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MASTER AND SERVANT: EMPLOYER'S CLAIM AGAINST NEGLIGENT EMPLOYEE.

WHEN, last year, we considered the judgment of the Court of Appeal in *Romford Ice and Cold Storage Co. Ltd.* v. *Lister* [1956] 2 Q.B. 180; [1955] 3 All E.R. 460, we were not aware that the matter was being taken to the House of Lords by the unsuccessful appellant: see (1956) 32 N.Z.L.J. 130.

The undisputed facts were that the appellant, a lorry-driver in the employ of the respondent company, taking his father (a fellow-employee) with him as a mate, drove a motor lorry to a slaughterhouse to collect some waste in the course of his service with the company. After driving into the slaughterhouse yard, he backed the lorry, and in so doing injured his father, who brought an action against the company for personal injuries caused by the son's negligence. McNair J. gave judgment against the company for the father, whom he found one-third to blame, and awarded him £1,600 damages and costs.

The company was insured under an employer's liability policy at Lloyds, which contained a clause permitting the underwriters to prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise, and to have full conduct of the proceedings.

In the name of the employer company the underwriters of the employer's liability policy issued against the lorry-driver a writ claiming damages in the amount paid under the policy to the father for the breach of an implied term in the lorry-driver's contract of service with the company that he would use reasonable care and skill in driving his employer's lorry. The effective plaintiffs were the insurers, who instituted the proceedings without the knowledge of the employer-company. Ormerod J. gave judgment for the nominal plaintiffs for the full sum claimed. The employee appealed.

It will be remembered that the Court of Appeal by a majority (Birkett and Romer L.JJ., Denning L.J. dissenting) held that the lorry-driver was liable to his employers for the damages recovered by a fellow-employee, his liability being founded in breach of contract; to be more precise, in breach of an implied condition in his contract of employment to use reasonable care in his work for his employer. At the time, we said that the judgment raised some questions of great interest and of great difficulty in relation to principles governing the relationship of master and servant.

Now, the House of Lords, in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*, [1957] 1 All E.R. 125, again by a majority, (Viscount Simonds, Lord Morton of Henryton, and Lord Tucker, with Lord Radcliffe and Lord Somervell of Harrow dissenting) have upheld the decision of the majority of the Court of Appeal. Again, the deciding factor was whether or not certain terms are to be implied in every contract of service between employee and employer.

The contest, in its simplest terms, was whether there is implied in the contract of employment:

(*a*) a term that the employee will carry out his duties under the contract with reasonable care and skill.

(In such a case, if, by reason of his negligence, the employee commits a breach of that implied term, the employer (or his insurance indemnifier) would be entitled to recover from the employee damages for breach of contract (normally, the totality of damages and costs which the employer has had to pay a third party, including a fellow-servant) as damages arising out of such negligence).

(*b*) a term that the employer will not seek contribution or indemnity from the employee, if the employer is insured against any loss or damage occasioned by the employee's negligence causing injury to a third party (including a fellow-servant), or if the employer, as a reasonable and prudent person, ought to have been insured against the risk of an employee's negligence.

(In such a case, it would be a necessary implication in the contract of employment that the employer's insurer, after paying in pursuance of its employer's indemnity policy the damages awarded to a third party in consequence of the employee negligence, could not turn around and bring an action against the employee to recover the amount which it had paid under the policy when the employee was not indemnified by statute or otherwise.)

All their Lordships accepted the proposition that a servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract.

On the second proposition, their Lordships, by a majority, held that no such term as was pleaded can be implied in the contract of employment; and that the employer is not deprived of his remedy in damages against the employee for his breach of duty of care.

The minority of their Lordships were of the opinion that the second proposition was sound; and they did not consider it to be inconsistent with, or contradictory to, the first one on which they were all agreed.

In the course of his speech, Viscount Simonds observed that any decision on the questions arising on the appeal, which had divided learned Judges in the Court below and on which their Lordships were also divided, might have far-reaching consequences.

I.—The Effect of the Judgment.

There is no room for doubt that their Lordships' judgment has far-reaching consequences; because, when it is read in its application to New Zealand conditions, it applies to the relations between master and servant in all conditions of industry where a servant owes a contractual duty of care to his master, save and except payment by an employer of damages to third persons arising from negligence in the driving by a licensed driver of his master's motor-vehicles; because, in this country, such a driver is deemed to be fully indemnified against liability to pay damages in respect of injuries to third persons: Transport Act 1949, s. 67 (1).*

It follows that, although the negligent act with which their Lordships were dealing in the *Romford* case was performed by a lorry-driver while driving his employer's motor lorry, it is not that fact which is important for our purposes here. What is important is that the principle enunciated in the speeches of their Lordships of the majority is applicable in New Zealand to every other type of accident causing injury to others arising from a negligent act in the course of a worker's employment—e.g., in factories or on farms, in ships or on the waterside—and for which, at common law, his master is vicariously liable.

The negligent driving of the lorry in the *Romford* case—and this must be stressed—thus becomes merely an illustration of the application of the principle. The question their Lordships decided, in its simplest terms, is that a master has right of recourse against the property of a negligent workman if the act of that workman, in the course of his employment, in breach of the implied condition in his contract of service that he will use reasonable care and skill in performing his duties, has involved his master in the payment of damages to some third person—unless the workman himself is indemnified.

In reading their Lordships' speeches in the *Romford* case, the "tie up" with the Road Traffic Act 1930 (U.K.) can be disregarded. It must also be remembered that the employer had paid the damages arising from the employee's negligent act; and, although the action was brought in the employer's name, it was, in fact, the action of the insurer which had paid the damages brought under the right of subrogation given it by the policy. The employers specifically stated in evidence that they had had no intention of taking action against their employee, and the action taken (by the insurer) was taken without the employer having any say in the matter.

In the Third Edition of *Negligence on the Highway* (shortly to be published), Dr. O. C. Mazengarb Q.C., at pp. 153 to 157, after describing the steps by which the law on this topic has reached its present stage, says that this question of the power of a master's insurers to require a negligent servant to reimburse the employer for any loss he sustains "has leapt into the forefront of current forensic discussion." "Modern industrialists," he continues, "show a commendable desire to preserve harmonious relations with their employees; but the insurers look at the matter through different spectacles."

Although the common law is now settled by the judgment of the majority of their Lordships' House in the *Romford Ice and Cold Storage* case, Dr. Mazengarb points out that this does not prejudicially affect the position of a servant who is indemnified (by statute or otherwise) against the consequences of bodily injuries to third parties. Thus, s. 67 (1) of the Transport Act 1949 provides in part as follows:

> If at the time of any accident affecting a motor-vehicle any person other than the owner is in charge thereof with the authority of the owner, that person shall, if he is the holder of a motor-driver's licence in force under Part II of this Act, be indemnified to the same extent as if he were the owner in respect of his liability (if any) to pay damages on account of the accident.

"But," says Dr. Mazengarb, the [*Romford*] judgment invites serious consideration in those jurisdictions where there is no statutory indemnity, and, in all jurisdictions where the master's insurance does not extend to accidents happening off the highway or does not cover damage done to property, passengers, or persons entering or alighting from a vehicle. In all such cases, the insurers can sue the negligent servant to recover back the money they are obliged to pay to the person injured."

We add that the *Romford* judgment goes much further. The decision of the House of Lords will undoubtedly be studied by trade-union officials, and by workers in factories, mines, and ships. As Denning L.J. said in his dissenting judgment in the Court of Appeal, [1956] 2 Q.B. 180, 186; [1955] 3 All E.R. 460, 463, there was until very recently never a case of the kind recorded. Many a master has been made responsible for the mistakes of his servants, but never has he sought to get contribution or indemnity from them. He continued:

> One obvious reason is that it is not worth while . . . The other reason is no doubt the reluctance of a good master to visit the risks of accidents on to his servants. The risks should be borne by the undertaking as a whole rather than by a servant who happens to make a mistake, especially when he is working his master's machine. The master takes the profits from using the machine, and should bear the responsibility for the damage it does, even though the damage would not happen without some human error. It seems that these reasons no longer commend themselves to employers, or rather to their insurers . . . .

The master is not allowed to make any deduction from his servant's wages; and, the learned Lord Justice said, it would seem the extreme of harshness to seize his savings or make him bankrupt.

A new era in industrial relations will be entered upon if the insurers of large industrial enterprises in New Zealand, relying on the authority of the House of Lords' judgment, start suing employees (directly, or at second-hand as in the *Romford* case) for the moneys which the insurers of employers pay to people who have been injured by the negligence of employees in the course of their employment. We need not dwell on the far-reaching and serious consequences which would inevitably ensue. As Denning L.J. said: "Nothing could be more detrimental to good relations between an employer and his servants. Nothing could be

**Sed quaere*, as to the indemnity of the licensed driver in respect of claims against the *owner* of a motor-vehicle for contribution under s. 17 (1) of the Law Reform Act 1936: see the Transport Act 1949, s. 70 (5).

further from the contemplation of the parties (*ibid.* 192, 467).

II.—The Majority View.

In his speech, Viscount Simonds discussed, first, the question which divided the Court of Appeal: what, if any, were the terms to be implied in the contract of service between the parties. He continued:

> It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by Willes J., in *Harmer* v. *Cornelius* (1858) 5 C.B.N.S. 236, 246, has never been questioned:
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> > "When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes,—*Spondes peritiam artis.* Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts . . . . An express promise or express representation in the particular case is not necessary."
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> I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case; on the contrary, "possess" and "exercise" are there conjoined? Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for "skill" is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty.

The learned Viscount went on to say that it did not appear to him to make any difference to the determination of any substantive issue in the case before their Lordship's House whether the respondents' cause of action lay in tort or breach of contract. But, he said that he concurred in what he understood to be the unanimous opinion of their Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that present case (apart from any defence) was such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this, the negligence of a servant in performance of his duty is a clear example.

His Lordship concluded his comment on the first stage of the argument by saying that the appellant was under a contractual obligation of care in the performance of his duty, that he committed a breach of it, that the respondents thereby suffered damage, and they were entitled to recover that damage from him, unless it was shown either than the damage is too remote or that there is some other intervening factor which precludes the recovery.

It had been pleaded that there was an implied term in the contract of employment that the servant should receive the benefit of any contract of insurance effected by the employer and covering the employer's liability in respect of actions brought by third parties.

Viscount Simonds continued:

> This is the plea which found favour with Denning L.J., and the argument was put so simply and cogently by him that I venture to quote his judgment [1955] 3 All E.R. 460, 467:
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> > "Take this very case where the insurers issue a writ in the employer's name against the servant without consulting either the employer or the servant beforehand. When the servant receives the writ he will take it to his employer and say 'Why are you suing me? Surely you have got the money from your insurance company. So you cannot sue me.' This natural comment between master and man throws a flood of light on the implied understanding of the parties."
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> A little later he says:
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> > "This shows that there is an implied term in these cases whereby, if the employer is insured, he will not seek to recover contribution or indemnity from the servant."
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> It will be observed that the implied term which thus commended itself to the learned Lord Justice is limited in its scope. The driver is to be relieved from liability if his master is covered by insurance against the claim.

It was argued, for the employee appellant, that the driver was entitled to be indemnified not only if the employer was in fact insured or was required by law to be insured, but also if he ought, as a reasonable and prudent man, to have been insured against the risk in question. It was in this form, that the implied term was submitted to their Lordships.

