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THE CROWN PROCEEDINGS ACT, 1950.

II.

OUR consideration of the Crown Proceedings Act, 1950, began on p. 17, *Ante*, where we gave some of the background to the new statute. We now go on to consider the sections in some detail.

Part I of the new statute, comprising ss. 2-11, inclusive, is headed "Substantive Law." While the general effect of those sections differs little from the corresponding provisions of the Crown Suits Act, 1908, and the Crown Suits Amendment Act, 1910, there has been a co-ordination of those provisions with those of the Crown Proceedings Act, 1947 (U.K.), and this has resulted in some amplification of the now-repealed provisions of those statutes.

Claims Enforceable by or against The Crown.

Section 3 renders enforceable proceedings by or against the Crown to which either the previously existing New Zealand legislation applied or the Crown Proceedings Act, 1947 (U.K.), extends. The provisions of s. 3 of the Crown Suits Amendment Act, 1910, have been amplified so as to cover explicitly claims based on tort and causes of action in respect of which relief would be granted against the Crown in equity. The New Zealand section differs from the corresponding one in the United Kingdom Act, as the latter applies to actions against the Crown only in cases of tort and in those cases where a petition of right lay against the Crown in Great Britain before the passing of the Crown Proceedings Act, 1947.

Subsection 1 provides that all debts, damages, duties, sums of money, land, or goods due, payable, or belonging to the Crown, may be sued for and recovered by proceedings taken by or on behalf of the Crown in accordance with the provisions of the statute.

Under subs. 2, the full scope of a subject's rights of recovery against the Crown is disclosed. Subject to the provisions of the statute and any other Act, any person (whether a subject of His Majesty or not) may enforce as of right, by civil proceedings taken against the Crown for that purpose in accordance with the provisions of the statute, any claim or demand against the Crown in respect of any of the following causes of action:

(*a*) The breach of any contract or trust.

(*b*) Any wrong or injury for which the Crown is liable in tort under the statute or under any other Act which is binding on the Crown. (The extent of the Crown's liability in tort under the Crown Proceedings Act, 1950, is the subject-matter of s. 6, to which reference will be made.)

(*c*) Any cause of action, in respect of which a claim or demand may be made against the Crown under the statute or under any other Act which is binding on the Crown, and for which there is not another equally convenient or more convenient remedy against the Crown.

(*d*) Any cause of action, which is independent of contract, trust, or tort, or any Act, for which an action for damages or to recover property of any kind would lie against the Crown if it were a private person of full age and capacity, and for which there is not another equally convenient or more convenient remedy against the Crown.

(*e*) Any other cause of action in respect of which a petition of right would lie against the Crown at common law or in respect of which relief would be granted against the Crown in equity.

Limitation of Actions.

All actions by or against the Crown by virtue of the Crown Proceedings Act, 1950, are, by s. 4, made subject to the provisions of the Limitation Act, 1950, and of any other statute which limits the time within which proceedings may be brought by or against the Crown. Sections 7 and 32 of the latter statute, which came into force contemporaneously with the Crown Proceedings Act, 1950—*i.e.*, on January 1, 1952—apply to the Crown, with some reservations, the principles of limitation of action applicable to individuals. The period of prescription against the Crown is now sixty years (s. 7 (1)).

Enactments binding The Crown.

Section 5 of the new statute preserves the rule declared in s. 5 (*k*) of the Acts Interpretation Act, 1924, that the Crown is not bound by any enactment unless it is expressly stated therein that the Crown shall be bound.

In order to make effective the general scheme of the Crown Proceedings Act, 1950, the foregoing rule is again stated in s. 5 by declaring that that statute is not to be construed so as to make any Act binding upon the Crown which would not otherwise be so binding, or so as to impose any liability on the Crown by virtue of any Act which is not binding on the Crown.

It was originally thought that a general provision making all statutes binding on the Crown would be an effective way of dealing with the subject-matter of s. 5; but it required little consideration to establish that, for a number of reasons, such a general provision would create more difficulties than it would solve.

For instance, s. 3 (2) (*d*) refers to causes of action, independent of contract, trust, or tort, or any Act, for which an action for damages or to recover property of any kind would lie against the Crown " if it were a private person of full age and capacity." Although it is possible in a large part of the field covered by the activities of the Crown to draw an analogy between those activities and those of private enterprise, there are certain necessary functions of Government where no such analogy exists—*e.g.*, no private person has a duty to maintain the armed forces or to undertake the duties of the Crown in discharging its responsibilities to defend the State.

There were, of course, a number of statutes which did not, in terms, bind the Crown ; and it was necessary, in enlarging the scope of the former Crown Suits legislation, that such of these as could properly be applied to a liability of the Crown analogous to that of a private citizen should be declared to bind the Crown. Consequently, by s. 5 (2), the following enactments are declared to bind the Crown as from the coming into force of the Crown Proceedings Act, 1950, on January 1, 1952 :

Administration Act, 1908.
Bills of Exchange Act, 1908.
Deaths by Accidents Compensation Act, 1908.
Evidence Act, 1908.
Imprisonment for Debt Limitation Act, 1908.
Infants Act, 1908.
Judicature Act, 1908, s. 51, Part III, and the Second and Third Schedules.
Life Insurance Act, 1908, ss. 65, 66.
Mercantile Law Act, 1908, Part II.
Sale of Goods Act, 1908.
Declaratory Judgments Act, 1908.
Friendly Societies Act, 1909, s. 99.
Inferior Courts Procedure Act, 1909.
Acts Interpretation Act, 1924.
Life Insurance Amendment Act, 1925, s. 3.
Law Reform Act, 1936, Parts I and VII.
Carriage by Air Act, 1940.
Sea Carriage of Goods Act, 1940.
Law Reform Act, 1944, s. 4.
Magistrates' Courts Act, 1947.
Superannuation Act, 1947, s. 83.

Liability of The Crown in Tort.

Sections 3 (*c*) and 4 of the Crown Suits Act, 1910, as we have already seen, extended, in New Zealand, the Crown liability in tort. But, in the United Kingdom, this was first enacted in the Crown Proceedings Act, 1947 (U.K.). Section 6 of the Crown Proceedings Act, 1950 (N.Z.), achieves a happy combination of the now-repealed pioneer provisions of the New Zealand legislation with the drafting improvements of s. 2 of the United Kingdom statute, not so much for the purpose of changing the well-known local provisions as to create a uniformity between the New Zealand and United Kingdom legislation.

Section 6, in defining the circumstances in which the Crown is to be liable in tort, provides in subs. 1 that, subject to the provisions of the statute and any other Act, the Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject :

" (*a*) In respect of torts committed by its servants or agents ;

" (*b*) In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer ; and

" (*c*) In respect of any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property."

The foregoing is subject to the proviso that no proceedings lie against the Crown by virtue of para. (*a*) in respect of any act or omission of a servant or agent of the Crown, unless the act or omission would, apart from the provisions of the statute, have given rise to a cause of action in tort against that servant or agent or his estate.

(The effect of this proviso is, in the first place, to enable the Crown to avail itself of any personal defence which may be open to a primary tortfeasor, such as reasonable mistake—*e.g.*, as a justification of the arrest and imprisonment of a suspected criminal, where a crime has been committed—privilege, or self-defence, or that the act complained of was an " Act of State " authorized or ratified by the Crown, if the Court should hold that such an act is within the scope of the Royal prerogative, since the exercise of prerogative powers does not give rise to any legal claim against the Crown or its servants. Secondly, where it is an essential ingredient of a tort that the tortfeasor should have acted with malice (as in malicious prosecution), or with knowledge of the likelihood of danger—*e.g.*, foreseeability—in actions of negligence, the plaintiff should be able to point to some particular servant of the Crown who committed or directed the commission of the act complained of and also had the malice or the knowledge in question, or to whom the malice or knowledge can be imputed, because it is in respect of the tort committed by that particular individual that the plaintiff's cause of action must be founded.) Section 11 of the Crown Proceedings Act, 1950, preserves the powers and authorities of the Crown which are exercisable by virtue of the prerogative or of any statute, except so far as such powers and authorities are expressly taken away by that Act.

It is considered, though with the possibility of some overlapping, that those three categories of wrongs independent of contract cover all parts of the law of torts that are within the scope of the new statute. Because, as is apparent to everyone, it is impossible in drafting such a statute to deal with the question of tort by the summary method of merely enacting that the Crown should be liable to be sued in tort in the general words of s. 3 (2) (*b*) in respect of " any wrong or injury," the saving words are there added " for which the Crown is liable under this Act or under any other Act which is binding on the Crown." This generalization is, accordingly, modified by s. 5 (as stated above), and by paras. (*a*), (*b*), and (*c*) of s. 6 (1), which we have quoted.

The opening words of s. 6 (1) (" Subject to the provisions of this Act ") have reference to the other provisions of the statute which amplify or restrict the operations of s. 6. The principal of these are s. 8 (indemnity and contribution), s. 9 (liability in respect of the death or disablement of members of the armed forces), s. 10 (claims in respect of visiting forces), s. 11 (acts done under prerogative and statutory powers), s. 35 (1) (saving of the rights therein enumerated), and s. 35 (2) (liability in respect of *bona vacantia*).

Subsection 2 of s. 6 goes on to provide that, where the Crown is bound by a statutory duty which is binding also on persons other than the Crown, the Crown is liable

in tort for breaches of that statutory duty to the same extent as it would be so subject if it were a private person of full age and capacity. This provision at first sight seems somewhat complicated, but its purpose is to ensure (*a*) that the Crown is to be liable only for breaches of statutory duty which bind the Crown, and (*b*) that the duty must be binding upon persons other than the Crown and the Crown is not to be liable for breaches of statutory duties which bind the Crown but do not at the same time bind these other persons. The reason for this latter limitation is that there are many Acts of Parliament which impose general duties laid upon the Crown alone or on particular Ministers—*e.g.*, it is the duty of the Minister of Education to provide for the education of the people of New Zealand by controlling and directing the Department of Education and all its officers, and generally to administer the Education Act, 1914. If the Minister fails to perform this duty, he should be answerable in Parliament, and not elsewhere. Some statutes, however, are binding on the Crown subject to reservations in some particulars, such as the Factories Act, 1946 : the Crown, in respect of those reservations, would not be bound, and so not liable for damages, though other persons may be liable for breach of statutory duty under them.

Many duties are imposed by statute upon officers of the Crown, and the common-law rule is that, when a duty to be performed is imposed by law and not by the will of the party employing the servant, the employer is not liable for the wrong done by the servant in carrying out that duty : *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838. Section 6 (3) deprives the Crown of any defence based on this principle. (It reproduces s. 2 (3) of the Crown Proceedings Act, 1947 (U.K.).)

Section 6 (4) gives the Crown the benefit of any statutory provision which negatives or limits the liability of any Government Department or officer of the Crown in respect of any tort committed by that Department or officer. Examples of this provision will be found in statutes where Parliament has deliberately expressed its will that servants of the Crown are entitled to certain protection in carrying out their duties ; in those cases, the Crown should enjoy some protection in the case of proceedings in respect of the acts of those servants.

By virtue of s. 6 (5), the Crown is exempted from liability in respect of anything done or omitted to be done by any person while discharging, or purporting to discharge, any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process. It is a principle of our law that the Crown should not interfere with any person who is charged with the execution of judicial process, as any such interference would in effect be an interference by the Executive in the course of justice. The Crown, therefore, cannot interfere with the acts of a judicial officer in these cases. It would be wrong to render the Crown liable for those acts. Moreover, the basis of a master's vicarious liability is the power of the master to control and direct the servant ; but, in so far as Judges of the Supreme Court are concerned, they are not even the servants of the Crown.

