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NEWSPAPER CONTEMPT OF COURT.

A truthful report in a newspaper of what takes place in a Court of justice is privileged and is not a contempt of Court, even if, as in *R.* v. *Evening News*, [1925] 2 K.B. 158, there are in it some limited exceptions to its overall accuracy and fairness. As Collins, M.R., said in *Hope* v. *Leng and Co.* (*Sheffield Telegraph, Ltd.*), (1907) 23 T.L.R. 243, 245, a newspaper reporter cannot be treated as a law reporter. The responsibility of newspaper proprietors for a misrepresentation by one of their reporters in a published report of Court proceedings is another matter, and they are vicariously liable for a contempt of Court if the report might have interfered with the course of justice. It was so held by a Divisional Court in a recent case to which we shall shortly refer; but, first, it would be well to state the basic general principles applicable to cases of contempt of Court in general.

In *R.* v. *Gray*, (1865) 10 Cox C.C. 184, 193, Fitzgerald, J., said:

> It appears to me that the security gained by publicity for the due administration of justice is this: that it brings to bear on that administration at once the pressure and the support of public opinion—its pressure to prevent intemperance on the part of the Judge—to prevent corrupt or improper proceedings, and, on the contrary, its support where justice is administered in a pure, fair, and legitimate manner. It has been said, and said truly, that possibly in particular cases there may be inconvenience to individuals from the early publication of evidence or of statements with respect to matters that are subsequently to be tried more solemnly, but it has been well observed, too, that this inconvenience to individuals is infinitesimal in comparison with the great public advantage given by that publicity.

In delivering the judgment of the Judicial Committee in *Ambard* v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322, 329, Lord Atkin said:

> Every one will recognize the importance of maintaining the authority of the Courts in restraining and punishing interferences with the administration of justice, whether they be interferences in particular civil or criminal cases, or take the the form of attempts to depreciate the authority of the Courts themselves.

The question in every case of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice. As Cotton, L.J., said, in *Hunt* v. *Clarke*, (1889) 5 L.J.Q.B. 490, 492:

> It is not necessary that the Court should come to the conclusion that a Judge or a jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is a contempt, and would be met with the necessary punishment in order to restrain such conduct.

It was held by our Court of Appeal in *Attorney-General* v. *Davidson*, [1925] N.Z.L.R. 849, that, while a newspaper has a right to publish a fair and accurate report of public judicial proceedings in a Court of justice, it may not, in the guise of reporting such proceedings, indicate the writer's own opinion of the demeanour of a witness and so comment on that demeanour. It it does, it is guilty of contempt of Court. Again, in *Attorney-General* v. *Tonks*, [1934] N.Z.L.R. 141, a Full Bench of the Supreme Court held it to be a grave contempt of Court to publish in a newspaper before trial the photograph of a person charged with a criminal offence, where it should have been apparent to the mind of any reasonable person that the necessity, or possible necessity, of proof of identity of the accused person with the criminal has arisen or may arise, and such publication is calculated to prejudice a fair trial. In that case it was necessary, or at least very material for the Crown to establish the identity of the accused; but in *R.* v. *Daily Mirror, Editor, and Proprietors*, [1927] 1 K.B. 845, no question of identity arose; nevertheless, the defendants were found guilty of contempt in publishing before his trial a photograph of a person charged with a criminal offence.

In *Delbert-Evans* v. *Davies and Watson*, [1945] 2 All E.R. 167, a Divisional Court (Humphreys and Oliver, JJ.) held that, in view of the powers of the Court of Criminal Appeal (which, incidentally, do not extend, as in New Zealand, to the ordering of a new trial in a criminal case) a case is *sub judice* during the time between the conviction of an accused person and his appeal to the Court of Criminal Appeal, and that any improper statements published in the interval might justifiably give rise to proceedings for contempt of Court.

That very severe penalties can be imposed for deliberate contempt of Court by newspapers is shown by *R.* v. *Bolan, Ex parte Haigh*, (1949) 93 Sol Jo. 220, where the editor of the *Daily Mirror* (London) was committed to prison for three months, and the proprietors were fined £10,000. In that case, Lord Goddard, L.C.J., delivering the judgment of the Divisional Court, the other members of which were Humphreys and Birkett, JJ., said that, on March 4, three separate issues of the *Daily Mirror* were published which contained articles, photographs, and headlines in the largest possible type, of a character which the Court could only describe as a disgrace to English journalism and as violating every principle of justice and fair play which it had been the pride of this country to extend to the worst of criminals. To quote Lord Hardwicke, it was the case of "prejudicing mankind against persons before their case is heard." Anyone who had had the misfortune to read the articles must be left wondering how

it could be possible for the applicant to obtain a fair trial after what had been published. Not only did the articles describe him as a vampire and give reasons for that description of him, but, after saying that he had been charged with one murder, went on to say not merely that he was charged with other murders, but that he had committed others, and gave the names of persons whom, it was said, he had murdered. Lord Goddard continued:

> In the long history of the present class of case there had never, in the opinion of the Court, been one of such gravity as this, or one of such a scandalous and wicked character. It was of the utmost importance that the Court should vindicate the common principles of justice, and, in the public interest, see that condign punishment was meted out to persons guilty of such conduct. What had been done was not the result of an error of judgment but had been done as a matter of policy in pandering to sensationalism for the purpose of increasing the circulation of the newspaper.

His Lordship went on to recount that, after it had come to the knowledge of the Commissioner of Police that the *Daily Mirror* or some other newspaper might be likely to publish some details of the case, a warning was sent from the office of the Commissioner to that newspaper. He said that it was doubtful whether that warning had any real effect: there was very little alteration in the last edition, itself a gross contempt. It might aggravate the case that more attention was not paid to the warning. In view of the gravity of the matter the Court had ordered the proprietors of the newspaper to be brought before the Court. He would add a word of warning:

> Let the directors beware; they knew now the conduct of which their employees were capable, and the view which the Court took of the matter. If for the purpose of increasing the circulation of their paper they should again venture to publish such matter as this, the directors themselves might find that the arm of that Court was long enough to reach them and to deal with them individually.

In the recent case, *R.* v. *Evening Standard Co., Ltd., Ex parte Attorney-General*, [1954] 1 All E.R. 1026, it was held by a Divisional Court (Lord Goddard, L.C.J., and Hilbery and Hallett, JJ.) that an inaccurate statement published by the newspaper amounted to a contempt of Court and might have interfered with the course of justice; and, further, that the proprietors of the newspaper were vicariously liable for the reporter's mistake. They were fined £1,000.

This was a motion for a writ of attachment for contempt of court against the Evening Standard Co., Ltd., Percy Elland, the editor of the *Evening Standard*, and George Embleton Forrest, a reporter, in respect of an article which was published in the *Evening Standard* on February 23, 1954, and which purported to be a report of the trial of one Kemp, who had been charged with the murder of his wife.

Kemp's wife had disappeared, and was, in fact, dead, a considerable time before his arrest, and part of the case for the prosecution was based on a number of misstatements which he had made after her disappearance. The reporter, Forrest, who reported the trial, was also present when Kemp was charged before the examining justices. The prosecution called as witnesses a Miss Briggs and a Mrs. Darmody to prove certain statements which Kemp had made to them. Before the justices Miss Briggs said that Kemp had told her that he was unmarried and that he had asked her to marry him. Mrs. Darmody's evidence was that Kemp had told her that he had been married and that his wife had died.

On February 23, 1954, the trial opened at Chelmsford Assizes. After Miss Briggs, the first witness, had started to give her evidence, the Judge, having read her deposition, intervened, and, after a discussion with counsel in the absence of the jury, he ruled that the statement that Kemp had proposed marriage to Miss Briggs after the death of his wife should not be allowed in evidence as it was highly prejudicial to him and was not relevant. Miss Briggs's evidence of what Kemp had said to her was, accordingly, confined to the statement that he was unmarried. Mrs. Darmody then gave evidence, repeating in substance what she had said before the examining justices. She said that she had met Kemp in a public house, that she had seen him several times, that he had told her that he was not married, that she had asked to see his pay book, and that he had produced a buff-coloured book, saying: "Before I show you this I shall have to tell you I have been married"; and that he went on to say that his wife had died two years before in childbirth.

The reporter, Forrest, was in court when Miss Briggs gave her evidence, but, while the discussion took place between Judge and counsel in the absence of the jury, he left the court to telephone to the publishing office of the *Evening Standard*, his system of reporting being to take some notes in court, then to go to a telephone to communicate his report to his office, and then to return to court to resume his note-taking before telephoning again. He returned to court before Mrs. Darmody gave her evidence. That evening (February 23) the *Evening Standard* published a report of the trial under the headline: "Trunk trial story of marriage offer". The report began:

> Mrs. Gertrude Darmody, of Spitalfields, Norwich, said at the assizes here today that a man accused of murdering his wife asked her to marry him . . . Mrs. Darmody said she met Kemp in a public house in September last year. "He told me he was not married. After I had seen him in the same public house again and he had asked me to marry him, I asked him to show me his army pay book."

The words "and he had asked me to marry him" were wholly inaccurate, no such statement having been made. On the back page of the newspaper, where the report was continued, was the headline: "Accused man 'asked me to marry'".

In his telephone message to the *Evening Standard* office, Forrest said that when Miss Briggs began to give evidence a submission was made by counsel for the defence in the absence of the jury, and that Miss Briggs collapsed at the end of her evidence and was carried from the Court. He went on to say:

> "The witness who followed her into the box was Mrs. Gertrude Darmody of 55 Spitalfields, Norwich. She said that she met Kemp, the accused, in a public house there in September last year. 'He told me he was not married. After I had seen him in the same public house again and he had asked me to marry him, I asked him to show me his Army pay book.'"

There followed a short résumé of the rest of her evidence.

Lord Goddard, L.C.J., in delivering the judgment of the Court said that the fact that Kemp was acquitted of the murder was neither here nor there. Fortunately, no damage was done to the prisoner who was on trial, though that was not a matter which concerned the Court. The question was one of much more far-reaching importance than that. . . . The evidence which Miss Briggs might have given if the learned Judge had not ruled that it was not to be admitted as it was highly prejudicial to Kemp was printed in the *Evening Standard*

and attributed to another witness who had not said anything of the kind. Consequently, the public at Chelmsford, including members of the jury, who are no longer locked up when the Court has risen, could have bought the paper and read that Kemp had made an offer of marriage to Mrs. Darmody although he had not done so. The Lord Chief Justice continued :

> How comes it that this inaccurate statement, a most prejudicial statement, was published ? It was suggested that it was a mishearing. I do not think that there could possibly have been any question of mishearing. It seems to the Court that the most probable explanation and the inference which should be drawn is that the reporter, going in and out of Court, listening to the evidence of one witness and not listening, perhaps, to the evidence of another witness, had at the back of his mind what he had heard before the Justices. He remembered that at some time something was said there about an offer of marriage. Miss Briggs's evidence he telephoned to London as evidence of no moment, but he had been in Court while Mrs. Darmody had given evidence that she had asked Kemp if he was married. Having this at the back of his mind, he inaccurately and carelessly telephoned what he thought she had said, having got the idea into his mind from what he had heard on the previous occasion.

Lord Goddard said that this was surely a proper matter to bring before the Court. He then summarized the law applicable to it.

> It is as well that the nature of the jurisdiction which this Court exercises on these occasions with regard to reports of trials in newspapers should be understood. It is called contempt of Court, which is a convenient expression because it is akin to a contempt. The foundation of the jurisdiction is that all misreports, whether they form comments on cases before they are tried or alleged histories of the prisoner who is on trial, as in *R.* v. *Bolam. Ex parte, Haigh* ((1949) 93 Sol. Jo. 220), where this Court had to intervene, are matters which tend to interfere with the due course of justice.