His Lordship went on to say:

> No qualification of this general proposition was suggested. The driver might owe a duty of care to his employer, but for any dereliction from duty he was to be absolved from all responsibility. Nor was it suggested that, in the present case, there were any features which distinguished the relation of the appellant and the respondents from that of any other driver and his employer. That is why, at the outset of this opinion, I said that this appeal raises a question of general importance. For the real question becomes not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction or course of business.
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> We have to take a wider view, for we are concerned with a general question, which, if not correctly described as a question of status, yet can only be answered by considering the relation in which the drivers of motor vehicles and their employers generally stand to each other. Just as the duty of care, rightly regarded as a contractual obligation, is imposed on the servant, or the duty not to disclose confidential information (see *Robb* v. *Green* [1895] 2 Q.B. 315), or the duty not to betray secret processes (see *Amber Size and Chemical Co., Ltd.* v. *Menzel* [1913] 2 Ch. 239), just as the duty is imposed on the master not to require his servant to do any illegal act, just so the question must be asked and answered whether, in the world in which we live today, it is a necessary condition of the relation of master and man that the master should, to use a broad colloquialism, look after the whole matter of insurance . . . The solution of the problem rests, not on the implication of a term in a particular contract of service, but on more general considerations.
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> As a general proposition it has not, I think, been questioned for nearly two hundred years that, in determining the rights *inter se* of A and B, the fact that one or other of them is insured is to be disregarded: see, e.g., *Mason* v. *Sainsbury* (1782) 3 Doug. K.B. 61. This general proposition, no doubt, applies if A is a master and B his man; but its application to a case or class of case must yield to an express or implied term to the contrary, and, as the question is whether that term should be implied, I am not constrained by an assertion of the general proposition to deny the possible exception. Yet I cannot wholly ignore a principle so widely applicable as that a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man.

Probably the most interesting feature of the division in their Lordships' views, is their evaluation of the present state of the common law in relation to a master's insuring his workman against the consequences of the workman's negligence. On this point Viscount Simonds said:

> If it has become part of the common law of England that, as between the employer and driver of a motor vehicle, it is the duty of the former to look after the whole matter of insurance (an expression which I have used compendiously to describe the plea as finally submitted), must not that duty be more precisely defined? It may be answered that in other relationships duties are imposed by law which can only be stated in general terms. Partners owe a duty of faithfulness to each other; what that duty involves in any particular case can only be determined in the light of all its circumstances. Other exam les in other branches of the

law may occur to your Lordships where a general duty is presented and its scope falls to be determined partly by the general custom of the country which is the basis of the law and partly, perhaps by equitable considerations; but even so, the determination must rest on evidence of the custom or on such broad equitable considerations as have from early times guided a court of equity. . . .

Another argument was, at this stage, adduced which appeared to me to have some weight. For just as it was urged that a term could not be implied unless it could be defined with precision, so its existence was denied if it could not be shown when it came to birth. Here, it was said, was a duty alleged to arise out of the relation of master and servant in this special sphere of employment which was imposed by the common law. When, then, did it first arise? Not, surely, when the first country squire exchanged his carriage and horses for a motor car or the first haulage contractor bought a motor lorry. Was it then the practice of insurance against third-party risk became so common that it was to be expected of the reasonable man, or was it only when the Act of 1930 made compulsory and, therefore, universal what had previously been reasonable and usual?

Then, again, the familiar argument was heard asking where the line is to be drawn. The driver of a motor car is not the only man in charge of an engine which, if carelessly used, may endanger and injure third parties. The man in charge of a crane was given as an example. If he, by his negligence, injures a third party who then makes his employer vicariously liable, is he entitled to assume that his employer has covered himself by insurance and will indemnify him, however gross and reprehensible his negligence? And does this depend on the extent to which insurance against third-party risks prevails and is known to prevail in any particular form of employment? Does it depend on the fact that there are fewer cranes than cars and that the master is less likely to drive a crane than a car?

It was contended, too, that a term should not be implied by law of which the social consequences would be harmful. On this aspect of the case, Viscount Simonds said that the common law demands that the servant should exercise his proper skill and care in the performance of his duty; the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master. Other sanctions there may be, dismissal, perhaps, and loss of character and difficulty of getting fresh employment; but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, he thought, an aspect of the case which made a special appeal to Romer, L.J. ([1956] 2 Q.B.; [1955] 3 All E.R. 460, 480). It cannot be disregarded.

Finally, it was urged that the implication of the suggested term in the contract between employer and driver would have the effect of denying to the insurer the right of subrogation given to him either expressly by the policy of insurance or by the implication of law. Viscount Simonds observed that this would, no doubt, be the result; but he did not attach much importance to this, for if the implied term is imposed by law, not in respect of a particular contract but as a legal incident of this kind of contract, the insurer may be assumed to know it as well as anyone else. It may surprise him, but he should study the law.

His Lordship concluded his speech by saying that the considerations which he had discussed did not permit him to imply a term such as was pleaded in any of the alternative forms adopted in the pleadings or advanced in argument at the Bar; and that the appeal, so far as it was founded on such an implied term in the contract of service, must fail. He added that if the employer could not recover damages for breach of contract, he was not precluded from obtaining contribution from the worker; if he claimed under the Act, corresponding in its express language with Part V of our Law Reform Act 1936 (see (our) s. 17 (1) (*c*)); and, if he claimed apart from the Act, by the principles on which the rule in *Merryweather* v. *Nixan* (1799) 8 Term. Rep. 186, has been consistently applied.

Lord Morton of Henryton concurred. He agreed with their Lordships that the employee was liable in contract to pay the respondent any damages it had suffered as a result of his failing to take reasonable care in fulfilling his duty towards his employer on the occasion in question.

His Lordship then turned to the pleas as to implied terms set out in the statement of defence—that an employer would indemnify the employee against all claims or proceedings brought against him for any act done by him in the course of his employment; and that the employee would receive the benefit of any contract of insurance effected by his employer and covering liability in respect of his driving his employer's vehicle in the course of his employment. On this point, Lord Morton said:

> If any such term is to be implied in this case, it must surely be implied in all cases where an employee is employed to drive any kind of vehicle which might cause damage to third parties. . . . Surely it must logically extend to cases such as the crane-driver in factory premises, and many other cases come to mind which cannot logically be distinguished from the present case. . . . It cannot be said, in my view, that the implication of either of these terms is necessary in order to give " to the transaction such efficacy as both parties must have intended . . . it should have ": *The Moorcock* (1889) 14 P.D. 64, 69.

Later, his Lordship said:

> Counsel for the appellant finally suggested that some such term ought to be implied because, in its absence, the employee was placed in a most unfortunate position. It is, however, your Lordships' task to decide what the law is, not what it ought to be. In saying this, I am far from suggesting that either of the terms under discussion ought to be implied.

As to the suggested implied term of the contract of employment that the employee would receive the benefit of any contract of insurance effected by the employer and covering his liability in respect of the employee's negligent act, Lord Morton said it had this somewhat surprising result—insurers who had paid the employer in a case of this kind would, apparently, be deprived of their right of subrogation by reason of an implied term in a contract to which they were not a party. The result was that His Lordship was not able to accept any of the implied terms which had been pleaded by the employee.

Lord Tucker, too, concurred. After setting out the employee's pleadings relative to the implied terms of the contract of employment, he said: (*a*) to suggest that it was an implied term that the employer would indemnify the worker against all claims or proceedings brought against him for any act done by him in the course of his employment was far wider than anything which could reasonably be required on any view, and would result in completely nullifying the effect of the duty of care which the servant owes to his master, and to give him a licence to be as negligent as he liked; and (*b*) to suggest it was an implied term that the employee should receive the benefit of the employer's liability insurance policy, to be effective, must purport to deprive the insurance company of its right, on payment of the claim, to be subrogated to the rights and

LEGAL NOTICE

Alan Murray Cousins and Ralph Thomas Cooper Armstrong, Barristers and Solicitors, T. & G. Building, Grey Street, Wellington, have pleasure in announcing that they have admitted into partnership Kerry Franklin Hoggard, LL.B., and that as from the 18th day of February, 1957, the practice formerly carried on under the name of Findlay, Hoggard, Cousins & Co. will be carried on from the same address under the name of FINDLAY, HOGGARD, COUSINS & ARMSTRONG, by the undersigned:

A. M. COUSINS K. F. HOGGARD
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LEGAL ANNOUNCEMENTS.

Continued from page i.

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remedies of its insured, which right exists independently of any express term in the contract of insurance. Alternatively, it may mean that the insured, who has paid damages to the injured person out of his own pocket and received payment by way of indemnity from his insurance company, must pay out of his own pocket the same sum to his servant to meet a claim brought against him by the insurance company by virtue of its right of subrogation. His Lordship continued :

> But, my Lords, apart from these objections which make it impossible for me to accept any of the pleaded implied terms, the case raises questions of importance going beyond the precise language used in this case by the pleader.
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> Some contractual terms may be implied by general rules of law. These general rules, some of which are now statutory, e.g., Sale of Goods Act 1893, Bills of Exchange Act 1882, etc., derive in the main from the common law by which they hav become attached in the course of time to certain classes of contractual relationships, e.g., landlord and tenant, innkeeper and guest, contracts of guarantee and contracts of personal service. Contrasted with such cases as these, there are those in which, from their particular circumstances, it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their minds to the contingency which has arisen. These are the " officious bystander " type of case, to use the well-known words of Mackinnon L.J. [in *Shirlaw* v. *Southern Foundries* (1926) *Ltd.* [1939] 2 All E.R. 113, 124]. I do not think that the present case really comes in that category ; it seems to me to fall rather within the first class referred to above.
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> Without attempting an exhaustive enumeration of the duties imposed in this way on a servant I may mention : (i) the duty to give reasonable notice in the absence of custom or express agreement ; (ii) the duty to obey the lawful orders of the master; (iii) the duty to be honest and diligent in the master's service ; (iv) the duty to take reasonable care of his master's property entrusted to him and generally in the performance of his duties ; (v) to account to his master for any secret commission or remuneration received by him ; (vi) not to abuse his master's confidence in matters pertaining to his service: cf. *Robb* v. *Green* [1895] 2 Q.B. 1, affd. [1895] 2 Q.B. 315.

His Lordship thought it would require very compelling evidence of some general change in circumstances affecting master and servant to justify the Court in introducing some quite novel term into their contract, e.g., a term absolving the servant from certain of the consequences of a breach of his recognized duty to take care, or as to the provision of insurance covering the servant's liability to third parties or his master. He found it difficult to understand what, if any, were the limitations of this theory. Was it to be confined to the relationship of master and servant with reference to motor cars, or was it to extend to all those employed in industry or transport who, in the very nature of things, are engaged on work in which negligence on their part may result in widespread and grievous damage amounting to thousands of pounds for which they may be liable to their employers; and in respect of risks which it was customary for the employer to insure against long before the advent of the motor car.

It was said that the passing of the Road Traffic Act 1930, has created the new situation which gave rise to the necessity for these implied terms. It is common knowledge that, for many years before 1930, the great majority of prudent motor car owners protected themselves by insurance, and the insurance provisions of that Act were passed not for the protection of the bank-balances of car-owners, or the life-savings of their employees, but simply and solely to ensure that persons injured by the negligent driving of motor cars who established their claims in Court might not be deprived of compensation by reason of the defendant's inability to satisfy their judgments.