It will be noticed that the subsection does not involve the Crown in the frequently difficult question whether a judicial officer is under a liability for his acts, as when acting in excess of his jurisdiction or without statutory authority, for it provides that, if he merely " purports " to act in the discharge of judicial responsibilities or the execution of judicial process, no liability will attach to the Crown. Wherever the Act refers to an " officer," it does not include any Judge, Magistrate, Justice of the Peace, or other judicial officer ; but subs. 5 does not use that word : it refers to " any person " while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process. The like protection is not given the Crown in respect of any person's administrative functions. For the distinction between judicial and administrative functions, see *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431, and *26 Halsbury's Laws of England*, 2nd Ed. 274, 275.

Industrial Property.

Section 7 (1) makes provision as to industrial property by imposing a liability on the Crown in respect of an infringement, after January 1, 1952, by any of its servants of any patent, registered trade-mark, or copyright in a design subsisting under the Patents, Designs, and Trade-marks Act, 1921-22, where the infringement is committed with the authority of the Crown. Subsection 2 makes it clear that that provision, however, does not affect the right which the Crown has under s. 32 or s. 66 of the Patents, Designs, and Trade-marks Act, 1921-22 (which confer the right on the Crown to patents, inventions, and registered designs for the services of the Crown upon payment of compensation), or the rights of any Minister of the Crown under s. 6 of the Patents, Designs, and Trade-marks Amendment Act, 1947 (which concerns inventions relating to the protection or use of atomic energy or research into matters connected therewith).

Subsection 3 enacts that, save as expressly provided by s. 7, no proceedings shall lie against the Crown by virtue of the Crown Proceedings Act, 1950, in respect of the infringement of a patent, a registered trade-mark, or any such copyright as is mentioned in subs. 1. The apparent purpose of subs. 3 is to exclude the application of s. 3 of the statute to claims for infringement of industrial property as specified in s. 7 (1).

During the passage of the Crown Proceedings Bill, 1947 (U.K.), it was considered necessary to insert the section corresponding to our s. 7, rather than leave such infringements of industrial property of the nature specified therein to be dealt with as torts under our s. 3 (*146 House of Lords Official Report*, 367). There is a practical difference between the Crown's position with regard to patents and copyright in registered designs subsisting under the Patents, Designs, and Trade-marks Act, 1921-22, on the one hand, and with regard to trade-marks and ordinary copyright, on the other hand. The latter have their origin in rights of property recognized by the common law ; and, although they are now entirely regulated by and dependent on the provisions of statutes, the Crown has no special rights with regard to them ; in particular, the Crown cannot lawfully authorize any infringement of a registered trade-mark or a copyright. It is otherwise with regard to patents, which are themselves created by the Crown. The right of the Crown for certain purposes to use or authorize the use of a patent or registered design by virtue of the statutory provisions specified in subs. 2 without exposing itself or the authorized user to any liability, except for compensation on terms agreed upon or to be fixed by the

Court, is preserved by subss. 2 and 3 : so that the only liability to which the Crown will be exposed, and for which an action will lie against it, with relation to the infringement of a patent or registered design will be when it has exceeded the powers given by the named provisions of the specified statutes.

Indemnity and Contribution.

Section 8 (1) applies the law as to indemnity, contribution, and joint and several tortfeasors to the Crown wherever the Crown is subject to any liability in tort by virtue of Part I of the Crown Proceedings Act, 1950. (The words " any liability " refer to the liabilities imposed on the Crown by ss. 3, 4, 5, 6, and 9.)

In this way, the Crown is placed in the same position as a private person of full age and capacity. Thus, by subs. 2, without prejudice to the effect of subs. 1, Part V of the Law Reform Act, 1936 (which relates to proceedings against, and contribution between, joint and several tortfeasors), is declared to be binding on the Crown.

The third subsection of the corresponding section (s. 4) of the Crown Proceedings Act, 1947 (U.K.), declares that the Law Reform (Contributory Negligence) Act, 1945 (U.K.) (which is reproduced in its main essentials in our Contributory Negligence Act, 1947), is to bind the Crown. This subsection was unnecessary here, because, though the Contributory Negligence Act, 1945, as enacted, did not expressly bind the Crown, that omission was cured by s. 4 of the Statutes Amendment Act, 1948, which added a new s. 7 to the Contributory Negligence Act, 1947, to declare that the Crown was thereby bound.

It might be thought, in view of the short-term limitation imposed in respect of actions against the Crown by s. 23 (1) of the Limitation Act, 1950, that it may be desirable for a tortfeasor with a right of contribution from the Crown to institute proceedings against the Crown for a declaration that the Crown is so liable to contribute, before he is himself sued. But, in New Zealand, such a step is unnecessary, because the cause of action in respect of any claim for a sum of money by way of contribution or indemnity is deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained (s. 14 of the Limitation Act, 1950), thus remedying the position disclosed in *Merlihan* v. *A. C. Pope, Ltd., and Hibberd (Pangello, Third Party)*, [1946] K.B. 166 ; [1945] 2 All E.R. 449, and *Hordern-Richmond, Ltd.* v. *Duncan*, [1947] K.B. 545 ; [1947] 1 All E.R. 427.

The Crown and Members of The New Zealand Armed Forces.

Section 9 exempts the Crown from liability for the payment of compensation or damages in respect of the death or disability of members of the New Zealand armed forces if any pension has at any time been paid or is being paid or at any time will become payable under the War Pensions Act, 1943, in respect of that death or disablement. If, however, an officer of the Crown becomes liable for any act or omission in any case where the Court is satisfied that the act or omission was not connected with the execution of his duties as an officer of the Crown, he is not exempt from liability for any such act or omission.

It is to be noted that the exemption of the Crown in s. 9 (1) relates only to liability in respect of the *death* or *disablement* of any member of the armed forces : it does bar a claim either against the Crown or against an officer of the Crown in respect of other torts such as false imprisonment or malicious prosecution. Members of the armed forces or their personal representatives are not deprived of their remedies at common law in cases of death or disablement if the Secretary for War Pensions does not certify that a pension has not been paid, or is not being paid, or will not be payable at any time, under the War Pensions Act, 1943, in respect of death or disablement.

Claims in Respect of Visiting Forces.

Section 10 deals with claims against the Crown in respect of visiting forces. This section re-enacts with slight amendment the provisions of s. 21 of the Statutes Amendment Act, 1945, which was to be read with and deemed part of the Crown Suits Act, 1908 (now revoked).

Section 10 now provides that any person may claim redress from the Crown if he suffers in New Zealand any damage, loss, or injury through the use of any ship, vehicle, or aircraft belonging to a visiting force, or if he has a claim against a member of a visiting force in respect of a cause of action which arises in New Zealand and which is in respect of death, bodily injury, or damage to property. For the purposes of any such claim for redress, the visiting force and its ships, vehicles, and aircraft are treated as if they belong to the Crown.

Acts Done under Prerogative and Statutory Powers.

Section 11 is a saving clause in respect of acts done by virtue of the prerogative of the Crown or any powers or authorities conferred on the Crown by any statute. In particular, nothing in Part I of the Crown Proceedings Act, 1950, is to extinguish or abridge any powers or authorities exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of the realm or of training, or maintaining the efficiency of, any of the armed forces of New Zealand or of any part of the Commonwealth.

Subsection 2 of s. 11 goes on to provide that, where, in any proceedings under the Crown Proceedings Act, 1950, it is material to determine whether anything was properly done or omitted to be done in the exercise of the prerogative of the Crown, the Minister of Defence, if satisfied that the act or omission was necessary for any such purpose as is mentioned in the section, may issue a certificate to the effect that the act or omission was necessary for that purpose ; and his certificate is, in those proceedings, to be conclusive as to the matter so certified.

It is difficult to see in what way this statute could be used to extinguish or abridge the prerogative powers of the Crown, especially those powers in matters of defence. The precise operation of the section is, therefore, obscure : it follows the wording of the corresponding s. 11 of the Crown Proceedings Act, 1947 (U.K.). Comment on its inclusion in that Act has been to the effect that there is nothing in Part I likely to be construed as restricting the lawful exercise of the prerogative, while there is nothing in the section itself to take away any right to compensation which a person damnified by the exercise of the prerogative may have in accordance with the decisions in *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508, *Commercial and Estates Co. of Egypt* v. *Board of Trade*, [1925] 1 K.B. 271, and *Newcastle Breweries, Ltd.* v. *The King*, [1920] 1 K.B. 854.

On the other hand, it may well be that the section has been inserted in both the United Kingdom and the New Zealand statutes *ex abundanti cautela*. Dicey makes it clear that no prerogative of the Crown can be abridged or affected except by express statutory enactment. The prerogative, so far as it relates to Crown proceedings, ensured that the Sovereign could not be sued in his own Courts, and, accordingly, to obtain redress from the Crown, he had to be approached by petition: this is now extinguished by s. 12. The Crown could do no wrong: hence it was not permissible to plead that the Crown had committed a trespass or any other actionable wrong: this prerogative is now extinguished by ss. 3 (2) (*b*) and 6. Another prerogative of the Crown was that it could demand discovery without submitting to it: this right is abridged by s. 27 (1) (*b*); and similarly with interrogatories, as to which see s. 27 (1) (*a*). Consequently, it would appear that s. 11 is designed to restrict the statute to what it expressly declares, so as to make it clear that, "except as expressly provided," nothing in Part I of the Crown Proceedings Act, 1950 (in the words of subs. 1), "shall extinguish or abridge any powers of the Crown."

In our next issue, we shall consider Part II of the Act, which deals with jurisdiction and procedure.

SUMMARY OF RECENT LAW.

ALIEN.

Deportation—Order that Alien "shall be deported"—Validity—Aliens Order, 1920 (S.R. & O., 1920, No. 448), art. 12 (1). On October 6, 1950, the Home Secretary made an order that the applicant, an alien, "shall be deported from the United Kingdom and shall remain thereafter out of the United Kingdom," and further directed that he should be placed in the custody of a Police officer until deportation. In September, 1951, the order was served on the applicant, who was detained in order to be placed on board a Polish ship. It was contended that the order was invalid and the applicant's detention unlawful because (i) the order did not "require" him to leave the United Kingdom, and, therefore, failed to comply with art. 12 (1) of the Aliens Order, 1920, and (ii) he was not given an opportunity of leaving the United Kingdom voluntarily and thereby enabled to escape deportation to Poland. *Held*, That, under the Aliens Order, 1920, art. 12 (1), the Home Secretary had power to make an order compelling an alien to leave the United Kingdom, as distinguished from requesting him to do so; there was no provision in the Order of 1920 that, before a compulsory order was made against an alien, he must first be given the opportunity of leaving, and no special form of deportation order was provided; and, therefore, the order made against the applicant was valid. (*The King* v. *Home Secretary. Ex parte Chateau Thierry* (*Duke*), [1917] 1 K.B. 922, applied.) *The King* v. *Governor of Brixton Prison and Another, Ex parte Pawel Sliwa*, [1952] 1 All E.R. 187 (C.A.).

As to the Deportation of Aliens, see *1 Halsbury's Laws of England*, 2nd Ed. 484-488, paras. 820-827; and for Cases, see *2 E. and E. Digest*, 194-197, Nos. *542-553*, and Digest Supplement.

ANIMALS PROTECTION.

Taking or killing Game without Licence—Restriction of Meaning of "take or kill" to Game presently in Evidence—Animals Protection and Game Act, 1921-22, s. 2. The expression "take or kill," as defined in s. 2 of the Animals Protection and Game Act, 1921-22, is restricted to hunting a particular animal or one or more particular animals already sighted, with the design of taking it or them alive or dead, since the word "the" before the word "animal" in the definition inplies a particular as opposed to a general object—namely, the specific animal hunted or pursued, in contradistinction to an animal or animals at large which might have happened to be in the vicinity at the material time. (*Carmody* v. *Barlow*, (1905) 25 N.Z.L.R. 418, *Elliott* v. *Walpole*, (1912) 31 N.Z.L.R. 1257, and *R.* v. *Oberlander*, (1910) 13 W.L.R. 643, referred to.) *Smith* v. *King*: *Smith* v. *Hibbard*. (Dannevirke. October 3, 1951. Harlow, S.M.).

