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# CONTRIBUTORY NEGLIGENCE: FUNCTION OF JURY IN ASSESSING FAULT.

IN *Laskewitz* v. *Holland and Hanna and Cubitts (N.Z.) Ltd.* (to be reported), there was a motion for a new trial on the ground, *inter alia*, that the jury was in error in limiting the degree of fault attributable to the plaintiff at 20 per cent., and, in this respect, that the verdict of the jury was against the weight of evidence.

The learned trial Judge, McGregor, J., said the question arose in a somewhat acute form as to the function of the Court in interfering with the apportionment of fault by the jury; and, though the question as to what extent a Court of Appeal should interfere with an apportionment of degrees of fault by a trial Judge sitting alone had been authoritatively decided in England in *British Fame (Owners)* v. *Macgregor (Owners), The Macgregor*, [1943] A.C. 197, [1943] 1 All E.R. 33, it did not seem that the Courts in New Zealand have ever been called upon to express a concluded opinion as to the respective function of a jury and the Court in respect of a jury's assessment of fault in a case where a Judge sat with a jury, though the general question seemed to have come before our Courts on several occasions.

In *Hibberds Foundry, Ltd.* v. *Hardy*, [1953] N.Z.L.R. 14, one of the questions arising for decision by the Court of Appeal was whether the verdict of the jury, in fixing the contributory negligence of the plaintiff at the proportion of one-third, was against the weight of evidence.

The learned trial Judge, Gresson, J., dealing with the motion for a new trial, said, at p. 21:

> The jury recognized that plaintiff had been negligent, and had, through his own conduct, materially contributed to the cause of the accident, and the jury reduced the damages as assessed by one-third, having regard to plaintiff's share in the responsibility for the accident. I should myself have apportioned a greater degree of blame to the workman, but it is for the jury to say. The principle, which has been often stated, is that the verdict of a jury cannot be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. To what extent plaintiff's injury was due to the breach by the company of its statutory duty and to what extent it was to be attributed to the folly, or even recklessness, of the plaintiff is for the jury to determine. The apportionment of blame is a matter upon which opinions may vary widely; it is the jury's responsibility, and, unless it is manifest on the evidence as a whole that there has been some error in law or fact, the apportionment cannot be disturbed. I do not think it is competent for the Court to vary the proportions, as fixed by the jury, in which the imprudence of the plaintiff and the company's contravention of the statute contributed to the accident.

On the defendant's appeal from Gresson, J.'s dismissal of the motion for a new trial, the learned Chief Justice, Sir Humphrey O'Leary, in the course of his judgment, at p. 29, said:

> I fail to see how, in ordinary circumstances an appellate Court, or, indeed, the trial Judge, can displace the finding of a jury on this matter. The reduction is made by virtue of s. 3 of the Contributory Negligence Act, 1947, which empowers the Court to say to what extent it is just and equitable, having regard to the claimant's share in the responsibility for the damage, the damages shall be reduced. The question is impossible of ascertainment with mathematical accuracy. It is much a matter of speculation, and the words used ("thinks just and equitable") make it clear that the extent of the reduction is within the discretion of the tribunal of fact. There are no guiding principles to be applied, but it must be remembered that the reduction is the unanimous view of twelve men in respect of whose finding no error in law is pointed to or even suggested, and, in my opinion, the finding cannot be disturbed.

In the course of his judgment, Hutchison, J., at pp. 34, 35, said:

> The submission that there should be a new trial on the issue under the Contributory Negligence Act, 1947, is based on the contention that the verdict on this issue was one that the jury could not properly find, and admittedly, as with other applications for a new trial on the ground stated in R. 276 (*i*) of the Code of Civil Procedure, must be considered on the principles stated in the judgment of this Court in *Petrie* v. *Frank M. Winstone (Merchants), Ltd.*, [1949] N.Z.L.R. 886, 901). While I would probably, like the learned Judge in the Court below, have myself apportioned a greater degree of blame to the respondent, I think on the application of these principles that the jury's apportionment may not be interfered with. I must not be understood to disagree with the view expressed by *Cooke*, J., in his judgment that the question arises as to whether the Court should not be even more reluctant to review an answer of a jury as to apportionment of damages than it is to review an answer to any other issue. I have not found it necessary to consider that.
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> As it has been, to my knowledge, questioned in at least one other case whether the Court may, in any event, order a new trial on the question dealt with by this issue, I think that I should say that I do not think that there is any reason why a new trial should not, in a proper case, be granted on this question. By s. 3 (6) of the Contributory Negligence Act, 1947, it is provided as follows:
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> > Where any case to which subsection one of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.
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> The decision on this matter is to be that of the jury, but so is the verdict in respect of which a new trial may be ordered on the question of damages under R. 276 (c); and I think that the verdict of the jury under the terms of this section as to the extent to which the damages are to be reduced is within the scope of R. 276 (*i*).

Mr. Justice Cooke, in dealing with the question of disturbing the jury's apportionment of the plaintiff's

degree of fault, at p. 29, said :

> That contention gives rise to the question whether there is power to order a new trial of that issue on the ground that the answer to it is against the weight of evidence. In cases in which, for one reason or another, the answer of the jury to some preceding issue relating to negligence is set aside, the answer to an apportionment issue necessarily also falls to the ground. A conclusion of Judge or jury on a question of the apportionment of damages is, however, very much a matter of individual choice or discretion: *British Fame (Owners)* v. *Macgregor (Owners), The Macgregor,* [1943] A.C. 197, 201; [1943] 1 All E.R. 33, 35); and, in cases in which the answers to preceding issues are not disturbed, there may perhaps be some doubt as to whether the words " against the weight of evidence " are always an apt description of the nature of the alleged wrongness of an answer to an issue relating to the apportionment of damages.
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> On the whole, however, I agree with the view of *Hutchison,* J. (*ante,* p. 35, l. 26), that such a case is within the scope of R. 276 (*i*). I observe, too, that the same view was apparently taken by *Stanton,* J., in *White* v. *Tip Top Ice Cream Co. (Wellington), Ltd.,* [1950] N.Z.L.R. 406. I think, however, that the question arises whether the Court should not be even more reluctant to review the answer to an issue relating to the apportionment of damages on the ground that it is against the weight of evidence than it is to review the answer to any other issue on that ground: see *British Fame (Owners)* v. *Macgregor (Owners), The Macgregor,* [1943] A.C. 197; [1943] 1 All E.R. 33; *Boy Andrew (Owners)* v. *St. Rognvald (Owners),* [1948] A.C. 140, *sub nom. Admiralty Commissioners* v. *North of Scotland and Orkney and Shetland Steam Navigation Co., Ltd.,* [1947] 2 All E.R. 350, and *Helson* v. *McKenzies (Cuba Street), Ltd.,* [1950] N.Z.L.R. 878, all of which decisions relate to an assessment by a Judge. I do not think it is necessary to pursue the question in these proceedings because, whether the negligence on the part of the appellant by the statutory negligence referred to in Issue No. 1 (*b*) or the common-law negligence referred to in Issue No. 1 (*a*), or both, I have come to the conclusion that, judged by any test that could possibly be applicable, the answer of the jury to the fourth issue is not one that could properly be interfered with.

In his recent judgment in *Laskewitz's* case, McGregor, J., after holding that the damages awarded were not so large as to warrant interference by the Court, proceeded :

> The second and more difficult matter arises as to whether the apportionment of fault in the answer to Issue (4) is against the weight of evidence. The jury has determined that the plaintiff's share in the responsibility for the accident is 20 per cent. The Contributory Negligence Act, 1947, s. 3 (1), directs that :
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> > Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person . . . the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
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> Subsection 6 of the same section provides :
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> > Where any case . . . is tried by a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

The learned Judge said that if the action had come before him, sitting without a jury, he would have felt bound to find that the plaintiff had been negligent and that the injury suffered by him was the result partly of his own fault, and he would have assessed the plaintiff's share in the responsibility for the damage at a much higher percentage than that assessed by the jury. It seemed to him the weight of evidence was that at the moment of impact, the defendant's truck had stopped, that the plaintiff had a clear space of 13 ft. on either side of the defendant's vehicle to pass through ; that he made no endeavour to stop ; and that, at the time of the impact, he was admittedly, although on his correct side, near the centre line of a road 32 ft. in width of usable surface. He continued :

> It may be, however, that the jury took the view that the defendant's driver was initially on his incorrect side of the road and that his movements thereafter produced a state of uncertainty in the mind of the plaintiff and that there was still uncertainty in the mind of the plaintiff as to the defendant's driver's actions until almost the instant of impact. The evidence as to this uncertainty was somewhat slender, but at the same time there was evidence on which the jury might have so held and might have accepted it as a factor which partly excused the plaintiff for his contribution to the accident. With proper control of the motor-cycle, it does seem to me that the plaintiff should have had an opportunity to stop or steer clear of the defendant's truck, irrespective of the negligence of the defendant's driver.
>
> The question, therefore, arises in a somewhat acute form as to the function of the Court in interfering with the apportionment of fault by the jury. It must be borne in mind that the jury is the appointed tribunal and is peculiarly fitted to decide what apportionment is, in the words of the statute, " just and equitable " although what is equitable to my mind must be, at least to some extent, under the control of the Court and cannot be dependent on the length of the jury's feet.

The learned Judge went on to say that the question as to what extent a Court of Appeal should interfere with the apportionment of degrees of fault by a trial Judge sitting alone had been authoritatively decided in England in *British Fame (Owners)* v. *Macgregor (Owners), The Macgregor,* [1943] A.C. 197, [1943] 1 All E.R. 33, where Viscount Simon, L.C., said, at p. 198 ; 34 :

> It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate Court, while accepting the findings of fact of the Court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial Judge. I do not say that there may not be such cases. I apprehend that if a number of different reasons were given why one ship is to blame, but the Court of Appeal, on examination, found some of these reasons not to be valid, that might have the effect of altering the distribution of the burden. If the trial Judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that, I think, would be a reason for considering whether a change in the distribution should be made on appeal. But, subject to rare exceptions, I submit to the House that, when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare.

This principle, His Honour continued, has been applied to cases of collisions on land. In *Ingram* v. *United Automobile Service, Ltd.,* [1943] 1 K.B. 612; [1943] 2 All E.R. 71, in view of the rule laid down by the Lord Chancellor in *The Macgregor (supra),* Mackinnon, L.J., declined to interfere with the apportionment of blame made by the Judge, although he expressed the view that it would have been kinder to members of the Court of Appeal if the House of Lords had intimated for their guidance what the position under the Contributory Negligence Act should be. In the same case, du Parcq, L.J., expressed the view that it would seem to follow from the decision of the House of Lords in *The Macgregor* case that the Court of Appeal should not interfere with the apportionment of liability made by the Judge at the trial unless there is some error of law or fact in his judgment.

In *The Boy Andrew (Owners)* v. *St. Rognvald (Owners),* [1948] A.C. 140 ; [1947] 2 All E.R. 350, Viscount Simon, L.C., reiterated the principle that an appellate Court should not undertake to alter the proportions fixed by the Judge who tried the case save in exceptional circumstances such as were indicated in *The Macgregor.*

In *Stapley* v. *Gypsum Mines, Ltd.*, [1953] A.C. 663; [1953] 2 All E.R. 478, the House of Lords saw fit to alter the apportionment of blame, but appears to have altered the apportionment as the trial Judge had, in its view, not taken into account the fact that the deceased's wrongful act was deliberate and culpable: see the speech of Lord Reid (*ibid*, 682; 486).

Mr. Justice McGregor observed that a similar matter came before the English Court of Appeal in *Johnson* v. *Stockland Garage*, (1949) 99 L.J. 315, where it was held that apportionmentof liability between joint tortfeasors was a matter for the County Court Judge to determine; and, provided there was some evidence on which he could base his finding, the Court of Appeal ought not to interfere.

His Honour proceeded to say:

> The question seems to have come before the Court in New Zealand on several occasions, but it does not seem that the Court has ever been called on to express a concluded opinion. I do, however, find assistance in the judgment of Cooke, J., in *Hibberds Foundry, Ltd.* v. *Hardy*, ([1953] N.Z.L.R. 14, 38). There the learned Judge, after considering the English cases, agreed with the view of Hutchison, J., that such a case is within the scope of R. 276 (*i*), but further observed:
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> > I think, however, that the question arises whether the Court should not be even more reluctant to review the answer to an issue relating to the apportionment of damages on the ground that it is against the weight of evidence than it is to review the answer to any other issue on that ground.

In view of the English authorities, I respectfully agree with this dictum.