Lord Tucker, in conclusion, said that he found himself in complete agreement with Ormerod J. at first instance, and with Birkett and Romer L.JJ. in the Court of Appeal.

III.—The Minority View.

Lord Radcliffe was of the opinion that the appeal ought to be allowed and an order made dismissing the respondent's action. He considered that it was plain that the law imputes to an employee a duty to exercise reasonable care in the handling of his employer's property ; it would be a surprising anomaly that, merely because there was a contractual relationship between himself and his employer, the standard of his obligation was to be somehow lower than the standard of his obligation of care to the outside world ; and he could see no good reason why their Lordships should uphold the existence of such an anomaly. He went on to say :

> The existence of the duty arising out of the relationship between employer and employed was recognized by the law without the institution of an analytical inquiry whether the duty was contractual or tortious. What mattered was that the duty was there. A duty may exist by contract, express or implied. Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since, in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other. I have said this much out of respect to that part of the judgment of Denning L.J., in the Court of Appeal which deals with this topic. I do not agree with him that " the action against a servant must be founded on tort " ([1955] 3 All E.R. 460, 465) ; and I do not think that his citation of authorities proves this point.

It was common ground, Lord Radcliffe said, that the employee could not be employed to drive his employer's lorry on the road unless there existed a policy of insurance complying with the conditions of the Road Traffic Act 1930, and so providing cover to indemnify any third party who might suffer actionable damage from the employee's driving of the lorry. Then, in simple terms, he explained the question on which the appeal turned :

> Now the insurance policy required would not come into existence of its own motion. One of the two parties, employer and employed, had to assume responsibility for taking it out or keeping it running and for paying the necessary premiums to buy the cover. To which of them ought we attribute that responsibility, having regard to the relationship of the parties In my view, the employer. I cannot suppose that, short of special stipulation, any other answer would be given in such a case. So far as it is relevant, all the evidence given at the trial, both by the appellant and by Colonel Howis, the respondent's managing director, confirms that this would be the right answer.
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> Is it then consistent with such an arrangement that, if the driver does cause third-party damage by negligence and the person injured sues and recovers damages from the employer on the ground of his vicarious responsibility for the act of his servant, the employer should be able to recover the damages that he has to pay by suing the driver ? In my opinion, that is the simple question on which this appeal turns, but, of course, it is, in practice, impossible to keep it simple owing to the complications which arise in any well-argued case. I will try briefly to notice some of them. It is not that I

do not think that they involve difficulties, but the difficulties do not present themselves to me as being such as would affect the final result.

In the first place, His Lordship did not think it mattered whether the employer was really, or only ostensibly, the plaintiff. The appellant's point, if it was a good one at all, was equally good whether it is his employer who is claiming or the insurer by subrogation. To each his reply is the same: "I and my employer recognized that a fund of money had to be secured by insurance to take care of any third-party liability that my driving might involve us in, and we arranged that he should pay for and provide the insurance policy that would produce the money. It follows from that that he cannot now look to me to find all or part of that money". If that answer were a good reply to the employer, it is good against insurers who are subrogated to him. His Lordship did not understand the idea that it is somehow hard on the insurers that they should be affected by an implied term that bound the person to whose rights they are claiming to be subrogated. Then Lord Radcliffe said that if an accident takes place through negligence, the person injured can sue either the employer or the employee or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has bought him; the insurance company has to find the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer alone or jointly with the employee, the position of the employee is apparently much worse, and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name; and the former, instead of getting the benefit of the insurance which his employer was to provide, is in the end the one who foots the bill. His Lordship added that he should be very much interested to know how the premium required by an insurance company is adjusted to the risk of these alternatives.

His Lordship then concluded his speech with the following important statement:

> My Lords, on this part of the case I take the same view as that taken by Denning L.J. I agress with what he says in his judgment [1955] 3 All E.R. 467, 469, and I do not think it possible to escape the force of his reasoning.
>
> If we assume any understanding at all between the appellant and the respondents as to insurance against third-party liability, to the appellant's inquiry as to who was to provide it, the respondents must have answered: "We will see to that and the expense of providing it will fall on us." But the result of this appeal depends on which of the following alternatives they must be taken to have added. One would be to this effect—"but, of course, you understand that although we are going to secure the moneys required to pay the injured person in the first instance, you will have to make them good ultimately, either to us or to the insurance company." The other would be—"and, of course, it is understood that, since we are providing for the fund that will indemnify the injured person, that closes any question of our calling on you at any time to contribute to that fund." I can only say that, to me, the first alternative seems a contradiction of what is involved in the respondents' undertaking to pay for and provide the fund. The second seems to be the natural exchange to take place between the company and their lorry driver.
>
> I am, therefore, in favour of allowing the appeal. I think it a very difficult point, and I well understand the difference of approach that leads us in this House to different conclusions.
>
> I ought, however, to say something about two considerations which have been advanced on behalf of the respondents, but which are to me unpersuasive. It is said that to imply such a term as I propose is, in effect, to contradict the general duty of the employee to exercise reasonable care in carrying out his employer's work. I do not think that this is so. The general duty remains, and it will have its legal effect on all acts of the employee which do not touch this question of insurance against third-party liability. It is the special system whereby this form of insurance is a necessary condition of the employment which brings about the special result. Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it it really have existed since the Road Traffic Act 1930, if it did not exist before it? My Lords, I do not know, because I do not think that I need to know. After all, we need not speak of the master's action against his servant for negligence as if it had been common fare at the law for centuries. Economic reasons alone would have made the action a rarity.
>
> If such actions are now to be the usual practice, I think it neither too soon nor too late to examine afresh some of their implications in a society which has been almost revolutionized by the growth of all forms of insurance.

And, in his final paragraph, which we venture to suggest will become an oft-cited classic, Lord Radcliffe said:

> No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another, but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.

Lord Somervell of Harrow agreed with Lord Radcliffe that the appeal should be allowed. He said that most of the statements against too readily implying terms are in judgments in cases where one party is seeking to imply a term into a written and often detailed contract which is effective and covers the obligations of the parties in normal circumstances without the addition of the term sought to be implied. The position is different when the contract, written or oral, is silent as to matters which have to be settled one way or the other if the contract is to be effective. In the past, as today, goods are often sold, the parties dealing expressly only with the identification of the goods physically or by description and the price. The buyer claims that the goods are defective. The Court has in such a case to imply terms. It would be doing so if it had allowed no exceptions to the warning caveat emptor. Section 12 to s. 14 of the Sale of Goods Act 1893 set out the terms which, over the preceding years, the Courts had implied when the parties were themselves silent. Other examples of this process can be found in the terms to be implied in tenancies. A classic example of the process is the judgment of Holt, C.J., in *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909. He proceeded:

> It may be that, in the case of sales of goods and tenancies, the ground has been covered. I would not expect the ground to have been covered in the case of weekly wage-earners who would seldom be worth suing. In any case, new circumstances may present new problems which have to be dealt with in the same way.

After accepting the submission on behalf of the respondents that there is normally a contractual duty on a servant to take care, His Lordship turned to the implication submitted on behalf of the appellant as to the personal liability of the driver of a lorry or car for damage caused by negligent driving. He said that soon after motor cars came into use it became obvious that the risk of accidents due to negligence causing serious injuries and damage was very much greater than when vehicles were drawn by horses. Many

years before 1930 no reasonable man allowed himself to be in a position where, if negligent, he would be liable to pay out of his own resources third-party damages. He insured. Though this case was concerned only with third-party liability, it would, His Lordship thought, be found that the normal policy also covered damage to himself and his car. He continued :

> When a man is engaged as a chauffeur or a lorry driver, the question whether his resources are at risk, should he cause damage through his negligence, is as important to him as it is to an owner-driver. Nothing was said in this case, and I dare say nothing is usually said. If, when such a contract was being negotiated, the question had been raised, it is obvious, I think, that the appellant would have stipulated for the usual cover that an owner-driver provides for himself. If nothing is said, it is, in my opinion, for the employer to see that the driver's resources are protected by insurance. It is inconsistent with such an obligation that the employer should seek by action to make the driver personally liable, as in the present case.
>
> It is fair to the respondents to state that these proceedings are brought in their name but without their knowledge or, I think, approval. They are brought by an insurance company, which ultimately paid the third party, under alleged rights of subrogation contractual or in law. It was suggested that the term which I have implied is unenforceable unless agreed to by the insurers of the employer. This point was not pleaded and I cannot think it is right. The insurer, when he has paid, succeeds to such rights as the assured possesses. The assured is not, as I see it, fettered in any way as to the terms on which he contracts with his driver.
>
> The implied term is an answer to the claim for damages and also to the claim for indemnity or contribution under the Act of 1935, [our Law Reform Act 1936]. Both claims seek to make the appellant personally liable in respect of damage to a third party which is plainly of the kind to be anticipated and covered. It is said that this would have far-reaching consequences. So, I think, would the decision of the Court of Appeal. With respect, I think that that decision is not only far-reaching but also anomalous. One may take as an example an accident causing damage which is within the compulsory provisions of the Road Traffic Act 1930. If a driver was sued direct, it seems clear the insurers would have to pay and there would be an end of it. If, however, the employer is sued, the insurers again pay but can by subrogation recover against the driver and levy execution on his savings. This would, I think, be anomalous. It would also mean that any driver who realized what the law was would have to take out a policy to cover this risk. Romer L.J., at the end of his judgment ([1955] 3 All E.R. p. 480, letter F.) said that it was not in the public interest that drivers should be immune from the financial consequences of their negligence. The public interest has for long tolerated owners being so immune and it would, I think, be unreasonable if it was to discriminate against those who earned their living by driving. Both are subject to the sanction of the criminal law as to careless or dangerous driving. The driver has a further sanction in that accidents causing damage are likely to hinder his advancement.

His Lordship concluded his speech by saying that the terms which he had implied might apply to other cases. The question would be whether the damage sought to be recovered from the servant was damage which any reasonable person would cover by insurance. There would be the further question whether the employment was such that the servant, if nothing was said, was entitled to assume that the master would arrange the insurance. This is plain enough in car or lorry cases, as the owner has to have a policy under statute. In other cases, it might be a question of evidence.

* * * *

The effect of the judgment of their Lordships is, therefore, that the appellant, the employee, had been in breach of duty to his employers to take due care, under the implied term in that behalf in his contract of employment.

Furthermore, their Lordships held (Lord Radcliffe and Lord Somervell of Harrow dissenting) that the appellant's employers were entitled to recover in damages from the appellant the amount for which they had been made liable to his father, including the costs of defending the action brought by his father.

The reasons for the judgment of their Lordships of the majority included the finding that no term was implied in the contract of employment either that the employee was entitled to be indemnified by his employers against claims or proceedings for acts done in the course of his employment, or that he was entitled to the benefit of any insurance which his employers had effected (or as reasonable and prudent men should have effected) concerning accidents due to his carrying out his employment without due care.

The respondents, actually the underwriters of the insurance company which had paid the damages to the appellant's father in pursuance of the policy effected with it by the employers—and by terms of their policy authorized to " prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise "—were, accordingly, not deprived of their remedy against the employee for the breach of his contract with his employer to use reasonable care in his work.

