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CROWN PROCEEDINGS.

THE recent mining case in Westport, *Moynihan* v. *Attorney-General*, although ending in settlement, brings to light several matters of interest in connection with actions against the Crown. Any guidance along these lines must be welcome since the purpose of the Crown Proceedings Act 1950 and the Crown Proceedings Rules 1952 is to make litigation with the Crown approximate as nearly as possible, consistently with the circumstances, to that between subjects.

The action concerned primarily two claims for damages for non-acceptance of coal by the Crown under a Crown lease whereby the Crown undertook to take up to 50 tons per day at a set price. It also moved to a second cause of action for a large sum by way of general damages arising out of, as alleged, a wrongful cancellation of the lease which was over a period of eight years, with the right of renewal for another eight years. Essentially, in its terms, it was a money claim. But the statement of claim took care to claim declarations arising out of the circumstances.

The matter came before Mr Justice McGregor upon a motion by the defendant to strike out the accompanying declarations and so, no doubt, ensure that the matter be tried by a jury of twelve, as being an action in which the relief claimed was damages, exceeding £500, and nothing else was claimed. The learned Judge acceded to the argument presented on behalf of the plaintiffs and dismissed the motion: see *Moynihan* v. *Attorney-General* [1957] N.Z.L.R. 347. An alternative request on the defendant's motion was that the Court should order a trial by jury pursuant to the discretion given by s. 3 of the Judicature Amendment Act (No. 2) 1955.

The plaintiffs had 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 plaintiffs' 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.

There was a counterclaim based upon four different alleged causes of action, the total damages claimed being £11,236 14s. 2d.

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 embarrass, prejudice, or delay the fair trial of the action.

In his judgment, McGregor J. at p. 349, l. 1, said:

> The real reason actuating the notice to strike out is that, if the prayers for relief by way of declaratory orders remain in the statement of claim, the plaintiffs are entitled to set down the action for trial before a Judge alone; whereas, if the relief claimed is limited to damages, the defendant is entitled as of right to trial before Judge and jury.
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> Before considering the first part of the defendant's motion it is more convenient to consider the alternative application for trial before Judge and jury in any event based on the grounds of convenience. The onus is on the party applying for a jury to show that the case is one which can be more conveniently tried by a jury. The Judge is entitled to consider the method of trial best suited effectively and speedily to dispose of the issues in the case considering the interests of the parties, of the Court and jury whose time is occupied, and the general principles of the administration of justice (*Moore* v. *Commercial Bank of Australia Ltd.* [1934] N.Z.L.R. 106; [1934] G.L.R. 103.)
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> From a perusal of the pleadings and after hearing the arguments submitted to me, it seems to me that complicated questions involving issues both of law and fact must arise in this trial. The provisions of the original deed of lease, it is alleged, were subsequently varied by a subsequent agreement and lengthy correspondence. Questions of construction of these documents will certainly arise. If the plaintiffs have been guilty of breaches of any of the terms of the contract between the parties, the plaintiffs claim waiver and acquiescence by the Crown. In the statement of defence, the defendant claims that the original deed of lease was subject to a condition that an agreement of variation should be drawn up and signed by the parties, and that the deed was signed and delivered in escrow and did not become effective and binding. In other words, the defendant in effect claims that there was no completed or binding contract between the

parties. Although the issues of alleged breaches of contract by the plaintiffs may be pure questions of fact suitable for determination by a jury, it does seem to me that the other matters of intention and construction of documents make it more convenient that the trial should be before a Judge alone rather than that complicated and detailed issues with necessary elaborate directions on matters of law should be placed before a jury. Furthermore, it seems to me that the assessment of damages will necessitate detailed evidence and intricate matters of accountancy to ascertain loss of profits during the unexpired term of the contract. I therefore dismiss the alternative application."

The decision refusing to strike out the claims for declaratory orders was surely justified on one ground alone in that the declarations sought by the plaintiffs related to a collateral matter in connection with the performance of covenants from which a right to remove fixtures flowed. This was relevant to the matters raised in the action and formed a part of them.

The decision, too, was prophetic, and justified in result, in that it seems that the action could *not* have been "more conveniently tried before a Judge with a jury of twelve" (Judicature Amendment Act (No. 2) 1955, s. 3), even if the striking-out sought by the Crown had been granted. After twenty-eight days of hearing of evidence before the learned Judge, the plaintiffs' evidence had not been completed; and, from what we can gather, the hearing of evidence may have continued for another twenty-eight days, to be followed by long argument on difficult questions of law.

It is likely that the decision as to procedure may be tested again in some other connection; but it does appear to raise a matter of considerable importance, and one, it is suggested, for consideration by the learned Attorney-General and the Law Revision Committee. In the *Moynihan* case, as it was reported in the newspapers, there appeared to be considerable difficulty in getting outside the matters in dispute. From small beginnings based upon allegations in the notice cancelling the lease of three different forms of breach of covenant, it grew by the statement of defence to a further eight breaches; and, in the course of the hearing, leave was given to amend by the addition of some further five breaches of covenant. The alleged breaches, or most of them, involved highly technical mining matters. The plaintiffs themselves had extended the ambit of the suit by applying for, and being granted, leave to amend their statement of claim by the addition of two alternative causes of action based upon informal contracts arising in the circumstances. (We shall refer later to this aspect of the proceedings.)

The case gave rise to new points of law, and we gather the impression from counsel, and also from occasional references by the learned Judge during the hearing, that numbers of knotty and interesting points must have emerged. One at least is outstanding—namely, whether the doctrine enunciated by the Court of Appeal in *Pearce* v. *Stevens* (1904) 24 N.Z.L.R. 357 applies to a notice of forfeiture of a lease, or whether the grounds given in the notice of cancellation are themselves the only grounds available to a party who claims a forfeiture in a matter not covered by the Property Law Act 1952. The lease which fell for consideration might possibly be regarded as in a class apart in view of the fact that there was no relief against forfeiture provided in the lease or in the Coal Mines Act 1925, and the Crown was not bound in the circumstances by the protection given to a lessee by the Property Law Act 1952.

Be that as it may, a more impossible case to place before a jury by Judge or counsel it would be hard to conceive; and yet the statute says that such a case shall be tried by a jury, i.e., if the prayer for declarations was to be disregarded.

The *Moynihan* case brings into prominence the thought whether consideration should be given to the addition of a proviso to s. 2 of the Judicature Amendment Act (No. 2) 1955 on these lines:

> "Provided that in any such case [i.e. a money claim] the Court may direct that the case be tried by a Judge alone if it appears to the Court that difficult questions of law will be a prominent feature of the hearing, and difficulty will exist as to the presentation of the matters for consideration to a jury in a form to lead the jury to understand the issues involved."

A plain anomaly exists in practice at the present moment, of which other illustrations from recent cases in the Court appear; see, for instance, *Nicholls* v. *Lyons* [1955] N.Z.L.R. 1097. That was a case heard by Judge and jury in May, 1954, and it reached the Court of Appeal as appears in the report. By the decision of the Court of Appeal, it became necessary to go back to the Supreme Court on the second part of the motion, i.e. asking for a new trial. The latter Supreme Court decision itself came up before the Court of Appeal in September last, and still awaits judgment. It may be understandable in the future that cases declared by statute as for the consideration of a jury, but embarrassing to a Judge to present to a jury, and very confusing to a jury to understand, may nevertheless not receive the protection which was given in *Moynihan* v. *Attorney-General*, *supra*, by reason of declarations asked for in the statement of claim.

