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NATIONALITY: NEW ZEALAND WOMEN MARRIED TO UNITED STATES CITIZENS.

IN international law, the terms "nationality" and "citizenship" are, generally speaking, synonymous. "The nationality of an individual is his quality of being the subject of a certain State, and, therefore, its citizen"[1]. Thus, for example, the citizen of the United States is necessarily also a national of the United States[2]. It is for the Legislature of a particular country to determine who are its own nationals—that is, what persons it will recognize as its own citizens, and upon whom it will confer its citizenship, which is accordingly a creature solely of municipal law. International law is concerned with the citizenship of any State only in so far as it emphasizes or establishes simultaneously that State's nationality.

Several of our readers have recently asked us to answer a question, which may thus be expressed: What is the national character of a New Zealand woman who has married a United States serviceman in New Zealand?

To answer this question we must first consider the relevant New Zealand municipal law. This is found in the British Nationality and Status of Aliens (in New Zealand) Amendment Act, 1935. Section 2 (1) of this statute declares the provisions of the statute of the Parliament at Westminster, the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V, c. 17), as amended and re-enacted in the British Nationality and Status of Aliens Act, 1933 (23 & 24 Geo. V., c. 49), to be part of the law of New Zealand.

Section 10 (1) of the British statute, which is set out in the Schedule to our Amendment Act of 1935, re-enacts the rule that the wife of a British subject is deemed to be a British subject, and the wife of an alien to be an alien; but it subjects this rule to certain qualifications set out in the succeeding subsections, the one which concerns us here being as follows:

> (2) Where a woman has (whether before or after the commencement of this Act[3]) married an alien, and was at the time of her marriage a British subject, she shall not, by reason only of her marriage, be deemed to have ceased to be a British subject, unless, by reason of her marriage, she acquired the nationality of her husband.

Before considering this qualification, it may be well to remember that s. 10 of the British statute, which was adopted in New Zealand by s. 3 of our 1928 statute, originally declared that the wife of an alien must be deemed to be an alien; but the law, as so expressed, was considered to be a hardship on British women married to aliens. The section was repealed and re-enacted to give effect to the Convention on Certain Questions Relating to the Conflict of Nationality Laws, entered into by His Majesty's Government in Great Britain and certain other powers with particular reference to the status of married women, who, by reason of their marriage to aliens, acquired the nationality of their husbands. This was the Nationality Convention of the Geneva Conference of 1930, under Arts. 8–10 of which the loss of British nationality is made conditional on the wife's acquiring the nationality of her husband. Although the Imperial Conference of 1923 had deprecated any change of this nature, the Imperial Conference of 1930 agreed in principle to the terms of the 1930 Convention, and the repeal of s. 10 of the then existing statute and the substitution of a new s. 10 was effected by the British Nationality and Status of Aliens Act, 1933 (Great Britain). This was adopted by the Dominions in due course; in New Zealand by s. 2 (1) of our Amendment Act, 1935, declaring the substituted s. 10 to be part of the law of New Zealand.

Now, as our terms, according to the law of New Zealand: "A British subject" is defined as a natural-born British subject, or a person to whom a certificate of naturalization has been granted, or a person who has become a subject of His Majesty by any annexation of territory. An "alien" is defined as a person who is not a British subject[4]. (A "natural-born British sub-

[1] *1 Oppenheim's International Law*, 5th Ed. 571, para. 293. The political status of an individual is called his "national character," as distinct from his civil status—the basis on which must depend his personal rights, determining his majority or minority, marriage, succession, testacy, or intestacy—which is governed universally by the principle of domicil: see *Udney* v. *Udney*, (1869) L.R. 1 Sc. & Div. 411, 457, per Lord Westbury, National character depends on the will of the State, domicil almost entirely on the will of the individual.

[2] *1 Hyde's International Law chiefly as interpreted and applied in the United States*, 611.

[3] March 26, 1935.

[4] British Nationality and Status of Aliens (in New Zealand) Act, 1928 (N.Z.), s. 3 (adopting s. 37 (1) of the British Statute of 1914 (4 & 5 Geo. V, c. 17)).

ject " is one who is or becomes a British subject on and from the day of his birth[5].)

Since, as we have seen, the national character of a person is determined by the municipal law of any particular country, a New-Zealand-born woman is, in New Zealand law, a British subject, and every one who is not a British subject, by birth or naturalization, is, in New Zealand law, an alien. Under s. 10 (2), as above set out, adopted as the law of New Zealand, a New Zealand woman, who is a British subject, loses her nationality by marrying an alien, *if, by reason of her marriage she acquires the nationality of her husband.* Consequently, to ascertain in any particular case if a New Zealand woman loses or does not lose her British nationality on her marriage to an alien, the municipal law of the State of which that alien is a national must be examined to find if, under that law, she acquires her husband's nationality by reason of her marriage to him, without any further action on her part; or if the converse is the case.

The particular question to be considered here is, accordingly, whether a New Zealand woman of British nationality, on her marriage to a citizen of the United States, acquires United States nationality by reason of that marriage. So we turn to the municipal law of the United States to ascertain her national character after such marriage.

The Fourteenth Amendment to the Constitution of the United States, ratified in 1868, declared: " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside."

In *United States* v. *Wong Kim Ark*, (1898) 169 U.S. 649, 702, Mr. Justice Gray, who delivered the opinion of the Court, in defining citizenship, said in a passage, which still applies:

> Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

Thus, both New Zealand (and other British countries) and the United States have the same test of citizenship, both having adopted the old rule of *jus soli* to its fullest extent—the test applied to both countries being birth within the country, irrespective of the birthplace or nationality of the parents. (In most European countries, and in Japan, nationality is determined by the *jus sanguinis*—that is, by parentage irrespective of place of birth, so that a legitimate child of a national of those countries acquires the father's nationality whether that child is born at home or abroad[5a].) According to the law of the United States, therefore, a *single woman* who is a British subject, unless and until she becomes a United States citizen by naturalization, is an alien.[6] We shall consider later the status of a British subject on her marriage to a United States citizen. In the meantime, we must turn aside for a moment to ascertain the conditions on which the United States confers naturalization on an alien.

Naturalization of aliens by the United States, conferring upon them its citizenship and stamping upon them the impress of its nationality[7], is now regulated by an Act of Congress of July 2, 1940, known as the Nationality Act, 1940. Section 303 of this statute limits the right to become a naturalized citizen of the United States " to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere."

The main provisions of the Nationality Act, 1940, dealing with naturalization, are as follows:—

An alien desiring to be naturalized must declare on oath before the clerk of any competant Court, regardless of the applicant's place of residence in the United States, his intention to become a citizen of the United States. This must be done not less than two nor more than seven years at least prior to the applicant's petition for naturalization. He must declare that he is " not an anarchist, nor a disbeliever in or opposed to organized government," nor a member of any organization teaching such disbelief or opposition; that it is his " intention in good faith to become a citizen of the United States and to reside permanently therein "; and that before being admitted to citizenship he will renounce forever " all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty " of whom or of which he may be a subject or citizen: see s. 331 (54 U.S. Statutes, 1153).

Not less than two nor more than ten years after the applicant has made his declaration of intention to become a citizen of the United States, he may file his sworn petition for naturalization. This must show, *inter alia*, that the applicant has resided continuously in the United States[8] for five years immediately preceding the date of the petition for naturalization, and continuously in the State in which the petition is made for six months immediately preceding its date: see ss. 332 (*a*) and 309 (54 U.S. Statutes, 1154, 1143).

An alien woman may be naturalized in the United States on the same conditions as an alien man, subject, as will appear later, to the relaxation of certain of those conditions in the case of an alien woman married to a United States citizen.

Now we come to the municipal law of the United States which determines the national character of an alien *married woman* on her marriage to a United States citizen. The " Cable Act " of the United States Legislature, officially entitled " An Act in relation to the Naturalization and Citizenship of Married Women," passed on September 22, 1922 (42 U.S. Statutes, 1022),

[5] *Dicey's Conflict of Laws*, 5th Ed. 142.

[5a] There is, both in British and United States law, a qualified recognition of the *jus sanguinis* in exceptions to the general rule of citizenship by birth or naturalization, relating to children born of nationals abroad, when granting them citizenship in certain circumstances: see British Nationality and Status of Aliens (in New Zealand) Amendment Act, 1943, s. 3 and Second Schedule, cls. 1, 2; and the Act of Congress of July 2, 1940, the Nationality Act, 1940, s. 201 (*c*), (*d*), (*g*).

