaps, will never be exercised to the fullest extent.

The effect of the regulations is to give to the Minister of Transport (who has power to delegate his powers) complete control over the employment and use of all motor-vehicles throughout the Dominion, including the power to prevent their use for any specified purpose. For example, if it is necessary to put five hundred trucks on to the carriage of war material in a certain area, the Minister of Transport or any person authorized by the Minister, has the power to see that this is done. This includes also power to direct that the requisite labour be supplied: Reg. 4 (2). It follows that dispensation from existing contracts must be given to those who are prevented from fulfilling the contracts due to exercise of the Minister's powers, and this dispensation is provided by Reg. 7. It is stated in Reg. 5 that any person using a motor-vehicle in terms of a notice given under the regulations is exempted from the provisions of the Transport Licensing Act, 1931, and heavy traffic restrictions save to the extent provided in the notice, and he is further exempted from obligation to pay any additional compulsory third-party insurance premium which might otherwise be required owing to the use of the vehicle in terms of the notice.

Theft-Bote.—Lord Westbury observed in the course of his speech in *Williams* v. *Bayley*, (1866) L.R., 1 H.L. 200, 220, that if you know that a crime has been committed, you must not convert it into a source of profit to yourself. A contract to help a thief whom you know has stolen your goods is a breach of this rule; and the maker of such a contract may find himself before a Judge and jury for a misdemeanour. Birkett, J., had lately such a case before him on circuit: *R.* v. *Neaverson* (*Times*, March 6). A master who found his servant guilty of stealing, or suspected her, persuaded her to agree to pay him a small sum. It looks as if he had promised not to prosecute. It was as venial a case as could be found, for the master thought he had done right and told the police of his action. Still it was an offence and a formal sentence of imprisonment was passed. The practice is old and the word is old, 'bote' being apparently 'profit'—as in "What boots it," "freebooter," and so on. But, old or new, the offence must not be allowed.—Apteryx.

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. Magistrates' Court.—*Jurisdiction — Contribution — Whether Claim lies.*

QUESTION: Has the Magistrates' Court jurisdiction to entertain a claim for contribution made pursuant to s. 17 of the Law Reform Act, 1936?

ANSWER: No. The relief claimed is not payment of a debt or pecuniary relief. The remedy provided by the statute is merely an equitable one: *Stevens* v. *Collinson*, [1938] N.Z.L.R. 64, 66. The Magistrates' Court does not possess equitable jurisdiction: *Dempsey* v. *Piper*, [1921] N.Z.L.R. 753, 755; and, therefore, it cannot grant relief in such case. Section 99 of the Judicature Act, 1908, does not help: as pointed out by His Honour, the Chief Justice, in *Taranaki Hospital Board* v. *Brown*, [1941] N.Z.L.R. 586, 587, although that section extends to matters litigated in the Magistrates' Court it "does not mean jurisdiction in equity." The Law Reform Act, it will be noted, does not define "Court."

2. Justices of the Peace.—*Appeal—Point of Law—Case Stated—Preparation.*

QUESTION: How should a Magistrate state a case under s. 303 of the Justices of the Peace Act, 1927? Who should prepare the case on appeal?

ANSWER: As pointed out in *Cogswell* v. *Morgan*, [1933] N.Z.L.R. 1082, Form J.P. 51 is intended only as a guide; and it would be proper for a Magistrate to state his reasons for the particular decision he gave. The directions given in *Downsborough* v. *Huddersfield Industrial Society*, [1941] 2 All E.R. 434, should be adhered to. In the latter case the duty of Magistrates in this regard is thus stated: ". . . to find the facts and state the contentions of the parties, to express the opinion or the decision of the Magistrate, and to submit the questions of law which arise on the case for determination of the Court" (p. 435).

Primarily the duty of preparing the case on appeal rests upon the Magistrate; but the practice has grown up of counsel for the appellant preparing a draft case and submitting the draft to the opposite party. The settled draft is then submitted to the Magistrate for his approval. When approved, the draft is handed to the counsel for appellant for engrossment in triplicate. In short the procedure adopted is that set out in regard to cases on appeal on point of law under the Magistrates' Courts Act, 1928.