Lord Goddard went on to say that one of the earliest cases in which this jurisdiction was invoked was *The St. James's Evening Post Case, Roach* v. *Garvan* (*or Hall*), (1742) 2 Atk. 469 ; 26 E.R. 683) before that great Judge, Lord Hardwicke, L.C., in 1742. That was a motion to commit two printers for publishing a libel against litigants who had made affidavits in a cause then before the Court. It was objected that it was not a matter for the summary jurisdiction of the Court because there was a remedy at law for libel. Lord Hardwicke, L.C., started his judgment, at p. 469 (683) by saying :

> Nothing is more incumbent upon Courts of justice, than to preserve their proceedings from being misrepresented ; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.

Having rejected the argument that he could not deal summarily with the case because there was a remedy at law, he went on to deal with three different sorts of contempt. With regard to the third sort, at p. 471 (685) he said :

> There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

Lord Goddard added :

> That is the foundation of the summary jurisdiction which this Court has exercised now for more than two hundred years in the case of comment before the case is heard, or of the publication of improper information about a case which is to be heard or is not fully heard, or of the misrepresentation of the proceedings in a Court. We have frequently said that this jurisdiction should be invoked and should be exercised only in cases of real and serious moment, and, reaffirming what Lord Russell of Killowen, C.J., said in *R.* v. *Payne*, [1896] 1 Q.B. 577, 580, we have said that the power which the Court possesses in such cases should be exercised only where there has been a serious interference with justice. In the present case there might have been a disastrous interference with justice. As Lord Hewart, C.J., said in *R.* v. *Daily Mail* (*Editor*). *Ex p. Factor*, (1928) 44 T.L.R. 303, the gravity of the penalty or sanction which this Court will impose must depend on the circumstances of the particular case.
>
> If a comment is gratuitously published either in a newspaper or in any other form of public disssemination, this Court would not hesitate to impose a severe penalty, even the penalty of imprisonment, as was done in *R.* v. *Bolam, Ex parte Haigh supra*, p. 217. In this case, however, one cannot avoid coming to the conclusion that there was no intentional interference with the course of justice.
>
> Let us take the case of Mr. Forrest first. I cannot believe that he for a moment deliberately or intentionally sent out false information. As a responsible journalist, he would know that to do so would place him in the gravest possible difficulty. Nor can one attach moral blame, if I may use that expression, to the editor, who had no reason to suppose that a reporter of the *Evening Standard* had sent him information in an inaccurate form. Therefore, there are mitigating circumstances in this case, and one can only be thankful that the misreport did not react unfavourably on the prisoner. But whether it reacted favourably or unfavourably on the prisoner is not the test on which this Court interferes. The Court interferes to prevent and punish the dissemination of false reports, or improper comments or observations on cases before they are heard.

The learned Lord Chief Justice then considered the vicarious liability of newspaper proprietors for mistakes or misconduct of their staffs. He said, at p. 1029 :

> Counsel for the Evening Standard Co. submitted that, while his clients desired to abide by the well-understood rule of journalism that the editor and the proprietors of a newspaper must in a case such as this take responsibility, the company ought not to be made vicariously liable for the mistake or misconduct of the reporter. I do not think that we could possibly agree with that submission, which seems contrary to what Lord Russell of Killowen, C.J., and Wright, J., said in *R.* v. *Payne*, where they pointed out that the Court would interfere where the publication was intended or calculated or likely to interfere with the course of justice. Wright, J., used the words " likely " and " calculated," Lord Russell used the words " intended " and " calculated." Indeed, the principle goes further than this, because, in the case of the *St. James's Evening Post Case*, (1742) 2 Atk. 469, 472 ; 26 E.R. 683, 685, Lord Hardwicke, L.C., said :
>
> > " With regard to Mrs. Read, the publisher of the *St. James's Evening Post*, by way of alleviation, it is said, that she did not know the nature of the paper ; and that printing papers and pamphlets, is a trade and what she gets her livelihood by. But, though it is true, this is a trade, yet they must take care to do it with prudence and caution ; for if they print anything that is libellous, it is no excuse, to say, that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous ; and so is the rule at law, and I will always adhere to the strict rules of law in these cases."

Lord Goddard, in considering what penalties the Court should impose, said that it must impose a substantial penalty in this case, because although the misreport may have been the result of misadventure, or mistake, it was a very grave mistake and one which might have done incalculable harm. He concluded :

> We do not propose to impose any penalty on the editor because he had no reason to suppose that the report telephoned to him by the reporter was otherwise than accurate. I have already said that the principle of vicarious liability is well established in these cases and must be adhered to. We have had some doubt as to what we should do in the case of the the reporter, Mr. Forrest. As I have already said, we think he made an honest mistake and we are quite convinced that he did not deliberately send up that which he knew to be untrue. Perhaps, owing to illhealth or other reasons, he had got a confused idea in his mind. We are not, therefore, going to impose a separate penalty on him.

The Court ordered the Evening Standard Co. to pay a fine to the Crown of £1,000 and the costs of the proceedings. The fine had to be paid within forty-eight hours.

SUMMARY OF RECENT LAW.

ANIMALS.

Cruelty to Animals, *97 Solicitors' Journal*, 855.

HUSBAND AND WIFE.

Necessaries—Costs—Right of Wife to pledge Husband's Credit—Dispute as to Title to Property—Legal Proceedings by Husband against Wife—Wife's Costs—Liability of Husband—Married Women's Property Act, 1882 (c. 75), s. 17—(Married Women's Property Act, 1952 (N.Z.), s. 19). The common law rule that, in certain circumstances, a wife is entitled to pledge her husband's credit for necessaries applies to the costs of proceedings between husband and wife relating to the title to or possession of property under the Married Women's Property Act, 1882, s. 17. The provision in s. 17 that the Judge may make such order " as to the costs of and consequent on the application as he thinks fit " merely gives the Court complete jurisdiction over the costs *inter partes* and does not exclude the right of the solicitors retained by the wife, in a proper case, to recover from the husband their professional charges for work done and moneys expended by them on behalf of the wife in proceedings instituted against her by the husband under the section. If it is shown that the wife was reasonable in opposing the husband's application, the solicitors are entitled to recover their costs against the husband provided that they discharge the burden, which is on them, of showing that the wife was compelled by financial stress to pledge the husband's credit. (*Cole* v. *James*, [1897] 1 Q.B. 418, distinguished.) (*Abrahams, Sons and Co.* v. *Buckley*, [1924] 1 K.B. 903, criticised.) *J. N. Nabarro and Sons* v. *Kennedy*, [1954] 2 All E.R. 605 (Q.B.D.)

Voidable Marriage and Rights of Property, *104 Law Journal*, 244.

LANDLORD AND TENANT.

Landlord's Liability to Passers-by, *97 Solicitors' Journal*, 846.

Sharing Arrangements, *104 Law Journal*, 260.

MUNICIPAL CORPORATION.

Unlighted Obstruction in Street undergoing Repair—Duty of Local Authority—under Statute and at Common Law—Effect of Overhead Street-lighting in Vicinity considered—Municipal Corporations Act, 1933, s. 178.
Limitation of Action—Notice given to Local Authority under Repealed Provision after Passing of Limitation Act, 1950—Notice sufficient for Purposes of that Statute—Local Authority not prejudiced by Delay of Sixteen Weeks in giving Notice—Limitation Act, 1950, s. 23 (1) (2). It is the duty of a municipal corporation, under s. 178 of the Municipal Corporations Act, 1953, to take sufficient precautions to prevent accidents during the construction and repair of any street, and to cause any such dangerous place to be sufficiently lighted by night. In any event, there is a duty on the part of such authority to take reasonable steps to present the obstruction's becoming a danger to users of the road. The failure to observe the obligation is *prima facie*, negligence. (*Fisher* v. *Ruislip-Northwood Urban District Council and County Council of Middlesex*, [1945] 2 All E.R. 458, followed.) Where such an obstruction is unlighted by night, the mere fact that there was overhead street lighting at the time of an accident caused by collision with the unlighted obstruction does not release the local authority responsible for the obstruction from anything further being done by way of warning to the public. The street lighting would require to be so effective and so clear that anybody driving along the highway with due care and attention would find the obstruction so illuminated as not to be a danger to users of the highway. (*Whiting* v. *Middlesex County Council*, [1947] 2 All E.R. 758, followed.) A notice given to a municipal corporation on July 17, 1953, in respect of an accident on March 31, 1953, under s. 361 of the Municipal Corporations Act, 1933 (which was repealed by s. 35 (2) of the Limitation Act, 1950 which came into force on January 1, 1952, was sufficient for the purposes of the new Act, and the defendant corporation had not been materially prejudiced by the delay of sixteen weeks in the sending of the notice. *Blue Star Taxis Dunedin Limited* v. *Dunedin Borough Council*, (Dunedin. March 25, 1954. Willis, S.M.)

NEGLIGENCE.

Firm undertaking to teach Motor-driving—Pupil with Instructor causing Damage to Gateway—Car supplied Older and Larger than Car used for Earlier Lessons—Brakes Defective—Firm, its Instructor, and Learner, all Negligent. M. engaged P'.s firm to give her a course of lessons in motor-driving. She had had two lessons in a Morris Minor car. At her third lesson, an old Chevrolet with inferior brakes was supplied. During that lesson, the tutor, K., instructed her to drive into the crossing leading to the plaintiff's gateway; and, in performing that manoeuvre, M. failed to stop short of an ornamental brick pillar flanking the gateway. The front of the car struck the brickwork and damaged it. K. tried to use the hand-brake, but he was too late to prevent the impact. In an action for damages against P., K., and M., *Held*, 1. That, on the facts the brakes of the car were defective, and the use of an old Chevrolet with defective brakes, at an early stage of M.'s instruction, showed lack of care on the part of P., and there was negligence on K.'s part in failing to check the car by the use of the hand-brake; and P. and K. were each accordingly guilty of negligence. 2. That M., in undertaking to drive, was bound to exercise reasonable skill and prudence in the control of the vehicle; and she must be deemed to have accepted the risk of incurring liability in the event of some untoward occurrence. *Rubice* v. *Faulkner*, [1940] 1 All E.R. 285; and *Goff* v. *Hubbard*, (1927) 50 A.L.R. 1382, followed.) (*Samson* v. *Aitchison*, (1914) N.Z.P.C.C. 441, distinguished.) Judgment was given against each of the three defendants for the sum claimed. *Robertson* v. *Power and Others*, (Auckland. February 3, 1954. Spence, S.M.)

NUISANCE.

Noise—Noise from Milk-treating Premises in Early Hours of Morning—Interference with Nearby Property-owner's Comfort and Health—Award of Damages—Perpetual Injunction against Loading Milk-crates during Night Hours—Magistrates' Courts Act, 1947, s. 41. The plaintiff alleged that the defendant, a milk-treatment corporation, by its servants, workmen and invitees, in the early hours of the morning, between 3 a.m. and 7 a.m., greatly disturbed him and his family in their repose by the noisy starting and stopping of vehicles, the clanging of milk trays over a steel floor, and the loading of such crates on to trucks and the banging of doors, etc., to such an extent that the plaintiff had suffered greatly from loss of sleep and has even had to consult medical advice, and that his property had diminished in value as a result of its proximity to the nightly disturbance. The plaintiff claimed £25 as damages for interference with his comfort and enjoyment of his rights of property at Council Road, Lower Hutt, and an injunction against the defendant corporation enforcing it to desist permanently from committing the nuisance of interfering with the comfortable and healthful enjoyment of the premises occupied by him. *Held*, 1. That the plaintiff had established a nuisance interfering with his comfort and health. (*McKelvey* v. *Invercargill Milk-supply Co., Ltd.*, [1928] N.Z.L.R. 223; [1928] G.L.R. 245; *Fanshawe* v. *London and Provincial Dairy Co.*,(1888) 4 T.L.R. 694; and *Bloodworth* v. *Cormack*, [1949] N.Z.L.R. 1058, followed.) 2. That, having regard to the discretionary nature of an injunction and to the conditions under which the remedy should be allowed, the plaintiff was entitled to the maximum relief which the Court had power to decree, and, in consequence he should be awarded the sum of £10 as damages in respect of loss of comfort only, and, in addition, orders should be made that the defendant corporation be restrained in perpetuity from carrying on the business of loading crates of milk bottles between the hours of 9.30 p.m. and 6.30 a.m. at its premises in Council Road, Lower Hutt, as from May 1, 1954. *Hay* v. *Hutt Valley Milk Treatment Corporation, Ltd.* (Wellington. April 6, 1954. McLachlan, S.M.)

