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NUISANCE AND KNOWLEDGE.

AN occupier of land who fails to abate a nuisance within a reasonable time after it has come, or ought to have come, to his knowledge is responsible for the resulting damage. This principle, enunciated by the House of Lords in *Sedleigh-Denfield* v. *O'Callaghan*, [1940] A.C. 880, [1940] 3 All E.R. 349, renders inevitable a correction of all the text-books on Nuisance. These text-books follow the decision of the majority of the Court of Appeal (Scrutton, L.J., dissenting) in *Job Edwards* v. *Birmingham Navigations*, [1924] 1 K.B. 341, where it was held that in the case of a private nuisance mere refusal or neglect by the occupier to remove or abate the nuisance does not make him responsible for any damage it may cause to others. That decision was overruled in the *O'Callaghan* case, which is the latest and most authoritative pronouncement on the law of Nuisance. Their Lordships there refused to accept the distinction between public and private nuisance, on which the Court of Appeal had relied, without disturbing the distinction that an individual cannot take proceedings in respect of a public nuisance unless he has suffered some damage himself. Consequently, the effect of their Lordships' decisions is that where a nuisance, public or private, is committed on a man's land, that is not enough to render him liable; but once he has knowledge—*i.e.*, once he knows or ought to have known—of the nuisance and has had time to correct it and prevent its mischievous possibilities, he will be liable if he fails to do so, and damage results. This decision, in applying the same principle to private nuisances and public nuisances where the civil remedy of damages is sought, declares the duty of an occupier towards adjoining owners of land and his duty towards users of the highway, where his land adjoins it, in respect of their persons and property.*

The point of primary importance to the legal profession—as Stable, J., remarked in *Bank View Mill, Ltd.* v. *Nelson Corporation*, [1942] 2 All E.R. 477, 484—was the liability of an occupier who found himself with a nuisance on his land which he himself had not created; and the House of Lords held that, even though the nuisance was brought on to the land by a trespasser, if the owner, with knowledge of the nuisance and time and opportunity to abate it, allowed it to remain there, he was equally liable as though he had brought the nuisance on the land himself.

The facts in the *Sedleigh-Denfield* v. *O'Callaghan* case were that the respondent society was the owner of property adjoining the appellant's premises. The boundary of its property on that side had originally been a ditch and a hedge, their relative positions changing along the boundary. Where the appellant's garden adjoined the college property, the ditch abutted on the garden, the hedge being on the side of the ditch nearer to the respondent's property. It was admitted that, applying the usual presumption, the ditch at this point belonged to the respondent. About 1934, when a block of flats was erected upon the western side of the appellant's premises, the ditch had been piped in by the County Council. No permission was obtained, and the fact that these pipes had been put in was not at any material time brought to the notice of the respondent authorities, but it did become known to the member of the respondent society responsible for cleaning out the ditch, a matter which had been done twice yearly. No proper guard was put at the entrance to the pipe to prevent its being blocked by debris. The pipe became blocked, so that the appellant's garden was flooded, and he claimed damages from the college, on the ground that the pipe was a nuisance. It was held that as nearly three years elapsed before the garden was flooded, and as a person authorized by the respondent was in charge of the ditch and cleaned it out on its behalf twice a year, the respondent society was liable, because, with knowledge or means of knowledge, it suffered the nuisance to continue without taking reasonably prompt and efficient means for its abatement. The respondent had adopted the nuisance by continuing to use the artificial contrivance of the conduit for getting rid of water from its property without taking the proper means for rendering it safe. Thus, an occupier of land "continues" a nuisance if, with knowledge, or means of knowledge, or presumed knowledge of its existence he fails to take reasonably prompt and efficient means to bring it to an end; and he "adopts" it if he makes any use of any erection or artificial structure which constructs the nuisance without taking

* The principle of *Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330, does not, of course, apply in the circumstances here dealt with, as it relates only to cases where there has been some special use of property bringing with it increased danger to others, and does not extend to damage caused to adjoining owners as the result of the ordinary use of land: *Rickards* v. *Lothian*, [1913] A.C. 263, 280.

the proper means of rendering it safe. Lord Wright stated the principle as follows:

> If the defendant, by himself, or those for whom he is responsible, has created what constitutes a nuisance, and if it causes damage, the difficulty now being considered does not arise; but he may have taken over the nuisance, ready-made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it.

(The period of three years mentioned is of no importance as a measure of time. The defendants would have been liable if the flooding had occurred at any time within the period of three years which elapsed after the erection of the pipe, if the time had been sufficient to enable them to take reasonably prompt and efficient means for abating the nuisance. The "ordinary and reasonable care" to which Lord Wright referred must in each case depend on its own particular circumstances.)

The effect of the House of Lords decision can be locally illustrated from the recent judgment, *Boatswain* v. *Crawford*, [1943] N.Z.L.R. 109, in which Johnston, J., followed the *O'Callaghan* case in relation to damage done to a neighbour's property through the failure of the adjoining owner to abate or to take steps to prevent a scrub fire, of which he or his servants had knowledge, or ought to have had knowledge at least at a time when the fire was easily controllable. In that case, the learned Magistrate in the Court below had held, following *Hunter* v. *Walker*, (1888) 6 N.Z.L.R. 690, that there was no legal duty cast upon the owner of a land upon which an unexplained fire originates to prevent it from spreading to the land of another, though he was present immediately after it was lighted and might have put it out. The *O'Callaghan* case was not cited in the Court below; and, in view of the state of the authorities before that decision, the Magistrate's decision was understandable. But, in following their Lordship's judgment, His Honour held that the owner of the land on which a fire of unknown origin had commenced, and which had been brought to his notice or the notice of his servants and could then have been extinguished in an early and controllable stage, had failed to take any reasonable steps to extinguish the fire; and that he was liable for the damage caused to his neighbour's property when the fire had spread over the boundary on to that neighbour's land. The decision in *O'Callaghan's* case had overruled *Hunter* v. *Walker* (*supra*).

Another application of this principle is illustrated in *Slater* v. *Worthington's Cash Stores* (*1930*), *Ltd.*, [1941] 1 All E.R. 245, 3 All E.R. 28, where a mass of accumulated snow, after storms which lasted some days early in 1941, fell from a roof upon the plaintiff who was standing outside the door of a shop and brought down three 6 ft. lengths of rainwater guttering. The roof had been inspected before the accident and the defendants knew of the dangers, as the gutter projected substantially over the pathway. About 18 in. of snow must have been lying on the roof for four days. It was the occupiers' duty to have abated the nuisance of which they had knowledge or to have put up a warning notice; and, on these facts, they were liable in nuisance and in negligence for the plaintiff's injuries. The Court of Appeal in affirming the judgment of Oliver, J., held that the defendants were liable in nuisance because "they had such knowledge as put on them the duty of taking steps to abate the nuisance or to prevent people from passing within reach of a potential fall of snow."

The same result could follow after an earthquake had seriously damaged a building. The occupier would be liable, if with knowledge or means of knowledge of such damage, and opportunity to make the building safe, he allowed the nuisance to continue, and the adjoining owner or a passer-by later suffered injury to his property or person. In such a case, it would not be the earthquake which caused the resulting damage rendering the occupier liable; but the fact that the occupier of the earthquake damaged building had not repaired it as he should have done. A case of this kind would probably turn on the proof of such knowledge or imputed knowledge, and of the opportunity to take prompt and efficient means to make the building safe.

In another case, *Dollman* v. *A. and C. Hillman, Ltd.*, [1941] 1 All E.R. 355, the plaintiff fell and was injured by slipping on a piece of fat outside a butcher's shop. On the probabilities, the fat either flew from the shop when meat was being cut on a stand in the doorway or, adhering to the shoe of a customer, subsequently remained on the pavement. The Court of Appeal said that if there had been no connection between the shop and the piece of fat there would have been no liability on the shopkeeper's part for leaving the fat on the footpath. Even if he had not seen it there, the shopkeeper, on the facts, had caused the nuisance directly, if the fat had got to the pavement through the doorway, in which case the shopkeeper had put it there, just as though he had picked it up and put it there by hand; or, if the fat got there by adherence to the shoe of a customer, the shopkeeper had caused the nuisance indirectly, because he so conducted his business that fat was in a position on the floor of the shop, where a customer, treading upon it, would be likely to pick it up on his or her shoe and take it out on the pavement. Such a result, in either event, was one which ought reasonably to have been foreseen. Precisely the same facts as those relevant on the question of nuisance led also to the conclusion that the shopkeeper was guilty of negligence. Here, no question of the continuance of the nuisance arose.