3. Magistrates' Court.—*Judgment—Actual Decision.*

QUESTION: When a Magistrate gives a written judgment what part of the judgment constitutes his actual decision?

ANSWER: Only that part in which he gives judgment for one or other party. The rest consists merely of the reasons for his judgment: *Higgison* v. *Blackwell Colliery Co.*, (1915) 84 L.J.K.B. 1189, 1199. If a Magistrate gives an oral judgment it would appear that he is entitled subsequently to give different grounds for his judgment provided he arrives at the same result. Once having found certain facts and given a judgment based on them he is not entitled to alter his opinion regarding such facts.

4. Judgment.—*Judgment by Default—Whether Appealable.*

QUESTION: Is there a right of appeal in the case of judgment by default? Is there such a right where evidence is tendered by the plaintiff but the defendant does not appear?

ANSWER: There is no right of appeal against a judgment given by default: *Allum* v. *Dickinson*, (1882) 9 Q.B.D. 632. The remedy is by way of a new hearing under s. 104 of the Magistrates' Courts Act, 1928.

Where, however, evidence has been given for the plaintiff, but there has been no appearance by the defendant, there is a right of appeal: *Hession* v. *Jones*, [1914] 2 K.B. 421, particularly at p. 427. While this is so, he should apply in the first instance to the Magistrates' Court for a new hearing (*ibid.*, 428).

5. Probate.—*Two Executors applying—One becoming insane after Application, but before Grant.*

QUESTION: Two executors are appointed under a will, and both of these join in an application for a grant of probate; but before the grant is made one of the executors becomes insane. What is the position so far as the present application is concerned, and what steps should we now take?

ANSWER: It is assumed that the Court has been advised of the change of circumstances since the filing of the application, and the application held up accordingly. The next step is to file an affidavit as to the new facts, and a fresh motion asking for a grant of probate to one executor, and reserving leave to the other executor to apply to join in the probate if he should recover and desire probate: see *In the Estate of Shaw*, [1905] P. 92.

6. Divorce.—*Restitution of Conjugal Rights — Order for Petitioner's Costs.*

QUESTION: In the case of a petition by a wife for restitution of conjugal rights, can an order for the petitioner's costs be obtained when the decree is made?

ANSWER: Yes, although practically in all of such cases costs are never asked for, an order for the petitioner's costs can be obtained when the decree is made. Scale costs and disbursements can be allowed, but see s. 51 of the Divorce and Matrimonial Causes Act, 1928. (In a suit by a wife for restitution of conjugal rights recently heard at Wellington, His Honour, the Chief Justice, granted a decree and allowed costs on the lower scale, together with disbursements.)

7. Probate.—*Will of Minor—Member of Royal New Zealand Air Force—Attested for Service while—Subsequent Will—Validity—Requirements for Probate.*

QUESTION: A minor was attested for service in the Royal New Zealand Air Force, on July 4, 1940. He made his will on September 6, 1940. About the same time he was given the opportunity to transfer to the Fleet Air Arm, which he did, and was entered in the Royal New Zealand Navy and attested for Naval Service on September 14, 1940. He reported for duty on about September 10, and lived in barracks at Wellington until September 14, when he embarked on board ship for England, having been wearing his civilian clothes all the time and sailing in them. He was killed in England on Active Service on August 19, 1941.

We are acting for the executor appointed under the will and desire to know whether the same was validly executed on the date mentioned. The question appears to us to be governed by cls. 2 and 6 of the Soldiers' Wills Emergency Regulations, 1939 (Serial No. 1939/276). We are not sure, however, whether attestation brings a civilian within the definitions in these clauses or not. If the matter is doubtful, what is the cheapest and most effective method of resolving it? The whole estate is worth just over £300.

ANSWER: The will is made under s. 9 of the Wills Act, 1837. All that is required is to show, by affidavit in support of the application for probate, that the testator came within Regs. 2 and 3 of the Soldiers' Wills Emergency Regulations, 1939, which modify s. 7 of the Wills Act; and this is proved by his attestation in the Royal New Zealand Air Force, which made him a member of His Majesty's Forces raised in New Zealand: see Reg. 5. (The relevant references to statutes and regulations, &c., should be set out in a memorandum attached to the motion for probate.) The facts that the testator transferred to the Fleet Air Arm, and that he wore civilian clothing after attestation are immaterial. The whole position of the wills of minors who have become members of the Armed Forces since September 2, 1939, is dealt with editorially in 17 NEW ZEALAND LAW JOURNAL, 157 (August 5, 1941).