POWERS.

Joint Powers: Whether General or Special, *204 Law Times*, 217.

PRACTICE.

Trial—Allegation by Plaintiff's Counsel in Opening Case that Plaintiff's Claim based on Felony—Whether Action should be Stayed. The power of the Court to stay proceedings in a civil action for damages, where it is clear that the basis of the claim is a felony committed by the defendant against the plaintiff, may be exercised after hearing allegations made by counsel for the plaintiff in opening the facts proposed to be proved, although the allegations do not appear in the statement of claim. *Henry Haskin & Co., Pty., Ltd.* v. *Hooke*, [1954] V.L.R. 300.

LEGAL ANNOUNCEMENTS.

Continued from cover i.

LAW CLERK with many years experience in CONVEYANCING AND ESTATES desires position in Wellington. If interested, please reply to :—

108 TASMAN STREET, WELLINGTON.

Stare Decisis and the Citation of Authority. *98 Solicitors' Journal*, 327.

Trial—Separate Trials of Actions—Negligence—Two Actions arising out of Same Accident—Defendant and Third Party in One Action being Plaintiff and Defendant respectively in other Action—Actions to be tried separately—Jury hearing First Action to determine Extent of Defendant's Right to Contribution from Third Party—Trial of Second Action confined to Assessment of Damages to which Plaintiff and Defendant in That Action respectively entitled. W. was a party to each of two actions claiming damages for negligence arising out of the same accident. W. was joined as third party in one action, and he was the defendant in the other action. He moved for an order that both actions be heard together. The plaintiffs in the first action opposed the application. *Held*, 1. That the order sought should not be made against the opposition of the plaintiffs, and the actions must be heard separately. 2. That the jury in the first action should determine the question or issue stated in the third-party notice, not only as between the plaintiff and the defendant but also as between the plaintiff, the defendant, and the third party, including the extent of the defendant to contribution (if any) from the third party. (*Norman* v. *Sinclair* (*Earle, Third Party*), [1953] N.Z.L.R. 493, followed.) 3. That, as the findings in the first action would determine the respective liabilities of the parties to the second action, the trial of the latter action would be confined to an assessment of the damages to which the parties to that action were respectively entitled, and it was not necessary that these should be determined by the same jury as heard the first action. *Rabone et Ux. Schiessel* (*Williams, Third Party*). *Schiessel* v. *Williams*. (S.C. Auckland. May 27, 1954. Stanton, J.)

PROBATE AND ADMINISTRATION.

Probate—Instructions for Will in Document executed animo testandi, *with all Prescribed Formalities—Such Document revocable only by One of Permitted Methods of Revocation—Mere Lapse of Time or Change of Intention by Testator not rendering Such Document inoperative.* No mere lapse of time or any mere change of intention on the part of a testator will render inoperative a document, headed "Instructions for the will of [the testator]", executed *animo testandi* with all the formalities required by the Wills Act, 1837; and a revocation, to be effective, must be by one of the permitted methods in accordance with that statute. (*In re Gilmour*, [1948] N.Z.L.R. 687; [1948] G.L.R. 346, considered; and, with the concurrence of the learned Judge who gave that judgment, applied with modifications.) On November 9, 1951, the testator signed, in his solicitor's office, a document headed "Instructions for the will of [the testator]," and the signatures of two witnesses were appended to it. The Public Trustee was named as executor. The testator was then informed that a will in proper form could be prepared ready for execution the same afternoon by 5 p.m., but he said that he could not wait. He did not again mention his will, and he died on April 11, 1953, without having executed any other testamentary document. The evidence showed that during the last eight weeks of his life, the testator intended to make a new final will by which he would have given his estate equally among his children and the making of such a will would have included the revocation of the "instructions" document. On application for probate by the Public Trustee as the executor named in the document propounded. *Held*, 1. That, on the evidence, the testator executed the document meaning that it should operate as his effective will unless before his death he should execute in its stead a more formal document, embodying the same provisions, which his solicitor was to prepare. 2. That there was no need to rely on the presumption that the document, duly executed, was intended to be a will, as the testator's solicitor's extrinsic evidence was sufficient in help to convince the Court that the testator executed the document intending that it would operate as a will until some more formal document should be prepared and executed. (*Meynell* v. *Meynell*, [1949] W.N. 513, referred to.) 3. That the document having been executed *animo testandi*, and with all the formalities prescribed by the Wills Act, 1837, thereby became the last will and testament of the deceased; and, being so constituted, it could thereafter not lapse by the failure of the testator to make another will, or be revoked by any mere change of intention, or by mere lapse of time; and the testator's expression of intention to make a new and different will was ineffective to revoke the will which he had already made. (*Whyte* v. *Pollok*, (1882) 7 App. Cas. 400, distinguished.) (*In re Gilmour*, [1948] N.Z.L.R. 687; [1948] G.L.R. 346, explained.) *Public Trustee* v. *Barnes and Others*. (S.C. Invercargill. April 7, 1954. Turner, J.)

STATUTE.

Construction—Effect of Subsequent Enactment in pari materia *with, but not amending, Statute to be Construed—Resolution of Ambiguity—Evidence of—Foreign Statute—Expert Evidence—Meaning of Common English Words.* Adoption of the construction of a statute by Parliament in subsequent enactments *in pari materia*, but not amending the statute in question, does not import an addition to or modification of the statute, but it can be looked at as a legislative interpretation to resolve any ambiguity in it. (*Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, [1921] 2 K.B. 403, *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143, and *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney and Co., Ltd.*, [1952] 1 All E.R. 531, applied.) (Reasoning of *Lawrence*, J., in *Inland Revenue Commissioners* v. *Gull*, [1937] 4 All E.R. 290, disapproved.) Corporation Law of New York State the purposes of a membership corporation were required to be of a "kindred or incidental nature", and if the main purpose was followed by later purposes not of a kindred or incidental nature those other purposes were to be rejected as entirely ineffective. The main purpose of such a corporation was "to advance the science of chemistry, chemical engineering and related sciences as a means of improving human relations and circumstances throughout the world", and a later purpose was "to promote any other scientific educational or charitable purposes." In an appeal against the refusal of its exemption from income tax in which the Crown contended that the later purpose was not charitable, *Held*, In arriving at their decision that the corporation was established for charitable purposes only on the ground that the later purpose was not of a kindred and incidental nature to the first and so was wholly ineffective, the Special Commissioners of Income Tax were entitled to hear the evidence of New York lawyers on the question whether the later purpose would be held to be kindred and incidental to the main purpose under New York law, since that was evidence as to the effect of foreign law and not merely as to the meaning of two common English words. *Camille and Henry Dreyfus Foundation, Inc.* v. *Inland Revenue Commissioners*, [1954] 2 All E.R. 466 (C.A.)

SETTLED LAND.

Retirement of Trustees. *104 Law Journal*, 307.

TENANCY.

The Statutory Sub-Tenant. *98 Solicitors' Journal*, 298.
Valuation of Furniture. *98 Solicitors' Journal*, 281.

TRANSPORT.

Drunk in Charge. *98 Solicitors' Journal*, 275.

TRUSTS AND TRUSTEES.

Modification of Trusts. *98 Solicitors' Journal*, 296, 312, 328.

WILL.

Construction—"Any possessions I may have"—Condition—Certainty—Condition Subsequent—Devise and Bequest to One Daughter "on condition that she will always provide a home" for Another Daughter. By his will, dated March 19, 1950, the testator, after appointing an executor and directing payment of his debts and funeral expenses, declared: "I give and bequeath unto my daughter [I.C.] . . . my house at . . . . together with the contents of same and any possessions I may have, on condition that she will always provide a home for my daughter [D.M.B.] at the above address." There was no residuary gift. The testator died on August 8, 1953. The estate comprised (*a*) the freehold house mentioned in the will, (*b*) some furniture and personal effects, (*c*) cash on deposit at a bank, (*d*) proceeds of an insurance policy, and (*e*) arrears of a pension. *Held*, The words "any possessions I may have" included the whole of the testator's estate. (*Fleming* v. *Burrows* (1826) (1 Russ. 276), applied.) 2. The phrase "to provide a home" was not susceptible of any such clear and definite interpretation as would enable the Court to say what it meant and what obligations it involved, and, therefore, if the words "on condition that she will always provide a home for my daughter" were regarded as a condition subsequent, they were void for uncertainty: (*Re Richardson*, [1904] 2 Ch. 777, distinguished;) but, in the absence of an express gift over in the event of non-compliance, the words, despite their form, should be construed as being merely precatory, rather than as a condition subsequent; and, on either construction, I.C. was entitled to the whole of the testator's estate absolutely, free from any condition. *Re Brace (deceased)*. *Gurton* v. *Clements and Others*, [1954] 2 All E.R. 354 (Ch.D.)

CRIMINAL LAW: THEFT.

Intention to Replace Money.

By D. W. McMullin, LL.B.

The recent judgment of the Court of Criminal Appeal in England in *R.* v. *Williams*, [1953] 1 All E.R. 1068, contains a clear pronouncement of the law on a subject on which there was very little previous authority and even that which did exist was conflicting.

In *Williams'* case the appellants, who were husband and wife, were convicted of stealing money from a sub-post office, of which the wife was postmistress, the post office being carried on in conjunction with a general shop managed by the husband, and the evidence being that they took coins and notes from the post office till and put them into the shop till or into their own pockets. The jury found that, in respect of two counts for larceny, the appellants intended to repay the money and honestly believed they could repay it, and, in respect of three counts, that they intended to repay the money, but had no honest belief that they would be able to do so.

This finding of fact gave rise to the question as to whether or not the constituent elements of the crime of theft as laid down by s. 1 (1) of the Larceny Act, 1916 (6 & 7 Geo. 5 c. 50) had been satisfied. The definition of larceny given in that section is :

> A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof.

To determine the appeals, the Court had to decide :—

(*a*) What was meant by the words " fraudulently and without a claim of right made in good faith " and

(*b*) Whether the jury's finding that the appellants intended in respect of two counts to repay the money and honestly believed that they could repay it, and in respect of three counts that they intended to repay the money but had no honest belief that they would be able to do so, afforded a defence to the charges of larceny.

The section in the Crimes Act, 1908, defining theft, *viz.*, s. 240, is, in substance, the same as s. 3 (1) of the Larceny Act, 1916 (Eng.) and, in particular, the requirement that the prosecution must prove that the accused acted fraudulently and without a claim of right and that he intended to deprive the owner permanently of the thing taken is common to both the English section and its New Zealand counter-part.

After dealing with the meaning of the expression " fraudulently and without a claim of right made in good faith," Lord Goddard, C.J., who delivered the judgment of the Court of Criminal Appeal, proceeded to deal with the contention of counsel for the appellants that the fact that the jury found in two cases that the appellants intended to repay the money and honestly believed they could repay it and in the other three cases that the appellants intended to repay the money but had no honest belief that they were able to do so constituted an answer to the several charges in that it negatived the suggestion that the two appellants intended to deprive the owner permanently of the money. At p. 1070, Lord Goddard, C.J., said :

> A great part of the discussion in the court below took place because the defence was submitting that, if the appellants intended to repay and had reasonable grounds for repayment, that would be an answer. We have to point out, as has been pointed out more than once in the course of the argument, that we are here dealing with the case of coins, and there is no question that, having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes. Does it make any difference that they intended to replace them, which can only mean in this case that they hoped they would be able to replace them ?

It is because of the Court's pronouncement on this last submission that the decision in *Williams'* case provides us with an authority that was previously lacking.