In *Cushing* v. *Walker*, [1941] 2 All E.R. 393, a slate, loosened by blast from an enemy bomb in September, 1940, fell from a roof during a high wind three weeks later. Reasonable inspection of the roof did not disclose the loosening. It was held that the defendants were not liable. The nuisance was caused by enemy action—that is, by the act of a trespasser, but the defendants had no knowledge or presumed knowledge of the nuisance. This followed from the dictum of Viscount Maugham in the *O'Callaghan* case: "An occupier of land 'continues' a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so."

Moreover, as Lord Atkin and Lord Porter declared in their speeches in the *O'Callaghan* case, the knowledge of a servant is attributable to his employers. Lord Maugham considered employers liable independently of their servants' knowledge. He said:

> All that is necessary in such a case is to show that the owner or occupier of the land with such a possible cause of nuisance upon it knows of it, or must be taken to know of it.

> An absentee owner, or an occupier oblivious of what is happening under his eyes, is in no better position than the man who looks after his property, including such necessary adjuncts to it, in such a case as we are considering, as its hedges and ditches.

Lord Wright and Lord Romer would hold the employer liable, in the absence of the servant's knowledge, as being in possession and control of the land from which the nuisance began as a result of conditions capable of discovery and remedy, with ordinary and reasonable care and attention in the management of his property.

It follows from their Lordship's judgments in the *O'Callaghan* case that a plaintiff, in order to succeed, must establish that the defendant either knew or ought to have known of the existence of the nuisance. (The plaintiffs in the modern cases referred to by Lord Wright, on p. 367, did not have this knowledge.) Having established this, the plaintiff must prove that the defendant suffered the nuisance to continue without taking reasonably prompt and efficient means for its abatement. Until it is proved that the defendant knew or ought to have known of the existence of the nuisance, he cannot be held liable for the acts of a trespasser who created it. Again, the occupier of the land is liable for a nuisance to the extent that he can reasonably abate it, even though he has neither created it nor received any benefit from it. It is enough, said Lord Porter, if he permitted it to continue after he knew, or ought to have known, of its existence. To this extent, but to no greater extent, he must be proved to have adopted the act of the creator of the nuisance. Finally, it must be established that the defendant, having knowledge, could have prevented the danger if he had acted reasonably.

It would be a defence to show that the resulting injury to a neighbour's property was due to a circumstance so exceptional that it should be regarded as an act of God; or, subject to the qualifications stated by Viscount Maugham, at p. 354, that the damage was caused by the interference of a trespasser. In this connection, Lord Maugham and Lord Wright in particular approved the statement of the law in *Salmond on Torts*, 5th Ed. 258–265:

> When a nuisance has been created by the act of a trespasser or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.

Lord Maugham observed that internal fires on large refuse-heaps may require special consideration.

Finally, it is a matter of interest that nearly seventy years before their Lordships' speeches in *O'Callaghan's* case, a similar statement of the law of nuisance was made in the Court of Appeal here, though it does not appear to have been followed in our Courts. In *Whitlock* v. *Parsons*, (1875) 1 N.Z. Jur. (N.S.) C.A. 46, 51, it was held by Sir James Prendergast, C.J., and Johnston, J., sitting as a Court of Appeal, that, as a general rule, an action will be against a person who continues a nuisance as well as against one who creates it, provided he had power to prevent its continuance.

ANNUAL TAX RETURNS.

Economy in the Use of Forms.

The Commissioner of Taxes has requested the co-operation of the profession in his attempt to secure economy in the use of taxation return forms.

When plentiful supplies of paper were available, quantities of returns were printed greatly in excess of known requirements to ensure that neglect to furnish returns could not be excused by the plea that return forms were unobtainable.

The paper-supply position has now altered and the Commissioner is experiencing the utmost difficulty in obtaining adequate supplies of return forms to meet the known demand. Whereas in past years four forms were printed and distributed for each completed one returned to the Tax Department, it will not be possible for 1943 to provide more than half that number, and users of the forms will need to practice economy if the available supplies are to satisfy all demands.

The Commissioner realizes that all practitioners furnishing returns on behalf of clients require to keep a copy preferably on the actual form of return and efforts have been made to provide sufficient forms to allow of this being done. There will not, however, be enough forms to permit what was apparently a general practice in the past—namely, the using of an actual return form as a draft and the taking of an extra copy for office records.

When asked what steps he had taken to economize in the use of paper by reducing the size of forms, the Commissioner said that wherever possible reductions had been made and he instanced the case of the Social Security declaration of income other than salary or wages which is now half its original size, and the new land-tax return form for use where the holding of land at March 31, 1943, is the same as that at March 31, 1942, the new form in this case being only one-fourth of the size of the previous form. "I have also had all the unused forms from previous years which could be adapted for use as 1943 forms collected and overprinted," the Commissioner continued, "but unfortunately no reduction in size of the income-tax return forms could have been made without sacrificing information essential for the protection of the revenue."

The Commissioner concluded by saying that he was sure that the profession would co-operate to eliminate wastage of forms, and summarized the means for securing economy as follows:—

(1) Don't use a return form as a draft—use salvaged scrap paper.

(2) Don't make more than one copy of returns prepared; if your client requires a copy, then your copy for office records should be made on scrap paper.

(3) Use the appropriate land-tax return forms. The large form for use when the land-holding has changed during the year, and the smaller form for use when no change has taken place.

(4) When obtaining forms at the Post Office or from the Tax Department, don't take more than you actually need, allowing for two forms for each return prepared.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Christchurch. 1943. February 26. *Northcroft*, J.

TRAINOR v. TRAINOR.

Practice — Jurisdiction — Lost Mandatory Document — Inherent Jurisdiction of Court to issue Duplicate of its own Mandate where Original lost.

Divorce and Matrimonial Causes—Practice—Citation—Original lost—Inherent Jurisdiction to issue Duplicate.

The Supreme Court has inherent jurisdiction to issue a duplicate of its own mandate, when the original of that mandate has been lost and where justice requires that a duplicate should be brought into existence, but with such precautions as seem desirable to prevent any inconvenience arising from the possible coexistence of two documents identical with each other.

Thus, whereon original citation and the accompanying documents appeared to have been irrevocably lost in transit between Army Headquarters, Wellington, and the Second New Zealand Expeditionary Force, Middle East, an order was made authorizing the issue of a duplicate citation *simpliciter*.

Chillcott v. *Chillcott and Smith*, (1873) 43 L.J. P. & M. 8; *McHugh* v. *McHugh*, (1898) 20 A.L.T. 45; and *Burns* v. *Cooney*, [1923] V.L.R. 137, followed.

Solicitor: *Roy Twyneham*, Christchurch, for the petitioner.

Case Annotation: *Chillcott* v. *Chillcott and Smith*, E. & E. Digest, Vol. 27, p. 397, para. 3932.

SUPREME COURT. Wellington. 1943. March 2, 17. *Smith*, J.

SOLNIK v. THE KING.

Crown Suits—Petition of Right—Declaration sought that Certain Actions of Crown Ultra Vires *and invalid—No Cause of Action alleged—No remedy sought from Crown—Whether Petition bad in Law—Crown Suits Act, 1908, ss. 25, 37—Crown Suits Amendment Act, 1910, ss. 2, 3, 4.*

A petition under the Crown Suits Act, 1908, which is not intended to allege, and does not allege, any cause of action against the Crown or seek any remedy from the Crown in respect of a permitted cause of action is bad in law.

Therefore, where the suppliant alleged in his petition of right that the Government and its officers directed B. to take and retain exclusive possession of his premises and that the acts of the Government and its officers were *ultra vires* and invalid, and asked for a declaration to that effect in order that if such a declarating order were made he might sue B. in the Magistrates' Court for possession of the tenement, and for damages or mesne profits,

Heine, for the suppliant; *O'Shea* and *C. H. Taylor*, for the respondent.

Held, on a plea by way of demurrer, that the petition was bad in law.

Marconi's Wireless Telegraph, Ltd. v. *The King*, [1912] 31 N.Z.L.R. 732, 14 G.L.R. 548, and *Smith* v. *Attorney-General for Ontario*, (1922) 52 O.L.R. 469, applied.

