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NEGLIGENCE: APPORTIONMENT OF LIABILITY TO DEGREES OF FAULT.

IN this place in 1939, in 15 NEW ZEALAND LAW JOURNAL, 193, 217, we summarized at some length the Eighth Report of the English Law Revision Committee, made in pursuance of the following reference which had been made to it :—

"(*a*) In so far as the provisions of the Convention for the unification of certain rules of law respecting collisions, signed at Brussels, on September 23, 1910, may permit, the rule applicable to collisions at sea in s. 1 of the Maritime Conventions Act, 1911.

"(*b*) The rule contained in s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935 [s. 17 of our Law Reform Act, 1936], regarding contribution between joint tortfeasors."

The proposals of the Committee embodied in its Report have now been put in statutory form, and the Law Reform (Contributory Negligence) Bill was introduced by the Lord Chancellor in the House of Lords last February. Whether or not there was time for it to become law before the dissolution of Parliament in June is not known at the time of writing.

We do not propose to refer at any length to the Law Revision Committee's Report and its reasons for a reform of the common law so as to overcome the frequent instance of injustice to a person suffering injury and claiming damage, that arises when he loses all the damages he claims merely by reason of his negligence "in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is immediately due to his own want of care and not to the defendant's": *Pollock's Law of Torts*, 14th Ed. 367. Our readers may refer to the articles referred to if they desire to ascertain the Committee's reasons for the change in the common law now under notice.

In brief, the Law Reform (Contributory Negligence) Bill, 1945, sets out to achieve a more equitable adjustment of damages for loss of life and personal injury by enacting the rule of apportionment of liability according to the respective degrees of fault—known as the "Admiralty Rules," long applied in Great Britain in connection with collisions at sea, and, more generally since they were made statutory in s. 1 of the Maritime Conventions Act, 1911) enacted as s. 2 of our Shipping and Seamen Amendment Act, 1912), which is as follows :—

1. (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault :

Provided that—

(*a*) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(*b*) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and

(*c*) nothing in this section shall affect the liability of a person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

Section 2 (s. 3 of the corresponding New Zealand statute) is as follows :—

2. Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several :

Provided that nothing in this section shall be construed as depriving any person of any right of defence on which, independently of this section, he might have relied in an action brought against him by the person injured, or any person or persons entitled to sue in respect of such loss of life, or shall affect the right of any person to limit his liability in cases to which this section relates in the manner provided by law.

The new Bill does not apply to claims to which the corresponding Admiralty Rules apply; and nothing in the Bill is to affect that provision; and, in general, the Bill is not to apply to any case where the acts or omissions giving rise to the claim occurred before the passing of the Bill (cl. 3).

Before proceeding to consider the general principles of the Bill contained in cl. 1, reference may be made to the definitions, which appear in cl. 4, as follows :—

"Court" means, in relation to any claim, the Court or arbitrator by or before whom the claim falls to be determined;

"Damage" includes loss of life and personal injury;

"Dependant" means any person for whose benefit an action could be brought under the Fatal Accidents Acts, 1846 to 1908;

"Employer" and "workman" have the same meaning as in the Workmen's Compensation Act, 1925, as amended by any subsequent enactment;

"Fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence;

"Industrial disease" means any disease to which section forty-three of the Workmen's Compensation Act, 1925, for the time being applies, and any disease in respect of which a scheme is for the time being in force under section forty-seven of the said Act or under the Workmen's Compensation and Benefit (Byssinosis) Act, 1940.

To refresh our minds on the common-law rule relating to contributory negligence: Professor Winfield in his *Law of Tort*, 456, says:

> During the last one hundred years, the Courts have worked out in some detail the rules relating to contributory negligence. The authorities are rather confused, but perhaps a fair statement of the result is this. The ultimate question is, "who caused the accident?"
>
> (1) If it were the defendant, the plaintiff can recover in spite of his own negligence.
>
> (2) If it were the plaintiff, he cannot recover in spite of the defendant's negligence.
>
> (3) If it were both the plaintiff and the defendant, the plaintiff cannot recover (*a*).

The learned author illustrates (1) by *Davies* v. *Mann*, (1842) 10 M. & W. 546, 152 E.R. 588, *Radley* v. *London and North Western Railway Co.*, (1876) App. Cas. 546, and *British Columbia Electric Railway* v. *Loach*, [1916] 1 A.C. 719; (2) by *Butterfield* v. *Forrester*, (1809) 11 East 60, 103 E.R. 296; and (3) by *Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129, 144–145 (a case on s. 1 of the Maritime Conventions Act, 1911, reproduced in s. 2 of the Shipping and Seamen Amendment Act, 1913, above set out); and *Swadling* v. *Cooper*, [1931] A.C. 1, 10.

The author says later, at p. 459:

> A rather misleading way of formulating Rules (1) and (2) is to embody them in the proposition that the party who caused the damage is he who had the last opportunity of avoiding it, who would have had it but for his own negligence. In many cases this would be accurate, but it does not always follow that, because one of the parties had this last opportunity and did not take it, he is solely to blame. This is exemplified by *The Eurymedon*, [1938] P. 1, [1938] 1 All E.R. 122.

To return to the Law Reform (Contributory Negligence) Bill, 1945: Clause 1, the principal clause of general application, is as follows:—

> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that—
>
> (*a*) this subsection shall not operate to defeat any defence arising under a contract;
>
> (*b*) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.
>
> (2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.
>
> (3) Section six of the Law Reform (Married Women and Tortfeasors) Act, 1935 (which relates to proceedings against, and contribution between, joint and several tortfeasors) (*b*), shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (1) of this section in respect of the damage suffered by any person.
>
> (4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act, 1934 (*c*), the damages recoverable would be reduced under subsection (1) of this section, any damages recoverable in an action brought for the benefit of the dependents of that person under the Fatal Accidents Acts, 1846 to 1908 (*d*), shall be reduced to a proportionate extent.
>
> (5) Where, in any case to which subsection (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act, 1939 (*e*), or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages or contributions from that other person or representative by virtue of the said subsection.
>
> (6) Where any case to which subsection (1) of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.
>
> (7) Article 21 of the Convention contained in the First Schedule to the Carriage by Air Act, 1932 (which empowers a Court to exonerate wholly or partly a carrier who proves that the damage was caused by or contributed to by the negligence of the injured person) (*f*), shall have effect subject to the provisions of this section.

What the Bill sets out to achieve is undoubtedly the abrogation of "harsh and often cruel bearing of our common-law doctrine of contributory negligence upon the right of the plaintiff to recover damages for negligence or breach of statutory duty by the defendant. However slightly to blame the plaintiff may be, however little that blame may contribute to causing the result, if he is in fault and his fault does contribute, the plaintiff recovers nothing," as Scott, L.J., put it in *Sparks* v. *Edward Ash, Ltd.*, [1943] 1 All E.R. 1, 6.

That, in itself, makes a considerable change in the law, and abrogates the common-law doctrine as to the effect of the plaintiff's contributory negligence.

But it seems, as in cases where the Admiralty Rules apply, we would have still (notwithstanding the new Bill) to fall back on the rules of common law as to negligence and contributory negligence. This on first

(*a*) *Cf.* Lindley, L.J., in *The Bernina*, (1887) 12 P.D. 58, aff. on app. (1888) 13 App. Cas. 1.

(*b*) Law Reform Act, 1936, s. 17.

(*c*) Law Reform Act, 1936, s. 3.

(*d*) Deaths by Accidents Compensation Act, 1908.

(*e*) Not in force in New Zealand: see Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3: *Howell* v. *Young*, (1826) 5 B. & C. 259, 108 E.R. 97.

(*f*) Carriage by Air Act, 1940, First Schedule.

impression, would seem inevitable since subcl. 2 of cl. 1 requires the Court, where damages are apportionable, to "find and record the total damages which would have been recoverable if the claimant had not been at fault." That seems to indicate that, on any trial in which negligence is in issue, the present course of the trial would be retained with all the refinements and near refinements of the doctrine of "last opportunity," and the rest, available as heretofore. The difference, therefore, would be solely the apportionment of the total liability, as found; and, in that sense only, would the legal effect of cobtributory negligence be modified by the statutory provisions we have quoted.

Now, we set out merely to place the new Bill fairly and squarely before our readers; and, for their assistance, we refer to some New Zealand opinion on the adoption of the Admiralty Rules that has appeared in these pages.

There was a discussion on the subject of apportionment of damages at the Legal Conference at Auckland in 1930 (6 NEW ZEALAND LAW JOURNAL, 93) when a remit—

> That legislation is necessary to bring the Law relating to collisions on land into unison with that relating to collisions at sea, so that when both parties are negligent the damages may be apportioned—

was carried unanimously. It was supported by a number of speakers. The Hon. John McGregor said he had recently introduced a Bill into the Legislative Council on the lines indicated by the remit, and it was passed there but fell dead. Sir Francis Bell, K.C., said the substance of the Bill was actually in force in Canada, where it had given great satisfaction, and it was wise to proceed on lines that had been proved satisfactory elsewhere. "Unless something of the kind is accepted," he added, "it will be impossible for justice to be done under the present rule of law, as ascertained by recent decisions in England." Mr. H. F. O'Leary supported the remit, because he knew that the Admiralty rules were being adopted by juries, without their knowing it, in the assessment of damages. He made a good point in saying that, "in cases one is trying to settle, one would get a little more reason in one's efforts to effect a settlement if the Admiralty rules were adopted."

