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CONTRACT: STATUTORY MODIFICATION OF THE DOCTRINE OF FRUSTRATION.

IN this place we have summarized the report of the English Law Revision Committee on the following question that had been submitted to them: "Whether, and if so in what respect, the rule laid down and applied in *Chandler* v. *Webster*, [1904] 1 K.B. 493, requires modification, and in particular to consider the observations made thereon in *Cantiare San Rocco S.A.* v. *Clyde Ship-building and Engineering Co., Ltd.*, [1924] A.C. 266, by Lords Dunedin and Shaw, at pp. 247, 248, and 259."

The rule, which is incident to the doctrine of frustration of contract, was to the effect that, after a frustrating event, the loss "lies where it falls"; and this means that sums paid or rights accrued before that event are not to be surrendered, but that all obligations falling due for performance after that event are excused. The rule not only declared that the contract is at an end and that further performance is excused; but it also said that all moneys paid shall remain as they are.

The Law Revision Committee, after referring to the criticisms that the doctrine had received in the Courts and in textbooks on the law of contract, said that, on any view, the rule declared the making of a new contract. The report concluded by suggesting to the Legislature alterations that it could properly make to modify the effect of the existing common-law rule.[1]

Since the report was issued, there was a limited overruling of *Chandler* v. *Webster* by the decision of the House of Lords in *Fibrosa Spolka Akcyjna* v. *Fairburn, Lawson, Combe, Barbour, Ltd.*, [1942] 2 All E.R. 122, which, at the time, we discussed both as to its own implications, and in relation to the recommendations of the Law Revision Committee[2]. As Lord Russell of Killowen remarked in the course of his speech in the *Fibrosa* case:

> It is to be observed that the doubt as to the correctness of the rule [in *Chandler* v. *Webster*] only arises in cases in which one of the parties to the contract has paid over to the other party the whole or part of the money payable to him as the consideration moving from the other party. If no such money has been paid the rule must apply that the loss lies where it falls; for I know no principle of English law which would enable either party to a contract which has been frustrated to receive from the other compensation for expense, or indemnity from any liability already incurred in performing the contract. Nor could moneys paid before frustration be recovered if the person making the payment has received some part of the consideration moving from the other party for which the payment was made. By way of illustration, take for example, a case in which A. agrees, for a lump sum, to carry out certain expensive repairs or improvements to a special machine which is only of real value to its owner B. for whom the work is to be done. A. expends a considerable sum in the execution of the requisite works and has almost completed them. Frustration then occurs. Notwithstanding the *Fibrosa* decision, as the law stood before the passing of the new Act, A. would not have been entitled to receive a penny piece from B.

Notwithstanding the pressure upon the Legislature entailed by war-conditions in England, the British Parliament has made an attempt to overcome the injustices that have arisen out of the doctrine of frustration of contract—indicated in the Report of the Law Revision Committee, and referred to in the speeches of their Lordships in the *Fibrosa* case—by means of an enactment entitled the Law Reform (Frustrated Contracts) Act, 1943. While it may be too much to expect that this statute will solve all the problems which can come into being in connection with the doctrine of frustration, it certainly gives effect, by a statement of general principles, to the recommendations of the Law Revision Committee to which detailed reference has been made in the articles already referred to.

The framers of the new statute have refrained from entering into too much detail, and from any attempt to consider and rectify the exact implications of the various decisions of the Courts since the doctrine of frustration has troubled them. The result of their efforts has been the enunciation in statutory form of broad principles by means of a short Act intituled, "An Act to amend the law relating to the frustration of contracts." Notwithstanding the general nature of its title, the statute lays down no rules relating to the *cause* of frustration—namely, the circumstances in which a frustrating event can or will occur. It adopts a realistic attitude by confining its provisions to the law relating to the *effect* of the frustration of contracts—that is to say, with the adjustment of the rights and liabilities of the parties after the contract has become frustrated.

Now, to proceed to an examination of the statute itself, for which we are, in part, indebted to our contemporary, the *Law Journal* (London).

[1] (1939) 15 N.Z.L.J. 165.
[2] (1942) 18 N.Z.L.J. 229.

The new Law Reform Act, subject to the exceptions mentioned below, applies to all contracts (whether made before or after the date of its passing)[3] which are governed by English law, and which have "*become* impossible of performance or been otherwise frustrated," with the result that "the parties thereto have for that reason been discharged from the *further* performance of the contract": s. 1 (1). The statute applies to contracts to which the Crown is a party. It has been said that the effect of frustration is to "dissolve" or "discharge" the contract, but as a recent writer has remarked: "Rather should it be said that the rights and obligations of the parties are (upon frustration) to be determined as if both parties were released from all obligations due to be performed after the frustrating event, each party retaining all rights and benefits which have vested or accrued under the contract prior to that event": *57 Law Quarterly Review*, at p. 345, n. 20. The *Fibrosa* decision only disturbed the position in this respect where there was a total failure of consideration. The phrase "*become* impossible" make it appear that the subsection is not intended to apply to a contract which might be said to be frustrated if it were, from its inception, impossible of performance, since the words are "has become impossible" and not "is or has become impossible" of performance.

The exceptions above mentioned are as follows:—

(*a*) The Act does not apply where frustration takes place before July 1, 1943: s. 2 (1). The Act states with what has been described as "hideous inelegance" that it is not to apply to contracts "*as respects which* the time of discharge is before the said date."

(*b*) The Act does not apply to charter-parties (except time charter-parties or charter-parties by way of demise) or to any contract (except a charter-party) for the carriage of goods by sea or to contracts of insurance (except as mentioned below); or to any contract to which s. 7 of the Sale of Goods Act, 1893,[4] applies. That section avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer. Furthermore, the statute does not apply to any other contract for the sale, or the sale and delivery, of *specific* goods, where the contract is frustrated by reason of the fact that *the goods have perished*: s. 2 (5).

It will be remembered that, unless it is otherwise agreed, goods sold remain at the vendor's risk until the property passes; but once the property has passed the goods are at the risk of the purchaser, whether delivery has been made or not, except that where delivery is delayed through the vendor's or purchaser's fault, the risk is with the party in fault: Sale of Goods Act, 1893, s. 20.[5] The property in specific goods will pass according to the intention of the parties (not necessarily upon the contract being made) (s. 17).[6]

(*c*) The parties may have inserted in the contract a provision which is intended to have effect in circumstances which would otherwise result in the frustration of the contract, or which is intended to take effect whether frustration does or does not arise. If the Court considers upon the true construction of the contract that such was the intention of the parties, then it is only to make the adjustments mentioned below "to such extent, if any, as appears to the Court to be consistent with such provision in the contract": s. 2 (3). If the parties chose to state that the Act should not apply at all, presumably such a stipulation would be valid, through not very reasonable unless they set up their own code for adjusting their rights if the contract is frustrated.

Before dealing with the adjustments which are made by the statute there is one further provision of the Act to be mentioned. The contract may be one to which the Act applies, but it may appear to the Court that a part of the contract can properly be severed from the remainder of the contract. By s. 2 (4) the Court *must* then treat that part as a separate contract if, but only if, that part has been wholly performed before the "time of discharge" or so performed except as to the payment in respect of that part of the contract of the appropriate sums which are specified or can be ascertained under that part of the contract.

The main provisions of the Act—or, we might say, of the main section, for the whole of the adjustments of the rights and liabilities of the parties in relation to frustrated contracts are in it—are all contained in s. 1.

All sums paid or payable to any party in pursuance of the contract before the time of discharge are to be recoverable if paid, or if not paid shall cease to be payable: s. 1 (2). Of course, if that rule were absolute it might produce considerable hardship. Accordingly, it is provided that if the party to whom the sums so paid (or payable) has incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court, if it considers it just to do so having regard to all the circumstances of the case may allow that party to retain (or recover) the whole or any part of the sums so paid (or payable), but he will not be allowed to retain (or recover) more than the amount of the expenses so incurred by him: s. 1 (2), proviso.

It may, however, be noted that the power is given to "the Court" to allow such retention or recovery if it considers it just to do so. By s. 3 (2) "the Court" means the Court or arbitrator by or before whom the matter falls to be determined.