Guaranty Trust Co. of New York v. *Hannay and Co.*, [1915] 2 K.B. 536; *McDougall* v. *Attorney-General*, [1925] N.Z.L.R. 104, [1924] G.L.R. 585; *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410; *Feather* v. *The Queen*, (1865) 6 B. & S. 257, 122 E.R. 1191; *Windsor and Annapolis Railway Co.* v. *The Queen and Western Counties Railway Co.*, (1886) 11 App. Cas. 607, 614; *Esquimalt and Nanaimo Railway Co.* v. *Wilson*, [1920] A.C. 358; and *Lovibond* v. *Grand Trunk Railway Co.*, [1936] 2 All E.R. 495, 505, referred to.

Solicitors: *W. Heine*, Wellington, for the suppliant; *Crown Law Office*, Wellington, for the respondent.

Case Annotation: *Guaranty Trust Co. of New York* v. *Hannay and Co.*, E. and E. Digest, Vol. 30, p. 147, para. 218; *Dyson* v. *Attorney-General*, *ibid.*, p. 143, para. 194; *Feather* v. *The Queen*, *ibid.*, Vol. 16, p. 236, para. 319; *Windsor and Annapolis Railway Co.* v. *The Queen and Western Counties Railway Co.*, *ibid.*, p. 239, para. 346; *Esquimalt and Nanaimo Railway Co.* v. *Wilson*, *ibid.*, Vol. 11, p. 527, para. 317; *Lovibond* v. *Grand Trunk Railway Co.*, *ibid.*, Supp. Vol. 16, p. 25, *e i.*

SUPREME COURT. Wellington. 1943. February 25; March 9. *Johnston*, J.

GRANT AND OTHERS v. COMMISSIONER OF STAMP DUTIES.

Public Revenue—Death Duties (Succession Duty)—Charitable Trust—Gift by Will of Statuary to be erected in Public Park in memory of Named Person—Whether a "Charitable trust" and so exempt from Succession Duty—Death Duties Act, 1921, s. 18—Statute of Elizabeth, 1601 (43 Eliz., c. 4).

A bequest by will of money to erect in a public park statuary tending to its beautification—a purpose beneficial to the community—is a charitable trust. The pronouncement by the donor that it is a tribute to the memory of a particular person does not cause such a gift to lose its "charitable" character.

In re Bruce, Simpson v. *Bruce and Attorney-General*, [1918] N.Z.L.R. 16, G.L.R. 26; *Special Income Tax Commissioner v. Pemsel*, [1891] A.C. 531; *In re Spence, Barclay's Bank, Ltd.* v. *Stockton-on-Tees Corporation*, [1938] Ch. 96, [1937] 3 All E.R. 684; *Hoare* v. *Osborne*, (1866) L.R. 1 Eq. 139, 585; and *In re King, Kerr* v. *Bradley*, [1923] 1 Ch. 243, applied.

Mellick v. *Asylum (President and Guardians)*, (1821) Jac. 180; 37 E.R. 18, distinguished.

Counsel: *Spratt*, for the appellant; *Broad*, for the respondent.

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

COMPENSATION COURT. Greymouth. 1942. October 2. 1943. February 22. *O'Regan*, J.

McENANEY v. UNION STEAM SHIP CO. OF NEW ZEALAND, LIMITED.

Workers' Compensation—Accident Arising out of and in the Course of the Employment—Worker summoned to fill Vacancy on Night Shift and agreeing to do so—Injury while cycling to Work—Whether Accident arose "in the course of employment"—Workers' Compensation Act, 1922, s. 3.

The plaintiff, who had been loading a vessel of defendant, had returned to his home, when he received a telephone call from a fellow-worker, speaking on behalf of the waterfront controller, that the night shift was a man short and asking him to fill the breach. He replied that he would return when he had finished his meal, and was cycling by the shortest route to the waterfront when he suffered injuries from a collision, which disabled him. The plaintiff's wage commenced at 6 p.m. before he started his journey.

W. D. Taylor, for the plaintiff; *Hannan*, the defendant.

Held, That the accident occurred in the course of the worker's employment which began when he left home (under the contract of service between the defendant and the plaintiff) and that the plaintiff was entitled to compensation.

Blee v. *London and North Eastern Railway Co.*, [1937] 4 All E.R. 270, 30 B.W.C.C. 364; *Shepherdson* v. *Hayward*, (1940) 33 B.W.C.C. 57; and *Dennis* v. *A. J. White and Co.*, [1917] A.C. 479, 10 B.W.C.C. 280, applied.

Ayling v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1943] N.Z.L.R. 30, [1942] G.L.R. 474, distinguished.

Alderman v. *Great Western Railway Co.*, [1937] 2 All E.R. 408, 30 B.W.C.C. 64, referred to.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Hannan and Seddon*, Greymouth, for the defendant.

SUPREME COURT. Palmerston North. 1943. February 12, 13. *Blair*, J.

CLARKE v. INSPECTOR OF POLICE.

Justices—Appeal—Summary Conviction after Charge entered in "Charge-book" at Watchhouse and Proceedings brought on "Charge-sheet"—Notice of Appeal addressed to Inspector of Police—Brought by him to the Notice of the Arresting Constable—Whether Appeal properly constituted—Practice—Accused surrendered to Bail—Whether Written Information necessary—Justices of the Peace Act, 1927, ss. 78, 81, 316.

Notice of appeal from the conviction of an accused person—after his being arrested on a charge which was entered in the "Charge-book" in the watchhouse, the case proceeding upon a charge-sheet—served on the Inspector of Police for the district, and brought by him to the notice of the arresting constable, is a sufficient notice of appeal within s. 316 of the Justices of the Peace Act, 1927.

The provisions of s. 78 of the Justices of the Peace Act, 1927, are applicable when an accused person surrenders to his bail, in which case the production of a written information is unnecessary unless the accused person so desires.

Counsel: *Rowe*, for the appellant; *Cooper*, for the respondent.
Solicitors: *G. E. Rowe*, Palmerston North, for the appellant; *Cooper, Rapley, and Rutherford*, Palmerston North, for the respondent.

LAW RELATING TO MOTOR-VEHICLES IN NEW ZEALAND.

Noteworthy Decisions in 1942.

By W. E. LEICESTER.

Shock and suicide provide the subject-matter for the leading cases of 1942 in the law relating to motor-vehicles; but one refreshing note in a somewhat humdrum year, in so far as new authority is concerned, is that the Court of Appeal has been deprived of its usual opportunity of reconsidering contributory negligence from the "donkey's case" onwards. In *Hay or Bourhill* v. *Young*, [1942] 2 All E.R. 396, the House of Lords has given a decision of far-reaching importance. Here, the appellant, a fishwife, alighted from a tramcar and went round the near side to its front in order to lift her fish basket from the driver's platform. A motor-cyclist travelling in the same direction as the tram-car passed the appellant while her back was turned to the rider, and some 50 ft. further on collided with a motor-car which had been travelling in the opposite direction. The cyclist, who was killed in the collision, was held to have been travelling at an unreasonable speed. The appellant saw and heard nothing of the cyclist until the sound of the noise created by the impact of the two vehicles reached her senses; and, after the cyclist's body had been removed from the street, the appellant approached and saw the blood left on the roadway. It was alleged that, as an immediate result of the violent collision and the extreme shock of the occurrence, the appellant had wrenched her back and was thrown into a state of terror which, it was explained, did not involve any element of reasonable fear of immediate bodily injury to herself. Lord Russell of Killowen, adopting the view of Lord Macmillan in *Donoghue* v. *Stevenson*, [1932] A.C. 562, considers that a man is not liable for negligence "in the air," the liability only arising when there is a duty to take care and where failure in that duty has caused damage. In his judgment, Lord Porter refers to the conclusion in favour of the plaintiff reached by the Court of Appeal in *Owens* v. *Liverpool Corporation*, [1939] 1 K.B. 394, in which the driver of a tram negligently ran into a hearse containing the body of a relation of the plaintiffs and was held liable to them in respect of the illness caused by the shock of seeing the accident. At p. 409, he says:

> The Lords Justices seem to have accepted the view that the driver ought to have anticipated that the result of his negligence might be to cause emotional distress to spectators of the consequent accident and, therefore, was guilty of negligence towards any one physically affected by feelings induced by the sight presented to them. With all respect I do not myself consider the Court of Appeal justified in thinking that the driver should have anticipated any injury to the plaintiffs as mere spectators or that he was in breach of any duty which he owed to them.