Another feature of interest is that a litigant contemplating litigation with the Crown must pause when he sets himself to enter into conflict with the public purse. As mentioned above, the hearing of this suit, by elaboration of issues, grew almost out of hand. A check of the evidence shows also that the cross-examination of the plaintiffs' evidence by counsel for the Crown took 500 pages, as compared with 252 pages for the evidence-in-chief and the re-examination. (As events proved, the action ended in a "draw," with each party withdrawing its claims.) A factor is that the Crown, with its unlimited resources, has, if it should be so minded, a weapon in its hands to prolong litigation beyond the reasonable reach of the financial resources of the private litigant. The learned Judge appears to have been disturbed in a measure by this aspect of expense as the case proceeded, and he is on record in the closing stages, after settlement, as observing that he had been most perturbed at the great length to which the case was running and the heavy expense involved. He did not, of course, lay any blame on either of the parties or their respective counsel.

Another matter which may call for attention in the future is the granting of amendments, during the hearing, to a plaintiff who sues the Crown.

Section 31 of the Crown Proceedings Act 1950 (which substantially reproduces s. 34 of the Crown Suits Act 1908) is, in part, as follows:

> 31. Subject to the provisions of this Act and any other Act, and to any rules made pursuant to the last preceding section, the laws, statutes, and rules for the time being in force as to pleading . . . amendment . . . for the time being available as between plaintiffs and defendants in personal actions between subjects . . . shall, *unless the Court otherwise*

orders, be applicable and apply and extend to *civil proceedings by or against the Crown.*

There would appear to be an element of conflict between that section and s. 23 (1) (*a*) of the Limitation Act 1950.

(It is to be noted that s. 4 (1) of the Crown Proceedings Act 1950 declares that the provisions of that Act are subject to the provisions of the Limitation Act 1950.)

Section 23 (1) of the Limitation Act 1950 (which is derived from s. 20 of the Limitation Act 1939 (U.K.))* is as follows :

> 23. (1) No action shall be brought against any person (including the Crown) for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless—
>
> (*a*) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action.

Reference may be made to two judgments based on s. 26 of the now-repealed Crown Suits Act 1908 and while s. 34 of that statute corresponding to s. 31 of the Crown Proceedings Act 1950 was in force.

In *Official Assignee* v. *The King* [1922] N.Z.L.R. 265, Herdman J. held that a petition under the Crown Suits Act 1908, could not be amended at the trial so as to add a new claim, for the reason that no notice had been given of that claim. In *Quinn* v. *The King* [1937] N.Z.L.R. 742, Ostler J. said that a suit against the Crown had to be preceded by the notice prescribed by s. 26 of the Crown Suits Act 1908. If the petition were amended it would not comply with the notice. He added, at p. 742, l. 35.

> In *Robertson's Civil Proceedings by and against the Crown*, 390, the opinion is expressed that a petition of right cannot be amended. The Crown must be given " explicit " notice of the claim, and a claim which was different from the notice would, in my opinion, be bad and liable to be struck out, for the Crown is entitled to fair notice of the claim in order to have an opportunity of judging whether it should be acknowledged or defended.

(Since those cases were decided the dispensing power given by s. 23 (2) of the Limitation Act 1950 has been enacted.)

* Cf. s. 26 of the Crown Suits Act, 1908.

There would appear to be an anomaly that while, under s. 23 (1) (*a*) of the Limitation Act 1950 a plaintiff must give to the Crown " reasonable information of the circumstances upon which the proposed action will be based ", yet under s. 31 of the Crown Proceedings Act 1950 power is given to amend pleadings, as by adding during the hearing a new cause of action which is not indicated in the notice which must be given under s. 23 (1) (*a*) of the Limitation Act 1950.

Leave was given for the amendment of the statement of claim during the hearing of the *Moynihan* case ; and this amendment introduced two new alternative causes of action. Whether or not it was embarrassing to the Crown in that case is not under discussion ; but it would seem that the Crown or a public authority can be faced with difficulties if the plaintiff applies for amendment of his statement of claim during the trial—and even in the course of the presentation of his evidence—to change or add to the ground stated in his notice of action and in his filed statement of claim founded on the circumstances set out therein. The phrase " after the accrual of the cause of action " at the end of s. 23 (1) (*a*) must surely refer to the cause of action disclosed in the notice, and none other.

Presumably, the dispensing power given by s. 23 (2) of the Limitation Act 1950 could apply to the situation, according to the nature of the amendment and the circumstances generally ; but this is not altogether clear. An application made during a trial for extension of time related only to after-thought causes of action could, it seems, place the Court in an unenviable position in dealing with it.

On the other hand, if the notice of action to the Crown is to be regarded as an exclusive statement of all that is to be gone into at the hearing, the subject is in substance deprived of the equality in litigation between Crown and subject which the Crown Proceedings Act 1950 is intended to ensure. In its favour the Crown will have full power of amendment, and the subject none.

This is another matter to which the Law Revision Committee might give some attention. But that Committee may be of the opinion that the Crown, merely by reason of the requirement of notice of action, should not be put in any better position in relation to amendment of pleadings than that enjoyed by the private litigant.

SUMMARY OF RECENT LAW.

FAMILY PROTECTION—TIME FOR MAKING APPLICATION.

Application for Extension—Transmission and Transfer of Only Remaining Asset, executed by Executor in favour of Sole Beneficiary and held Unregistered with Certificate of Title by Beneficiary's Solicitors—Application for Extension made One Month later—Application made after Final Distribution of Estate—Family Protection Act 1955, s. 9 (1)—Land Transfer Act 1952, s. 123 (1). The testatrix died on August 23, 1953, leaving a will specifically devising a freehold property (the main asset of the estate) to her only surviving child, who was appointed executrix. She was survived also by A., her second husband. The named executrix having died, probate of her will was granted to W., her executor and sole beneficiary. On December 20, 1955, W. signed an application for transmission to him of the freehold property, and, on the same date, he signed a transfer as registered proprietor by virtue of such transmission to himself as transferee as sole beneficiary ; and these documents in registrable form, together with the certificate of title, were forwarded to the Wellington agents of the transferee's solicitors for registration, which, however, was not effected when A. commenced proceedings for further provision out of the estate of the testatrix. The application made by A., under s. 9 of the Family Protection Act 1955, two years and a month after grant of probate, for an order extending the time for making application for further provision, was refused by McGregor J. [1956] N.Z.L.R. 657. On appeal from such refusal, *Held*, 1. That, once the transfer had been executed and sent with the relative certificate of title to the Wellington solicitors for registration, then, in fact, the final distribution of the estate had been effected. *In re Annett, Annett* v. *Taylor* [1956] N.Z.L.R. 929, distinguished. *Quaere*, Whether the test adopted by the learned trial Judge, in which he drew an analogy to gifts, is not too stringent a test. Appeal from the judgment of McGregor J. [1956] N.Z.L.R. 657, dismissed. *In re Anderson (deceased), Anderson* v. *Williams.* (C.A. Wellington. March 18, 1957. Finlay J. Hutchison J. North J. Henry J. McCarthy J.)

MENTAL DEFECTIVES.