BANKRUPTCY.

Discharge—No Bankruptcy Offence proved—Court not satisfied with Conduct of Bankrupt generally—Re-entry into Business contrary to Public Interest—Principles Applicable—Discharge refused—Bankruptcy Act, 1908, s. 127. Where, though there is no evidence that would justify the conclusion that an offence against the Bankruptcy Act, 1908, has been committed, the Court is not satisfied with the conduct of the bankrupt generally, and considers that to allow him to enter into business of any kind again—or, rather, to facilitate his entering business again—is contrary to the public interest, it may refuse a discharge. Before the Court frees him from the obligation of disclosing that he is a bankrupt before he can obtain credit for over £20, it should be satisfied that it is proper that his entry into business again should be facilitated. (*Re Sceptre Hardware Co.*, [1923] 1 D.L.R. 1201, and *E. A. Mamsa* v. *M. E. Majid*, (1931) I.L.R. 9 Ran. 333, followed.) *Re Martin (A Bankrupt), Ex parte James.* (S.C. Wellington. February 6, 1952. Fair, J.)

CONVEYANCING.

Exclusion of the Rule in *Allhusen* v. *Whittell*. *212 Law Times*, 350.

Judicial Decision and Administrative Adjudication. *102 Law Journal*, 102.

Subsidiary Vesting Deeds. *213 Law Times*, 6.

Sale by A Surviving Joint Tenant. *95 Solicitors' Journal*, 828.

DESTITUTE PERSONS.

Desertion—Evidence—Notes of Proceedings on Earlier Summons. This was an appeal by the husband from a decision of the Divisional Court, dated April 18, 1951, affirming an order of Bradford (Yorkshire) Justices, dated November 6, 1950, whereby they found that the husband had deserted his wife and ordered him to pay maintenance of £2 a week. The parties were married on December 21, 1946. On April 28, 1950, the wife left her husband and the Justices found that, in view of his conduct, he had been guilty of constructive desertion, and made a maintenance order against him. On October 8, 1950, at the instance of the wife, the parties resumed cohabitation, but there were differences between them and eight days later the wife again left the husband and took out a summons alleging desertion. On the hearing of this summons, the Justices made the order which was the subject of the present appeal. The Justices on this occasion were not the same as those adjudicating on April 28, and there was no cross-examination as to what took place when the first order was made. Before the Divisional Court, the notes of the first hearing were considered by the Court as forming part of the history of the case. On appeal, four points were taken: (i) Did the husband's conduct amount to constructive desertion? (ii) Was the Divisional Court entitled to look at the notes of the previous proceedings between the parties although they were not in evidence before the Justices? (iii) Was the doctrine of condonation and revival applicable to desertion so that conduct falling short of what would be required to prove desertion originally might be sufficient to revive condoned desertion? (iv) Was the amount payable under the order too high? The Court of Appeal (*Jenkins*, L.J., *dissentiente*) held on the facts that the Justices were entitled to hold that the husband's conduct amounted to constructive desertion and that they had not erred in principle in the amount of maintenance ordered. *Lane* v. *Lane*, [1952] 1 All E.R. 223 (C.A.).

Father of Unsound Mind with Estate being administered by Public Trustee—Jurisdiction to make Maintenance Order—Proof of Wilful Failure to Maintain unnecessary—Destitute Persons Act, 1910, ss. 26, 27, 37—Mental Defectives Act, 1911, s. 100. Section 37 of the Destitute Persons Act, 1910, which sets out in terms the procedure to be adopted where the defendant in a complaint is a person of unsound mind whose estate is in the hands of the Public Trustee, gives jurisdiction to make an order for the maintenance of his children. There is no necessity for a complainant in proceedings for maintenance of children under Part IV of the Destitute Persons Act, 1910, to prove wilful failure to maintain; and a failure to maintain, once proved to have occurred *de facto*, provides the necessary jurisdiction for the making of an order, notwithstanding the fact that the maintenance order would be made in favour of the child of a mental defective. Section 100 of the Mental Defectives Act, 1911,

is merely an enabling section permitting the administration of the estate of a mental defective, the collection and disposal of assets and the incidental matters which would necessarily arise, without the recurring necessity of applications to the Supreme Court for leave or for directions. The fact that the Public Trustee has a discretion to make payments of maintenance is not sufficient to enable an implication to be drawn that s. 37 of the Destitute Persons Act, 1910, is to be regarded as having no effect. *S.* v. *S.* (Auckland. September 18, 1951. Spence, S.M.)

DIVORCE AND MATRIMONIAL CAUSES.

Connivance. *95 Solicitors' Journal*, 829.

Restitution of Conjugal Rights—Wife's Petition—Duty of Husband to take First Step to resume Cohabitation—Divorce and Matrimonial Causes Act, 1928, ss. 3 (2), 8. When a petition for restitution of conjugal rights has been served on the husband, it is not necessary for the wife thereafter to offer to return to him, as he must take the first step to resume cohabitation. (*Alexander* v. *Alexander*, (1861) 30 L.J. P.M. & A. 173, followed.) (*Weldon* v. *Weldon*, (1883) 9 P.D. 52, referred to.) *Morey* v. *Morey*. (S.C. Wellington. December 18, 1951. Fair, J.)

FISHERIES.

Obstruction of Officer—Warning of Ranger's Presence given to Other Fishermen—One Such Fisherman later found fishing illegally—Warning not given by Person acting in Concert with Offender—Offence not in Process of being Committed—No Obstruction Proved—Fisheries Act, 1908, s. 82. Two rangers found the defendant, W., a Maori, fishing with a fly. He warned other Maoris (including E., who arrived later) that there was a ranger around, but those Maoris had not then begun fishing. Later, E. was found to be fishing illegally (using illegal bait, fishing without a licence, and fishing with a hand-line). He resisted and obstructed one of the rangers, and used physical force in so doing. This ranger called on the defendant, W., to render aid, but he refused to give any assistance. Asked why he refused to help, he said that the bank of the stream on which he was fishing was his own property, and that he would not help a ranger at any time. W. was charged under s. 82 of the Fisheries Act, 1908, with obstructing a ranger in the execution of his duties. *Held*, That, in a prosecution charging a defendant with a breach of s. 82 of the Fisheries Act, 1908, it must be proved, before a conviction can be entered, that the defendant was acting in concert with an offender, or that, when he gave a warning to other Maoris of the approach of the Acclimatization Society's rangers, an offence was in the process of being committed. (*Bastable* v. *Little*, [1907] 1 K.B. 59, applied.) (*Betts* v. *Stevens*, [1910] 1 K.B. 1, distinguished.) *Dickenson* v. *Potaua Waaka*. (Rotorua. October 29, 1951. Grant, S.M.).

FOOD AND DRUGS.

Offences—Tripe—Boric Acid added as Preservative Substance—Long-established Custom in Trade to use "Tripe Bleacher"—No Knowledge that Same contained Boric Acid—Tripe processed in accordance with Standard Trade Practice—All Reasonable Steps taken to avoid Offence—Food and Drugs Act, 1947, s. 7—Food and Drug Regulations, 1946 (Serial No. 1946/136), Regs. 10, 27 (1). Each defendant was charged with selling 1 lb. of tripe to which had been added a preservative substance (boric acid), an addition not specifically permitted by the Food and Drug Regulations, 1946. The defendants denied having added any preservative to the tripe, and also denied having in their possession any boric acid, but they admitted using a bleaching agent to bleach the tripe. They were ignorant of the composition of the bleaching agent, which had been supplied to them by reputable spice merchants labelled "Tripe Bleacher," or invoiced to them as "Perborate of Soda" and labelled accordingly. Evidence was given that "tripe bleacher" had been in general use in the butchering business from the time that the witnesses served their apprenticeship (in one case, twenty-one years), and that its composition was unknown to them. In both cases, evidence was given that the tripe in question had been given the customary treatment, which the witnesses had been taught when they learned the trade. *Held*, 1. That s. 7 of the Food and Drugs Act, 1947, imposed on the defendants the onus of proving by demonstrable evidence that all reasonable steps had been taken to avoid the offence. (*Canterbury Central Co-operative Dairy Co., Ltd.* v. *McKenzie*, [1923] N.Z.L.R. 426, *City Milk Supply, Ltd.* v. *Rawlinson*, [1918] N.Z.L.R. 679, and *Wellington Dairy Farmers' Co-operative Association, Ltd.* v. *Pomare*, [1944] G.L.R. 478, followed.) 2. That the reasonable inference from the evidence was that the boric acid disclosed by the analysis came from the "Tripe Bleacher" used by the defendants; that it had been the custom in the trade to use such tripe bleacher over a long period of time without question, and it was not unreasonable for the defendants to infer that they were not being supplied with anything which, if used for the purpose for which it was sold, might be contrary to the Regulations; and that the defendants had processed the tripe by washing and scraping it in accordance with the standard procedure of the trade. 3. That the boric acid would not be an ingredient incorporated in the tripe itself, as would a preservative mixed in the food, which would necessarily be consumed as part of it. 4. That, having regard to the nature of the offence charged and the facts relevant thereto, the defendants had both proved by demonstrable evidence that all reasonable steps had been taken to avoid an offence. *Parker* v. *Liddle : Parker* v. *Batters*. (Hamilton. December 17, 1951. Paterson, S.M.)

INNKEEPERS.

Liability of Innkeepers. *212 Law Times*, 335.

INSURANCE.

Broker's Duty—Delay in forwarding Cover Note to Insured—No Cover obtained against Loss sustained before Cover Note received. The insured, the plaintiffs in the action, on March 30, 1951, instructed the defendants, who were insurance brokers, to effect an open marine insurance of the insured's goods, obtaining immediate cover. On April 2, the brokers reported the rates quoted to the insured, and, on their acceptance by the insured, informed them that the cover was placed. On April 4, the brokers dispatched the cover note to the insured. It did not contain any clause relating to attachment of risk while goods were at packers, such clause not being a usual one, though also not an unusual one, in an open cover. On the night of April 4-5, goods of the insured of the value of £8,000 were destroyed by a fire at a warehouse at Gomersal, near Leeds, of the packers, LEP Transport, who were holding them on behalf of the insured. The insured alleged that the brokers were negligent in failing to effect an insurance of the goods while at packers when so instructed, or, alternatively, in failing to advise the insured that the insurance did not cover goods in the hands of packers at insured's risk after having had clear notice that the insured had goods in that situation. They also submitted that the brokers were negligent in that they delayed in sending them a copy of the cover note for some days after the insurance had been placed, thereby depriving the insured of the opportunity of examining it and seeing whether it complied with their requirements. The insurers said that, if the cover note had been sent in due time, they would have had the opportunity of ascertaining that it did not cover the goods in the circumstances which existed. The insurance brokers denied negligence. *Held*, That, on the facts, it was the practice of brokers that, when cover had been placed, the clients were notified as soon as possible, and such practice seemed to be good business and prudent office management; but it was no part of the duty owed by the broker to the client so to notify him, in the sense that a failure to do so would involve him in legal liability; and there must be judgment for the brokers with costs. *United Mills Agencies, Ltd.* v. *R. E. Harvey, Bray and Co.*, [1952] 1 All E.R. 225 (K.B.D.).