Lord Wright also, in his reference to *Owens's* case, considers that the good sense of the tribunal should have stopped short of judgment for the plaintiffs in that case since the particular susceptibility there was, to his mind, beyond any range of normal expectancy or of reasonable foresight. The decision is placed by Lord Porter upon the basis that it is not every emotional disturbance or shock which should have been foreseen, as the driver of a motor-vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm. The opinion of the House is that, in the circumstances of the case, the motor-cyclist owed no duty to the appellant since he could not be held to have reasonably foreseen the likelihood that, placed as she was, she could be affected by his negligent act. It is to be remembered, however, when this case is compared with cases like *Dulieu* v. *White and Sons*, [1901] 2 K.B. 669, and *Re Polemis and Furness, Withy, and Co.*, [1921] 3 K.B. 560, that this is a decision upon the question as to whether or not liability for negligence was established and not upon the question of remoteness of damage.

Widespread discussion upon the legal consequences of suicide is furnished in *Murdoch* v. *British Israel World Federation (New Zealand) Incorporated*, [1942] N.Z.L.R. 600. This was a claim by a widow under the Deaths by Accidents Compensation Act, 1908, on behalf of herself and her two children claiming damages for the death of her husband. In December, 1940, in the course of his duty, the husband was adjusting a trolly-pole of a tramcar when he was knocked over by a motor-car driven by the secretary of the federation in circumstances giving rise to an action for negligence. It was found necessary to amputate Murdoch's left leg above the knee; the right leg became

infected with osteomyelitis; and while in hospital he began to have mild delusions that other patients of the ward were laughing at him, nurses were callous, and letters of sympathy sent to him were insulting. He was returned to his home to see whether a change in his surroundings would help his mental state, and nurses from the hospital attended periodically to dress the wound. However, while waiting for room in the hospital to enable him to have a further operation for the removal of dead bone in the leg, and on the very day that his wife called on his solicitor to endeavour to expedite his re-entry into hospital Murdoch committed suicide. A claim for £7,000 damages for personal injury had already been issued in his behalf, and for this was substituted a claim for £3,500 by his dependants. The defence of suicide was pleaded, whereupon it was alleged for the plaintiff that the deceased had become mentally deranged as the result of his injuries and at the time of his death was suffering from a well known form of insanity known as melancholia. At the trial a nonsuit was sought upon the ground that the plaintiff had not proved that at the time of his death the deceased was suffering from a disease of the mind so as not to know the nature and quality of the act he was committing and that it was wrong. The Chief Justice (Sir Michael Myers) with the consent of counsel, moved the case into the Court of Appeal upon the ground that "the statement of a number of issues to meet the various possible legal positions and a direction that would also have to envisage those different possibilities would tend to confuse the jury, and that a continuation of the trial before the jury might lead to a multiplicity of proceedings, new trial and nonsuit motions, probably new trials, and appeals, resulting in delay, increased expense, and perhaps driving a litigant of slender means from Court to Court to seek redress *in forma pauperis*."

Considerable criticism was levelled at this course of procedure. Ostler, J., considered that the Court of Appeal should not be placed in the embarrassing position of having to decide questions of fact without having seen the witnesses, although he thought that, as the case had been referred, responsibility for a decision should be accepted. The opinion of Fair, J., was that in practically every case tried with a jury it was possible to submit issues that would obtain findings applicable to whatever construction of the law was subsequently adopted. Smith, J., evinced considerable surprise that the question as to whether or not Murdoch knew that what he was doing was wrong (it was common ground that he knew the nature and quality of the act) should have been removed from the jury to whom he thought that counsel's contentions could have been put, and he doubted the jurisdiction of the Supreme Court to act as it had done. The main case on which the Chief Justice had relied as a precedent read, in Smith, J.'s., view, like a "cautionary tale" and constituted a serious warning against turning the Court of Appeal into a Court of first instance, even with the consent of the parties, where the facts were in dispute. On the other hand, the Chief Justice in his judgment states that the practice of such removal is not confined in New Zealand, and cites *Byrnes* v. *Commissioner of Stamp Duties*, [1911] A.C. 386, a case from New South Wales, in which the Full Court were given liberty to draw inferences and deal with the matter as a jury.

The difficulties which were encountered in this case become manifest when consideration is given to the facts. The lay-witnesses were unable to say from their own personal observations that the deceased at the time of his death was suffering from delusions or exhibiting other symptoms from which a diagnosis of melancholia had to be inferred; and the Court had to determine whether inferences from the accounts of such people, which might or might not be true, should be accepted as evidence. None of the three nurses who massaged the deceased for the first four months after he returned home and every other day for the remaining three months of his life was called to speak as to his condition; and Johnston, J., considered it hard to understand how doctors could have given an opinion in the case without having an opportunity of first examining the nurses or having statements from them. He did not regard complaints of the deceased about the nurses and others in the ward laughing at him as justifying a description of a mental condition impaired by delusions. The majority of the Court (Sir Michael Myers, C.J., and Ostler and Fair, JJ.) held that Murdoch's insanity was caused by the accident and that the chain of causation enabled the widow to succeed. They fixed the damages at £2,079. On the other hand, Johnston, J., who exhaustively analysed the medical evidence, came to the conclusion that there was no evidence on which a jury could find deceased, at the time he committed suicide, did not know that his act was wrong. Smith, J., declined to accept the invitation extended to the Court of Appeal to do the jury's job. Altogether, we leave a perusal of the judgments with a feeling of vague dissatisfaction, if not of a form of melancholy not amounting, we hope, to actual melancholia. With great respect and while recognizing that from the widow's point of view there should be no distinction in principle between recovery in this case at common law or under the Workers' Compensation Act, we feel that the onus being on the plaintiff to prove that the deceased did not know he was doing wrong, the tendency has been to bridge this gap; and the bridge, like Hemingway's for which the bell tolled so interminably, is likely to blow up at any time.

An unsuccessful attempt to apply the "rescue" doctrine was made in *Ireton* v. *Whyte*, [1942] N.Z.L.R. 325, where a traffic inspector while engaged in pursuing a motorist, whom he considered to be travelling at an excessive speed, himself reached one of more than seventy miles an hour when approaching a corner, with the result that, in an attempt to turn it, he skidded, overturned, and injured himself. It was contended that the purpose of the pursuit was to prevent driving which was a menace to road users and the cause of the plaintiff's accident was the dangerous driving of the defendant. Mr. Justice Johnston was not disposed to accept the suggestion that a traffic inspector is a kind of G-man trained to get his man, nor that there was any need for him to risk his own life or to drive recklessly; and inasmuch as there was no evidence that the plaintiff saw any user of the road, either pedestrian or vehicle-driver, who was in imminent danger or in any danger at all from the defendant's driving, which could justify plaintiff taking any risk or raise any natural impulse to protect that could impel him to drive his own car at a speed or in any way that was dangerous to himself, he felt bound to withdraw the case from the jury. The Court, at p. 327, appears to take a somewhat narrow view of the right of a plaintiff to recover where he has voluntarily intruded into a danger-zone created by another's

negligence: a wider view is to be found in the impressive judgment of Cardozo, J., in the New York Court of Appeals in *Wagner* v. *International Railway Co.*, (1921) 232 N.Y. 176. The following passage stated by Greer, L.J., in *Hayes* v. *Harwood*, [1935] 1 K.B. 146, to represent the law in England is cited from an article by Professor Goodhart in *5 Cambridge Law Journal*, 196:

> The American rule is that the doctrine of the assumption of the risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty.

Thus in *Morgan* v. *Aylen*, [1942] 1 All E.R. 489, the plaintiff who was escorting a child of three and a half years back to his home, as she had done on a number of previous occasions, ran out on to the road to save the child who was in danger of being struck by a motor-cycle driven at a high rate of speed. It was held by Cassels, J., that the initial wrongful act was on the part of the defendant who was approaching the cross-roads at too great a speed, and as it was a natural and proper thing for the plaintiff, when she saw the danger, to run out to save the child, there was no contributory negligence on her part. It would seem that the maxim *Volenti non fit injuria* has no application where the defendant by his misconduct places a third person in imminent danger from which the plaintiff, acting like a reasonably courageous person, endeavours to rescue him and is injured in consequence: *Winfield's Cases on the Law of Tort*, (1941). On the other hand, acquiescence by a passenger depends upon whether he has freely and voluntarily agreed to incur the risk. Thus, where a passenger was travelling in a motor-car which was driven on or over the centre of the road at an excessive speed and which collided with a lorry loaded with hay, the Court considered that the defence to be successful must establish knowledge on the part of the plaintiff to justify the conclusion that he had agreed in the circumstances to ride on at his own risk: *Keane* v. *Knowles*, [1942] S.A.S.R. 13.