Apart from *R.* v. *Martini*, [1941] N.Z.L.R. 361, where the point came before the Court of Appeal only indirectly, the only decision in New Zealand on the question whether an intention to repay moneys taken without right amounts to theft appears to be *Police* v. *Kirkpatrick*, (1943) 3 M.C.D. 122. In that case, the accused, a pay clerk at a R.N.Z.A.F. Station, took sums of £10 from each of five pay envelopes which were temporarily in his care. He was then transferred to another station, and, on the day of his transfer, he informed his immediate superior that he had taken the money but he would wire the amount within two days, and, at the same time, he gave this superior officer a list of the five pay envelopes concerned. Three days later, he repaid the money. The defence set up to a charge of theft was that the accused took the money under the pressure of urgent private necessity without any intention of stealing it but with the intention of repaying it within a few days and with the knowledge that he had the ability so to repay it.

The learned Magistrate, in dismissing the charge of theft, held that the taking of anything does not amount to theft unless the person taking it either has then, or forms later, an intention to deprive the owner permanently of the thing taken. He then went on to cite *Hamilton and Addison's Criminal Law and Procedure*, 3rd Ed. 148, to show that, so long as a person intended to return the thing taken, there was no limit in English Law as to the length or extent of use or misuse which a person might carry out without being guilty of theft. He also pointed out that it was because of the necessity to prove an intention to deprive the owner permanently of the thing taken that it became necessary for the Legislature to create a special offence to cover the conversion of chattels, particularly motor-vehicles, in circumstances not amounting to theft. (It is noteworthy that the Legislature in England had to overcome the same problem by the Road Traffic Act, 1930).

Having found as a fact that Kirkpatrick at the time he took the money really believed he would be able to repay it within a few days and never at any time before it was repaid intended to deprive the owner permanently of it, the learned Magistrate held that the actions of the accused did not constitute the crime of theft and dismissed the information. His decision was later appealed against by the Police, but, in an unreported decision, Sir Michael Myers, C.J., dismissed the appeal and upheld the Magistrate.

It is respectfully submitted, for reasons to be stated later, that, in so far as the dismissal of the charge was based on his findings of fact, the Magistrate's decision was, perhaps, correct in the circumstances. However, *in so far as his decision was based on his interpretation* of the law that the taking of moneys does not amount to theft in a case where the defendant intends to repay the same, that interpretation is not supported by *Williams'* case.

It is submitted that, while an intention to return a converted *chattel* to its owner would negative theft, in the case of *coins and notes* the position is different because " the borrower " will not put back the identical coins and notes that he took but only an equivalent amount in substitution. As Lord Goddard, C.J., pointed out in *Williams'* case at p. 1070 :

> We are here dealing with the case of coins, and there is no question that, having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes.

It may be that the layman would not appreciate the niceties of such a definition but, though it matters little to the owner if he has other coins and notes returned to him in place of those taken, in law it may mean the difference between whether an offence has been committed or not.

Another authority in line with the decision in *Williams'* case is that of the Full Court of New South Wales in *R.* v. *Johnson,* (1867) 6 S.C.R. N.S.W. 201. In this case, the prisoner was a teller in a bank, and for a number of years he had been carrying on a systematic abstraction of bank moneys part of which from time to time he had paid back accounting for the deficiency by fraudulently altering his accounts. At the time of his apprehension, he was approximately £300 short in his cash. To an indictment for theft of this amount, the jury returned a verdict of guilty but added a rider that they found that the accused intended to return the money. The Full Court held that the conviction should be affirmed on the ground that the prisoner, having actually spent the money stolen, had assumed complete ownership over it and his intention to return other moneys equivalent in value could not make the original taking any less a theft. This decision is in line with the decision in *Williams'* case where Lord Goddard, C.J., at p. 1071 said :

> The fact that they may have had a hope or expectation in the future of repaying that money is a matter which at most can go to mitigation. It does not amount to a defence.

In the light of the decision in *Williams'* case and the decision in *Johnson's* case, the judgment of the learned Magistrate in *Police* v. *Kirkpatrick* that a defence may be established to a charge of theft by showing that the accused intended to return actual cash to the person from whom it was taken would not appear to be correct but, as mentioned above, even with the application of the principles decided in *Williams'* case to the facts in *Kirkpatrick's* case the decision in the latter would probably be the same to-day because not only must the Court be satisfied that the accused could not return the money to the owner but it must also be satisfied that the money was taken fraudulently and without colour of right. That these two ingredients are separate and are not to be confused with one another is illustrated in *Williams'* case at p. 1070 where Lord Goddard, C.J., said that, where a person of good credit and plenty of money uses someone else's money in his possession in place of some of his own which is easily obtainable, then no jury would say it was a fraudulent taking. It is another matter, however, if a person who takes money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future.

In *Kirkpatrick's* case, the learned Magistrate found that the accused was of good character and had been completely frank about his actions and that before he took the money he had arranged to obtain it from a friend and the money was in any case repaid within a week. It is submitted that these facts would bring the case within the exculpatory remarks of the Lord Chief Justice in *Williams'* case as referred to in the preceding paragraph.

Cases of this nature must arise from time to time and it is strange that the matter has not proved the subject of earlier decisions. It may be that the pure question of fact involving the issue of honest or dishonest conduct by the accused has short-circuited the issue of law ; but, if the matter does arise in the future, as indeed it must, there will be clear judicial dicta available for guidance.

Certainty in the Law.

Why is it, I ask, that English law, and latterly, under the influence of the House of Lords, Scots law as well, attach such supreme value to tradition and precedent in judicial administration, and have even bowed to the amazing consequences of the rule in the *London Street Tramways* v. *L.C.C.* ? In the last analysis the only answer is—to enable all and sundry, and in particular legal advisers, to be *certain* what the law on any given point is. There are other answers, but that is the popular pragmatic test, and it is the justification which was given to me only a short time ago by a very eminent English Judge. I invite you who are experts in your several fields to tell me frankly whether that certainty has in fact been attained, and, in so far as it has, whether it has not been bought at far too dear a price. Think of the law of contributory negligence, beginning with *Davies* v. *Mann* and continuing through the long series of House of Lords decisions such as *The Volute*. Think of the antimony between *Cavalier* v. *Pope* and *Donoghue* v. *Stevenson*. Think of the decisions, and their number is legion, which have been built upon *Idermaur* v. *Dames* and of the discussion now being revived as to the famous categories of invitee, licensee, and trespasser. Think of the forty-one reported decisions within the last twenty years on the meaning of " charity." Think of the judicial explanations which have been offered of the rule of *respondeat superior,* contemptuously but not unfairly described in a standard work as " rhythmical inanities." Without multiplying instances I venture to assert, with the support of many of the text-books which have been written by some of your number, that on many subjects we are far further from certainty than we were in the middle of the nineteenth century, and that far too many cases are presented daily in our Courts the result of which in the light of conflicting authorities is wholly unpredictable. (The Rt. Hon. Lord Cooper, " Defects in the British Judicial Machine," (1953), *2 Journal of the Society of Public Teachers of Law,* (N.S.) 91, 95, 96).

SECRET TRUSTS.

The Problem of Johnson v. Ball

By MALCOLM BUIST, LL.M.

The recent case of *In re Karsten*, [1950] N.Z.L.R. 1022; aff. on app. [1953] N.Z.L.R. 456, has brought to fresh notice the complex doctrine of secret trusts arising out of wills, *i.e.*, trusts imposed on a legatee in favour of a beneficiary not named in the will. The Court of Appeal followed and confirmed what is now the orthodox rule laid down in *Johnson* v. *Ball*, (1851) 5 De G. & Sm. 85, 91; 64 E.R. 1029, notwithstanding that non-judicial authorities of the eminence of the late Professor Holdsworth have strongly criticized that case as unsound and unjust. An interesting situation has thus developed: *Johnson* v. *Ball* has now been followed by the Courts of Appeal in England (*In re Keen*, [1937] Ch. 236) and in New Zealand (*In re Karsten*, [1953] N.Z.L.R. 456), and has at least the *obiter* approval of the House of Lords (*Blackwell* v. *Blackwell*, [1929] A.C. 318), and yet, on the other hand, the tendency is for the text-books to treat the decision in *Johnson* v. *Ball* with neither respect nor trust.

Some of the difficulties seen in the case seem to arise through the differing viewpoints from which the facts are looked at, and the division of opinion between the Courts and the writers suggests that there are several aspects to take into account.

In order to consider this conflict, some general points regarding the nature of secret trusts should first be noted. Then the particular difficulty dealt with in *Johnson* v. *Ball*, *viz.*, the situation when the trust is expressly declared in the will and only the name of the beneficiary is secret, can be looked at in perspective.

WHAT ARE SECRET TRUSTS?

A secret trust may, for practical purposes, be defined as the vesting of property in trust by an instrument which does not on the face of it fully disclose the trust. An interesting example is found in *Cullen* v. *Attorney-General*, (1866) 14 L.T. 644, where an Irish testatrix left the residue of her estate, not direct to the Church, but to the Rev. Patrick Doyle and the Most Rev. Daniel Murray, writing to them at the same time to explain what she wanted them to do with the money. Exemption from death duty was sought by the legatees on the grounds that they were administering a charitable trust, but the House of Lords was not prepared to allow this. Lord Chelmsford said, at p. 645, that the residue was given to the charity, not by the will, but by "the trust imposed by the letters contemporaneous with the will." Had the trust been part of the will, the "trustees" would not have taken as beneficiaries. The trust was in this case a separate matter, not constituted by the will, and, on the face of the will, the Rev. Patrick Doyle and the Most Rev. Daniel Murray were mere beneficiaries and were, for revenue purposes, in the position they would have held if the testatrix had not written the letters giving the directions to them.

Cullen v. *Attorney-General* brings out the essential feature that a secret trust is constituted by transactions taking place outside of the will. This aspect must, however, be considered guardedly. There are secret trusts where the entire transaction is, as in *Cullen* v. *Attorney-General*, undisclosed; but there are also cases where the existence of the trust is disclosed, but not the name of the beneficiary under the trust. These, too, are secret trusts, and Dr. Megarry, in 59 *Law Quarterly Review* 23, mentions that they may be termed "half-secret" trusts. This term serves to keep under notice the special character of their creation.

In common with other equitable interests, trusts are rights raised upon legal or equitable rights already vested elsewhere, and are enforced only by a Court of Equity. This aspect is brought out by Lord Westbury in *McCormick* v. *Grogan* (1869) L.R. 4 H.L. 82, in the following words:

> The jurisdiction which is invoked here by the Appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud.

But a man cannot, in the ordinary course, be declared trustee of property that has not vested in him; and, as a practical step, vesting should be the first matter looked into when the doctrine of secret trusts is being invoked. Only after this step has been taken is there room for proper investigation whether a secret trust should be imposed upon the person in whom the property vests.

Indeed, it may be useful to apply four test questions, if the validity of an alleged secret trust is being considered: first, "In whom does the will vest the property?"; secondly, "How does he take in terms of the will—beneficially, or expressly as trustee?"; thirdly, "If he takes beneficially in terms of the will, should he be deemed to hold in trust by reason of a collateral transanction not appearing on the face of the will?"; and, fourthly, "If he is expressly, or is deemed to be, a trustee, who is the beneficiary under the trust?"

Some of these matters will be dealt with in the following notes, in so far as they are relevant to the doctrine laid down in *Johnson* v. *Ball* (*supra*) at p. 91.

JOHNSON V. BALL.