[6] According to the law of the United States, an " alien " is one born out of the jurisdiction of the United States and who has not been naturalized under their constitution and laws: *2 Kent's Commentaries on American Law*, 50; *1 Bouvier's Law Dictionary*, 8th Ed. 172.

[7] " Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen ": per Fuller, C.J., in *Boyd* v. *Thayer*, (1891) 143 U.S. 135, 162. " Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency ": *Luria* v. *United States*, (1913) 231 U.S. 9, 22.

[8] The term " United States," where used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands of the United States: Nationality Act, 1940, s. 101.

reversed the then existing law by which a woman of another nationality on marrying a United States citizen automatically became herself a citizen of the United States. Section 2 of the Cable Act, was, in part, as follows :—

> That any woman who marries a citizen of the United States after the passage of this Act, or any woman whose husband is naturalized after the passage of this Act, *shall not become a citizen of the United States by reason of such marriage* or naturalization ; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions : . . . [*Since replaced* : *see* infra.]

A consideration of this section—and in particular the words we have italicized—shows, as the other sections of the Act show, that the Cable Act severed nationality from marriage altogether ; and that in effect, the section quoted corresponds with s. 10 (2) of the British Nationality and Status of Aliens Act, 1933, adopted as part of the law of New Zealand by s. 2 (1) of the British Nationality and Status of Aliens (in New Zealand) Amendment Act, 1935[9]. Further, it defined the special conditions on which a woman of other nationality may, after her marriage to a United States citizen, acquire her husband's nationality if she so desires.

Under the Nationality Act, 1940 (amending and in part repealing the Cable Act), concessions are granted to an alien who is married to a United States citizen at the time or after the passing of the statute. Sections 310–312 imply that an alien woman married to a United States citizen must be naturalized to become a citizen of the United States, and they specify residential conditions, which vary according to the respective circumstances of the petitioner. As ss. 310 (*b*) and 311 will meet the generality of cases of New Zealand women married in the Dominion to United States servicemen, we set out their relevant provisions in full :

> Section 310 (*b*). Any alien who, on or after May 24, 1934, has married or shall hereafter marry a citizen of the United States . . . may, if eligible for naturalization, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions :
>
> (1) No declaration of intention shall be required.
>
> (2) In lieu of the five-year period of residence within the United States, and the six months' period of residence in the State where the petitioner resided at the time of filing the petition, the petitioner shall have resided continuously in the United States for *at least three years* immediately preceding the filing of the petition.
>
> Section 311. A person who upon the effective date of this section is married to or thereafter marries a citizen of the United States . . . , if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, may be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws with the following exceptions :
>
> (*a*) No declaration of intention shall be required.
>
> (*b*) The petitioner shall have resided continuously in the United States for *at least two years* immediately preceding the filing of the petition in lieu of the five-year period of residence within the United States and the six months' period of residence within the State where the Naturalization Court is held.

A section that may be applicable to a New Zealand woman married to a member of certain specified classes of United States citizens, is as follows :

> Section 312. An alien, whose spouse is (1) a citizen of the United States, (2) in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney-General, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof, and (3) regularly stationed abroad in such employment, and who is (1) in the United States at the time of naturalization, and (2) declares before the naturalization Court in good faith an intention to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse, may be naturalized upon compliance with all the requirements of the naturalization laws, with the following exceptions : (*a*) No declaration of intention shall be required ; and (*b*) no prior residence within the United States or within the jurisdiction of the Naturalization Court or proxy thereof shall be required.

It is now clear that, under the law of the United States, a New Zealand woman married to a United States citizen remains an alien after her marriage, and can only change to the nationality of her husband by being naturalized in the United States upon the terms under which citizenship may be conferred on her as prescribed by Congress in the Nationality Act, 1940.

An interesting question arises in respect of Maori women and half-caste Maoris married to United States citizens. The Department of State has said that the question of citizenship is a judicial and not an executive function ; and the question of the eligibility of members of the Maori race has not, so far as we are aware, come up for decision. It may be one of those questions which " cannot be finally determined by the Department of State ; but when the question has not been determined judicially, the Department must follow the statutes in determining its course of action."[10]

In *Takao Ozawa* v. *United States*, (1922) 260 U.S. 178, 192, the law as it stood before the passing of the Nationality Act, 1940, was stated by the Supreme Court of the United States to be as follows :

> In all of the Naturalization Acts from 1790 to 1906 the privilege of naturalization was confined to white persons (with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress had decided to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.

In the same case, the Court held that the term " white persons " in § 2169 of the Revised Statutes implied a racial and not a colour test, and that the words were meant to indicate a person of what is popularly known as the Caucasian race. The opinion of the Court went on to say, at p. 198,

> The determination that the words " white persons " are synonymous with the words " a person of the Caucasian race " simplifies the problem, although it does not entirely dispose of it. . . . Controversies have arisen and will no doubt arise in respect of the proper classification of individuals in borderline cases. The effect of the conclusion that the

[9] An example of the difficulties overcome by this statute is as follows : A United States citizen, temporarily resident in New Zealand and married to a New Zealand woman between 1922 and March, 1935 : He could not obtain a United States passport to enable her to return to America with him, because, by virtue of the Cable Act, she did not acquire United States citizenship by reason of her marriage. Since, by our law as it was before 1935, she lost her British nationality on her marriage, she could not obtain a British passport ; with the result she could not reach the United States in the ordinary way. Now, since 1935, as she retains her British nationality on her marriage, she may go to the United States on a British passport, which she can retain until she becomes a United States citizen on naturalization.

[10] Consular Reg. U.S. sec. 144B 2, March 1933, quoted in 3 *Hackworth's Digest of International Law*, 7.

words "white person" mean a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, on the other hand, are those clearly ineligible for citizenship.

Later, in holding in *United States* v. *Bhagat Singh Thind*, (1923) 261 U.S. 204, 209, 213, that the words "white persons" did not include a high caste Hindu of full Indian blood, the Supreme Court said:

> They imply as we have said a racial test, but the term "race" is one which, for the practical purposes of the statute, must be applied to a group of living persons *now* possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote common ancestor, but who, whether they both resemble him to a greater or less extent, have, at any rate, ceased altogether to resemble one another. . . .
>
> What we hold is that the words "white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs.

These dicta are interesting because Congress "in unmistakable terms" in s. 303 of the Nationality Act, 1940, has since added—as persons eligible for, and having a right to, naturalization as United States citizens—"the descendants of races indigenous to the Western Hemisphere," to "white persons" and "persons of African nativity and descent."

It would appear, therefore, that Maoris are now eligible for naturalization as citizens of the United States[11]. They are unquestionably "descendants of a race indigenous to New Zealand," whatever may be the speculations of the ethnologists (to apply the words of the Supreme Court, quoted *supra*). New Zealand is in the Western Hemisphere, which begins at the 20th meridian west of Greenwich, as the Dominion lies between 162° east longitude and 173° west longitude, and, therefore, east of the 160th meridian east of Greenwich. Thus, the descendants of the race indigenous to New Zealand are eligible for naturalization as United States citizens, as are the Polynesians in all New Zealand's island territories, as these are all in the Western Hemisphere. It so appears on the material available to us[12].

From the foregoing considerations, the answer to the question posed at the commencement of this article is as follows:

A New Zealand woman, who is a British subject by birth or naturalization, does not lose her British nationality or acquire United States nationality by the mere fact of her marriage to a United States serviceman. This follows from the municipal law of New Zealand defining the national character of a New Zealand woman married to an alien, combined with the law of the United States which prescribes the conditions upon which its nationality is acquired, and which will not confer upon her nationality as a United States citizen until she has resided in the United States for the applicable period, and then only if she is eligible for citizenship and voluntarily applies for and obtains naturalization there. In the meantime, and until she is naturalized as a United States citizen, she remains a British subject. (A Maori woman married to a United States serviceman appears to be eligible for naturalization as a United States citizen by virtue of s. 303 of the Nationality Act, 1940.)

[11] Under the statutes referred to in the *Ozawa* case, *supra*, the State Department held, at a time when the marriage of a woman eligible for citizenship to a United States citizen conferred nationality on her, that Mrs. Moetia Attwater, a Polynesian by birth, was ineligible for citizenship when, as the wife of a United States citizen, she applied to submit a claim against Germany based on destruction of property during the bombardment of Tahiti: Decision of Nov. 2, 1915, quoted in *Hackworth*, *op. cit.* Vol. 3, 46.