From South Australia, also, comes a decision on the much disputed question of what constitutes "driving without due care": *Fraser* v. *Dayman*, [1942] S.A.S.R. 5. In this case, the driver of a tramway bus overtook and ran down in a public street a motor-car which had stopped at some 20 ft. out from the kerb and in the course usually taken by traffic rightly using the road. The bus was proceeding at too high a speed to enable its brakes to stop it sufficiently soon and the driver was unable to guide it as the wheels locked and it slid on a surface made slippery by rain. In the opinion of Murray, C.J., the offence of driving "without due care" has obvious reference to the duty imposed by the common law on all persons who drive vehicles on a public road to manage them with the same degree of care as an ordinary prudent man would deem necessary in the circumstances in order to avoid causing damage or injury to other persons using the road. "For the due observance of that duty the driver must keep a proper look out, give timely warning of his approach to other persons who may not be aware of his coming, exercise proper control over his engine and steering-gear, and use his brakes when necessary." With this decision, there may be contrasted that of Mr. Justice Smith in *Johnston* v. *Griffin*, [1942] N.Z.L.R. 554, where he had to consider the effect of Reg. 17 of the Traffic Regulations, 1936, which provides that no person shall drive any motor-vehicle at such a speed that the vehicle cannot be brought to a standstill within half the length of clear roadway which is visible to the driver immediately in front of the vehicle. In his opinion, this regulation is not designed to control the entry of traffic from side roads to main roads, but to control the speed at which a driver should travel in relation to what is immediately in front of him, the duty being governed by the length of clear roadway visible to the driver in the direction immediately in front of him:

> The second paragraph of Reg. 17 (1) shows that if another vehicle were being driven in front, the length of clear roadway would be limited by the position of that vehicle. Other examples would be the approaching of bends in a road or the obscuring of the road immediately in front by fog. The regulation is therefore designed to ensure safe progress in relation to the visibility immediately in front of the driver. On the other hand, the duty of a driver in relation to traffic coming from his right or his left is controlled by any rules of the road such as the right-hand rule which determine who has the right of way. The right-hand rule facilitates the safe use of intersection highways by permitting driving in accordance with it. If Reg. 17 (1) were held to govern the entry of side-road traffic on either side of a main highway, the right-hand rule would be virtually superfluous. As a car approached any side road or track on the left or right of the driver, which could hide a vehicle, so the speed of the car would have to be reduced until perhaps it crawled along before the speed could be again increased. This would make driving in cities almost a series of compulsory starts and stops at many intersections, without the benefit of any reliance upon the right-hand rule. It might seriously hamper the maintenance of a time-table by long distance motor-services and could interfere, I should think, with their economical operation. After all, the regulations are designed to facilitate the passage of traffic with safety and not to impede it with unreasonable restrictions.

Other traffic cases involving negligence may be briefly noted. That fruitful source of litigation, the pedestrian in dark clothes, rears his injured head in *Blunderfield* v. *Mates*, [1942] S.A.S.R. 1. Here he was walking at night across a well-lighted street to catch a tram, and at the same time two motor-cars were approaching towards him. The driver of the first saw and avoided him by turning to his left and passing behind him; but the plaintiff proceeded on his way and the second motor, which was driven more to the right than the first motor-car, swerved but failed to avoid the pedestrian. In the vain hope that this article may be remembered by some future jurymen, attention is drawn to the observation of Napier, C.J., that there is no doubt it is easier for a pedestrian to see the head lights of a motor-car than it is for the driver to see the pedestrian at night when he is wearing dark clothes and the road is wet, and it is necessary to make some allowance for a driver who assumes that pedestrians will act reasonably. The Court held that, in attempting to cross in front of oncoming motor-cars in the manner he did, the plaintiff had acted without regard for his own safety, and he failed to recover. The duty laid down in *Bailey* v. *Geddes*, [1938] 1 K.B. 156, as imposed upon a driver approaching a pedestrian-crossing—he must proceed at such a speed as to be able, if necessary, to stop before reaching the crossing—was held not to be altered by the imposition of the black-out regulations, although the Court of Appeal in *Franklin* v. *Bristol Tramways Co., Ltd.*, [1941] 1 All E.R. 188, is an authority for the proposition that during black-out conditions a pedestrian has a new duty of bearing

in mind the difficulty which the driver of an oncoming vehicle has to see a person or vehicle bearing no light, and it must be realized that it is the duty of such a pedestrian to take all reasonable steps to minimize this difficulty. In *Lowrie* v. *Raglan Building Co., Ltd.*, [1942] 1 K.B. 152, the plaintiff's husband while standing in a queue on a footpath was knocked down and killed by a lorry which skidded on frozen snow on the roadway. It was not fitted with chains, and it seemed from the evidence that the lorry did not mount the footpath but that its tail overhung the kerb and caused the accident. The plaintiff was non-suited and appealed. The Court of Appeal (Lord Greene, M.R., Goddard and du Parcq, L.JJ.) allowed the appeal, holding that the plaintiff had established a *prima facie* case and that the decision relied on by Wrottesley, J.—*Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652—was distinguishable as it "turned on very special circumstances." The defendant while admitting that if the lorry had mounted the pavement there would have been a *prima facie* case of negligence under the doctrine of *Res ipsa loquitur*, contended that the position was different where some part of the vehicle merely overhung the pavement. The Master of the Rolls considered, however, that there could be no distinction in principle between the two cases, and that, in the absence of evidence explaining the skid and the occurrence of the accident, a *prima facie* case had been made out and there should be a verdict for the plaintiff. Finally, the duty of a driver on a country road to look out for overhanging branches is emphasized in *Radley* v. *London Passenger Transport Board*, [1942] 1 All E.R. 433. The plaintiff, a small boy, was sitting quietly on the top deck of an omnibus when a branch of a tree which overlapped the road brushed against the omnibus in such a way that two or three windows were broken and a splinter of broken glass penetrated the infant plaintiff's eye which as a result had to be removed. There was evidence that branches had brushed against the omnibus before on the particular road, and the Court held that that fact imposed a duty on the defendants to see that it did not recur. Mr. Justice Humphreys placed his decision on the basis—there was no evidence at all on the part of the defendants—that when the omnibus entered upon that particular portion of the road, there was an obstruction clearly visible to the driver which he should have avoided.

Practice notes in this branch of the law have not been added to measureably during the year. Judges in the Court of Appeal discussed the question of the procedure to be followed in regard to applications for the Court's approval of compromises of claims by infants for bodily injuries resulting from another's negligence. A summary of their views is to be found in "Practice Note," [1942] N.Z.L.R. 231. Attention is drawn to the view that it is undesirable in cases of compromise of infants' claims that the initiative in bringing such a matter before the Court should be taken by the person responsible for the injury to the infant. In *James* v. *Glenn*, [1942] V.L.R. 132, a cyclist was killed and his parents brought an action for damages under the Wrongs Act, 1928, against the driver of the motor-car. It seemed that the only persons present at the collision, apart from the deceased, were the defendant and the occupants of his car. Interrogatories were administered to the defendant seeking his version of the collision, and he refused to answer these upon the ground that the collision had been the subject-matter of a Coroner's inquest at which he had given evidence on oath and had been cross-examined on behalf of the plaintiffs. In the view of the Full Court (Mann, C.J., MacFarlan and Lowe, JJ.) there was no rule of practice which enabled a defendant in such circumstances to resist interrogatories and he was required to answer them subject to specific objections.

A useful reminder to those who have to draw pleadings under the Deaths by Accidents Compensation Act, 1908, is afforded by *Lundman* v. *Commissioner of Railways*, (1942) 59 W.N. (N.S.W.) 140, in which Street, J., states that the particulars to be furnished under the corresponding Act in New South Wales (Compensation to Relatives Act, 1897) should show the nature and extent of the financial loss suffered by the death of the deceased and should distinguish in appropriate cases between wholly dependent and partially dependent persons. "The particulars have to be 'full' and that requires that the defendant should be informed with a reasonable degree of certainty as to the actual financial loss sustained by each claimant. This would depend upon such factors as the respective ages of the claimants, their position in life, the value of the benefits received by them individually from the deceased, and such other matters as would enable a defendant to ascertain, with some degree of exactness, the extent of the loss which he must make good if his liability to pay compensation is established. In effect the particulars should be such as would reasonably inform a defendant of the full extent of the loss alleged to have been sustained as a result of the death of the deceased, and would provide him also with some basis for calculating the amount which would make good that loss."