At the next Legal Conference, at Dunedin in 1936, Dr. A. L. Haslam read a paper on "Trial of Collision Cases" (12 NEW ZEALAND LAW JOURNAL, 104). In it he discussed the Admiralty Rules, with unfavourable comment thereon. It must, however, be pointed out that he was considering an amendment of the law substituting the principles of negligence and contributory negligence for the uncertain yard-stick of degrees of fault, with all the complications of "last opportunity" left untouched. But, as we have endeavoured to indicate, the Bill under notice leaves untouched all the principles of negligence and contributory negligence, and merely provides a yard-stick after finding and recording the total damages on the basis that the claimant had not been at fault. The paper did not call for any formal resolution.

Discussion took a new turn at the last Legal Conference, at Christchurch in 1938, with the paper read by Mr. W. J. Sim, K.C., on "The Principle of Absolute Liability in Motor-collision Cases." It was a memorable event, on account of the quality of the plea for a change in the law of negligence, as well as for the lengthy discussion which followed its reading. After various views had been expressed, and a change of tone had appeared in the afternoon, the Conference approved

> the principle of absolute liability for personal injuries in motor-collision cases, such liability to be covered by compulsory insurance, and compensation be assessed in some suitable manner.

We should point out that the law of negligence was considered only in so far as it relates to running-down cases, and not in the broad all-embracing way in which the Bill relates to "negligence, breach of statutory or other duty or other act or omission which gives rise to liability in tort *or* would, apart from this Act, give rise to the defence of contributory negligence: "see 14 NEW ZEALAND LAW JOURNAL, 124.

Eighteen months later, the English Law Revision Committee made its Eighth Report. After considering all the relevant authorities, the Committee said that though the principles of causation are the same in Admiralty and at common law, the resultant finding as to liability has not in fact always been applied in exactly the same way, as the Admiralty Court has had an advantage over the common law. Where the liability can be apportioned to the fault, "the question," as Lord Birkenhead said in *The Volute* (*supra*), at p. 144, "of contributory negligence can be dealt with somewhat broadly and on common-sense principles as a jury would probably deal with it." The Committee's general recommendation was the principle of apportioning the loss to the fault should be adopted at common law.

The Bill not only appears to follow that direction, but it carefully follows the rest of the Committee's recommendation: it did "*not* recommend any change in the method of ascertaining whose the fault may be, nor any abrogation of what has been somewhat inaptly called the 'last opportunity rule'." As it so stood, the Committee considered its recommendation assimilated the common law to that of the Court of Admiralty. In a final definition of its proposals, the Committee recommended:

> That in cases where damage has been caused by the fault of two or more persons the tribunal trying the case (whether that tribunal be a Judge or jury) shall apportion the liability in the degree in which each party is found to be at fault.

In 1942, with the appearance of Dr. O. C. Mazengarb's *Negligence on the Highway*, we were provided by the learned author with a useful comparison of the common-law and Admiralty Rules (at p. 184 *et seq.*); a discussion of Canadian Experience of the Apportionment Principle, to which Sir Francis Bell referred at the Auckland Legal Conference, as indicated earlier (at p. 191 *et seq.*); and, even more valuable for our purpose, a careful examination and detailed criticism of the Law Revision Committee's Eighth Report (at p. 197 *et seq.*). As we have shown, the Bill we are considering follows very carefully the Committee's recommendations; and Dr. Mazengarb's comments can, therefore, be directly applied to the Bill. He was, of course, making particular reference to running-down cases.

A still more recent pronouncement is found in the judgment of Scott, L.J., in *Sparks* v. *Edward Ash, Ltd.* (a "black-out" case) (*supra*) at p. 10. It is as follows:—

> The common-law rule of contributory negligence, which to-day constitutes a complete defence so that the injured

pedestrian recovers nothing, should be abolished, and for it should be substituted the proportional rule under which the Court can apportion the loss between plaintiff and defendant in accordance with the degree of blame attaching to each, for causing the accident, as has been done with such eminently satisfactory results in the Admiralty Court since 1911, pursuant to the International Convention which the late Lord Sterndale and I signed on behalf of His Majesty's Government at Brussels, in 1910. In 1939 the very strong Law Revision Committee, presided over by Lord Wright (with Goddard, L.J., as a member) devoted the whole of a closely reasoned report to the reform, and urged its adoption very strongly. I venture to suggest that a Bill to carry that advice into effect would be non-contentious, and universally welcomed even during the war.

And at p. 13, Goddard, L.J., said :

Since writing the above I have read the judgment of Scott, L.J., and must make some further observations. . . . In my opinion the Court cannot lay down any rule or set any particular standard for determining whether or not a plaintiff has been guilty of contributory negligence, whether the accident happened on a pedestrian crossing or elsewhere. As I have already said, I think this is a question of fact depending on all circumstances of the case, and ought not to be treated as one of law. If, to use the words of Lord Atkin in *Caswell's* case, ([1940] A.C. 152, [1939] 3 All E.R. 722), the injury is the result of two causes operating at the same time, a breach of duty by the defendants and an omission on the part of the plaintiff to use ordinary care for his own protection, he cannot recover. I cannot, for myself, attempt to lay down what may or may not constitute negligence on the part of the plaintiff in regard to a particular class of accident beyond the classic definition of negligence.

As we have endeavoured to narrow the scope of consideration of the Bill to its main principle, we have not referred to cl. 2 which has application to claims in respect of death or accident arising out of the relations of master and servant, wherein claims under the Workmen's Compensation Acts, 1925 to 1943, are excluded, and its application to other sections of these statutes is modified.

We now ask our readers' consideration of the Law Reform (Contributory Negligence) Bill, 1945, in so far as its provisions are here set out. We have endeavoured to assist that consideration by supplying them with references to New Zealand opinions that are readily available to them. And we shall, with both gladness and gratitude, publish in these pages any expression of their views, after they have come to a conclusion of the application of the Bill to our own conditions, as to whether or not they consider that a similar enactment should become part of our statute law.

SUMMARY OF RECENT JUDGMENTS.

THE KING v. GLASS.

COURT OF APPEAL. Wellington. 1945. June 21, 22. KENNEDY, J.; CALLAN, J.; FINLAY, J.

Criminal Law—Evidence—Separate Counts in Respect of Theft of Several different Articles—Admissibility of Evidence respecting One Count on Charges in Other Courts—Evidence so Connected and Intertwined as to be admissible in respect of Several Charges—Identification—Witness first Identifying Accused on Appearance in Lower Court—Admissibility of such Evidence—Warning by Trial Judge as to Danger of such Evidence—Whether Sufficient—Whether Question of Law involved—Crimes Act, 1908, ss. 442, 443.

While, in respect of any count in an indictment the jury must agree on the evidence in support of that count, the whole of the evidence, where there are a number of separate counts, may be so connected and intertwined that, in respect of any count, the greater part of the evidence is admissible. It is then open to the jury to conclude that the whole of the acts charged were committed, as here, by the one person upon the one expedition; and the jury might well regard the hypothesis of coincidence as incredible and wholly excluded.

Where the first identification of an accused person was made by a witness during the proceedings against the accused in the Lower Court, and the learned trial Judge admitted his evidence, warned the jury of the danger in action upon it, and left them to judge the value of it, it was held that the evidence was admissible and that it was for the jury to estimate its worth, and there was no question of law involved; and, therefore, no question which the Court of Appeal could deal with under ss. 442, and 443 of the Crimes Act, 1908.

R. v. *Johnston*, [1931] G.L.R. 563, 7 N.Z.L.J. 209, distinguished.

So held by the Court of Appeal on an application under s. 443 of the Crimes Act, 1908, for leave to appeal to the Court of Appeal against refusal of leave by the learned trial Judge.

Counsel: *Gillies*, for the Crown; *Trimmer*, for the accused.

Solicitors: *Crown Law Office*, Wellington, for the Crown; *Trimmer and Teape*, Auckland, for the accused.

BOULCOTT GOLF CLUB INCORPORATED v. ENGELBRECHT.

SUPREME COURT. Wellington. 1945. March 20; May 14. FINLAY, J.

Negligence—Fire—Occupier of Land—Liability for Consequences of Fire negligently caused by Licensee.

An occupier of land is liable for the consequences of fire negligently caused by his licensee.

Rylands v. *Fletcher*, (1868) L.R. 3 H.L. 330, and *Threlkeld* v. *White*, (1890) 8 N.Z.L.R. 513, applied.

Whitmores (Edenbridge) Ltd. v. *Stanford*, [1909] 1 Ch. 427, distinguished.

Filliter v. *Phippard*, (1847) 11 Q.B. 347, 116 E.R. 506, referred to.

Counsel: *Rothwell*, for the appellant; *Gillespie* and *E. F. Page*, for the respondent.

Solicitors: *Rothwell and Reid*, Lower Hutt, for the appellant; *Bunny, Gillespie and Page*, Lower Hutt, for the respondent.

NORTH SHORE TRANSPORT COMPANY v. ORAM.

SUPREME COURT. Auckland. 1945. April 23; June 15. CORNISH, J.

Negligence—Passenger in Public Vehicle—Injury as Result of Driver's sudden Application of Brakes—Cat running across Roadway—Driver swerving to avoid Cat and applying Brakes—Passenger thrown to Bus-floor and injured—Duty of Bus-driver.

The driver of a motor-bus, who, seeing something appear suddenly in front of his vehicle, involuntarily applies the brakes and brings the bus to a sudden stop, is not guilty of negligence.

A passenger in a motor-bus must be taken to know that it might be pulled up suddenly; and a passenger, who, instead of remaining seated until the bus has come to rest at a stopping-place, rises and moves along the bus while it is still in motion, although this is the usual process of passengers about to alight as the bus is slowing down on approaching a stopping-place, is guilty of negligence.

On an appeal from the decision of a Stipendiary Magistrate,

Held, allowing the appeal, 1. That between the driver's perceiving a cat appear suddenly in front of his motor-bus and the pressure of his foot on the brake, there was no interval of time sufficient for the exercise of a deliberate choice or active preference.