Section 1(3) is to the effect that where A. has benefited in any manner under a contract made between A. and B., owing to anything done by B. (except a payment by B. to which s. 1 (3) applies), in or for the purpose of performing the contract before the time of discharge of the contract, then A. must pay for that benefit such sum (if any) as the Court considers just in the circumstances. For this purpose the Court is to have regard in particular to the following matters:—

(*a*) Any expenses incurred by A. before the time of discharge in, or for the purpose of performing, the contract, including any sums paid or payable by A. to B. in pursuance of the contract and retained or recoverable by B. under s. 1 (2); and

(*b*) "The effect in relation to the said benefit of the circumstances giving rise to the frustration of the contract."

In estimating "expenses" for the purposes of the provisions above mentioned, a reasonable addition is to be made in respect of overhead expenses and work or services performed personally by a party to the contract: s. 1 (4).

[3] August 5, 1943.
[4] Sale of Goods Act, 1908, s. 9.
[5] *Ibid.*, s. 22.
[6] *Ibid.*, s. 19.

Moneys payable under any contract of insurance are to be disregarded in considering what sums should be recovered or retained by any party to the contract, unless such insurance has been effected pursuant to an express term of the contract: s. 1 (5) and s. 2 (5). The Act does not state simply that the Court is to disregard sums payable under any contract of insurance, but that, save as above mentioned, the Act "shall not apply to any contract of insurance." Moreover, it is gathered that, particularly in connection with marine insurance, insurance companies have long since devised what Dr. A. D. McNair has referred to as an anti-gas mask in the shape of the following clause: "Warranted free of any claim based upon loss of, or frustration of, the insured voyage."

Next in the Act follows a provision to the following effect. One party to the contract (A.) has assumed obligations in consideration of the conferment by another party to the contract (B.) of a benefit upon some other person (C.) (C. being either a party to the contract or a third person). The Court may, if it is thought just, treat the benefit conferred on C. as a benefit conferred on A.

The new Law Reform Act is an attempt to remove the harshness and injustice of what Lord Dunedin, in the *Cantiare San Rocco* case, termed "the something for nothing rule," and to overcome the doctrine that "the loss lies where it falls," which Lord Shaw, in the same case, stigmatized as amounting to a maxim that "works well enough among tricksters, gamblers, and thieves." It certainly speeds the consignment of *Chandler* v. *Webster* and its congeners, to use Lord Macmillan's words in the *Fibrosa* case, "to the limbo of cases disapproved and overruled, . . . and unwept." Nevertheless the statute has received considerable criticism in regard to its details, though not as to its broad essential principles which appear to have received general commendation. With such criticism, we do not at this stage propose to deal. As one learned commentator has observed: "Strange though it may seem, few commercial contracts contain provisions which are intended to ameliorate the harshness of the doctrine of frustration by suitable adjustments of the rights of the parties in the event of frustration. Now that the lay-figure is provided by Parliament, commercial lawyers will be able to put upon it such clothing as they may think fit."

We think that the New Zealand Law Revision Committee should give early consideration of the provisions of the new British statute, and should study it, moreover, in the light of the available expert and well-informed criticism that has been devoted to it with a view towards suggested improvements in its terms. The resultant Bill, if introduced with the blessing of the Committee, should not be controversial in the Parliamentary sense, and might well receive the approval of the Legislature without delay or difficulty. If the matter be delayed here, we shall remain bound by the common-law doctrine that has been ameliorated by the new statute in Great Britain. Further, contracts made in New Zealand for performance in the Mother-country, and *vice versa*, may, in circumstances giving rise to frustration, cause considerable difficulty if there is disparity in the law of the two countries. As war-conditions—and, it may well be, post-war conditions, too—provide fruitful soil in which frustration in contract may germinate, we recommend early action on the part of the Law Revision Committee; and we hope for legislative fulfilment of their considered recommendations.

SUMMARY OF RECENT JUDGMENTS.

COURT OF APPEAL.
Wellington.
1943.
June 29, 30;
July 1, 2, 5–9,
12–14.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

TAURANGA BOROUGH v. TAURANGA ELECTRIC-POWER BOARD.

Contract—Municipal Corporation—Electric-power Board—Contract by such Corporation to supply Electricity in bulk to such Board of adjoining District whose Boundaries coincided with those of a County adjoining Borough, for Sale or Distribution to Consumers in such District—"Any person residing beyond the Borough"—"The local authority of any adjoining district"—Whether such Board within either Designation—Contract ultra vires *both Parties—Whether Remedy* quasi ex contractu *or by means of tracing Judgment—Municipal Corporations Act, 1920, ss. 281, 282 (Municipal Corporations Act, 1933, ss. 287, 288)—Electric-power Boards Act, 1925, s. 82.*

Section 282 of the Municipal Corporations Act, 1920 (identical with s. 288 of the Municipal Corporations Act, 1933), is the only provision in that statute that authorizes a borough to supply electricity beyond the boundaries of the borough. The words in para. (*a*) of that section, "any person residing beyond the borough," refer to an individual consumer requiring electricity for his own use. An Electric-power Board of an electric-power district is not such a person, nor is such a Board "the local authority of any adjoining district" within the meaning of para. (*b*) of s. 282 (the only provision permitting the supply of electric energy in bulk for sale or distribution by the purchaser to consumers in a district outside the borough), even though the electric-power district of that Board adjoins the borough, which supplies that Board, and although the boundaries of the district coincide with the boundaries of the district of the municipal local authority adjoining the borough. The words "the local authority of any adjoining district," in s. 282 (*b*), interpreted in the light of the definition of "local authority" in s. 4 of the Acts Interpretation Act, 1924, means that the word "district" must be a locality which enjoys the privilege of self-government in respect of its local affairs generally and not merely self-government in respect of one specified activity.

Therefore, a contract by a borough to supply to such an Electric-power Board electrical energy in bulk for sale or distribution by the latter to consumers in such a district is *ultra vires* the borough. As by s. 82 (*d*) of the Electric-power Boards Act, 1925, an Electric-power Board "may purchase electric energy in bulk from . . . any local authority . . . authorized to sell the same" and the local authority selling the same was not so authorized, the contract was *ultra vires* the Board also. It was, therefore, void *ab initio* and could not be sued on by either party.

Ashbury Carriage and Railway Co. v. *Riche*, (1875) L.R. 7. H.L. 653) applied.

Attorney-General v. *Wilson's (N.Z.) Portland Cement Co., Ltd.*, [1939] N.Z.L.R. 813, G.L.R. 464; *Taranaki Electric-power Board* v. *New Plymouth Borough*, [1932] N.Z.L.R. 1537, G.L.R. 699, aff. on app. [1933] N.Z.L.R. 1128; *Dundee Harbour Trustees* v. *D. and J. Nichol*, [1915] A.C. 550; *Attorney-General* v. *West Gloucestershire Water Co.*, [1909] 2 Ch. 338; *Attorney-General* v. *Leicester Corporation*, [1910] 2 Ch. 359; *Attorney-General* v. *Sheffield Corporation*, [1912] 106 L.T. 367; *Attorney-General* v. *Manchester Corporation*, [1906] 1 Ch. 643; *Macarthy* v. *Wellington City Corporation*, (1889) 8 N.Z.L.R. 168; *Attorney-General* v. *Great Eastern Railway Co.*, (1880) 5 App. Cas. 473; *Attorney-General* v. *West Gloucestershire Water Co.*, [1909] 2 Ch. 338; *Mayor, &c., of Wellington* v. *Gilmer*, (1913) 33 N.Z.L.R. 86, 16 G.L.R. 1; and *Sinclair* v. *Brougham*, [1914] A.C. 398, referred to.

As such a contract was *ultra vires* both parties, relief could not be granted on the basis of a claim *quasi ex contractu*.

Re Coltman, Coltman v. *Coltman*, (1881) 19 Ch.D. 64, distinguished.

Relief could, however, be granted on the basis of a tracing judgment, on the following lines. So far as the energy generated by the borough at its own works and supplied to the Board at a price agreed upon by the parties and paid to the borough, was concerned those transactions stood and would not be reopened. But in respect of energy taken by the Board from the borough for which it had not paid or had paid only an arbitrary and insufficient price fixed by itself, the following was the position: The Board had received property (electrical energy) to which it was not entitled and which continued to be the property of the borough, the proceeds of the sale of which it had in its possession, as its balance-sheets showed a surplus to a greater amount than the value of this electrical energy, for which the borough would not accept in full satisfaction. Hence, the principle of a tracing judgment should be applied in the following way:—

There must be an inquiry as to the quantities of such energy, as to the price at which the same was sold by the Board, and as to the fair and reasonable costs and expenses of the Board of and incidental to such sale; and a declaration that the Board must account to the Council for the amount found to represent such proceeds of sale, less the costs and expenses, the Council bringing into account all moneys already paid by the Board to the Council in respect of the quantities of energy the subject-matter of such inquiry. The action should then stand referred back to the Supreme Court to give such further directions, and make such further orders as might be necessary to work out the judgment of the Court of Appeal.