Committee—Estate of Mental Defective consisting of Poultry-Farm—Wife applying for Appointment as Committee—Expenses of Management not increased to Any Extent by Appointment of Public Trustee—Periodical Visits of Farm Supervisor from Public Trust Office providing Wife with Competent Advice—Contemplated Claim for Damages for Large Amount in Respect of Patient's Condition caused by Negligence—Advice of Public Trustee and His Administration of Moneys resulting from Successful Claim beneficial to Estate—Wife's Application refused—Mental Health Act 1911, s. 115. S., a mental patient, was injured in a motor accident and his mental condition was thereby affected so that he became a mental patient. Before his committal, he was employed as a salesman, and he also carried on the business of a poultry-farmer. The assets in his estate consisted almost entirely of the land and stock of the poultry-farm. His wife had assisted in the poultry-farming business, and, since her husband's illness, she had completely managed the farm. She applied to be appointed a committee in her husband's estate. *Held*, 1. That the onus was on the applicant to show sufficient reasons why she should be appointed in preference to the Public Trustee. *In re Q.* [1953] N.Z.L.R. 327, followed. 2. That the expenses of management of the poultry-farm would not be inc eased to any extent by the appointment of the Public Trustee, the only additional expense being that of period cal visits of a farm supervisor, which small outlay might be of assistance to the wife in providing her with additional competent advice. 3. That, as it was contemplated that a claim for substantial damages in respect of the patient's mental deterioration as the result of his injuries due to the negligence of another party would be made, the advice of the Public Trustee would be of assistance in prosecuting the claim, and, if it should be successful, the estate would be better administered by the Public Trustee in the interests of both the wife and the infant child. *In re S. (A Mental Patient).* (S.C. Blenheim. April 2, 1957 McGregor J.)

NASELLA TUSSOCK.

Notice to Landowner to "grub out and/or destroy other than by burning all nassella tussock"—Notice correctly given—"Land" referring to Land and Nassella Tussock growing thereon—Nassella Tussock Act 1946, s. 8 (1) (e). All the paragraphs of subs. (1) of s. 8 of the Nassella Tussock Act 1946 apply to the land and to the nassella tussock thereo; and the word "land" in s. 8 (1) (e) refers not only to the land but also to the nassella tussock growing thereon. A notice sent by a Tussock Board to a landowner to "grub out and/or destroy other than by burning all nassella tussock" was correctly given; and the recipient of the notice would comply with it if he grubbed and destroyed the tussock (other than by fire) or simply destroyed it (other than by fire), or simply grubbed it. *North Canterbury Nassella Tussock Board* v. *Weston and Others.* (Rangiora. March 28, 1956. Ritchie S.M.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Worker engaged in Repetitive Work creating enforced Familiarity with Potentially Dangerous Substances or Elements—Such Circumstance not to be overlooked in determining Question of Worker's Negligence—Contribution—Damages—Large Amount awarded—Quantum not Excessive—Assessment in Respect of Contributory Negligence reasonable. The dictum of Lawrence J. (as Lord Oaksey then was) in *Flower* v. *Ebbw Vale Co. Ltd.* [1934] 2 K.B. 132, 140— namely, ". . . in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence" simply seeks to ensure that, in all cases in which the nature and duration of the employment in a factory or elsewhere, induces forced familiarity with dangerous machines, or with potentially dangerous substances or elements, that circumstance must not be overlooked in considering the question of the worker's contributory negligence. The dictum does not alter or lessen the standard of care, but insists that all the circumstances must be considered. The standard of care is that which would be observed by a reasonably prudent workman in the particular situation and circumstances; and, if one of the circumstances present is enforced familiarity with danger, then to ignore that factor is to disregard a relevant circumstance, and to apply a standard which is not the standard of a reasonably prudent workman in the particular circumstances. *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152; [1939] 3 All E.R. 722, followed. *Staveley Iron & Chemical Co. Ltd.* v. *Jones* [1956] A.C. 627; [1956] 1 All E.R. 403, distinguished. *Rippon* v. *Port of London Authority and J. Russell and Co.* [1940] 1 K.B. 858; [1940] 1 All E.R. 637, and *Public Trustee* v. *The King* [1946] N.Z.L.R. 134; [1946] G.L.R. 2, and *Procter* v. *Johnson and Phillips Ltd.* [1943] K.B. 553; [1943] 1 All E.R. 565, referred to. The jury award of £21,500 for general damages, was held to be reasonable, as not being out of proportion to the circumstances of this case. The jury's reduction of the awarded damages in respect of the plaintiff's contributory negligence was not an apportionment of blame so unreasonable as to be incapable of acceptance. *Hoani* v. *Wallis* [1956] N.Z.L.R. 395, applied. *Taylor* v. *Central Waikato Electric Power Board.* (S.C. Hamilton. February 8, 1957. Shorland J.)

PRACTICE—APPEALS TO THE PRIVY COUNCIL.

"Civil right"—Value of Such Right to be distinguished from Consequences following from Further Delay—Value incapable of Appraisement or Reduction to Money Value—Judgment of Court of Appeal Unanimous—Material Element in Consideration of Exercise of Discretion as to whether Appeal should lie—Privy Council Appeals Rules 1910, R. 2 (a) (b). While the circumstance that a judgment of the Court of Appeal was an unanimous one affirming the judgment of the Court below is not a ground in itself under R. 2 (*b*) of the Privy Council Appeals Rules 1910, for refusing leave to appeal to Her Majesty in Council, it is a material element, in considering whether a discretion should be exercised, to consider whether the Court of Appeal has any reasonable doubts of the accuracy of its decision. Statement of Williams J. in *Bowron* v. *Bishop* (No. 2) (1910) 29 N.Z.L.R. 821, 826; 12 G.L.R. 517, 532, approved. In proceedings in the nature of a representative action, the sole question raised was one of the jurisdiction of the learned Magistrate who was of the opinion that he was entitled to reject the board's Lower Manawatu River Control Board's Classification List on the graund that it did not provide a basis of rating that was equitable. Barrowclough C.J. held that the Magistrate had wrongly refused jurisdiction and he granted a mandamus to the Magistate exercising jurisdiction in Palmerston North to hear and determine the appeals against the List [1956] N.Z.L.R. 634. His judgment was unanimously upheld on appeal: [1957] N.Z.L.R. 368. The appellant, who was one of the objectors, sought leave to appeal to Her Majesty in Council. *Held*, by the Court of Appeal, 1. That the value of the "civil right" in question, which had to be distinguished from the indirect consequences which might follow from further delay, could not be appraised or reduced to a money value; and that, consequently, the appellant had no right of appeal under R. 2 (*a*) of the Privy Council Appeals Rules 1910. *Griffin and Sons Ltd.* v. *Judge Archer and General Manager of Railways ante*, p. 502, referred to. 2. That this case was not one of "great general or public importance" within the meaning of R. 2 (*b*) of the Privy Council Appeals Rules 1910, and the case did not fall within the special classes of case which have been recognized thereunder. *Lancaster* v. *Manawatu Catchment Board and Another* (No 2). (C A. Wellington. April 16, 1957.)

Civil Right involved—Right to have Case heard by Impartial Tribunal—Value of Such Right incapable of Appraisement or Reduction to Money Value—Only Proper Inferences to be drawn in respect of Judge's Observations, only Question in Dispute—Special Class of Case—"Or otherwise"—Privy Council Appeals Rules 1910, R 2 (a) (b) The Court of Appeal dismissed an appeal from a judgment refusing the appellant a writ of prohibition, the sole question for determination being whether Judge Archer, as the Transport Appeal authority, had predetermined the appellant company's appeal in proceedings to which it was not a party and on which it was not heard, and so had disqualified himself from hearing or adjudicating on an appeal by the General Manager of Railways from the decision of a Transport Licensing Authority refusing to revoke a transport licence held by the appellant. (The judgments in the Supreme Court and in the Court of Appeal are not reported.*) On motion for conditional leave to appeal to Her Majesty in Council, it was common ground that the transport licence in question was worth more than £500 sterling. *Held*, 1. That the transport licence itself was not in issue, and could not be in issue in the proceedings; and the only civil right involved in the application for a writ of prohibition either directly or indirectly was the right of the appellant to have its case heard by an impartial tribunal; and the value of that civil right could not be appraised or reduced to a money value; and that, consequently, the appellant could not bring itself within R. 2 (*a*) of the Privy Council Appeal Rules 1910. 2. That there were no disputed questions of fact; and, as the only question in dispute was the proper inference to be drawn in respect of

LEGAL ANNOUNCEMENTS.