His Honour's conclusion on the matter was as follows:

> It seems to me that where a jury has applied the correct principles in determining whether the plaintiff was in fact negligent in a manner causing or contributing to the accident and it cannot be predicted with reasonable certainty that the jury has based its findings on a wrong application of the law or an error of fact, the Court should refrain from interfering with the jury's apportionment of fault. In view of the fact that the jury has to determine what is just and equitable, it must, I think, have considerable latitude in determining what apportionment it thinks is just and equitable, and the Court should not, in my view, set aside such apportionment unless it is satisfied that the apportionment was perverse or so unreasonable as twelve could not properly find, or unless it is satisfied that the jury has proceeded to consider the matter on wrong principles. In the words of Cooke, J., "A conclusion of a jury on a question of apportionment of damages is, however, very much a matter of individual choice or discretion." In this case, there is no complaint as to misdirection in the summing-up, and in the circumstances of the case, while I would have attributed a greater degree of fault to the plaintiff, I do not feel that the Court would be justified in interfering with the jury's estimate of his degree of fault.

The motion for a new trial was therefore dismissed.

# SUMMARY OF RECENT LAW.

## CHARITABLE TRUST.

*Education—Gift for furthering the "Boy Scouts Movement," by helping to Purchase Camping sites and Outfits.* A testator by his will directed his executors to devote the remainder of the income of his estate to the furthering of the Boy Scouts Movement, by helping to purchase sites for camping, outfits, etc. The Boy Scouts Association, which had general control over the Boy Scouts Movement, was incorporated by royal charter on January 4, 1912, and its purpose was the instruction of "boys of all classes in the principles of discipline, loyalty and good citizenship." *Held*, The purpose for which the Boy Scouts exist is a charitable purpose, within that branch of charity which arises from the purpose being educational, and the Boy Scouts Association, the Boy Scouts Movement and the Boy Scouts Organisation are similarly charitable objects: accordingly, the direction in the testator's will for the devotion of income of the remainder of his estate for furthering the Boy Scouts Movement constituted a good charitable trust. (*Re Alexander* (June 30, 1932) (The Times), applied.) *Re Webber* (*deceased*), *Barclays Bank Ltd.* v. *Webber and Others*, [1954] 3 All E.R. 712 (Ch.D.).

*Testamentary Gift of Residue to Church Trustees "to help in any good work"—Gift not Valid Charitable Trust—Words of Will deemed to include Both Charitable Purposes and Non-Charitable Purposes—Gift upheld with Qualification that Trust Funds be restricted to Charitable Purposes—Trustee Amendment Act, 1935, s. 2.* The remedial effect of s. 2 of the Trustee Amendment Act, 1935, which must receive a literal interpretation, applies not merely to cases where charitable and non-charitable purposes are expressly included, but to cases where the language used in the will is susceptible of comprehending both charitable and non-charitable purposes; so that it applies where the language of the will does not expressly state purposes charitable and non-charitable, but uses such general language that both purposes charitable and purposes non-charitable may be deemed to have been included. The residuary bequest in a will was in the following words: "To hand any surplus to the Trustees of the Church of Christ Wanganui to help in any good work." It was held by *Smith*, J., [1950] N.Z.L.R. 42; [1950] G.L.R. 123, that the gift failed for the uncertainty of its objects. On appeal from that judgment, *Held*, by the Court of Appeal, 1. That a gift in such general terms as "to help in any good work" did not constitute a valid charitable trust; and the meaning of those words in the will was unmodified by the evidence submitted, and, this being so, the gift failed as a charitable disposition. (*Barrell* v. *Fordree*, [1932] A.C. 676; *Muller* v. *Dalgety*, (1909) 9 C.L.R. 693, and *Farley* v. *Westminster Bank, Ltd.*, [1939] A.C. 430; [1939] 3 All E.R. 491, applied.) (*In re Garrard, Gordon* v. *Craigie*, [1907] 1 Ch. 382, and *In re Flinn*, [1948] 1 Ch. 241; [1948] 1 All E.R. 541, distinguished.) (*Union Trustee Co. of Australia, Ltd.* v. *Church of England Property Trust Diocese of Sydney*, (1946) 46 N.S.W. S.R. 298; *Perpetual Trustee Co., Ltd.* v. *King George's Fund for Sailors*, (1949) 50 N.S.W. S.R. 145; *Perrin* v. *Morgan*, [1943] A.C. 399; [1943] 1 All E.R. 187, and *Re How*, [1930] 1 Ch. 66, referred to.) 2. That the words of the will, "to help in any good work," can be, and should be, deemed to include both charitable purposes and non-charitable purposes; that, accordingly, s. 2 of the Trustee Amendment Act, 1935, rescued the gift from invalidity as those words can be deemed to include a charitable purpose or purposes and some non-charitable and invalid purposes; and that the gift should be upheld with the qualification that the trust funds shall be restricted to charitable purposes, so that the trust becomes one for any good and charitable work. (*In re Hollole*, [1945] V.L.R. 295; *In re Belcher*, [1950] V.L.R. 11, distinguished (*Union Trustee Co. of Australia, Ltd.* v. *Church of England Property Trust Diocese of Sydney*, (1946) 46 N.S.W. S.R. 298; *Perpetual Trustee Co., Ltd.* v. *King George's Fund for Sailors*, (1949) 50 N.S.W. S.R. 145, considered.) (*In re Cumming*, [1951] N.Z.L.R. 498, referred to.) Appeal from the judgment of Smith, J., [1950] N.Z.L.R. 42; [1950] G.L.R. 123, allowed.) *In re Ashton* (*deceased*), *Siddall and Others* v. *Gordon*. (C.A. Wellington. October 12, 1954. Gresson, Hay, Turner, JJ.)

## COMPANY LAW.

*Meeting—Quorum—Quorum present when Meeting proceeded to Business but not when Vote taken.* The articles of association of a company limited by shares provided for the modification of rights of shareholders and the holding of separate meetings of any class of shareholders whose rights were intended to be varied. To any such separate meeting the provisions of the articles relating to general meetings were applied, but so that the necessary quorum should be members of the class holding one-third of the capital paid up on the shares of that class. The articles also provided: "52. No business shall be transacted at any general meeting unless a quorum is present when the meeting proceeds to business . . . 53. If within half an hour from the time appointed for the holding of a general meeting a quorum is not present, the meeting . . . shall stand adjourned to the same day in the next week . . . and if at such adjourned meeting a quorum is not present within half an hour from the time appointed

. . . the members present shall be a quorum." At a meeting of a class of shareholders of the company a quorum was present when the meeting proceeded to business, but before a vote was taken on the resolution, one member left, reducing the meeting to less than a quorum. On the question whether the resolution, which received the requisite majority of votes cast, was validly passed, *Held*, Although art. 52 required that a quorum should be present when the meeting proceed to business, it was not necessary that the quorum should also be present when the vote was taken, particularly as this construction of the article was the only one which could prevent there being a gap in the scheme of art. 52 and art. 53; accordingly, the resolution was validly passed. (Dictum of the Lord President in *Henderson* v. *Louttit and Co., Ltd.*, (1894) (21 R. (Ct. of Sess.) 674), not followed.) *Re Hartley Baird, Ltd.*, [1954] 3 All E.R. 695 (Ch.D.)

Oppression of Minority Shareholders. *104 Law Journal*, 646.

*Winding-up—Foreign Bank dissolved abroad—Branch Office inEngland—Debt, balance on Current Account, in Foreign Currency —Proof by Customer in English liquidation—Conversion into English currency—Date at which Conversion to be effected—Bank —Current Account with Branch of Foreign Bank—Dissolution of Bank abroad—Balance due.* A bank, which was incorporated in Russia in 1890, established in 1911 a branch in London. In or about December, 1917, the bank was dissolved under the laws of the Union of Soviet Socialist Republics, but continued business in London until, on February 3, 1922, a petition was presented for its compulsory winding-up in England. On October 24, 1922, an order was made for the compulsory winding-up of the bank. For many years prior to the winding up R. had a current account with the bank at the London branch, and he proved in the winding-up for a balance of some 36,430 roubles due to him as at July 1, 1921. For the purposes of proof it was necessary to convert the sum in roubles into sterling and the question arose at what date the conversion should be effected. *Held*, The appropriate date was that of the commencement of the winding-up of the bank in England in the year 1922 and not that of the dissolution of the bank in Russia at or about the end of the year 1917, because, although a debt expressed in foreign currency should be converted into sterling at the date when it became due (*Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] 2 Ch. 589, and *Madeleine Vionnet et Cie* v. *Wilds*, [1939] 4 All E.R. 136, followed), and although a customer's balance on current account with a banker becomes due when the relationship of banker and customer terminates (dicta of Atkin, L.J., in *Joachimson* v. *Swiss Bank Corpn.*, [1921] 3 K.B. 127, 132, applied) which in the present case happened when the bank was dissolved in Russia, yet for all purposes of the liquidation the dissolution of the bank in Russia was to be ignored (dictum of Lord Atkin in *Russian and English Bank and Florence Montefiore Guedalla* v. *Baring Bros. and Co., Ltd.*, [1936] 1 All E.R 518, applied), and R. having proved in the winding-up must accept for the purposes of the winding-up that the dissolution was to be treated as not having taken place. (*Dicey's Conflict of Laws* (6th Ed.) p. 745, r. 165, para. (3), criticised.) *Re Russian Commercial and Industrial Bank*, [1955] 1 All E.R. 75 (Ch.D.)

## CONTRACT.

Unjust Enrichment. *32 Canadian Bar Review*, 855.

## DEFAMATION.

*Privilege—Communication made by Officer of State in Course of Official Duty—Absolute Privilege—Vexatious Action— Negligence—Failure of Minister of Crown to advise as to Course of Action to be taken by Company—Minister not under Duty to give Advice—Allegation of Negligence struck out of Statement of Claim.* The appellant (plaintiff in the Court below and hereinafter referred to as "the company") at all material times carried on business as a baker. It brought an action against W. (who was sued in his private capacity, but at all material times, he held office as Minister of Industries and Commerce) and McPh. (who was the manager of the Wheat Committee) claiming damages on three separate causes of action: (*a*) an alleged slander in respect of which the company claimed against both defendants (respondents in the Court of Appeal), jointly and severally the sum of £1,000 for damages; (*b*) an alleged false representation in respect of which the company claimed £4,000 for damages; and (*c*) as an alternative to (*b*), alleged negligence in the giving of advice to the company in respect of which the company claimed £4,000 as damages. The false representation and the negligent giving of advice were alleged against W. only, and damages claimed against him only. Each defendant applied for an order striking out the statement of claim and dismissing the action on the ground that the statement of claim disclosed no reasonable cause of action, and that the proceedings were frivolous, vexatious and an abuse of the process of this Court. Upon those applications, Gresson, J., made an order, which, in effect, allowed the first cause of action to stand, but directed that the second and third causes of action be struck out. The company appealed against that part of the order which related to the second and third causes of action, and the first defendant cross-appealed against that part of it which related to the first cause of action. (The judgment of the Court of Appeal did not accordingly affect the second defendant). *Held*, by the Court of Appeal, 1. That W. (hereinafter termed "the Minister") was a high officer of State and publication of the words complained of was one of the steps taken by him in the performance of an act of State in the course of his official duty, and it did not lose that character because it was made to servants and to an agent of the Wheat Committee; and that not even malice would destroy the absolute privilege conferred on the Minister and protecting him in the performance of the act of State which was the subject-matter of the first cause of action. (*Chatterton* v. *Secretary of State for India*, [1895] 2 Q.B. 189, followed.) (*Isaacs and Sons, Ltd.* v. *Cook*, [1925] 2 K.B. 391, applied.) 2. That no amendment of the pleadings could operate to destroy the absolute privilege which protected the Minister in the performance of the act of State which was the subject-matter of the slander alleged as the first cause of action in the statement of claim; and that that part of the statement of claim should be struck out. 3. That allegations in the statement of claim relating to the letter sent by the Minister to a director of the company, were not allegations of proof, which, for the purposes of the present proceedings, the Court was bound to assume to be approved or admitted; and that, as no conceivable interpretation which a jury could put in any words contained in that letter would justify a Judge in interpreting the letter as a representation of any of the matters alleged in the statement of claim as forming the basis of the second cause of action, which was bound to fail; and that the paragraphs in the statement of claim containing those allegations should be struck out. (*Evans* v. *Barclay's Bank and Galloway*, [1924] W.N. 97, distinguished.) *Banbury* v. *Bank of Montreal*, [1918] A.C. 626, 642, referred to). 4. That, as the Minister was not under any duty to give the further advice as to the course of action the company should take (as set out in the statement of claim), the failure to give it could not be regarded as negligence, and the third cause of action, for negligence, could not succeed; and that the paragraphs of the statement of claim relating to it should be struck out. *So held*, by the Court of Appeal, varying the judgment of Gresson, J., by affirming that part of his judgment which related to striking out the paragraphs in the statement of claim relating to the second and third causes of action; and reversing that judgment in so far as it related to the first cause ofaction; with the result that, as far as the first defendant was concerned, the allegations against him on the statement of claim were struck out. *Peerless Bakery, Ltd.* v. *Watts and Another*. (C.A. Wellington, September 17, 1954. Barrowclough, C.J.; Hutchison, McGregor, JJ.)