RECENT ENGLISH CASES.

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

ACTIONS.

Divorce—Maintenance—Death of Divorced Husband—Proceedings Against Administrator for Secured Maintenance—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1.

A divorced wife has no cause of action in respect of secured maintenance which can be kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934.

DIPPLE *v.* DIPPLE, **[1942] 1 All E.R. 234.**

As to cause of action: see HALSBURY, vol. 1, pp. 8, 9, para. 9; and for cases: see DIGEST, vol. 1, p. 13, Nos. 104–108.

CHARITIES.

Relief of Poverty—Fund to Help Persons to Become Self-supporting—Implication of Poverty.

A fund established "for the purpose of helping educated women and girls to become self-supporting," and which has no commercial end in view, is a valid charitable trust.

Re CENTRAL EMPLOYMENT BUREAU FOR WOMEN AND STUDENTS' CAREERS ASSOCIATION INCORPORATED, **[1942] 1 All E.R. 232.**

As to gifts in relief of poverty: see HALSBURY, vol. 4, pp. 111–115, paras. 147–152; and for cases: see DIGEST, vol. 8, pp. 242–245, Nos. 7–50.

CONSTITUTIONAL LAW.

Allied Governments Established in England—Conscription of Subjects Resident in England—Arrest as Deserter—Allied Forces Act, 1940 (c. 51)—Allied Forces (Application of Visiting Forces (British Commonwealth) Act, 1933) (No. 1) Order, 1940 (S.R. & O., 1940, No. 1118).

It is not contrary to British constitutional law for the Government of an Allied State established in England, with the consent of the British Government, to issue a decree conscripting its subjects resident in England.

Re AMAND, **[1942] 1 All E.R. 236.**

For the Allied Forces Act, 1940: see HALSBURY'S COMPLETE STATUTES OF ENGLAND, vol. 33, p. 466.

DIVORCE.

Maintenance—Application for Leave to Apply for Order Over Seven Years After Decree Absolute—Reasonable Time—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190—Matrimonial Causes Rules, 1937, r. 44.

An application for maintenance made seven years after the decree absolute may, in special circumstances, be within a reasonable time and accordingly be entertained by the Court.

FISHER *v.* FISHER, **[1942] 1 All E.R. 438.**

As to provision of permanent maintenance: see HALSBURY, vol. 10, pp. 785–787, paras. 1244, 1245; and for cases: see DIGEST, vol. 29, p. 510, Nos. 5481–5487.

INCOME TAX.

Annual Profits or Gains—Isolated Transaction—Payment for Articles in Newspaper—Revenue Payment—Income Tax Act, 1918 (c. 40), Sched. D, case VI.

Payment for articles in a newspaper, though it may involve a sale of copyright, is of a revenue nature.

HOBBS *v.* HUSSEY (INSPECTOR OF TAXES), **[1942] 1 All E.R. 445.**

As to casual profits of a revenue nature: see HALSBURY, vol. 17, pp. 206, 207, para. 423; and for cases: see DIGEST, vol. 28, pp. 81, 82, Nos. 451–462.

Deductions from Profits—Costs of Litigation—Unfounded Action relating to Business Transaction.

Costs incurred in defending an unfounded action relating to a business transaction may properly be deducted for income-tax purposes from the profits of the business.

INCOME TAX COMMISSIONER, BIHAR AND ORISSA *v.* MAHARAJADHIRAJ SIR RAMESHWAR SINGH OF DARBHANGA, **[1942]1 All E.R. 362.**

As to the expenses wholly or exclusively expended for purpose of the trade, see HALSBURY, Vol. 17, pp. 152, 153, para. 312; and for cases, see DIGEST, Vol. 28, pp. 46, 47, Nos. 233–236.

NEGLIGENCE.