[12] Under ordinary circumstances, the State Department will not give an opinion as to citizenship status on a hypothetical question, but only when it has before it a claim for naturalization, an application for a passport, or some other matter requiring action by the Department: Adee, Asst. Secretary of State, to Daugherty, Attorney-General, Oct. 1, 1921; Seymour, Acting Attorney-General, to Hughes, Secretary, State Department, July 9, 1923, referred to *Hackworth*, *op. cit.* Vol. 3, p. 7.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Wellington.
November 16;
December 2.
1943.
Johnston, J.

In re **MORTON (DECEASED), GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. MacLEAN AND OTHERS.**

Will—Devises and Bequests—Specific Bequest of Shares—Reduction of Company's Capital—Reduction satisfied by issue to Shareholders of Perpetual Debenture Stock—Shareholder retaining balance of original Shares—Effect on Bequest.

Testatrix made a bequest of "all the shares which I may own in the Auckland Gas Company, Limited." At the time the will was made, testatrix was joint tenant with her sister of three hundred and fifty shares of a nominal value of £1 each fully paid up and one hundred shares with a nominal value of £1 each paid up to 15s. per share in the company.

During the joint tenancy, and subsequent to the execution by the testatrix of her will, the company took steps under the provisions of the Companies Act, 1933, to reduce its capital and satisfy the reduction by the issue to shareholders of perpetual debenture stock. The meeting called for the purposes of the reduction was not attended by the testatrix; but her sister gave a proxy on behalf of herself and testatrix authorizing a shareholder to vote on their behalf. The motions for reduction were carried unanimously.

Testatrix's sister predeceased testatrix, and the joint holding became vested in testatrix at the time of her death, and consisted of one hundred shares of a nominal value of 10s. each paid up to 5s. per share and three hundred and fifty shares of a nominal value of 10s. each fully paid up, and, in addition, perpetual debenture stock to a nominal value of £225. The conversion did not change the nominal money value of testatrix's holding: when she held shares only the value was £425, and, when she held shares and debenture stock the value of her interest remained at £425.

On originating summons for the interpretation of the said bequest,

1. That it was a specific generic bequest—*viz.*, a gift of shares which testatrix had, and not a pecuniary bequest.

Bothamley v. *Sherson*, (1875) L.R. 20 Eq. 304; *In re Pratt*, *Pratt* v. *Pratt*, [1894] 1 Ch. 491; and *In re Nottage*, *Jones* v. *Palmer*, [1895] 2 Ch. 657, applied.

2. That, as the specific bequest could be traced and identified as in substance the property bequeathed, despite a change in form, the said perpetual debenture stock passed as "shares" under the said bequest.

3. That, at the time testatrix made her will, she had shares only and, the fact under a subsequent conversion scheme that some of the shares became debenture stock, did not, because it was not a total change, prevent the gift being identified and

destroy the integral gift. If the whole were changed the gift could be identified; and, if part only were changed in form, it also could be identified; and the fact that the part retaining its original form which might be only a small portion, actually satisfied the wording of the bequest, could not debar identification of the part changed, as part of the whole.

Oakes v. *Oakes*, (1852) 9 Hare 666, 68 E.R. 680, applied.

In re Slater, *Slater* v. *Slater*, [1907] 1 Ch. 665; *In re Gray*, *Dresser* v. *Gray*, (1887) 36 Ch.D. 205; *In re Bodman*, *Bodman* v. *Bodman*, [1891] 1 Ch. 828; *Trinder* v. *Trinder*, (1866) L.R. 1 Eq. 695, distinguished.

In re Clifford, *Mallam* v. *McFie*, [1912] 1 Ch. 29; *Morris* v. *Aylmer*, (1874) L.R. 1 H.L. 717; *In re Leeming*, *Turner* v. *Leeming*, [1912] 1 Ch. 828; *Goddard* v. *Overend*, [1911] 1 I.R. 165; *Carron Co.* v. *Hunter*, (1868) 1 H.L.Sc. 362; *In re Kuypers*, *Kuypers* v. *Kuypers*, [1925] Ch. 244; and *In re Herring*, *Murray* v. *Herring*, [1908] 2 Ch. 493, referred to.

Counsel: *K. G. Gibson*, for the plaintiff; *Burton*, for the first defendant; and *R. C. Christie*, for the second defendants.

Solicitors: *Young, Courtney, Bennett, and Virtue*, Wellington, for the plaintiff; *Burton and Meltzer*, Wellington, for the first defendants; *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the other defendants.

SUPREME COURT. Wellington. 1943. September 9; November 9. *Myers*, C.J.

NEW ZEALAND HARBOUR BOARDS' INDUSTRIAL UNION OF EMPLOYERS v. TYNDALL AND OTHERS.

Industrial Conciliation and Arbitration—Award—Ambiguity in Terms—Whether such Award invalidated by Statute—Industrial Conciliation and Arbitration Act, 1925, s. 89 (1) (2).

The following provisions of s. 89 of the Industrial Conciliation and Arbitration Act, 1925:—

"1. The award shall be framed in such manner as shall express the decision of the Court, avoiding all technicality where possible, . . .

"2. The award shall also state in clear terms what is or is not to be done by each party on whom the award is binding or by the workers affected by the award, and may provide for an alternative course to be taken by any party."—

are not mandatory but directory only.

The fact that an award presents difficulties of interpretation does not make it invalid.

Salmond v. *Duncombe*, (1886) 11 App. Cas. 627, referred to.

Observations as to the exercise of the power of the Court of Arbitration to state a case for the opinion of the Court of Appeal on questions of law arising out of the ambiguity of the terms of an award.

Templeton v. *Georgeson*, [1935] N.Z.L.R. s. 169, G.L.R. 796, and *Inspector of Awards* v. *Fabian*, [1933] N.Z.L.R. 109, [1922] G.L.R. 517, referred to.

Counsel: *J. F. B. Stevenson*, for the plaintiffs; *Solicitor-General* (*Cornish*, K.C.), for the defendants; *M. J. Gresson*, by leave of the Court, for the New Zealand Harbour Board's Employees' Union.

Solicitors: *Izard, Weston, Stevenson, and Castle*, Wellington, for the plaintiffs; *Crown Law Office*, Wellington, for the defendants.

SUPREME COURT. Hamilton. 1943. Oct. 29; Nov. 23. *Johnston*, J.

NEW ZEALAND FORESTS PRODUCTS, LIMITED v. TOKOROA RABBIT BOARD.

Rating—Rates and Rate-book—Land outside Rateable District included in Ratepayers List and Valuation Roll—Imposition of Rate thereon—Rate paid by Owner under Mistake of Fact—Whether Imposition of such Rate valid—Whether Ratepayers List or Valuation Roll conclusive and disentitling Owner to recover Rate paid—Rating Act, 1925, s. 58—Rabbit Nuisance Act, 1928, ss. 39, 40, 43, 44, 45, 65, 66, 68.

The imposition of a rate on land outside a rating authority's rateable district is without jurisdiction and void. Such land cannot be made rateable by that authority by its inclusion in the ratepayers list or valuation roll.

The owner of land who has paid such a rate under a mistake of fact is entitled to recover it from the rating authority, notwithstanding s. 58 of the Rating Act, 1925.

Mayor, &c., of Auckland v. *Speight*, (1890) 16 N.Z.L.R. 651, and *Thomas* v. *Mayor, &c., of Wanganui*, [1927] G.L.R. 462, applied.

Counsel: *Stanton*, for the plaintiffs; *Strang*, for the defendants.

Solicitors: *J. Stanton*, Auckland, for the plaintiffs; *Strang and Taylor*, Hamilton, for the defendants.

SUPREME COURT. Wellington. 1943. November 16; December 8. *Myers*, C.J.

JACKSON v. WITTICH.

Industrial Conciliation and Arbitration Act—Award—Interpretation—Principles governing Interpretation—Whether Worker employed under Two Distinct Arrangements—"Tea"—Industrial Conciliation and Arbitration Act, 1925, s. 89.

The principles that govern the interpretation of an award under the Industrial Conciliation and Arbitration Act, 1925, are—

(*a*) Before an act can be deemed to be a criminal act the words of an award must be express.