## DETINUE.

*Proprietary Interest essential—Property had passed to Buyer of Goods—Arrangement to cancel Sale—Seller to collect Goods from Buyer's Agent—Refusal of Agent to deliver up Goods— Cause of Action against Agent.* J. agreed to sell goods to P. and at his request delivered them to W. Differences arose between J. and P. (who had failed to pay the purchase price) and J. offered to take the goods back if P. would pay the cost of their collection. P. accepted that offer and J.'s agent went to W.'s house to collect the goods, but was not permitted to take them. J. claimed against W. in detinue for the return of the goods. *Held*, On delivery to W. at P.'s request, the property in the goods passed to P., and the arrangement whereby the goods were to be collected by J. from W. at P.'s cost did not re-vest the property in J.; and, therefore, at the time of demanding the goods from W., J. had no such right of property in the goods as enabled him to sustain an action in detinue. (Dictum of Court of Appeal in *Rosenthal* v. *Alderton and Sons, Ltd.*, [1946] 1 All E.R. 584, applied.) Appeal allowed. *Jarvis* v. *Williams*, [1955] 1 All E.R. 108 (C.A.).

## LEGAL ANNOUNCEMENTS.

*Concluded from page i*

WANTED by old established South Island City firm qualified man with experience of general work. Definite prospects of partnership and good salary for suitable man. General work. Replies to :—

"CITY PRACTICE,"
C/o P.O. Box 472, WELLINGTON.

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Young Solicitor seeks position with prospects with established firm. Sound knowledge of Conveyancing and Estate Work. Reply to :—

"OMEGA,"
C/o P.O. Box 472, WELLINGTON.

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MESSRS. W. E. LEICESTER, W. B. RAINEY, T. P. MCCARTHY and A. H. ARMOUR who have been practising as Barristers and Solicitors at 125 Featherston Street, Wellington, and at 78 High Street, Lower Hutt, under the firm name of Leicester, Rainey & McCarthy, announce that they have admitted to partnership as from 1st January, 1955, Mr. CYRIL BERTRAM BOOCK, LL.B., who has been a member of their staff for some years. The practice will continue to be carried on as formerly under the name of LEICESTER, RAINEY & MCCARTHY, at the same addresses.

## DIVORCE AND MATRIMONIAL CAUSES.

Collusion. *28 Australian Law Journal*, 373.

*Desertion—Constructive Desertion—Conduct equivalent to Expulsion of other Spouse—Inference of Intention to end consortium—Husband's persistent Cruelty to Wife—Persistence despite Wife's Threats to leave Matrimonial Home—Marriage Act, 1928 (Victoria) (No. 3726 of 1928), s. 75* (b), (d). The parties were married in South Australia in November, 1924. For a number of years the matrimonial relationship was fairly happy, but from 1942 (when the husband returned from the Middle East where he had been serving in the armed forces) until 1948 the husband grossly ill-used and insulted his wife. In April, 1943, she left him for a period of about two months, but was induced to return by promises of amendment, which were, however, promptly and continuously thereafter violated. In July, 1948, after being treated with such violence that the police had to be called in, she asked him to leave, which he did, returning, however, in August, 1948. A few days after his return he forced sexual intercourse on her in circumstances of calculated and revolting indignity, and told her that he was going to use her for the same purpose whenever he wanted to and as often as he wanted to. She then finally left him and, ignoring various letters in which he begged her to return to him but did not express any intention to treat her differently if she did, in October, 1951, presented a petition for divorce on the ground that the husband had without just cause or excuse wilfully deserted her and had continued in desertion for three years and upwards. In September, 1952, she was granted a decree *nisi*. On appeal by the husband, *Held, Prima facie*, a husband who treats his wife with gross brutality may be presumed to intend the consequences of his acts, though the inference may be rebutted; and if the whole of a husband's conduct is such that a reasonable man must know that it will probably result in the departure of his wife from the matrimonial home the fact that the husband did not wish this consequence to ensue does not rebut the inference that he intended the probable consequences of his acts and thus intended his wife to leave the home; in the present case, the husband must have known that his conduct would necessitate his wife leaving him if she acted as a reasonable being, and, therefore, he had constructively deserted her. (*Sickert* v. *Sickert*, [1899] P. 278, and *Edwards* v. *Edwards*, [1948] 1 All E.R. 157, approved.) *Lang* v. *Lang*, [1954] 3 All E.R. 571 (P.C.).

*Desertion—Continuance of Desertion—Determination of Deserted Spouse not to take back Deserting Spouse—Effect.* The parties were married in 1933. On an evening in August, 1950, the husband left the matrimonial home taking a few personal belongings. On August 26, 1950, the husband returned to the matrimonial home to collect some more clothes but found that the locks of the doors had been changed so that he was unable to obtain entry. He sought the aid of a police sergeant, collected his clothes and left. On August 29, the wife's solicitors wrote to the husband: "We have been consulted by your wife whom you deserted . . . and our instructions are to require you to enter into a separation agreement agreeing not to return to the home and to live separate." On September 14 the same solicitors wrote to the wife: "Your husband . . . has agreed to sign the separation agreement and to pay you £2 a week maintenance." The agreement was never in fact signed but the husband sent the wife £2 a week. On December 10, 1953, the husband presented a petition for divorce on the ground of the wife's desertion, the wife denied that she had been guilty of desertion and cross-prayed for a decree on the ground of the husband's desertion when he left the matrimonial home in August, 1950. The husband contended that, although he admittedly deserted the wife when he left the matrimonial home in August, 1950, he had attempted unsuccessfully to resume matrimonial life on August 26, 1950. *Held*, 1. On the facts, the husband had made no attempt to resume matrimonial life and his petition failed. 2. If a husband has recently left his wife and the possibility of his return to her has been decisively negatived by her, then she so rejects her husband as to render herself unable to maintain that she has been deserted by him: (principle derived from *Pratt* v. *Pratt*, [1939] 3 All E.R. 437; *Cohen* v. *Cohen*, [1940] 2 All E.R. 331; and *Harriman* v. *Harriman*, [1909] P. 123, stated and applied); accordingly, as the wife had firmly and decisively rejected her husband, her cross-prayer for divorce on the ground of her husband's desertion failed. (Observations in *Church* v. *Church*, [1952] 2 All E.R. 443, not followed.) 3. Even if the wife's cross-prayer for divorce on the ground of desertion had not failed by reason of any rejection of his return by her, yet, by September 18, 1950, both parties were agreed that they should live apart and, accordingly, the separarion then became consensual, and on this gound also the wife's cross-prayer failed. *Per curiam*: I am not concerned with the position which may arise when a deserted wife determines not to have her husband back but does not make that fact clear to him. *Barnett* v. *Barnett*, [1954] 3 All E.R. 689 (P.D.A.).

As to Refusal by Petitioner to Resume Conjugal Relations, see *10 Halsbury's Laws of England*, 2nd Ed. 657, para. 967; and for Cases, see *27 English and Empire Digest* (Repl.) 347-350, *2877-2896*.

"Discretion" in Divorce Suits. *104 Law Journal*, 659.

*Foreign Decree—Jurisdiction of Foreign Court based on Separate Domicil of Wife and Ninety days' Residence by her—Decree not recognised by English Court.* The parties were married in 1950 in England. The husband's domicil of origin was English. In June, 1951, the parties emigrated to Florida, arriving in the United States on June 26, 1951, where the husband acquired a domicil of choice. In October or November, 1952, the husband returned alone to England with the intention of permanently residing here thereby re-acquiring his English domicil. On July 20, 1953, the wife instituted in Florida proceedings for divorce on the ground of "extreme cruelty," and filed a bill of complaint in which it was alleged, *inter alia*, that she "is a resident of the city of Hollywood, county of Broward, State of Florida, and has been an actual *bona fide* resident of . . . Florida, for more than ninety days last prior to the filing of this bill of complaint for divorce." The husband took no part in those proceedings and on November 3, 1953, the Circuit Court of Florida made a "final decree" dissolving the marriage. By his petition dated May 31, 1954, the husband prayed for a declaration that the marriage was dissolved by the decree of the Circuit Court of Florida. The evidence showed that the jurisdiction of the Florida Court was based on a separate domicil of the wife in Florida plus ninety days' residence there. *Held*, Since the divorce jurisdiction of the English Court depended on the domicil of the parties, the Court would not recognise a divorce decree of a foreign Court made in the exercise of jurisdiction which encroached on that test unless the English Court itself possessed a statutory jurisdiction which so encroached to an equal extent; accordinglym the decree of the Court in Florida would not be recognised, because English law did not accept that a wife could have a domicil separate from her husband or that ninety days' residence by her was sufficient to found a jurisdiction dependent on her residence, and, therefore, the petition would be dismissed. (*Travers* v. *Holley and Holley*, [1953] 2 All E.R. 794, distinguished.) *Dunne* v. *Saban* (*formerly Dunne*), [1954] 3 All E.R. 586 (P.D.A.).

*Nullity—Incapacity of Wife—Practical impossibility of Consummation—Date for Ascertaining—Remediable by Minor Operation without Danger—Nullity—Wilful Refusal to Consummate Marriage—Indecision not Refusal—Refusal distinguished from Neglect. Held*, 1. Where both incapacity and wilful refusal were alleged, it was still necessary for the Court to ascertain the cause of non-consummation and the questions of incapacity and wilful refusal would be considered separately: (observations of Denning, L.J., in *Morgan* v. *Morgan*, [1949] W.N. 250, not applied.) 2. The true test of incapacity was the practical impossibility of consummation, and a spouse must be regarded as incurable if the condition could be remedied by an operation attended by danger or if the spouse at fault refused to submit to an operation (observations of Lord Penzance in *G*—— v. *G*—— (1871) L.R. 2 P. & D. 291, applied): in deciding whether a state of impotency at the date of the marriage and continuing to the date of the action was remediable the Court must take into consideration future medical or surgical treatment which might remove the cause of the disability: (*W.Y.* v. *A.Y.*, [1946] S.C. 27, applied); accordingly, the test whether there as practical impossibility of consummation must be applied in the present case at the date of the hearing of the suit in July, 1954, and, as at that date the wife was willing to undergo and subsequently underwent an operation which remedied the impediment, the husband failed to prove that the marriage had not been consummated owing to the wife's incapacity. 3. Wilful refusal to consummate a marriage implies a conscious act of volition, which is to be distinguished from neglect that may be no more than a failure or an omission to do what has been suggested; in the present case the wife had not come to a settled and definite decision and the husband had failed to prove that she had wilfully refused to consummate the marriage (observations of Lord Jowitt, L.C., in *Horton* v. *Horton*, [1947] 2 All E.R. 874, applied.) 4. Accordingly the husband's petition must be dismissed and the wife would be granted a divorce on the ground of the husband's adultery. *Per curiam*: it was accepted by counsel, and I agree, that wilful refusal to consummate a marriage, if it is to be a ground for rendering a marriage voidable under

s. 8 (1) (*a*) of the Matrimonial Causes Act, 1950, must have persisted up to the date of the presentation of the petition. *S.* v. *S.* (*Otherwise C.*), [1954] 3 All E.R. 736 (P.D.A.).

Variation of Settlements by the Divorce Courts. *28 Australian Law Journal*, 371.