2. That the passenger was negligent in rising and moving along the bus before it came to rest.

Counsel: *West*, for the appellant; *Trimmer*, for the respondent.

Solicitors: *Jackson, Russell, Tunks, and West*, Auckland, for the appellant; *Trimmer and Teape*, Auckland, for the respondent.

THROP v. TRUSTEES, EXECUTORS, AND AGENCY COMPANY OF NEW ZEALAND, LIMITED, AND OTHERS.

SUPREME COURT. Dunedin. 1944. July 17, September 14. KENNEDY, J.

Trusts and Trustees—Trust for sale and Conversion of Sheep-farm—Powers to Postpone Sale and to carry on Farming Operations—Application by One of Two Trustees for Approval of Sale of Trust Property to him—Offer of Sale—Price adequate—Sale not recommended by Co-trustee and opposed by Beneficiaries entitled to One half of Sale Proceeds—Court's Consent refused.

Trustees of a will held testator's estate, which included a sheep-farm, upon trust to sell and convey, with power to postpone and to carry on testator's business as a sheep-farmer for so long as they in their discretion thought fit. There had been but a limited offering of the sheep-farm for sale. One trustee, one of the four residuary beneficiaries, applied to the Court to approve a sale to him of the sheep-farm at a price which the Court on the evidence considered adequate. His co-trustee did not recommend the sale, his brother, another of the said beneficiaries, grudgingly consented; and his two sisters, the other beneficiaries, opposed the sale, contending that the value of the property had been reduced by the management of the trustee who desired to purchase, and that the time was not propitious for a sale.

On an application by the said trustee-beneficiary for an order for leave to purchase the sheep-farm from the estate and approving a sale to him provisionally made,

Held, 1. That the Court, notwithstanding the proved adequacy of the price offered, should be reluctant to approve a sale which amounted to a compulsory purchase by one of the trustees from beneficiaries, of whom two (having together a half-interest in the property) objected to the sale.

Campbell v. *Walker*, (1800) 5 Ves. 678, 31 E.R. 801, *Farmer* v. *Dean*, (1863) 32 Beav. 326, 55 E.R. 128, and *Tennant* v. *Trenchard*, (1869) L.R. 4 Ch. 537, considered.

2. That it was reasonable for such opposing beneficiaries to consider the time for such a sale inopportune, and the Court should not presently grant the approval sought, but should leave it to the applicant for the order to apply again, if so advised, in different circumstances.

Counsel: *E. S. Anderson*, for the plaintiff; *A. C. Stephens*, for the Trustees, Executors, and Agency Co. of New Zealand, Ltd., and *Throp*, in his capacity as trustee; *Layburn*, for Florence Pearshouse; *F. B. Adams*, for Crisp; *Calvert*, for Martha Throp.

Solicitors: *Webb, Allan, Walker, and Anderson*, Dunedin, for the plaintiff; *Mondy, Stephens, Munro, and Caudwell*, Dunedin, for the Trustees, Executors, and Agency Co. of New Zealand, Ltd., and *Throp*, in his capacity as trustee; *E. T. Layburn*, Christchurch, for Florence Pearshouse; *Adams Bros.* Dunedin, for Ruth Crisp; *Brugh, Calvert, and Barrowclough*, Dunedin, for Martha Jane Throp.

PEARSON v. AOTEA DISTRICT MAORI LAND BOARD.

SUPREME COURT. Wanganui. 1944. November 22, 1945. May 11. FINLAY, J.

Land Transfer—Lease—Right of Renewal—Registration—Whether a Right of Renewal of a Lease is a Proper Subject of Registration—Land Transfer Act, 1915, ss. 89, 93.

A right of renewal under a lease is a proper subject of registration under the Land Transfer Act, 1915.

A lease which was void and not validated, and which contained a right of perpetual renewal which the lessor, when it executed the lease, had no power to grant, was registered under the Land Transfer Act, 1915. The leasehold interest thereunder was transferred to a purchaser for value without notice of the invalidity. The first term of the lease having expired, a new lease was executed by the lessor and the transferee but did not contain the provision for perpetual renewal, a fact the transferee did not realize at the time. He brought an action against the lessor claiming that the lessor rectify the said new lease by accepting a surrender of such lease and issuing to him a lease containing the said provision of perpetual renewal.

Held, That he was entitled to the said relief.

Muller v. *Trafford*, [1901] 1 Ch. 54, and *Roberts* v. *District Land Registrar at Gisborne*, (1909) 28 N.Z.L.R. 616 applied.

Fels v. *Knowles*, (1906) 26 N.Z.L.R. 604; 8 G.L.R. 627, *Otago Harbour Board* v. *Spedding*, (1885) N.Z.L.R. 4 S.C. 272, and *Ripeka te Peehi* v. *Davy*, (1890) 9 N.Z.L.R. 134, referred to.

Counsel: *Barton*, for the plaintiff; *A. B. Wilson*, for the defendant.

Solicitors: *Armstrong, Barton, and Armstrong*, Wanganui, for the plaintiff; *Marshall, Izard, and Wilson*, Wanganui, for the defendant.

KELBURN AND KARORI TRAMWAY COMPANY, LIMITED v. WELLINGTON CITY CORPORATION.

SUPREME COURT. Wellington. 1945. April 16, 23; June 1. BLAIR, A.C.J.

Municipal Corporation—Passenger-service—Authority to operate Tramway delegated to Company before passing of Tramways Act, 1908—Passenger Motor-service established by Corporation—Whether such Passenger-service serving "areas not served or not adequately served by the said tramway"—Jurisdiction of Supreme Court to determine such Question—Municipal Corporations Act, 1933, s. 217 (2).

Practice—Originating Summons—Road Traffic—Questions relating to Procedure by Transport Licensing Authority in relation to Passenger-service Routes—Validity questioned—Subject for Certiorari Proceedings and not for Originating Summons.

Section 217 (2) of the Municipal Corporations Act, 1933, is operative and effective in respect of any tramway erected and operated under s. 15 of the Tramways Act, 1894.

Questions raised in an originating summons that depend for answer on the procedure followed by the Transport Licensing Authority under the Transport Licensing Act, 1931, in relation to certain amendments to the routes or timetables of a passenger-service, should be raised by certiorari and not by originating summons.

Counsel: *J. F. B. Stevenson*, for the plaintiff; *O'Shea*, for the defendant.

Solicitors: *Buddle, Anderson, Kirkcaldie, and Parry*, Wellington, for the plaintiff; *J. O'Shea*, City Solicitor, Wellington, for the defendant.

BUCKLEY v. THE KING.

SUPREME COURT. Palmerston North. 1944. December 11. 1945. April 30. FINLAY, J.

Road Traffic—Negligence—Right-hand Rule—Driver approaching Intersection with Benefit of Right-hand Rule—Continued Exercise of such Right to Point of Collision—Standard of Care—Considerations for Jury whether Driver should have abandoned such Right—Traffic Regulations, 1936 (Serial No. 1936/86), R. 14 (6).

A driver of a motor-vehicle, entitled at an intersection to the benefit of the right-hand rule (as, here, under Reg. 14 (6) of the Traffic Regulations, 1936, before amendment), is entitled to exercise the right to proceed which the rule confers upon him until that point of time at which he sees, or, as a reasonably prudent driver, ought to see and appreciate, that if he continues to exercise the right and continues to proceed a collision will result.

Dempsey v. *Spiers*, [1941] G.L.R. 30, applied.

Hazeldon v. *Andrews*, [1943] N.Z.L.R. 261, G.L.R. 161, referred to.

Counsel: *A. M. Ongley*, for the suppliant; *Cooper*, for the respondent.

Solicitors: *A. M. Ongley* Palmerston North, for the suppliant; *H. R. Cooper*, Crown Solicitor, Palmerston North, for the respondent.

THE CITATION OF REPORTS.

A Guide to Counsel.*

By J. P. KAVANAGH, Assistant-Editor of *The New Zealand Law Reports.*

An American librarian, in referring to the *Law Reports* of England, said that his experience has been that more mistakes are made in citing that series than in citing any other English Reports. This gentleman, who is the Minnesota Law Librarian, would have possibly spoken even more feelingly if he had experienced the too-frequent manner in which Law Reports generally are mis-cited in the Courts in this country.

Apart from the precision with which any expert is expected to handle his tools of trade, there is, in the profession of the Law, a courtesy due to the Bench and to one's fellow practitioners in correctly citing authorities. It is only when references given in Court have to be checked, that the seriousness of the sins of commission and omission in citation are realized in the resultant loss of time and in trouble which could have been obviated. And it must not be overlooked that mis-citation in Court gives the appearance of inefficiency.

There is, therefore, nothing pedantic (as is sometimes felt) in an insistence on the proper citation of authorities. Quite the reverse: it is a workmanlike practice enabling technical material to be used to the best advantage. In addition, correct citation saves time and vexation to others—not only to the Judges, but also to all, who, in one way or another, are concerned to follow up the cited references.

CITATIONS GENERALLY.

When the Incorporated Council of Law Reporting undertook the publication of authorized Reports in 1865, there were current fourteen sets of accepted Reports, besides a number which were unacceptable or irregular. On the inception of the *Law Reports*, thirteen sets of hitherto-acceptable reports went out of existence. Those of Best and Smith remained; the short-lived *New Reports* were abandoned in 1866, and the *Jurist* in 1867. *The Reports* lasted from 1893 to 1895, when they became embodied in the *Law Reports*.