(*b*) The Court of Arbitration must "state in clear terms in the award what is or is not to be done by each party on whom the award is binding or by the workers affected by the award."

(*c*) The Court must not, under the guise of interpretation, make a decision which would in effect be the making of a new award.

Chapman v. *Rendezvous Ltd.*, [1922] G.L.R. 457, applied.

The word "tea" in the definition in the New Zealand Tearooms and Restaurant Employees' Award, 1942 (*42 Book of Awards*, 225)—of "a single meal or either a breakfast, dinner, luncheon, or *tea*"—includes afternoon tea as well as an evening meal in place of dinner. The award deals separately with part-time waitresses and casual or "single meal" waitresses. There is nothing in the award which prevents a person being employed during different hours in two different employments each with its own status in one and the same establishment.

It was held, on an appeal from the decision of a Magistrate dismissing the appeal, that on the facts the waitress to whom the decision appealed from relates had been on the relevant occasions employed under separate and distinct engagements within cl. 10 (*f*) of the award.

McBrearty v. *Amalgamated Theatres, Ltd.*, [1941] N.Z.L.R. 1081, G.L.R. 565, applied.

Counsel: *C. H. Taylor*, for the appellant; *Spratt*, for the respondent.

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

COMPENSATION COURT. New Plymouth. 1943. September 8; November 4. *O'Regan*, J.

MAHONEY v. THOMAS BORTHWICK (AUSTRALASIA), LIMITED.

Workers' Compensation—Delay in Commencing Action—Union Official believing Case still Open for Discussion with Employer—Whether "Reasonable cause"—Workers' Compensation Act, 1922, s. 27.

Where the employer allowed its business at the place where the worker was employed to be conducted by a committee of management representing employer and employees, for thirty years there had been no litigation in connection with accidents, and the worker, while in hospital, conformed to the usual practice of allowing the union to look after his interests and the delay was occasioned by the inaction of the union officials who believed that the case was still under discussion and who had assured the worker that his claim was in order,

Held, That the failure to commence the action within the time limited by the said s. 27 was occasioned by "reasonable cause."

Corrie v. *Pithie and Ritchie*, [1920] G.L.R. 252, and *Kitchen* v. *Koch and Co.*, [1931] A.C. 753, 24 B.W.C.C. 294, applied.

Simpson v. *Geary*, [1921] N.Z.L.R. 285, G.L.R. 50, distinguished.

The case is reported on this point only.

Counsel: *L. M. Moss*, for the plaintiff; *Wheaton*, for the defendant company.

Solicitors: *L. M. Moss*, New Plymouth, for the plaintiff; *Bamford, Brown, and Wheaton*, Auckland, for the defendant.

COURT OF ARBITRATION.
NAPIER.
1943.
August 17;
November 23.
Tyndall, J.

ROYDHOUSE (INSPECTOR OF AWARDS) v. NAPIER BOROUGH.

Industrial Conciliation and Arbitration—Wages—Temporary Illness—Award silent on Question of Deduction for Time lost through Sickness—Rule applied—Principle applicable to Worker also applicable to Apprentice—Industrial Conciliation and Arbitration Act, 1925, s. 152.

Where an award is silent on the question of deductions from wages in respect of time lost through sickness, then, subject to any express or implied term to the contrary in the contract of employment of the worker subject to such an award, wages continue through sickness and incapacity from sickness to do the work contracted for until the contract is terminated by a notice by the employer in accordance with the terms of the contract.

Marrison v. *Bell*, [1939] 2 K.B. 187, [1939] 1 All E.R. 745; *Petrie* v. *Mac Fisheries, Ltd.*, [1940] 1 K.B. 258, [1939] 4 All E.R. 281; and *O'Grady* v. *M. Saper, Ltd.*, [1940] 2 K.B. 469, [1940] 3 All E.R. 527, followed.

Martha Gold-mining Co. (Waihi), Ltd. v. *Inspector of Awards*, [1942] N.Z.L.R. 335, G.L.R. 255, referred to.

The same principles apply to a contract of apprenticeship.

Patten v. *Wood*, (1887) 51 J.P. 549, followed.

Counsel: *L. W. Willis*, for the defendant.

Solicitors: *Kennedy, Lusk, Willis, and Sproule*, Napier, for the defendant.

THE STATUTE OF WESTMINSTER.

Legislative Powers of the New Zealand Parliament.

By R. O. McGechan, Professor of Jurisprudence and Constitutional Law, Victoria University College.

Lest, from what follows, any one ascribe to me a purpose I am far from furthering, let me say at once that I favour New Zealand adopting the Statute of Westminster. My reasons are irrelevant to this article, which is directed only to showing that before adopting it we should settle certain doubts(1) about our own legislative capacity lest they live on to plague us through the operation of s. 8 of the statute. Any incapacity resulting from this section will be peculiar to New Zealand among members of the British Commonwealth, and will be quite pointless.

Section 8 of the Statute of Westminster provides:

> Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

This is an understandable provision in the case of Australia (as is the parallel s. 7 for Canada) because the Australian Constitution establishes a federal system and it was important in framing the Statute of Westminster to make it quite clear that the statute did not disturb the balance between Commonwealth and State secured by the provisions as to amendment of the Constitution by s. 128 thereof. New Zealand, however, has a unitary, not a federal, system. We are not concerned with a balance of state and federal powers and amending power framed to secure that balance. Section 8 is not an understandable provision so far as we are concerned. If New Zealand retains her present unascertained and uncertain mixture of capacity and incapacity to amend the New Zealand Constitution Act and adopts the Statute of Westminster and so necessarily s. 8 crystalizing that uncertainty, then, notwithstanding the Statute of Westminster, the Imperial Parliament must be asked to legislate for us if we would do certain things. No doubt the Imperial Parliament will do these things if asked. There is, all the same, definite illogic in adopting a statute which has for its object a grant of legislative independence, and, at the same time, qualifying that independence by refusing to take the power to make certain constitutional changes of no interest whatsoever to Great Britain under the present constitutional status of New Zealand within the Commonwealth. There is no illogic in s. 8 for Australia, for the Commonwealth Constitution contained full and adequate machinery to alter the Constitution without reference to the Imperial Parliament. And if amendment of the Canadian Constitution remains still a matter for the Imperial Parliament this is because Canada is determinedly federal and forces within Canada cannot agree on a form of constitutional machinery for purely Canadian amendment. Canada's case has no relevance to New Zealand.

The New Zealand Constitution Act, 1853, like the British North America Act, 1867, in relation to Canada, with minor exceptions, contained no provision enabling the New Zealand Assembly to amend the New Zealand Constitution. But the Constitution Amendment Act, 1857, contained this provision: "It shall be lawful for the said General Assembly of New Zealand by any Act or Acts from time to time to alter suspend or repeal all or any of the provisions of the said Act, except such as are hereinafter specified; namely . . . " Then follows a list of twenty-one sections. Some of these concerned the provincial system and power to abolish this was given by 31 and 32 Vict., c. 92. This power has been exercised and these sections no longer

(1) I am, moreover, concerned only to raise the doubts, not to give the grounds for any opinion as to what I believe to be the better view on any doubt raised. I may undertake the latter on some future occasion.

concern us(2). If these Imperial Acts stood alone the effect of s. 8 could be stated with certainty. But in 1865 the Colonial Laws Validity Act, s. 5, upset this easy certainty. It enacted " . . . and every representative legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had full power to make laws respecting the Constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council or Colonial law for the time being in force in the said Colony." Does this Act apply to New Zealand at all? No definite answer can be given to the question. A general statute does not usually override a particular one. But the history of the Act, the mischief it was enacted to remedy, and its emphatic word " every " point the other way. Keith(3) regarded the position as uncertain, but favoured the view that it did apply. The Privy Council, obiter and admittedly so, in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 390, [1941] N.Z.L.R. 590, expressed the view that it did and it is extremely probable that if the matter arose squarely for decision before the Board it would follow its two quite constant trends, to follow a dictum of its own, and to extend rather than diminish dominion legislative capacity(4). Keith now(5) takes the view that this decides the matter. My own opinion is that the Colonial Laws Validity Act, s. 5, does apply to the Dominion, but I would not agree that the matter is either concluded by authority, or even free from doubt.

If the Colonial Laws Validity Act, s. 5, does apply to the Dominion at present, will it continue to do so after we have adopted the Statute of Westminster?