A DISTINGUISHED LEGAL CENTENARY.

OUR London contemporary, the *Solicitors' Journal*, published by the Solicitors' Law Stationery Society, Ltd., attained its centenary with its issue of January 3 of this year. Such an event is rare, even in the older countries ; and, if we recall what were the general conditions of life in our own land in the pioneering days of 1857, we begin to realize the remarkable changes in the law and its practice, and in the living conditions of people generally, of which the centenarian legal periodical has been a living witness. The length of its service to the law and to lawyers is exceeded only by the *Law Times*, which dates from 1843.

In its elegant centennial number, the *Solicitors' Journal* is honoured with the congratulations of Her Majesty the Queen to all concerned with its production, and her good wishes to its readers.

The Lord Chancellor, Viscount Kilmuir, has written that many generations of lawyers have benefited by the journal's clear and objective reporting, and that its editors have not shrunk from expressing forthright opinions on matters of current controversy. The Master of the Rolls, Lord Evershed, among others, expresses the opinion that the *Solicitors' Journal*, in the distinguished company of a relatively small number of legal journals, has earned a high place for its quality.

We feel that lawyers generally will appreciate the opening sentences of the journal's history during the past century :

> " The law is the garment of life. The law reports are the mirror of the life of the nation ; they reflect its every movement. The legal Press which serves the law reflects that life, too, and when its service is at its best it is at its most unobtrusive. So the story of a legal journal is for the most part the story of whom it serves."

We of a younger generation of the legal periodicals of the British Commonwealth add our congratulations to the *Solicitors' Journal*, to its learned editor, and to all responsible for the high standard and useful service it has maintained during its long life, and wish them continued success and high attainment in the years to come.

SUMMARY OF RECENT LAW.

ARBITRATION.

Misconduct—Natural Justice—Letter received by an Arbitrator and used as Evidence—No Opportunity given to Party affected to criticize or comment upon It—Such Action constituting Misconduct in Regard to Procedure—Award remitted to Arbitrators and Umpire to give Opportunity to Parties to be heard in Relation to Letter. The admission of a letter dealing with several matters which were the subject of an arbitration, addressed to one of the arbitrators and used as evidence, without any notice to either party and without giving the party affected thereby any opportunity of criticizing it or commenting upon it, is a departure from the fundamental principles of justice which prohibit any tribunal from deciding against a party without giving him an opportunity of hearing what is alleged against him, and so constitutes misconduct on the part of the arbitrators. (*In re Brook, Delcomyn, and Badart* (1864) 16 C.B. (N.S.) 403; 143 E.R. 1184, followed.) As, in this case, there was misconduct merely in the technical sense and in regard to procedure only, the award should be remitted to the arbitrators and umpire with a direction to afford an opportunity to the parties to be heard if they so desire, in particular in relation to the letter received and acted upon. *Garland and Lyn Jones Ltd.* v. *Winwood.* (S.C. Wanganui. February 12. 1957. Gresson J.)

DIVORCE AND MATRIMONIAL CAUSES.

Seven Years' Separation—Court in Northern Ireland, after hearing Both Parties, and finding Husband's Desertion proved and making Separation and Guardianship Order—Weight to be given to Such Order—Respondent's Affidavit asserting Petitioner's Desertion accepted as Sufficient Proof of Petitioner's Bringing about Separation by His Wrongful Acts and Conduct—Divorce and Matrimonial Causes Act 1928, s. 1 (JJ). The petitioner, seeking dissolution of his marriage on the ground that the parties had been living apart for seven years and were not likely to be reconciled, left his wife in Belfast, Northern Ireland, and had not since lived with her. She and the children continued to live in the matrimonial home. A Resident Magistrate in Belfast, after hearing both parties, decided that cruelty on the part of the husband had not been proved, but that desertion by him was proved, and made a maintenance order in respect of the wife and children, guardianship of whom was given to the wife. An appeal against the order was dismissed. The present suit was defended on the ground that the separation was due to the wrongful conduct of the petitioner. *Held*, 1. That the order made in Northern Ireland did not create an estoppel so that the Supreme Court could not inquire into the validity of its conclusions, but considerable weight should be attached to it as it was a judicial determination of a fact in circumstances which did not cause any doubt as to its being a bona fide decision on conflicting evidence. (*Tickner* v. *Tickner* [1937] N.Z.L.R. 44; [1937] G.L.R. 57, applied. 2. That the respondent in her affidavit had asserted that the petitioner did desert her, and as this was the very matter inquired into and adjudicated on by a local Court with both parties represented and giving evidence, the respondent's affidavit should be accepted as sufficient proof that the petitioner had brought about the separation by his wrongful acts and conduct. *Campbell* v. *Campbell.* (S.C. Auckland. February 1, 1957. Stanton J.)

LANDLORD AND TENANT.

Conditional Surrender. *100 Solicitors' Journal*, 813.

Unauthorized Leases. *106 Law Journal*, 739.

LIMITATION OF ACTION.

Action in Respect of Bodily Injury—"Delay in bringing the action"—Period elapsing since Expiration of Limitation Period—Limitation Act 1950, s. 4 (7). The words "the delay in bringing the action", as used in the proviso to s. 4 (7) of the Limitation Act 1950, connote the period which has elapsed since the expiration of the limitation period (or the period during which the claimant can be said to be in default). Consequently, prejudice to the intended defendant from matters arising only during the period in which the claimant has been in default becomes an answer to the claimant's right to obtain leave to bring action. (*Meadows* v. *Lower Hutt City Corporation* [1955] N.Z.L.R. 863, approved.) *William Cable Ltd.* v. *Trainor* (Ct. of App. December 19, 1956. Gresson J., Stanton J., Shorland J.)

PRACTICE.

Appeals to Court of Appeal—Time for Appealing—Judgment granting Leave under Limitation Act 1950 to bring Action against Intended Defendant—Interlocutory Judgment—Special Leave—Respondent receiving Special Indulgence from Court on Construction of Statutory Provision—Point of General Importance—Special Leave given—Counsel's Delay in Failing to give Notice of Appeal in Time not Grounh for granting Special Leave—Court of Appeal Rules 1955, R. 27 (1) (4). A judgment granting leave, under s. 4 (7) of the Limitation Act 1950 to bring an action against an intended defendant, is "an interlocutory judgment or order" within the meaning of those words as used in R. 27 of the Court of Appeal Rules 1955 in that, as made, it does not finally dispose of the rights of the parties. (*Bozson* v. *Altrincham Urban District Council* [1903] 1 K.B. 547, followed.) Error on the part of counsel or of solicitor in failing to give notice of appeal within the time limited by R. 27 is not of itself sufficient ground for granting special leave to appeal. (*Pitcher* v. *Dimock* (1913) 32 N.Z.L.R. 1127; 16 G.L.R. 57 and *Wilson* v. *New Zealand Loan and Mercantile Agency Co. Ltd.* (*No. 2*) [1934) N.Z.L.R. s. 115; [1934] G.L.R. 280, followed. (*Gatti* v. *Shoosmith* [1939] Ch. 841; [1939] 3 All E.R. 916, distinguished.) Special leave to appeal may be granted under R. 27 of the Court of Appeal Rules 1955 where the respondent has received a special indulgence from the Court on a construction of a statutory provision which could later be held to be erroneous, coupled with the fact that the point involved is one of general importance, and, in addition, the respondent would be in no worse position if special leave was granted than he would have been if notice of appeal had been given in time. *So held* by the Court of Appeal, dismissing an appeal from the judgment of Turner J. [1956] N.Z.L.R. 610. *William Cable Ltd.* v. *Trainor.* (Ct. of App. December 19, 1956. Gresson J., Stanton J., Shorland J.)

Third-party Procedure—Circumstance wherein Third-party Notice issued—No Justification for Issue of Same where Defendant makes No Claim and seeks No Relief or Remedy against Third Party—Code of Civil Procedure, R. 95. Notwithstanding the terms of cls. (c) and (d) of R. 95 of the Code of Civil Procedure, the only justification for the issue of a third-party notice is to enable the defendant to secure some relief or to enforce some remedy against the proposed third party without the necessity of bringing a separate action for that purpose. Where the defendant concedes that he makes no claim and seeks no relief or remedy against the third party, there is no justification for the issue of a notice, and it is not sufficient for the defendant to allege that the proposed third party might be liable to the plaintiff, if he chose to sue him, or that his joinder as a third party might be of advantage to the defendant in his defence. (*Swansea Shipping Co.* v. *Duncan* (1876) 1 Q.B.D. 644, and *Brown* v. *Samson* (1889) 7 N.Z.L.R. 496, followed.) *Freemantle* v. *Moore.* (S.C. Wellington. December 14, 1956. Archer J.)

Trial—Trial before Judge and Jury or before Judge alone—Action claiming Declaratory Orders and Damages—Construction of Documents and Breaches of Contract and Intricate Matters of Accountancy involved—Complicated Questions involving Issues both of Law and Fact—Trial before Judge alone More Convenient and best suited effectively and speedily to dispose of Such Issues, considering Interests of Parties—Striking out Pleadings—Prayers for Relief by Way of Declaratory Orders in Addition to Claim for Damages—Plaintiffs entitled to obtain Equitable Remedies sought—Such Procedure likely to result in Saving of Expense to Parties—Motion to strike out Claim for Equitable Relief refused. The plaintiffs claimed against the Crown damages for breach of a contract alleged to have been entered into by deed on August 2, 1955, subject to certain subsequent alleged variations, whereby the Crown granted to the plaintiffs coal-mining and other rights. The damages under this head were based upon allegations that the Crown had refused to accept coal at certain periods and pay for same in accordance with the contract. The plaintiffs further alleged that the Crown wrongfully terminated or repudiated this contract by notice, dated July 5, 1956. The plaintiff's prayer for relief included, in respect of the first cause of action, a claim for loss and damage amounting to some £5,186 together with interest thereon, and, on the second cause of action: (i) a declaration that the repudiation by the Crown of the deed referred to and the variation thereof was wrongful; (ii) a declaration that throughout the term of the deed and variations the plaintiffs had paid, observed, and performed all the covenants, provisions, and conditions therein contained

or implied and on the part of the plaintiffs to be observed and performed; (iii) a declaration that the deed and the variations aforesaid were terminated and ended so far as they related to the obligations of the plaintiffs thereunder; (iv) the sum of £60,000 by way of damages; and (v) if the Court thought fit, an order for inquiry as to the damages suffered by the plaintiffs. The defendant moved to strike out the prayers for relief referred to as (i) (ii) (iii) and (v) above, on the grounds substantially that, if there had been a breach or breaches of contract by the defendant, the plaintiffs were entitled to damages in an ordinary common-law action for breach of contract, and that the prayers for declarations and the consequential inquiry as to damages were redundant and might tend to embarras, prejudice, or delay the fair trial of the action. In the alternative, the defendant moved for an order for a trial before a Judge and jury of twelve on the ground that the action could be more conveniently so tried than before a Judge alone. *Held*, 1. That the motion to strike out the specified prayers for relief should be dismissed, for the reasons that the plaintiffs, if they so desired, were entitled to endeavour to obtain the remedies they sought; and this could not cause embarrassment or delay but might be the means of considerable saving of expense to the litigants. (*Knowles* v. *Roberts* (1888) 38 Ch. D. 263, followed.) 2. That, although the issues of alleged breaches of contract by the plaintiffs might be pure questions of fact suitable for determination by a jury, the other matters of intention and construction of documents made it more convenient that the trial should be before a Judge alone rather than that complicated and detailed issues with necessarily elaborate directions on matters of law should be placed before a jury; and, in addition, the assessment of damages would necessitate detailed evidence and intricate matters of accountancy to ascertain loss of profits during the unexpired term of the contract. (*Moore* v. *Commercial Bank of Australia, Ltd.* [1934] N.Z.L.R. 106; [1934] G.L.R. 103, applied.) *Moynihan and Another* v. *Attorney-General*. (S.C. Wellington. February 13, 1957. McGregor J.)