The facts in *Johnson* v. *Ball* were, briefly, that the testator, by his will bearing date February 21, 1844, gave "to John Ball and Thomas Manners the policy in the Equitable, No. 25,098, on my life, to hold the same upon the uses appointed by letter signed by them and myself." The letter produced in the litigation following the death of the testator was dated August 4, 1845, and indicated the manner in which he desired John Ball and Thomas Manners to distribute the proceeds of the policy of insurance. The Court was asked to decide whether the directions contained in the letter should be carried out by these two legatees. Sir James Parker, V.-C., said:

> The testator's language appears to point at some letter already signed by him and the trustees; but, even supposing it to refer to a letter to be afterwards signed, it is impossible to give effect to any such letter as a declaration by the testator of the trusts in which he has bequeathed the policy to his trustees. To give them any such effect would be to receive, as part of or as codicils to the will, papers subsequent

THE UNITED STATES SUPREME COURT

How It Reaches A Decision

By Luther A. Huston.*

The Supreme Court of the United States is called upon to pass decision on issues which affect the whole fabric of American society. The Founding Fathers of that nation intended that the provisions of the U.S. Constitution should be flexible and adaptable to changing conditions. "Decision Monday" thus finds the High Court, as it has been doing since it was established in 1789, not only unravelling the complexities of established law but also breaking new ground concerning the transcendental questions of the age.

Such decisions are announced in the dignified splendour of the High Court's chamber within its white marble building on Capitol Hill in Washington, D.C. The carpets are deep red. The chairs and tables are of rich leather and fine woods. Great Doric columns line the chamber on each side and gleaming brass gates guard the side entrances. The public, including the vast swarm of tourists which views the Court each year, enters through tall doors of softly shining mahogany.

The nine black-robed Justices sit on the high Bench before flowing draperies. The entrance of the Justices is always a high moment on decision days and days when arguments are heard. Lawyers and all others in the Courtroom rise as the clerk intones the announcement that the Court is in session. "God Bless the United States and this honourable Court," he concludes, and the Justices and spectators take their seats.

The places for the Justices are an odd feature of the otherwise sumptuous Courtroom. Each member of the Court has the privilege of selecting his own chair. Some are relatively low-backed, some seem excessively high-backed and they are of assorted shapes and sizes. All are upholstered in black leather.

From them, as the Court convenes, the Justices announce their decisions or question lawyers during arguments. Decision days are usually the most solemnly dignified, argument sessions the most lively, although lawyers appearing before the High Court depend more upon decorous logic than upon forensic antics.

How cases reach the Court and how it reaches decisions is another story. A comprehensively basic definition of the function of the Court would be "to adjust the relationship of the individual to the separate States, of the individual to the United States, of the 48 States to one another and of the States to the United States." This process has been called "keeping the constitutional system in equilibrium."

Except in infrequent cases which arise out of matters over which the Supreme Court has original jurisdiction, such as a dispute between the Federal Government and a State, cases come to the High Court on appeal from decisions of the Circuit Courts of Appeal, the Federal District Courts and the State Courts.

The first thing the Court decides when an appeal comes in is whether it shall hear the case. Unless firm constitutional issues or substantial points of federal law are involved a case has little chance of getting on the docket. If four of the nine Justices feel that the questions involved should be adjudicated, however, the High Court takes the case.

Within three weeks after a case is docketed, the party which brought the action must file briefs. A brief states the issues of the case, recites the actions of the lower Courts, sets forth the reasons why the Supreme Court has jurisdiction, submits the constitutional or legal arguments of the appellant, and cites cases and precedents in support of them.

Respondents also file briefs, usually after they have seen the briefs of the appellant. If the case involves issues of direct concern to the Federal Government, the Solicitor-General of the United States may be permitted to file a brief as *amicus curiae*, or "friend of the Court." Individuals or private groups or corporations whose interests might be affected by the Court's decision also are permitted to come in with such briefs.

When the briefs are all in, they go to each of the Justices. The study of them is an essential part of the process of reaching a decision. The Justices become skilled in knowing what to look for and what to use as a basis for research of their own into the law and the precedents and the constitutional provisions involved.

While cases are under study from the briefs, the law clerks do a great deal of work. Law clerks are an institution of the Court only slightly less necessary than the Justices, although few people ever hear of them as individuals until after they cease to be law clerks.

Many of the Supreme Court law clerks, however, later become famous. Dean Acheson, who was a law clerk of the late Justice Louis D. Brandeis, became U.S. Secretary of State. Francis Biddle, once a clerk of the famous Justice Oliver Wendell Holmes, became Attorney-General of the United States.

Each Justice selects his own law clerks in his own way and uses them in his own way. Much of the research which goes into an opinion written by a Justice is done by the law clerks. They relieve the jurists of certain forms of drudgery but the Justices share the cold, hard labour that goes into the preparation of an opinion. Justice Felix Frankfurter, for example, likes to have law clerks who will argue with him on points of law, on special aspects of the cases and on the phraseology of his opinions. In an important case which the Court decided in the spring of 1953, Justice Frankfurter and his clerks spent months on the research which produced a 15,000-word concurring opinion. Justice Frankfurter's law clerks are selected for him by the Dean of the Harvard Law School and he never sees them until they report for duty. He gets a new pair each year. Other Justices select their clerks personally but most of them also get new ones for each term of the Court.

After the briefs and other documents in a case have been studied, the Justices decide whether or not to hear oral arguments. Usually the Court wants to hear the

* This article appeared in the magazine section of *The New York Times*, one of the leading newspapers in the United States. The writer is a Washington, D.C., staff-correspondent for that newspaper.

in date to the will, which are unattested, and which have not been and could not be admitted to probate.

The implication is that, if the letter had been contemporaneous with or before the execution of the will, or had been executed in accordance with the provisions of the Wills Act, 1837, it would have been admitted to probate and then given effect to by the Court. The Vice-Chancellor then went on :

> A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil. The decisi ons to this effect on devises of real estate under the Statute of Frauds are clearly applicable, and have been applied, under the existing law, to testamentary dispositions of any kind : *Countess De Zichy Ferraris* v. *Marquis of Hertford* (3 Curt. 468 ; S.C. on appeal, *sub. nom.*, *Croker* v. *Marquis of Hertford*, 4 Moo. P.C.C. 355), *Briggs* v. *Penny* (3 De G. & S. 525).

The point here is that the statute will, as it were, decapitate any trust that purports to arise pursuant to the express power given by the words of the will. In *Cullen* v. *Attorney-General*, (1866) 14 L.T. 644, as noted above, the Court was able to sever the trust completely from the will, and to set it up as an independent transaction. But in *Johnson* v. *Ball* the trust was only half-secret and could not be fully severed from the will, and therefore, in the opinion of the Court, it was caught by the requirements of the Wills Act, 1837. Finally, the Vice-Chancellor dealt with a further aspect :

> It was argued that the policy is bequeathed to the trustees ; and that, as they admit a trust in favour of the Plaintiff and her children, the Court will execute the trust so admitted. But the trustees have no interest in the policy which enables them to admit any such trust. The bequest is expressly to them upon trusts to be appointed by the testator ; and, as the testator has made no effectual appointment, the trustees, if the bequest has not wholly failed, are trustees for the residuary legatees, and cannot by their admission create any other trust. Cases in which there is no trust appearing on the will, and where the Court establishes the trust on the confession of the legatee, have no application to the present ; nor, as it appears to me, have those cases cited in the argument, in which the will refers to a trust created by the testator by communication with the legatee antecedently to or contemporaneously with the will.

There was only one possible trust declared by the will. This could not be carried out, for the reasons already given by the Court, and the beneficial interest was thereupon carried away by the residuary provisions of the will and could not be intercepted in favour of the persons referred to in the letter.

The question still arises : " Why does this not happen in the case of an ordinary secret trust ? " The answer appears to lie in the nature of the vesting process, and in differences observed by the Courts between the vesting under a half-secret trust and the vesting under a fully secret trust.

Vesting.

For a legatee to take at all, whether beneficially or in trust, under a will, it is necessary that the will be executed in accordance with the formalities laid down by the Wills Act, 1837. Notwithstanding that secret trusts come within the equitable jurisdiction of the Courts, the requirements of this statute are rigidly enforced by the same Courts, for " equity follows the law." There is good reason for the provisions of the Wills Act. As Blackstone has recorded in 2 *Commentaries*, xx :

> With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law ; which are so nicely constructed together, that the least breach in any one of them disorders for a while the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance ; for so loose was the construction made upon this Act (Statute of Wills, 1540) by the courts of law that bare notes in the handwriting of another person were allowed to be good wills within the statute. To remedy which, the Statute of Frauds and Perjuries, 29 Car. II (1677) directed that all devises of lands and tenements should not only be in writing, but be signed by the testator, or some other person in his presence, and by his express direction ; and be subscribed, in his presence, by three or four credible witnesses ; a number which, by the Wills Act, 1 Vict., c. 26 (1837), has been reduced to two.

At first thought the layman tends to look upon these formalities as pettifogging ; but an explanation of the protection they afford will impress him, and thereafter he would have less confidence in the administration of justice if they were set aside for any reason. It is however not uncommon for the topic of secret trusts to be approached in terms of an expression used by Vaughan Williams, L.J., in *In re Pitt-Rivers*, [1902] 1 Ch. 403, 407 :

> I suppose one may state shortly and concisely that the Court never gives the go-by, if I may use the expression, to the provisions of the Wills Act by enforcing upon any one testamentary intentions which have not been expressed in the shape and form required by that Act, except for the prevention of fraud.

Any suggestion that there might be circumstances in which the Courts would " give the go-by " to the Wills Act was criticized by Lord Sumner in *Blackwell* v. *Blackwell*, [1929] A.C. 318, 337 :

> Evidence which could not be admitted to fill in what the testator's will leaves out, may yet be admissible to inform the Court what duty, onerous or not, it must bind on the conscience of the devisee, taking him as being with regard to legal title such a devisee as the will has made him according to its terms.

In other words, what the Courts do is first, in their jurisdiction as Courts of construction, to ascertain the legal position in terms of the Wills Act, and then in their Equity jurisdiction to apply equitable doctrines, where relevant, to that legal position.

Now, when the Court comes to ascertain the legal position, it does so in terms of the Wills Act, and not in terms of the doctrines of equity. This appears to be the basis of the decision in *Johnson* v. *Ball*. Before we turn to the criticism of that case, it will be as well to look further at secret trusts themselves, comparing both forms that have developed, so that the criticisms may be read with a complete understanding of the process of recognizing and enforcing a secret trust. For, in *In re Young*, [1950] 2 All E.R. 1245, Danckwerts, J., pointed out :

> The whole theory of the formation of a secret trust is that the Wills Act, 1837, has nothing to do with the matter, because the forms required by the Wills Act are entirely disregarded in effect, the persons who take beneficially taking not by virtue of the will but by virtue of the secret trusts which are imposed on the apparent beneficiary who does in fact take under the will.

It is submitted that his Lordship has perfectly described the boundaries of the small field within which a secret trust may properly be said to arise. If the will does not show either the existence of the trust or the name of the beneficiary under the trust, then there is a fully secret trust ; if the will vests the property in the trustee as such, but does not disclose the name of the beneficiary, there is a half-secret trust. In other words, a trust is secret only as to the elements not set forth in the will, in that they will not come before the notice of the Court

of construction. All that Danckwerts, J., speaks of as falling within the proper scope of secret trusts lies outside the will.

In the light of this comment by Danckwerts, J., and the situation that arose in *Johnson* v. *Ball*, it is possible to make a simple classification of secret trusts into two groups, as follows :

(*a*) Secret beneficiaries vis-à-vis a person constituted a beneficiary by the terms of the will (fully secret).

(*b*) Secret beneficiaries vis-à-vis a person constituted a trustee by the terms of the will (half-secret).

By looking at a case under the first heading and then a case under the second heading, some light may be obtained upon the nature of the differences existing between them and upon the different treatment each class has received in the Courts.

A. Secret Beneficiaries vis-a-vis a Person constituted a Beneficiary by the Terms of the Will.

This is the position of a fully secret trust, and the case of *Cullen* v. *Attorney-General*, (1866) 14 L.T. 644, has already been mentioned as an unusually interesting illustration. An absolute legatee under a will may, to his surprise, learn after the death of the testator that someone contends that the legacy was intended to be held in trust. There has been nothing in the will, and no such arrangement has been entered into between the testator and the legatee. In some situations, however, such as *Cullen* v. *Attorney-General*, the claim may be no surprise to the absolute legatee. What are the rules under which an absolute legatee may be attacked, and what defences may he raise ?