We could adopt the statute without adopting s. 2(6), but as s. 2 is the very one which removes our principal general legislative incapacity—*i.e.*, that of making laws repugnant to Imperial statute—we are not likely to do anything so useless. If we do adopt s. 2, subs. (1) thereof provides that " The Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion." Does this mean that the Colonial Laws Validity Act, s. 5, will then cease to apply to New Zealand?

The Colonial Laws Validity Act so far as our present purpose goes includes two sections: s. 2 which declares the law relating to invalidity of Colonial Acts repugnant to Imperial statutes and s. 5 which declares the constituent legislative power of certain Colonial legislatures. When s. 2 of the Statute of Westminster provides that " the Colonial Laws Validity Act 1865 shall not apply," it raises doubts as to whether s. 5 as well as s. 2 is to cease to apply. And if part of our legislative power is derived from the Colonial Laws Validity Act, s. 5, then the Statute of Westminster by s. 8 would seem to preserve it to us, but s. 2 to take it away.

It may be that s. 8 and s. 2 can be reconciled by construing " the Colonial Laws Validity Act 1865 " to mean " the Colonial Laws Validity Act, s. 2, thus leaving s. 5 still operative in New Zealand, and this is probably the sound view when s. 2 (1) is read with s. 2 (2), for subs. (2) is concerned with repugnancy only and not with other matters also dealt with by the Colonial Laws Validity Act, in particular not with the matter dealt with by s. 5. Courts, however, frequently prefer " plain " or " literal " meanings, and if s. 2 (1) " means what it says " it certainly does not say " the Colonial Laws Validity Act 1865, s. 2 only." This matter is scarcely beyond doubt either.

If, now, s. 2 of the Statute of Westminster does not deprive us of the operation of s. 5 of the Colonial Laws Validity Act, are the legislative powers given by the Colonial Laws Validity Act, s. 5, themselves clear? I am not concerned with aspects of s. 5 which are clear enough, but with some difficulties it does raise.

The most important of these is the meaning of the word " powers." The section gives " full power to make laws respecting the Constitution *powers* and procedure of such legislature " (italics mine). If s. 5 in granting to colonies " full power to make laws respecting . . . the powers . . . " of their legislature means that Colonial Parliaments can increase the ambit of their legislative capacity then, always assuming the Statute of Westminster does not repeal s. 5, obviously we need not worry about the limitation involved in s. 8 of the statute for it has little if any effect(7). But this is probably not the meaning. Certainly it has been far more restrictively interpreted. Isaacs, J., has expressed the opinion that " legislature " in s. 5 means the two Houses and does not include " the Crown ": see *Taylor* v. *Attorney-General*, (1917) 23 C.L.R. 457(8). If this view is correct, " powers " of the " legislature " means " powers of the two Houses," which in turn means that " powers " refers only to legislative capacity to control the law-making process prior to presentation of a Bill to the Governor-General and not legislative capacity generally. And if this is its meaning s. 5, while a handy addition to the Constitution Amendment Act, 1857, does not free us from most of the now quite anachronistic legislative incapacity left by that Act. The dictum in *Tukino's* case was to the effect that the Assembly had power to repeal the Constitution Act, s. 73, under s. 5 of the Colonial Laws Validity Act, which is to say that the New Zealand Parliament under that section has power to repeal one of the sections of the Constitution which the Constitution Amendment Act, 1857, had denied our Parliament power to repeal, and this power can only be based on an interpretation of the word " powers " as meaning " general legislative powers "; but the meaning of " powers " in s. 5 of the Colonial Laws Validity Act does not seem to have been argued in that case and the judgment and dictum do not seem to have given a considered opinion on this question. Possibly (if I may so express it with respect) this view of the meaning of " powers " is correct, and quite

(2) Sections which cannot be repealed under the 1857 Act and as to which there is and after adopting the Statute of Westminster will continue to be doubt as to the powers of the New Zealand Parliament are: ss. 44, 46, 47, 53, 54, 56-59, 61, 64, 65, 71, 80.

(3) *The Governments of the British Empire*, 46.

(4) See, for an explicit statement of this: *Shell Co. of Australia, Ltd.* v. *Federal Commissioner of Taxation*, [1931] A.C. 275, 298.

(5) [1942] J.C.L. 66-67.

(6) Statute of Westminster, s. 10.

(7) It is this view of s. 5 which leads Keith to say in the work cited *supra*: " . . . it is probable that since the Act of 1865 she has practically full authority in this regard . . . "

(8) See for an expression of the contrary view, Harrison Moore, in 4 J.C.L. (N S.), 21-22.

likely it may be followed; suffice it for the present that the effect of s. 5 in this vital respect is not clear, and the Statute of Westminister, s. 8, incorporates that lack of clarity.

Finally, the wording of s. 8 is not without its own difficulty. It is worded differently for Australia and New Zealand. For Australia it provides that there is to be no further power to alter "the Constitution or the Constitution Act." For New Zealand by contrast, the limitation is only as to "the Constitution Act," not as to "the Constitution." It would seem to be tolerably clear that "Constitution Act" would include amending Acts including that of 1857, but is the Colonial Laws Validity Act, 1865, itself included in the words "Constitution Act" as used in s. 8? If that Act applies to New Zealand, it is in relation to New Zealand an Act virtually amending the Constitution Act and may possibly be so treated as part of our "Constitution Act." A matter which will follow the answer to this question is the important one whether one Parliament can bind its successors as to the manner and form in which future Acts respecting the Constitution powers and procedure of such legislature must be passed: See s. 5, proviso, and *Attorney-General* v. *Trethowan*, [1932] A.C. 526. If "Constitution Act" includes Colonial Laws Validity Act, then a New Zealand Parliament will continue competent to bind its successors in this way: if the words "Constitution Act" do not include Colonial Laws Validity Act so that the latter Act was to be treated as part of our "Constitution" only—and this would seem to me to be the better view—possibly the New Zealand Parliament could, after adopting the Statute of Westminster, legislate inconsistently with the Colonial Laws Validity Act, s. 5, proviso, since repugnancy to an Imperial Act will then no longer invalidate local legislation (s. 2): *Moore* v. *Attorney-General for Irish Free State*, [1934] A.C. 499. If this is so, it may have the somewhat remarkable effect of enabling amendment of the Constitution Act in some parts by methods—"manner and form"—not now possible. And this, not merely in spite of, but by virtue of s. 8. The effect of s. 8 is certainly not beyond doubt.

To recapitulate. There is no rhyme or reason in s. 8 so far as New Zealand is concerned, however apposite it may be for Australia. It leaves or raises doubts as to our own legislative capacity, as to whether the Colonial Laws Validity Act, s. 5, applies to New Zealand, whether it is not rendered inoperative in New Zealand by the Statute of Westminster, s. 2, as to the meaning of s. 5; and the meaning and effect of s. 8 is not clear either.

There is no point in perpetuating these legal difficulties. And whatever incapacities exist are in view of our status as a member of the British Commonwealth now quite anomalous. If New Zealand asked the Imperial Parliament to amend the Constitution Act in ways not competent to it, that request would be met. If we adopt the statute and still need to ask the Imperial Parliament to enact such amendments for us, we merely preserve a formality without substance—actually we only waste the time of the Imperial authorities. Perhaps, too, we cause confusion in the minds of the politicians and people of Great Britain, not to mention New Zealand, and, even more important, foreign countries, as to just where we stand. This is well illustrated by a British lawyer's comment on Canada's second wartime request to Britain to amend the British North America Act: "This resort to Westminster is a little puzzling to the Englishman who is getting into his mind that the Dominions have independence in legislation"([9]).

Certain preliminaries to adopting the statute seem to be desirable. We could, of course, ask the Imperial Parliament to amend s. 8 of the Statute of Westminster by deleting the words making it applicable to New Zealand. The results we would achieve by that means could be achieved as well by securing the passage of an Imperial statute declaring and enacting that the New Zealand Parliament has and ever since December 10, 1931 (the day before the commencement of the Statute of Westminster), has had full power to amend the Constitution and Constitution Acts([10]). The Report of the Conference on the Operation of Dominion Legislation makes it quite clear that power to amend New Zealand Constitution is a matter for New Zealand alone: Paragraph 6: see Dawson, *Development of Dominion Status*, 385. Section 8 would then be innocuous, and our legislative powers be beyond legal argument. The political advantage of the second alternative, that it does not involve amendment of the Statute of Westminster, would presumably make it the better one to follow.