## EQUITY.

*Undue Influence — Voluntary Settlement — By Unmarried Girl shortly after Coming of Age—Parental influence—No independent Advice — Laches — Settlement — Voluntary Settlement—Validity —Undue influence—Settlement by Unmarried Girl shortly after Coming of Age—No independent Advice—Laches—Costs of Trustee.* On June 11, 1940, the settlor attained the age of twenty-one and thereupon became absolutely entitled, under the will of her deceased mother, to funds amounting to about £12,000. At that time the settlor was unmarried and was living with her father. At the father's suggestion, and acting on the advice of the father's solicitor without consulting a solicitor independent of her father, the settlor settled the funds by a deed of settlement, dated July 12, 1940, and made between herself, of the one part, and a bank, as trustee, of the other part. By the terms of the settlement the bank was to hold the trust fund on the statutory protective trusts for the settlor for life, and after her death (subject to any interest appointed by her to a surviving husband)*on trust for her issue, and in default* of issue on certain trusts for her father and brother and the brother's issue. In the event of the failure or determination of all these trusts, the fund was to be held on trust for the testamentary appointees of the settlor or for the settlor. The settlement conferred on the settlor the power to appoint the fund *among* her issue by will or codicil, but not by deed, and the settlor was empowered to revoke or vary all or any of the trusts contained in the settlement, but only with the consent in writing of the bank, which consent should only be given in what the bank deemed to be the best interests of the settlor, and the bank had an absolute discretion to give or withhold the consent as it thought proper without incurring any responsibility in that behalf. The settlement contained no general power of appointment to override the trusts in favour of the settlor's father and brother. At the time when the settlement was executed, the settlor's father was in financial difficulties, but there was no selfish or fraudulent motive on his part in regard to the execution of the settlement. The settlor understood to a certain extent what she was doing, but she was never told that she was not obliged to make the settlement or that it was only one of many alternative arrangements which it was open to her to make. She was under the impression that the bank would look after the money for her and did not understand that the money was to be placed irrevocably beyond her own unfettered control. In 1949 she became aware of objections to the validity of the settlement and during the following years she endeavoured to persuade the bank to consent to the revocation of the trusts and to allow her to receive the fund for herself. On February 27, 1953, the settlor commenced an action for a declaration that the deed of settlement was void. *Held*, 1. A settlement of this character, viz., by a young unmarried woman of the whole of a considerable fortune upon trusts which placed that irrevocably beyond her unfettered control, can only stand if executed after receiving legal advice which is careful, deliberate and wholly independent; on the facts, the settlor's understanding of the settlement at the time of its execution was *imperfect, insufficient time had been given to her consideration* of it and of possible alternatives and she had not had wholly separate independent advice, and accordingly, though her adviser and her father had acted with integrity, the settlement should be set aside. 2. The delay in bringing the action did not, in the circumstances, disentitle the settlor to the relief sought, and the settlement was set aside. (*Allcard* v. *Skinner*, (1887) 36 Ch.D. 145, considered.) 3. In the circumstances, the bank was entitled to its full taxed costs and expenses as though there had been an unexceptionable trust. (*Dutton* v. *Thompson*, (1883), 23 Ch.D. 278, considered.) *Bullock* v. *Lloyds Bank, Ltd. and Another*, [1954] 3 All E.R. 727 (Ch.D.).

## EVIDENCE.

Evidence of a Party Abroad. *98 Solicitors' Journal*, 676.

## GIFT.

*Inter Vivos—Advancement—Father and Children—Evidence to rebut Presumption of Advancement—Subsequent Acts or Events—Allotments of Shares in Names of Children—Shares subsequently sold and Proceeds treated by Father as His own Moneys—Other Provision made for Children—Limitation of Action—Trustee—Father vesting Shares in Children—Subsequent Dealing with Shares and Proceeds of Sale of Shares for his own Benefit.* The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour. In 1929 the deceased and an associate promoted six private limited companies and caused substantial blocks of shares to be allotted to and registered in the names of each of his three children, of whom the two appellants, R. and W., were then aged sixteen and twenty-three years respectively. The children were ignorant of the transactions and never received the share certificates. The companies were very prosperous, and in 1934 a new company was formed to acquire the shares of the existing companies. The deceased procured a power of attorney from the appellants to deal with the shares standing in their names and any dividends on those shares. Under the agreement for sale, R. became entitled to £45,937 10s. in cash and £40,000 in shares of the new company, and W. to £26,737 10s. in cash and £40,000 in shares. R. and W. signed the agreement without understanding what they were doing. The deceased received the cash consideration for the shares of R. and W. in the six original companies, and at various times he sold and received the proceeds of sale of their shares in the new company. He *subsequently placed to the credit of R. and W. respectively* in separate deposit accounts at a bank the amount of the cash consideration for their shares in the original companies and the proceeds of sale of the shares in the new company. At some date in 1934, the deceased obtained the signatures of R. and W. to documents authorising him to withdraw moneys from their deposit accounts: R. and W. were ignorant of the contents of those documents. Without the knowledge of R. or W. the deceased drew on the accounts, which were exhausted by the end of 1936. Some part of the money so withdrawn was used for the benefit of R. and W., but a large part remained unaccounted for. On the deceased's instructions, some dividends declared in 1934 on shares in one of the original companies and also interest on the bank deposit accounts were returned as the income of R. and W. for tax purposes. In an action brought after the deceased's death by R. and W. against the deceased's executors for an account for the proceeds of their shares in the original companies and other relief, *Held*, 1. Apart from the evidence with regard to returns of income for tax purposes (which was admissible as a statement by the deceased against his interest) none of the evidence relating to events which occurred after 1929 was admissible because: (*a*) those events could not be regarded as part of the original transaction as a result of which shares became vested in R. and W. for the events were remote in time and all of them appeared to be wholly independent of the original transaction, and (*b*) as regards the conduct of R. and W., that conduct did not constitute an admission against interest because it was an indispensable condition for such conduct being admissible that it should be performed with knowledge of the material facts. 2. The legal estate in the shares was vested in R. and W. in 1929, and their knowledge or lack in the shares was irrelevant to that vesting; the question whether they became beneficially entitled or not depended on the presumption of their advancement and whether that presumption was or was not rebutted; and the evidence did not rebut the presumption which, therefore, prevailed in their favour. (*Cochrane* v. *Moore*, (1890) 25 Q.B.D. 57, considered.) 3. *The deceased in 1934 received the cash* from the shares in the new company as trustee for R. and W., and could not discharge himself of the trust by purporting to act in some capacity other than trustee in a manner and in circumstances unknown to R. and W.; accordingly, the respondents' plea of the Limitation Act, 1939, failed. (*Devoy* v. *Devoy*, (1857), 3 Sm. & G. 403, explained by *Lord Morton of Henryton*.) (Decision of the Court of Appeal (*sub. nom. Re Shephard (decd.)*, [1953] 2 All E.R. 608, reversed.) *Shephard and Another* v. *Cartwright and Others*, [1954] 3 All E.R. 649 (C.A.).

## HUSBAND AND WIFE.

Legal Proceedings as Necessaries. *104 Law Journal*, 691.

## INCOME TAX.

Income Tax and Deduction of Trade Expenses. *104 Law Journal*, 643.

Income Tax on Sales of Goodwill. *7 Australian Conveyancer and Solicitors' Journal*, 108.

Solicitors and Income Tax. *98 Solicitors' Journal*, 674.

**JUDICIAL CHANGES.**

Lord Porter has retired after sixteen years as a Lord of Appeal in Ordinary.

Lord Justice Somervell has been appointed a Lord of Appeal in Ordinary.

Mr. Justice Parker has been appointed, in succession to Lord Somervell of Harrow, a Lord Justice of Appeal.

**JURY.**

Guessing of Damages by Juries. *28 Australian Law Journal*, 365.

**LAND TRANSFER.**

Building Scheme in Relation to Land Under Torrens Title. *7 Australian Conveyancer and Solicitors' Journal*, 105.

**LEGAL HISTORY.**

Scottish Influence on the English Bar. *32 Canadian Bar Review*, 855.

**LIMITATION OF ACTION.**

Fiduciary Agents Under the Limitation Act. *104 Law Journal*, 661.

**MASTER AND SERVANT.**

*Loss of Service—Harbouring of Servant—Servant's departure in Breach of Contract—Employment by new Master after Notice of Breach—Liability of New Master—Need to prove Damage.* Without giving notice to determine his employment, a servant at the plaintiffs' fried fish bar, employed on a weekly basis at a wage of £8 10s. a week, applied to the defendant for the post of assistant chef at his hotel at a wage of £7 a week. He was engaged subject to permission being given by the labour exchange under the Notification of Vacancies Order, 1952, and on procuring this he started work at the defendant's hotel. On the same evening a director of the plaintiffs, having learnt what had happened, protested to the defendant in person and by letter, but the defendant, acting in the *bona fide* belief that the permission of the labour exchange left him free to employ the servant, retained him in his employment. *Held*, 1. Maliciously harbouring a former servant, who has left another master's employment in breach of his contract of service, by employing or continuing to employ the servant after notice of the breach of his contract or service, is not actionable without proof of damage to the former master flowing from the new employment as distinct from the breach of the contract of service. (*Mary's Case*, (1612), 9 Co. Rep. 111b, and *Bird* v. *Randall*, (1762), 3 Burr. 1345, applied.) 2. In relation to the tort of maliciously harbouring a servant, "maliciously" means knowingly. (*Lumley* v. *Gye*, (1853) 2 E. & B. 216; *Bromage* v. *Prosser*, (1825), 4 B. & C. 247, followed); (*British Industrial Plastics, Ltd.* v. *Ferguson*, [1940] 1 All E.R. 479, distinguished.) 3. On the facts, the plaintiffs had suffered no damage because their former servant would not have returned to them even if he had not been taken into the defendant's employment, and, accordingly, the plaintiffs had no cause of action against the defendant. (*Blake* v. *Lanyon*, (1795), 6 Term. Rep. 221, explained and distinguished.) Appeal dismissed, but on different grounds. *Jones Brothers (Hunstanton) Ltd.* v. *Stevens*, [1954] 3 All E.R. 677 (C.A.).

**MASTER AND SERVANT.**

*Service Contract—Essentials to satisfy Statute of Frauds—Quantum Meruit—Recovery of Wages stipulated in Incomplete Service Contract—Contractual Rate of Remuneration admissible in Evidence—Statute of Frauds*, 1677 (29 Car. 2, c. 10), s. 4. In a service agreement, in order to satisfy s. 4 of the Statute of Frauds, there must be some indication of the general nature of the duties which the servant has to perform, and of his position as an employee in the master's service. (*James* v. *Thomas H. Kent and Co., Ltd.*, [1951] 1 K.B. 531; [1950] 2 All E.R. 1099, and *Pocock* v. *A.D.A.C. Ltd.*, [1952] 1 All E.R. 294), followed.) Either on the basis of implied contract, or by resort to the doctrine of restitution, if the servant has fully performed his part of the contract of which there was no note or memorandum in writing, he is entitled to recover for his services a reasonable remuneration which might be equal to his stipulated wages. (*Scott* v. *Pattison*, [1923] 2 K.B. 723, followed). (*James* v. *Thomas H. Kent and Co., Ltd.*, [1951] 1 K.B. 531; [1950] 2 All E.R. 1099, referred to.) On such a claim, the contractual rate of remuneration is admissible as evidence, because it shows the value which each party has put on the services; but it is not conclusive. (*Scarisbrick* v. *Parkinson*, (1869) 20 L.T. 175, and *Way* v. *Latilla*, [1937] 2 All E.R. 759, followed.) *Tipling* v. *T.P.R. Printing Co., Ltd.* (S.C. Wellington. October 27, 1954. Cooke, J.)

**NUISANCE.**

Oil on the Shore and the Landowner's Remedies. *98 Solicitors' Journal*, 679.

**PROBATE AND ADMINISTRATION.**

*Letters of Administration—Preference to Person seeking Administration* prior petens—*Disclosure of Applicant's Substantial Claim against Estate—Interest incompatible with Due Administration—Need for Consent of Persons* in eodem gradu *with full Prior knowledge of Applicant's Interest—Code of Civil Procedure, R. 531c.* If an applicant for a grant of letters of administration has a substantial claim against the estate, that does not necessarily disentitle him to the grant, and he, as *prior petens*, would ordinarily be preferred; but, unless all parties equally interested in the estate under the intestacy consent to the payment of his claim, he may have an interest incompatible with the due administration of the estate. (*Budd* v. *Silver*, (1813) 2 Phill. 116; 161 E.R. 1094, and *Webb* v. *Needham*, (1823) 1 Add. 494; 162 E.R. 175, followed.) The Court, before making the grant to the applicant, should be assured that the consent of persons *in eodem gradu* to the making of the grant to the applicant has been given with a full appreciation of the fact that the applicant had such an interest as might make it probable that the interest of the estate in disputing the applicant's claim would not be as strongly asserted as it should be. *In re Rosse (deceased)*. (S.C. Palmerston North. November 18, 1954. Barrowclough, C.J.)

**TRUSTS AND TRUSTEES.**

Modification of Trusts: A Successful Application. *98 Solicitors Journal*, 709.