Sinclair v. *Brougham*, [1914] A.C. 398, applied.

So held by the Court of Appeal (*Myers*, C.J., and *Kennedy*, *Callan*, and *Northcroft*, JJ., *Blair*, J., dissenting), allowing the judgment of *Smith*, J.

Per *Blair*, J., That the contract was *intra vires* both the Council and the Board; but agreeing that, on the basis that it was *ultra vires* both, the tracing-order proposed should be made.

Counsel: *Johnstone*, K.C., *Cooney*, and *T. Henry*, for the appellant; *North and Cleary*, for the respondent.

Solicitors: *Cooney and Jamieson*, Tauranga, for the appellant; *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the respondent.

SUPREME COURT. Christchurch. 1943. June 3, 11; December 17. *Northcroft*, J.

In re **BRIGHTON COAL-MINES, LIMITED (IN LIQUIDATION).**

Company Law—Directors—Winding-up—Restraint from management of Company of Person who has committed Fraud in the Promotion or Formation thereof—"Fraud"—Companies Act, 1933, s. 216.

"Fraud" in s. 216 of the Companies Act, 1933, is that which connotes actual dishonesty, involving according to current notions of fair trading among commercial men, real moral blame.

In re Patrick and Lyon, Ltd., [1933] Ch. 786, applied.

In re New Zealand Loan and Mercantile Agency Co., Ltd., (1894) 10 T.L.R. 371); *Gluckstein* v. *Barnes*, [1900] A.C. 240; *Peek* v. *Gurney*, (1873) L.R. 6 H.L. 377; and *In re London and Globe Finance Corporation, Ltd.*, [1903] 1 Ch. 728, referred to.

Counsel: *A. W. Brown*, in support of summons; *Thomas* and *E. S. Bowie*, for Wilson, to oppose; *Lascelles* and *H. M. S. Dawson*, for Hunter, to oppose.

Solicitors: *Crown Solicitor*, Christchurch, for the Official Assignee; *Bowie and Bowie*, Christchurch, for Wilson; *Joynt, Andrews, Cottrell, and Dawson*, Christchurch, for Hunter.

COURT OF APPEAL. Wellington. 1943. June 15, 16. *Blair*, J.

NAPIER BOROUGH v. HAWKE'S BAY ELECTRIC-POWER BOARD.

Electric-power Board—Election by Electors of a Borough of its Representative on such Board—Election Conducted by Borough Council—"Public bodies"—Whether such Board "entitled to use" the District Electors Roll of the Borough under s. 16 of the Municipal Corporations Act, 1933, and liable to pay to Borough Council a fair Proportion of the Cost of making and printing the Roll—Electric-power Boards Act, 1925, s. 13—Electric-power Boards Amendment Act, 1927, s. 4—Municipal Corporations Act, 1933, s. 16.

An Electric-power Board, some of whose members elected as "representatives of the several constituent districts" are elected by the electors of a borough at an election conducted under s. 13 of the Electric-power Boards Act, 1925, subs. (6) of which section makes the returning officer of the borough the returning officer of the Board (as well as of the borough) is "a public body entitled to use" the district electors roll of the borough for the purpose of the elections of its members or for polls taken by it within the meaning of s. 16 of the Municipal Corporations Act, 1933; and is, as such, liable to contribute a fair proportion of the cost of making and printing the said roll.

Auckland City Corporation v. *Auckland Transport Board*, [1936] N.Z.L.R. 962, [1937] G.L.R. 189, applied.

Armstrong v. *Wairarapa South County*, (1897) 16 N.Z.L.R. 144, (1899) 17 N.Z.L.R. 504, 1 G.L.R. 99, referred to.

So held by the Court of Appeal (*Blair* and *Kennedy*, JJ., *Northcroft*, J., dissenting), allowing an appeal from the judgment of *Myers*, C.J., reported [1943] N.Z.L.R. 211.

Counsel: *O'Shea*, for the appellant; *Sproule*, for the respondent.

Solicitors: *John O'Shea*, Wellington, for the appellant; *Kennedy, Lusk, Willis, and Sproule*, Napier, for the respondent.

BENCH AND BAR.

The Hon. F. W. Schramm, M.P. (Messrs. Schramm and Elwarth, Auckland), has been elected unanimously Speaker of the House of Representatives.

The First Division of the Court of Appeal for the current year will consist of the Chief Justice, and Blair, Kennedy, Callan, and Northcroft, JJ. The Second Division will comprise the Chief Justice, and Smith, Johnston, Fair, and Finlay, JJ.

Mr. F. W. Aickin, O.B.E., has been appointed chief legal adviser and staff superintendent of the New Zealand Government Railways. Mr. Aickin, who was a major in the Second New Zealand Expeditionary Force has just returned to duty after four years' service overseas. He also served from 1914 to 1919 in Samoa, Egypt, Gallipoli, the Western Front, and in the Army of Occupation in Germany, and was mentioned in dispatches. In this war, he commanded the 16th Railway Operating Company, which served with signal distinction in the Western Desert and Libyan campaigns from 1940 to 1943. He was mentioned in dispatches in 1940 when his company was attached to the Desert Force, and in 1942 was awarded the O.B.E. for his services with the Eighth Army.

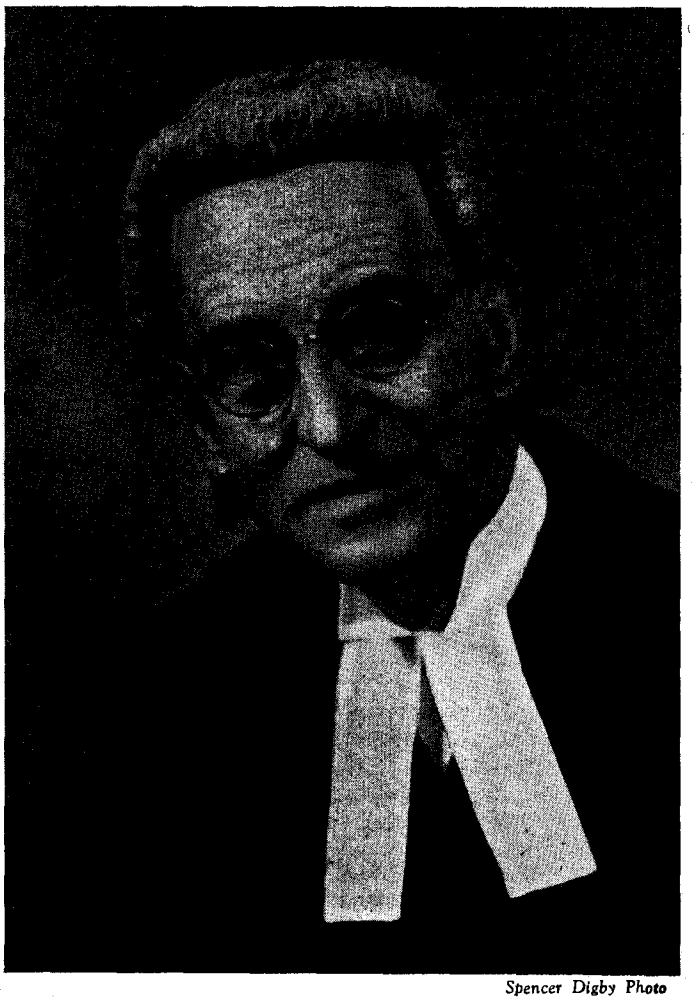
Captain Colin Armstrong, M.C. and Bar (Messrs. Armstrong, Barton, and Armstrong, Wanganui), returned to the Dominion with a recent furlough draft. After service with the 2nd New Zealand Expeditionary Force, he was captured with Brigadier Hargest's staff in Libya. Sent to a prison camp in Italy, he escaped, but was recaptured. He was then sent to Austria, where he again escaped and was recaptured. Then from a prison camp in what used to be the Polish Corridor, he got back to England by way of Sweden, and he returned to the Middle East. In the latest Honours List, he was awarded a bar to his Military Cross.

THE LATE SIR HUBERT OSTLER.

Tributes of Bench and Bar.

The late Sir Hubert Ostler, Kt., who retired on the grounds of ill-health on February 1 of last year, from his position on the Supreme Court Bench, which he had adorned for eighteen years, died at Dunedin on February 24, in his sixty-eighth year.