Before considering the *Law Reports*, attention may be drawn to the various Reports which ante-dated the official series. These, when cited, should be referred to by their proper names, not by initials. Thus, for example, "*Barnewall and Adolphus Reports*" will not be confused with "*Barnewall and Alderson Reports*," as they might be if "B. and A." were given, or the permissible *written* abbreviations of "B. and Ad." or "B. and Ald." (Strange as it may seem, the latter references have been heard *coram Judice*.) An example of the proper oral citation of a case in one of these pre-1865 Reports is, "*Draper* and *Thompson*, 4 Carrington and Payne, 84, at page 86."

In some of the circuit towns, and in the majority of office libraries in the Dominion, the old Reports are not to be found. It is accordingly a courtesy leading to facility of reference, to *add* the parallel reference to the *English Reports* reprint of the old Reports. Thus, to the *Carrington and Payne* reference already given, may be added "172 English Reports, 618, at page 619." (The *New Zealand Reports*, as may have been noticed, invariably provide this convenience for their users.) Among the things "not done by the best counsel," is the giving of the *English Reports*' reference only, and the omission of the source whence that reprint is derived.

Now we come to the English Law Reports, which, in their mis-citation, bring down adverse comment at times indiscriminately upon the heads of the just and the unjust alike. How often we hear counsel quoting "Q.B.," "Q.B.D.," quite oblivious of the several series which are so distinct, and of a citation that may indicate any one or more of them. To what does "1 Q.B." refer? The Judge, used to correct references, will go at once to *Adolphus and Ellis's Queen's Bench Reports*, New Series, which in eighteen volumes cover the years 1841 to 1852. But, if the case cited were of an 1865 vintage, the former reference would be as misleading as would be a reference to "Q.B.D." which, preceded by the same "1," would most likely be a case decided in 1875. A reference to "1 Q.B.," actually given in Court, sent a harassed reporter to Adolphus and Ellis's *Queen's Bench Reports*, whereas, after a protracted search through "L.R. 1 Q.B." and "1 Q.B.D." the correct reference was found to be "[1891] 1 Q.B.," where the parties' names were found to be the reverse of those given in Court. He felt with the learned Master of the Rolls at whom counsel had quoted "Q.B.D.," "Q.B.D.," after being gently corrected from the Bench: "'[1892] 2 Queen's Bench,' please." His Lordship, on counsel's persistence in error, leaned over and said: "You seem determined to stick to your 'Q.B.D.'; but, if you won't cite correctly, I say 'You Be D.' Give the book its proper name."

Furthermore, the abbreviations "L.R. 1 Q.B.," or "Ch.D." or "A.C." *simpliciter*, should be avoided: the name should be given in full: "Law Reports one Queen's Bench," "Chancery Division," "Appeal Cases."

As to citations generally: where a case appears in two or more series of Reports, unless there be some special reason to the contrary, counsel should direct the Court to the official or semi-official series—*e.g.*, the *Law Reports*, in preference to the *Law Journal*, or *Law Times*, or *Times Law Reports* series; the *New Zealand Law Reports* to the *Gazette Law Reports*; the *Victorian Law Reports* to the *Argus Reports*, and so on.

In the best-regulated Reports the "mode of citation" usually appears at the head of the Table of Cases, as in the *Law Reports* series since 1885, or the *Commonwealth Law Reports*, the *Queensland State Reports*, and, in the present series, the *New Zealand Law Reports*, and in many others. In other series, the method of citation appears in bold type at the head of the title page, such as 1933 Session Cases, or on an early,

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otherwise blank, page, as in the *Irish Reports*. But, if there is any doubt as to citation, open up any modern Reports where two printed pages face one another, and, at the top of the facing pages, and usually carried across the inner margins, the proper method of citation will appear.

A cardinal rule in citing references from a judgment is to give, correctly, the name of the case, the reference to the report *with the first page of that report*, and *then* the page from which the citation is taken.

This is another general rule in citation: Where the year appears in brackets—[ ]—the *year* is cited: [1934] 1 Ch. is "1934 one Chancery." But where, as in a reported case a year in parentheses—( )—precedes, that is the year in which the case was decided, and in general it is not orally cited; but the *number* which follows *must* be cited: For example, *Pearks* v. *Moseley*, (1880) 5 App. Cas. 714 is sufficiently cited as: "*Pearks* and *Moseley*, five Appeal Cases, 714." These two rules thus emerge:

(*a*) Where [ ] (brackets) appear always quote the year; if followed by a number (such as, [1932] 2 Ch.), quote both year and volume number, as the citation indicates more than one volume in the year.

(*b*) Where a numeral precedes the name of a Reports series, such as 5 App. Cas. or 18 Ch.D., quote the numeral. (In these circumstances, when, in a written Report or a Digest, the year of the decision appears in parentheses, this is for the convenience of the reader to enable him to follow the sequence of decisions; the year, when so appearing in parentheses, need not be quoted orally, unless asked from the Bench.)

Some Special Series of Reports.

Having made these general observations, we come to the citation of particular reports. There is no difficulty as to the Reports of the several overseas Dominions, if the foregoing suggestions are kept in mind. But trouble seems to centre in cases decided in the English Divisional Courts, and in Scottish decisions, and in some Australian series.

In the *Law Reports*, there are certain series to be borne in mind. The pre-official Reports years—namely before 1865—are remarkable for a number of private Reports to which reference has been made, but they may be eliminated for the present. The *Law Reports* fall into periods:—

(*1865–1875*): These are always preceded, in citation, by the words "Law Reports" and the volume number: Cite them as follows:

L.R.C.C.R. (2 vols.): "Law Reports, (*number*) Crown Cases Reserved."
L.R.C.P. (10 vols.): "Law Reports, (*number*) Common Pleas."
L.R.Ch. App. (10 vols.): "Law Reports, (*number*) Chancery."
L.R. Eq. (20 vols.): "Law Reports, (*number*) Equity Cases."
L.R. Exch.: (10 vols.) "Law Reports, (*number*) Exchequer."
L.R. English and Irish Appeals (7 vols.): "Law Reports, (*number*) House of Lords."
L.R.P. & D. (3 vols.): "Law Reports, (*number*) Probate and Divorce."
L.R.P.C. (6 vols.): "Law Reports, (*number*) Privy Council."
L.R.Q.B. (10 vols.): "Law Reports, (*number*) Queen's Bench" (*not* Queen's Bench Cases or Queen's Bench Division).
L.R. Sc. & Div. (2 vols.): "Law Reports, (*number*) Scottish and Divorce Appeals."

(*1875–1890*): These are quoted according to the Court, and preceded by the volume number:

(1–15): App. Cas. or A.C.: "(*number*) Appeal Cases."
(1–45): Ch.D.: "(*number*) Chancery Division."
(1–5): C.P.D.: "(*number*) Common Pleas Division."
(1–5): Ex. D.: "(*number*) Exchequer Division."
(1–15) P.D.: "(*number*) Probate Division."
(1–25) Q.B.D.: "(*number*) Queen's Bench Division."

(*1891 to present time*): These are preceded by the year alone in brackets, with or without a low number (1, 2, or 3) for that year's volumes. They are cited as follows:

[1933] A.C.: "Nineteen thirty three Appeal Cases."
[1933] 1 Ch.: "Nineteen thirty three, one Chancery."
[1933] 2 K.B.: "Nineteen thirty three, two King's Bench."
[1933] P.: "Nineteen thirty three, Probate."

Irish Reports: The Irish Law Reports do not present any difficulty. The correct citation is generally found centred on an otherwise blank leaf backing the title-page such as: "8 L.R. Ir.," or "[1898] 2 I.R."

Now for some occasional difficulties:

Scottish Reports: In Scotland the name of the reporter persists until 1907 for citation purposes—*e.g.*, Rettie, Fraser, Macpherson—and so provides a trap for the unwary. These Reports should be cited according to the name of the first reporter on the title-page of the particular volume:

First series of Session Cases: "(Volume number) Shaw (page)."
Second series of Session Cases: "(Volume number) Dunlop (page)."
Third series of Session Cases: "(Volume number) Macpherson (page)."
Fourth series of Session Cases: "(Volume number) Rettie (page)."
Fifth series of Session Cases: "(Volume number) Fraser (page)."
New series (since 1907): "(Year) Session Cases (page)."

New Zealand Reports: The *first five volumes* of the *New Zealand Law Reports* are each in two separately numbered parts: Court of Appeal Cases, and Supreme Court cases. Citation of cases in these volumes is as follows:—

(*Vols. 1–5*): For Court of Appeal cases, cite: "New Zealand Law Reports (volume number) Court of Appeal (page)."
For Supreme Court cases, cite: "New Zealand Law Reports (volume number) Supreme Court (page)."

The *New Zealand Law Reports* fall into two other series:

(*Vols. 6–34*) N.Z.L.R.: "(*number*) New Zealand Law Reports."
1916–current: [Year] N.Z.L.R.: "(Year of volume) New Zealand Law Reports."

New Zealand Jurist Reports, (1873–79). In citing these Reports, care should be taken in giving "First Series," "Second Series," or "Cases in Mining Law," since each is separately numbered and paged.

In *Ollivier, Bell and Fitzgerald's Reports*, the Supreme Court cases and the Court of Appeal cases are similarly paged separately, and the name of the Court should be cited preceding the page referred to.

Canadian Reports: The series of the *Dominion Law Reports* (D.L.R.) and that of the *Supreme Court Reports* (S.C.R.) present no difficulties. The Ontario Reports are not so simple. A reference to "9 O.R.," a case which would have been decided in 1885, might be a mis-citation for one decided in 1905, so care must be taken in references. The several series are cited as follows:

(1882–1900) O.R. (32 vols.): "(*Number*) Ontario Reports."
(1901–1931) O.L.R. (66 vols.): "(*Number*) Ontario Law Reports."
(1932-current) [Year] O.R.: As "Nineteen forty-four Ontario Reports."