RENT STABILIZATION: JURISDICTIONS DEFINED.

By Reg. 2 of the Economic Stabilization Emergency Regulations, 1942, Amendment No. 1 (Serial No. 1943/38), Reg. 21 (1) of the principal regulations, which came under criticism on p. 26, *ante*, has been amended so that the respective jurisdictions of the Supreme Court and the Magistrates' Court in respect of applications by landlords and tenants under the regulations have been more satisfactorily defined.

It is now provided that the jurisdiction conferred on the Court by the principal regulations may be exercised by the Supreme Court where the basic rent of the property concerned *exceeds* an annual rent of £525; and, if the rent be less than that sum, the Supreme Court may entertain an application if the parties agree in writing that the Supreme Court shall have jurisdiction.

The jurisdiction conferred on the Court by the regulations may be exercised by a Magistrate where the basic rent of the property concerned does *not exceed* an annual rent of £525; but, if the parties so agree in writing, a Magistrate or any specified Magistrate shall have jurisdiction even though the rent be in excess of that sum.

The definition of "the Court" in Reg. 12 of the principal regulations has been revoked, and "The Court" is now defined as meaning the Supreme Court where that Court has jurisdiction; and, where a Magistrate or any specified Magistrate has jurisdiction in accordance with Part II of the regulations, as meaning any Magistrate or the Magistrate so specified, as the case may be. Regulation 21 (1) is accordingly revoked, and a new subcl. (1) substituted for it.

LAND AND INCOME-TAX PRACTICE.

Tax Reliefs.

At a time when taxation rates are abnormally high, a consideration of the statutory provisions and practice with regard to relief from payment of taxation may be helpful to practitioners. The following is a survey of the various methods of obtaining a reduction of tax assessed.

INCOME-TAX.

Default Assessments.—Many taxpayers fail to render returns, and are assessed under the provisions of s. 14 of the Land and Income Tax Act, 1923, on an income known to have been received, or on an estimated income. A surprisingly large number of persons who receive such assessments do not lodge objection within the specified time, and ultimately face a demand for payment, and, in some cases, a summons for recovery of tax assessed in the absence of a return. Although the period prescribed for objection may have expired, the Commissioner will accept a proper return and reassess the tax to the basis of a taxpayer's actual income. The Commissioner is not obliged to reassess tax if objection is not lodged within the prescribed time, and each case is treated on its own merits. In this connection it should be noticed that the taxpayer risks a prosecution under the penal clauses of the Act for failure to furnish a return, and the Commissioner is not inclined to stay a prosecution on receipt of belated returns where taxpayers or their agents show continued disregard of the due date for forwarding returns.

Relief on the Grounds of Hardship.—The Commissioner is given discretionary power under s. 7 of the Finance Act (No. 2), 1937, to grant relief where it is shown to his satisfaction that—

(1) A taxpayer has suffered such loss or is in such circumstances that the exaction of the full amount of the tax has entailed or would entail serious hardship; or

(2) That, owing to the death of any person who, if he had not died, would have been liable to pay tax, the dependants of that person are in such circumstances that the exaction of the full amount of the tax has entailed or would entail serious hardship.

This is the principal relief section of the Land and Income Tax Act. Under this section, the Commissioner may give relief to any taxpayer—individual, company, or the estate of a deceased person. Each case is considered on its own merits, and the following notes may be of assistance in framing applications for relief:—

(*a*) *Individual Taxpayers.*—A concise history of the circumstances under which it is considered that the taxpayer would suffer hardship by payment of the full amount of tax should be given. Before a remission of tax can be obtained, it must be shown that *serious* hardship would be suffered by payment. The Commissioner requires details of the assets and liabilities of the taxpayer (and his wife) as at the date of making an application, together with a statement of receipts and disbursements (including personal disbursements) from the date to which the last return was made to the date of making the application. In order to succeed in obtaining a remission of tax, it must be shown that a partial payment, or payment by instalments over a long term, would still result in *serious* hardship being suffered. The nature and extent of any extraordinary financial losses should be shown, in detail. The Commissioner is not disposed to grant a remission of tax where it is apparent that ordinary trade creditors are being paid in full.

(*b*) *Companies.*—The question of a rearrangement of the finances of the concern with a view to obtaining liquid resources for payment of the tax and the existence of any secret reserves or undisclosed assets should be fully explored. Before granting relief the Commissioner will look to the financial circumstances of the shareholders, and if it is obvious that a remission of tax would be of benefit to the creditors, a claim for relief on the grounds of hardship would not be successful. Where applications are made on behalf of private companies, a brief summary of the financial resources of each of the principal shareholders should be furnished, in addition to details of assets and liabilities as at the date of making an application, in order that the Commissioner may determine whether relief is justified.

(*c*) *A deceased taxpayer's estate.*—It must be shown that any anticipated remission of tax would be of direct benefit to the beneficiaries, and not the creditors, and, furthermore, that the beneficiaries are in such circumstances that payment would not merely reduce their share of income from the estate, but would result in serious financial hardship being suffered. The Commissioner has in some cases given relief in estates conditionally on the amount of tax remitted being applied by the trustees for the benefit of a certain beneficiary. It is therefore necessary to indicate briefly the financial resources of beneficiaries, in the same manner as the resources of shareholders would be shown if the application were being made on behalf of a limited company. Here, again, details of the assets and liabilities in the estate, as at the date of application, are required in every case.

An application for relief from payment of income-tax on the grounds of hardship, should not be made on receipt of the notice of assessment, but on receipt of a demand for payment.

If tax assessed has been paid, the Commissioner is empowered to authorize a refund sufficient to alleviate serious financial hardship caused by the tax payment. The approval of the Minister of Finance is required where the amount of tax to be remitted or refunded is in excess of £25. There is no limitation of time within which an application for remission or refund must be made (*cf.* the provisions relating to an application for a refund of social security charge and national security tax paid where such payment is alleged to have caused hardship—see below).

Social Security Charge and National Security Tax.—In addition to the statutory provisions as to exempt income, the Commissioner is empowered to exempt from liability to pay *any specified instalment or instalments* of social security contribution, or any penalties imposed by the Act, any person who would suffer serious hardship by reason of his financial circumstances or sickness, or the sickness of any member of his family: s. 112 of the Social Security Act, 1938.

Under the same section the Commissioner may grant temporary relief by postponing the due date of any instalment, notwithstanding that the due date may have passed.

The section applies to instalments of the registration fee and instalments of social security charge and national security tax, but does not apply with respect to the charge on salaries and wages—there is no authority under which the Commissioner can grant relief from what is commonly known as "wages tax."

Section 17 (2) of the Social Security Amendment Act, 1939, empowers the Commissioner to grant relief in terms of s. 112 of the principal Act to any company "if, having regard to the financial circumstances of the company or to the financial or other circumstances of any shareholders of the company, he thinks fit so to do."

Refunds of instalments of charge, on the grounds set out in s. 112 may be made "in whole or in part, in any case where application in writing for exemption has been made on or before payment of the instalment or penalty, or within twelve months thereafter, but not in any other case." [Section 112 of the principal Act as amended by s. 17 (1) of the Social Security Amendment Act, 1939, and s. 14 of the Finance Act, 1942.] It should be noted that such a limitation of time does not exist with respect to refunds of income-tax or land-tax claimed on the grounds of hardship.

Relief to certain Persons in receipt of Income other than Salary or Wages—Finance Act (No. 3), 1940, s. 4.—When unemployment tax was first imposed in 1931 the charge on income other than salary or wages was levied on income derived during the year ended March 31, 1931, whereas the charge on salaries and wages was imposed on earnings as from August 1, 1931. The Act requires that where a person leaves the country, or dies, he or his personal representative is liable for the charge on salary, wages, or other income derived up to the date of departure, or death, as the case may be. In such circum-

stances the person whose source of income is other than salary or wages will have paid the charge on approximately an additional year's income, and to remove any anomaly the Commissioner is empowered to adjust the liability where—

(*a*) At any time after October 11, 1940, a person dies, or ceases to be ordinarily resident in New Zealand; and

(*b*) Where the Commissioner is satisfied that the person's income derived during the *year ended July 31, 1931*, consisted exclusively or principally of income other than salary or wages *subject to the charge* imposed by the Unemployment Amendment Act, 1931.

In such cases the liability is limited to instalments of the charge falling due prior to the date of departure, or death, as the case may be. Thus, income derived since the expiry of the last income period up to the date of departure or death is free of the combined charge. Relief in respect of national security tax only is available if the date June 30, 1940, can be substituted for July 31, 1931.