On the morning of February 28, the Supreme Court at Wellington was filled with an attendance of members of the legal profession that must have been a record one. It included the Attorney-General, the Hon. H. G. R. Mason; the Solicitor-General, Mr. H. H. Cornish, K.C.; Mr. C. H. Weston, K.C.; Mr. P. B. Cooke, K.C., and Mr. W. J. Sim, K.C. In addition, there were present in Court Mr. Justice Hunter, Mr. J. L. Stout, S.M., Mr. A. M. Goulding, S.M., and Mr. W. F. Stilwell, S.M.; the Under-Secretary of Justice, Mr. B. L. Dallard, and Dr. T. G. Gray, Director-General of Mental Hospitals, who represented the Prisons Board, of which the late Judge was for many years Chairman.



Spencer Digby Photo

The Late Sir Hubert Ostler

THE CHIEF JUSTICE.

The Chief Justice, the Rt. Hon. Sir Michael Myers, with whom were associated Mr. Justice Blair and Mr. Justice Smith, addressing the assembled members of the Bar, said: "We are met to-day on a sad occasion. The cold hand of Death has removed from our midst one who for the period of eighteen years a Judge of this Court, from which position he retired at the zenith of his mental powers only a short thirteen months ago. We meet to do honour to his memory and to express our respectful word of sympathy to his widow and family in their bereavement. Mr. Justice Johnston has asked me to express his regret that judicial engagements outside Wellington prevent him from being present with us.

"Sir Hubert Ostler had a very fine career. As a young man, though essentially a lover of outdoor life, he decided upon a career in the profession of the law. Showing great promise as a junior, he soon acquired an extensive practice and eventually in February, 1925, was appointed, and until his resignation in February, 1943, remained, a Judge of this Court. To each of us and to some of you he was a comrade at the Bar, but it is as a Judge that he was best known to you all, and it is as a colleague on the Bench that I shall speak of him now.

"If I were asked to name his chief characteristic, I should find it difficult to answer, for the truth is that he was the fortunate and gifted possessor of a rare combination of talents. A powerful intellect, indefatigable industry, great physical and moral courage, an intense passion for justice, a shrewd knowledge of human nature coupled withal with a strong feeling of sympathy with its frailties, a keen perspicacity of judgment—all these were his attributes. Add to all these his promptness of decision: his judgments were never delayed, for he always insisted that to no man must justice be delayed, and that every litigant is entitled to a prompt adjudication. He was an extremely useful and sound Judge; the dignity of his Court was invariably maintained and the traditions of the Bench were always inviolate in his hands. We have missed him greatly since he retired, and I perhaps most of all, for there are various problems that confront the Judges outside the mere deciding of the cases that come before them, and his wise counsel in these matters, particularly in his last seven years during which he was senior puisne Judge, was always a great help.

"But what perhaps most compelled the admiration of all who knew him was his heroic fortitude in his fight with the malady that afflicted him during the last few years of his life and which eventually broke him down physically though fortunately leaving his superb intellect absolutely unimpaired, for his great mental alertness remained to the very end. For years he suffered constant and intense physical pain. He bore it without flinching and without complaint—pain from which he knew there could be no surcease but in death. He died as he had lived—a brave soul. *Vita enim mortuorum in memoria vivorum est posita.* His old colleagues and his friends will remember him."

The Attorney-General.

The Attorney-General, Hon. H. G. R. Mason, said that it was hardly more than a year since the late Mr. Justice Ostler, still in the full possession of his vigorous power of mind, was compelled by physical infirmity to relinquish his high office of Judge of the Supreme Court and the Court of Appeal of New Zealand. The impression that he made upon members of the legal profession by his work and personality was, therefore, still fresh in their minds when they meet all too soon after his retirement to pay their tribute of respect to his memory. He proceeded: "The late Mr. Justice Ostler was a man of strong character and robust intellect. His thinking was clear and direct; his expression of it terse and vigorous. The faculty of decision which was strongly developed in him enabled him to reach his conclusions without the strain of protracted doubt or hesitation.

"As was fitting in a disciple of that grand old man of our jurisprudence, the late Sir Robert Stout, Mr. Justice Ostler showed scant regard for technicalties that stood in the way of the merits as he saw them. To him the law was not an end in itself but only a means of doing what was fair between the parties. And so he was never overawed by the seemingly conclusive precedent or rule of Court, whose application would in his view defeat the better right. Seldom if ever did he find authority so intractable as to prevent his doing what he believed to be justice.

"In the determination by our higher Courts of complicated issues where rival merits or even principles of law compete for ascendency, unanimity of judicial opinion is not always possible. At times the duty of dissent is laid upon a Judge. The late Mr. Justice Ostler never shirked or shrank from its performance."

The Attorney-General went on to say that the late Judge as a young man, earned his bread literally in the sweat of his brow. The experience so gained was invaluable to the Judge for it ensured that he never lost touch with reality which means the outlook and the needs, the fears and the hopes of ordinary men and women at work in a working-world. To the discharge of the difficult and anxious duties of President of the Prisons Board, the late Judge brought not only his characteristic good common sense, but also a genuine sympathy with the penitent offender who honestly desired to become a good citizen. While realizing the paramount need of protecting the community of men and women who obey the laws and respect each other's rights, the late Judge would have been the last to deny or delay to the man or woman who had done wrong the opportunity of doing right in the future.

In conclusion, Mr. Mason said: "The late Mr. Justice Ostler will be remembered by all who knew him as a man who did what he believed to be his duty without fear or favour. To young men, his life and work should be an inspiration for they show that the door of opportunity is always open to character and courage."

The New Zealand Law Society.

Mr. G. G. G. Watson, on behalf of the New Zealand Law Society, in the unavoidable absence of the President, Mr. H. F. O'Leary, K.C., and of the Vice-President, Mr. A. H. Johnstone, K.C., said that it was his duty to pay the tribute which every practitioner in New Zealand would wish to pay to the memory of a man each and all of them respected and esteemed.

"When in practice at the Bar, he was regarded by his colleagues as one who strove with all his might to serve worthily the interests of those who entrusted their cause to him, but one who scorned to take advantage of anything which savoured of being mean, paltry or unfair," Mr. Watson continued: "When appointed to the Bench, he found wide scope for his ever-present ideal of selfless service to the community. He brought to that high office not only his talents as an able lawyer and a prodigious worker, but also a great love of fairness and justice and a hatred of all that was unfair and unjust. At all times he sought to make the law the true servant of justice.

"At the Bar, on the Bench, and in private life, he was above all a manly man, of high ideals, great courage, and forthright speech. He wrought worthily; he achieved highly; he suffered bravely. Each one of us this day will say, 'I have lost a friend.'

"May the grief of his widow and family be, in measure, assuaged by the knowledge that far-flung friendship now emerges into the cherished memory of a good man."

The Wellington Law Society.

The President of the Wellington District Law Society, Mr. T. P. Cleary, said that it was fitting that the practitioners of the Wellington District should especially associate themselves with the tributes that had been paid to the memory of the late Judge. He continued: "There are those amongst us who recall him as a fellow-student when he first came to the study of the law; there are many who remember him as a colleague in practice during his first years at the bar here in Wellington, when he early showed that capacity and industry which within a comparatively short time were to carry him to the Bench; and all of us have known him as a Judge for it was in Wellington that he spent the eighteen years of his judicial life.

"We count it a rare privilege that this has been so. From the outset his impelling earnestness to see justice done commanded the complete loyalty and respect of the Bar. As time went on, and the characteristics of the man were mirrored in his work as a Judge, our feeling of respect deepened into one of attachment and affection. And then in later years, and particularly during this last year since we farewelled him as a Judge, we watched with sympathetic admiration the valiant courage with which he met the inexorable advance of his long drawn out illness.

"As we held him in respect and affection and admiration during his lifetime, so we lament his death and will cherish his memory and example."

Mr. Cleary added that he had been especially asked by the practitioners of the Horowhenua District, where the late Judge spent his early years and where he still had many friends, to associate them with the tributes paid to his worth and work.

In conclusion, he said that all members of the profession in Wellington joined in conveying an expression of their sincerest sympathy to Lady Ostler and the bereaved family in their sad loss.

WAR CRIMINALS AND THE NEUTRALS.

The Position in International Law.

By H. A. MUNRO.

(*Concluded from p. 31.*)

EXTRADITION.