([9]) 17 A.L.J. 177.

([10]) This, of course, does not purport to draft the clause.

ALLIED RULE IN TRIPOLITANIA.

The British Military Courts.

To be detached from his unit and assigned to duties in the office of legal adviser at the headquarters of the British Military Administration in Tripolitania, was the interesting experience of Mr. K. A. Gough, who served with the New Zealand Engineers in Greece, Crete, and Egypt. Mr. Gough recently returned to Christchurch, where he has joined Mr. A. C. Brassington in partnership.

Mr. Gough said that part of his duties consisted of appearing in the British Military Courts, Tripoli, in defence of enemy civilians charged with offences under the British Military Legislation. He paid tribute to the impartiality of these Courts and said that all accused were accorded a fair trial in accordance with international law. Representation by counsel was arranged by the legal adviser for any accused charged with a serious offence. During the two and a half months he was with the Administration, said Mr. Gough, the officials worked hard and ably to restore the economic life of Tripolitania. The inhabitants were left free to carry on their usual lives and were interfered with only if they acted to the prejudice of the British or Allied occupying forces.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Democracy and Bureaucracy.—The Chancellor of the New Zealand University (Hon. J. A. Hanan) is a lawyer and it was fitting that he should have addressed the last meeting of the Senate upon the subject of the drift from democracy. Notwithstanding the wide publicity given to his observations by the Press throughout the Dominion, these two sentences will bear reprinting here :

> Since the outbreak of this world holocaust of war there has been a marked growth of the centralization of power and authority in State government, and of bureaucratic regimentation of business, trade, and industry, as well as a serious invasion of domestic liberties of an anti-democratic nature which may be justified at this present time of grave emergency, but which with the return of peace should not be tolerated one moment longer than is necessary. In regard to this situation we should remember the fact that when rights and privileges have been usurped, it is often difficult to recover them.

The truth of these observations of the Chancellor is appreciated by most members of the legal profession and it is to be hoped that, as soon as this war is over, our Law Societies will be found in the forefront of those demanding a return to freedom and the rule of law. The burden of the battle should not be left to a few individual members of the profession.

Blue Bags and Red.—Blue bags are not a regular part of the equipment of a New Zealand barrister, though Scriblex has seen an odd one or two in robing-rooms in this country. Presumably they are owned by, or are heirlooms from, barristers who have been called to the English Bar. But Scriblex has never seen a red bag in this country. Does any reader know any counsel who sports one ? The practice in England about these bags is explained by MacKinnon, L.J., in his recent book, *On Circuit* :

> When a young man is called to the Bar he is provided, as part of his outfit, with a blue-cloth bag, in which his robes and wig-box may be carried. If later on he is in a case with a K.C. as his leader, it is the privilege of the latter, if he thinks the junior has played his part well, to present him with a red bag. So that if a junior is seen carrying a red bag it is a sign that once at least he has acquitted himself well, in the opinion of a leader. I believe on some circuits a junior is only allowed to carry a red bag there if it was given to him by one of the circuit leaders, but not if he received it in London from a leader not of the circuit.

First Death Sentence in New Zealand.—The first Chief Justice of New Zealand was Sir William Martin, who held the office, with headquarters at Auckland, from the date of his arrival in New Zealand in 1841 until 1857. One of the first criminal trials over which he presided was that of a Maori, Maketu, for the murder of a European. Martin, then aged only thirty-four, had had little previous practical experience of the Courts for, although he had been called to the English Bar in 1836, his experience had been confined to the chambers of an equity draftsman and conveyancer. But he presided in an exemplary fashion over the trial of Maketu, and the proceedings, conducted with the aid of an interpreter and with punctilious regard for the interests of the accused, did much to impress the minds of the Maori spectators with the advantages and impartiality of the British system of justice. The accused was found guilty and sentence of death was duly passed and, be it added, duly executed. Passing sentence, Martin said, in tones of deep emotion, "Maketu, in your own emphatic language, I bid you go to your forefathers."

Simulated Vehemence ?—In a judgment delivered last November by the Judge of the Compensation Court the following sentence appears :—

> Mr. , counsel for the defendant, argued with a degree of vehemence that I am unable to think was simulated.

Scriblex will always hold the view that Judges should refrain from embalming statements of this nature in their judgments.

Lord Cairns and Interrupting Counsel.—Lord Cairns ranks high indeed among England's Lord Chancellors. Jessel, M.R., and Benjamin, Q.C., both awarded him the title of the greatest lawyer of their time. Viscount Bryce, who was strongly opposed to him in politics, has pronounced him to be unquestionably the greatest Judge of the Victorian era, perhaps of the nineteenth century. Lord Selborne who was also his political opponent, said of him : "It would be difficult to name any Chancellor, except Lord Hardwicke, who was certainly his superior, or, indeed, in all respects his equal." Great lawyer though he was, Lord Cairns was always reluctant to interrupt counsel's addresses. Lord Blackburn, who became a Lord of Appeal during Lord Cairns's Chancellorship, had developed the very contrary habit during his term as a Judge of the Queen's Bench : and, on the first occasion when he sat in the House of Lords, was quick to put a poser to counsel. But, before counsel could answer, there was a frigid voice from the Lord Chancellor : "I think the House is desirous of hearing the argument of counsel and not of putting questions to him."

Miscellany from Overseas.—His Honour Sir Thomas Artemus Jones, K.C., former County Court Judge, died recently in England. He was the successful plaintiff in that leading case in the law of libel—*Jones* v. *Hulton*, [1910] A.C. 20 . . . At a luncheon given in his honour by the Pilgrim's Club, last September, Lord Wavell said : "When we pay our schoolmasters at a much higher rate and our lawyers perhaps at a much lower rate, we shall really be making progress." The statement was widely published and broadcast, but the President of the Law Society took the matter up and wrote to *The Times* (London) pointing out that solicitors were underpaid rather than overpaid. The President added that when the comments which his observations had aroused had been brought to Lord Wavell's notice, he had immediately replied that his remarks had been misunderstood, and that he had no intention of suggesting in his speech that the rank and file of solicitors were or ever had been overpaid, and that in fact he knew that that was not the case. . . . An impertinence of a prisoner recently brought before a London Court prompted the presiding Magistrate so far to forget himself as to ask : "What do you mean by that, you rat ? "

OBITUARY.

Mr. HENRY COTTERILL, Christchurch.

(Contributed.)

The death of Mr. Henry Cotterill on December 2 last has removed from the ranks of the legal profession one of the oldest of its members. His connection with our profession dates back many years, in fact it has its roots deep in the old Provincial days of Canterbury.

He was born at Lyttelton in the year 1855, the second son of Canon George Cotterill who arrived in that town from Norfolk, England, in 1851. He was educated at Christ's College, Christchurch, entering that school in 1864, being taken there at the age of nine in the proverbial conveyance of that distant period—the bullock dray.

He had a very successful career at school, both in scholarship and in sport. He was Soames Scholar, Provincial Scholar, and New Zealand University Scholar. He captained both the cricket eleven and the football fifteen for several years.

After serving his articles with the firm of Hanmer and Harper, the then leading lawyers in Christchurch, he was appointed Associate to His Honour Mr. Joshua Strange Williams, upon that most able and distinguished gentleman being elevated to the Supreme Court Bench. Mr. Justice Williams was formerly District Land Registrar at Christchurch, charged with the important work of inaugurating the Land Transfer system in New Zealand. Upon relinquishing his position as Judge's Associate, Mr. Cotterill entered into partnership at Christchurch with the late Mr. T. S. Duncan, a Scottish lawyer, who was for some years Provincial Solicitor and later Crown Solicitor for the provincial district, the name of the firm being Duncan and Cotterill. This was in 1879, and the legal business then inaugurated has continued with unbroken continuity to the present time. There have, of course, been changes, but Mr. Cotterill was and remained the common partner throughout. Upon the death of Mr. T. S. Duncan, Mr. Cotterill was joined by Mr. J. C. Martin, and the firm became Duncan, Cotterill, and Martin, which continued until Mr. Martin was appointed a Magistrate and later elevated to the Supreme Court Bench. Mr. Cotterill continued the business on his own account under the style of "Duncan and Cotterill" for a number of years; and in 1905 he was joined by Mr. T. W. (later Sir Walter) Stringer who was then Crown Solicitor, and by the late Mr. J. D. Hall and Mr. A. F. Wright, under the style of Duncan, Cotterill, and Stringer. This partnership continued until Mr. Stringer was called to the Supreme Court Bench. Mr. Beswick then joined Mr. Cotterill and Mr. Wright, and the name was changed to Duncan, Cotterill, and Co., which title it still retains. After the last War Mr. W. J. Sim and Mr. L. D. Cotterill became partners, and the partnership continued until Mr. Beswick's retirement and until Mr. Sim took silk. Later, Mr. Peter Wynn Williams, now serving with the New Zealand Forces in the Middle East, joined the firm.