PROBATE AND ADMINISTRATION—PROBATE.

Jurisdiction—Will made in 1951 in New Zealand by Testatrix domiciled in Indonesia—Testatrix born of British Father, married to Netherlands National, and living in Indonesia until coming to New Zealand after Husband's Death—Testatrix possessed of Real and Personal Property in New Zealand—Testatrix British Subject by Birth and becoming Citizen of United Kingdom and Colonies, by Operation of Statute, as from January 1, 1949—Status in New Zealand as British Subject—Will, notwithstanding Testatrix not domiciled in New Zealand, valid and effectual to dispose of Property situate therein—Wills Act 1937, (7 Will IV & 1 Vict., C. 26), s. 24—British Nationality Act 1948 (11 R. 12 Geo. 6 c. 56), ss. 12 (2), 14—British Nationality and New Zealand Citizenship Act 1948, s. 3 (1)—Administration Act 1952, s. 40—Wills Amendment Act 1955, s. 14 (5). The testatrix, by her will made at Auckland on April 9, 1951, revoked all prior wills, and purported to deal with all her real and personal estate whatsoever and wheresoever situate. She was born in Surabaya, Netherlands East Indies, on September 10, 1903, and her father, at the time of her birth, was a British subject who had been born in a British Colony of British parents, and retained his British nationality throughout his life. She lived at Surabaya, Indonesia, until her arrival at Auckland in December, 1950. The testatrix married a Netherlands national in the Netherlands East Indies (then Dutch territory). Her husband died before she came to New Zealand. Her domicile, through marriage and subsequently to her husband's death, remained in Indonesia. The testatrix owned real and personal estate situate in New Zealand at the date of her death and real and personal estate in Indonesia, and personal property and cash in banks in Holland.

The testatrix's will, for which probate was sought, was regularly executed and valid as to form according to New Zealand law. On the question whether or not the Court had jurisdiction to grant probate limited to assets situate in New Zealand. *Held* 1. That the testatrix was a British subject by birth, who ceased on her marriage to be a British subject before the commencement of the British Nationality Act 1948 (U.K.) and became an alien; but notwithstanding the loss of her British nationality by marriage, she became, pursuant ot ss. 12 (2) and 14 of that Act, a citizen of the United Kingdom and Colonies as from January 1, 1949; and, accordingly, under s. 3 (1) of the British Nationality and New Zealand Citizenship Act 1948, she had the status in New Zealand of "a British subject" for the purposes of s. 40 (2) of the Administration Act 1952, which was in force when she executed her will in New Zealand. 2. That, notwithstanding the fact that the testatrix was not domiciled in New Zealand, either at the date of the making of her will or at the date of her death, the will, being the will of a British subject made as required by New Zealand law, was valid and effectual to dispose of personal property situate in New Zealand, by virtue of s. 40 of the Administration Act 1952 and the preservation of that section affected by s. 14 (5(of the Wills Amendment Act 1955 in respect of wills made before October 27, 1955. Probate was granted of the will executed on April 9, 1951, limited to the property of the testatrix situate in New Zealand. *In re Veen (deceased)*. (S.C. Auckland. February 18, 1957. Shorland J.)

PUBLIC WORKS.

Maori Land—Assessment of Compensation for Land taken—Land in Undeveloped State—No Actual Subdivision effected at Relevant Date—Plan for Subdivision into Allotments prepared before Proclamation Gazetted—Part Land immediately available upon Approval of Subdivisional Scheme—Balance of Allotments Saleable over Subsequent Period of Years—Basis on which Compensation should be assessed—Finance Act (No. 3) 1944, s. 29 (1) (b). In accordance with s. 29 (1) (*b*) of the Finance Act (No. 3) 1944, and subject to the other provisions of that section, the function of the Maori Land Court is to ascertain, as the value of the land, "the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realize." (*Turner* v. *Minister of Public Instructions* [1956] A.L.R. 367 applied. The valuation must be of the land in the state in which it is on the specified date; any potentialities must be taken into account in assessing its value. *So Held, per totam curiam*, on Case Stated by the Maori Land Board for the opinion of the Supreme Court, and removed by consent into the Court of Appeal. *Held Further* (Gresson and Shorland JJ., F. B. Adams J. dissenting), 1. That the Court must contemplate the sale of the land as a whole, unless on the specified date there could have been separate sales of particular portions and there was a market for such separate portions. (*St. John's College Trust Board* v. *Auckland Education Board* [1947] N.Z.L.R. 507, considered and distinguished. 2. That, only if the land had been legally subdivided at the specified date so that particular lots might have been sold and title given, can it be said that there could have been separate sales of particular portions. 3. That, if the land has to be valued as a whole, the Court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies, and profit for himself. (*Raja Vyricheria Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302; [1939] 2 All E.R. 317, and *Turner* v. *Minister of Public Instruction* [1956] A.L.R. 367, applied.) *In re Whareroa 2E Block*. (C.A. Wellington. December 19, 1956. Gresson J., F. B. Adams J., Shorland J.)

SALE OF LAND.

Contract — Condition — Misdescription. On September 14, 1954, an industrial property was offered for sale by auction. Owing to an innocent mistake on the vendor's part, the particulars of sale prepared by the auctioneer stated that the area of the property was approximately 3,920 square yards, whereas it was approximately 2,360 square yards. The purchaser, having obtained a copy of the particulars of sale, inspected the property before the auction and decided to bid up to £4,500 for it, in the belief that its area was as stated in the particulars. At the auction the property was sold to him for £4,500. He signed the contract and paid £40 in cash as part of a deposit of £450 payable on signing the contract. Condition 35 of the Law Society's Conditions of Sale, 1953, which was incorporated in the contract, provided: ". . . the property . . . shall be taken as correctly described as to quantity and otherwise, and any error . . . or misstatement found in the contract (whether or not it materially affects the description of the property) shall not annul the sale, nor entitle the purchaser to be discharged from his purchase, nor shall the vendor, nor any purchaser, claim or be allowed any compensation in respect thereof: Provided that nothing in this condition shall entitle the vendor to compel the purchaser to accept, or the purchaser to compel the vendor to convey, property which differs substantially from the property agreed to be sold and purchased, whether in quantity . . . or otherwise, if the purchaser or the vendor respectively would be prejudiced by reason of such difference." The purchaser's object in buying the property was to sell it, if possible, at a profit, and, if that was not practicable, to put it into a proper state of repair and then to let it. After the sale he was given a key of the premises and, while showing prospective purchasers or tenants over the property, he discovered that

its area was smaller than that stated in the particulars. He informed the auctioneers of this fact towards the end of October, 1954, and, while waiting for the vendor to check the measurements, he wrote to her asking for certain repairs to be done, and he also had a leaking roof repaired by his own men. At that time he was still willing to complete the purchase, provided that he obtained suitable compensation for the difference between the stated and the actual area. On or about November 26 he paid the balance of the deposit to the stakeholders at their request. On November 30, 1954, a meeting took place between the vendor and the purchaser, but they were unable to come to any agreement on the question of compensation. On December 31, 1954, the purchaser's solicitors wrote to the vendor rescinding the contract. In an action by the vendor against the purchaser for specific performance of the contract, the purchaser, by way of counterclaim, asked for a declaration that he was entitled to rescind the contract. At the hearing of the action the vendor was willing to waive the condition in the contract excluding compensation, but the purchaser was no longer willing to accept compensation. *Held*: specific performance must be refused and the purchaser was entitled to rescind the contract for the following reasons—(i) the statement of the site area was a term of the contract and could not be rejected under the maxim *falsa demonstratio non nocet* (dictum of Sir Richard Malins, V.-C., in *Whittemore* v. *Whittemore* (1869), L.R. 8 Eq. at p. 605, followed.) (ii) the purchaser could not be given what he had bargained for, since the difference between the area stated and the actual area was substantial; moreover as the purchaser was also prejudiced thereby the case was within the proviso to condition 35 of the Law Society's Conditions of Sale, 1953, so that that condition did not preclude the purchaser from rescinding the contract (*Flight* v. *Booth* (1834), 1 Bing. N.C. 370, *Jacobs* v. *Revell* [1900] 2 Ch. 858, and *Re Puckett & Smith's Contract* [1902] 2 Ch. 258, applied.) (iii) the purchaser had not waived his right to rescind the contract by completing payment of the deposit and asking for repairs to be done after he became aware of the misstatement, since his conduct was consistent with his intention to try, in the first instance, to obtain an abatement of the purchase price. (iv) the plaintiff could not by her unilateral action in offering to waive condition 35 of the Law Society's Conditions of Sale, which excluded compensation, entitle herself to a decree of specific performance if the purchaser were unwilling (as he was) to accept compensation. (Dictum of Viscount Haldane delivering the judgment of the Privy Council in *Rutherford* v. *Acton-Adams* [1915] A.C. at p. 869, considered. *Shepherd* v. *Croft* [1911] 1 Ch. 521, distinguished.) *Watson* v. *Burton* [1956] 3 All E.R. 929 (Ch.D.)

TENANCY.