If, however, the neutrals, showing no sympathy with the aims of the United Nations, stand on their right to retain possession of enemy refugees, the only remedy is to proceed under the network of extradition treaties. Here there are difficulties which need examination, and necessity, rather than effrontery, drives me to put forward some tentative observations in this almost unexplored field of extradition in relation to war crimes. The Lord Chancellor has warned us that "this is one of the most complicated topics which can engage the attention of anybody, at any rate as far as the different treaties are concerned. Indeed, a very limited number of people would claim to be anything like completely competent to deal with the whole subject." The writer certainly does not profess to reach the required standard, and hopes that critics will make allowance for the apparent dearth of authority on extradition and war crimes, although a great deal of research on general questions of extradition has already been carried out by unofficial bodies of international lawyers, and in 1928 the International Law Association adopted a draft Convention on Extradition; see also the work mentioned in the notes to pp. 555, 558, and 559 in *1 Oppenheim's International Law*, 5th Ed. The points which arise might well have to be submitted to the Permanent Court of International Justice for an advisory opinion.

In order that a criminal may be extradited, his crime must be considered an offence by the law of the State where he has taken refuge, and the Treaties sometimes provide that an extradited person is only to be tried for the crime for which he has been extradited, or a crime within the terms of the Treaty. Some Extradition Treaties are founded on national laws, such as the British Extradition Acts of 1870 to 1935, which contain a list of crimes (including murder, larceny, rape, robbery with violence, sinking or destroying a vessel at sea, or attempting to do so) for which extradition may be claimed. The person whose extradition is sought must be alleged to have committed one of the extradition crimes, but need not be a subject of the State demanding extradition, or of the State against which the demand is made: *R.* v. *Ganz*, (1882) 9 Q.B.D. 93.*

WAR CRIMES AND EXTRADITION.

What is the position of what are known as "war crimes" in relation to Extradition Treaties? Are war crimes offences of the type which comes within the Treaties? This leads to the question of what is a war crime. "War crimes" are defined in *2 Oppenheim's International Law*, 6th Ed., p. 451, as "such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders." What acts fall within this category? According to Oppenheim they are:—

"(1) Violations of recognized rules regarding warfare committed by members of the armed forces.

"(2) All hostilities in arms committed by individuals who are not members of the enemy armed forces.

"(3) Espionage and war treason.

"(4) All marauding acts"—

and he then proceeds to give instances. The declarations of the United Nations made in the course of this war have also specifically referred to "imprisonments, mass expulsions, the execution of hostages and massacres" and "acts of violence inflicted on the civilian populations."

While a few of the war crimes seem to fall outside the conception of ordinary crimes against national systems of law (*e.g.*, breach of parole, use of enemy uniforms during battle), the bulk of them (*e.g.*, assassination) are ordinary crimes, and the question arises whether these ordinary crimes should not be classed as offences against the law of the country where they are committed, as well as against International Law. Barbarous acts in war, and war crimes generally, can be claimed to be contrary to the laws of the country where they are committed, notwithstanding the existence of a state of war, and thus to be triable in the Courts of that country, a principle which was reaffirmed at the Moscow Conference of October, 1943. On this basis such crimes could be the subject of extradition proceedings, and the view that war crimes fall within the law of extradition appears to receive support from the note to p. 564 in Vol. 1 of *Oppenheim*, 5th Ed., where there is a reference to the question of whether war crimes should be considered as political crimes or not, which appears to imply that, if not political, they can be the subject of extradition.

THE DEFENCE OF SUPERIOR ORDERS.

If extradition is sought, the answer might be made that the accused is entitled to acquittal because he committed his crime under superior orders. The possibility of a successful defence should not, however, prevent extradition, but it is relevant to consider the position. A plea that the war crime was committed in pursuance of superior military orders is not necessarily a defence; the Inter-Allied Declaration at St. James's Palace of January 13, 1942, denounced "acts of violence against civilians," disregarding of "laws in force" in occupied countries, and overthrowing "national institutions," and proclaimed the punishment "of those guilty of or responsible for those crimes, whether they have ordered them, perpetrated them, or participated in them." From this it can be seen that the defence of superior orders has been dealt with in advance. In one of the Leipzig trials after the last war, the case of the *Llandovery Castle* (*Annual Digest*, 1923–24, case No. 235, a charge of murdering the passengers in a torpedoed ship when they had taken to the boats) it was decided by the German Supreme Court that it could be no defence to plead superior orders where the crime was clearly in defiance of International Law. On the other hand, it would seem that (subject to the new elements introduced by the

* See definitions of "extradition" in *14 Halsbury's Laws of England*, 2nd Ed. 522, and *1 Oppenheim's International Law*, 5th Ed. 544, and observations on pp. 558 to 560.

Inter-Allied Declaration) the fact that the crime was committed under superior orders, "not obviously unlawful," would be an element for consideration by the Court; "such circumstances," writes *Oppenheim* at p. 454, Vol. II, "are probably in themselves sufficient to divest the act of the stigma of a war crime." The question, however, of whether a person accused of a war crime could escape extradition, because he might have a defence based on superior orders, should, it is thought, be answered in the negative.

Are War Crimes Political Offences?

It is well known that political offences are sometimes excluded from extradition, but, while there is some uncertainty as to exactly what a political offence is, it seems clear that a war crime does not fall within that category. The exclusion of political criminals is due to the policy of many of the most highly civilized countries during the nineteenth century, and particularly of Great Britain and the United States. In *14 Halsbury's Laws of England*, 2nd Ed., 538, it is said that "fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to or formed part of political disturbances": *Re Castioni*, [1891] 1 Q.B. 149 (a case of a Swiss subject who committed homicide during an insurrection in Ticino, and whose extradition was declined by a British Court on the ground that the crime was political). The principle of non-extradition for a political offence was also applied by Italy in 1934 in relation to the application by France for the murderers of King Alexander of Jugoslavia and M. Barthou at Marseilles on October 9, 1934. The crimes of anarchists were, however, not usually regarded as political: *Re Meunier*, [1894] 2 Q.B. 415. The reason for this appears to be that an anarchist is a disbeliever in all forms of government, and an offence is only considered to be political if it is committed in the course of an attempt to force a new government on a State where there are opposing factions, a test which shows that a war crime is not political. The practical difficulties of refusing extradition in all cases which might be political are so great that Swiss law now prescribes that a political criminal is not entitled to protection if his crime is substantially a crime against ordinary law, controversies on this point being settled by the Swiss Federal Court; if extradition is granted, a condition must be inserted by the Federal Council that the criminal must not be prosecuted or punished for a political crime or motive.

Restricted Criminal Jurisdictions.

A serious difficulty may arise because of the limited scope of the criminal law of various countries, a subject dealt with in *1 Oppenheim's International Law*, 5th Ed. 267-270. Extradition would be limited by the extent to which States can claim criminal jurisdiction for offences by aliens committed abroad. Different views on this subject are held by various States, but the British criminal law does not extend to offences by aliens out of England. As was pointed out by Lord Maugham in the House of Lords, this assumes considerable importance in relation to such possible offences as, for instance, the murder of a British prisoner of war in Germany by a German, and Lord Maugham suggested that legislation should be passed to confer jurisdiction on British Courts in such a case. Lord Simon (in his speech on behalf of the British Government in the same debate) referred to the question of "What is the ambit of the jurisdiction which might by International Law be conferred upon them" (the National Courts) "... by Parliament here actually legislating to enlarge, within permissible limits, the jurisdiction of our Courts to deal with crimes committed abroad," but no such legislation has so far been introduced, and it seems clear that the British will have considerable difficulty in showing that enemy criminals who have committed crimes abroad can be extradited to Britain.

There are, however, cases (such as *R.* v. *Godfrey*, [1923] 1 K.B. 24) where Britain has allowed extradition of a person who was charged with an offence committed in this country, but having effects in another country. In *R.* v. *Godfrey* the accused was extradited to Switzerland for having, in England, allegedly procured an offence which was to be completed in Switzerland. At the time of prohibition the United States were faced with the problem of offences by subjects of other countries who lay in ships outside the territorial waters of the States, and such persons were held in *Ford* v. *United States*, (1927) 273 U.S. 593, to be triable in the States.