Whilst the decision of the House of Lords in *McCormick* v. *Grogan*, (1869) L.R. 4 H.L. 82 is the superior authority, and very fully explains the reasons behind the relevant law, the decision of Tomlin, J., in *In re Falkiner*, *Mead* v. *Smith*, [1924] 1 Ch. 88 is of great practical value in showing, in an orderly pattern, the manner in which the Court will deal with a situation involving a legacy to which a trust may be annexed in favour of a beneficiary not disclosed on the face of the will. This decision is of special interest in that it analyses a marginal case that might have fallen into the classification of half-secret trusts, but for certain express provisions otherwise in the will, and so serves to bring out the mode of distinguishing the one class from the other.

The facts in *In re Falkiner*, were, briefly, that the testatrix bequeathed certain property to H. J. M. and H. G. M. absolutely, " with the request that they will dispose of the same in accordance with any memorandum or paper signed by me and deposited with this will or left among my papers at my death . . . . Any such memorandum of paper . . . shall not be deemed to form part of my will or to have any testamentary character and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees (H. J. M. and H. G. M.) in my lifetime."

Tomlin, J., at p. 94, said,

> The first question is whether they [meaning H.J.M. and H.G.M., the legatees named in the will] " are absolute owners of what is expressed to be given them under the will. If not, then the further question will arise whether they are trustees for the persons and institutions set out in the lists of October 12, 1921," [*viz.*, the beneficiaries named in certain memoranda supplied to and discussed with the legatees by the testatrix in pursuance of her will, which was dated April 22, 1922], " or whether they are trustees of a fund of which the beneficial interest is undisposed of, so that the persons beneficially entitled are the testatrix's next of kin. I think the question whether, if there is not a trust created outside the will in favour of the persons named in the lists, the Messrs. Mead are trustees for the next of kin must depend on the construction of the will itself ; because if there was no bargain outside the will imposing a fiduciary relationship, then that relationship can exist only by virtue of the will itself. Looking at the will, I do not think that any fiduciary relationship is created.

His Lordship here sought to ascertain at the outset whether there was any room for the doctrine set out in the words quoted early in these notes from *McCormick* v. *Grogan*, *viz.* that a Court of Equity proceeds, in the case of a secret trust, to convert a party into a trustee. He was unable to find, in point of construction, that the will set up any trust. It had expressly declared that there was no trust. Therefore he had to take the step required by Equity and ascertain whether it would be fraud on the part of these legatees to retain for their personal enrichment the beneficial interest so given them by the will. Having ascertained that they were not made trustees by anything inside the will, he turned to the doctrine of secret trusts and proceeded (p. 95) :

> The remaining question is whether they are trustees by reason of some bargin outside the will. I do not think the principle is in doubt that if a gift made absolutely by will is induced by a representation that the donee will apply the same in a special manner indicated by the testator, the Court will impose a trust on the donee binding on his conscience and will give effect to that trust.

This is but another way of saying what Lord Westbury said. It defines the jurisdiction invoked to preclude an absolute legatee from committing a fraud upon the trust reposed in him by the testator.

Finally, his Lordship turned to the facts of the particular case, and demonstrated the practice of equity in considering an allegation that an absolute legatee will commit fraud if he is permitted to remain, in Lord Sumner's words *ante*, " as the will has made him according to its terms."

> But the question must always be what the donee has in fact agreed to do ; and it must be borne in mind in this case that whatever H.G.M. agreed on behalf of his father and himself to do he did it with full knowledge of all the relevant documents. He knew that the testatrix objected to her will taking a form which showed the persons intended to be benefited. He knew also that she had expressed her intention in the will that no trust or legal obligation should be imposed ; and the question is whether the true inference to be drawn is that in agreeing to carry out her wishes he was giving an absolute assent so as to create a trust or a qualified assent subject to the terms and conditions contained in her will, including the condition that he and his father would remain absolute owners of the property bequeathed to them, though under a moral obligation to carry out her wishes.

On the facts he held that there was not between the testatrix and the legatees such a course of dealings as to charge the legatees' consciences with a binding trust to be carried out by them when the will invested them with the legal and beneficial ownership of the property. We could, perhaps, say that the arrangement entered into was " precative " in nature and not amounting to a binding trust.

When Equity thus investigates the conscience of an absolute legatee, it will not be concerned whether the testator discussed the alleged trust before or after making his will. Likewise, the Statute of Wills will

not be concerned whether or not the alleged trust is to be proved by oral or informal evidence. The sole function of the will has been to vest the legal estate in the alleged trustee as *prima facie* beneficial owner. " What they [the Courts] do is to ascertain the legal position in terms of the Wills Act, and subsequently to apply equitable doctrines, where relevant, to that legal position," per Lord Sumner, as already quoted.

In the principal case of *McCormick* v. *Grogan*, (1869) L.R. 4 H.L. 82, the relevant principles were authoritatively laid down. Here, as in *In re Falkiner*, the beneficiary under the will took free from any trust, and for a similar reason—namely, that the testator had not in fact set up any trust at all. In *In re Falkiner* the question of a binding trust was actively negatived by the testator. But in *McCormick* v. *Grogan* the testator passively omitted to constitute any binding trust. The testator, Abraham Walker Craig, had made a will leaving all his property to one Grogan. On his death-bed, the testator sent for Grogan and told him he was sole beneficiary. Grogan asked the testator, " Is that right ? ", to which the testa or answered, " It shall be no other way," and then told Grogan that he would find the will in a desk, and a letter with it. No assent was asked from Grogan as to the contents of the letter. The envelope, opened after the testator's death, contained the particulars of certain secret trusts.

The principal argument that Grogan was bound by these trusts was expressed by counsel for McCormick (an annuitant in the sum of ten pounds, under the letter, whom Grogan did not pay, though some other persons mentioned in the letter were paid) at p. 86, as follows :

> The principle that must govern cases like the present was declared in an elaborate judgment by Vice-Chancellor Wood, in the case of *Wallgrave* v. *Tebbs* (1855) 2 K. & J. 313 ; 69 E.R. 800, and is thus referred to and adopted in *Jones* v. *Badley* (L.R. 3 Ch. Ap. 362, 363) by Lord Chancellor Cairns, who thus expresses its substantive purpose : " Where a person knowing that a testator, in making a disposition in his favour, intends it to be applied for purposes other than for his benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is, in effect, a case of trust " Here the Respondent, before he proved the will, knew the contents of the letter. The testator had informed him of its existence, and he knew that it contained the wishes of the testator ; he knew, from the letter, what those wishes were, and knowing them, and undertaking to execute the will, he bound himself to do so according to the wishes of the testator.

But the House of Lords did not agree. After reviewing the doctrine of secret trusts, and showing that if the beneficiary under the will or heir on intestacy has by words or conduct led the deceased to believe that a secret trust will be executed, the Court will fix a trust upon the beneficiary to whom the deceased has permitted the trust property so to come, Lord Hatherley, L.C., at p. 89, pointed out :

> This doctrine evidently requires to be restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds [*sc.* Wills Act], and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform.

His Lordship then examined the facts of the case, for, as he said :

> We have to consider whether or not that conversation, coupled with the existence of the letter found in the same envelope with the will, brings the case within the rule of Equity to which I have referred.

Next Lord Westerby gave his opinion ; and it is submitted that he went to the root of the facts and the law when he asked, at p. 98, " Now, are there any *indicia* of fraud in this case ? " He recapitulated the evidence, and then said :

> My Lords, it is impossible to hold that that that amounts to a distinct promise, the breach of which would constitute a fraud ; for you cannot constitute a fraud in this matter unless you find that there is a distinct and positive promise, the non-fulfilment of which brands the party with disgrace as having personally imposed on the testator. There is nothing, I repeat, in the circumstances of this case, that would warrant us in arriving at that conclusion ; and there is nothing, therefore, to justify the Appellant in coming here to fasten that personal imputation upon the Respondent, and then to derive from that a conclusion of trust in favour of himself.

(To be concluded.)

EASEMENT IN GROSS IN FAVOUR OF A LOCAL BODY

Grant of Drainage Rights.

By E. C. Adams, I.S.O., LL.M.

Explanatory Note.

Local Bodies have extensive statutory rights, as to drainage, conferred on them, by such Acts as, the Land Drainage Act, 1908, the Public Works Act, 1908, the Counties Act, 1920, and the Municipal Corporations Act, 1933. It is often difficult, however, to advise local bodies as to the precise extent of their rights and liabilities under these statutes. For example, under the Municipal Corporations Act, 1933, the position is rather involved. Thus, in referring to the powers and liabilities of a Borough Council under the Municipal Corporations Act, 1933, F. B. Adams, J., in the Court of Appeal, (*Petone Borough* v. *Daubney*, [1954] N.Z.L.R. 305, 328) said :—

> There is no general provision vesting general control of drainage in a Borough Council, or expressly imposing on a Borough Council any general duty to provide or control drainage. What is done is done piecemeal by conferring specific and particular powers, and with one exception, everything is in permissive form, the word " may " recurring time and time again like a keynote.

Rather than rely on their statutory rights, local bodies often find it expedient to enter into private treaty with an owner of land, and eventually procure a grant of drainage rights in gross, such as the one in the following precedent.

In connection with drainage rights in gross, however, which form part of a scheme-plan under the Land Subdivision in Counties Act, 1946, attention may be drawn to s. 10 of the Land Subdivision in Counties Amendment Act, 1953, the relevant portions of which read as follows :—

> 10 (3) Where the Minister approves a scheme plan conditionally on any specified rights of way or drainage easements

shown on the plan being duly granted or reserved, the following provisions shall apply;

"(*a*) No such right-of-way or drainage easement may be surrendered by the owner of the dominant tenement or, in the case of a drainage easement in gross, the grantee of the easement or be merged by transfer to the owner of the servient tenement, except with the approval of the Minister. The District Land Registrar shall endorse on the instrument by which the right-of-way or drainage easement is granted or reserved a memorial that the right-of-way or drainage easement is subject to the provisions of this paragraph:

"(*b*) There shall be endorsed on the scheme plan and on every plan of subdivision of the land deposited under the Land Transfer Act, 1952 or the Deeds Registration Act, 1908, as the case may be, a memorandum showing with respect to each such right-of-way or drainage easement which is the dominant tenement and which is the servient tenement or, in the case of a drainage easement in gross, the name of the proposed grantee and which is the servient tenement:

"(*c*) The District Land Registrar or, as the case may require, the Registrar of Deeds shall refuse to register any instrument of transfer or conveyance of any allotment shown on the plan, unless he is satisfied that all rights-of-way and drainage easements so specified which are appurtenant to that allotment or to which that allotment is subject have been duly granted or reserved.

The purpose of this very novel legislation, constituting as it does a bold experiment in conveyancing, is to ensure that one of the purposes of the scheme of subdivision—the creation of certain easements to benefit the scheme as a whole—will not fail, either because the particular easement concerned is not granted and registered, or being created and registered, it is subsequently surrendered by the parties directly affected thereby without regard to the rights of the owners of other allotments or of the general public.

PRECEDENT.

EASEMENT IN GROSS. GRANT OF DRAINAGE RIGHTS.

Memorandum of Transfer.