**WILL.**

*Annuity—Rights as to Property charged—Continuing Charge on Income—Gift of Share of Income of Trust Fund to be made up to Minimum Sum.* By his will dated June 2, 1927, a testator who died on February 23, 1929, constituted a residuary trust fund and by cl. 12 directed his trustees to pay one-third of the income thereof to his wife for her life, and continued ". . . if one-third of the income of the trust fund shall in any year during the life of my said wife amount to less than £6,500 per annum free of English income and supertax my trustees shall in respect of that year pay . . . to my said wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of £6,500 free of English income and supertax." By cl. 13, the testator provided that, "Subject to the interest of my said wife in part of the income of the trust fund under the last preceding clause" his trustees should on his son's attaining the age of twenty-five years (which did not happen) hold the income of the trust fund on protective trusts for the son during his life. The testator made dispositions in favour of the son's issue and provided finally by cl. 18, that, "If the trusts hereinbefore declared shall fail or determine then subject to the trusts powers and provisions hereinbefore declared and contained" the trustees should hold the trust fund in trust for such of named persons as were living at such failure or determination. It was claimed that the widow was entitled to a continuing charge on the income of the trust fund during her life in respect of the difference between one-third of the income of the trust fund in any year and £6,500 free of income tax and surtax, and, therefore, that a deficiency in her income in any year ought to be made up out of accumulations of surplus income of previous years and the surplus income of subsequent years. *Held*, On the true construction of the will, the payments to the widow in respect of a year were payable out of the income of the trust fund for that year only, especially in view of the fact that, while it was a characteristic of a continuing charge on income that the charge extended to each and every part of the income, cl. 13 of the will referred to the widow's interest in "part of the income" of the trust fund. *Re Coller's Deed Trusts*, [1937] 3 All E.R. 292, considered.) *Per curiam*: Having regard to the extraordinary incidence of a continuing charge if strictly applied, the Court will be slow to find a continuing charge except in a very clear case. *Re Cameron (deceased). Currie* v. *Milligan and Others*, [1954] 3 All E.R. 329 (Ch.D.)

As to Rights of Annuitant as to Property Charged, see *28 Halsbury's Laws of England*, 2nd Ed., p. 202, para. 369; and for Cases, see *39 English and Empire Digest*, pp. 143-148, Nos. *373-422*.

(*Concluded on p. 32.*)

# THE LEGAL SYSTEM OF SCOTLAND.

## Some Notes.

By W. E. Leicester.

While overseas in 1953, the divorce difficulties confronting a petitioner with a domicil of origin in Scotland and a permanent home in the Malay States led me to confer with counsel in Edinburgh. This conference took place in one of the cubicles off Parliament Hall, the meeting-place of advocates, solicitors, and their clients, where the Parliament of Scotland sat from 1640 until it ceased to exist on its union with England in 1707. Impressed by the majestic beauty of this Hall with its rows of marble figures of great Scots, I decided to spend a short time inquiring into the legal system of which it is the centre. These notes are the result of my questions and of memoranda willingly and graciously furnished.

### I. The Court of Session.

The Court of Session is the supreme court of Scotland and exercises jurisdiction in every kind of civil case. It consists of the Lord President, the Lord Justice-Clerk, and twelve other Judges who are Lords of Council and Session, and bear, in the nature of their duties, a close resemblance to the puisne Judges of our Supreme Court. There are two branches—

(*a*) *The Inner House* or highest appellate tribunal of Scotland which functions as a Court of Appeal from the Outer House and from the inferior Courts. It is composed of eight judges. Its First Division is presided over by the Lord President of the Court of Session who is the principal Judge of Scotland, while the second principal Judge, the Lord Justice-Clerk presides over its Second Division. As a general rule, four Judges sit in each Division and, contrary to our unsatisfactory practice, where there is any equal division of opinion in either Division of the Inner House, cases may be reheard by a specially-constituted Court consisting of five or seven Judges or, where a case is of exceptional difficulty, of the full Court.

(*b*) *The Outer House* composed of six Judges known as Lords Ordinary who sit singly as Judges of first instance. They deal with all manner of cases, as do puisne Judges in this country; but, in Scotland, juries appear to be used mainly in actions for personal wrongs. On this appointment to judicial office, a member of the Faculty of Advocates becomes a junior Lord Ordinary of the Outer House, and, with seniority, he joins one or other of the Divisions of the Inner House.

### II. The High Court of Justiciary.

This usually sits at Edinburgh but it goes on circuit to Glasgow, Aberdeen, Inverness, Dundee, and elsewhere, as occasion requires. It is the main Criminal Court of Scotland; and the Lord President of the Court of Session, when presiding over it, is called the Lord Justice General of Scotland. The remaining thirteen members of the Court of Session are all members of it, and are styled Lord Commissioners of Justiciary. In cases of difficulty or importance, three or more Judges may attend. Juries, like our own, are selected by ballot, but there are material differences: they consist of fifteen men and women; their verdict can be that of a majority; and it is open to them to bring in a "Not Proven" verdict, if they cannot decide between "Guilty" and "Not Guilty."

### III. The Sheriff Court.

There are some sixty of these throughout Scotland presided over by salaried Sheriff-substitutes who resemble our Stipendiary Magistrates save that their jurisdiction, although extending to all local types of cases except divorce, appears to be more limited than that which Magistrates exercise in New Zealand. As Courts of first instance, they differ from our Magistrates' Courts in that an appeal lies from the Sheriff-substitute to the Sheriff, a Queen's Counsel appointed for life by the Crown. Scotland has thirty-three counties grouped into twelve Sheriffdoms in which those of Lanarkshire and the Lothians have a full-time resident Sheriff, while the other ten Sheriffs usually reside in Edinburgh and are entitled to continue their practice at the Bar. In some matters, the Sheriff is required to hear cases at first instance, and he has also the power to require more important cases to come before him and a jury of fifteen. The solemn-sounding Procurator-Fiscal—a name redolent of the grandeur that was Rome—conducts criminal cases for the Crown in each Sheriff's Court. It is fairly common for s Sheriff to be elevated to the Court of Session, but this promotion is not open in practice to a Sheriff-substitute unless he first returns to work at the Bar. Both in the civil and criminal jurisdiction of the Sheriff Court, solicitors have audience and appear there more frequently than counsel.

### IV. Burgh Courts and Justice of the Peace Courts.

Minor crimes and statutory offences are dealt with in these Courts.

### Judges.

Judges of the Court of Session are appointed exclusively from the ranks of advocates, and, by virtue of an Act of the Parliament of Scotland of 1532, become Senators of the College of Justice. On the advice of Cabinet, they are appointed for life by the Queen. As has been said, a Sheriff is in line for promotion to the Bench, as is the Dean or Vice-Dean of the Faculty of Advocates; but, to the highest offices, those of Lord President and Lord Justice-Clerk, Law Officers such as the Lord-Advocate and the Solicitor-General for Scotland (who are always Queen's Counsel) are appointed direct.

The robes of the Judges vary in the two Courts in which they exercise concurrent jurisdiction. In the Court of Session, they are arrayed in maroon robes with scarlet crosses on the facings, while in the High Court of Justiciary the robes are scarlet and the facings white. A subtle and economic distinction in the matter of dress is to be found between the robes of the Lord Justice-

General, who wears ermine facings and those of the Lord Justice-Clerk, who has to be content with white facings punctured with small square holes to represent ermine. The wig, save on ceremonial occasions, is a short one in both Courts. To see a Lord Ordinary, impressively rising from his chair in these striking robes and himself administering the oath to the witness is to have cause to wonder whether the truth ever fails to emerge triumphant in a Scottish Court, even in an affidavit.

### Advocates.

With a status equivalent to that of a barrister in England, an advocate in Scotland is a member of the Faculty of Advocates, which has had upon its roll of membership Dr. Johnson's famous biographer, as well as Sir Walter Scott and Robert Louis Stevenson. The advocate has the right to appear in every court of Scotland, civil, criminal and ecclesiastical, and has, in addition, the right of audience before the House of Lords and the Privy Council. It is considered that the necessity for the advocate to be, as it were, a mental jack-of-all-trades tends to make him more worldly and humane than his more specialized English counterpart: if this is so, a like claim could be made for the New Zealand barrister with his ever-widening sphere of common-law and quasi-judicial work.

In the Court of Session itself, the Lord Advocate as the principal law officer of the Crown is entitled to a seat within the Bar on the right side of the clerk's table; the Dean of Faculty has his seat in the centre of the Bar and comes next in the order of precedence; third ranking goes to the Solicitor-General, who is also within the Bar, and on the left side of the clerk's table. In the outer Bar all other Queen's Counsel and junior counsel are to be found, and there are altogether about a hundred advocates in actual practice. No woman has as yet attained the rank of Queen's Counsel.

In this country, the young law student who has passed his examinations files his notice and in due course prevails upon some senior practitioner to move for his admission. The greatest hazard he encounters is a round of drinks on or shortly after the day he receives his practising certificates. The young intrant in Scotland, however, must not only prepare a Latin thesis, but also defend it to the satisfaction of the majority of the members of Faculty present at a public examination at which the thesis is impugned. Once admitted, he is formally introduced to the Lord President and is required by statute to pay contributions to the Advocates' Widows' Fund, which provides annuities to widows of deceased members of Faculty.

### Solicitors.

Solicitors are not entitled to plead in the Court of Session or in the High Court of Justiciary. They do not concern themselves in general with the drawing and settlement of proceedings or the conduct of litigation; but their interests are fostered by various societies which provide law-libraries and other privileges. One of the finest libraries in Scotland, standing a few yards from the busy intersection in Edinburgh of the Royal Mile and the George IV Bridge, is normally open to members of Writers of the Signet only; but scholars, on a member's recommendation, are permitted to browse among its 160,000 books. Entitled as of right to be notaries public, solicitors after five years in practice are eligible to become Sheriff-substitutes.

### Degrees.

The degree of LL.D. in Scotland is purely honorary and that of LL.M. is unknown. The intrant must show the prescribed attainment in General Scholarship and Law. He is deemed duly qualified in General Scholarship if he holds the degree of Master of Arts of a Scottish University or that of Bachelor of Arts of an English University. All four Scottish Universities (Aberdeen, Edinburgh, St. Andrews, and Glasgow) confer the Bachelor of Law (B.L.) degree. Provided it includes the prescribed subjects, the degree of Bachelor of Laws is a sufficient qualification in law. The only higher degree obtainable by examination is that of Ph.D. in Law. Although solicitors often graduate both in General Scholarship and Law, many content themselves with the qualification in Law alone, which enables them to enrol provided they have served an apprenticeship with a legal firm.

### Law Reports.

The official Law Reports are the Session Cases, which belong to the Faculty of Advocates and contain reports of cases decided in the House of Lords on appeal from Scotland and in the Court of Session and the High Court of Justiciary.

### Appeals.

There is no appeal to the Privy Council, but, when cases go on appeal from either of the Divisions of the Inner House to the House of Lords, there is always one, and sometimes two, Scottish members of the Judicial Committee of that tribunal who sit to hear the appeal. The Court of Criminal Appeal, consisting usually of three or more Lords Commissioners of Justiciary, sits in Edinburgh to hear appeals against conviction or sentence of the High Court of Justiciary. There is no further right of appeal in criminal matters, either to the House of Lords or the Privy Council.

### Practice and Procedure.

The main characteristic of the Scottish system is the avoidance of the expensive English element of specialization and the emphasis upon a simplicity of procedure and a consistency of method that are readily understood. The legal profession is strongly opposed to any attempt on the part of bureaucrats to dispense with the rule of law. Private prosecutions are not permitted, and Departments of the Crown cannot issue proceedings without the approval of the legal officers of the Crown Department given after independent inquiry and report. In the case of serious crime, these inquiries usually made by the Procurator-Fiscal with the assistance of the police are not published. The accused is given a list of Crown witnesses and of exhibits intended to be used against him. There is no publicity concerning the evidence before the trial, and no opening address at the trial. The jury learns of the strength or the weakness of the Crown case when the witnesses testify, and not until then; and counsel make their addresses after the evidence is heard. Whatever this procedure lacks in sensationalism, it more than achieves in fairness; and it dispels that prejudice which at times has, in this Dominion as well as in England, been a blot on our administration of justice.

The Courts of Scotland, with their fusion of law and equity, endeavour to apply the principles of justice with dignity and common sense, and the result has been the creation of a proud and enviable tradition.

# CARRIERS: THE LAW OF COMMON CARRIAGE IN NEW ZEALAND.

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

## I. Carriage of Goods.

The Carriers Act, 1948, represented an attempt to reconcile the concept of common carriage with the circumstances of New Zealand's modern economic development. The attempt was at the best a half-hearted one, and the net result is that an already anomalous branch of the law has been rendered even more unsatisfactory and confused than it was before. The Act has not yet been interpreted, and, until it is, its effect must necessarily be controversial. The purpose of this article is to investigate the origins of the law of common carriage, discuss its development, and assess its operation as modified by the Act.