Open Policy—Certificate of Insurance issued in respect of Particular Goods—Condition in Policy that Claim be referred to Local Tribunal of Commerce—Jurisdiction of English Court. On March 25, 1949, D. and Co., a French firm of forwarding agents, took out an open policy of insurance with the defendants, a Swiss insurance company, to cover shipments by customers of D. and Co. from France and the Saar to all parts of the world. The policy contained a number of conditions, including one specifying that, in the event of a dispute, the defendants could only be sued before a tribunal of commerce of the place where the contract was entered into. In February, 1951, the plaintiffs, a firm carrying on business in London, contracted to buy from a firm in the Saar a quantity of hams to be shipped c.i.f. London. The defendants issued to D. and Co., as agents for the plaintiffs, two certificates each headed: "Addendum to insurance policy" in respect of the shipment of the goods. The certificates, which purported to have been issued pursuant to the open policy, referred to many of the conditions incorporated in the open policy, but also contained conditions as to certain risks not referred to in that policy, and no reference was made in the certificate to the condition conferring exclusive jurisdiction on the Swiss Courts. In a claim by the plaintiffs against the defendants in respect of damage alleged to have been covered by the insurance, the defendants moved to stay the action. *Held*, That, on construction, the open policy and the certificates were separate contracts; the plaintiffs were only bound by those conditions which were specifically referred to in the certificates; and, therefore, the condition ousting the jurisdiction of the Court was not available to the defendants on an application by them

to stay the action. (*Phoenix Insurance Co. of Hartford* v. *De Monchy*, (1929) 141 L.T. 439, applied.) *Macleod Ross and Co., Ltd.* v. *Compagnie d'Assurances Generales L'Helvetia of St. Gall*, [1952] 1 All E.R. 331 (C.A.).

As to Rules of Construction of Marine Policies, see *18 Halsbury's Laws of England*, 2nd Ed. 187-190, paras. 248-252; and for Cases, see *29 E. and E. Digest*, 68-71, Nos. *262-290*.

JUDICIARY.

Lords of Appeal in Ordinary, Peers, or Commoners. *102 Law Journal*, 103.

LAND AGENT.

Commission: Principle or Construction. *95 Solicitors' Journal*, 830: *212 Law Times*, 346.

LANDLORD AND TENANT.

Compensation for Loss of Goodwill. *95 Solicitors' Journal*, 831.

MAINTENANCE.

Moneys advanced to assist Another to obtain Divorce—Recipient having Insufficient Means to assert Right—Such Payment Act of Charity or Compassion, and not Maintenance. Moneys paid and advanced to a nephew by marriage who was without sufficient means, for the purposes of the latter's obtaining a divorce from an unfaithful wife, are paid as an act of charity or compassion to assist a poor connection in asserting a right which he was financially unable to undertake without such assistance; and such payment is accordingly not maintenance. The payment is not an officious intermeddling in the litigation of another, but merely an advance of the requisite moneys to assist a poor man in asserting his right. (*Neville* v. *London "Express" Newspaper Ltd.*, [1919] A.C. 368, applied.) (*Alabaster* v. *Harness*, [1895] 1 Q.B. 339, distinguished.) (*Sievwright* v. *Ward*, [1935] N.Z.L.R. 43, and *Bradlaugh* v. *Newdegate*, (1883) 11 Q.B.D. 1, referred to.) B., on his return from service overseas, decided to obtain a divorce from his wife on the ground of her adultery in his absence. He had insufficient means for that purpose; and T., his uncle by marriage, offered to assit him to obtain the evidence and to finance him in expenses so incurred and in the divorce proceedings. He advanced in all the sum of £85. The divorce was obtained with a judgment against the co-respondent for damages and costs, none of which could be recovered. B. said he would have repaid the advances if such amounts had been recovered, but that there was no agreement that he should repay T. the moneys that he had advanced, and, if there had been any such agreement, it was illegal, in that the payments were maintenance. *Held*, That the transaction between the parties was not in the nature of maintenance, and was accordingly not unlawful *inter partes*; and the moneys advanced, which, on the facts, had been by way of loan, were recoverable. *Taylor* v. *Bowling*. (Auckland. January 14, 1952. Wily, S.M.).

MARRIED WOMEN'S PROPERTY.

Life Assurance Policies under the Married Women's Property Act. *96 Solicitors' Journal*, 3.

MISREPRESENTATION.

Principal and Agent—Liability of Principal for Misrepresentation of Agent—Innocent Misrepresentation by Agent—Knowledge of True Facts by Principal—No Fraud on Part of Principal. In the course of negotiations by the plaintiffs for the purchase of a bungalow belonging to the first defendant, the agents of the first defendant made certain statements as to the value of the property. Owing to the defective condition of the bungalow, the statements were untrue, but the agents were not aware of the existence of any defects, and so made the statements innocently, believing them to be true. The first defendant, who was aware of the defective structural condition, had not authorized his agents to make the statements, nor had he deliberately kept them in ignorance with the dishonest intention that they should mislead a prospective purchaser, and he did not know that the statements were being made. Relying on the agents' representation, the plaintiffs bought the property. On discovering its defective condition, they sued the first defendant and his agents for damages for fraudulent misrepresentation. *Held*, That, in the absence of actual fraud or dishonesty on the part of a principal, knowledge by him of facts which render false a statement made innocently by his agent does not render the principal guilty of fraudulent misrepresentation, and, therefore, the action failed. (*London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.*, [1936] 2 All E.R. 1039, criticized and explained.) (*Derry* v. *Peek*, (1889) 14 App. Cas. 337, applied.) (Observations of *Atkinson*, J., in *Anglo-Scottish Beet Sugar Corporation, Ltd.* v. *Spalding Urban District Council*, [1937] 3 All E.R. 335, approved.) *Armstrong and Another* v. *Strain and Others*, [1952] 1 All E.R. 139 (C.A.).

As to Principal's Liability for Agent's Misrepresentation, see *1 Halsbury's Laws of England*, 2nd Ed. 289, para. 475; and for Cases, see *1 E. and E. Digest*, 587-594, Nos. *2245-2281*.

NEGLIGENCE.

Contracting out of Liability—Lease containing Clauses exempting Lessor from Liability for Damage to Property leased or Goods therein and providing Indemnity against Claims by Third Parties—Need of Express Language to exempt from Liability for Negligence—Existence of Other Ground of Damage. By a lease, dated November 18, 1940, the Crown leased to a shipping company a shed for storing freight situated on the bank of a canal in the city of Montreal. Clause 7 of the lease provided that "the lessee shall not have any claim . . . against the lessor for . . . damage . . . to the . . . said shed . . . or to any . . . goods . . . placed . . . in the said shed." By cl. 8 the Crown undertook to maintain the shed. Clause 17 provided that "the lessee shall at all times indemnify . . . the lessor . . . against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder." On May 5, 1944, while repairs to the shed, involving the use of an oxy-acetylene torch, were being carried out by the Crown's employees, a spark from the torch was negligently allowed to fall on some bales of cotton waste, which caught fire, and the shed and its contents were destroyed. In a claim by the company against the Crown for damages for negligence, the Crown relied on cl. 7 as relieving them from liability, and under cl. 17 claimed from the company to be indemnified against claims by the owners of goods destroyed by the fire. *Held*, That a clause purporting to exempt a party to a contract from liability for negligence must contain express language to that effect; in the absence of such language, but if the words used were wide enough, in their ordinary meaning, to cover negligence, the existence of a possible ground of damage other than that of negligence might deprive the party of the protection of the clause on a claim for negligence; on construction, cl. 7 and cl. 17 were not expressed in such clear terms as would exempt the Crown from liability for the negligence of its servants or entitle it to an indemnity from the company for such negligence in the course of carrying out the obligation of the Crown under cl. 8; under the provisions of the Civil Code of Lower Canada, the damage might be based on some ground other than negligence; and, therefore, the Crown had failed to establish its defence under cl. 7, or its claim for indemnity under cl. 17. (Dictum of *Lord Greene*, M.R., in *Alderslade* v. *Hendon Laundry, Ltd.*, [1945] 1 All E.R. 245, applied.) *Canada Steamship Lines, Ltd.* v. *The King*, [1952] 1 All E.R. 305 (J.C.).

As to Conditions Limiting Liability for Negligence, see *23 Halsbury's Laws of England*, 2nd Ed. 670, para. 952.

Driver of Motor-vehicle damaging Parked Motor-car on Highway—Accident due to Driver's Sudden Faintness—Awareness of Physical Condition, though Cause unknown—Driver Negligent in Those Circumstances. While the defendant was driving a motor-truck along a main road at 25 miles per hour, he struck the plaintiff's unoccupied parked motor-car. He had suddenly fainted at the wheel; but he soon recovered, reported the accident to the Police, and went to a doctor, who found that the defendant was suffering from pyelitis and that the faintness was due to his high temperature. The defendant was not subject to fits or loss of consciousness, and, when he was in good health, was a fit and proper person to drive. In an action claiming damages for the injury done to the plaintiff's motor-car, *Held*, 1. That the damage was caused during, and because of, the onset of unconsciousness, without any further act of the defendant. 2. That, even though the defendant did not know the precise nature of his illness, its symptoms were sufficiently grave to convince any prudent man that there was a probability of dizziness, faintness, or even worse afflicting him. 3. That, in those circumstances, the defendant was negligent in driving the motor-vehicle. *Glover* v. *Robinson*. (Auckland. December 16, 1951. Astley, S.M.).

POLICE OFFENCES.

Use of Insulting Words in Public Place—"Scab"—Use of Word insulting per se*—Proof of Intention to insult unnecessary for Conviction—Police Offences Act, 1927, s. 3* (ee). The use in a public place of the word "scab" is insulting *per se*, whatever may have been the intention of the person using it; and, consequently, it is unnecessary in a prosecution under s. 3 (*ee*) of the Police Offences Act, 1927, to prove any intention to annoy or insult the person to whom the word was addressed. (*Murphy* v. *Plasterers Society*, [1949] S.A.L.R. 98, and *Wilcox* v. *Baigent*, [1950] N.Z.L.R. 636, applied.) *Mahood* v. *Robinson*. (S.C. Auckland. December 14, 1951. Stanton, J.)

PRACTICE.

Statement of Defence—Order for Filing and Service of More Explicit Statement of Defence—Court's Discretionary Power to make Such Order—Principles to be applied—Specific Grounds to be given in Motion—Defective Motion amendable—Magistrates' Courts Rules, 1948, r. 113 (*6*) (*7*). The making of an order under r. 113 (7) of the Magistrates' Courts Rules, 1948, to file and serve a more explicit statement of defence is discretionary. Before the Court may make such an order, it must be shown that it is necessary that the order be made, so as to ensure that the Court and the opposite party "should be fully and fairly informed of the nature of the defence" (as is provided in r. 113 (6)). The Court must be satisfied that the making of such an order is justified, as a defendant should not be so burdened unless there are very good grounds justifying such a course; and regard must be had to the just, speedy, and inexpensive determination of any proceeding. A notice of motion for an order under r. 113 (6), based on the general ground that a full and explicit statement of the particulars of the defence is necessary, is too bald and too general, as it does not set out the specific grounds for the application and the nature of the order that is sought. Such a motion can, however, be amended. *Nicholls* v. *Black*. (Christchurch. November 21, 1951. Ferner, S.M.)

Trial: Disagreement with The Jury. *213 Law Times*, 4.

Unsatisfied Judgment Debt—Application by Plaintiff for Payment by Instalments—Plaintiff not required to adduce Evidence as to Defendant's Means—Defendant entitled to resist Order by Evidence showing Order for Instalments in Amounts asked for Prejudicial to Him—Magistrates' Courts Rules, 1948, r. 218. Where an application is made under r. 218 (1) of the Magistrates' Courts Rules, 1948, by a plaintiff for an order for payment of the judgment debt by instalments, he is entitled to the order without calling evidence as to the defendant's means, unless the defendant, by calling evidence as to his means, can show that, if the order were made, it would be a hardship to him, or that he would be embarrassed or prejudiced by it. (*Re Pomeroy*, (1910) 29 N.Z.L.R. 317, followed.) The Court is not bound to fix the instalments to be paid at the same amount as that nominated by the plaintiff in his application. If, however, the defendant does not object or call evidence as to his means, the Court is entitled to assume that the instalments are such as he is able to pay; and it may make the order in the terms asked for. *Aliter*, in respect of applications made under r. 218 (2) or r. 218 (3). *Johnston* v. *Johnston*. (Hamilton. November 29, 1951. Paterson, S.M.)