NEW SOUTH WALES: This is a series that requires special care in citation. It is sometimes a matter for regret that in citing some Australian series, here mentioned, that counsel do not learn the hard way; but their carelessness is a source of much illumination to those who have to check their references. In the following series, a reference to "10 N.S.W. page 11" initiated a search into five Reports before the right one was found. A faulty Victorian reference entailed a search into ten different Reports or Parts of a volume, before the proper one was the last to be discovered. Then, it was clear why no Digest was of assistance: the name of the case was mis-cited, too.

The New South Wales series are as follows:

(1863–1893) N.S.W.S.C.R.: "(*Number*) New South Wales Supreme Court Reports" (add "Law" or "Equity," as indicated below).
(1880–1900) N.S.W.L.R.: "(*Number*) New South Wales Law Reports" (add "Law" or "Equity," as indicated below.
Both these series contain "Cases at Law" and "Cases in Equity," separately numbered in each volume. Consequently, the citations respectively given above should contain the added words "Law (page)" or "Equity (page)," as the case may require.
(*1901–current*) N.S.W.S.R. (or St. R. N.S.W.): "(*Number*) New South Wales State Reports (or, optionally, State Reports, New South Wales)."
There is no official mode of citation, and no indication is given in the Reports as to a uniform citation. The pages run consecutively irrespective of the jurisdictions.

As each of the above series contains volumes numbered from "1" onwards, the correct citation of the particular series indicated is most necessary.

VICTORIA: There are three series of Reports, respectively cited as follows:

(*1870–1872*) V.L.R. (3 vols.): V.L.R. (Eq.): "(*Number*) Victorian Law Reports, Equity Cases."
V.L.R. (L.): "(*Number*) Victorian Law Reports, Law."
V.L.R. (I. and M.): "(*Number*) Victorian Law Reports, Insolvency."
V.L.R. (M.): "(*Number*) Victorian Law Reports, Mining."
V.L.R. (V.A.): "(*Number*) Victorian Law Reports, Admiralty."
(*1875–1884*) V.L.R. (10 vols., numbered 1 to 10): V.L.R. "(*Number*) Victorian Law Reports" (with additions as above).
Each of the volumes in the two above series is subdivided, as indicated, with separate paging for each part respectively from p. 1 onwards. Careful citation, with the addition of the part from which the citation is taken, is, therefore, of importance.
(*1885–1904*) V.L.R. (19 vols., numbered 11 to 29): "(*Number*) Victorian Law Reports" *only*, without additions.
These volumes are paged consecutively throughout, without any divisions for jurisdictions.
(*1904–current*): [Year] V.L.R.: As "Nineteen forty-four Victorian Law Reports."
This series is cited by the Year-name, and not by the volume number.

SOUTH AUSTRALIA: There are three series of these Reports:

(*1867–1898*) S.A.L.R.: "(*Number*) South Australian Law Reports."
(*1899–1920*) [Year] S.A.L.R.: "(Year of volume) South Australian Law Reports."
(*1901–current*) [Year] S.A.S.R.: As "Nineteen forty-four South Australian State Reports."

The Reports of the other States give little difficulty.

Sometimes there is difficulty in remembering the full names of Reports abbreviated in a reported judgment; and this is frequent in relation to the full names of Reports published in England before 1865, as their names are becoming less familiar as the years go by. Well, the *English and Empire Digest* contains a full and very useful list of abbreviations of the names of all Reports, at the beginning of each of the first forty-four volumes; and thus supplies an easily-available guide. Conversely, if, in writing opinions and the like, there is difficulty in remembering the correct abbreviations, the same list will be found to be an ever-ready help.

SOME POPULAR PITFALLS.

In cases in which the Crown is a party, the terms "The King," or "The Queen," should always be used in oral citation, and none other. The terms "Rex" and "Regina" are never heard to fall from the lips of "the best counsel." Nevertheless, one has heard cases cited in Court as "R." or even "Reg."—just like that! On occasion, one has heard "So-and-so versus Reginam" from counsel manfully striving to observe the niceties. But there is only one permissible reference, whether the Crown is plaintiff or respondent, namely, "The King" or "The Queen," as the case may require.

When counsel is quoting from a judgment, and he comes to a reference to a Judge in the course of the extract, it is not correct, and is, indeed considered discourteous, to refer to him as "J." or "M.R.," or the like, *tout court*, as printed. The abbreviation should be expanded, when reading the citation in Court, to "Justice," or "Master of the Rolls," and so forth.

In citing cases in Court, it is not considered proper to refer to them as X. *v.* Y., or X. *versus* Y. (In this connection, New Zealand counsel have often learned from the Bench that this *v.*—sign is not a sign of victory.) The accepted usage in quotation in all British Courts is X. *and* Y. All pleadings commence with the word "Between" before the plaintiff, or appellant; and the word "And" is interposed before the name of the defendant or respondent. Even in the criminal jurisdiction, cases are "Between Our Sovereign Lord the King *and*" the accused. The "*v.*" is simply a reporter's abbreviation, and usage has confirmed its convenience in written reference. In oral reference in Court, however, the word "and" should replace the printed "*v.*", always.†

Then there is the year of the case, which, owing to later statutory repeal or amendment, or to the effect of subsequent judgments, is so often of considerable importance. But, when asked from the Bench for the year of a cited judgment, counsel are frequently seen to turn to the back of the volume and give the year that there appears. This is not only incorrect, but is also often very misleading. The year of the case is *the year in which the judgment was delivered.* It is *not* the year in which the volume was published, or the two years over which, sometimes, the hearing and judgment extended. For simple illustration, we take down at random a volume of the *New Zealand Law Reports*—Volume 10. On its back appears, as the

† In good reporting, for this reason, where a case is cited in argument or in a judgment, and in it there are several plaintiffs or defendants, &c., the words "and Others" are eliminated, so that a superfluous "and" never appears. By this means a convenient reference is provided, and in proper citation the replacement of the written "*v.*" by the spoken "and" sufficiently indicates the individuality of the parties.

year, "1892." It contains 768 pages. It will be observed, however, that cases decided in *1891* do not end until page 640. And it is the same with practically all Reports. The correct year always appears in the shoulder note to the case, or, in Reports that dispense with shoulder notes, at the beginning of the reported judgment.

The citation of Scottish cases sometimes involves counsel in a difficulty. The case will be headed, for example, "*M'Alister (or Donoghue)* and *Stevenson* ([1932] A.C. 562) or *Hay or Bourhill* and *Young* ([1943] A.C. 92). (Curiously enough, and seemingly to add further difficulty, the former case, in the shoulder reference is given as "*Donoghue* v. *Stevenson*," but, in the latter case, the shoulder reference is "*Hay or Bourhill* v. *Young*.)" The proper cited references are respectively: *Donoghue* and *Stevenson*, and *Bourhill* and *Young*. Shortly after the final judgment in the former case, Lord Macmillan enlightened the learned readers of the *Law Quarterly Review* (Vol. 49, pp. 1, 2) as to the proper citation of Scottish cases, in a note which was as follows:

> Some confusion is apt to arise in the citation of Scottish decisions in consequence of the practice in Scotland of naming a married woman in legal documents and proceedings by her maiden as well as by her married surname with the (infelicitous) disjunctive "or" interposed. If Miss Mary Wilson married Mr. Scott her legal appellation thenceforth becomes Mrs. Mary Wilson or Scott, and if Mr. Scott should die and she marries Mr. Thomson as her second husband, the formula becomes Mrs. Mary Wilson or Scott or Thomson —and so on. Consequently when a married woman in Scotland is the pursuer or defender of an action her name appears in the proceedings in this composite form, which suggests to the English reader that the lady has adopted an alias.
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> In the Session Cases, the official Scottish Law Reports, a married woman is given both her maiden and her married name in the full title of the case, but in the shoulder note and in the index her married surname alone is used, and this surname alone is used in citing the case. If the case goes to the House of Lords both the maiden and the married name appear on the printed papers, and should it come to be reported in any of the English series of law reports the maiden name is apt to be retained in the name of the case and confusion ensues. Thus in the recent Scottish case of *Donoghue* v. *Stevenson* in the House of Lords, on which Sir Frederick Pollock writes in this number, the appellant appears on the House of Lords papers as "Mrs. May M'Alister or Donoghue." In the *Law Reports* [1932] A.C. 562, the case is titled "*M'Alister (or Donoghue)* v. *Stevenson*," and it so appears in the index, but in the shoulder note it is named "*Donoghue* v. *Stevenson*." Not unnaturally the case is liable to be cited by the first name in the full title, and it has already been mentioned in the Court of Appeal as "*M'Alister's Case*," although its proper designation is "*Donoghue* v. *Stevenson*." It is very desirable that this source of confusion should be removed and that when a married woman is appellant or respondent in a Scottish appeal her married name alone should be used in the name of the case when reported, so that the identity of the case in the Scottish and the English Reports may be preserved, and uniformity of citation ensured.
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> The opportunity may be taken of drawing attention to the error frequently perpetrated of describing the Scottish official reports as "Sessions Cases," whereas their proper title is 'Session Cases,'—*i.e.*, cases decided in the Court of Session.

Although it is outside the scope of this article, the correct pronunciation in Court of Latin terms used in the law is another pitfall for counsel, and requires careful study to avoid solecisms. This matter has been comprehensively dealt with in this JOURNAL by Professor R. M. Algie, in an article appearing under the title "Forensic Pronunciation of Latin," in 14 NEW ZEALAND LAW JOURNAL, 281.

Finally, readers will not take it amiss to be reminded that it is a matter of inconvenience to the Judges, and of possible loss to counsel, if, in making quotations from Reports or text-books, counsel reads the extract in Court as if he were doing so in the ordinary way when reading for his own information. So that full value may be given to the quotation, the book should be held at a higher level to the intent that the voice be directed towards the Bench, and not towards the printed page.