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certain observations made by the Judge in the course of proceedings before him, the issues raised were not such that they ought to be determined by Her Majesty in Council; and, furthermore, that the case was essentially one where a knowledge of local conditions is of some importance. * "The Court of Appeal did not find it necessary to determine whether the test to be applied in considering the question of bias arising from predetermination was that of 'real likelihood of bias' or the less exacting test of 'what a reasonable man would judge', for the Court was of opinion that whichever test was applied on the facts of this case, the result must be the same." *Griffin & Sons Ltd.* v. *Judge Archer and General Manager of Railways.* (C.A. Wellington. April 16, 1957. Finlay J. North J. Turner J.)

PRACTICE—SPECIAL JURY.

Classes of Cases wherein Special Jury may be ordered—Material to be placed before Court—Court's Fettered Discretion—"Difficult questions in relation to scientific, technical, business, or professional matters . . . likely to arise"—Statutes Amendment Act 1939, s. 37. A special jury in a civil action will not be ordered unless the material which is before the Court is sufficient to lead the Court to the opinion that difficult questions of the kind specified in s. 37 of the Statutes Amendment Act 1939, are involved in the action and that they are likely to arise at the trial. Cases in which the matter arises fall into at least two classes, and possibly three classes: First, cases where the issues raised in the pleadings provide sufficient material to enable a Court to form an opinion that difficult questions of the kind specified are involved and are likely to arise at the trial. Secondly, cases where the pleadings do not contain sufficient material to enable the Court to form an opinion on this question. In this class of case, affidavits are required. A third possible class (which may only be an extension of the second class) are cases when prima facie the issues raised in the statement of claim are simple, or at least not complex, but the defendant by way of defence wishes to raise an issue which may involve difficult questions in relation to scientific or technical matters. In this class of case, the applicant for a special jury, in order to succeed, may have to condescend to the disclosure of detailed facts. Statement of Smith J. in *Auckland Hospital Board* v. *Marelich* [1944] N.Z.L.R. 596, 606; [1944] G.L.R. 308, 313, applied. The discretion to order a special jury is not an absolute or uncontrolled discretion, but rather is a fettered discretion. If, however, there is sufficient evidence before the Judge upon which he may form an opinion, the whole matter is to be regarded as one of discretion. But, in the case of a fettered discretion such as this, a Court of Appeal will be more readily disposed to examine anew the relevant facts and circumstances in order to exercise a discretion by way of review. *Evans* v. *Bartlam* [1937] A.C. 473, and *Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130, applied. The decision of Shorland J. granting a special jury, reported *ante*, 228, reversed. *Patrick* v. *Attorney-General.* (C.A. Wellington. April 16, 1957. Finlay J. North J. McCarthy J.)

SALE OF GOODS.

Contract—Licence for Export from Finland necessary—Contract provided for Delivery: as soon as export Licence granted—Licences granted only to Members of Finnish Exporters' Association—Sellers not members of Association—Whether Sellers liable in Damages for failure to deliver Goods. By a contract dated September 16, 1953, the sellers, a Finnish concern, agreed to sell to the buyers, an English company, a quantity of ants' eggs f.o.b. Helsinki. The contract, which provided for disputes to be settled in London, contained the clause: "Delivery: prompt, as soon as export licence granted". Before the execution of the contract, the sellers' agents assured the buyers that the obtaining of a licence was merely a formality which might cause a short delay in delivering the goods. Under Finnish law, at all material times, the export of ants' eggs was prohibited except under licence and an export licence was granted only if the Ant Egg Exporters' Association approved the application. It was the practice of the association not to approve an application unless the applicant was a member of the association. The sellers were not members of the association and did not know of its practice. The sellers applied for an export licence but their application was refused on the ground that they were not members of the Ant Egg Exporters' Association and they were unable to deliver the goods in accordance with the contract. On the question whether the sellers were liable in damages for breach of contract, *Held*, That on the true construction of the contract and in the circumstances, the sellers warranted absolutely that they would obtain an export licence because the clause "Delivery: prompt, as soon as export licence granted" showed that the assumption of both parties underlying the contract was that an export licence would certainly be granted and that the only question was when it would be granted; the sellers were, therefore, liable in damages. Per curiam: Where a warranty regarding licences has to be implied in a contract for the sale of goods the warranty will generally be to use all reasonable diligence to obtain a licence, but each case must be decided according to its own circumstances.) *Peter Cassidy Seed Co., Ltd.* v. *Osuustukkukauppa I. L.* [1957] 1 All E.R. 484 (Q.B.D.).

SPECIFIC PERFORMANCE.

Sale of land—Innocent Misrepresentation as to Size of Site—Contract incorporating Law Society's Conditions of Sale 1953, Condition 35—Area of Property Substantially smaller than that stated in Particulars of Sale—Purchaser prejudiced by reason of Difference—Contract rescinded. 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*, That 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 V.-C., in *Whittemore* v. *Whittemore* (1869) L.R. 8 Eq. 605, followed). (ii) the purchaser could not receive what he had bargained for, since the difference between the area stated and the actual area was substantial; moreover, as the purchaser was also preudiced 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). (ii) 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 L.C., delivering the judgment of the Privy Council in *Rutherford* v. *Acton-Adams* [1915] N.Z.P.C.C. 688, 689, considered; *Shepherd* v. *Croft* [1911] 1 Ch. 521, distinguished). *Watson* v. *Burton* [1956] 3 All E.R. 929 (Ch.D.).

Specific Performance and Laches. *101 Solicitors' Journal*, 331.

TENANCY—PROPERTY.

Assignment of Lease—Tenant of Shop assigning Lease, with Lessor's Consent—No Written Consent by Lessor to Continuance of Protective Statutory Provisions—Lessor entitled to Possession on Expiry of Term of Lease—Tenancy Act 1955, s. 14. In 1952, W. leased a lock-up shop to B., who, in 1954, assigned her lease to the defendant company. The lessor in accordance with the provisions of the lease, consented to the assignment; but, before the date of the transfer, he did not consent in writing to the continued application of Part IV and the other provisions of the Tenancy Act 1955, as provided in s. 14 of that statute. When the term of the lease expired, the lessor claimed to recover possession of the shop. *Held*, 1. That there was a real transfer of the lessee's interest in an existing lease, the original lessee remaining liable under the lessee's covenant in the lease and the assignee becoming liable by virtue of the privity of the estate; and the tenancy of the property had been transferred by the tenant within the meaning of s. 14 of the Tenancy Act 1955. 2. That, notwithstanding the approval by the lessor of the assignee of the lease, he had not consented to the passing to the assignee of the continued application of the protective provisions of the Tenancy Act 1955; and, in terms of s. 14, the assignee had no right to continue in occupation of the property after the expiration of the lease. *Waddington* v. *De Luxe Confectionery Ltd.* (S.C. Wellington. April 5, 1957. Stanton J.)