Although his firm has for many years had a large common-law practice it is as a trust lawyer and conveyancer that Mr. Cotterill was best known, and he was instrumental in building up one of the greatest businesses of this description in New Zealand. It falls to the lot of few to cover such a long period of legal practice. He was in active practice for over sixty-four years and if the term of his articles and the period he was acting as Associate to Judge Williams be taken into account, his association with the legal profession covered over seventy years.

Although he did not take part to any great extent in public affairs, or appear in the Courts, he yet filled a very important place in the legal, commercial, and farming life of the community. Several important charitable trusts in this Provincial District (notably the McLean Institute and the Sir John Hall Charitable Trust) bear the impress of his creative and assiduous work and careful guidance in their inception.

Outside his professional life it was, however, to Christ's College that he devoted his greatest energies. Ever since he entered that institution as a small boy he was actuated by a remarkable affection towards it throughout his long and arduous life. He was elected a Fellow of the College in 1896 and later filled the position of Sub-Warden. For many years he was Chairman of its Finance Committee—a post he relinquished only a few years before his death. The position of that important secondary school (the second oldest in Australia and New Zealand) is due in no small measure to the late Mr. Cotterill's guidance and foresight and to the care and ability he brought to the management of its finances and endowments.

His interest and skill in athletics, which formed a noticeable feature of his school life, were continued later. He played both cricket and football for Canterbury, notably against Auckland in 1873, and Wellington in 1874. While cricket matches were a yearly fixture of the profession in Christchurch Mr. Cotterill took a keen interest. These functions were discontinued some years ago and have not been revived. One remembers one instance in later years in one of our legal cricket matches—Mr. Cotterill was captain of one of the legal sides. The trouble from which he was a great sufferer later on in life—rheumatoid arthritis—had not made itself manifest and he was still very active and a first-rate fieldsman. In this particular match one opposing batsman had made a great stand, and if the match was to be won it was felt that he must be disposed of. Several changes of bowling were tried without success. At last Mr. Cotterill as captain put himself on to bowl and apparently the old hand had not altogether lost its cunning for he dismissed the batsman with his very first ball. He then finished the over, but the remaining balls included six "wides," and having accomplished his object, like a wise and prudent captain he took himself off.

Instances could be given of his hunting days. Although a man of extreme caution this did not preclude him from always taking his fences when he came to them. Mishaps he had, it is true, but he always returned to the charge. He was a life member of the Christchurch Hunt Club. His extreme caution, to which reference has been made, was probably one of his outstanding characteristics and very many of his letters were headed "without prejudice." This was very pronounced, and some younger members of the profession humorously christened the horse upon which Mr. Cotterill used to ride in Hagley Park, "Without Prejudice," and gave the breeding of the horse as follows—"Without Prejudice by Extreme Caution out of Clients' Interests." At times his excessive caution would bring him into conflict with other members of the profession, but this in no way deflected him from the position he had taken up if he was convinced it was a correct one. He used to say to younger practitioners in the office that they were to take no risks which they could see. There were enough risks in the law which could not very well be foreseen and it was very unwise to take any risk, however remote, which was apparent.

He kept his interest in his profession, and particularly in Christ's College, to virtually the day of his death.

Mr. S. MACALISTER, Stratford.

The death occurred at Stratford recently of Mr. Sinclair Macalister at the age of sixty-one years.

Mr. Macalister was born in Blenheim in 1882. After receiving his primary education in Blenheim, Mr. Macalister entered the service as a cadet of the Post and Telegraph Department at Wellington and later was promoted to the staff of the Secretary of the Post Office. He studied law at Victoria University College and qualified in 1912. In the same year he took a position with Messrs. Spence and Stanford, Stratford, and early in January, 1913, he commenced practice on his own account in Stratford, in partnership with Mr. E. S. Rutherfurd. This partnership continued up till Mr. Macalister's death. Mr. Alfred Coleman (now a Stipendiary Magistrate) joined the partnership in 1915 and continued as a partner till he was appointed to the Court of Review in 1935.

About two years ago Mr. Macalister became ill, but in spite of his disability he carried on with his work and his other activities till the beginning of last month. His death terminated the longest legal partnership in Taranaki, Mr. Macalister and Mr. Rutherfurd having been continuously in partnership for a period of thirty-one years.

He took an active interest in various organizations in the province, associated with education, sport, and the welfare of returned soldiers. He served overseas with the 1st N.Z.E.F. in the Great War, and rose to the rank of lieutenant. During the present war he was captain of the security section of the Home Guard.

Mr. Macalister is survived by his wife, a son, and a daughter; Mr. R. L. Macalister, Wellington, is a brother

RECENT ROAD TRAFFIC REGULATIONS.

XII.—General.

By R. T. Dixon.

It has been suggested to the writer that an article on recent changes in road traffic laws other than those arising from Emergency Legislation (as dealt with in a current series of articles) may be of interest to practitioners.

The following, therefore, is a note of the road traffic enactments (other than War Emergency measures) passed since November, 1942—*i.e.*, the date of publication of the Supplement No. 1 to Chalmers and Dixon's *Road Traffic Laws of New Zealand*. Some cases likely to be of interest are also mentioned.

Notice, 1943 New Zealand Gazette, *1280*, under the *Transport Organization Membership Regulations, 1941* (*Serial No. 1941/224*).

This notice, issued under the authority of the regulations cited in the heading, has the effect of requiring that goods-service operators, excluding generally those in the town-carrier class, must join the New Zealand Road Transport Alliance (Incorporated). Town carriers operating about the main centres, and other operators (*e.g.*, Government Departments, ancillary users of trucks, and operators having goods-service revenue less than £200 per annum) are excluded from the requirement by paragraphs (1) to (6) of the notice.

An important point is that membership of an organization affiliated to the above Alliance is deemed a sufficient compliance with the requirements of the notice (*vide* Reg. 5 of the above regulations).

Motor-drivers Regulations, 1940, Amendment No. 1 (*Serial No. 1943/101*).—The principal effect of this amendment is to prohibit any woman from driving a taxicab during the hours of darkness, no doubt by reason of the unfortunate sequel to this employment in some recent months.

It is also provided that the provisions requiring taxicab-drivers to be of good character, and authorizing their driver's licenses to be reviewed by the local authority, shall apply to omnibus-drivers.

Motor-vehicles (*Special Types*) *Regulations* (*No. 2*), *1937, Amendment No. 1* (*Serial No. 1943/113*).—These regulations provide that tractors, traction engines, or vehicles drawn thereby, and self-propelled grass-mowers are exempted from annual license fees if used for the cultivation or upkeep of sports or school grounds. This follows a verbal decision by J. H. Bartholomew, S.M., at Dunedin, on March 26, 1943 (*Ford* v. *St. Clair Golf Club*), in which he held that even when a tractor proceeds directly across a road dividing a property it is being "used" on the road for the purposes of s. 3 of the Motor-vehicles Act, 1924.

Transport Licensing Passenger Regulations, 1936, Amendment No. 4 (*Serial No. 1943/114*).—The purpose of this amendment is to alter certain of the fees due in connection with passenger-service licenses. A minor amendment is also made to clarify a point in principal regulations so far as they restrict hours of driving. These restrictions now apply with equal force and effect whether or not the driver is employed by more than one licensee.

Traffic Regulations, 1936, Amendment No. 3 (*Serial No. 1943/199*).—These regulations are issued, no doubt, as the result of the Full Court decision, *Hazledon* v. *Andrews*, [1943] N.Z.L.R. 261, dealing with the "right-hand" rule at intersections.