### History of Common Carrier.

The common carrier is an intruder in our law. He entered it uninvited, and almost by accident. Along with his fellow-intruder, the innkeeper, he is absolutely responsible for the safety of goods entrusted to him, and to this extent he occupies a quite exceptional position in the common law scheme of liability. It has traditionally been supposed that the liability of a common carrier is merely a survival of a liability which, it is assumed, attached in the early common law to all bailees of goods. Both Holmes (in *The Common Law* (Lecture V)) and Holdsworth (in *8 History of English Law*, 452) assert that during the seventeenth century the ordinary bailee was relieved of absolute liability by the development of the concept of negligence, while the common carrier retained this liability because of his public office. This theory has not escaped serious criticism.[1] It is doubtful if the common law ever formulated any concept of absolute liability. A bailor could enforce his rights against a bailee by invoking any one of three separate actions. He could, in the first place, call the bailee to account. The latter could, however, set up a plea that he had been robbed: (1367) Y.B. 41 E. 3, 33, (1478) Y.B. 2 R. 3, 14; *Vere* v. *Smith* (1661) 1 Vent. 121; 86 E.R. 83. The second action was that of detinue, but this lay only for loss of goods and not for damage to them.[2] If liability was ever absolute, therefore, it must have arisen under the third action, that of trespass on the case.[3] Even here the proposition of Holmes is controversial. As the action on the case developed, it came to have annexed to it the concept of negligence.[4] If a bailor were to succeed he had to prove either negligence on the part of the bailee or that the bailee had "assumed" some special duty. *Southcote's Case*, (1601) 4 Co. Rip. 83*b*; 76 E.R. 1061, was the last in which an action was granted to a bailor in the apparent absence of negligence on the part of the bailee: (It is not any plea in detinue to say he was robbed by one such; for he hath his remedy over by trespass.") In *Williams* v. *Hide*, (1628) Palm. 548; 81 E.R. 1214, a bailee, who had been robbed of goods without fault of his own, was discharged in an action brought by the bailor.

The absolute liability of the common carrier must, therefore, be explained on some basis other than that of mere bailment. The correct view seems to be that in the seventeenth century the carrier was considered to have "assumed" a strict liability to take care as part of his "common" or public occupation: *Lane* v. *Cotton*, (1701) 12 Mod. 472; 88 E.R. 1458. It seems that from the earliest times victuallers, taverners, innkeepers, smiths, tailors and carriers were deemed to have undertaken so to perform their functions as to avoid losses due to unskilfulness or lack of attention to business. Fitzherbert says that "if a smith prick my horse with a nail, I shall have my action on the case against him without any warranty by a smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought": Fitz. Nat. Brev., 94*d*. It is clear that liability was not unqualified, and was generally imputed to a tradesman in such cases by reason of bad workmanship or failure to fulfil a duty of care. This duty was probably a stringent one, and it is interesting to see the duty of victuallers resurrected in *Donoghue* v. *Stevenson*, [1932] A.C. 562.

There is no record of an action "on the custom of the realm" in respect of carriers before the sixteenth century. In fact, the earliest mention of carriers is in *Doctor and Student* in 1518, where it is said that "if a common carrier go by the ways that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed, or if he overcharge a horse whereby it falleth into the water, or otherwise, so that the stuff is hurt or impaired, that he may stand charges for his misdeamour": Vol. 2, c. 38. There is no assertion of absolute liability here,[5] nor was there in the case of *Mors* v. *Slue*, (1672) 2 Keb. 866; 3 Keb. 72, 112, 135; 84 E.R. 548, 601, 624, 638, when the Court "agreed the master shall not answer for inevitable damages

[1] See also *2 Pollock and Maitland's History of English Law* (1911) p. 169. Beale, "The Carrier's Liability" in *2 Harvard Law Review*, 159; (1661) 1 Vent. 121.

[2] In a case in 1299 the defendant in detinue for charters tendered the charters without the seals and alleged that robbers had cut off the seals, and on the admission that this had been so the action was dismissed. Pollock and Maitland cite this case in illustration of their conclusion "that already in his (Bracton's) day, English lawyers were becoming familiar with the notion that bailees need not be absolutely responsible for the return of the chattels bailed to them; and that some bailees should perhaps be absolved if they have attained a certain standard of diligence: *op. cit.*, p. 171.

[3] Trespass could be invoked by a bailor against a bailee as early as the 14th century: (1315) Y.B. 48. E. 3, 20-28.

[4] Holdsworth, *op. cit.*, p. 452. Even as early as 1315 it was held that where it had been proved that bailed goods had been stolen the bailee was discharged: (1375) Y.B. 8. E. 2, 275.

[5] But St. Germain's statement does suggest that in the action for account a plea before auditors that the carrier has been robbed did not avail. In *Woodlife's Case*, Popham, C.J., commenting on this view, said that "there is a difference between carriers and other servants and factors, for carriers are paid for their carriage and take upon themselves safely to carry and deliver the things received": (1596) Owen 57. Coke, in his report on *Southcote's case*, said: "but a ferryman, common innkeeper or carrier, who takes for hire, ought to keep the goods in their custody safely and will not be discharged if they are stolen by thieves": (1610) 4 Co. Rep. 83*b*. This view was followed in *Rich* v. *Kneeland*, (1613) Hobart 17 and *Mathews* v. *Hopkins*, (1665) 1 Sid. 244; but these cases were decided before the concept of negligence had completely evolved, and were based on the assumption that the carrier had agreed "to keep safe" the goods, and was liable for his failure to do so. Nevertheless the carrier, as Professor Bordwell puts it, was "a marked man." ("Property in Chattels," in 29 *Harvard Law Review*, 746.)

*nor the owners neither without special undertaking.*" Negligence, allied with an undertaking to keep goods safe, seems then to have been the basis of a common carrier's liability down to the eighteenth century: Holmes, *op. cit.*, 200. The case that deflected the law of carriage was *Coggs* v. *Bernard*, (1703) 2 Ld. Raym. 909; 92 E.R. 107; 1 Sm. L.C. 12th Ed. 191, 203. This was a case of action brought against a gratuitous carrier, and the discussion on the liability of common carriers was therefore *obiter*. The majority of the Court decided on the strict facts, but Lord Holt permitted himself the indulgence of a discourse on the entire law of bailment. The ordinary bailee, he stated, was liable only for negligence. The common carrier, however, he considered to be in a different position:

> "The law charges this person thus entrusted to carry goods *against all events but acts of God and of the enemies of the* King, and this is a politic establishment contrived by the policy of the law for the safety of all persons that they may be safe in the way of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered."

There may be something in the suggestion that the absolute liability of a common carrier was imposed by the Courts because of a habit, more or less prevalent, of carriers arranging with highwaymen to have themselves robbed of their goods, and share in the spoils. Lord Holt's statement would seem to substantiate this conclusion. His view of the law, however, was not upheld in a Court for over half a century: *Beale, ex cit.* As late as 1771, Buller, in his *Nisi Prius*, at p. 69, seems to assume that negligence must be proved against a carrier before he could be held liable. The real change in the law came only with *Forward* v. *Pittard*, (1785) 1 Term Rep. 27; 99 E.R. 953. In this case the plaintiff sued a carrier for loss of goods occasioned by a fire which occurred independently of any default on the part of the carrier. The issue was thus squarely put: was the carrier absolutely liable? Counsel for the plaintiff relied on the language of Lord Holt, while the defendant pleaded that no damages could be granted unless negligence was proved. Lord Mansfield held for the plaintiff, and laid down the liability of a carrier in terms that have clung to the institution to the present time. "A carrier," he said, "is in the nature of an insurer." This liability was said to be imposed by "custom of the realm," and to be independent of contract between the carrier and the owner of the goods.

So the common carrier assumed his present position in our common law[6]; and he did so, if the above analysis is correct, quite fortuitously. His liability, as Professor Beale puts it, is due to "an ignorant extension of a much narrower earlier liability" (*loc. cit.*, 192). Common carriers naturally sought to evade this heavy burden thrust upon them, and the law reports after 1785 are replete with cases in which carriers sought to escape judgment by proving that they had erected notices on their premises negativing or restricting liability.[7] In some of these cases the notices were held to be sufficient, while in others considerable argument was directed to the question whether or not the owner of goods had had the notice directed to his attention so as to make its terms part of the contract of carriage.

[6] See Lord Dunedin in *London and North Western Railway Co.* v. *R Hudson and Sons, Ltd*, [1920] A.C. 324, 333.

[7] The practice of erecting notices was apparently not new even in 1785, as would appear from *Gibbon* v. *Payton*, (1769) 4 Burr. 2298; 98 E.R. 199.

All these cases were very unsatisfactory and it was clearly undesirable that carriers should be able to emancipate themselves, not only from absolute liability, but also from gross negligence, merely by affixing a notice to their warehouses or shops.

The Legislature was accordingly compelled to intervene to put a stop to a practice that was apparently becoming widespread. In 1830 the first Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68) was passed, which is the ancestor of our Carriers Act, 1948. It was enacted that a "common carrier cannot by public notice or declaration limit or anywise affect his liability at common law for any articles or goods carried by him": s. 4. The right of such a carrier to make a "special contract" of carriage was, however expressly reserved: s. 6. It was felt, nevertheless, that if a carrier was to be invested with the character of an insurer he should enjoy some protection in respect of valuable goods wrapped in small parcels. A carrier who filled his wagon with every kind of merchandise could not be expected to know that one of his packages contained Venetian glass. Unless the character of the goods was directed to his attention it was a real imposition to hold him absolutely responsible for their safe carriage. The Act, therefore, sought to limit liability in respect of certain classes of goods, and it did so, as was stated in the preamble, to protect carriers "from great risk which they ran under common law in carrying parcels containing articles of great value in a small compass."

> No common carrier by land [it was enacted] shall be liable for the loss of or injury to any article or articles or property of certain kinds contained in any package delivered to the carrier to be carried for hire or to accompany the person of a passenger in a public conveyance, where the value of such property contained in the package shall exceed £10 unless at the time of the delivering of the package at the carrier's office or to his servant the value and nature of such article or property shall have been declared by the person delivering the package.

A receipt had to be obtained for the goods covered by the Act. These were roughly as follows: valuable documents, money, furs, glass, jewellery, lace, paintings, plate, silks, watches and other items of similar class: s. 1.

The Act was badly drafted and not conspicuously successful in attaining its primary purpose. After a certain amount of confusion in its interpretation, the Courts proceeded from 1832 onwards to support the view that a common carrier could still limit his liability by notice, provided the notice had been brought to the attention of the owner of goods, and could be imported into the contract of carriage: see the advice tendered to the House of Lords by Lord Blackburn in *Peek* v. *North Staffordshire Railway Co.*, (1863) 32 L.J.Q.B. 241, 269; and see, also, the review of the situation by Scrutton, L.J., in *Great Northern Railway Co.* v. *L.E.P. Transport and Depository Ltd.*, [1922] 2 K.B. 742; *Baxendale* v. *G.E.R.*, (1869) L.R. 4 Q.B. 244. During this period the railway was revolutionizing the whole system of inland transport, a development which the Legislature, in speaking in 1830 of "mail contractors and stage coaches," had clearly not envisaged. It became the universal practice of railways to attach to bills of affreightment notices limiting or even completely negativing responsibility for loss or damage occasioned by negligence or otherwise.[8] Further legislation was clearly necessary, and acting upon a suggestion of the learned Judge in *Carr* v. *Lancashire*

[8] Hughes, "The Evolution of the Liability of the Carrier in Modern Railway Law," in 47 *Law Quarterly Review*, 229.

*and Yorkshire Railway Co.*, ((1852) 7 Exch. 707; 155 E.R. 1133), the Legislature in 1854 (17 & 18 Vict. c. 31) enacted the Railway and Canal Traffic Act, 1854 (G.B.), s. 7 of which purported to provide for judicial review of such limitations of liability. "This extraordinary section", as it has been described,[9] was scarcely on the statute book before it incurred criticism from the Bench,[10] yet in substantially the same form it is reproduced in the New Zealand Act of 1948.

The section confirmed the common-law liability of a railway company for "neglect or default in the receiving, forwarding or delivery of goods, notwithstanding any notice or condition to the contrary." To this general assertion that a railway company cannot negative its liability by notice or condition, several complicated provisos were appended, the purport of which is as follows: Nothing was to be "construed to prevent a company from making such conditions with respect to the carriage of goods as shall be adjudged by the Court before whom the matter is tried to be just and reasonable." The effect of this proviso was to qualify the first part of the section. A company could exclude or limit its liability by contract, provided the conditions of the contract were held by the Court to be "just and reasonable." A second proviso, however, limited loss of or injury to certain animals to a figure named in the section "unless a declaration of higher value and a payment of a premium on the excess value has been made." The final proviso, appended to the section quite inconsequentially, prescribed that "no special contract between the company and any other parties respecting the carriage of goods shall be binding unless the same be signed by the party or the person delivering the goods for carriage."

It was not long before the section afforded problems of interpretation; but, as these are referable to the similar sections in our Carriers Act, 1948, a discussion of them may be postponed.