TRANSPORT.

Offences—Cancellation of Licence and Disqualification—"Special Reasons" for mitigating Penalty—Reasons admissible as "special reasons"—Matters affecting General Public may be "special reasons"—Transport Act 1949, s. 41. It is a question of law whether any particular reason is such as can be accepted as a "special reason" within the meaning of those words in s. 41 of the Transport Act 1949. Reasons which are special to the offender, such as financial hardship, the facts that the offender has never been convicted before or has driven for many years without complaint, cannot be accepted as "special reasons". But circumstances which are special to the offence, in the sense that they mitigate the offence itself, are admissible. *Whittal* v. *Kirby* [1946] 2 All E.R. 552 and *Rimmer* v. *Bellingham* [1952] N.Z.L.R. 87, followed. Matters affecting the general public may constitute "special reasons". They are not limited to national emergencies, and it is not necessary, as a matter of law, that the considerations adduced should be overwhelming. The reasons must be "special", and not such as are common to the ordinary run of cases. If a particular reason is within an admissible category, the question whether it is or is not, in the circumstances, a "special reason", is a question for the tribunal that is seized of the facts. *Jowett-Shooter* v. *Franklin* [1949] 2 All E.R. 730, followed. *Profitt* v. *Police*. (S.C. Christchurch. April 15, 1957. F. B. Adams J.)

WAGES PROTECTION AND CONTRACTORS' LIENS.

Contract to Transport Material for Assembly as Dais and Supervision of Its Erection—Further Work of Similar Kind done later—Such Work sufficiently severable to constitute Independent Contract—Dais, though Collocation of Chattels, Itself a "chattel"—Such Carriage Major Part of Work—Erection and Dismantling of Dais—Work done "upon or in respect of a chattel"—Property in Respect of Which Lien asserted not ascertainable "with reasonable certainty from the notice"—Wages Protection and Contractors' Liens Act 1939, ss. 20 (2), 21 (1), 30 (1). The concluding words of s. 20 (2) of the Wages Protection and Contractors' Liens Act 1939 recognize that there may be "additional or extra work which is connected with or related to the work, but is not specified in the contract or subcontract", but the necessity for the performance of such additional work is not to negative the completion of the contract as originally made. As the right of lien is a right conferred by statute, to enjoy the benefit of it, there must be compliance with the terms of the statute. Consequently, for a notice of lien to be valid, the property sought to be charged must be ascertainable "with reasonable certainty from the notice" in terms of s. 30 (1) of the Act. A written contract provided for the transport by L. for the company of equipment and furnishings for two dais in two vehicles provided by L. The erection and dismantling of the structures were to be carried out on behalf of the company by six men who were carried on L.'s vehicles. When the trucks were together, L. was to supervise the erection and dismantling of the equipment, and, when they were apart, he was to exercise such general supervision as was practicable from a distance. The vehicles were to be driven by L. and his driver respectively. The material was assembled at each place for the more convenient utilization of the many parts of which it was comprised in order to make a stage or dais.

The original contract contemplated the return of the vehicles to Wellington, which, it was anticipated, would be January 11, 1954, and the materials would be unloaded there, and that would mark the end of the contract. It was later agreed that, following the return to Wellington, L. should be available to erect a dais at Athletic Park, in Wellington, and complete the erection of a dais at Masterton. The dais remained on one of the vehicles until it was unloaded at Athletic Park. A notice, dated February 12, 1954, claimed a lien against the chattels to which the contract related. At that time, the dais were both dismembered and parts of the equipment were not all in one place, some were in Wellington and others in the South Island, and the company owned other equipment of the same type as L. had carried. *Held*, 1. That the work to be performed at Athletic Park and at Masterton should be regarded as an additional distinct and separate contract (or as two separate contracts), as that work was sufficiently severable to constitute it as an independent contract; and, consequently, as the main contract was completed more than sixty days before the issue of the writ, the action was out of time. *Walker Bros.* v. *Roberts* (1908) 10 G.L.R. 629, applied. 2. That each dais, though a collocation of chattels, could be regarded as "a chattel"; and that the contract was the transport of all this material (all being chattels) from place to place and the assembly at each place to make a dais; and, as the erection and taking down of the dais was an important and indispensable part of the contract, what L. had to do was "work upon or in respect of a chattel" as those words are used in s. 21 (1) of the statute. *Chamberlayne* v. *Collins* (1894) 70 L.T. 217 and *Pukuweka Sawmills Ltd.* v. *Winger* [1917] N.Z.L.R. 81; [1916] G.L.R. 728, referred to. 3. That, on the facts set out in the judgment, the property in respect of which the claim of lien was asserted could not have been ascertained with reasonable certainty from the notice of lien, since the company had other articles of the same kind. *Lyver* v. *J. Crowe & Sons Ltd. (In Liquidation)*. (S.C. Wellington. March 26, 1957. Gresson J.)

THE DOMINION LEGAL CONFERENCE ISSUE.

Corrigendum.

Regret is expressed for the mutilation and incompleteness of a part of the speech of the learned Chief Justice at the Bar Dinner, in which, as printed, His Honour is reported as saying something which he did not, in fact, say.

At the end of the first paragraph on p. 148, the quotation commencing "*Parturiunt montis* (sic)" should be completely eliminated, and the following, which His Honour actually said, is to be substituted:

> "*Parturient montes*: *nascetur*—no, I am not going to say what you are thinking—*nascetur*—*Curia Superrima*".

Readers are asked to correct their copies of the JOURNAL accordingly.

SOME REFLECTIONS ON LISTER v. ROMFORD ICE AND COLD STORAGE CO. LTD.

By A. G. Davis.

The facts of *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] 1 All E.R. 125, together with the decision of the House of Lords, and certain consequences of that decision, have already been discussed in this Journal, *ante*, p. 49. But the decision is one of such importance that it is felt proper to advert further to some of its far-reaching consequences. If one may hazard a prophecy, it can be said that this case will be regarded as a milestone along the road of the common law, equal in importance to the epoch-making case of *Donoghue* v. *Stevenson* [1932] A.C. 562.

Lister's case can appropriately be compared with *Donoghue* v. *Stevenson*, not to the advantage of the former case. Whereas *Donoghue* v. *Stevenson* might appropriately be called the "Consumers' Charter", *Lister's* case might equally appropriately be called the "Employees' Execution Block". *Donoghue* v. *Stevenson* showed how the common law can, in case of need, keep pace with the changing nature of the society it controls. *Lister's* case shows how the common law can, equally, arrest the advance or, to vary the metaphor, put back the clock.

The facts of *Lister's* case are simple. Lister was a lorry-driver in the employment of the Romford Ice Company. In the course of his employment, he drove his lorry to the yard of a slaughterhouse to collect some waste, taking with him, as his mate, his father. Nothing turns on the relationship of father and son. While in the yard of the slaughterhouse, he negligently backed his lorry and, in so doing, injured his father. The father brought an action against the company for the personal injuries he had suffered. Judgment was given in his favour for £1,600 and costs, he being held one-third to blame.

The company was insured under two policies: a motor-vehicle policy which covered them and Lister junior, as their driver, against third-party risks to the public, in accordance with the provisions of the Road Traffic Act 1930, but did not cover injuries to servants of the plaintiff company, other than a driver of the vehicle. They also had a Lloyd's employers' liability policy under which the accident to the father was covered. Under the latter policy, Lloyd's paid the father £1,600 damages and costs.