* * * *

Lord Chancellor Westbury said that reporting is a privilege of the Bar. Consequently, only a Law Report taken or vouched for by a practising or qualified barrister may be taken into Court. This accords with the long practice of reporting, which, at first, according to Maitland, was identified with the law-apprentices, in their note-books, and followed by the reports of Plowden, Coke, Dyer, etc., in the sixteenth century, and Ventris, Shower, Holt, Salkeld, Beaven, East, and others, later. The Reports are thus provided by counsel for counsel.

It remains to say that it is well for the members of the Bar who use Reports as their tools of trade, to handle them with dexterity; but, as officers of the Court, it is incumbent on them to assist the Bench. It is a hindering, or a doubtful assistance, to mis-cite cases. This does not accord with the duty of courtesy owed to the Bench and to fellow-counsel.

While the foregoing suggestions as to correct citation do not pretend to be exhaustive, it is hoped they may be of assistance as a working guide to promote fulfilment of that duty.

THE UNITED NATIONS' CONFERENCE.

The Chief Justice's Interesting Account.

On the evening of July 12, there was a record gathering of members of the profession resident in Wellington to hear a most interesting talk by the Chief Justice, the Rt. Hon. Sir Michael Myers, lasting an hour and a half. His Honour described the personalities from fifty nations whom he had met and worked with at Washington, during the meeting of the representative jurists of the United Nations, and, later, at San Francisco at the United Nations Conference for International Organization; and he went on to explain the various legal difficulties that had to be resolved, and the working of the various committees of which, as New Zealand representative, he was a member.

Mr. H. R. Biss, President of the Wellington District Law Society, presided. At the conclusion of the Chief Justice's instructive and enjoyable talk, Mr. H. F. O'Leary, K.C., moved a vote of thanks to His Honour; and this was carried by acclamation.

ADOPTION ORDERS.

Consents: Death of Natural Mother: Death of Adopting Parents.

The following question was asked in the Practical Points service of the JOURNAL:—

> When an application is made for the adoption order in respect of an illegitimate child, is the consent of the natural father necessary or advisable? Reference is made to ss. 18 and 21 of the Infants Act, 1908, and to *In re R.V.W., An Infant*, (1906) 26 N.Z.L.R. 297. If the adopting parents die during the infancy of the illegitimate adopted child, do the rights and liabilities of the natural mother revive; and what are the rights and liabilities (if both the adopting parents and the natural mother die during such infancy) of (*a*) the natural father, and (*b*) the near relatives of the natural mother?

Section 18 (1) (*e*) of the Infants Act, 1908, requires the consent to an adoption of a child to be given by the legal guardian of the child "if both parents are dead." An illegitimate child is *filius nullius*, and, if the mother is dead and no one has been adjudged the father, then the Judge will almost certainly require the consent of the guardian of the child thus necessitating if the child has no guardian, the appointment of a guardian *ad litem* who can give the necessary consent: *In re Nash*, (1884) N.Z.L.R. 2 S.C. 286.

In *2 Halsbury's Laws of England*, 2nd Ed. 579, para. 797, in the title "Bastardy and Legitimation," it is stated that—

> The liabilities of the mother are put an end to by her death and her personal representatives are not bound to provide for the child. At her death the father becomes the guardian of the child either alone or jointly with the guardian appointed by the mother.

The authority quoted for the statement that the father becomes the guardian is the Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), ss. 4 (2) and 5, which are in the same terms as ss. 4 (2) and 5 of the Guardianship of Infants Act, 1926; but in *In re R. V. W. An Infant*, (1906) 26 N.Z.L.R. 297, 298, Sir Robert Stout, C.J., said as to the provisions which have since been replaced by ss. 4 (2) and 5:

> In this case, the child being illegitimate there does not seem to be any jurisdiction for the Court to act under the statute. This has not, so far as I know, been decided in any case in the Courts of England, but the Court of Sessions in Scotland has held that the Act does not apply to an illegitimate child: *Brand* v. *Shaw*, 16 Ct. of Sess. Cas. 4th ser. 315.

It is stated in *2 Halsbury's Laws of England*, 2nd Ed. p. 579 (*s*) that "formerly a guardian appointed by the mother could not act in opposition to the father (*Re Kerr*, (1889) 24 L.R. Ir. 59)." The headnote of *Re Kerr* is as follows:—

> Except in special circumstances the putative father is entitled, after the mother's death to the custody of his illegitimate child, as against a person claiming to have been appointed guardian by its mother. She is entitled by any peaceful means, to take possession of it or to ratify its being taken from him by others.

In actual practice, some Magistrates require the consent to the adoption of an illegitimate child of the person who has been adjudged by an affiliation order to be the father of the child, or who, on the registration of the child's birth, signed the entry in the Register of Births as father of the child. It was held in *Penwarden* v. *Gray*, [1931] N.Z.L.R. 780, that, on the deaths of the adopting parents during the currency of an adoption order, the rights and liabilities of the natural parents do not revive. Such rights and liabilities are, however, revived if the adoption order is reversed or discharged, subject, however, to the terms of the discharging order: s. 22 of the Infants Act, 1908. This section represents s. 9 of the Adoption of Children Act, 1895, as amended by s. 3 of the Statute Law Amendment Act, 1906. The last-mentioned section was passed because of a decision that the legal relationship of parent and child had not been revived as regards the child and its natural parent by the discharge of an adoption order in respect of the child.

Section 21 (2) of the Infants Act, 1908, provides that when an order is made for the adoption of a child

> such order shall thereby terminate all the rights and legal responsibilities and incidents existing between the child and its natural parents, except the right of the child to take property as heir or next-of-kin of his natural parents directly or by right of representation.

But this provision must now be read subject to the anomalous provisions of the Destitute Persons Act, 1910, ss. 4 (5) and 12 of which preserve the liability of the parents of an illegitimate child, as well as relatives who come within the definition of "near relatives" in s. 4 (2) of that statute, for its maintenance, even though it is adopted.

LEGAL LITERATURE.

Man-power Legislation.

Industrial Man-power Legislation (Annotated). By J. P. KAVANAGH. Second Edition, revised and enlarged. Pp. 153 + Index. Wellington: Butterworth and Co. (Aus.) Ltd.

This is an up-to-date edition of a work that has proved very useful in relation to the former Man-power Emergency Regulations and the now-revoked earlier Minimum Weekly Wage (Essential Undertakings) Order. Of this Edition, the Controller of Industrial Man-power, Mr. H. E. Bockett, in a Foreword, says:

> "Mr. J. P. Kavanagh's earlier book on *The Industrial Man-power Emergency Legislation* was well received as a guide to the various measures relating to man-power control, and has, I believe, proved most useful, particularly to employers' and workers' organizations and others closely affected by the operation of the Industrial Man-power Emergency Regulations.
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> "Such regulations are inevitably subject to amendment from time to time, and it is to the advantage of both the administration and the public that up-to-date information concerning them should be available. In this revised book Mr. Kavanagh has covered the various amendments made since the 1942 Regulations were issued (some of them of very considerable importance), and in doing so has compiled a fresh guide to the regulations which should prove no less acceptable than his earlier work."

The new edition contains the Man-power Regulations, 1944, with all amendments incorporated in their text, as well as the Minimum Weekly Wage (Essential Undertakings) Order, 1945, which, a few weeks ago, substituted a new method of assessing the minimum weekly wage payable to essential workers.

Copious notes and illustrative examples explain each clause of the Regulations and Order, and all judicial decisions on them appear to have been included and explained.

THE STATUS OF STIPENDIARY MAGISTRATES IN NEW ZEALAND.

An Historical Summary.

By S. L. PATERSON, LL.B.

(*Continued from p. 162.*)

REDUCTION OF STATUS IN 1932.

During the depression period, the Magistrates were subjected to the salary cuts imposed by the Finance Act, 1931. This was the cause of an amendment to the Act which resulted in a lowering of status.

In 1932, the addition of a few words in the Schedule of a Finance Act, unnoticed by anybody and to which the attention of the Magistrates was not drawn, repealed the provision in the Magistrates' Courts Act charging their salaries in the Consolidated Fund, without annual appropriation. The Minister of Justice at the time was not a lawyer, and probably did not realize —nor was it pointed out to him by the Under-Secretary or any responsible official—what this actually meant, and its effect upon the status of the Magistrates. If it had not been for certain amendments to the Civil Service Act, 1908, it would have reduced them to the status of Civil Servants. As it was, it put them in the position which obtains to this day of virtually having to go to Parliament, cap in hand, each year and say "Please vote us our salaries"; and Parliament could from time to time at appropriation reduce the salary or refuse to vote the salary of any Magistrate.

Rusden, in his *History of New Zealand*, when referring to a somewhat similar provision in a Native Land Bill in 1873, said:

> There was one palpable blot in the Bill which was not removed. The Judges under the Act of 1865 held office during good behaviour, and their salaries were fixed. McLean, prone to personal government and jealous of other authority than his own, left the salaries to be annually appropriated; the Governor (acting of course under McLean's advice) having power to remove any Judge from time to time and appoint another. Although the Bill contained this arbitrary power, McLean said: "The constitution of the Native Land Courts did not vary from what it was formerly, except that the Government from year to year would ask the House to vote the salaries of the Judges of the Native Land Court, and thus the House would exercise control over this branch of the Native Service." Mr. Rolleston remarked that nothing could be more "mischievous than that the Judges, if they did not carry out the desires of a political body, should be liable to have their salaries reduced"; but he raised no question as to the power to remove Judges from time to time. The student of constitutional history is aghast at the readiness with which the independence of Judges was imperilled by making their remuneration precarious and subjecting their tenure of office to the caprices of an executive Department.