In 1866, the New Zealand Legislature adopted s. 7 of the English Act of 1854; but, instead of limiting its operation to railway and canal companies, it was extended to all common carriers by land or by sea in or around New Zealand: Carriers Act, 1866, 552, 3. The net result has been that while a road carrier in England has remained with his common law liability modified only by the Act of 1830: (*Sutton and Co.* v. *Ciceri and Co.*, (1890) 15 App. Cas. 144; *Price* v. *Union Lighterage Co.*, [1904] 1 K.B. 412), any carrier in New Zealand has been since 1866, restricted in his competence to make special contracts by the provisions relating to judicial review. The 1866 Act was, with a few minor modifications of language, and a division into several sections, reproduced in the Mercantile Law Act, 1880, ss. 25-28. It assumed virtually the same form as the corresponding provisions in the Carriers Act, 1948. Finally, the Mercantile Law Act, 1908, in ss. 17-20, re-enacted the relevant sections of the 1880 Act.

The common law liability of a carrier was not abrogated by the Act but only circumscribed. The effect and object of the enactment, it was stated in *Marsden* v. *Westport Coal Co., Ltd.*, (1910) 29 N.Z.L.R. 787) was "only to prevent a common carrier from contracting himself, in respect of losses occasioned by his neglect or default, out of his common law liability for by notice or otherwise" (*ibid.*, 789). The statement that a common carrier shall be liable for his neglect or default was merely a confirmation of his common law liability for negligence, and in no way affected his liability as an insurer; see also *Andrew Lees, Ltd.* v. *Brightling*, [1921] N.Z.L.R. 144, 149, per Herdman, J. It was also held in a much earlier case on the 1866 Act that the Act of 1830 was in operation in New Zealand, and had not been modified by the subsequent legislation: *Rolleston* v. *Fuhrman*, (1873) 1 N.Z. Jur. 68, followed by Herdman, J., in *Andrew Lees, Ltd.* v. *Brightling*, [1921] N.Z.L.R. 144; *Rees* v. *Mangin*, (1944) 34 M.C.R. 34. In this case it was held that "silk" within the definition of the Act of 1830 included silk stockings and other silk garments. In *S.O.S. Motors, Ltd.* v. *Foxton Borough and Metro-Goldwyn. Mayer (N.Z.) Ltd.*, [1932] N.Z.L.R. 1159; it was held that film was not a "picture" within the Act.

The legal position of a common carrier in New Zealand before the Carriers Act, 1948, might therefore be described in very general terms as follows:—

A common carrier was subject in the first place to the duty of care that is encumbent upon any member of the public. Liability for negligence might, however, as Lord Westbury put it in *Peek* v. *North Staffordshire Railway Co.*, (1863) 32 L.J. 1 Q.B. 241), "be limited by such conditions as the Court or Judge may determine to be just and reasonable, but with this proviso that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract or writing shall be signed by such owner or person?" (*ibid.*, 269). In the second place, the carrier was an insurer of the goods carried. As the power of judicial review appears to have been limited only to contracts excluding negligence, it would seem that the carrier might enter into a special contract totally excluding his liability as an insurer, provided that such special contract was written and signed. Apart from limitation of liability by contract, a carrier was not liable to an amount beyond £10 in respect of loss of or damage to the articles specified in s. 1 of the Carriers Act, 1830, unless the full value of such articles had been declared and a receipt obtained. Nor, under the provisions of the 1908 Act, was he liable for loss or or injury to any horse beyond the amount of £50, to cattle beyond £15, and to sheep and pigs beyond £2, unless there had been both a declaration of value and a payment of an additional premium: s. 20.

(To *be continued.*)

[9] Hughes, *loc. cit.*, p. 229.

[10] Jervis, C.J., in *London and North Western Railway Co.* v. *Dunham*, (1856) 18 C.B. 826; 139 E.R. 1596, described it as "this very obscurely-worded section," while Martin, B., commented in the House of Lords in *Peek* v. *North Staffordshire Railway Co.*, (1863) 32 L.J. Q.B. 241) that "it is needless to comment upon its composition or to speculate how it came to be framed as it is."

# A LAND TRANSFER MORTGAGE.

## Some Special Features.

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

### EFFECT AS SECURITY MERELY.

Section 100 of the Land Transfer Act, 1952, provides that a mortgage under the Land Transfer Act shall take effect as security, but shall *not operate as a transfer* of the estate or interest charged. It thus, in theory at any rate, differs fundamentally from a mortgage under the general law (for example, a mortgage under the Mining Act), which acts as a transfer of the legal estate or interest mortgaged or whatever estate or interest in the land the mortgagor may own.

The late Mr. Justice Adams very neatly applied this principle in the case of *Gallagher* v. *Thomson and Allen*, [1928] G.L.R. 373, which must have produced much dry and technical and very difficult argument. His Honour, at the beginning of his judgment, said :—

> A considerable part of the argument in this case was directed to the question whether the first proviso in clause 21 of the lease is a covenant, the obligation of which runs with the reversion and so falls upon the assigns ; I have reached a conclusion which renders it unnecessary for me to enter upon an inquiry which might obscure the real issues in the case.

It was in the following paragraph that His Honour applied this principle with his characteristic conciseness and sound knowledge of conveyancing. In reading this passage, one should remember that His Honour was referring to the relevant sections in the Land Transfer Act, 1915, and not to those in the Land Transfer Act, 1952 :

> The case against the defendant Allen must also fail. Allen was the owner of an interest as mortgagee under a registered memorandum of mortgage. The nature of this interest is defined in ss. 101 and 102. The mortgage creates a charge upon the land, but does not operate as a transfer of the estate or interest charged. The mortgage conferred upon Allen the power of sale contained in the fourth schedule to the Land Transfer Act with modifications. Under that power of sale he sold the land to Thomson, and executed a transfer of the land to him. Upon registration of that transfer the estate and interest of Davison, the mortgagor, became vested in Thomson by virtue of s. 109 of the Act. Until such registration the legal estate in the land remained vested in Davison. It is plain, therefore, that Allen never became an assignee of the plaintiff's lessor Davison, and he was never bound by the covenant to pay valuation.

In this case it was unsuccessfully sought to make Thomson liable under a covenant by the lessor in an expired lease to pay compensation to the lessee.

### EFFECT UNDER THE LAND TRANSFER ACT OF A MORTGAGE BY ONE JOINT TENANT.

One noteworthy consequence of this principle is that a mortgage of land under the Land Transfer Act by one of two or more joint tenants, does not break or cause a severance of the joint tenancy. Therefore, if the joint tenant who has mortgaged dies before the other joint tenant or tenants, the land will vest in the surviving joint tenant or tenants free of the mortgage. It is for this reason that the conveyancer should never advise a mortgage by one joint tenant as an adequate security.

If, however, the joint tenant who has mortgaged, is the ultimate survivor, then the mortgage becomes an effective security against the *whole* estate. But where one joint tenant mortgages to a stranger and subsequently transfers his estate or interest in the land to the other joint tenant, the transferee is bound by the mortgage, whether or not he survives the transferor ; this is because he claims under the transfer and not by survivorship.

At common law an encumbrance created by a joint tenant (such as a rent charge or *profit a prendre*) which does not pass the estate or interest in the land itself, is not binding on the surviving joint tenant, the applicable maxim being *jus accrescendi praefertur oneribus* : *Lord Abergavenny's Case*, (1607) 6 Co. Rep. 78*b* ; 77 E.R. 373. This rule of the common law, it is submitted, applies to a Land Transfer mortgage.

### ONE JOINT TENANT UNDER THE LAND TRANSFER ACT, 1952 MORTGAGING TO HIS CO-JOINT TENANT.

Excepting homes settled under the Joint Family Homes Act, 1950, and "No-survivorship" titles, there is nothing to prevent one joint tenant from mortgaging to the other. If the mortgagor predeceases the mortgagee, the matter is simple because the mortgagee takes the whole title and the mortgage of the interest would merge in the fee simple, but, if on the other hand, the mortgagee predeceased the mortgagor, then it would appear that, although the mortgagor would take the whole title, he would take it subject to the mortgage, which would then be the property of the legal representative of the deceased mortgagee.

It perhaps remains to be pointed out that, if a mortgagee of the estate or interest of a joint tenant exercises his power of sale, the joint tenancy becomes severed : the interest of the joint tenant which is mortgaged, is transferred to the purchaser by the mortgagee or the Registrar of the Supreme Court as the case may be, and on the registration of that transfer the joint tenancy is effectually broken.

### WIDE DEFINITION OF MORTGAGE UNDER THE LAND TRANSFER ACT.

Another noteworthy feature of the Land Transfer Act, 1952, is the very wide definition of mortgage. It may be used to secure payment of an antecedent debt as well as the repayment of a contemporaneous loan : it may be used to secure the repayment of future advances, or payment or satisfaction of any future debt or unascertained debt or liability, contingent or otherwise. It may also be used to secure payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rentcharge, or sum of money *other than a debt*. Thus it includes a rentcharge, or a charge to include an annuity or other periodical sum which under the general law is not in the form of a conveyance with a proviso for redemption but in the form of a charge. As the late Mr. Goodall pointed out : "The Land Transfer Act in providing

the memorandum of encumbrance as an instrument to secure payment of a sum of money, annuity or rentcharge, has virtually made it a species of mortgage " : *Goodall's Conveyancing in New Zealand*, 2nd Ed. p. 452.

As pointed out by *Goodall* (op. cit.) at p. 451, the statutory form of memorandum of encumbrance provided by Form D in the Second Schedule to the Land Transfer Act, 1952, is no doubt intended to be the Land Transfer or modern counterpart of the deed creating *inter vivos* an annuity charged upon land or a rentcharge. It is also a convenient form of security for periodical payments for the purposes of maintenance pursuant to a family arrangement or yet again on divorce or separation between husband and wife. It may also be used to secure a sum of money, and (as pointed out in (1950) 26 NEW ZEALAND LAW JOURNAL, 171) to secure performance of a personal covenant, or a positive covenant, or a restrictive covenant in gross. (Restrictive covenants appurtenant to land may now be noted against the Land Transfer Register by virtue of s. 126 of the Property Law Act, 1952, if the servient tenement is under the Land Transfer Act).

The other two forms of mortgages prescribed by the Land Transfer Act, 1952, are Form C (which is the one usually employed) and Form E (where the particulars are tabulated), in the Second Schedule to that Act.

" Mortgage " is defined in s. 2 of the Land Transfer Act, 1952 ; and this definition must be read in conjunction with s. 101, which directs that whenever any estate or interest under the Act is intended to be charged with or made security for payment of any money, the registered proprietor shall execute a memorandum in Form C, D or E in the Second Schedule to that Act. Thus there is every opportunity for the conveyancer to exercise his skill and show his versatility in the very flexible form of mortgage and encumbrance provided by the Land Transfer Act, 1952.

ESSENTIALS OF A LAND TRANSFER MORTGAGE.

The essentials of a Land Transfer Mortgage are :

(i) The caption, asserting the proprietorship.

(ii) The contractual part, which sets out what is to be paid and the terms which are to govern the relations of the parties in regard thereto.

(iii) The conclusion by which the charge is created for securing the payment in manner set out. As pointed out in the leading case, *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489, 500 ; [1916] G.L.R. 126, 128, the charge is an essential feature of a mortgage by virtue of the definition. That must always be present.

It is necessary, therefore, to emphasise that the *charge* is an essential element in every Land Transfer mortgage. The form of the charging or operative clause will differ according to whether the instrument is a memorandum of mortgage (*i.e.*, in Form C or Form E) or a memorandum of encumbrance (*i.e.*, in Form D).

If Form C is employed, the charge will read :—

> And for the better securing to the said E. F. there payment in manner aforesaid of the principal sum and interest I hereby mortgage to the said E. F. all my estate and interest in the said land above described.

If Form E is employed the charge will read :—

> And for the better securing to the said the payment of the said principal sum, interest, and other moneys, I (or we) hereby mortgage to the mortgagee all my (or our) estate and interest in the said land above described.

If Form D (the memorandum of encumbrance) is used, the charge after the appropriate recitals set out in the form, will read :—

> do hereby encumber the said land for the benefit of the said C. D. with the sum (annuity or rent charge) of £ to be raised and paid at the times and in the manner following— that is to say,

Then one must be careful to see that the following directions in Form D are precisely set out :—

> (*Here state the times appointed for the payment of the sum, annuity, or rentcharge intended to be secured ; the interest, if any, and the events on which that sum, annuity, or rentcharge shall become and cease to be payable.*)

If these directions are not precisely carried out difficulty may be met when in due course it is sought to discharge the land from the encumbrance. It is often easier in practice to get a memorandum of encumbrance on to the Register than to get it off.