So far as collisions at sea were concerned, the limits of criminal jurisdiction were investigated in 1927 by the Permanent Court of International Justice in the much discussed *Lotus Case* (*Turkey* v. *France*, Series A., No. 10), in which Lord Finlay (dissenting) endorsed the view that States have no criminal jurisdiction for the crimes of aliens committed abroad. The case arose out of a collision on the high seas between the French ship *Lotus* and the Turkish ship *Boz-Kourt*, which sank, eight of the Turkish crew being lost. When the *Lotus* reached Constantinople, officers of both ships were tried for manslaughter, and convicted, but France subsequently raised in the Permanent Court the question of whether Art. 6 of the Turkish Penal Code was valid in International Law, in giving jurisdiction over foreigners for offences abroad. This raised a sharp division of opinion in the Court, which eventually decided by a casting-vote that the effects of the collision were produced in Turkish territory, *viz.*, the ship *Boz-Kourt*, and that the prosecution was not inconsistent with International Law. Opinions were further expressed by some of the Judges that International Law does not absolutely prohibit States from assuming criminal jurisdiction over aliens for offences committed abroad. Lauterpacht, in *The Function of Law in the International Community*, pp. 76 and 77, refers to "the discrepancies so clearly revealed in the *Lotus Case* in the practice of States in regard to the question of jurisdiction over foreigners for crimes committed abroad."

The actual place where a crime was committed does not appear to affect military courts. An opinion on this subject is quoted by Sheldon Glueck in an article published in the *Harvard Law Review* for June, 1943, entitled "By What Tribunals Shall War Offenders be Tried?" After the close of the last war a German general was accused of having looted a house where he had been billeted in France. At the time of the accusation he was living in Coblenz, territory occupied by the American Army. The opinion of the Judge Advocate of the 3rd United States Army was that, as the looting of private property is not justified by any law of war, the crime must have been simple larceny under French law. It was possible to deliver the accused to the French Courts, but the Judge Advocate advised that the territorial requirement of jurisdiction did not apply to a military court (*4th American Military Government Reports*, 362).

In view of the difficulties arising out of limited criminal jurisdiction, it seems possible that the Extra-

dition Treaties to be used will depend on the place where the crime was committed; for crimes within the British jurisdiction, British Extradition Treaties; for those within the jurisdiction of another of the United Nations, the Extradition Treaty of that nation; for those solely within the German jurisdiction, or that of one of her Allies, the particular Extradition Treaty available for use by the future government of that country, which will, it is presumed, be under the direction of the United Nations.

While I have been compelled to discuss (perhaps at undue length) some of the questions which arise if extradition procedure has to be followed, it is clear that none of these problems needs solution if the neutrals decide to act in accordance with the policy set forth in the Notes from the United Nations quoted earlier in this article.

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

(*Continued from p. 33.*)

Post-War Aid: Rehabilitation Refresher Courses.—The Post-war Aid Committee reported as follows:—

The Post-war Aid Committee has met on two occasions recently, when the question of rehabilitation refresher courses for demobilized law practitioners was discussed.

Professor McGechan, Dean of the Law Faculty, who has been appointed a member of the Committee, put forward the following suggestions as the most suitable (at least in the area served by Victoria University College).

These suggestions have been recommended by the Committee for the consideration and approval of the New Zealand Law Society, and in particular for the urgent consideration of District Societies in other centres.

1. (*a*) A course of 50 lectures (two a week) to be given in the evenings, say 5-6 p.m.

(*b*) Of these 50 lectures:

(i) 40 lectures to be given on those parts of subjects mentioned below in which new material, *i.e.*, new case law or new legislation, has emerged since the war began. The subjects to be covered being: Contracts; Torts; Criminal Law; Property; Trusts; Company Law; Evidence; Procedure; and Constitutional Law.

(ii) Ten lectures, five each on Interpretation of Statutes, and Regulation-making power, with special reference to *ultra vires*.

These lectures to be available to all demobilized men whether they desire to become full-time students or not.

2. (*a*) A system of moots for full-time students to be co-ordinated with lectures under (1) above, one each week.

Judges associated with the Wellington Supreme Court and more prominent practitioners in Wellington to be invited to preside at these moots. Twelve would be ample, and a panel might be prepared for this purpose. This would mean that each would take two moots per session.

(*b*) Conveyancing: Each of a panel of 12 prominent practitioner Conveyancers to set, twice per session, a draft to be prepared by members of the class, corrected, and discussed at a meeting of the class and the Conveyancer setting the draft.

3. Members of the class to be given general permission to take any lectures of the LL.B. course if they wish.

4. Those members of the class competent and wishing to do so to be encouraged to take an LL.M. course.

The above scheme should, if possible, come into operation immediately for however few students. The need of a man returning from abroad now is, of course, a refresher course now, not at the end of the war.

Lectures:

In more detail the scheme of lectures suggested is as follows: Lecturers to choose those parts of the subject where new material has emerged, then to treat that part of the subject in its broad essentials so as to recall it to the class, fitting the new material into its proper perspective at the same time.

This, it is believed, is a better plan than one which seeks to cover shortly and rapidly the whole of each subject. That alternative would certainly prove dull to the class and would not imprint on the memory nearly as much in the end.

The scheme suggested will fulfil the dual purpose of a refresher course and a systematic exposition of the more important case and statute law the class has missed through being away from practice and reading.

Lectures on Interpretation of Statutes and *ultra vires* regulations will give some new material, of an easily-assimilated kind, and of obvious importance in everyday practice.

Moots, &c.:

It seems probable that the Government (or its Rehabilitation agency) are willing to allow returned men some £5 to £6 a week for, say, six months to enable them to attend the University full time if they desire to do so. The scheme of moots and conveyancing is designed to meet the case of any lawyers who might care to avail themselves of this. Those who might be expected to do so would mostly be returned men who had not been, or not long been, in practice before enlistment. Some assistance and advice in advocacy and conveyancing from leaders in the profession can best serve their needs. Their most serious loss is the important first few years in practice after qualifying: moots under the critical eye of Judge or skilled and practised advocate are suggested as the best available means of making this good.

Co-ordination of subject-matter of moot and lecture will secure maximum benefit from both.

Generally:

Colleges differ in the nature of their Law teaching staffs. Victoria, for instance, has in normal times full-time teachers in all but Conveyancing; Auckland a full-time professor and part-time teachers; the Southern Colleges have part-time staffs. It is unlikely that any one scheme will be convenient to all four colleges, and there are distinct advantages in having in each centre a scheme acceptable both to the profession and to the college.

We would suggest, then, (1) that the Wellington Committee adopt the above scheme for this college district, acting in this respect as a local committee; (2) that it recommend the scheme for the consideration of other centres in consultation with the University College involved in each case.

If adopted by the local Society representatives of that Society and of Victoria University College should approach the authorities as soon as possible to implement the scheme. As financial aspects of the scheme, it is suggested, really concern the College only, it can be left to the College to negotiate these with the Rehabilitation authority.

Textbooks:

The Committee desire to report that grateful acknowledgement of the textbooks sent from the Society has been received from the British Council in Cairo.

The Council subsequently decided to lend the books to the Deputy Judge Advocate General, 2nd N.Z.E.F., Maadi Camp, so that a more extensive use might be made of them.

Since the last meeting further textbooks have been distributed. One case was sent to the Army Education Headquarters, New Caledonia, for the use of members of the armed forces in the Pacific area, and the remainder for the use of mobilised students in New Zealand.

The report was received and the Council recommended that the scheme suggested for rehabilitation refresher courses should be considered by the District Societies with a view to discussing the matter with the University Colleges concerned.

Publishing Details of Sales.—The Canterbury Society expressed concern at the publication of the details of sales that had been considered by the Land Sales Committees. It was submitted that the publication of the consideration involved was objectionable and did not in any way further the intention of the legislation.

It was decided that the Auckland members should include this matter in the representations to be made.

A resolution was passed expressing the gratitude of the Council and of the profession to the Wellington members, Messrs. G. G. G. Watson, A. M. Cousins, J. R. E. Bennett, A. B. Buxton, and N. H. Mather, for the very efficient work carried out by them.

(*To be concluded.*)

LAND AND INCOME TAX PRACTICE.

SUNDRY TAXATION NOTES AND RULINGS.

Valuation of Live-stock upon Transfer of Farm.—Agreements for the sale and purchase of a farm are frequently made on a "walk in, walk off" basis, the consideration being fixed at a certain figure per acre of the property to be transferred, and without fixing a definite valuation upon live-stock as at the date of transfer. The provisions of s. 16 of the Land and Income Tax Amendment Act, 1939, should not be overlooked. In *all* cases of disposition of live-stock the Commissioner will require the vendor to show the live-stock on disposition at its actual market or true value as at the date of disposition. In order to avoid the time and trouble of determining some months after the date of transfer the value of live-stock as at the date of transfer, the only safe course is for the numbers and value of each class of live-stock to be specifically stated in the agreement. Cases have arisen where the Commissioner has asked for true values at date of disposition, and due to the lapse of time it has been difficult to arrive at a value which is satisfactory to both vendor and purchaser. Obviously, the Commissioner requires the purchaser to show live-stock on hand at the commencement of the new trading period at the same figure as returned by the vendor. Standard values will not be accepted at the commencement or close of farming operations.