The employers' liability policy contained a term authorizing 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. The underwriters in consequence, and without the knowledge of the company, the insured, but in their name, issued a writ against Lister claiming the £1,600 damages which had been paid to Lister senior, together with their costs. In this action, tried before Ormerod J., the company succeeded.

(In the *Weekly Law Reports*, it is said that the trial Judge gave judgment for £1,800, and the taxed costs, as between solicitor and client, of defending the action brought by Lister senior against the company, together with two-thirds of the costs of the action then heard. In the *All England Reports*, it is said that judgment was given for £1,800 and costs (being £1,600 awarded as damages, and £200, the agreed costs of the company in defending the action, together with costs). For the present, little turns on the difference in the figures; but the prospect of a servant being called on to pay solicitor and client costs to an indemnifying underwriter is truly terrifying. Party and party costs are bad enough.)

From the judgment of Ormerod J., Lister appealed to the Court of Appeal. His appeal was dismissed by a majority (Birkett and Romer L.JJ., Denning L.J., dissenting).

A further appeal to the House of Lords was dismissed by a majority of 3 to 2.

It is not clear from the statement of facts, both in the Court of Appeal [1956] 2 Q.B. 181, and in the House of Lords, whether Lister junior was the actual defendant, or whether he was only a nominal defendant, the actual dispute being between Lloyd's and the company which had insured the plaintiffs under the policy issued in accordance with the Road Traffic Act 1930. A precedent for such a contest appears in *Semtex Ltd.* v. *Gladstone* [1957] 2 All E.R. 206. In that case, the issue of law involved was similar to that in the instant case: a claim by an employer against an employee for an indemnity against damages which the employers had had to pay to third parties, in consequence of their employee's negligence, in which the employee was held liable. Only passing reference was made to this case by the House of Lords in *Lister's* case, Viscount Simonds interpolating that, in his opinion, the case was rightly decided, and Lord Somervell stating that, in his opinion, the case was wrongly decided.

In the course of his judgment in *Semtex Ltd.* v. *Gladstone* (*supra*), Finnemore J., after mentioning the fact that the defendant had pleaded that his wages were £365 per annum, said:

> "Of course, it is obvious to anyone who uses his eyes in "this Court, apart from the evidence that was given, that, "in the result, this is a contest between much more seasoned "warriors than even Semtex Ltd. or Mr Gladstone. Behind "the scenes are two well-known insurance companies, and "I think that the facts that the defendant is a man of small "means, and that, ex hypothesi, the insurance companies "are people of large means, are quite irrelevant".

It would appear, however, that in *Lister's* case, the contest was between Lloyd's and Lister junior personally. As Denning L.J. said ([1956] 2 Q.B. at p. 186):

> "They [Lloyd's] want the son to indemnify them out of "his own pocket".

In the House of Lords, all their Lordships were agreed that the driver (Lister) was under a contractual obligation of care to his employers in the performance of his duty as a driver. The majority (Viscount Simonds, Lord Morton of Henryton and Lord Tucker) further held that the company was entitled to recover from the driver damages for breach of that contractual obligation, and that there was no implied term in the contract of service that the driver was entitled to be

indemnified by the company, his employer, either if the company was in fact insured, or was required by the Road Traffic Act 1930 to be insured, or if, as a reasonable and prudent person, it ought to have been insured.

Viscount Simonds and Lord Morton of Henryton were of the opinion that the company was also entitled to recover contribution from the driver under the Law Reform (Married Women and Tortfeasors) Act 1935 (cf. s. 17 (1), Law Reform Act 1936 (N.Z.)), the contribution amounting to a complete indemnity.

It is of some interest to note that Lister, the defendant, alleged that he was present in Court throughout the trial of the action brought by his father against the company, and was ready to give evidence on behalf of the company, but that he was not allowed to do so. Consequently, he alleged that the judgment against the company was not due to his negligent driving, but to the failure of the company to call him as a witness. This argument was summarily dismissed in the House of Lords, Viscount Simonds saying:

> "I do not think your Lordships will take this plea very seriously. It cannot by any means be sustained."

The judgments of all their Lordships (the minority as well as the majority) have been carefully and adequately analyzed in the article already referred to, p. 49, *ante*, and there is no need to refer to them further at this stage. For the present, it will suffice to refer to some of the implications of the decision.

First, it restores to the common law, under a somewhat different guise, the discarded doctrine of common employment, of which Kenny (*Cases on Tort*, p. 90) said:

> "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase."

This doctrine, abolished in New Zealand in 1908, and in England forty years later, provided that a master was not responsible for negligent harm done by one of his servants to a fellow servant engaged in a common employment. Its effect was to absolve the master from liability and to leave the injured worker with a remedy solely against his negligent fellow-worker. The master and, consequently, his insurers, if he were insured, got off scot free. With the abolition of the doctrine, liability is imposed on the master and, consequently, on his insurers; but *Lister's* case makes the master merely a guarantor of the plaintiff's claim and, if the negligent workman has sufficient assets to meet that claim, the master and his insurers still go scot free. The abolition of the doctrine which, as Mac Kinnon L.J. said in *Speed* v. *Thomas Swift* ([1943] K.B. 557) "lawyers who are gentlemen have long disliked", was surely intended to make the master primarily liable for the injury suffered by his servant by reason of his fellow-worker's negligence. *Lister's* case imposes on him only secondary liability.

Inasmuch as all their Lordships in the House of Lords agreed that an employee was under a contractual obligation of care to his employers in the performance of his duties, as were two of the Judges in the Court of Appeal, it is difficult to criticize this part of the decision from the juridical aspect. One can only direct attention to its consequences.

A more serious criticism arises in those cases in which the master is insured—more particularly in those cases in which, by the terms of the policy, the underwriters are authorized to take over the full conduct of the defence and, as they were in the instant case, "to prosecute in the name of the assured, for their own benefit, any claim for indemnity or damages or otherwise".

This means, in effect, that a negligent employee may find himself, as Lister alleged he was, confronted, as defendant, with a claim arising out of an action over which he had no control; in which he was not allowed to give evidence, and in which leading counsel (with a suitably marked brief) are engaged without his consent or, indeed, without his knowledge. That may be the law, but it is certainly not justice.

Further, if the reasoning of Lord Radcliffe is correct, the ultimate liability of an employee to pay out of his own pocket will depend on the chance whether the injured person sues the employee alone, or the employer alone, or jointly with the employee. Lord Radcliffe said (at p. 141):

> "Moreover, the motor-vehicle policy took what is certainly not the uncommon form of including a 'Third-Party Extension', the effect of which was that the driver was equipped with his own direct right to call for indemnity from the insurers, if he became liable to a third party for damages caused while driving the respondents' lorry. I must call attention to this last point, because it illustrates the almost intolerable anomalies which are involved in the respondents' argument. The situation is this. If an accident takes place through negligence, the person injured can sue either employer or 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 brought him; the insurance company has to provide 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, either 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. I should be very much interested to know how the premium required by an insurance company is adjusted to the risk of these alternative situations."

It may be objected that if an employee is indemnified against the consequences of liability by means of an insurance policy towards the cost of which he has contributed nothing directly, he would tend to be less careful in the driving of a vehicle. In the Court of Appeal, Romer L.J. said ([1955] 3 All E.R. 460, at p. 480) that it was not in the public interest that drivers should be immune from the financial consequences of their negligence. Lord Somervell (at p. 147) replied to that suggestion in the following terms:

> "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."