Possession—Shop Premises—Possession sought by Parent Company, Owner of Premises, for Occupation by Subsidiary Company—Special Relationship between Them—Premises "reasonably required by the landlord for [its] own occupation"—Tenants in Partnership—Court bound to consider Hardship caused to Tenants or any other Persons—Hardship and Conduct of Partners collectively, and not individually, to be assessed—Tenancy Act 1955, ss. 36 (e), 37 (1). In April, 1950, the plaintiff completed its purchase of a property at 220-224 Lambton Quay, Wellington. There were then in the building three ground-floor tenants. In February, 1951, it gave notice to quit to these tenants. One vacated. The defendants, occupying the middle shop as partners, did not vacate; and the plaintiff took proceedings against them for possession; but these proceedings, heard in October, 1952, were not successful. On October 9, 1952, the plaintiff, then having been the defendants' landlord for over two years, served on them one year's notice of its intention to apply for an order for possession, and, on December 8, 1953, it gave a further month's notice to the defendants. On January 20, 1954, the plaintiff applied for an order of possession under s. 36 (*e*) on the ground that it reasonably required the premises for its own occupation. The plaintiff was a company engaged in the business of conducting chain stores throughout New Zealand. The title to the property, the subject of these proceedings, was in the plaintiff's name. The plaintiff conducted the majority of its stores throughout New Zealand by means of subsidiary companies which conducted the individual shops. When possession was obtained of one of the adjoining shops in the Lambton Quay property, the plaintiff formed a subsidiary known as McKenzies (Lambton Quay) Ltd. to conduct the business of this store. Substantially, all the capital in this subsidiary was owned by plaintiff. The directors of the subsidiary were the same directors as those of the plaintiff. The plaintiff and its subsidiaries were one organization working under suitable internal arrangements. A small minority of the plaintiff's stores were conducted by the appellant company itself. The trial Judge, Hutchison J., in the exercise of his discretion under s. 37 (1) refused to make an order for possession in favour of both defendants, because of his view that he should exercise it in favour of the defendant Boolerous. On appeal from that judgment, *Held*, by the Court of Appeal, That the premises were reasonably required by the plaintiff for its own use and occupation within the meaning of s. 36 (*e*) of the Tenancy Act 1955. (*Clift* v. *Taylor* [1948] 2 K.B. 394; [1948] 2 All E.R. 113; *G. C. and E. Nutall (1917) Ltd.* v. *Entertainments and General Investment Corporation Ltd.* [1947] 2 All E.R. 384; and *Pegler* v. *Craven* [1952] 2 Q.B. 69; [1952] 1 All E.R. 685, referred to. For the reasons, per *Barrowclough* C.J. That, when a subsidiary company is so associated with its parent company as McKenzies (Lambton Quay) Ltd. was with the plaintiff and was so completely the *alter ego* of the parent company as here, the plaintiff required the premises for its own occupation within the meaning of s. 36 (*e*), even though such occupation was occupation on its behalf by its subsidiary. Per *McGregor* J. That the relationship between McKenzies (Lambton Quay) Ltd. and the plaintiff was a special one, such as to warrant regarding the two companies as being virtually one, even though they were separate legal entities; the occupation was connected with business use; and, though the actual occupation would be that of the subsidiary company, it could fairly be regarded as that of the plaintiff, since the latter, for the purposes of carrying on its business installed its subsidiary to conduct the actual trading which was wholly conducted in the interest of the plaintiff. *Held further*, 1. That, in refusing to make an order for possession the learned Judge in the Court below had exercised his discretion under s. 37 (1) of the Tenancy Act 1955 on a wrong principle of law, as the Court was bound to consider the hardship which might be caused to all the persons mentioned in s. 37 (1), but the learned Judge had determined the matter only on the existence of hardship in the case of one of the partner tenants; and that he should have assessed the hardship and conduct of the tenants collectively and not individually, as the premises were let to them as partners and they should be regarded as such. 2. That on a consideration of hardship and all other relevant matters, it was just and equitable that the Court's discretion should be exercised in favour of the plaintiff, and an order for recovery of possession on April 30, 1957, should be made. (*Jackson* v. *Huljich* [1955] N.Z.L.R. 1057, followed.) *Quaere*, Whether if the question of fact fell for consideration, the public would be more inconvenienced by the absence of a restaurant in that part of Lambton Quay where the premises were situate or by the absence of a store which is large enough to carry the usual lines stocked by the plaintiff's chain of stores and adequate for the company's business. *J. R. McKenzie Ltd.* v. *Gianoutos and Boolerous.* C.A. December 19. (Barrowclough C.J., Gresson J., McGregor J.)

Possession—Premises let in One Tenancy as Shop and Living Quarters—Landlord proposing to occupy Shop—No Jurisdiction to make Order for Possession of Same against Will of Tenant, by Splitting Premises into Two Parts and calling Shop "property" and Living Quarters a "dwellinghouse"—Tenancy Act 1955, ss. 2, 36 (e). The landlords of premises, let in one tenancy as a shop and living quarters in which the tenants resided, propose to close a door leading to the living quarters and to carry out other alterations designed to make the living quarters a self-contained flat with access from an adjoining lane, and turn the shop into a lock-up shop. They required the shop for their own purposes. It was not proposed to disturb the tenants in their occupation of the living quarters. An order for possession of the part of the premises comprising the shop was made on the ground that the landlords reasonably required the shop for their own occupation for business purposes. On appeal from that determination, *Held*, That the landlords could not, against the will of the tenants, change the character of the premises, as by splitting the premises, which were comprised in one tenancy, into two parts and calling the shop "property" and the living quarters a "dwellinghouse". *Fakir and Another* v. *Gopal and Another.* (S.C. Auckland. December 19, 1956. North J.)

STAMP DUTY.

Stamp Duty and Title. *100 Solicitors' Journal*, 868.

VALUATION.

Contingent Liability: Treatment in Accounts. *108 Law Journal*, 6.

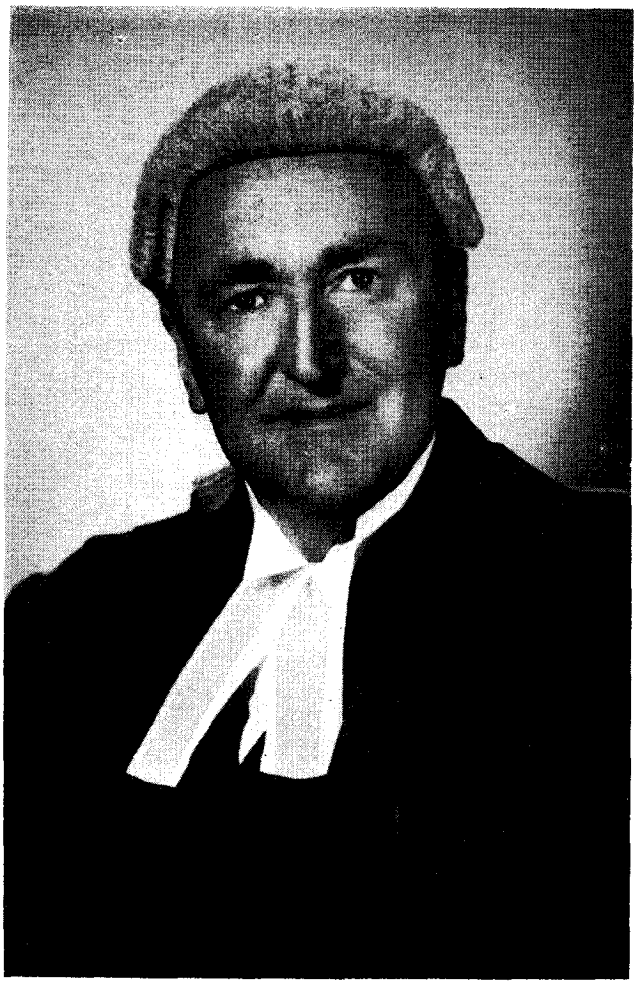
WILL.

Assents by Personal Representatives. *108 Law Journal*, 5.

MR JUSTICE McCARTHY.

Widespread approval of the appointment to the Supreme Court Bench of Mr. Thaddeus Pearcey McCarthy, barrister and solicitor, of Wellington, has been echoed throughout the Dominion.

Coming at a time when the Judiciary has shared with the legal profession dismay and apprehension at delay in hearings and judgments, particularly in Judge-alone cases, the appointment must inevitably strengthen the Bench by adding to its number one whose age is ideal for the work, and who possesses a well-deserved reputation for versatility, common-sense, scholarship, and outstanding industry—qualities that in the past have flourished richly in our judicial soil.



S. P. Andrew Ltd., photo.

Mr Justice McCarthy.

Son of the late Mr. Walter McCarthy, merchant, of Napier, the new Judge was born at Napier on August 24, 1907. He was educated at St. Bede's College, Christchurch, and Victoria University College, where he obtained the degree of Master of Laws with first-class honours. In 1936, he joined Mr. W. E. Leicester and Mr. W. B. Rainey as a partner in the firm known as Leicester, Rainey, and McCarthy and was later joined in partnership by Messrs. A. H. Armour, C. B. Boock, and R. G. Collins.

During the period of World War II, the new Judge served in the Armed Forces, first, as a staff officer in New Zealand, and, then, after resigning his commission in the ranks, as an infantryman in the 22 Bn. 2 N.Z.E.F. in the Italian campaign. After being re-commissioned, he was seconded to the legal department 2 N.Z.E.F., ultimately taking command of that department with the appointment of Deputy-Judge Advocate-General and the rank of major.

Although he possesses wide experience in the fields of conveyancing and company law, the arena of the Courts has always exercised for Mr. Justice McCarthy the real and foremost fascination of the practice of the law. Within a few days of his admission as a barrister, he appeared as junior counsel before both Divisions of the Court of Appeal in *Worth* v. *Worth*]1931] N.Z.L.R. 1109, in which the law of conflict was invoked to decide whether it was *intra vires* of the Parliament of New Zealand to permit a wife to found her petition in divorce upon residential qualifications and not upon the domicile of her husband that had always been recognised, here and elsewhere in the British Commonwealth, as an essential ingredient of the jurisdiction of the Court to entertain the petition. As an indication of the extensive nature of his appearances during the last year or so, reference is made to the Court of Appeal case of *Smith* v. *Wellington Woollen Manufacturing Co Ltd.* [1956] N.Z.L.R. 491 (which canvassed the extent of a successful plaintiff's liability for income tax and social security charges); the Full Court case of *Embassy Liqueurs Ltd.* v. *Licensing Control Commission* [1955] N.Z.L.R. 734 (as to when a wholesale licence is "needed"), and *The Queen* v. *Taare* [1955] N.Z.L.R. 1050, the first case to be heard before the newly-created Court Martials Appeal Court consisting of Mr. Justice Hutchison, Mr. L. M. Inglis S.M., and Sir Howard Kippenberger. Not the least of his accomplishments was his thorough and skilled presentation of the Crown case in *The Queen* v. *Bolton*, a long and difficult trial involving a large volume of intricate and conflicting medical evidence and one that will take its place in the annals of poisoning in this country alongside the famous, or infamous, cases of Hall, Munn, and Mareo.

Humanity in outlook should grace the career on the Bench of the new Judge. Always disposed to concede a modicum of good in the worst of his fellow-creatures, he has proved himself to be singularly free from prejudice and predilection in his relations with practitioners whom he served for a number of years as a member of the Wellington District Law Society. A lover of the outdoors, much of his spare time has been spent in shooting, fishing, yachting, and (even) gardening, while as a past captain and vice-president of the Wellington Golf Club he demonstrated in golfing affairs an efficiency that placed him on a scratch mark as an administrator.

A facility to shear a case of its trimmings and embellishments, and to arrive quickly at the heart of the matter, is a marked characteristic of the new Judge.

When there are added to this valuable judicial quality, the attributes of modesty, concentration, and a keen sense of humour, it will be readily appreciated that he brings sufficient to his high office to justify the prophecy that his service will be one of great distinction and most fruitful in accomplishment.

THE SWEARING-IN CEREMONY.

A record number of the new Judge's former colleagues in practice in Wellington filled the large Court and overflowed into the passageways on February 15, when His Honour took the prescribed oaths of office.

Mr. Justice Gresson presided. With him on the Bench was Mr. Justice McGregor.

In beginning the proceedings, Mr. Justice Gresson said :

" The Court is sitting in order that Mr Justice designate McCarthy may take the oaths of office. I have before me a warrant under the hand of His Excellency the Governor-General authorizing me to administer such oaths. This I will now proceed to do, all standing."

The new Judge then took the prescribed oaths.