An interesting position arises where a farmer takes his sons into partnership, the sons acquiring a share in the profits, but no interest in the capital. While the Commissioner would no doubt examine the facts of each case, it may be generally stated that if from the terms of the agreement there appears to be a possibility of the partnership being created as an attempt to transfer the stock to the sons at standard values by the subsequent withdrawal of the father, the Commissioner would require true values to be shown by the father in his final return of operations on his own account. While the sons continue to have no interest in the live-stock, normal standard values may be used, but if at any time the father disposes of the stock to his sons the *whole* of the difference between standard and true values as at the date of disposition would be included in the *father's* share of income—*i.e.*, the difference would not be divided according to the profit-sharing ratio.

The foregoing applies equally to the stock-in-trade in a business.

Valuation of Live-stock on Death of Life Tenant.—One exception to the general rule stated in the preceding note is that where standard values have been used, it is not necessary to include live-stock at probate values in the final return to the date of death of a life tenant. It appears from *Bassett* v. *Bassett*, [1934] G.L.R. 537, that the life tenant or her estate is entitled only to such profits as were derived during her lifetime on the basis of standard values.

It should be observed, however, that if on the death of a life tenant the trustees hand over the farming property to the remainderman, the first return by the remainderman will show opening stock at the same value used for closing the life-tenant's interest. It may be that owing to new methods of farming adopted by the new owner the quality of live-stock will improve, and if this is so the position should be watched to ensure that there is no risk of the remainderman being "caught" by a large discrepancy between the standard values with which he commenced and actual sale (or probate) values when he eventually disposes of the property. In all cases where the quality of live-stock is known to be steadily improving, it is a wise precaution to review standard values from time to time and pay taxation as the values increase, rather than on a substantial nominal increase at correspondingly high rates in the final return.

Depreciation in Estates: Buildings: Life Tenants.—In the case of any business, trustees have power to deduct depreciation, and where in the exercise of that power an amount is actually withheld from a life-tenant's income and carried to a reserve or otherwise dealt with for the benefit of remaindermen, such depreciation will be allowed as a deduction in arriving at the life-tenant's income. Where, however, there is no business, trustees are not entitled to charge depreciation unless there is an express authority in the will. The Commissioner rules that if depreciation is withheld by the trustees, in the absence of such express authority, the amount deducted is merely a disposition of the life-tenant's own income with his consent, and is not a deductible item for taxation purposes. (This extends the practice note on p. 485 in *Cunningham and Dowland's Taxation Laws of New Zealand.*)

Depreciation: Buildings: Profit on Sale.—Where buildings are sold at a figure substantially in excess of the departmental written-down value at the commencement of the income year, the Commissioner does not allow any deduction for depreciation on such buildings for the year in which the sale is made. If, however, the profit on sale is relatively small, the Commissioner will consider each case on its merits.

Dependent Relative Exemption: Relatives Overseas.—A taxpayer may claim as a special exemption (maximum £50 for any one relative) contributions paid towards the support of relatives by blood, marriage, or adoption, wherever they may reside. With respect to claims made by Chinese in respect of dependent relatives in China, the Commissioner will allow all claims on production of evidence that the taxpayer is under an obligation to repay the cost of his dependants' upkeep to the persons or community supporting them in China. Where dependent relatives reside in enemy occupied territories the exemption will be allowed only when evidence is produced showing that provision to the extent claimed was actually made by the taxpayer during the year for the support of the relative concerned.

The Commissioner explains that the distinction in favour of Chinese is made because of the existence of a strong national custom in China to maintain one's relatives at home.

Dependent Relative Exemption: Widow receiving Social Security Benefit plus Amount for Child.—That proportion of a widow's benefit payable for each child, pursuant to s. 23 (*b*) of the Social Security Act, 1938, is not paid "on behalf of" the child but is an additional benefit to the widow. The words in s. 11 of the Land and Income Tax Amendment Act, 1939—"to whom or on whose behalf a monetary benefit is payable out of the Social Security Fund"—have no application in such cases and the exemption is allowable to a taxpayer who contributes towards the support of the child.

Children's Exemption: Father in Armed Forces.—Where a wife is in employment and claims an exemption in respect of a dependent child, on the grounds that her husband in the armed forces is able to allocate only 1s. 6d. per day towards the child's support and has no other income, the full exemption of £50 is allowable to the mother of the child.

Payments made by an Employer to a Conscientious Objector.—Although a former employee is a conscientious objector detained in a detention camp he is still a "serving employee" within the meaning of the definition contained in s. 3 (2) of the Finance Act, 1943. Any payments made by an employer to such a person are deductible by the employer within the limits imposed by s. 3 (3) and are assessable in full to the employee provided he has a definite title to the moneys credited to him.

Income from the Sale of Market Produce.—Inquiries made from the Tax Department reveal that the Commissioner has in some cases been requiring returns covering income from casual sales of surplus home-grown vegetables through produce markets. Some taxpayers apparently augment their income to an appreciable extent by this means. The net profit from such sources must be included in the taxpayer's income-tax return and must be declared as income other than salary or wages for social security charge and national security tax purposes.

Dividends: Non-resident Companies.—*Vide* article in the 1943 *Journal*. Note that dividends from National Discounts, Limited, are now chargeable with social security charge and national security tax in the hands of New Zealand shareholders for the year ended March 31, 1944, and onwards.

Partnership shareholding in Proprietary Company.—Section 2, Land and Income Tax Act, 1923, defines a "person" as including a company or local or public authority. A partnership is not a separate legal entity and is not a person for taxation purposes. Where shares in a proprietary company are held by a partnership, it is clear from a perusal of the provisions of s. 23 (1) (*i*) and s. 23 (1) (*b*) of the Land and Income Tax Amendment Act, 1939, that an individual partner cannot be assessed with proprietary income unless in actual fact he is entitled to receive not less than a one-fifth share of the company's income computed on the basis of his share in the partnership.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The late Sir Hubert Ostler.—Men of the type of the late Sir Hubert Ostler are, unfortunately, not met with every day. His fortitude and courage under the constant pain which he suffered for so many years will long be remembered. There will be remembered, too, his extraordinary capacity for work, his independence of mind, his forthrightness and his passionate sense of justice. On occasions those very qualities tended to create the impression of the taking of a view somewhat early in the argument; but in reality such views were only tentative and his mind was never closed to arguments to the contrary. He was justly impatient of fatuous submissions and was stern in censure of anything savouring of sharp practice or chicanery; but young and inexperienced counsel could always be sure of his understanding and encouragement. It is too soon yet to say exactly where Ostler, J., will rank among our Judges. This can, however, be said with certainty—that while this country may have had Judges of greater legal calibre, it has had none of greater manliness.

The Convenience of Counsel.—Northcroft, J., is reported in the newspapers as having said that a criminal trial could not wait for the convenience of counsel. It may be that the learned Judge attached to this observation qualifications which did not appear in the newspaper reports; but, if not, one would submit, with all due deference, that the observation should have been qualified. Counsel's convenience must, of course, yield to other more paramount considerations—where those other considerations require a yielding. But if a proposed date for trial is unsuitable to counsel for the accused and it is found possible, without causing any real inconvenience to Court, jurors, or prosecution, to fix a slightly later date which would be suitable to counsel, then it is submitted that the convenience of counsel not only can be met, but should be met.