As to the contractual part of the mortgage (which, as in a mortgage under the general law, usually consists of covenants) the parties may as a general rule insert what they please provided that what is inserted does not render the instrument something different from a mortgage within the statutory definition and provided the covenants and conditions are not of such a character as to clog the Register or embarrass the Registrar or to bring into jeopardy the Consolidated Fund. For example, a covenant or condition purporting to clog the equity of redemption (as to which see *Garrow's Real Property in New Zealand*, 4th Ed., 489 *et seq.*) would be inadmissible. Also any provision which is *ex facie* illegal or *contra bonos mores* should also not be inserted. For example, a provision purporting to negative s. 92 of the Property Law Act, 1952. would be inadmissible, for subs. (7) of that section prevents contracting out.

Finally, it may be pointed out that a covenant in a Land Transfer mortgage may refer to documents or instruments not embodied in the Land Transfer Register : *Gibbs* v. *Registrar of Titles*, (1940) 63 C.L.R. 503. Thus a mortgage may refer to the rules of a building society, or to the plans for the building of a new house.

# IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

**The Statute of Frauds.**—Save for the provision that *special promises to answer for the debt, default or miscarriage* of another person must be evidenced in writing, the Statute of Frauds, 1677, is no more in Great Britain, its demise being brought about by the Law Reform (Enforcement of Contracts) Act, 1954. The *Law Quarterly Review* (October, 1954) claims a place as one of the honorary pall-bearers at the funeral upon the ground that, in the very first article in the *Review* in 1885, Mr. Justice Stephen and Sir Frederick Pollock attacked s. 17 (re-enacted substantially in s. 4 of the Sale of Goods Act, 1893) with opprobious epithets, which, presumably on the "*nil nisi bonum*" principle, the journal considers it would be unseemly to repeat. Over the years, however, it has drawn attention to the injustices that the Statute brought about—an instance being in 1927 when the 250th anniversary of the Statute was being celebrated. Writing in this year on the *law of contracts*, Dr. P. H. Winfield observed that it was inevitable that, with the advance of commerce, decisions appropriate to the period shortly after the Statute took effect should often become out of harmony with modern ideas, and should consequently lead nineteenth-century Judges to depart from the older cases by drawing distinctions that appear meticulous. The *Law Quarterly* admits, however, that there are at least some who will be sorry to see it go :

> This does not mean that the Statute will not have any mourners, for the textbook writers and the teachers of law will suffer by its going. In their next editions Cheshire & Fifoot and Anson will each have to sacrifice more than twenty pages. The law teacher will no longer be able to discuss the subtle distinction between a sale of goods and a contract for work, nor will he be able to analyse what constitutes performance within a year. For him many names which he has learned to love will now disappear into the limbo of forgotten cases.

Nothing has been said about the disappearance of the Statute in respect of contracts for the sale or other disposition of land or any interest in land. This may bring about *happier relations between potato-growers* (whose crops, produced by cultivation of the soil, were goods and outside the Statute) and apple-growers (whose crops were the natural produce of the land and within the Statute) if under the contract then ownership passed to the buyer. It is true that the apples still had to be growing on the tree; but, in this country, for some mysterious reason, that is where the apples usually remain.

**Harvest Tales.**—Scriblex concedes that the following two stories are not legal, but they are to be found in the column "A Lawyer on the Land," written by a contributor to the *Law Journal* (London) (12/11/54). They were told at the annual Harvest Home in his district. The first is related by the Bishop of a convivial evening at which all present ate well, drank well and talked well. The courses and the wines continued to circulate until eventually one of the ladies present turned to her husband and said: "Really, Henry! I don't think you ought to drink any more, your face is becoming quite blurred!" And the second is told by a world-famous agricultural scientist who came from Scotland. It appears, he said, that two men boarded a train at King's Cross with Aberdeen as their destination. When the train stopped at Peterborough one of them left his seat, dashed down the platform, and returned just before the train pulled out. When precisely the same thing happened at Grantham, the other man could no longer restrain his curiosity and pointing out that the train was complete with all modern conveniences, inquired as to the reason for these dramatic forays on to the platform. "Well", replied the first passenger "it's like this. I've just been to London to see a heart specialist and he's told me I may drop down dead at any moment—so I'm buying my ticket from station to station as we go along!"

**The Sea's Lure.**—The other day a most uncontrollable witness so angered the Magistrate that he remarked: "I'd like you to realize that you are sailing very close to the wind." "That suits me fine," replied the witness, intoxicated by the exuberance of his own verbosity, "I'm an old salt, I am." And this reminds Scriblex that a correspondent has been good enough to send in some verses by one Andy Logan, appearing in the *New Yorker*, (21/8/54), and having reference to the advertisement of an ex-sailor, an LL.B., who seeks opportunity "outside litigation, anywhere":

> Oh, I must go down to the seas again,
> Come typhoon or come beriberi;
> It's anchors aweigh for all cases *in re*
> And all rattle of writs *certiorari*.
>
> Oh, carry me back to the *status quo ante*,
> Far from the madding *jus strictum*;
> Chant me andante some lawless sea chantey.
> I'm fed up with *obiter dictum*.
>
> Oh I must go down to the seas again
> If I have to plead *habeas corpus*:
> Just give me a bunk where there's no *nunc por tunc*—
> Come back, come back, little porpoise!

**From My Notebook** (Penalties Division).—"I cannot see why this prosecution was brought . . . I can see Justices in a case like this imposing a fine of sixpence."—per Goddard, L.C.J., in *James and Son, Ltd.* v. *Smee*, [1954] 3 All E.R. 273.

"I was not at all impressed with the statement made at the Bar that many persons, including some of the appellant's former colleagues in the Department were shocked at the severity of the sentence. I hope the day will never come when this Court will be influenced in its decisions by popular and uninformed criticism. Nor am I influenced by a recital of the penalties imposed in other cases for similar offences. Some degree of uniformity in sentences is undoubtedly desirable; but that cannot be achieved by the mere citation of other cases without precise information as to the facts involved in them and without the reasons that actuated the Judges who imposed those other sentences".—per Barrowclough, C.J., in *McKechnie* v. *The Police* (5/11/1954).

"Often the very same circumstance is considered by one Judge as a matter of extenuation; but by another as a high aggravation of the crime."—Sir Samuel Romilly, eighteenth century jurist.

# MR. A. E. DOBBIE, S.M.

**Invercargill Farewell on His Retirement.**

On January 20, Mr. A. E. Dobbie, S.M., on his retirement, was bidden farewell by members of the Invercargill Bar in the Magistrate's Court. The deputy-chairman of the Southland Law Society, Mr. E. Preston, spoke on behalf of the Southland practitioners, and he was joined in his remarks by Mr. E. J. Anderson, of the Otago Law Society.

Mr. Preston referred to Mr. Dobbie's long service to the State in the administration of justice. He said that the Magistrate had completed forty years of service in the Justice Department when, in 1944, he had accepted higher office and for ten years he had "faithfully, ably, and zealously discharged the duties of Magistrate in the community."

"The office of Magistrate is one of great importance," continued Mr. Preston. "A Magistrate is called upon to deal with innumerable matters arising out of everyday life of the community, such as certain criminal offences, offences against statute, regulations, and by-laws, civil litigation and licensing committee work. In most of these matters it is essential that decisions be given or punishment awarded without avoidable delay.

"The adequate dispatch of such work calls for a quick and ready mind, a sound grasp of the principles of law, a wide knowledge of humanity and of its virtues and vices, and a keen sense of justice tempered nevertheless with kindness and mercy where such are merited. All these attributes it is felt, sir, you have shown yourself to possess.

"The general tone and spirit of a community may well be influenced by the manner in which, in its local Courts, justice is administered, and we are sure this community has much to thank you for in that respect.

"The Magistrates' Court to-day, by reason of its extended jurisdiction, is often called upon to decide many important questions of law, and it is a matter for congratulation, and we do congratulate you, sir, that you have not ever been reversed on any appeal from your decisions.

"It is appropriate to mention, here, your Worship, as indicative of your deep interest in and devotion to the law that excellent book *Dobbie's Probate and Administration Practice in New Zealand*. It is to-day a standard text-book in New Zealand law offices, and will be a lasting monument to your service to the practice of law in this Dominion.

"The profession has enjoyed a friendly and courteous relationship with you, both as a Magistrate and as a man. You have been at all times readily approachable and it is with regret that we must now see you step down from the Bench.

"May I assure you, sir, that you will take with you into your retirement the respect and the best wishes of the profession and their hope that you and Mrs. Dobbie will enjoy many serene and happy years after a working-life well spent in the service of the community."

MR. DOBBIE REPLIES.

"For me this is a grand day, to see you all assembled here to bid me farewell and to extend your felicitations to me for the long and arduous service I have been privileged to give in the cause of justice," said Mr. Dobbie.

"It has been a pleasant service, for during it I have met and enjoyed the friendship of many estimable gentlemen practising at the Bar, some of whom have later accepted judicial office.

"In New Zealand the people honestly and earnestly entertain a great respect for the law and the administration of it. They do this because they believe the law to be just and to be honestly administered. Upon us all depends the maintenance of that high regard and a continuance of its justification. Fair dealings should remain the foundation of our British way of life.

"Now I come to my hardest task—to express adequately my gratitude and thanks to you, Mr. Preston, and Mr. Anderson, for the more than generous tribute which you paid me and my work. To all my well-wishers, for their messages of goodwill and to you particularly, the members of the Southland Bar, for the confidence you have always placed in me during the years I have had the pleasure of presiding on the Bench, to you and all I thank you from the bottom of my heart."

Mr. Dobbie thanked the Police officers and Traffic officers for the efficient and pleasant way in which they had presented their cases, and he paid a tribute to the fine work of Senior-Sergeant Howes and Detective-Sergeant McDougall. "I cannot help but admire their efficiency and their great pains to be fair to an accused person."

He also thanked the Child Welfare officers, the members of the Licensing Committees, his colleague Mr. D. Mepherson, on the Land Valuation Committee, and the Registrar and his staff for their loyal co-operation in the smooth running of the Court.

After paying a tribute to the Press for their accurate reporting, Mr. Dobbie said, in reference to the suppression of the names of offenders, that he thought the freedom of the Press should be jealously guarded. "There is no doubt in my mind that the risk of publication of names is an important deterrent in the prevention of crime."

After wishing all present the best in the future, Mr. Dobbie went down into the body of the Court and took his leave in a more personal manner.

## SUMMARY OF RECENT LAW.

*(Concluded from p. 23)*

### WORKERS' COMPENSATION—APPORTIONMENT OF COMPENSATION.

*Deceased leaving Widow and Two Children—Court's Unfettered Power to make Exclusive Allotments or to establish a Class Fund or to use Combination of Them—Class-fund Order made—Workers' Compensation Act, 1922, s. 52 (4)—Workers' Compensation Amendment Act, 1952, s. 16 (2) (11).* Under s. 16 (2) of the Workers' Compensation Amendment Act, 1952, the Court has an unfettered discretion, either to make exclusive allotments or to establish a class fund, or to use a combination of the two. In making an order under s. 16 (11), the Court is not limited to a mere consideration of probable future needs or of respective degrees of dependency: it is entitled to do equity upon a consideration of all the circumstances, and may direct its mind to the fair and just distribution of capital. Where the total fund to be apportioned is not likely to be exhausted by mere maintenance, the residual capital benefit should be so distributed as to do justice to all concerned, taking into account any other gains consequent on the death. The dependants of the deceased worker were his widow, the plaintiff, aged thirty-three years, and two children. The plaintiff was the sole beneficiary under his will, and, in consequence, was possessed of an unencumbered home valued for death-duty purposes at £1,365 (and really worth £2,000), of the deceased's one-half interest (valued at £175) in furniture and effects, and of the sum of £104 in the bank. In addition she had her own half-interest in the furniture, which brought the value of her assets to approximately £2,450. The compensation payable amounted to about £2,525. On motion for apportionment of that sum: *Held*, 1. That it was appropriate in this case, subject to payments for funeral expenses and the plaintiff's costs, that the whole fund should, in terms of s. 16 (2) (*b*) of the Workers' Compensation Amendment Act, 1952, be held by the Public Trustee as a class fund for the benefit of the plaintiff and the two children. 2. That such an order made formally under s. 52 (4) of the Workers' Compensation Act, 1922, rendered it necessary at that stage to consider what effect should be given to the widow's gain under the deceased's will, or to the possibility of the widow's re-marriage, or to the contingencies of ill health or death of any of the dependants, or to the disparity in the ages of the children; these matters, and all other matters relevant to capital distribution, were left open for decision at some future date when decision on them should become necessary. *O'Connor* v. *Attorney-General*. (S.C. Christchurch. November 1, 1954. F. B. Adams, J.)