PROBATE AND ADMINISTRATION.

Jurisdiction of Court to control Administration—Trustee authorized to determine All Questions—Determination to be Conclusive and Binding on All Beneficiaries. By his will, dated July 31, 1931, the testator, who died on January 20, 1932, gave his landed property to his trustee on trust for sale and settled the proceeds of sale. The will contained a clause whereby the testator authorized his trustee to determine, *inter alia*, "whether any moneys are to be considered as capital or income . . . and to determine all questions and matters of doubt arising in the execution of the trusts of this my will . . . and I declare that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of my . . . trustee shall be conclusive and binding upon all persons interested under . . . my will." Between 1941 and 1948, the trustee sold a quantity of timber and trees on an estate which formed part of the trust property and had not yet been sold under the trust for sale contained in the will. Applying the accepted principle which applies to trees planted for the purposes of amenity, he treated the whole proceeds of the sale as capital, although not all the trees sold were planted for the purposes of amenity. On a summons taken out by him to determine whether his decision was correct, it was contended by the beneficiaries interested in capital that, under the terms of the will, the matter was concluded by his decision and the Court had no jurisdiction. *Held*, That the provision in the will which referred to the trustee the determination of all questions and matters of doubt arising in the execution of the trusts of the will, and purported to make the determination of the trustee conclusive and binding on all persons interested under the will, was void and of no effect, since (*a*) it was repugnant to the benefits conferred by the will on the beneficiaries, and (*b*) it was contrary to public policy as being an attempt to oust the jurisdiction of the Court to construe the will and to control the administration of the testator's estate, and, therefore, the question of the apportionment of the proceeds of sale of the timber and trees was not concluded by anything which the trustee had done and the matter would have to be reconsidered by him according to the principles of law which were applicable. (*Re Raven*, [1915] 1 Ch. 673, applied.) *Re Wynn's Will Trusts, Public Trustee* v. *Newborough (Baron) and Others*, [1952] 1 All E.R. 341 (Ch.D.).

As to Attempt by Testator to Oust Jurisdiction of Court, see *34 Halsbury's Laws of England*, 2nd Ed. 162, para. 214.

PUBLIC REVENUE.

Income Tax—Wilfully making False Return of Income—Taxpayer Farmer and operating as Bookmaker—Knowledge or otherwise of Illegality of Failure to make Return as to Bookmaking Profits irrelevant to Question of Penalty to be imposed—Defendant Recklessly Careless whether Failure to make Such Return was Breach of Duty—Land and Income Tax Act, 1923, s. 149 (b). Since October, 1941, S. was in business on his own account as a baker, and, since 1945, he was the owner of a farm. Since 1942 or thereabouts, in addition to his other activities, he had been operating as a bookmaker. In each of the years in respect of which he was charged with wilfully making a false return of income derived by him, the defendant made returns showing the income from his bakery business and (where applicable) that from his farming venture; and in respect of this income no substantial inaccuracies had been shown. He had, however, not included in any returns income which was admittedly derived from his bookmaking operations. He said that he would have included such income in his returns if he had known it was taxable. *Held*, 1. That the question of the defendant's knowledge or otherwise of the illegality of his actions in failing to make returns of his bookmaking income was not relevant to the question of the penalty which should be imposed following upon conviction. (*Commissioner of Taxes* v. *King*, [1950] N.Z.L.R. 202, followed.) 2. That, whether or not the defendant was telling the truth when he stated that he was unaware that income derived from bookmaking was taxable, he was at least recklessly careless, in the sense of not caring whether his act or omission was or was not a breach of duty. (*In re City Equitable Fire Insurance Co., Ltd.*, [1925] Ch. 407, applied.) *Commissioner of Taxes* v. *S.* (Hamilton. October 4, 1951. Kealy, S.M.).

SALE OF GOODS.

Cake-mixer purchased, but not under Trade-name, with Twelve Months' Guarantee—Machine found to be Defective and returned to Vendor for Repair—Such Action Acceptance of Guarantee in Place of Condition of Fitness for Cake-mixing—Claim for Repayment not Damages—No Jurisdiction to substitute Claim for Damages for Breach of Warranty—Sale of Goods Act, 1908, s. 16 (a)*—Magistrates' Courts Act, 1947, s. 59.* The plaintiff bought a "Selyac" cake-mixer from the defendant company. She had not asked for the machine by its trade name. The machine leaked oil into the cake mixture, and, as was admitted, it was not reasonably fit for cake-mixing. The plaintiff returned the defective motor for repair. The plaintiff said she was told by the defendant company's manager, who sold it to her, that the machine carried a twelve-months' guarantee. The machine was finally returned to the plaintiff with the defective part replaced. She refused to accept it, and claimed from the defendant the purchase price of the cake-mixer. *Held*, 1. That the plaintiff, in taking back the motor to the defendant for repair or replacement, relied on the guarantee to rectify it; and, by so doing, she accepted the guarantee in place of the condition of fitness for cake-mixing implied by s. 16 (*a*) of the Sale of Goods Act, 1908. 2. That, if the condition of fitness for cake-mixing applied notwithstanding the guarantee to rectify, a breach of the condition, after the long period during which the plaintiff kept and used the machine until her complaint, could be treated only as a breach of warranty, in which case the remedy would be an action for damages. (*Taylor* v. *Combined Buyers, Ltd.*, [1924] N.Z.L.R. 627, followed.) 3. That, as the plaintiff did not claim damages, the substitution of a claim for damages for the claim for repayment would not be justified under the jurisdiction of s. 59 of the Magistrates' Courts Act, 1947. *Gascoigne* v. *Porter Reesby, Ltd.* (Hawera. October 23, 1951. Woodward, S.M.)

LEGAL ISSUES IN THE PERSIAN OIL DISPUTE.

By D. P. O'Connell, LL.M. (N.Z.), Ph.D. (Cantab.).

The principle of the sanctity of private property, which was for centuries one of the keystones of European legal systems, has in the past generation been severely undermined by the expansion of State activities. The legal as well as the moral right of the State to expropriate the assets of its own and foreign nationals in the furtherance of schemes of economic and social development has been increasingly asserted. The exact limits of this right are as yet undetermined, but limits there must be if society is to preserve a proper balance between the demands of the common good and the fundamental rights of the individual. It is the great function of international law in this century to meet a challenge unique in the history of jurisprudence.

The competence of a State to expropriate the assets of other States, and of the nationals of other States, falls within the realm of international law. Hitherto, international law has permitted too many concessions to the principle of national sovereignty. It has admitted that the nationalization by a State of economic resources within its own domain is justifiable, provided that adequate compensation is paid to the titleholders, and thereby it has apparently provided States with a general mandate to confiscate property for any or no reason at all. The time has come when certain States assume the right to tear up contracts, repudiate agreements and assurances, and embark on the large-scale seizure of assets to the prejudice of countless investors, and often enough with no more excuse or reason than the aspirations of uncontrolled nationalism. If law is to function in the international community, some restraint must be imposed on this exercise of sovereignty.

Such is the issue in the Persian oil dispute, which is for this reason probably the most significant controversy in the history of international law. The time has come to call a halt to the tide of confiscation, and it is not without significance that Great Britain, which conceded the principle of nationalization to the Mexicans and the Hungarians and others, and which has employed it extensively in its own internal planning, is the first state to appeal to international law to this end. The Persian dispute is novel in that the expropriating State asserts the right not only to confiscate property, but also to terminate unilaterally the contracts under which that property was acquired and retained. The case thus goes beyond the topic of nationalization pure and simple and involves the whole principle of the sanctity of contracts and the extent to which they are protected in international law.

History of The Dispute.

Persia has only within the past generation emerged as a power capable of exploiting her own territory. Before that, she was dependent on foreign prospectors and investors, and the latter were induced to interest themselves in developing her economic capacities by agreements assuring them adequate time and opportunity to make a profit. In 1901, a British subject, Mr. Darcy, secured from the Shah a concession with the exclusive right to search for oil. This concession was expressed to subsist for sixty years. It contained a clause referring disputes to arbitration. In due course, Darcy's rights under the concession were assigned to the Anglo-Iranian Oil Company. In 1932, the Persian Government delivered a notice to the company threatening to cancel the concession on the ground that it had been granted before the establishment of a constitutional régime in the country, and had been secured by undue duress of an unexplained kind. The United Kingdom Government demanded the withdrawal of this notice, describing it as " a confiscatory measure and a clear breach of international law." It was pointed out that Persia was incapable of a unilateral abrogation of the contract, and it was stated that, if she persisted in her proposed measures, the British Government would refer the matter under the Optional Clause to the Permanent Court of International Justice.

As it happened, the matter was not referred to the Court, but was put on the agenda of the Council of the Council of the League of Nations, which appointed a *rapporteur*, Dr. Benes, to arbitrate the matter. While Benes was functioning in this capacity, the company and the Persian Government negotiated a new concession, extending the period of the old, and increasing the royalties to Persia. The words of the new concession are important in the present context. The parties declared that " they base the performance of the present agreement on principles of mutual good will and good faith," and that " this concession shall not be annulled by the Government and the claims shall not be abrogated " by any acts of the executive authorities. Article 22 provided for arbitration in the event of a dispute. Dr. Benes expressed some doubt as to the propriety of this agreement, in view of the fact that the matter was still *sub judice*, and it is possible that Persia will try to argue that the agreement was, for this reason, void *ab initio*. On the other hand, it must be noticed that the text was communicated to the Permanent Court of Arbitration with a covering letter explaining the circumstances and informing the Court that there had been no time to secure its approval to the arbitration clause. The Court accepted the concession and enrolled it among its records of documents providing for arbitration.

In 1949, a supplementary agreement was negotiated raising the royalties. It was not ratified by Persia. The law providing for nationalization of the oil industry was promulgated on May 1, 1951. Article 2 instructed the Persian Executive to dispossess the Anglo-Iranian Oil Company of its holdings, and provision was made for an examination of the claims of the company before a Supervisory Board which would recommend compensation. It is understood that a very small figure was in contemplation. Great Britain immediately took proceedings for an injunction before the International Court of Justice, and an order was made restraining Persia from taking further action to prejudice the case until the issues were decided. Persia has disputed the competence of the Court to make this order, despite the fact that only two of the fifteen Judges dissented from it on the ground of jurisdiction. Great Britain, it is to be noted, has been very careful to avoid confusing the political and the legal aspects of the matter. While signifying a willingness to negotiate on a new basis of agreement, she has not compromised her legal claims, and the Stokes Mission was explicitly stated to be without prejudice to such claims.

ISSUES OF THE DISPUTE.

There the matter rests. Preliminary documents for the trial at The Hague are still in the course of preparation. It may be undesirable to anticipate the outcome of the case, but it is still possible to analyse the issues involved and to attempt to establish the international law which will govern the decision. The central point in dispute is the juridical character of an economic concession, a matter upon which there is very little authority in precedents or in publicists' writings. Is a concession a contract binding under ordinary law until the date of its expiry or its bilateral termination ? Even if it is a contract, does its unilateral cancellation afford the national state of the *concessionaire* a right of intervention ? The argument outlined in the British memorials on these questions is one of considerable subtlety, and cannot easily be dismissed.