The late Sir George Lowndes.—The Rt. Hon. Sir George Lowndes, K.C.S.I., died recently in England at the age of eighty-one. His legal career was an unusual one. He had reached the comparatively late age of thirty when he was called to the Bar at Lincoln's Inn in 1892. Shortly afterwards he left England for the Bombay Bar, and there he built up a most extensive practice from which he retired some years before the last War. (During his time at Bombay most of the Bar work was in the hands of the whites; but things have changed in more recent years.) Lowndes returned to England and practised before the Judicial Committee of the Privy Council and soon found himself engaged in practically every Indian appeal. In 1915 he returned to India for five years as Law Member of the Viceroy's Council. During this period Lowndes was made a King's Counsel, his being one of the exceptional and special appointments made during the last War. In 1920 he returned to England and practised before the Judicial Committee and he at once resumed his leading place in Indian appeals. His career was crowned by his appointment to the Judicial Committee in 1929, under the appellate Jurisdiction Act, passed in that year. He took an active part in the work of the Judicial Committee until 1933, when he retired, having reached the age-limit provided by the statute under which he was appointed. He sat in at least four Appeals from New Zealand: *Benson* v. *Kwong Chong*; *Brooker* v. *Thomas Borthwick and Sons (Aus.), Ltd.*, and the other related workers' compensation appeals arising out of the Napier earthquake; *New Plymouth Borough* v. *Taranaki Electric-power Board*; and *Gould* v. *Commissioner of Stamp Duties.*

The Bookmaker.—Myers, C.J., in the course of his summing-up in an abortion case tried at the present sittings at Wellington, illustrated a point by reference to the offence of bookmaking, saying:

> You hear people say, "Why should a bookmaker be convicted when so many people go to him to make bets?" Well, I have always said, and I do not hesitate to say, that if the offence of bookmaking were properly dealt with when the offenders are prosecuted, bookmaking would be reduced by half within six or nine months.

The Gaming Amendment Act, 1920, provides that every person carrying on the business or occupation of a bookmaker is liable on summary conviction to a fine of £500, or to imprisonment for two years; but Magistrates seldom impose imprisonment and usually content themselves with fines which often give the impression of being little more than license fees. There can be no doubt that the Chief Justice is right when he says, as he does in effect, that more serious penalties should be inflicted.

Lord Westbury and Counsel's Opinion.—Richard Bethell became Lord Chancellor in 1860, and was thenceforth Lord Westbury. Before his appointment he had completely dominated the Equity Bar. He was supreme in his power of concise and lucid expression and in his persuasiveness. As an advocate he was completely fearless, and on one occasion he earned the gratitude of the Bar by saying to the impatient and loquacious Knight Bruce, L.J.: "Your Lordship will hear my client's case first, and if your Lordship thinks it right, your Lordship can express surprise afterwards." He resigned from the Lord Chancellorship in 1865, in unhappy circumstances; but he was undoubtedly one of the most colourful holders of that office. On one occasion, when delivering judgment against some unfortunate trustees, he professed sorrow for the embarrassing situation in which they found themselves. "Had they taken," he said, "the most ordinary precautions, had they employed a firm of reputable solicitors, had they taken the opinion of a member of the Bar, they would never have been enmeshed in the snares which now hold them." This was too much for their counsel who had upon his brief an opinion some years old and signed "R. Bethell," advising the trustees to take the very course which they had so unfortunately pursued; and counsel handed the document up to the Lord Chancellor without comment. Lord Westbury perused the opinion and then, quite unabashed handed it back to counsel, saying: "It is a mystery to me how the gentleman capable of penning such an opinion can have risen to the eminence which he now has the honour to enjoy."

PRACTICAL POINTS.

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1. Practice.—*Family Protection Act Application—Executrix seeking further Provision out of Estate—Parties to Originating Summons.*

QUESTION: We have a client who is sole executrix under her father's will. She desires to seek further provision under the Family Protection Act, 1908. May she sue in personal capacity, and join herself as defendant in her representative capacity; if not, how should we proceed?

ANSWER: The questioner draws attention to two cases: *Baker* v. *Symes*, (1902) 4 G.L.R. 364, and *Goss* v. *Suckling*, (1910) 13 G.L.R. 64. The first case was an originating summons to determine whether a letter found amongst the effects of the testatrix was effectual to forgive a debt due to testatrix, the debt being due by a son, who was also one of the executors. Denniston, J., expressed the opinion that the plaintiff, suing individually, could not join himself as defendant in his representative capacity, and, as the next-of-kin were parties, he removed the name of the plaintiff as defendant. In *Goss* v. *Suckling* (*supra*), an originating summons to determine several questions arising upon the will of testator, Chapman, J., amended the summons by striking out the names of the three defendants who were already parties as plaintiffs. All the parties entitled to take part in the argument were represented, and he held that it was irregular as it was unnecessary in an equity suit as at common law to make the same person both plaintiff and defendant. For the purpose of arriving at a decision the Court never required it, and the practice had frequently been condemned as embarrassing.

There is a further case on the point, *In re McCarthy, Public Trustee* v. *Public Trustee*, [1919] N.Z.L.R. 807, where the Public Trustee as administrator of the estate of a widow, who was mentally defective, instituted proceedings under the Family Protection Act, 1908, against himself as executor of the will and applied to the Court for directions as to service. Edwards, J., applying *Baker* v. *Symes* and *Goss* v. *Suckling*, held that the institution by the Public Trustee of proceedings against himself was an improper procedure.

The learned Judge was of the opinion that, except in cases of absolute necessity, an executor who is by law the guardian of the interests of the beneficiaries should not undertake the conduct of a proceeding under s. 33 (10) which must necessarily be adverse to those interests, and should not exercise the power conferred upon him by that subsection of initiating proceedings otherwise than by way of application to the Court for advice and directions. (Section 33 (10) of the Family Protection Act, 1908, provides that an executor may apply on behalf of any person being an infant or of unsound mind in any case where such person might apply or may apply to the Court or a Judge for advice or directions as to whether he ought so to apply.) Treating the motion before him as such an application, he held that the proper course was for the proceedings to be constituted between the claimant under the Act as plaintiff and the Public Trustee and the two infant children of the testator as defendants. His Honour also said that solicitors unconnected with the Public Trust Office should be appointed as guardians *ad litem* to represent the claimant and the infant children of the testator respectively; and that the Public Trustee should take no active part in the proceedings, but should submit to the judgment of the Court.

(Since this case the Public Trustee has obtained statutory authority to sue himself: Public Trust Office Amendment Act, 1921–22, s. 79.)

It seems clear from these cases that a plaintiff suing in personal capacity cannot join herself as defendant in her representative capacity. The beneficiaries under the will, with the exception of the executrix, could be made defendants. At the time the originating summons is sealed, there would be filed a motion for directions as to service: R. 540 of the Code of Civil Procedure. The Court would be supplied with information under R. 541B, whereupon the Court can, *inter alia*, direct any person to represent others who have the like interest, and direct the Public Trustee to represent any person or class of persons.

2. Social Security.—*Contribution—Person in receipt of Salary from Overseas—Whether liable for Combined Charge.*

QUESTION: A retired Indian Army officer arrived in New Zealand to take up permanent residence. He is now receiving retirement pay, but will receive an Indian Army pension as from June 1 next. Is he liable for social security charge on his retirement pay? If so, how is the charge payable—it is not income other than salary or wages and could not be included in a declaration of income other than salary or wages.

ANSWER: The officer is ordinarily resident: s. 110 (2), Social Security Act, 1938. His retirement pay is salary or wages within the meaning of ss. 108 (*b*) and 118 of the Social Security Act, 1938. Although it is salary or wages, the employer in India obviously cannot deduct the charge in terms of s. 118 (1) but the Commissioner of Taxes may recover the charge from the officer under the provisions of s. 130 (2) of the Social Security Act. The Department will probably require the officer to enter his retirement pay in a note-book and purchase social security stamps to be affixed and cancelled when each remittance is received. The pension is declarable as income other than salary or wages.

RULES AND REGULATIONS.

Agricultural Workers Extension Order, 1940, Amendment No. 2. (Agricultural Workers Act, 1936.) No. 1944/13.

National Service Emergency Regulations, 1940, Amendment No. 15. (Emergency Regulations Act, 1939.) No. 1944/14.

Bankruptcy Amendment Rules, 1944. (Bankruptcy Act, 1908.) No. 1944/15.

Sale of Rabbit-skins Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1944/16.

Soil Conservation Combined District Election Regulations, 1944. (Soil Conservation and Rivers Control Act, 1941.) No. 1944/17.

Agricultural Products (Railway Transportation) Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/18.

Cook Islands Import Control Regulations, 1944. (Customs Act, 1913.) No. 1944/19.

Cook Islands Finance Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/20.

Samoa Import Control Regulations, 1944. (Samoa Act, 1921.) No. 1944/21.

Samoa Finance Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) 1944/22.

Suspension of Apprenticeship Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/23.

Stock Act Modification Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/24.

Government Service Appeals Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/25.

Invercargill Licensing Committee Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/26.

New-Zealand-grown Fruit Regulations, 1940, Amendment No. 4. (Orchard and Garden Diseases Act, 1928.) No. 1944/27.