To accept the implications of the statement of Romer L.J., would be to deprive insurance against liability for tortious acts of its raison d'etre—namely, the spreading of the risk. Many acts of only a slightly negligent nature may result in enormous loss. On the other hand, gross negligence may result in only minor loss. The law of torts, unlike the law of crimes, does not concern itself with moral standards. Insurance, in particular compulsory insurance, has been devised to ensure compensation to the injured person without doing injustice to a tortfeasor by visiting upon him

personally consequences which far exceed his moral guilt.

As Professor Jerome Hall says (" *General Principles of Criminal Law* ", pp. 213, 242) :

> " Torts deal with individual damage which need not have been effected by morally culpable conduct. . . . If attention is centred on the injured plaintiff, it is thought that he certainly ought to have reparation. . . . On the other hand, countervailing moral principles induce equal insistence that actual fault is the only proper ground for shifting the loss. These various objectives and policies run at cross-purposes. To many the escape from the dilemma is offered by insurance—the injured person is compensated but the loss is distributed over a wide field—hence both monetary judgment against a particular person, and his want of culpability, are of minor consequence."

It remains to consider the consequences of *Lister's* case in New Zealand. Most of these have been sufficiently dealt with in the article, p. 49, *ante* referred to above. But the full consequences may be overlooked by reason of the fact that *Lister's* case concerned the negligent driving of a motor-vehicle, and because, by virtue of the Transport Act 1949, s. 67 (1), a licensed driver in charge of a motor-vehicle, who is in charge with the owner's authority, is indemnified to the same extent as if he were the owner, in respect of injuries to third persons. The law is otherwise in England. But, as Dr Mazengarb has pointed out (see p. 50, *ante*), the compulsory insurance provisions of the Act which, in effect, insure the vehicle and not the drivers, does not extend to accidents happening off the highway, nor does it cover damage to property, or to passengers or persons, entering or alighting from a vehicle. In all these cases, no statutory indemnity is given to a negligent driver. If he, the negligent driver, is an employee and his employer (or the employer's insurers) has been called upon to pay damages to a third party, the employer can claim an indemnity from the employee.

If the news of *Lister's* case reaches trade union circles, one may well anticipate a flood of applications for insurance by drivers, giving the drivers personal cover against liability. A rich harvest will be gleaned by insurance companies to whose activities the decision in *Lister's* case is due. Equally probably, the cost of the insurance will result in an application to the Court of Arbitration for a wage increase.

A footnote at p. 50, *ante*, raised the question as to the indemnity of a licensed driver in respect of claims against the owner of a motor-vehicle for contribution under s. 17 (1), Law Reform Act 1936.

Section 70 (5), Transport Act 1949, provides that subject to subs. (2) of the section (which deals with limits of liability) the liability of an insurance company under any contract of insurance shall extend to indemnify the *owner* against all claims for contribution under s. 17 of the Law Reform Act 1936 in respect of the liability under subs. (1).

Section 17 of the Law Reform Act 1936 provides that a tortfeasor, liable in respect of any damage, may recover contribution from any other tortfeasor who is . . . liable in respect of the same damage, whether as a joint tortfeasor or otherwise, unless he is liable to indemnify that other tortfeasor.

Suppose that A and B, driving separate motor-vehicles, both act negligently and cause injury to C. C brings an action against A and recovers judgment. A may now sue B for contribution. If B is insured, as he must be under the Transport Act 1949, and if B is the owner of the vehicle, B's insurance company must indemnify him against the claim for contribution in terms of s. 70 (5). But if B is not the owner, but an employee, such as Lister was, and he is sued by A for contribution, the insurance company of the owner (whom we shall call D) will not, in terms of the subsection, be liable to indemnify *him*, B. In terms of the subsection, they must indemnify D against claims for contribution arising from B's negligence, but they are not called upon to indemnify B himself. Indeed, having indemnified D, they may now, in D's name, call upon B for a complete indemnity.

We thus have this anomalous position : C, a pedestrian, is injured by the joint negligence of A and B, truck-drivers in the employment of D and E respectively. C sues D in respect of A's negligence. D's insurance company pays C the damages awarded. D then sues E for contribution in respect of B's negligence and succeeds. E may now, following *Lister's* case, receive an indemnity from B, his negligent employee. But A, the other negligent truck-driver, will be free from all liability. He is covered by s. 67 (1), which provides that 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 . . . 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.

If this is the law, as it is submitted it is, we may find a truck-driver, jointly negligent with the driver of another motor-vehicle, imploring the injured person to sue him personally and thus to free him from any other claims which might arise.

In his famous judgment in *Donoghue* v. *Stevenson*, Lord Atkin said (at p. 583) :

> " I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society, and the ordinary claims it makes upon its members, as to deny a legal remedy where there is so obviously a social wrong."

May one apply that statement to *Lister's* case and say, with respect, that there is something ill with our jurisprudence when it gives a legal remedy which, it is submitted, obviously creates a social wrong.

The Frontiers of Knowledge.—One result of the system [of institutional management in effect in Canadian universities] is a tendency for some lay boards to regard the university as a vocational school or an adult education venture, or even a football club, and at most as an institution whose function is to transmit civilization's accumulation of knowledge to the young. But the function of the modern university, as it is conceived by its community of scholars—an institution primarily engaged in pushing back the frontiers of knowledge and searching for the truth without fear or favour—is rarely fully appreciated. How many Canadian universities, for instance, allocate a really significant proportion of their budgets to the direct promotion of scholarship and research—especially in the humanities and social sciences, where money is rarely forthcoming from private foundations or government How many even have a library worthy of a university It may be, as Woodrow Wilson once said when President of Princeton, that the sideshows have swallowe dup the circus. (Donald C. Rowat, " The Government of Canadian Universities " (1956), 17 *Culture* at p. 372).

NEW ZEALAND AND THE LAW OF COPYRIGHT.

The United Kingdom's New Act.

By J. P. EDDY Q.C.

The United Kingdom has now a new Copyright Act, the first to be placed on the Statute Book for forty-five years. It is the Copyright Act 1956, and it is to be brought into operation in the near future. It will largely replace the Copyright Act 1911, from which the New Zealand Copyright Act 1913 was adapted.

There were two main reasons for the passing of the new Act. The first was to bring the law of copyright into line with present-day technical developments, chiefly in relation to broadcasting, which, of course, had not been invented when the earlier Act was passed. The second was to effect such amendments in the law as would enable the United Kingdom to ratify two conventions—the International Convention revising the Berne Convention for the Protection of Literary and Artistic Works, which was signed at Brussels on June 26, 1948, and is known as the Brussels Convention; and the Universal Copyright Convention, which was prepared under the auspices of the United Nations Educational, Scientific and Cultural Organization (Unesco) and signed at Geneva on September 6, 1952. New Zealand signed the Brussels Convention, though, like the United Kingdom, she has nos yet ratified it; but she was not represented at the Intergovernmental Conference at Geneva at which the Universal Copyright Convention was signed.

THE NEW ZEALAND ACT.

Pursuant to s. 25 (2) of the Act of 1911, the New Zealand Act of 1913 was certified as giving within the Dominion rights substantially identical with those conferred by the United Kingdom statute. But there was one outstanding difference between the two.

Under the Copyright Act of 1842 the proprietor of copyright in a literary work had to register it at Stationers' Hall in London before commencing an action for infringement, and the Fine Arts Copyright Act of 1862 imposed the same requirement in respect of paintings, drawings and photographs; but these provisions were wholly repealed by the Act of 1911. Consequently since that time there has been no statutory provision for registration in the United Kingdom in respect of copyright matters; and in fact registration at Stationers' Hall, pursuant to Act of Parliament, terminated at the end of 1923 (that is to say, the day before the Canadian Copyright Act 1921, as amended by the Canadian Copyright Amendment Act 1923, came into force—namely, January 1, 1924).