These latter remarks might well apply to the legislation passed in 1908 and in 1932, reducing the status of the Magistrates, who are Judges in all but name.

The events leading up to the amendment in 1932 are not without their significance. The Supreme Court Judges in New Zealand were not affected by the Finance Act, 1931, although High Court Judges in England were affected by similar legislation there. Some of the Magistrates, with the late Mr. Wyvern Wilson as prime mover, were of opinion that the Magistrates did not come within the terms of the Finance Act, 1931; as they were not Public Servants but judicial officers, they proposed to apply to the Supreme Court by originating summons for a declaratory judgment to that effect. They had taken the opinion of the late Mr. Alexander Gray, K.C., which was favourable; and they were confident of success. There was nothing in a Crown Law Office opinion to cause them any doubts. They were, however, informed by the Rt. Hon. J. G. Coates, then Minister of Finance, through the Under-Secretary of Justice, that the financial position of the Government was so desperate that if they proceeded with their action and were successful the Government would pass legislation vitiating the judgment *and would make it retrospective*. In view of this tip "straight from the horse's mouth," it was not deemed advisable to proceed with the action. Later, a number of the Magistrates petitioned Parliament for an increase in salaries. Others were of opinion that, in view of the financial situation, the time was inopportune for such a petition. However, in the meantime the Rt. Hon. J. G. Coates had prepared to deal with the Magistrates; and the provision making their salaries a matter of annual appropriation was unobtrusively slipped into the Schedule of the 1932 Finance Act. The petition referred to was, I think, recommended to the Government for favourable consideration when the country's financial position improved; but it has remained in its pigeon-hole ever since.

A CROWN LAW OFFICE OPINION.

The Crown Law Office opinion above mentioned is of some interest, partly because it apparently represents the Department's view of the position of the Magistrates; and it has been quoted several times since, once as recently as last August when a petition presented by Mr. Goulding was before the A to L Petitions Committee, and partly because its reference to the financial independence of the Judiciary. It first premises that Magistrates are "persons employed in the Public Service within the meaning of Part I of the Public Service Superannuation Act, 1927." This is demonstrably erroneous, because a consideration of Part I of that Act makes it clear that the "Public Service" referred to can only be ascertained by reference to the Public Service Act, 1912, and Stipendiary Magistrates are expressly excluded therefrom by s. 4 of the latter Act. The writer of the opinion contended that when the Finance Act, 1931, made it applicable to "all persons employed in the Public Service within the meaning of Part I of the Public Service Superannuation Act, 1927," it invoked the definition contained in the Act of 1927 and not the scope thereof. But the definition of what? Of "Public Service?" If it is the definition of "Public Service" which is invoked, then, as indicated, this ultimately comes back to the Public Service Act

1912. It is, however, rather the scope than the definition which is referred to. The phrase "all persons employed in the Public Service within the meaning," &c., is like a common fraction, of which the denominator is "the Public Service" and the numerator of which defines or limits the denominator is "all persons employed"— that is to say, the reference is to all persons in the Public Service between the Crown and whom there exists the relationship of master and servant. It is quite true that the term "Public Service" in its widest significance includes many persons and classes of persons who do not come within the Public Service Superannuation Act, Part I. Professor Sir William Holdsworth, in an article in 1932 on "The Constitutional Position of the Judges," in *48 Law Quarterly Review*, 25, 26, when discussing the applicability of the National Economy Act, 1931, to the Judges, said:

> It is clear, therefore, that some limitations must be put upon the expression "persons in His Majesty's Service" and "offices in the service of His Majesty." This limitation is, I suggest, contained in the implications of the word "service." That word seems to imply that the persons and offices indicated are persons who, by virtue of their offices, stand in a relation to the Crown which is analogous to the relation of servants to their masters.

I need not here elaborate this argument, which is gone into fully in the article referred to. It applies to Magistrates in their relation to the Crown, equally with the Judges; and it is even stronger when applied to the Finance Act, 1931, because of the use of the word "employed": because there may be service without the relationship of master and servant, whereas "employed" can hardly be dissociated therefrom. The fact that s. 3 of the Finance Act, 1931, enumerates ten other classes of persons who came within the widest meaning of the term "Public Service" is a clear indication that the phrase "persons employed in the Public Service within the meaning of Part I of the Public Service Superannuation Act, 1927 (whether permanently employed or not)," is used in a restrictive sense so far as it affects the Public Service.

This becomes still clearer when Part I of the Act is examined to see what persons are so employed. These persons are the persons referred to in ss. 16, 17, and 18 thereof, and who, vested rights being preserved, are compulsory contributors to the Superannuation Fund. The use of the terms "temporary" or "permanent" employment should be noted, as well as the continued use of the words "employed" and "employment" throughout that Part of the Act, as well as the use of the phrase "on his retirement "from the Public Service" as distinct from the phrase "retires from office" in Part III when referring to Magistrates. I note also the continued use of the word "employment" in Part I, whereas in Part III, referring to the Magistrates, the word used is "service."

Judicial Officers or Public Servants?

The opinion in question appeared to be somewhat off-hand, and was not satisfactorily documented. Its authority rested almost entirely upon the *ipse dixit* of the writer. That the statute was intended to be made applicable to the Magistrates was undoubted. There can be no question but that they came not under s. 3 (1) (*h*) as being "persons employed in the Public Service within the meaning of Part I of the Public Service Superannuation Act, 1927," as alleged in the opinion, but under s. 3 (1) (*k*) as being "persons in receipt of remuneration from public moneys within the meaning of the Public Revenues Act, 1926, . . . to whom this Act may be applied by the Minister of Finance by notice in the *Gazette*." In fact this was never done by the Minister; but any action by the Magistrates by petition of right or summons for a declaratory judgment could have been effectively scotched by the Minister under this subsection.

At one stage the opinion contained this rather extraordinary statement:

> Prior to 1924 all Magistrates were, *as they still are*, persons employed in the Public Service within the meaning of the Superannuation Act.

This is based upon the ingenuous argument that, because Magistrates appointed before 1924 and who were contributors to the Superannuation Fund, and Magistrates who prior to appointment were members of the Civil Service and contributors to the fund, are given the right of continuing to be contributors to the fund and to the benefit to be derived therefrom, *all* Magistrates are therefore *persons employed* in the Public Service within the meaning of Part I of the Superannuation Act. How Lord Atkin would have enjoyed this argument: see *Liversidge* v. *Anderson*, [1942] A.C. 206, 245, [1941] 3 All E.R. 338, 361, 362.

Although Magistrates, as pointed out above, were at one time included in the Public Service Classification List, and, although, before 1924, their retiring-allowances were provided by means of the machinery of the Public Service Superannuation Fund, they were not regarded as ordinary Public Servants. These statutes were made applicable to them as a matter of expediency rather than of principle, and the various Magistrates' Courts Acts and their amendments partook of the slovenliness which is characteristic of so much New Zealand legislation. Their position under the Act of 1893 (which differs little in principle from that of 1928) was to some extent under discussion in the Court of Appeal and in the Privy Council in the case of *Graham* v. *Callaghan*, (1905) N.Z. P.C.C. 330, when the views expressed in the dissenting judgments of Denniston and Edwards, JJ., (22 N.Z.L.R. 934, 949, 950, 960) met with the approval of the Privy Council. Their views were that a Magistrate is a judicial officer subject to the control of the Justice Department *only* so far as is necessary to regulate the time and places at which he is to exercise his jurisdiction; or as Edwards, J., put it "the sphere of the exercise of his duties," and Denniston, J., said that in this respect the position was very similar to that of the Supreme Court Judges.

(To be concluded.)

Profundity.—"A profound lawyer is one whose interest in law is greater than his interest in human nature."—Derek Walker-Smith in his *Life of Lord Darling*.

Under Cross-examination.—The Englishman goes into a Court of law unwillingly, fearfully, and especially apprehensive of cross-examination. No doubt, there are occasional witnesses of that kind in Ireland, too; but the vast majority go to give their evidence as a cricketer walks to the wicket. Each is confident he will not be bowled until he has knocked up a good score; each is very disappointed if the bowler limits his efforts to preventing the score from rising and does not attack his wicket.—Maurice Healy.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Psychology and the Cat.—An interesting contribution to the law of negligence is contained in the judgment of Cornish, J., in *North Shore Transport Company* v. *Oram*. The respondent was walking towards the front of a bus in readiness to alight, when the driver braked suddenly to avoid running over a cat. His quick decision, he maintained, was due to his aversion from running over an animal, and from this admission, made in cross-examination, the Magistrate held that he had time to appreciate the situation but decided to discharge his duty to the cat and to his own feelings instead of his duty to the plaintiff. The driver of a public vehicle, he considered, who gives a cat the preference that should be accorded his passengers is guilty of a breach of the duty he owes to them. Fortunately for the cat-conscious driver, Cornish, J., has invoked the aid of psychology which enables him to interpret the driver's admission as nothing more than an attempt to rationalize the act of braking, which, in examination-in-chief, he had described as involuntary.

> The driver's acceptance of aversion from running over an animal as the explanation of his act of braking does not amount to an admission by him that this act was a deliberate one. He could without inconsistency do two things: (1) claim to have acted involuntarily; (2) adopt his aversion from running over an animal as a feasible explanation of his involuntary conduct. In other words, he could well have thought that this aversion was the cause of his involuntary act of braking.

Result: the injured passenger loses her verdict for damages, the driver's faith in his particular aversion is restored, and the cat is left with such number of its nine lives as were, at the time of the accident, then unexpended.