WHEREAS A.B. of Hastings Farmer (hereinafter with his executors administrators and assigns referred to as and included in the term "the Grantor") is registered as the Proprietor of an estate: in fee simple subject however to such encumbrance liens and interest as are notified by memorandum underwritten or endorsed hereon, in that piece of land situated in the Land District of containing together [*set out here area of land in servient title*] be the same a little more or less being Lot on Deposited Plan and being part Section Block Survey District and being all the land comprised and described in Certificate of Title Volume Folio

AND WHEREAS the Grantor has agreed to transfer and grant unto THE CHAIRMAN COUNCILLORS AND INHABITANTS OF THE COUNTY OF (hereinafter with its successors and assigns referred to as included in the term "the Corporation") easements in and over such portions of the said land as are coloured pink on the said Deposited Plan (hereinafter called "the said land") for the conveyance of water whether rain tempest spring soakages or seepage water for disposal thereof in such manner as the Corporation shall determine NOW THIS MEMORANDUM OF TRANSFER WITNESSETH that in pursuance of the said agreement and in consideration of the premises the Grantor doth hereby transfer and grant unto the Corporation full and free right liberty and license for all times hereafter to carry convey and drain water whether rain tempest spring soakage or seepage water in any quantities through over and along the said land and to discharge the same beyond the said lands and for such purposes and from time to time to construct extend maintain alter repair renew and cleanse open drains pipes and conduits through over long or under the said land AND also full power and authority for the Corporation its surveyors engineers workmen agents and servants with or without horses carts and other vehicles and machinery from time to time and at all times to enter and remain for any of the purposes aforesaid upon the said land as shall be necessary for such purposes and generally to do and perform such acts and things in or upon the said land as may be necessary or proper for or in relation to any of the purposes aforesaid AND the Grantor and the Corporation hereby covenant and agree the one with the other of them as follows:—

1. THAT all works authorised to be carried out hereunder shall be carried out as expeditiously as possible and with as little disturbance to the surface of the said land as possible and immediately upon the completion of any such work the surface of the said land shall be restored as nearly as possible to its original condition.
2. THAT the Corporation will from time to time repair and make good all damage to fences gates or drains upon the said land by the carrying out by the Corporation of any of the works hereinbefore mentioned.
3. THAT the Grantor will not place any buildings erections or fences on the said land or any of them and will not at any time hereafter do or permit or suffer any act whereby the rights powers licenses and liberties hereby granted to the Corporation may be interfered with or affected PROVIDED ALWAYS this provision shall not affect any boundary fence between the land of the Grantor and any adjoining lands.
4. NOTHING herein contained or implied shall be deemed to compel the Corporation to conduct water through the said open drains pipes or conduits and the Corporation may discontinue such drainage and re-commence such drainage at will.
5 THAT nothing herein contained shall be deemed to abrogate limit restrict or abridge any of the rights powers and remedies vested in the Corporation by any statute and in particular by "The Land Drainage Act, 1908" "The Counties Act, 1920" and "The Public Works Act, 1928" or any of them or any amendment thereof or any act or acts passed in substitution therefor.

IN WITNESS whereof these presents have been executed this day of One thousand nine hundred and fifty-four

SIGNED on the day above named by the said A B
in the presence of:—
C.D.
Solicitor.
Hastings.

The Common Seal of the Chairman Councillors and Inhabitants of the County of was pursuant to a resolution of the County Council passed on the day of 1954 hereunto affixed in the presence of: L S.

E.F. Chairman.
G.H. Councillors.
K.L. County Clerk I.J.

Educational Reconciliation.

The conversation was, I think, symptomatic of a deeper cleavage in educational theory. Do we learn to lead adequate and useful lives by being encouraged to *think* or by being taught to *do*? And is the technique of doing, whether in sport or politics or the arts, the basic equipment for life, or are techniques something that one muddleheadedly teaches oneself as a result of specialized thinking and feeling?

There is something to be said, perhaps, on both sides. Technical and vocational education starts from the initial question "How can I earn my living?" Education in thinking first and doing afterwards is the result of asking "How can I fulfil myself?" The United States of America has decided, almost unanimously, to follow the first theory. Europe still clings to the second. Canada, which is in danger of developing a permanent squint by keeping one eye loyally fixed on England, while the other is jealously on the watch for the latest developments in the U.S.A., is perhaps in doubt as to which path to follow when the struggle develops between humanism and efficiency. Perhaps it is Canada's destiny to discover the formula for compromise between the Old World and the New. Or perhaps a better word would be reconciliation. (Eric Newton, "Art and Journalism," from *Saturday Night*, December 5, 1953).

THE UNITED STATES SUPREME COURT

How It Reaches A Decision

By Luther A. Huston.*

The Supreme Court of the United States is called upon to pass decision on issues which affect the whole fabric of American society. The Founding Fathers of that nation intended that the provisions of the U.S. Constitution should be flexible and adaptable to changing conditions. "Decision Monday" thus finds the High Court, as it has been doing since it was established in 1789, not only unravelling the complexities of established law but also breaking new ground concerning the transcendental questions of the age.

Such decisions are announced in the dignified splendour of the High Court's chamber within its white marble building on Capitol Hill in Washington, D.C. The carpets are deep red. The chairs and tables are of rich leather and fine woods. Great Doric columns line the chamber on each side and gleaming brass gates guard the side entrances. The public, including the vast swarm of tourists which views the Court each year, enters through tall doors of softly shining mahogany.

The nine black-robed Justices sit on the high Bench before flowing draperies. The entrance of the Justices is always a high moment on decision days and days when arguments are heard. Lawyers and all others in the Courtroom rise as the clerk intones the announcement that the Court is in session. "God Bless the United States and this honourable Court," he concludes, and the Justices and spectators take their seats.

The places for the Justices are an odd feature of the otherwise sumptuous Courtroom. Each member of the Court has the privilege of selecting his own chair. Some are relatively low-backed, some seem excessively high-backed and they are of assorted shapes and sizes. All are upholstered in black leather.

From them, as the Court convenes, the Justices announce their decisions or question lawyers during arguments. Decision days are usually the most solemnly dignified, argument sessions the most lively, although lawyers appearing before the High Court depend more upon decorous logic than upon forensic antics.

How cases reach the Court and how it reaches decisions is another story. A comprehensively basic definition of the function of the Court would be "to adjust the relationship of the individual to the separate States, of the individual to the United States, of the 48 States to one another and of the States to the United States." This process has been called "keeping the constitutional system in equilibrium."

Except in infrequent cases which arise out of matters over which the Supreme Court has original jurisdiction, such as a dispute between the Federal Government and a State, cases come to the High Court on appeal from decisions of the Circuit Courts of Appeal, the Federal District Courts and the State Courts.

The first thing the Court decides when an appeal comes in is whether it shall hear the case. Unless firm constitutional issues or substantial points of federal law are involved a case has little chance of getting on the docket. If four of the nine Justices feel that the questions involved should be adjudicated, however, the High Court takes the case.

Within three weeks after a case is docketed, the party which brought the action must file briefs. A brief states the issues of the case, recites the actions of the lower Courts, sets forth the reasons why the Supreme Court has jurisdiction, submits the constitutional or legal arguments of the appellant, and cites cases and precedents in support of them.

Respondents also file briefs, usually after they have seen the briefs of the appellant. If the case involves issues of direct concern to the Federal Government, the Solicitor-General of the United States may be permitted to file a brief as *amicus curiae*, or "friend of the Court." Individuals or private groups or corporations whose interests might be affected by the Court's decision also are permitted to come in with such briefs.

When the briefs are all in, they go to each of the Justices. The study of them is an essential part of the process of reaching a decision. The Justices become skilled in knowing what to look for and what to use as a basis for research of their own into the law and the precedents and the constitutional provisions involved.

While cases are under study from the briefs, the law clerks do a great deal of work. Law clerks are an institution of the Court only slightly less necessary than the Justices, although few people ever hear of them as individuals until after they cease to be law clerks.

Many of the Supreme Court law clerks, however, later become famous. Dean Acheson, who was a law clerk of the late Justice Louis D. Brandeis, became U.S. Secretary of State. Francis Biddle, once a clerk of the famous Justice Oliver Wendell Holmes, became Attorney-General of the United States.

Each Justice selects his own law clerks in his own way and uses them in his own way. Much of the research which goes into an opinion written by a Justice is done by the law clerks. They relieve the jurists of certain forms of drudgery but the Justices share the cold, hard labour that goes into the preparation of an opinion. Justice Felix Frankfurter, for example, likes to have law clerks who will argue with him on points of law, on special aspects of the cases and on the phraseology of his opinions. In an important case which the Court decided in the spring of 1953, Justice Frankfurter and his clerks spent months on the research which produced a 15,000-word concurring opinion. Justice Frankfurter's law clerks are selected for him by the Dean of the Harvard Law School and he never sees them until they report for duty. He gets a new pair each year. Other Justices select their clerks personally but most of them also get new ones for each term of the Court.

After the briefs and other documents in a case have been studied, the Justices decide whether or not to hear oral arguments. Usually the Court wants to hear the

* This article appeared in the magazine section of *The New York Times*, one of the leading newspapers in the United States. The writer is a Washington, D.C., staff-correspondent for that newspaper.

alwyers argue. One reason is that arguments give the Justices a chance to ask questions. "The Supreme Court," Justice Robert H. Jackson has observed, "is much given to interrogation."

By means of questions a Justice often develops a line of argument he wants to hear in order to help make up his own mind. Sometimes he helps a floundering lawyer to clarify points which the Justice feels to be important for his colleagues to understand. Such questions almost always provide the liveliest exchanges heard in the Court-room. They take some of the solemnity out of inherently dull proceedings.

The vote itself is the next great step in determining what the opinion of the Court is to be. It is taken at the conferences which are held each Saturday morning while the Court is sitting. The Justices meet in a high-ceilinged, book-lined room. Only the nine members of the Court are allowed in the room while the cases are being discussed or the vote is being taken.

Fred M. Vinson, the Chief Justice, sits at the head of the table. Ranged around him in order of their seniority of appointment to the Court are: Associate Justices Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, Robert H. Jackson, Harold H. Burton, Tom C. Clark, and Sherman Minton. Justice Clark, the youngest in years, is 51; Justice Frankfurter, the eldest, is 70.

Unless he chooses not to, the Chief Justice customarily opens the discussion. Each Justice then proceeds in order of seniority until Justice Minton finishes his turn. When the discussion is over, the Court votes in reverse order of seniority—from Justice Minton back to the Chief Justice.

No Justice ever tells what is said during the discussion of cases. The secrecy of the conference room is inviolate. None but the Justices themselves can say whether they argue calmly or shout and pound the table. No violation of confidence is involved, however, in attributing to more than one Justice the comment that heat generated in the conference room cools quickly when the Court members go to lunch.

After the vote is taken, the Chief Justice, if he is among the majority, designates the Justice who shall write the majority opinion. He may assign himself. If the Chief Justice has voted with the minority, the assignment to write the majority opinion is made by the senior Justice on that side of the issue.

The late Chief Justice Charles Evans Hughes once said that the Chief Justice, by reason of the fact that he may express his views first and has control over the assignment of majority opinions, has a "special opportunity for leadership." That could explain why, at some periods in the history of the Court, its opinions have borne the imprint of the personal and judicial philosophies of its presiding Justice.

The writing of an opinion is the climax of all the work which goes into a case. It is an exacting task into which must go many hours of research, thought, and physical labour. The care taken in the preparation of opinions by most Justices is one of the factors accounting for any delay which ensues between the closing of arguments and the rendering of the decision.

When a Justice—undoubtedly with much help from his law clerks—finally has drafted the majority opinion, it is circulated to all the other Justices. Sometimes the discussion over the verdict then starts all over again. A concurring Justice may think that a point has been over-emphasized or under-emphasized. He may think the phraseology should be changed in some places for purposes of clarity or to close potential loopholes. He may send a memorandum to the colleague who wrote the opinion, or he may drop into his office and talk it over with him. Very often the writer of the opinion is agreeable to the changes.

If a concurring Justice is not satisfied with what the opinion writer has said or the way he said it, however, he is free to write a separate opinion setting forth his own views in the way he wants to express them. This is the rule rather than the exception and accounts for the fact that on decision day it is seldom that a single opinion is handed down.

No one ever assigns a Justice on the minority side to write an opinion. A Justice who wants to write a dissent just goes ahead and does it. He circulates his opinion among those who voted with him against the position of the majority. Sometimes a colleague will join him, but often the colleague wants to dissent in his own words for his own reasons. So he also writes another opinion and on decision day he reads it from the Bench along with all the others.