Relief is also provided for in the case of a person (to whom (*a*) and (*b*) above apply) who changes the principal source of his earnings from income other than salary or wages to salary or wages, or who has commenced to be liable for deduction of the charge at the source of his income. The Commissioner may reduce "by such amount as appears to him to be just" the instalments of charge payable by that person on income other than salary or wages derived before the date of commencement of deduction at the source. The relief usually takes the form of a remission of all instalments unpaid as at the date of commencement of deduction at the source.

INCOME-TAX AND LAND-TAX.

Relief from Payment of additional Tax incurred by Reason of late Payment—Finance Act (No. 2), 1937, s. 6.—If land-tax or income-tax is not paid within twenty-one days of the due date fixed by an Order in Council or by the Commissioner, 5 per cent. additional tax accrues in terms of s. 135, of the principal Act. Prior to the passing of the Finance Act (No. 2), 1937, there was no authority under which any additional tax for late payment could be waived, whatever the circumstances, but the Commissioner is now empowered to waive or reduce such additional tax in certain circumstances "if he thinks it equitable so to do." In practice, relief under this section is not granted merely on the grounds that the last day for payment was overlooked, or because there were not sufficient funds in hand at the time. The Commissioner exercises his discretion only where it is shown that the circumstances are very exceptional—*e.g.*, where payment is usually entrusted to a responsible person who for some unforeseen happening was unable to make payment before the last day, or where there has been a genuine mistake, which can be supported by evidence, on the part of the taxpayer or his agent, or where the taxpayer was so incapacitated by illness that he was not able to arrange for payment.

The Commissioner is empowered to refund additional tax which has accrued under s. 135 of the principal Act, subject to the approval of the Honourable Minister of Finance where the amount involved is in excess of £25.

(A further article dealing with the various relief from land-tax, reliefs available to farmers and proprietary companies, and the present practice with regard to members of the armed forces will follow.)

CORRESPONDENCE.

The Appointment of King's Counsel.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

SIR,—

Your leading article, "Appointment of King's Counsel in War-time" will, I feel sure, meet with the approval of the whole profession.

It has always seemed to me to be extraordinary that in a democratic country like New Zealand the profession has no voice whatever in the matter of the granting or refusal of patents of King's Counsel. Not only has the profession no voice, but it has no opportunity for expressing any voice. The Law Societies and ninety-nine out of every hundred of their members are usually ignorant of any application for silk until the appointment has been made. In England it is the custom for a barrister who intends to apply for the patent to first notify all stuff-gownsmen who are his seniors on the circuit to which he belongs. Such notification is for the purpose of enabling his seniors to apply themselves, should they choose to do so; but the fact of notification necessarily involves a shedding of the light of day upon the intended application. In New Zealand we have no corresponding custom.

If the granting of patents of King's Counsel is to be resumed when the war is over, the regulations should, at least, be amended so as to provide that any intending applicant shall give prior written notice to the Law Society of the district in which he is then practising, to the Law Society of the district in which he intends to practice as a King's Counsel, and to the New Zealand Law Society. The New Zealand Law Society meets, as a rule, only quarterly, and the notice ought therefore to be at least a three months' one.

Many believe that among the actively practising members of the profession there is an overwhelming majority of opinion in favour of the cessation, in this Dominion, of further grants of the patent. Surely the opinion of the profession should be ascertained before any further appointments are made. I would suggest that no further patents of King's Counsel should be granted prior to the first Legal Conference to be held after the conclusion of the war, and that at that Conference a poll should be taken upon the question of whether any further appointments should be made.

SEVENTEEN YEARS' STANDING.

SIR,—

Few, if any, will deny the propriety of refusing the grant of the patent of King's Counsel during the war. I should imagine that the members of the profession who are serving with the armed forces would feel that their fellow-lawyers had badly let them down if such appointments were made without the strongest protests.

The trouble is that in New Zealand these appointments are made secretly, while in England there exists the sound practice of a barrister seeking this promotion advises his fellow-stuff-gownsmen, senior to him, of his intention to apply for silk.

Your readers may remember the amusing retort Eve, K.C. (afterwards Mr. Justice Eve), received in 1895 when he sent the customary note to his seniors. One replied: "My dear Eve, Whether you wear silk or a fig leaf I do not care A. Dam." The biographer of the late Mr. Justice McCardie said: "In accordance with legal tradition on making the application (for silk) he had to make known his intention to all those other practising barristers who had been called before him and who still remained 'juniors.' Thus it became known through the Temple and throughout the offices of his clients that Mr. McCardie had applied for silk."

The fact that this is war-time makes it doubly desirable that the profession should be told of any such application on the part of any of their brethren. In any event when peace comes it is suggested that the English practice should be adopted here. In the meantime the position could be protected adequately by a statement by the Chief Justice that he will not approve of any applications until a reasonable period after the war.

Of course, all this might be rendered unnecessary if the practice of granting the patent were discontinued; for it is a practice that many think need never have been initiated in New Zealand, and its abolition now would be received with approval.

EQUITY.

SIR,—

Your editorial article on the subject of "Appointment of King's Counsel in War-time" sets out a view of the matter which is unanswerable, but I am puzzled to understand what circumstances suggested the necessity for the publication thereof. Would any counsel, having sufficient eminence in the profession to warrant his contemplating taking silk, seek to advance himself at the expense of those of his colleagues who are prevented by war conditions from applying for the patent? Furthermore, it is certain that those who are charged with the duty of making such appointments would be vigilant to protect the interests of the profession on active service or engaged on service duties here. In any event the wide-

spread comments made by members of the profession concerning your editorial article would indicate that if silk were granted under the circumstances obtaining to-day, in whatever city the applicant had his chambers, professional disapproval would be so strong that the recipient of the distinction would find his income-tax burden a light one.

Anyhow, Mr. Editor, why shouldn't this King's Counsel business be put an end to in this country? Ever since its inception it has been a source of controversy in the profession. A large number take the view that while it is a perfectly proper institution in England where the professions of barrister and solicitor are entirely separate, it is an unwanted excrescence on a system of practice where the two professions are amalgamated. Few, if any, would regret the abolition of the patent in this country.

A JUNIOR BARRISTER.

SIR,—

I read your editorial article in the issue of March 16 with great interest. As to the main topic there dealt with, there cannot, of course, be any disagreement by practitioners. But it seemed to me, somehow, that, in your opening paragraph, you were "trailing your coat" for an argument on the continuance or otherwise of the present method of appointing King's Counsel. I accept the implied invitation to give my views thereon. I can assure you they are shared by a number of my learned friends.

The present conditions under which King's Counsel are appointed approximate to those applied in the wholly different legal atmosphere of Great Britain, where only the rank of barristers practising singly are affected. The application of the same conditions to this country, where every prospective silk is a solicitor as well as a barrister, and is invariably a partner in a firm doing both kinds of work, seems to me an incongruous and unjustified imposition.

During my years in practice I have seen appointments made under the first rules; and I have observed the results of those made under the present rules. Take, for instance, the year 1919. There were then fifteen King's Counsel in New Zealand in active practice, each, with one exception, the member of a firm of barristers and solicitors practising in partnership. The exception practised on his own account also as a solicitor. All these gentlemen were eminent in the profession, and they received their merited promotion without any loss or disarrangement in their personal or professional relationship or mode of conducting their work. They were leaders before taking silk, and leaders they remained. Of them, three became respected and valued Judges; the others, mostly by reason of age, did not attain the Bench eminence.

The position is different to-day. Under present conditions, only those members of the dual profession who are financially able to take the risk are able to seek appointment as King's Counsel. This places what is, in effect, a means test on aspirants to silk. In every case the step involves personal financial readjustment arising from disruption of partnership ties and personal connections, with their assurance of a settled income.

Again, there are men amongst us who would adorn the inner Bar, but who generously place loyalty to their partners and clients before their personal ambitions. They are deprived of asserting in the public eye their just claims to be regarded as leaders, because of the irrevocable break entailed by self-relegation to the lonely grandeur of chambers, which the taking of silk now demands.

Under English conditions, there is much to be said for the imposing of limitations on the barrister who takes silk, since he continues in familiar surroundings and his seeking of preferment is conditioned by circumstances that are peculiar to the single professional blessedness of the barristerial order there. But the imposition of those limitations consequent on the taking of silk here demands an upheaval in personal relations and environment that is completely out of focus in our differently circumstanced dual professional life.