Mr. Justice Gresson, continuing, said : " It only remains for me formally and publicly to welcome our new brother, as I have already done privately. It is a matter for satisfaction that there can be found men of standing and ability who are willing to give up the advantages of private practice to serve on the Bench where the work is always strenuous, sometimes very trying, and where the life is a somewhat cloistered one. But there is this consolation. I think it can be said that the legal profession, which is well qualified to judge, and the general public, with a more limited opportunity of judging, both credit us with integrity, diligence, and an endeavour always to maintain the high traditions of the Bench. I do not doubt that our new brother has those attributes in full measure. The large attendance here to-day testifies to the regard in which he is held.

" For ourselves, and particularly for the Chief Justice who is unable to be present, I say we welcome our new brother almost literally with open arms."

The Attorney-General, the Hon. J. R. Marshall, then addressed their Honours. He said :

" The members of the profession of Wellington are gathered here to-day to witness the swearing-in of Mr. Justice McCarthy as one of Her Majesty's Judges of the Supreme Court in New Zealand.

" I think I may say that Mr Justice McCarthy has commended himself to us all here, as colleagues in the profession, by his integrity, his clear and incisive mind, his capacity for work, and his courtesy to us all at all times.

" Mr Justice McCarthy enters his new duties with the good will and with the best wishes of the members of the profession throughout New Zealand. In particular, the members of the profession in Wellington with whom he has been so closely associated throughout the whole of his career and on whose Council he has served for a number of years, show, I think more eloquently than anyone can say, by their attendance to-day the respect that he has earned from them and their trust for what the future holds."

THE NEW COMPANIES ACT 1955.

The Rights and Remedies of Minority Shareholders Strengthened.

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

RECOMMENDATIONS OF COHEN COMMITTEE.

In *Schischka* v. *Schischka* [1936] N.Z.L.R. 50, 53 ; [1936] G.L.R. 270, 272, Callan J. pointed out the precarious position of minority shareholders in small family companies :

> Outsiders are never very ready to put money into a company which is largely a family concern. They cannot control policy. They cannot force liquidation and consequent realization of assets. They cannot regulate what proportion of gross profits goes in salaries and directors' fees, and what is left for dividends for those shareholders who take no active part in the business.

It is also not unusual for minority shareholders in larger companies to have a very lean time, and to suffer grave injustices. This problem greatly concerned those who sat on the Cohen Committee, to which reference has already been made in the course of this series of articles. That Committee in its most valued Report, which was the inspiration of what is now the Companies Act 1948 (U.K.), and on which statute our Companies Act 1955 is mainly based, summarized the disadvantages which minority shareholders often laboured under. For example :

(1) Liability to pay death duty on a greater value than the shares were able to be sold for. (Thus, in our own Estate Duties Act 1955, there is the provision that in ascertaining the value of shares in a company, including a private company, no account shall be taken by the Commissioner of the effect upon that value of any restrictive provisions as to the alienation or transfer of those shares contained in the memorandum or articles of association of the company (s. 76).)

(2) Excessive remuneration of directors.

The Cohen Committee therefore recommended that, in addition to the power to wind up the company (which was not always an adequate remedy), the Court should have power to impose upon the parties to a dispute whatever settlement the Court considered just and equitable. This recommendation has now been carried out by the necessary legislation both in the United Kingdom and New Zealand ; and, therefore, there will be found in both Acts several new provisions which appear to be worthwhile and likely to have the desired beneficial effect. There appears to be a dearth of authority so far on these new legislative provisions in the United Kingdom.

COURT'S INHERENT JURISDICTION TO PROTECT MINORITIES.

It may be stated in passing that in certain circumstances the Court has always had inherent jurisdiction to protect a minority. Thus, if a company alters its

articles and the alteration is not made in the interest of the company as a whole but to benefit the majority of the shareholders at the expense of the minority, the Court will hold that the purported alteration is void. That principle is well illustrated in *Geary* v. *Melrose Co-operative Dairy Co.* [1930] N.Z.L.R. 768; [1930] G.L.R. 223, where the leading cases are reviewed by Reed J. But the recent English case, *Pavlides* v. *Jensen* [1956] 2 All E.R. 518, appears to show that the new legislation does not cover every case of possible hardship to the minority. That case could not be brought within the new legislation. It deals with the Court's inherent jurisdiction in these matters, and deserves more than passing mention.

The plaintiff brought an action against Tunnel Asbestos Cement Co., Ltd. on behalf of himself and all other shareholders of the company except the defendant directors, and claimed a declaration that the defendant directors were guilty of a breach of duty, and an inquiry as to damages and payment of the amount found on the inquiry. It is particularly to be noted that the plaintiff did not allege fraud or ultra vires. The complaint of the plaintiff related to a sale of an asbestos mine in Cyprus, which was acquired by the company (according to the statement of claim) in 1936 for about £142,000 and was resold in 1947 for about £182,000 to Cyprus Asbestos Mines, Ltd., in which the company held twenty-five per cent. of the issued capital. The sale was carried through by the defendant directors, and was not submitted to the approval of the company in general meeting. The plaintiff alleged that the conduct of the defendant directors in effecting the sale was grossly negligent, because it was at an undervalue, the true value of the mine (according to the plaintiff's allegations) having been "somewhere in the neighbourhood of £1,000,000". Danckwerts J. said:

> If the allegations be true, this was, of course, a wrong to the defendant company for which the defendant company *but no one else* would be entitled to bring an action.

The italics are mine. The learned Judge proceeded:

> The plaintiff claims that he is entitled to the assistance of the court in the manner of this action because (1) he is unable to requisition or attend a general meeting of the company under the terms of its articles, and (2) the alleged delinquent directors are in a position to control the defendant company and so prevent the company taking any action against them (*ibid.*, 520).

On a preliminary point as to the competence of the plaintiff, *as a minority shareholder*, to bring the action, it was held by the Court that the action was not maintainable by the plaintiff because, the sale of the mine being within the powers of Tunnel Asbestos Cement Co., Ltd., and no acts of a fraudulent or ultra vires character being alleged by the plaintiff, the sale could be approved or confirmed by the majority of shareholders.

The cases in which under the general law the *minority* can maintain such an action are confined to those in which the sale complained of is of a fraudulent character or beyond the powers of the company. It is really an illustration of an elementary principle of company law that the Court will not interfere with the internal management of companies acting within their powers.

The New Statutory Provisions in Relief of Minorities.

The main new statutory provision in aid of minority shareholders is s. 209 of the Companies Act 1955, which appears to be of even wider import than its United Kingdom prototype (s. 210 of the Companies Act 1948). There are, however, several other new provisions calculated directly or indirectly to improve the position of minority shareholders. These may first be briefly referred to.

Variation of Shareholders' Rights.

Section 81 of the Companies Act 1955 reduces the number of shareholders who may object to a variation of their rights from 15 per cent. to 5 per cent. of those concerned; and the period of objection is increased to twenty-one days. The provisos to subss. (1) and (2) enable the Court to cancel the variation, notwithstanding that the applicants have consented to the application, where material facts have not been disclosed, and they extend the period for objection where an investigation of the affairs of the company is pending or when an application for investigation has been made. This section assists minorities somewhat more than does the corresponding section of the United Kingdom Act.

Rights of Shareholders to Requisition Meetings.

Paragraph (*a*) of s. 136 (1) is new, and does not appear in the United Kingdom statute. It enables one hundred members to requisition an extraordinary general meeting (although they may hold less than one-tenth of the shares or voting power). Under s. 471, this s. 136 (1) (*a*) may be modified by Order in Council in the case of unusually large companies.

Length of Notice for Calling Meetings of Company.

Section 137 contains the provisions stipulating the length of notice for calling meetings of a company. Subsection (1) avoids any article so far as it provides for a shorter notice than fourteen *clear* days' notice in writing. Subsections (2) and (3) make provision for fourteen days' clear notice of a meeting (other than an adjourned meeting or for a meeting for passing a special resolution), for notices sent by post, and for shorter notices by consent of all members in the case of the annual meeting, or of a majority of the members together holding not less than 95 per cent. in nominal value of the shares in the case of other meetings.

New Provisions as to Proxies.

The new provisions as to proxies (previously mentioned in the course of these articles), also ought to assist in safeguarding the interests of minorities. Proxies need not be shareholders, and they have the right to attend meetings of the company and to address the meeting.

Circulation of Members' Resolutions, etc.

Section 144 of the Companies Act 1955 is new. It differs somewhat from the United Kingdom provision. It enables members to *requisition* a company to circulate to the members generally resolutions or statements in relation to ensuing meetings. The number of members necessary for a requisition under this section shall be

(a) Any number of members representing not less than one-twentieth of the total voting rights of all the members having at the date of the requisition a right to vote at the meeting to which the requisition relates; or

(b) Not less than one hundred members having a right to vote at the meeting.

(To be concluded.)

DOMINION LEGAL CONFERENCE 1957.

The programme for the Conference to be held in Christchurch at Easter was confirmed at a recent meeting of the Conference Committee.

The official opening will be held at the Repertory Theatre at 10 a.m. on Tuesday, April 23, and at this function the Attorney-General will be invited to give an address.

On Tuesday afternoon, papers will be given by Sir Wilfrid Sim, K.B.E., Q.C., M.C., LL.B., on "Professional Ethics," and by Mr. Ralph L. Ziman, LL.B., on "A More Secure Title to Motor Vehicles."

A paper on "The Law's Responsibility regarding Domestic Relations" will be given by Mr. P. H. T. Alpers, LL.B., on Wednesday morning, followed by "Reform in the Supreme Court" by Mr R. Hardie Boys.

The afternoon session will comprise a paper on "Atomic Energy and the Law" by Dr. Ivor L. M. Richardson, LL.B. (N.Z.), LL.M., S.J.D. (Mich.); an open forum, and the closing address by the President of the New Zealand Law Society, Mr T. P. Cleary.

Arrangements are well in hand for the social events and the Kiosk at Addington Trotting Grounds has been booked for the Ball. There will be ample accommodation in the Kiosk for 800 dancers.

The programme of social events is :—

Monday, April 22 :
5 p.m. .. Cocktail Party.

Tuesday, April 23 :
10 a.m. .. Official opening ceremony and Civic welcome, followed by Morning Tea.
6.30 p.m. Conference Dinner.
Buffet Dinner for Ladies.

Wednesday, April 24 :
Scenic Drive in morning for Ladies.
9 p.m. .. Conference Ball.

Thursday, April 25 :
(Anzac Day) Free day, but private outings will be arranged where required.

Friday, April 26 :
Golf, Tennis, and Bowls, followed by Afternoon Tea and Closing Ceremony at Shirley Golf Links.

The Conference Secretaries are concerned that there may be several persons intending to attend the Conference who are not yet on the Conference Roll. Any person who has not enrolled is advised to write to the Secretaries at P.O. Box 2019, Christchurch, immediately.

THE QUEEN v. ADAMS.

Some Impressions of the Preliminary Hearing.

By C. G. LENNARD.

The writer was recently admitted to hear portions of the preliminary hearing before the Eastbourne Justices of the charge of murder preferred against Dr J. B. Adams. This case has created widespread interest throughout Great Britain and the accused was finally committed for trial at the Old Bailey after a nine-day hearing, during which forty witnesses were examined and a similar number of exhibits produced. The Crown case revealed a fantastic story which, if contained in a work of fiction, would strain the credulity of any reader.