When all the opinions are prepared, the Justices reassemble in their conference room for a regular Saturday session. They vote then as to whether the ruling of the Court shall be announced the following Monday. Monday is "opinion day" in the Court. Even though all the opinions may be in, however, one of the Justices still may have doubts. If only one of them votes not to announce the opinion on any given Monday it is not announced, and the case is still a "live" one on the Court's docket.

There comes a time, however, when a decision will be reached to hand down the ruling on a specific Monday. But no member of the Court nor any official of it can give positive assurance that the announcement will be made. Thus it was that one recent Monday morning the Justices had donned their robes and actually were ascending the Bench when one of them whispered to the Chief Justice that he had last-minute qualms about a case due for announcement. The opinion in the case was not announced that Monday morning.

Eventually, however, all doubts are resolved, all issues determined, and an opinion is announced which may settle a dispute over a minor Government contract or a grave constitutional question. The nation's highest judicial responsibility has been executed—by a process that Charles Evans Hughes called "distinctly American in conception and function."

Certainty or Justice?

In the course of a lecture delivered at the University of London in 1952, Denning, L.J., said: "The law as I see it has two great objects: to preserve order and to do justice; and the two do not always coincide. Those whose training lies towards order put certainty before justice; whereas those whose training lies towards the redress of grievances put justice before certainty. The right solution lies in keeping the proper balance between the two." ("The Need for a New Equity"). *Current Legal Problems*, 1952, p. 1.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Judges' Salaries—A correspondent has written to Scriblex querying the accuracy of his recent note that the salaries of English Judges have not risen for over one hundred years. In point of fact, they have not risen for one hundred and thirty years, and during that time have actually been reduced. In 1825, the Chief Justice received £10,000, the puisnes £5,500, but these figures dropped in the reign of William IV to £8,000 and £5,000 respectively. The vexed question of Judges' salaries is one to which the Government in this country is ever alive. Never an appointment, but it is accompanied by a Ministerial comment on the financial sacrifice rendered necessary by the ascent from Bar to Bench.

Payments into Court.—What racing journalists are wont to describe us a " bold late run " was attempted by the plaintiff in *Millar* v. *Building Contractors (Luton), Ltd.*, [1953] 2 All E.R. 339. During the course of the trial, Slade, J., observed that he was minded to reject her evidence, but she apparently brooded over this unkind observation until the conclusion of the final addresses, when her counsel informed the Judge, before he delivered his decision, that she had decided to accept the money paid into Court. In England, a plaintiff, who does not take out within the seven days' limit allowed, can do so only in pursuance of an order made before, at, or after the trial. However, in this case, the run was timed too late and the discretion refused. Very unfair to the defendant, thought the Judge.

The Citation of Authority.—In *Birtwistle* v. *Tweedale*, [1953] 2 All E.R. 1598, Somerville, L.J. (with whom Romer, L.J., agreed) said that he was unwilling that reports from the *Estates Gazette* should be cited since they were not by a barrister-in-law. The remaining member of the Court of Appeal (Denning, L.J.) observed : " There are quite enough cases that can be cited." R. E. Megarry, author of *Megarry's Rent Acts*, now in the Seventh Edition, in an article in (1954) *70 Law Quarterly Review*, 246, contended that, if the sole authority upon a point is reported only in the *Estates Gazette* it is hardly an answer to counsel who tries to cite it to say : " You must not cite that because there are many cases in the law reports which you can cite on other points." And he proceeds to show that Lord Hanworth, M.R., Sir Raymond Evershed, M.R., and Roche, Sir Mark Romer, Scrutton, Greene, Slesser, Scott, Clauson, Finlay, Tucker, Bucknill, Asquith, Birkett, and Sir Charles Romer, L.JJ., have all either cited cases from the *Estates Gazette* or concurred in judgments which have done so. As a final and neat *coup de grace* upon the point, Megarry mentions that in *Pickford* v. *Mace*, [1943] K.B. 623, Denning, K.C. (as Denning, L.J., then was) was victorious upon the basis of an earlier dicision of the Court of Appeal to which that Court was referred as " a short note of the decision in a periodical ", which was in fact none other than the *Estates Gazette*.

Megarry's Reputation.—A practitioner visiting England told Scriblex that in February last he dropped into the Old Bailey when R. E. Megarry was charged with tax evasion upon a case so weak that the jury returned a verdict in his favour without waiting to hear evidence for the defence. His counsel (Gilbert Paull, Q.C.) made the visitor feel completely at home when he quoted a review in the New Zealand Law Journal of one of Megarry's books in support of his contention that his client had a world-wide reputation.

A Trifle of Understatement, etc.—There is a ballad that was current after the Borden murder at Massachusetts in 1892. It runs :

Lizzie Borden took an axe
And gave her mother forty whacks ;
And when she saw what she had done
She gave her father forty-one.

The verse was frequently sung to the tune of *Tr-ra-ra-boom-de-ay* ; and memory of it is revived by a New Zealand writer, who, in her autobiography, recalls an episode out of her childhood. It seems that as a trusting youngster she made friends with Lizzie Borden, acquitted of the crime, and a quiet old lady on an adjoining farm. The child's mother, hearing of the friendship, found it difficult to reveal her fears. Finally, she said to the little girl, " You mustn't go through the woods with Miss Borden any more ". " Why not ? " " Well, the truth is that she was once very unkind to her father and mother."

Constructive Desertion.—Advocates of the theory that this is a women's world receive some confirmation, if not actual solace, from the case of *Deery* v. *Deery*, [1954] A.L.R. 262. The wife who might well be described as the teary Deery was the appellant ; and, it was found, on independent evidence, that, while the respondent had been kind and considerate, she, for her part, had developed the uncomfortable habit of upbraiding him in the presence of visitors, flying into violent passions over trivial domestic incidents, shrieking at the children, resenting domestic work, constantly complaining of the surroundings, provoking herself on the slightest pretence into unreasonable actions, and expressing herself usually in Italian—a language better suited to vituperation than Bessarabian, her native tongue. The trial Judge considered that the conduct of the wife, after repeated warnings, evinced an intention to end the matrimonial relationship ; but the Full Court (in the High Court of Australia), with Kitto, J., dissenting, thought otherwise. It was not satisfied that her conduct was such as to show a clear intention on her part to drive her husband away. " His only title to the dissolution of the marriage," said Dixon, C.J., " must depend on her being the deserting party. Temperamental, unstable or other irregular behaviour by one party to a marriage must cause the other party distress and often misery, but the Legislature has not seen fit to make that a ground for divorce, and the concept of constructive desertion cannot be stretched to cover cases of that sort." One of the wife's complaints was that the husband " rationed " sexual intercourse—an oddly bureaucratic note to introduce into matrimonial affairs.

From My Notebook.—" Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present and of the future from access to the enclosure."—Sir Herbert Cozens-Hardy in *Re J. Crosfield and Sons, Ltd.* (1909) 26 R.P.C. 837.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Torrens System; *Unregistered Instruments.*—The plaintiffs claimed specific performance of an agreement dated June 1, 1908, and made between the defendant Mary Jane Sheard of the one part and the plaintiff Miller of the other part, whereby the defendant Mary Jane Sheard contracted to sell, and the plaintiff Miller to purchase some 4.14 acres of land in the Vancouver District in British Columbia. Through certain misapprehensions, the plaintiff Miller, in entering into this agreement, was (in their Lordships' opinion) undoubtedly misled by the register and the certificate of title obtained by the defendant Mary Jane Sheard. Section 74 of the relevant Land Registry Act provided that no instrument . . . purporting to transfer, charge, deal with or affect land or any estate or interest therein (with an immaterial exception) shall pass any estate or interest, either at law or in equity, in such land, until the same shall have been registered. Lord Parker of Waddington said:

> "The agreement of June 1, 1908, was, in their Lordships' opinion, an instrument purporting to affect land, and therefore required registration under s. 74 of the Act. When so registered (but not before) it would confer on the plaintiff Miller an equitable interest his title to which would be registrable in the Register of Charges. On the day after the agreement was signed, the plaintiff Miller lodged an application for the registration of his title to a charge by virtue of the agreement; but in this application he did not, as he ought to have done, state the nature of the interest in respect of which he claimed registration. It is material to consider what this interest really was. It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and in so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract.
>
> "The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance, and if the plaintiff Miller had in his application attempted to define the nature of his interest, he could only so define it. Further, if the Registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase-money, he would have been usurping the function of the Court, and affecting to decide how far the contract ought to be specifically performed . . . At most, therefore, the plaintiff Miller became the registered owner of an interest commensurate with the interest which, under all the circumstances, equity would decree by way of specific performance of the agreement."

The case was *Howard* v. *Miller*, [1914] A.C. 318. The advice of their Lordships included the repayment, by Mary Jane Sheard, of the moneys paid by Miller.

Right of Way.—"The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public. That, however, is not the law of Scotland; and if it can be established that for the necessary period there has in fact been such a use of the way as negatives a mere licence or permission, then, as I understand the law of Scotland that establishes absolutely the right to way in question." Lord Halsbury, in *Macpherson* v. *Scottish Rights of Way and Recreation*, (1888) 13 App. Cas. 744, 746. The District Land Registrar, again, would have yet other views.

Parliament.—"When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed": Lord Macnaghten in *Trevor* v. *Whitworth*, (1887) 12 App. Cas. 409, 437, 438.

"*Irish Bull*"?—"I desire to rest my opinion upon the reasoning of the Master of the Rolls in Ireland. I only wish to add that it would be a strange result if in that country a bankruptcy creditor should be permitted to prove and establish his right to more than twenty shillings in the pound": Lord Halsbury, L.C., in *Deering* v. *Bank of Ireland*, (1886) 12 App.Cas. 20, 28.

LEGAL LITERATURE.

Professional Conduct.

Conduct and Etiquette at the Bar. By W. W. Boulton, B.A., of the Inner Temple, Barrister-at-Law, Secretary to the General Council of the Bar. Pp. vi + 85. London: Butterworth & Co. (Publishers), Ltd. Price, 12s., post free.

While this book is primarily a guide to Conduct and Etiquette at the Bar of England and Wales, with some reference to the Scottish Bar, there is much in it of great interest to New Zealand lawyers. They will, perhaps, be a little astonished at the circumscribed relationship which a barrister is required to maintain with solicitors. Be that as it may, this book, which, while in no sense an official publication, has been prepared by the secretary of the Bar Council, with its consent; and in that sense it may be regarded as authoritative.

The professional code of conduct is largely traditional and unformulated; but a summary of the principal rulings over the years by the General Council of the Bar on matters of professional conduct and etiquette appeared in some volumes of the *Annual Practice*. It is no secret that many of those rulings have been adopted or applied here. Since this last summary appeared in the 1949 edition of "The White Book", many of former rulings have been revised, cancelled, or consolidated, and some important new ones have been added. As the Author says in his Preface, "The objects of the work are first, to provide for the use of the practitioner within a small space, a reasonably comprehensive collection of Council decisions on the numerous matters which fall under the heading of professional conduct and etiquette, supplemented where necessary by authorities from other sources; and secondly, to set out this information as far as possible in a convenient and logical manner for the purposes of reference". A full index has been included to assist in the latter purpose.

The author's skilful grouping of subject matter is worthy of particular mention. We find authoritative rulings on the extent of a barrister's relation with the lay client, and on the many activities, which, while fully reputable in others, would not be proper in a barrister—such exclusions being wider in the case of the practising barrister than in that of the non-practising barrister. In this connection, the rules relating to the prohibition of advertising contain some useful rulings on what a barrister may do, and what he may not do, in writing for the Press or giving interviews and in relation to publicity in a wireless or television broadcast.

This little work will be found most interesting and instructive by every New Zealand practitioner; and it will, we venture to say, be a source of ready reference and application when doubt arises as to the propriety of action in many circumstances of daily life when the principal party concerned is a member of our local Bar. Students, too, will absorb much profit from a perusal of its pages.