If the grant of the patent to King's Counsel is to continue, I cannot see much wrong in a reversion to the old system. Eminent service deserves recognition in the conferring of higher rank in the members of any group of practitioners. (In 1919, the King's Counsel were distributed, with Auckland's three, Christchurch and Dunedin with two each, and Wellington with six. Sir John Salmond has not been included, as not being in general practice, though that is not to imply that the office of Solicitor-General should of itself qualify its holder for an *ex officio* patent.) It seems to me that it would be an advantage to leading stuff-gownsmen, their partners, and their clients if, under our dual system, the holder of a patent could retain his position with his firm on taking silk, with, perhaps, a limitation to one King's Counsel in any firm. Of course, if any one, on receiving a patent, wished to practise as a barrister only, that would be a matter of preference open to his individual choice. I cannot see how the profession could be adversely affected; probably better all-round service would result, and a lessening of expense to litigants.

For the foregoing reasons, I think that, if the grant of the patent is to continue, the time has arrived when there should be a reversion to the old system. An opportune time for making the change operative would be the occasion of the creation of the first King's Counsel at a convenient time after the conclusion of the present war.

UNAMBITIOUS STUFF-GOWNSMAN.

SIR,—

Your admirable article on War Time King's Counsel serves as a timely reminder: our anxieties should be directed not so much to the welfare of those on the home front, as to those on a more distant front. Our profession is so highly competitive and so personal, that no selection amongst those at home should be made while possible applicants are away on service.

Our stock-in-trade is justice—even among our members *inter se*! If those of us at home in peaceful practice should presume to judge and dismiss the claims (whatever they are) of those overseas, there is something wrong.

For any of us to seek and obtain a higher status, and take its benefits, while possible competitors are overseas suggests "grab." The K.C. urge should be repressed until after the war.

When the ranks of our profession are re-formed after the demobilization of our soldier lawyers, then and then only should promotion be even considered.

The profession here certainly views with apprehension any departure from the principle, traditions, and precedents so clearly enunciated in your article.

The profession's thanks are due to you for the voicing of what they all feel.

CHRISTCHURCH BARRISTER.

POWERS OF ATTORNEY.

New Zealand Government Securities.

The following notification has been received by the Secretary of the New Zealand Law Society from the Chief Accountant, Reserve Bank of New Zealand:—

During last year the Reserve Bank approached the Government regarding the requirements covering the execution of documents relating to Government securities under a power of attorney and the necessity for submitting declarations of non-revocation.

The matter has now been dealt with by legislation and in this connection I would refer you to s. 21 of the Finance Act (No. 2), 1942. This section stipulates that a power of attorney executed in the form provided under that section shall be exempt from stamp duty and shall be irrevocable until notice in writing of its revocation or of the death, disability, bankruptcy, winding up, or dissolution of the principal has been received by the Reserve Bank. Thus execution of documents under the power of attorney prescribed by s. 21 will be accepted by the Reserve Bank without the usual declaration of non-revocation. Similarly such powers of attorney will be exempt from stamp duty.

There are two requirements however. The power of attorney must be drawn in the form prescribed and it must be deposited with the Reserve Bank.

A separate form for companies and one for individuals has now been prescribed by the Minister.

It is not intended to distribute supplies of forms throughout New Zealand, but copies as and when required may be obtained from the Reserve Bank at Wellington or from the District Treasury Officers at Auckland, Christchurch, and Dunedin.

I shall be obliged if you could give notice of the foregoing to members of your Society.

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. Bailment.—*Gratuitous Bailee—Unclaimed Goods—Owners Unknown—Carriers desiring to Clear Unclaimed Goods in Store—Method of Disposal.*

QUESTION: A company, operating both as common carriers and as forwarding agents, is having a cleaning-up of its premises and has found various trunks, packages, &c., which have not been claimed from it, and which it has been storing, but without any contract or arrangement to do so, for over a period of upwards of twenty years. In some cases, there is nothing to indicate to whom the packages belong, whilst in others the present addresses are unknown. What procedure should the company follow to be quit of such packages, and what is the legal authority therefor?

ANSWER: The company is, in respect of all the goods, an involuntary gratuitous bailee, and, at the end of six years from the date of any demand for goods in its custody, any right of action by the owners for recovery would be statute-barred. In the circumstances outlined in the question, where the deposits of the goods were made on numerous dates over twenty years or more, the more convenient—and in any event the safest—manner of disposal of any obligation is to apply to the Court under s. 87 (1) of the Public Trust Office Act, 1908, which is designed for the disposal of unclaimed property, including chattels. The procedure is by way of *ex parte* application by the Public Trustee to a Judge of the Supreme Court for an order, in the interests of the persons wishing to relieve themselves of any legal obligation in respect of property, to exercise one or more of the powers set out in the section. Attention should be paid to s. 87 (2), which provides for the Public Trustee, by notice in the *Gazette*, to advertise the goods for sale or exercise any of the other powers set out in subs. (1), without application to the Court.

2. Workers' Compensation.—*Action—Extension of Time to commence—Application to be made.*

QUESTION: The writer is acting for a person who has a claim for compensation in respect of an injury by accident arising out of and in the course of employment. Owing to various circumstances, which may be rightly described as extenuating, some nine months have elapsed since the accident, and no action for recovery of compensation has been commenced. Under s. 27 of the Workers' Compensation Act, 1922, actions for recovery of compensation must be commenced within six months after the date of the accident, although, in certain cases, the Court may extend the time. What is the procedure in making an application to the Court for such extension?

ANSWER: Application to the Compensation Court should be by way of motion. As to the procedure on motion, see Chapter XIV of the Workers' Compensation Rules, 1939. The motion should be for an order extending the time within which to commence an action, and should be supported by a full affidavit as to all matters causing the delay in bringing the proceedings.

As to "reasonable cause" of delay, see *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 475, 539, *et seq.*

3. Criminal Law.—*Court of Appeal—Appeal against Sentence—Application for Leave—Presence of Prisoner.*

QUESTION: What is the procedure on an application to the Court of Appeal for leave to appeal against sentence (Crimes Amendment Act, 1920), and what form does the application take? Is the prisoner present at the hearing?

ANSWER: Printed forms of application are available, which provide for certain details to be supplied, and the grounds upon which the application is made then follow. The application is filed with the Registrar, Court of Appeal, Wellington, and there are no Court fees payable on the proceedings. If leave to appeal is granted and counsel is appearing, the Court gives a fixture for the hearing on which day counsel may be heard in support of the appeal, and the Crown, being represented, can be called upon by the Court to reply.

The prisoner is not present during the hearing, or when the decision is given, unless the Court decides to increase the sentence, as it has power to do, when, in such case, the prisoner is in attendance to hear the decision increasing his sentence.

4. Mortgage.—*Vested in Executor's Attorney—Person to Execute Discharge.*

QUESTION: A. died in England. One of his assets was a Land Transfer mortgage in New Zealand, of which he was the registered proprietor. A. appointed as his executor B., domiciled in England, and administration of A.'s estate was granted by the High Court in England to B. B. appointed C., domiciled in New Zealand, his attorney to apply for administration in New Zealand, and the Supreme Court of New Zealand granted administration to C., as B.'s attorney, and transmission of the mortgage has been duly registered accordingly. B. is at present in New Zealand. Can B. give a valid discharge of the mortgage?

ANSWER: B. cannot give a valid discharge. C. is the person who must give the discharge: *In re Rendell, Wood* v. *Rendell*, [1901] 1 Ch. 232; *Chambers* v. *Bicknell*, (1843) 2 Hare 536, 67 E.R. 222.

RULES AND REGULATIONS.

Rationing Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations, 1939.) No. 1943/35.

Transport Control Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations, 1939.) No. 1943/36.

Breadmaking Industry Control Order, 1943, Amendment No. 1. (Supply Control Emergency Regulations, 1939.) No. 1943/37.

Economic Stabilization Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/38.

Motor-vehicles Registration Emergency Order, 1943. (Transport Legislation Emergency Regulations, 1940.) No. 1943/39.

Goods-service Charges Tribunal Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/40.

Photography Emergency Regulations, 1939, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1943/41.

Radio Amendment Regulations, 1943. (Post and Telegraph Act, 1928.) No. 1943/42.

Egg Marketing Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/43.

Working Railways Account Regulations, 1935, Amendment No. 1. (Government Railways Act, 1926.) No. 1943/44.

Daylight Saving Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/45.

Cinematograph Operators Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/46.

Purchase of Wool Emergency Regulations, 1939, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/47.