The doctor had been engaged in practice in Eastbourne for many years past, and was the senior member of a leading partnership of four practitioners. In August, one of his patients died of barbiturate poisoning, and at the inquest a verdict of suicide was returned. For reasons not revealed, further action was taken by the local police, which resulted in Superintendent Hannam of Scotland Yard being called in to assist. Inquiries were then directed towards the death of this woman's husband, also a patient of Dr Adams, who had been operated upon by the New Zealand surgeon, Sir Arthur Porritt, and later died suddenly while still under Dr Adams's attention.

Certain alleged irregularities resulted in the doctor being charged with a number of offences relating to cremation formalities and other technical matters, and then, whilst on bail, he was arrested and charged with the murder of a wealthy woman patient in 1950. The Crown alleged the systematic administration to this lady of excessive quantities of morphia and heroin resulting in her death, with a suggestion that the doctor benefited by a monetary gift made immediately before her death and the later acquisition of a Rolls Royce car and a quantity of silver of appreciable value from her estate. The doctor was also alleged to have received some benefits from one of the other deceased patients. The Crown put the motive on the lowest plane of sordid greed, as the accused admitted to paying super-tax, and had over £12,000 on current account when the last patient died.

The case received the greatest publicity in the English and Continental press and the preliminary hearing was attended by the representatives of over sixty newspapers from as far afield as the United States and Vienna. It was headline news in the London papers each day and created such interest that it has been suggested in many quarters that it will be difficult to obtain a truly open-minded jury at the trial in London. This aspect was even raised in the House of Commons, but discussion was precluded by the Speaker's ruling that such would be improper whilst the case was subjudice. It has, however, forcibly drawn attention

(*Concluded on p. 64.*)

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

Murder Note.—Considerable criticism in England at the Homicide Bill framed broadly on the recommendations of the Royal Commission on Capital Punishment and influenced, it is said, by a recently published pamphlet "Murder—Some Suggestions for the Reform of the Law Relating to Murder in England" issued by a committee comprised of barristers of the Inns of Court Conservative and Unionist Society. The idea behind the Bill is that, in order to suffer the death penalty, one must be a violent criminal as well as a murderer. Capital murders are to be those committed in the course of or in furtherance of theft; those committed in resisting or avoiding arrest or escaping from legal custody; the murder of police or prison officers and those assisting them; murders by shooting or causing explosions; and, in addition, those convicted of murder for the second time. It would seem that a murderer like Bolton who, over a long period, deliberately and callously poisoned his ill and suffering wife would have escaped with imprisonment for life, although, if in a fit of uncontrollable passion he had shot her, he would have suffered the same fate as he did here. In the words of an American writer: "The planning of the murderer is most successful when situations are contrived which lead the casual to conclude that death resulted from natural causes"; and it is into this category that the poisoner fits and is rightly regarded as the type of criminal most deserving of the death penalty. If degrees of murder are legislatively to attract different penalties, then it would appear logical to lay the most emphasis on the carefully-conceived and calculated type of murder in which the element of "malice aforethought" is paramount.

The Defamed Wilsons.—Guthrie Wilson of Palmerston North is not the only "Wilson" to figure during recent years as plaintiff in a libel action of unusual interest. In 1934, one Stuart Wilson sued the British Broadcasting Corporation and another, the latter being a schoolmaster who had had published in the *Radio Times* a letter written by him in which he complained that Wilson (who had sung the part of the Evangelist in the Bach Choir rendering over the B.B.C. of St. Matthew Passion) had no control of his breath and inserted some 200 times the "intrusive H" in the middle of his vowels. "I have just been listening to the broadcast of Bach's glorious *Passion* music. While, on the whole, the rendering was excellent, there was one glaring fault that simply ruined the performance of one of the singers, and I am amazed that the B.B.C. could engage anyone quite so incompetent in his breath control. The 'intrusive H' must have appeared *hundreds* of times. Thus 'Pilate's wife' became 'Pigh-highlet's wigh-highf'; 'Potter's field' became 'Po-ho-te-her's feeheeled'; 'High Priest' was turned into 'High-high Pree-heest'; 'Purple robe' into 'Purple ro-hobe'; 'to' into 'too-hoo', and so on through the entire performance." Like the Manawatu editor, the schoolmaster defendant was unrepentant, and had no apology to offer. Although the singer Wilson's character does not appear to have been in issue, the jury considered the letter went beyond fair criticism and brought in a verdict for £2,100 against both defendants. The inference that may be drawn from a comparison of the respective sums of damages awarded is that there is thought to be more money in radio in England than in journalism in Palmerston North.

A Point of Precedence.—Richard Roe in the *Solicitors' Journal* (15/12/56) mentions that Coleridge L.C.J. and Archbishop Benson (whose sermon for the occasion was on "Humility") once had an argument as to which should take precedence of the other in arriving at the Assize Service at Oxford Cathedral. The Vice-Chancellor solved the problem by arranging for them to arrive separately. This reminds Scriblex of a story in the *Spectator* of Dr. Butler (former Master of Trinity) who once wrote to Sir Robert Scott and addressed his envelope to The Master, St. John's College, next door to Trinity College, Cambridge. He wrote his reply to The Master, Trinity College, opposite Matthew's the grocer's, Cambridge.

The Sky's the Limit.—Complaint has recently been made as to the disproportionate amount of time taken up by our Courts in the hearing of actions for damages. Whether or not the complaint is well-founded, our plight in this regard seems slender when contrasted with that of New York City. According to the American correspondent of a London paper, the City Council has a staff of no less than 420 qualified lawyers, most of whom are engaged in the defence of claims for damages. Last year, he says, the Council was sued for negligence of one sort or another, the damages claimed reaching nearly 127 million dollars. Successful plaintiffs obtained more than seven million dollars. Success, to the tune of about an eighteenth part of the sum demanded, is said to be rather above the national average. The police appear to be a favourite target. But hotels, department stores, and the medical profession are also advised to insure themselves against the risk of litigation. Some of the claims mentioned by this correspondent are superficially ludicrous; ludicrous or not, it seems that they have been actually brought before the courts as a speculation. Many lawyers, it is said, are prepared to pay court costs as a means of getting their names into the papers; if the damages claimed are so fantastic that the journalists make headlines of them this is all the better, and it does not matter much that the plaintiff recovers no more than a fraction of his claim. Nor is this position confined to New York: it seems fairly general throughout the largest cities in the United States.

From My Notebook.—"I should have thought that it was almost *res ipsa loquitur* that it would be unreasonable to buy a Bentley motor-car for nearly £7,000 for the purposes of the trade of a fruit farmer. I should have thought that that mere statement by itself would have at once aroused suspicion as to the propriety of the expenditure and justified the necessity for going into the reasons for, and objections to, such a purchase when the question of taxation had to be considered. *G. H. Chambers (Northern Farms) Ltd.* v. *Watmough (Inspector of Taxes)*]1956] 3 All E.R. 485, per Vaisey J.

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(*Concluded from p. 62.*)

to the Scottish criminal procedure under which there is no preliminary hearing in public, but the accused is furnished with a copy of the evidence which the prosecution proposes to adduce. Thus, any suggestion of a prior trial by the newspapers is obviated.

The hearing took place before five Justices, three men and two women, all laymen, and lasted, with the arguments and submissions of counsel, for nine full days. In view of the number of reporters there was room for about sixty members of the public only and queues formed each morning from 6.30 a.m. in the darkness, and even one morning in a snowstorm. The depositions were taken by a most laborious method. The questions and answers were taken down in shorthand by a stenographer who then dictated them to the Clerk of the Justices who typed them very slowly, appearing not to be using nearly all his fingers in the process. This slowed the proceedings down most considerably and appeared to be somewhat wearing to the patience of counsel for the defence who was freely availing himself of the right of cross-examination. This may have been actuated by a desire to dispel the effect of the publicity given to the opening address of the counsel for the Crown. This occupied the whole of the first day and traversed the whole of the evidence in detail.

As was to be expected, counsel soon crossed swords on the admissibility of the evidence relating to the 1956 deaths. This question of system was argued for 2½ hours in camera, which must have proved edifying and instructive to the lay tribunal who decided after a night's consideration to admit such evidence. Should this ruling be followed by the trial Judge, there should be a most interesting argument before the Court of Criminal Appeal if the doctor be convicted.

There was further lengthy argument as to the right of Superintendent Hannam to retain his note-book pending the trial, again a difficult question to be decided by a lay tribunal. It was claimed that a cheque for £1,000 drawn by one of the deceased, which had been deposited to Dr Adams's credit and also five prescriptions for dangerous drugs had been lost since the inquest in October last, the Police explanation being that they were last seen floating around the solicitors' table. In view of this the defence wished to obviate a risk of the note-book sharing a similar fate. It was held that the Superintendent might retain his note-book until the trial, subject to his producing it for inspection by counsel for the defence.

The cross-examination by Mr Geoffrey Lawrence Q.C. of the expert witnesses was most instructive and indicated intensive preparation on many technical medical matters involved. His manner is quiet and courteous with an underlying pertinacity, and he appeared never to ask a question where there was any risk of receiving an unfavourable reply. At the conclusion of the depositions, he addressed the Bench for a couple of hours on a submission that there was no prima facie case. However, the accused was committed for trial at the Old Bailey. Normally, he would have been committed to the Assizes at Lewes, the county town of Sussex, already the scene of many famous trials including the Crumbles murder and that of Haigh, the acid bath practitioner.

The question of costs is causing some misgivings to the Eastbourne ratepayers. At the conclusion of the hearing, a formal application for a certificate of costs was made by counsel for the Director of Public Prosecutions. The amount is yet to be fixed by the Justices, but it is believed that it will run into well over four figures. In addition to this, the Corporation will be responsible for the larger part of the cost of the police investigations and preparation for trial, as in England the police forces are provided and paid by each local authority. Finally, the local ratepayers will have to contribute towards the costs of the trial in London, which, it is estimated, will extend over three or four weeks, and the transport to and attendance in London of the forty-odd witnesses for the prosecution. The local newspaper has somewhat mournfully observed that a rate of 1d. in the £ produces only £5,610.

One could not but be impressed with the dignity, decorum, and leisurely tempo of the proceedings, the respect paid by counsel and the instructing solicitors to the Bench, notwithstanding their lack of legal training, and, finally, with the thorough preparation and presentation of the Crown case and the searching cross-examination by counsel for the defence. At the same time, our New Zealand system of hearings before a Stipendiary Magistrate with legal training has much to commend it on the score of expedition and the determination of difficult questions on the law of evidence.

Finally, one has no recollection of any case in New Zealand involving the loss of five important exhibits alleged to have been last seen in, on, or around the Bar table !

The Reasonable Man.—"He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound : who neither star gazes nor is lost in meditation when approaching trap doors or the margin of a dock—who investigates exhaustively the bona fides of every mendicant before distributing alms, and will inform himself of the history and habits of a dog before administering a caress—who in the way of business looks only for that narrow margin of profit which twelve men such as himself would reckon to be 'fair'—who never swears, gambles or loses his temper ; who uses nothing except in moderation and even when he flogs his child is meditating only on the golden mean. Devoid in short of any human weakness, with not one single saving vice sans prejudice, procrastination, ill nature, avarice, and absence of mind, as careful for his own safety as he is for that of others, this excellent but odious character stands like a monument in our Courts of Justice, vainly appealing to his fellow citizens to order their lives after his example."—Sir Alan Herbert (*Uncommon Law*, 3.)