Cats and the Law.—According to the old English common law, cats were held to be "no property, being base by nature," but no doubt this was due to the fact that larceny was punishable by death. On the other hand, cats have often inherited property. Lord Chesterfield left life pensions to his cats and their offspring, while Mademoiselle Dupuy, a celebrated harpist of the seventeenth century, left her entire fortune (including both town and country houses) to her cat which sat beside her when she played, showing pleasure or annoyance, accordingly as she did well or badly. A similar omniscience was attributed to his dog "Jack" by Mr. Justice Hawkins who kept the wretched animal on the Bench, where it demonstrated its ill-humour by punctuating the addresses of long-winded counsel with its growls and barks. In this uncomfortable habit, however, Hawkins, J., appears to have been anticipated by Cardinal Wolsey, who, while acting in his judicial capacity, invariably placed his cat by his side. He may have had in mind that St. Ives, the patron saint of lawyers, is always represented as accompanied by a cat, although why the saint should play this Dick Whittington role is not clear.

Slander Actions.—In *Baker* v. *Pierie*, (1703) 2 Ld. Raym. 959, Sir John Holt said, "It is not worth while to be very learned on this point, but where words tend to slander a man and take away his reputation I shall be for supporting actions for them, because it tends to preserve the peace"; and he refers to an action of which the story was told that, if the plaintiff had had any idea that he would lose, he would have cut his throat. What countless number of litigants must have echoed these sentiments in the centuries that have followed! In the same week last March, two more were added to the list—at least, if they did not actually threaten *felo de se*, they had grounds for justifiable annoyance. In the first case, *Cleghorn* v. *Sadler*, heard in the King's Bench Division, the defendant accused the plaintiff of prying and stated that she was in the habit of using keys entrusted to her in respect of her fire-watching duties for the purpose of getting into people's rooms and cupboards. It was contended that the words uttered amounted to an allegation of misconduct by her in the office of fire-watcher. However, the Court upheld a defence that the words were not actionable without proof of special damage since fire-watching was not an office, and no power of removing a person existed in the Defence (Fire Guard) Regulations, 1943. In this Dominion, fire-watching was regarded, not as an office, but a means whereby middle-aged gentlemen could temporarily escape some of the irritations of home life.

The Solicitor's Reference.—In the second of the cases, *Hopwood* v. *Muirson*, heard in the Court of Appeal, the defendant (who was on bad terms with the plaintiff) had said when a client called upon him, seeking a tenancy and supporting his application with a reference signed by the plaintiff who added the word "Solicitor" after his signature, "You have got one from that pimp H. It is quite worthless. His very calling as a solicitor makes him write whatever suits his client best. Damn it, he would sue his grandmother for 7s. 6d." An appeal from Hallett, J., was dismissed, the Court holding that the words were not defamatory of the appellant in the way of his profession and could not possibly be interpreted to mean that in defendant's view appellant was unfit to be a solicitor. The judgment, to say the least, appears to show an attitude much more favourable to the rights of the critic than to those of the sufferer.

It is reminiscent of a case at the Leeds Assizes in which a witness deposed that the defendant spoke of the plaintiff as a "damned thief." The defendant's counsel at once interrupted "A damned thief of a lawyer, my Lord." "That addition," observed Mr. Justice Day philosophically, "no doubt renders the saying perfectly innocuous."

Holmesiana.—*From a judgment*: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."

An observation in Court: "General maxims are oftener an excuse for the want of accurate analysis than a help in determining the extent of a duty or the construction of a statute."

Broadcasting on his ninetieth birthday: "The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voices of friends and to say to one's self: 'The work is done.' But just as one says that, the answer comes: 'The race is over, but the work never is done while the power to work remains'."

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Death Duty.—*Life Insurance Policy payable in England—Assigned by way of Gift to Donee domiciled in England—Insured dying domiciled in New Zealand—Liability to Death Duty in New Zealand.*

QUESTION: A. died domiciled in New Zealand in 1944. During his life he insured his life with an English company, and the proceeds of the policy are payable in England. About twenty years ago A. assigned the policy by way of gift to his niece B., and A. has paid the premiums all the time. Are the proceeds of the policy liable to death duty in New Zealand *re* A.'s estate? B.'s domicil is and always has been English.

ANSWER: The proceeds of the life policy are caught by s. 5 (1) (*f*) and s. 16 (1) (*e*) of the Death Duties Act, 1921. It is submitted that for the purposes of these sections the domicil of the donee or beneficiary is immaterial. The material point is the domicil of the deceased, which in this case is New Zealand.

The recent case of *In re MacEwan*, [1945] G.L.R. 92, (also on s. 5 (1) (*f*), *ibid.*), shows that s. 8, *ibid.*, must be read subject to s. 7, and the effect of the last-named section is that where deceased died domiciled in New Zealand, the proceeds of the life insurance policy are deemed to be situate in New Zealand. Were it not that in *In re MacEwan* (*supra*) the beneficiary was domiciled in New Zealand that case would be exactly in point here. X

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2. Will.—*Construction—Bequest of Personalty to Two Named Persons—Whether such Beneficiaries take as Joint Tenants.*

QUESTION: A. by cls. 3 and 4 in his will bequeathed certain personalty to B. and C. In each case, the gift is made to B. and C. simpliciter. Clause 5 provided that, if either B. or C. predeceased the testator, then the survivor was to take the whole of the gifts. Both B. and C. survive the testator, but C. dies before distribution of any assets. Did B. and C. take as joint tenants and do the whole of the gifts now vest in B.? Reference: *In re Maurice, Guardian, Trust, and Executors Co. of N.Z., Ltd.* v. *Maurice*, [1931] N.Z.L.R. 388; *Austin* v. *Austin*, (1908) 27 N.Z.L.R. 1099.

ANSWER: B. and C. take as joint tenants: *Jarman on Wills*, 7th Ed., 1764: *Garrow's Law of Wills and Administration*, 325; *25 Halsbury's Laws of England*, 2nd Ed., pp. 210, 211, para. 359; and unless the joint tenancy was severed before C.'s death B. takes the whole property by survivorship. Even without cl. 5 of the will, B. and C. would take as joint tenants. Clause 5 cannot operate in derogation of the joint tenancy created by the terms of cls. 3 and 4, for it merely states (or re-states) the right of survivorship (*jus accrescendi*), which is the distinguishing feature of joint tenancy: see *Cookson* v. *Bingham*, (1853) 17 Beav. 262, 51 E.R. 1035 (aff. on app. (1854) 3 De G. M. & G. 668), where the rule is stated that, in determining whether a testator intended to create a joint tenancy or a tenancy in common, the Court must look at all the testator's words and collect the meaning from the will. Y2

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3. Executors and Administrators.—*Bequest to Children in Equal Shares—Debt owing to Testator by Son predeceasing him—Son's Children taking deceased Parent's Share—Whether Debt may be set-off against Son's Children's Share.*

QUESTION: A testator bequeathed his estate to his children in equal shares with a provision that the children of a child predeceasing him takes their parent's share. Testator lent £50 to child A., who predeceased testator. A., at the time of his death, still owed this amount to testator, and left no estate. Can testator's trustees off-set this amount of £50 against the share to which A.'s children are entitled?

ANSWER: The trustees cannot off-set A.'s debt of £50 against his children's share of the estate: *In re Binns, Public Trustee* v. *Ingle*, [1929] 1 Ch. 677, cited in *Garrow's Law of Wills and Administration*, 280; and *13 Halsbury's Laws of England*, 2nd Ed. 163; *ibid.*, Vol. 34, p. 424.

It is assumed that the will contains no hotchpot clause, which might affect the question. Y2

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4. Income Tax.—*Master and Servant—Dismissal of Long-service Employee—Lump-sum Payment on Dismissal—Whether deductible.*

QUESTION: A company was obliged to dismiss an employee, who had been in its service for many years, on account of his unsatisfactory work and his continued absence from duty. In view of his long period of service, the directors decided to pay him a lump sum equal to one year's salary, when he was dismissed. Would any portion of this lump-sum payment be assessable to the recipient or deductible by the company for taxation purposes?

ANSWER: From the particulars stated, it is apparent that the payment by the company was an entirely voluntary one. It cannot be regarded as a payment in lieu of notice, as owing to the employee's unsatisfactory conduct, the company was entitled to dismiss him without notice. Being a voluntary payment the amount cannot be allowed as a deduction in arriving at the company's assessable income.

The employee's dismissal amounts to a compulsory retirement; and, as the amount was paid in respect of past services, it comes within the scope of the proviso to s. 79 (*b*) of the Land and Income Tax Act, 1923, as being a lump sum paid in respect of his employment on the occasion of his retirement, and thus only 5 per cent. would be assessable for taxation purposes. Z

RULES AND REGULATIONS.

Economic Stabilization Emergency Regulations, 1942, Amendment No. 6. (Emergency Regulations Act, 1939.) No. 1945/75.

Drainage and Plumbing Extension Notice, 1945, No. 2. (Health Act, 1920.) No. 1945/76.

Minimum Weekly Wage (Essential Undertakings) Order, 1945. (Industrial Man-power Emergency Regulations, 1944.) No. 1945/77.

Milk Board Election Regulations, 1945. (Milk Act, 1944.) No. 1945/78.

Savings-banks Emergency Regulations, 1945. (Emergency Regulations Act, 1939.) No. 1945/79.

Agricultural Workers Labour Legislation Suspension Order, 1941, Amendment No. 2. (Labour Legislation Emergency Regulations, 1940.) No. 1945/80.

Camping-ground Regulations Extension Order, 1945, No. 2. (Health Act, 1920.) No. 1945/81.

Phosphatic Fertilizer Control Order, 1945. (Primary Industries Emergency Regulations, 1939.) No. 1945/82.

Dairy Supply Control Order, 1945. (Primary Industries Emergency Regulations, 1939.) No. 1945/83.

Harbour Boards (Travelling-allowance) Regulations, 1945. (Harbours Act, 1923.) No. 1945/84.