The regulations restore the previous position, as generally followed before the latter decision, whereby a motorist or cyclist on a straight course at an intersection does not require to give way to another motorist or cyclist turning to the right, even when the right-hand rule is in the latter's favour; the motorist or cyclist turning to the right is then the one to give way; and if both vehicles are turning to the right both are required to give way. (This naturally is a very general indication of what the writer submits is the effect of the new regulations.) The same regulations also make provision for the issue of warrants of fitness to be effective only during daylight hours, and so meet the case of those motor-vehicles not fitted with lamps.

Some Recent Traffic Decisions.

Lee v. *Mudge and Cole*, [1943] N.Z.L.R. 569, provides yet another decision on the meaning of the term "roadway" in the Traffic Regulations, 1936, more particularly as used in the definition of "intersection" (*vide Road Traffic Laws of New Zealand*, 164). In this case it was held that those lateral boundary-lines of the roadway which go to form an "intersection" are the normal lateral lines and not the (possibly) curving lines of bitumen or other usable roadway.

In regard to the effect of war-time lighting restrictions on liability arising from negligent driving (now, happily, likely to belong to past history) note a New Zealand case—*Colonial Mutual Life Assurance Society, Ltd.* v. *Wellington City Corporation*, [1943] N.Z.L.R. 547—and an English case—*Sparks* v. *Edward Ash, Ltd.*, [1943] 1 All E.R. 1 (reversing on appeal the former decision noted on p. 9 of *Road Traffic Laws of New Zealand*, Supplement No. 1).

Traffic Inspector v. *Hawthorne*, (1943) 3 M.C.D. 151. In this case, under the Transport Control Emergency Regulations, 1942 (Serial No. 1942/190), Luxford, S.M., held that in spite of the control by Taxicab Control Committees in some areas the taxi-driver must provisionally accept any passengers who are offering subject to the consent of the Committee having been given either generally or particularly to their carriage, but if owing to a direction of the Committee the driver is barred from accepting the fares this obligation is discharged.

Those persons who are in the habit of having beer delivered by taxi will note with interest that a goods-service license as well as a taxicab license has been held to be required, unless the passengers accompany the beer: *Arthur* v. *Bryce* (Abernethy, S.M., November 30, 1942, unreported).

PRACTICAL POINTS.

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1. Settlement.—*Reservation of Special Power of Appointment—Exercise of Power of Appointment—Liability to Death Duty on Death of Settlor.*

QUESTION: In 1899 a settled property, worth about £2,000, on trustees to hold the income for B., A.'s wife, during her lifetime, with remainder to such of the children of A. and B. as A. should appoint by deed, revocable or irrevocable: on default of appointment remainder to such children equally. In 1942 A. exercised the appointment by deed, reserving to himself a power of revocation. A. died in 1943. Does the corpus of the settlement come into A.'s estate for death duty, and if so at what value? Would it have made any difference if A.'s appointment in 1942 had been irrevocable?

ANSWER: The corpus of the settlement is liable to estate and succession duty on A.'s death: s. 5 (1) (*g*) and 16 (1) (*f*) of the Death Duties Act, 1921: *Adamson* v. *Attorney-General*, [1933] A.C. 257.

The value is the full value of the corpus as at A.'s death: s. 27 of the Finance Act, 1937.

The settlement would not have been caught for death duty, if the exercise of the power of appointment had been irrevocable, for then the interests of the appointees would not have arisen by way of survivorship on A.'s death, but would have been *certain* before his death, and A., be it noted, did not reserve any benefit for himself in the settlement.

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2. Stamp Duty.—*Death Duty—Joint Tenancy transformed into a Tenancy in Common.*

QUESTION: In 1940 A., in consideration of the sum of £5,000, paid to him by H. and W. (husband and wife), transferred a parcel of land to H. and W. as *joint tenants*. The purchase-money was contributed in equal shares by H. and W. The special incidents (*jus accrescendi*) of joint tenancy having been explained to H. and W., they now desire to break the joint tenancy and to transfer to themselves as tenants in common in equal shares. What stamp duty and gift duty, if any, will be payable on such a transfer?

ANSWER: As there is no specific provision in either the Stamp Duties Act, 1923, or the Death Duties Act, 1921, the question must be considered by way of analogy and answered on principle.

The transfer from H. and W. as joint tenants to themselves as tenants in common in equal shares is a voluntary conveyance as defined in the Stamp Act. Our provisions as to voluntary conveyances are based on the corresponding English provisions. The House of Lords held in *Stanyforth* v. *Commissioners of Inland Revenue*, [1930] A.C. 339, that a voluntary conveyance from A. to B. reserving to A. a power of revocation, was liable only to a nominal duty, as affecting property worth not more than £50. The principle of that case appears to apply here. All that the transfer will do will be to alter the devolution of the property on the death of the joint tenant who dies first: the beneficial ownership *inter vivos* will remain as heretofore: moreover a joint tenant can always break the joint tenancy *inter vivos* by transferring to a third person: *Hagan* v. *Public Trustee*, [1934] G.L.R. 89.

As to gift duty, this is leviable only on a change of *beneficial* ownership, estate, or interest. The nearest analogy appears to be *Bulkeley* v. *Commissioner of Stamps*, (1907) 26 N.Z.L.R. 747, where it was held that deed of gift duty was not payable on a deed barring an entailed estate, because that merely enlarged the estate of the tenant in tail. Similarly a transfer by joint tenants transferring to themselves as tenants in common does not alienate any estate. Therefore it is submitted that no gift duty is payable.

The answer to the question therefore is that the only duty payable is stamp duty of 11s. It is possible that 15s. duty might be claimed under s. 168, as a deed not otherwise chargeable; but it does not appear to be worth arguing about a mere 4s.

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3. Death Duty.—*Life Insurance Policy—Assigned more than Three Years before Death by way of Gift—Liability to Death Duty.*

QUESTION: A., now deceased, paid for several years the premiums on a life insurance policy on his life, then let the payments lapse. In May, 1939, B., A.'s brother-in-law, paid the overdue premiums at the request of C., B.'s sister, and A.'s wife. The policy was assigned by A. to B. by way of gift (the value of the gift being less than £500). The assignment was taken for the purpose of keeping the policy from A.'s creditors, A. being of an improvident nature. C. later reimbursed B., who at all times admitted that he held the policy in trust for C and on A.'s death he handed the proceeds to C. Are the insurance policies liable to death duty *re* A.'s estate? A. died in 1943.

ANSWER: No. They do not come under s. 5 (1) (*f*), or s. 5 (1) (*b*), or s. 5 (1) (*c*) of the Death Duties Act, 1921, because deceased did not pay any of the premiums after the assignment, and the gift was made more than three years before his death and he did not reserve any interest in the life policy: *Inland Revenue Commissioners* v. *Inzievar Estates*, [1938] A.C. 402, [1938] 2 All E.R. 424.

They do not come under s. 5 (1) (*g*), because the assignment was absolute, and not by way of settlement and because A. did not covenant to pay the premiums after assignment, and finally C. the beneficiary, in order to be entitled to the insurance-moneys, did not have to survive A.: B. and C. at any time after the assignment could have surrendered the policy.

RULES AND REGULATIONS.

Honey Emergency Regulations, 1943 (Emergency Regulations Act, 1939.) No. 1943/200.

Educational Bursaries Regulations, 1940, Amendment No. 1. (Education Act, 1914.) No. 1943/201.

Education (School Age) Regulations, 1943. (Education Amendment Act, 1920.) No. 1943/202.

Secondary Schools Bursaries Regulations, 1943. (Education Act, 1914.) No. 1943/203.

Visiting Forces (Customs Duties) Emergency Regulations, 1943. (Emergency Regulations Act, 1943.) No. 1943/204.

Defence Emergency Regulations, 1941, Amendment No. 7. (Emergency Regulations Act, 1939.) No. 1943/205.

Industrial Rest Period Emergency Regulations, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/206.

War Damage Regulations, 1941, Amendment No. 3. (War Damage Act, 1941.) No. 1943/207.

Post and Telegraph (Staff) Regulations, 1925, Amendment No. 16. (Post and Telegraph Act, 1928.) No. 1943/208.

Public Works Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/1.

Engineers' Registration Regulations, 1925, Amendment No. 3. (Engineers Registration Act, 1924.) No. 1944/2.

Control of Prices Emergency Regulations, 1939, Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1944/3.

Medical Supplies Notice, 1942, No. 11, revoked. (Medical Supplies Emergency Regulations, 1939.) No. 1944/4.

Registration for Employment Order No. 9. (Industrial Man-power Emergency Regulations, 1942.) No. 1944/5.