Great Britain takes her stand firmly on the principle on the sanctity of contract. It is necessary that she should do so, because she has conceded too often the general principle of the right of the State to nationalize private property. The process of nationalization began if Russia in the 'twenties. It was followed in Mexico shortly afterwards, and in a Note to that country in 1938 the British Government admitted that it did not question " the general right of a Government to expropriate " except when the expropriation was " essentially arbitrary in character."[1] Since the war, most nations have indulged in considerable appropriations of private property, and Great Britain has acquiesced in the nationalization of property of her subjects by those nations. Concessions, however, are in a special position, in that the property consists not merely in the user and enjoyment of realty, but also in rights accorded under contract to such user and enjoyment for a specified time. A State cannot unilaterally abrogate its treaties with other States without violating international law, and there is no real difference in this respect between a treaty and a concession, except that the latter is an agreement, not between two States, but between a State and a person of private law. So long as international law protects rights of mixed public and private character, it must protect concessionary rights.[2] The protection of agreements and the observance of good faith are the essence of all law, and not least of international law. If States were able to cancel their contracts with foreign nationals, there would be no security of investment, and the smooth functioning of economic no less than of international relations would be severely impaired.

These general considerations are supported by the practice of States. When France annexed Madagascar in 1896, she proceeded to cancel concessions granted there to British and American companies. Both Great Britain and the United States protested that this was a violation of international law. When the United States took over Cuba and the Philippines two years later, she admitted that she was obliged to respect concessions granted in these islands by Spain, but refused to pay subsidies to a British company under the terms of these concessions, because the works undertaken by the company were in the interests, not, it was alleged, of the Philippines, but of " Spanish imperialism." Great Britain objected that no exception could be made to the general principle that contracts are binding. When Great Britain annexed the Boer Republics of South Africa in 1900, her legal advisers were of the opinion that she was bound under international law to continue mining concessions which had been granted to Dutch and German companies.

Should Great Britain substantiate the contention that international law protects concessionary rights and renders Persia incompetent to abrogate those rights, she must then prove that she, as the national State of the *concessionaire*, possesses the capacity to enforce the provisions of the contract. In the first place, it is argued that the expropriation of private property contrary to international law constitutes a denial of justice entitling the national State to intervene on the part of its subject. The wrong done to the Anglo-Iranian Oil Company entitles Great Britain to bring proceedings of a quasi-delictual character against the offending State. In support of this contention, there are innumerable precedents. But Great Britain goes further, and in her memorial asserts a novel proposition. It is alleged that there is not merely a contractual obligation to the *concessionaire*, and a consequent duty to the national State, but also a positive legal duty of international law towards that State to observe the terms of the concession. In other words, the contract between Persia and the Anglo-Iranian Oil Company is also a contract between Persia and Great Britain, a contract at once of international and of private law.

If Great Britain were asserting this contention as a general principle, she might find considerable difficulty in substantiating it. In the particular circumstances of the Persian dispute, however, she discovers considerable support for her argument. The settlement of 1932 constituted in effect, it is alleged, the terms of settlement of a dispute between Great Britain and Persia. It was thus more than a contract, and partook of the character of a memorandum of settlement filed in a municipal Court, entitling the latter to a function in its performance. The Council of the League, to which the dispute had been referred, was, it is argued, in the position of a Court, and the dispute had been removed from its agenda only upon the settlement. It would seem not to matter that the terms of settlement were not dictated by the Council, but were arrived at between the Persian Government and the company itself. Persia, it is alleged, is still bound to Great Britain to carry them out. Authority for this argument can be discovered in the decision of the Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and the District of Gex*.[3] In that case, a Manifesto of the Government of Sardinia terminated, in 1829, a dispute between Sardinia and Switzerland. In a subsequent dispute between France and Switzerland, this settlement was held binding on France, which was not a party to it. Terms of settlement would thus seem to have a " dispositive " character in attaching permanently to the territory concerned.

The British claim, therefore, rests on the basis of the indefeasibility of contract. The issue revolves, not merely round the amount of compensation to be paid upon expropriation, as in most previous disputes, but round the principle of expropriation itself. Great Britain should therefore insist, not on compensation alone, but on full *restitutio in integrum*. Reliance might be placed on the decision of the Permanent Court in the *Chorzow Factory* case,[4] where it was pointed out that, in the event

[1] (1938) *31 Parliamentary Papers* (Cmd. 5758), 432.

[2] An analysis of the legal character of an economic concession is made by the writer in an article in *The British Yearbook of International Law, 1950*.

[3] P.C.I.J. Ser. A/B No. 46.

[4] P.C.I.J. Ser. A No. 17, p. 46.

of *restitutio* being impossible in the case of nationalization contrary to international law, special compensation must be paid.

THE QUESTION OF JURISDICTION.

Inseparably linked with the argument on the merits is the question of the jurisdiction of the International Court. The Court in general has jurisdiction only when all interested States refer a dispute to it. A State can be compelled against its will to plead as defendant in the Court only when it has previously filed a declaration under the Optional Clause that it accepts the Court's jurisdiction. Great Britain, before presenting its case to the Court, must prove (i) that Persia has filed a declaration to this effect; (ii) that Great Britain herself has filed such a declaration; and (iii) that the declarations of both States cover the question of the nationalization of the oil industry.

In 1932, Persia filed a declaration accepting the jurisdiction of the Court in disputes arising out of treaties and conventions " subsequent to ratification." Great Britain had already filed a more general declaration. Persia, in reply to the British application to the Court, had objected that the question of the nationalization of the oil industry is not a dispute arising out of a treaty or convention, but is one arising out of a concession. The Court, therefore, it is argued, has no compulsory jurisdiction.

It is not certain whether the Persian declaration intended the words " subsequent to ratification " to refer to " disputes " or to " treaties and conventions." Upon this all-important question of interpretation much depends, because the dispute is subsequent to ratification, but the conventions are not. Furthermore, Great Britain must attempt to prove either that " convention " means also " concession " as well as protocol—in fact, anything of a contractual character—or that conventions exist between the two countries covering the concession. Great Britain will attempt to argue that she and Persia are parties to a number of treaties in which the latter has agreed to treat British subjects " according to international law," and, in most-favoured-nation provisions, as " Persian nationals "; that Persia, in cancelling the concession, has failed to treat a British company according to international law, and has discriminated against a British subject, thereby failing to treat it as a Persian national; that Persia in this way has violated her " treaties and conventions " with Great Britain; and that it is out of such " treaties and conventions " that the dispute has arisen.

The situation in Persia has proved explosive, and it may therefore be prudent to make some concession to national sentiment. For this reason, Great Britain has signified that she is willing to agree to nationalization in principle, provided that some guarantee is offered that her interests will be secure, and provided that compensation is paid. This does not imply that Great Britain is doubtful of the validity of her appeal to the International Court.

Whether or not the dispute does go to trial before the Court, the British attitude is of world significance as constituting the first major stand against unrestrained confiscation and the violation of the vested rights of private persons. It is to be hoped that the Court will clarify this controversial and extremely important aspect of international law, and lay down principles for the future which will accord to both States and private contractors a due measure of protection for their economic interests, and impose upon them a proper sense of responsibility.

Appellate Court Opinions

There is a great deal of mystery as to how some appellate Courts work, and a great deal of this mystery, I fear, would not stand the light of day. In more than half of our [American] Courts opinions are assigned in rotation in advance of the oral argument. Judges, being mere men, doubtless listen more attentively to the arguments in the case where they are to write the opinion than they do to the arguments in other cases. There is an art, I am told, of seeming to listen. At any rate it would seem to be significant that in Courts where opinions go in rotation, the law secretary of the Judge who is to write the opinion generally comes to Court and listens to the argument. In some jurisdictions the practice of rotation has been exalted to a cardinal principle; Judges have been called upon to write an opinion for the majority of the Court with which they did not agree, but then they have been permitted to accompany such a majority opinion with a dissenting opinion of their own expressing their true views! There are other Courts in which there is no conference at all after the argument, but the Judge to whom the case goes in rotation writes an opinion which is circulated and if nobody dissents, it becomes the opinion of the Court without any conference whatsoever. If the Judge disagrees with the opinion writer, he may prepare a dissenting opinion and circularize it, but a mere description of this process discloses its weakness. No opinion, I submit, should become the opinion of the Court without a full discussion of all the issues developed at the argument by the entire Court before the case is assigned for the writing of the opinion; and after the opinion has been written, it should likewise be studied by every member of the Court and subjected to frank criticism in conference both as to substance and language. One-Judge opinions are really a fraud on the litigants and the public: Hon. Arthur T. Vanderbilt, " Some Principles of Judicial Administration," an Address delivered on October 5, 1950, on the Alexander F. Morrison Lectureship Foundation, at the Annual Meeting of the State Bar of California.

Law and Society

The law is the calling of thinkers, and jurisprudence is not a mere survey of cases or of individual decisions determining particular rights. One learns from law an amiable latitude with regard to psychology, beliefs, and tastes, and acquires that catholic outlook whereby men may be pardoned for the defects of their quality if they have quality in their defects. To be able to see so far as one may and to discern the great forces that are behind every detail makes all the difference between philosophy and disputation and between legal compilation and jurisprudence. A good deal of jurisprudence in the near future will see a battle between that broad judicial tolerance of legislative and executive action, which in the absence of a better term might be called judicial *laisser-faire*, and that judicial control of legislative processes in which the political alarmists fear the creation of a third chamber in democratic institutions. In that battle it is safe to predict there will be a compromise: Hon. Mr. Justice P. B. Mukharji, (1950) *4 Indian Law Review*, 302.

LIFE INSURANCE POLICIES NOT BENEFICIALLY OWNED BY DECEASED.

Liability to Death Duties.

By E. C. ADAMS, LL.M.

Recently (*Ante*, p. 221), I discussed *Re D'Avigdor-Goldsmid's Life Policy, D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, [1951] 1 All E.R. 240, observing among other things that some of the reasoning therein was rather difficult to reconcile with the *ratio decidendi* of another English case, a decision of Romer, J., *Re Oakes, Public Trustee* v. *Inland Revenue Commissioners*, [1950] 2 All E.R. 851, 854.

The decision of the Court of first instance has been varied by the English Court of Appeal ([1951] 2 All E.R. 543), but in doing so it appears to disclose that in these matters the law in New Zealand has been construed differently by the New Zealand Courts, although the wording of the relevant English and New Zealand provisions is almost identical. This divergence in the two jurisdictions is to be regretted, for I am sure that New Zealand counsel, when arguing points of law in our New Zealand Courts, always feel somewhat happier when they can cite English cases in their favour. (Text-book writers feel the same.)

The two corresponding provisions of our Death Duties Act, 1921, read as follows:

> 5. (1) In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property . . .
>
> (*f*) Any money under a policy of assurance effected by the deceased on his own life, whether before or after the commencement of this Act, where the policy is wholly kept up by him for the benefit of a *beneficiary* (whether nominee or assignee), or a part of that money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit, if (in either case) the money so payable is property situated in New Zealand at the death of the deceased:
>
> (*g*) Any annuity or other interest purchased or provided by the deceased, whether before or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, *to the extent of the beneficial interest accruing or arising* by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased.

To the New Zealand lawyer, the facts in *D'Avigdor-Goldsmid's* case appear most complicated, the series of transactions consisting of settlements, disentailing assurances, resettlements, and the exercise of a power of appointment. It is difficult to imagine a similar set of complicated facts arising in New Zealand, but, despite these complications, the principles laid down by the English Court of Appeal must be grasped.