Public Vehicle—Omnibus Brushing Overhanging Branch—Injury through Breaking of Window—Presumption of Negligence—Duty to Avoid Obstructions Above the Level of the Road.

It is the duty of the driver of an omnibus to keep a look-out for obstructions whether on or above the level of the road.

RADLEY AND ANOTHER *v.* LONDON PASSENGER TRANSPORT BOARD, **[1942] 1 All E.R. 433.**

As to presumption of negligence: see HALSBURY, vol. 23, pp. 671–674, para. 956; and for cases: see DIGEST, vol. 36, pp. 88–91, Nos. 589–605.

SHIPPING.

Charterparty — Time Charter — Hire — Cesser of Hire — Charterers Deprived of Use of Ship during Fitting of Degaussing Apparatus.

Hire may not be payable in respect of a period during which the charters under a time charter have no use of the vessel by reason of a voluntary act of the owners, even though there is no express provision in the charterparty.

Re AN ARBITRATION BETWEEN SEA AND LAND SECURITIES, LTD., AND WILLIAM DICKINSON AND CO., LTD., "THE ALRESFORD," **[1942] 1 All E.R. 88.**

As to liability for hire under time charter: see HALSBURY, vol. 30, pp. 308–312, para. 500; and for cases: see DIGEST, vol. 41, pp. 358–363, Nos. 2074–2114.

RULES AND REGULATIONS.

Motor-vehicles Insurance (Third-party Risks) Act, 1928. Motor-vehicles Insurance (Third-party Risks) Regulations, 1939. Amendment No. 2. No. 1942/153.

Emergency Regulations Act, 1939. Road Transport Emergency Regulations, 1942. No. 1942/154.

Emergency Regulations Act, 1939. Expeditionary Force Emergency Regulations, 1940. Amendment No. 4. No. 1942/155.

Customs Acts Amendment Act, 1939, the Customs Acts Amendment Act, 1942, and the Customs Act, 1913. Cook Islands Customs Duties Order, 1942. No. 1942/156.

Emergency Regulations Act, 1939. Meat-exporters' Accounts Emergency Regulations, 1940. Amendment No. 2. No. 1942/157.

Emergency Regulations Act, 1939. National Service Emergency Regulations, 1940. Amendment No. 11. No. 1942/158.

Primary Industries Emergency Regulations, 1939. Milking-machine Control Order, 1942. Amendment No. 1. No. 1942/159.

National Expenditure Adjustment Act, 1932. Amending Maximum Rate of Interest on Savings-bank Deposits made with any Building Society. No. 1942/160.

National Expenditure Adjustment Act, 1932. Amending Maximum Rate of Interest Payable on Savings-bank Deposits. No. 1942/161.

Rationing Emergency Regulations, 1942. Clothing Rationing Order, 1942. No. 1942/162.

Emergency Regulations Act, 1939. Oil Fuel Emergency Regulations, 1939. Amendment No. 5. No. 1942/163.

Emergency Regulations Act, 1939. Land Acquisition Emergency Regulations, 1942. No. 1942/164.

Marketing Act, 1936. Meat Marketing Order, 1942. No. 1942/165.

Emergency Regulations Act, 1939. Police Force Emergency Regulations, 1942. No. 1942/166.

Control of Prices Emergency Regulations, 1939. Price Order No. 89 (Imitation Crystalized Cherries). No. 1942/167.

Control of Prices Emergency Regulations, 1939. Price Order No. 91 (Chocolate Tablets). No. 1942/168.

Emergency Regulations Act, 1939. Local Elections and Polls Emergency Regulations, 1942. No. 1942/169.

Primary Industries Emergency Regulations, 1939. Milking-machine Control Order, 1942. Amendment No. 2. No. 1942/170.

Electricity Emergency Regulations, 1939. Electricity Control Order, 1942. No. 1942/171.

Land Transfer Act, 1915. Land Registry Office Regulations, 1942. No. 1942/172.

Deeds Registration Act, 1908. Deeds Register Office Regulations, 1942. No. 1942/173.

Control of Prices Emergency Regulations, 1939. Price Order No. 92 (Potatoes). No. 1942/174.

Control of Prices Emergency Regulations, 1939. Price Order No. 93 (Eggs). No. 1942/175.