The relevant facts may be thus stated. The deceased in 1904 took out a policy of assurance on his own life and for his own benefit for £30,000 with profits. On October 22, 1907, the deceased made an ante-nuptial settlement whereby he settled certain freehold estates, certain investments, and the policy, and directed that the trustees should receive the moneys payable under the policy at maturity and invest them in freehold land to be held on the same trusts as might then be subsisting in relation to the freehold estates thereby settled. Under the settlement, the deceased took a protected life interest in the freehold estates, which, after his death, were directed to be held in tail male for the first and other sons of the marriage, subject to a jointure rentcharge. The deceased covenanted in the settlement to pay the premiums on the policy. In 1930, by virtue of powers conferred by a private Act of Parliament, the existing trusts were brought to an end, and, by a deed of resettlement, dated June 10, 1930, the freehold estates were settled on such trusts as the deceased and the plaintiff (the deceased's eldest son) should by deed jointly appoint (provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly) and in default of and until and subject to any appointment (as regards part thereof) on trusts under which there was a discretionary trust of which the plaintiff was the principal object, and (as regards the remainder) on trusts under which the deceased took a determinable protected life interest in restoration of his former life interest under the settlement. The deceased covenanted in the resettlement to pay the premiums on the policy, and it was provided that the proceeds of the policy should become subject to the same trusts as that part of the realty in which the deceased had a protected life interest. On November 10, 1934, the deceased and the plaintiff appointed that the policy (and also certain real property—the "Wood Street property") should be held in trust for the plaintiff absolutely, and the deceased was released from his covenant to pay the premiums. The deceased paid all the premiums falling due before November 10, 1934, *but thereafter until the maturity of the policy they were paid by the plaintiff*. On April 14, 1940, the deceased died, and the Crown claimed estate duty in respect of the proceeds of the policy under the English provisions corresponding to s. 5 (1) (*g*) of our Death Duties Act, 1921, or in respect of the proceeds, or a part thereof, under the English provisions corresponding to our para. (*f*) hereinbefore set out.

As the deceased, since the original settlement of 1907, had provided twenty-seven out of the total of thirty-three premiums paid, the Inland Revenue Commissioners claimed that the charge under the English provision corresponding to our para. (*f*) extended to nine-elevenths of the total policy moneys and bonuses payable on the deceased's death, such total sum amounting to £48,765.

"BENEFICIARY" OR "DONEE."

It is noteworthy that in our para. (*f*) the word is "beneficiary," while in the corresponding English provision the word is "donee." Whether this difference in wording causes a difference between New Zealand and English law is a nice question. Vaisey, J., in the Court of first instance, at p. 246, held that the word "donee" in the English provision meant the ultimate donee, and that the word properly signified only the final beneficiary and the owner of the policy:

in short, the word " donee," in His Lordship's opinion, was not properly applicable to a series of donees, as in the instant case. But the Court of Appeal ([1951] 2 All E.R. 543) rejected this view, adopting the contrary view of Wrottesley, J., in *Attorney-General* v. *Barclays Bank, Ltd.*, [1943] 1 All E.R. 181. The word " donee " —and, we may add, the word " beneficiary " in the New Zealand statute—is apt to comprehend a number of persons entitled to successive interests, and need not be restricted to one or more specified person or persons designated as the donee or donees from the date of the donation. Thus, in the simple case of a voluntary settlement in favour of such one of a class as the donor or some other might appoint, and in default of appointment over, the individual ultimately entitled to take would none the less be a " donee " for whose benefit the policy had been kept up from the date of the settlement, although the appointment in his favour was made only very shortly before the policy matured. Sir Raymond Evershed, M.R., thought that, were it otherwise, surprising and capricious results would appear to follow. In the course of his judgment, he said ([1951] 2 All E.R. 543, 549) :

> if the deceased is not to be treated as having kept up the policy from 1907 to 1934 for the benefit of the plaintiff, for whose benefit did he so keep it up ? Not, certainly, for his own. By the terms of the Act of 1928, he was disabled from recalling at all in his own favour the disposition of the policy he had made in 1907. As counsel for the Crown observed, he had then, so far as his own interest was concerned, parted altogether and irrevocably with the policy and all benefits to be received in respect thereof. For so long, then, as, pursuant to his covenants in the settlements of 1907 and 1930, he in fact kept up the policy he must be taken to have so done for the benefit of the person or persons who ultimately should become entitled to receive the policy moneys under the limitations of the settlement of 1907 or under limitations which might fairly be regarded or contemplated as derivable therefrom.

But the taxpayer escaped liability under our para. (*f*) for the reason that, as the foundation was a marriage settlement made by the deceased on his marriage, it was given for a *valuable* consideration, and, therefore, the word " donee " was not apt to describe the people within the marriage consideration. The word " donee " could not be construed as equivalent to " grantee." The Court of Appeal followed the Privy Council case of *Attorney-General for Ontario* v. *Perry*, [1934] A.C. 477. But, as previously pointed out, the corresponding word in our statute is " beneficiary." The word " beneficiary " is not defined in Part I or in Part II of our Act (dealing respectively with estate duty and with succession duty), but is defined in Part IV, which, however, deals only with gift duty. For the purposes of gift duty, a " beneficiary " means any person taking any beneficial interest under a gift, and " gift " is defined as a disposition of property without fully adequate consideration in *money or money's worth*. Thus, for the purpose of gift duty in New Zealand, a marriage settlement is a gift, whether made by the spouses or by their parents. And in *Public Trustee* v. *Commissioner of Stamps*, (1912) 31 N.Z.L.R. 1116, 1119, Sim, J., in dealing with the liability of a life-insurance policy under para. (*f*), went back to the definition of gift in Part IV. Nevertheless, I am inclined to think that an ante-nuptial marriage settlement entered into by the spouses is not caught by para. (*f*). The word " beneficiary " has no particular context to enlarge its ordinary meaning ; in future, therefore, I think that the New Zealand Courts in this respect will decline to follow the decision of Sim, J., above cited.

But the insurance policy was held to be partly caught by provisions corresponding to para. (*g*), and it is in this respect, too, that the judgment of the English Court of Appeal has rendered the law uncertain where previously most of us, I think, thought that certainty prevailed under the New Zealand statute.

The Conditions for Liability.

In order for liability to death duty to arise under para. (*g*), three conditions must be satisfied :

(i) There must be an annuity or other interest.

(ii) It must have been purchased or provided by the deceased either by himself alone or in concert or by arrangement with some other person.

(iii) A beneficial interest must accrue or arise by survivorship or otherwise on the death of the deceased.

It has been held time and again, both in England and in New Zealand, that an insurance policy is an interest within the meaning of the paragraph : *Attorney-General* v. *Murray*, [1904] 1 K.B. 165, 172, *Public Trustee* v. *Commissioner of Stamps*, (1912) 31 N.Z.L.R. 1116, and *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520. And so there was no real dispute on the first point in *D'Avigdor-Goldsmid's* case.

As to the second requisite, there is now a difference between English law and New Zealand law. It has been held by our Court of Appeal that para. (*g*) of our s. 5 (1) applies only where the *whole* interest under a life policy has been provided by deceased either alone or in concert or by arrangement with any other person : *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550. In New Zealand, therefore, such a case as *D'Avigdor-Goldsmid's* case would have escaped liability under our para. (*g*). On the other hand, s. 30 (1) of the Finance Act, 1939 (U.K.), ensures proportionate liability if deceased only *partially* provided the means, and it was under that section that the English Court of Appeal held that the policy was caught. New Zealand has so far not enacted a similar provision.

Conflicting Decisions.

It is as to the third requisite that the law has become unsettled in New Zealand, because the Court of Session has taken one view and the English Court of Appeal another.

The disturbing feature to counsel who has to advise is that the New Zealand Court of Appeal has already considered the leading Scottish case and expressed no dissent therefrom.

In *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426, the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons were to take absolute interests on attaining the age of twenty-five, while the daughter's share was settled on her for life with remainders over. The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under the English provision corresponding to our para. (*g*) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary on the grounds that, in the circumstances, (i) the property sought to be charged had not been provided by the

deceased, and (ii) there was no beneficial interest accruing or arising on the death of the deceased, inasmuch as the whole interest in the policies had passed to the beneficiaries twenty-four years before the trustee's death, their interest having indefeasibly vested.

The English Court of Appeal does not express dissent from the first ground, but it has refused to follow *Hamilton's* case, [1942] S.C. (Ct. of Sess.) 426, on the second ground. The New Zealand Court of Appeal unanimously approved of the first ground in *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, but only one member of the Court (Kennedy, J.) appears to have expressed any opinion on the second ground, which, however, he approved. In these circumstances, is the second ground of the decision in *Hamilton's* case, [1942] S.C. (Ct. of Sess.) 426, binding on the New Zealand Court of Appeal ? Apparently it is not ; but, if the question ever comes before our Courts, it is to be hoped that it will be considered by both Divisions of the Court of Appeal sitting together, unless, of course, in the meantime it is settled by the House of Lords.

The writer of this article prefers the view taken by the Scottish case, as being more in harmony with the *ratio decidendi* of the leading case, *Adamson* v. *Attorney-General*, [1933] A.C. 257.

In *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, Kennedy, J., said, at p. 545 :

> I do not think the Crown need invoke any such principle as it was submitted was established by *Attorney-General* v. *Robinson and Robinson* ([1901] 2 I.R. 67), to the effect that the mere fact that on the death of deceased policy moneys became payable was sufficient to attract the application of s. 5 (1) (*g*), in that it showed that a beneficial interest accrued on the death of the deceased. No such principle can justly be extracted from *Attorney-General* v. *Robinson and Robinson* ([1901] 2 I.R. 67), and, if it could, I think it could not be supported.

But this is exactly the principle which the English Court of Appeal has extracted from the English authorities (including *Attorney-General* v. *Robinson and Robinson*, [1901] 2 I.R. 67) and applied in *D'Avigdor-Goldsmid's* case, [1951] 2 All E.R. 543. Thus, the Master of the Rolls, in delivering the judgment of the Court, gives this example, at p. 562 :

> Thus, if A effects a policy of assurance on his life, assigns the whole legal and beneficial interest in it to B, and pays or provides for the payment of all premiums down to the date of his death, while B retains the policy down to the date of A's death and receives the moneys then becoming payable under it, the result on the principle above stated must, as it seems to us, be that a beneficial interest in the shape of the policy moneys —or the right to immediate payment of the policy moneys— will have accrued or arisen to B on the death of A within the meaning of s. 2 (1) (*d*) [our para. (*g*)], and that it can avail B nothing that the contract (*i.e.*, the policy) under which this beneficial interest so accrued or arose to him became his absolute property at the date of the assignment, or that he might, had he chosen, have sold or surrendered the policy at any time after that date.

But one may observe that another paragraph catches precisely such a case in New Zealand—para. (*f*). Such an interpretation involves much overlapping of the two paragraphs.

Finally, the Court of Appeal quotes a statement as to the English practice set out in *Green's Death Duties*, 2nd Ed. 100 :

> It is not the official practice to claim duty in the case of a fully-paid policy given by the deceased more than five years [in New Zealand, the period would be three] before his death to a donee absolutely.

If the decision of the English Court of Appeal is correct, this English practice has undoubtedly been wrong, for bad practice cannot make good law : *In re Robb's Contract*, [1941] Ch. 463 ; [1941] 2 All E.R. 200 ; aff. on app., [1941] 3 All E.R. 186. The corresponding New Zealand practice has also been wrong.

Now, as to the example from *Green*, if the policy was not fully paid up at the date of assignment, what would be the position in New Zealand ? Owing to the decisions of the New Zealand Court of Appeal in *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550, and *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, and the non-adoption by the New Zealand Legislature of s. 30 (1) of the Finance Act, 1939 (U.K.), para. (*g*) need not be considered. The paragraphs which are relevant are para. (*b*) and para. (*f*). Paragraph (*f*) has already been set out earlier in this article. Section 5 (1) (*b*) reads as follows :

> In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property . . .
>
> (*b*) Any property comprised in any gift, within the meaning of Part IV of this Act, made by the deceased within three years before his death, and whether before or after the commencement of this Act, if the property was situated in New Zealand at the time of the gift.

We shall consider liability under para. (*f*) first. If the deceased paid no premiums after the date of the assignment, there will be no liability under para. (*f*). If he paid all the premiums after the assignment, the total moneys payable in respect of the policy on the deceased's death will be liable to estate and succession duty. If, after the date of the assignment, the deceased paid some of the premiums and the assignee or some other person the rest, duty will be exigible on a proportionate part of the moneys payable in respect of the policy, equal to the proportion of the premiums paid by deceased after the assignment. The number of the premiums paid by deceased before the assignment is totally irrelevant for the purposes of para. (*f*): *Lord Advocate* v. *Robertson*, [1897] A.C. 145, and *Lord Advocate* v. *Inzievar Estates, Ltd.*, [1938] 2 All E.R. 424. If the deceased paid no premiums after assignment, there will be liability nevertheless under para. (*b*) if the deceased dies within three years after the date of the assignment, but the measure of value for taxation purposes will be the value (probably the surrender value) at the date of the assignment, and not the amount of the moneys payable under the policy at the deceased's death.

(An appeal in *D'Avigdor-Goldsmid's* case to the House of Lords has been lodged.—Ed.)

The Liberality of Law

We call ourselves a learned profession. Let me remind you that we are also a liberal profession. The difference between a trade and a profession is that the trader frankly carries on his business primarily for the sake of pecuniary profit while the members of a profession profess an art, their skill in which they no doubt place at the public service for remuneration, adequate or inadequate, but which is truly an end in itself. The professional man finds his highest rewards in his sense of his mastery of his subject, in the absorbing interest of the pursuit of knowledge for its own sake, and in the contribution which, by reason of his attainments, he can make to the promotion of the general welfare. It is only by the liberality of our learning that we can hope to merit the place in public estimation which we claim and to render to the public the services which they are entitled to expect from us. (Rt. Hon. Lord Macmillan, " Law and History," from *Law and Other Things*.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Lord Wright.—One remarkable feature of the legal career of Baron Wright of Durley, recently a visitor to New Zealand, was his occupancy of the office of Master of the Rolls for a couple of years between two terms as Lord of Appeal in Ordinary. Another feature is that, after ten years of comparative obscurity in the Temple, he blossomed forth quickly as an outstanding counsel in the Commercial Court, and soon attained to its leadership. It is said that by his forensic talents after the First World War he saved the underwriters at Lloyds no less than a million pounds. In his retirement, he occupies a lovely home by Savernake Forest, and is a noted connoisseur both of wines and of gems.

Completely Nuts.—The *Estates Gazette* of February 3, 1951, publishes the following regulation: "In the Nuts (Unground) other than Groundnuts Order, the expression 'nuts' shall have reference to such nuts other than groundnuts as would, apart from this Amending Order, fail to qualify as nuts (unground)"!

Beezlers and Toss-pots.—Scriblex unearthed the foregoing nutty extract in *I Break My Word* (Jonathan Cape, 1951), the seventh of Ivor Brown's word anthologies, the sixth of which he guaranteed would be the end of a fascinating series. Hence the title of the seventh. In this volume, there is something of interest to the lawyer. For instance, in dealing with the familiar term "embezzle," the author points out that "to bezzle" was to booze and behave sottishly; and, because sots need funds, and may snatch at them for lack of will to earn them honestly, a bezzler was one who not only guzzled and soaked but made away with the property of others in order to do so:

> So we have derived the embezzler, who may, after all, be a fanatical teetotaller; he is nominally descended from the toss-pots of the Tudor tavern; he is but a lick-wimble gone further down hill.

An "income" in Scotland, and the north of England, is, or was, an ailment of unknown source; and, nowadays, the frequent suffix of Income is Tax, and this impost has become so damnably oppressive that it justly shares its name with a disease. And, referring to "comfortably," he mentions a particularly revolting murder trial in which a doctor gave evidence. It seemed that the corpse had been sliced up for the purposes of concealment. This medical witness testified that "a human body could be cut up comfortably in about an hour."

The Ante-nuptial Tort.—"It may seem anomalous that in these days of equality the wife should be able to sue the husband for ante-nuptial torts and possibly for torts during coverture while the husband should not enjoy corresponding rights," says McNair, J., in *Baylis* v. *Blackwell*, [1952] 1 All E.R. 74. "This anomaly, if anomaly it be, is, in my judgment, so firmly engrafted in our law that it can only rightly be removed by legislation." Here, the plaintiff, while travelling in a motor-car driven by a lady, was injured when she collided with a stationary lorry. After the accident, he married her. In an action for damages for personal injuries, he alleged that the collision was due to the negligence of the owner and the driver of the lorry, and, alternatively, to the negligence of his wife. She contended, for her part, that any cause of action against her, if it existed, had abated in consequence of he marriage to the plaintiff; and the plea was upheld. Lord Ogleby had it in his maxim: "I look upon women as the *ferae naturae*, lawful game, and every man who is qualified has a natural right to pursue them." He may still be right, but, if the gentleman is injured during the pursuit, he is well advised to get judgment against the lady tortfeasor before he makes her his own.

The Young Advocate.—Many books of advice to the young advocate have been written, but the considerations that he should initially bear in mind have never been better or more succinctly expressed than by a recent reviewer in *The Law Times*. He stresses these four in particular: (i) to have his facts in chronological order and arranged with precision; (ii) to cite as few cases as possible, and only those strictly relevant to the facts in evidence; (iii) if his case has merits, to bring them out at the earliest possible moment; (iv) to maintain a conciliatory attitude in all eventualities, more especially when things are going wrong. And such considerations the advocate no longer young can do no harm by remembering.

The Injured Drunkard.—Accompanied by his friends, a Mr. Wood, who had been knocked down by a lorry, walked to a nearby hospital for attention. It was evening, and the injured man was in a state of intoxication. The doctor who examined him in the casualty department gave him a dressing for his face and let him travel in a taxicab to his home, eleven miles away. Next day he died. The post-mortem examination disclosed a fractured collar-bone, eighteen fractured ribs, and badly congested lungs. In an action for negligence, the doctor claimed that he had not negligently failed to examine the deceased, whose drunkenness dulled his reaction to pain and prevented him from giving a coherent account of what had happened. Damages amounting to £3,550 were awarded the plaintiff widow against the doctor and the hospital authorities. Pritchard, J., considered that, while a state of intoxication might deceive a doctor as to the patient's true condition, he should have been more careful when the intoxicated person arrived at the hospital with a story of having been under a moving lorry and having been touched by its wheel. The thought that the use of a stethoscope would almost inevitably have revealed the patient's true condition: *Wood* v. *Thurston*, *The Times*, May 25, 1951.

Gross Negligence.—"The use of the expression 'gross negligence' is always misleading. Except in the one case when the law relating to manslaughter is being considered, the words 'gross negligence' should never be used in connection with any matter to which the common law relates because negligence is a breach of duty, and, if there is a duty and there has been a breach of it which causes loss, it matters not whether it is a venial breach or a serious breach. A breach of a legal duty in any degree which causes loss, is actionable": per Lord Goddard, L.C.J., in *Pentecost* v. *London District Auditor*, [1951] 2 All E.R. 330, 333.

THEIR LORDSHIPS CONSIDER.

By COLONUS.

History.—Law Reports are like strata of rock where living matter has percolated and then fossilized. History, manners, religion, art—there are the footprints of contemporary life in every volume. Of the people whose doings have been recorded thus, one of the most unexpected is Titus Oates (of conspiracy fame) in the role of referee concerning the validity of a will: *Parker* v. *Burroughs and Reynolds*, (1702) Colles 257; 1 E.R. 275. Although, in the manner of the day, a full judgment is not reported: "The editor hath been more circumstantial in the foregoing report than usual, because this being a private case, long after all plot businesses were cool and laughed at, shows the true mind of the famous Titus Oates, about which some historians seem to entertain doubts." From a grant of administration on intestacy, setting aside a will, the parties appealed to Oates. He "confirmed" the grant, but his award was set aside in Chancery. Evidence showed (p. 261; 277): "Doctor Oates was angry with respondents, because . . . they had neglected to invite him and his wife to the testatrix's funeral, and prevented his preaching her funeral sermon; and that he had declared he cared not which of the parties got the cause, so respondent Burroughs was ruined; and said 'God had put a rod into his hands, wherewith he would scourge Burroughs; and that he would swinge him; and when he had wore it to the stump would lay it by; and that respondent Burroughs was a rogue.'" The House apparently was minded to transfer these epithets to Oates, as it affirmed the decree setting aside his award.

Double Dutch.—New Zealand has a historical interest in the following letter, appearing in the report of *French Hoek Commissioners* v. *Hugo*, (1885) 10 App. Cas. 336, 350, 351:

"To His Excellency Sir George Grey, K.C.B., Governor and Commander-in-Chief of the Colony of the Cape of Good Hope.

"The Memorial of Jacobus Johannes Hugo, of French Hoek.

"Humbly sheweth,

"That memorialist has become the proprietor of certain farm situated at French Hoek, in the district of the Paarl, called 'Cabriere,' formerly the property of Mr. Daniel Hugo.

"That, on the 7th of August, 1820, the then Landdrost and Heemraden of Stellenbosch granted to the then proprietor, Daniel Hugo, at his request, permission to lead out two small watercourses arising in the French Hoek mountains, and before that discharging themselves in the 'Wit Elzebooms river,' to his said farm, subject to the condition of not in any way thereby damaging the property or lands of other parties, or public roads, or otherwise, according to an Extract Resolution of the Court of the said Landdrost and Heemraden, which memorialist has annexed to this his memorial.

"That memorialist is anxious of having the same privilege extended to him under the like conditions, as being of the greatest importance to the said farm. And therefore prays that it may please your Excellency to grant him the like permission of leading out the said two watercourses.

"And your memorialist, as in duty bound, will ever pray.

"Cape Town, 22nd of June, 1855.

"G. J. DE KORTE,

"Attorney for J. J. Hugo."

A reply duly approving the grant was sent, but the comment of their Lordships, when the local Commissioners appealed (unsuccessfully) against the diversion, was not necessarily a compliment. Lord Blackburn, delivering the judgment of their Lordships, made the following passing comment, at pp. 351, 352: "It is very possible that the defendant, who it appears was a speaker of Dutch, did not understand the documents, which were in English. And even if they had been in Dutch, it is very likely he would not understand them; but their Lordships agree with what is said by the Chief Justice that, 'be this as it may, the acts of his attorney must be taken to be his.'" Moral: Employ a good attorney if you don't know!

Statute of Limitations.—In view of the renewed interest in the topic of "limitations," the following explanation by Lord Hatherley in *Thomson* v. *Eastwood*, (1877) 2 App. Cas. 215, 248, is of some help. This was a case where the trustee under an express trust constituted by a will had delayed payment on the grounds that the beneficiary (though *persona designata*) was illegitimate. The whole case is interesting. A release of the trustee in consideration of a smaller payment was held null and void, and the fact that the Statute of Limitations does not apply to an express trust (a point of interest when the nature of beneficial rights is investigated) was discussed. Lord Hatherley's remarks are too long to give in full, but include these comments, at pp. 248, 249: "The foundation of the limitation in the statute I apprehend to be twofold. In the first place it is thought right that a period should be assigned beyond which actions should not be brought, on the ground of probable loss of vouchers and probable loss of evidence on the part of the persons who might be attacked by others by the act of bringing stale demands against them. The Legislature thought it right, if I may so express it, by enacting the Statute of Limitations to presume the payment of that which had remained so long unclaimed, because the payment might have taken place, and the evidence of it might be lost by reason of the persons not pursuing their rights. But there is also another ground which may be referred to as a sound reason for imposing a limit, and requiring that parties should pursue their rights with diligence, namely, the change of position between the parties who are sought to be affected by any such stale demands as this. Here is a demand set up for payment of fifty-four years of interest amounting to a sum largely exceeding the principal sum. This is set up after the parties against whom it is set up have been living on the estates and spending the income of those estates, and applying it in the various ways in which they would apply it in ignorance, or without expectation, of any such demand as this being made against them." Applying these principles, their Lordships awarded only six years' interest to the claimant, though, of course, the principal sum was not affected by them.