On the other hand, the New Zealand Act contains provisions for registration. This, pursuant to s. 38, is optional, but the special remedies provided for by ss. 15, 16 and 17 may be taken advantage of only by registered owners. Section 15 makes it a summary offence for a person, for his private profit, to permit any theatre or other place of entertainment to be used for the performance in public of any musical or dramatic work without the consent of the registered owner of the performing right. Section 16 provides for the issue of a search warrant in respect of infringing copies of a copyright work. Section 17 enables the owner of a performing right to forbid the performance in public of a musical or dramatic work in infringement of his right.

THREE OUTSTANDING FEATURES.

The new Copyright Act has three outstanding features:

First, the creation of a new copyright in sound and television broadcasts.

Secondly, the creation of a new copyright in cinematograph films as such, that is to say, in films as a whole. Section 1 of the Copyright Act 1911 gave the owner of copyright in a literary, dramatic or musical work the sole right to make "any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered". These words were reproduced in s. 3 of the New Zealand Act 1913. Under the new United Kingdom statute the maker of a film—the person by whom the arrangements necessary for the making of it are undertaken—is to be entitled to copyright in the film as such, independently of any copyright there may be in its component parts.

Thirdly, the creation of a Performing Right Tribunal. This is not to follow the pattern of the Copyright Appeal Board in Canada which considers the tariffs of collecting societies whether objections have been lodged or not. The Performing Right Tribunal is to be a dispute-resolving body—to determine disputes arising between licensing bodies and persons requiring licences or organizations claiming to be representative of such persons.

INQUIRIES IN UNITED KINGDOM.

Since the passing of the Copyright Act 1911, there have been various inquiries in the United Kingdom in regard to the law of copyright. In 1929, for example, a Musical Copyright Bill was introduced in the House of Commons for the purpose of amending the law relating to the right of public performance of musical works, and this was committed to a Select Committee, who proceeded to take evidence. This Committee, while recognizing that an association of composers was undoubtedly a convenience and almost a necessity, considered that a super-monopoly could abuse its powers by refusing to grant licences upon reasonable terms, and that it should be open to persons to obtain relief by appeal to arbitration or to some other tribunal. The House of Commons ordered the Committee's report to lie upon the table, and the Bill made no further progress. More recently, broadcasting in all its aspects, including, among other matters, the broadcasting of sporting events and the position of relay stations, was considered by the Broadcasting Committee of 1949, who presented their report in 1951. To this Committee the British Broadcasting Corporation submitted a memorandum entitled "A Copyright in Broadcasting", in which it claimed that it was clearly anomalous and inequitable "that sound or television programmes on which the B.B.C. has expended much creative effort, and incurred considerable expense, should be freely available for third parties for their own pecuniary advantage".

But it is upon the recommendations of the Copyright Committee, who were appointed in April, 1951, and presented their report in October, 1952 (Cmd. 8662), that the new United Kingdom Act is largely based. The terms of reference of this Committee were :

> " To consider and report whether any, and if so what, changes are desirable in the law relating to copyright in literary, dramatic, musical and artistic works, with particular regard to technical developments and to the revised International Convention for the Protection of Literary and Artistic Works signed at Brussels in June, 1948, and to consider and report on related matters."

Television Broadcasts.

The Copyright Committee received oral evidence or representations in writing from a considerable number of organizations, and also from some individuals interested in the law of copyright. As regards broadcasting, there were representations from the British Broadcasting Corporation and the Association for the Protection of Copyright in Sport. The B.B.C. said it was now practicable for photographs to be taken of the images shown on the screen of a television receiver, and it was concerned at the increasing use which was being made of such photographs by commercial photographers and newspapers. " The quality of these photographs ", said the Corporation, " is often such as to give a very misleading impression of the televised programme, and artists or prominent people may well be reluctant to appear in television programmes if they find that photographs of an unflattering or derogatory nature are being made and used without their consent. The Corporation considers that this is an additional reason why the unauthorized use of broadcast programmes should be controlled by the creation of a broadcaster's right ". The Association for the Protection of Copyright in Sport sought a copyright in sporting spectacles and events which would entitle it to control simultaneous recording or subsequent reproduction. It had two objects : (a) to ensure that it received a share of whatever profits were made from the public performance of any television of the sporting spectacle its members produced ; and (b) to be able to ensure a measure of control over such public performances.

The Copyright Committee believed that the wise course was to recognize only one performing right which should be vested in the broadcasting authority emitting the programme.

Effect is given to this view in s. 14 of the new Act. This provides that the B.B.C. or the Independent Television Authority (which was set up in 1954), is to be entitled to any copyright subsisting in a television broadcast or sound broadcast made by it, with a performing right, limited to programmes before paying audiences, in television broadcasts ; and any such copyright is to continue to subsist until the end of the period of fifty years from the end of the calendar year in which the broadcast is made, and is then to expire.

As regards television broadcasts of sporting events, the Copyright Committee envisaged these results :

(i) That the broadcasting authority, by its acquisition of copyright, should be able to control the public performance of any spectacle televised, and so satisfy the reasonable requirements of the organizers.

(ii) That the broadcasting authority, from its fees derived from public performances, could be expected to provide the necessary extra payment to those supplying the material for the televised programmes.

(iii) That the sports promoters and others would be in a position to see that the interests with which they were concerned were suitably protected or compensated.

Amending the Law.

The Copyright Committee pointed out Articles in the Brussels Convention which necessitated amendments of the Copyright Act 1911, before the United Kingdom could accede to the Convention, and effect has been given to their views in the new Act :

Article 4 (*3*). The provision that a work is to be considered as having been published simultaneously in more than one country if published in two or more countries within thirty days of its first publication required amendment of s. 35 (*3*) of the Act of 1911 (s. 2 (*3*) of the New Zealand Act of 1913).

Article 7. The omission from the Brussels text of para. (2) of the Rome text (which provided that the countries of the Union should only be bound to apply the provisions of para. (1) as to the term of protection in so far as such provisions were consistent with their domestic laws) required the repeal of the proviso to s. 3 of the Act of 1911 and the whole of s. 4 of that Act. The proviso to s. 3 (s. 6 of the New Zealand Act of 1913) gave a publisher a " licence of right " to reproduce a published work at any time after the expiration of twenty-five years from the death of the author, on giving the prescribed notice and paying the prescribed royalty of ten per cent. As to this, the Copyright Committee said they had received evidence, which they saw no reason to challenge, that, as a matter of general practice, publishers did not wait for twenty-five years from the date of publication, let alone for twenty-five years after the death of the author, before they issued a cheap edition of works in popular demand. Section 4 (s. 7 of the New Zealand Act of 1913) provided for applications to the Judicial Committee of the Privy Council for their authority to issue works of deceased authors. As to this, the Copyright Committee said they understood that no such applications had ever been made. The Copyright Committee pointed out that the provisions contained in para. (6) of Art. 7, that the term of protection subsequent to the death of an author should begin from January 1 next following his death, required an amendment of s. 3 of the Act of 1911 (s. 6 of the New Zealand Act of 1913).

Article 7 (*bis*). The provision that the term of protection for works of joint authorship should end fifty years from the date of death of the last surviving joint author required an amendment of s. 16 of the Act of 1911 (s. 22 of the New Zealand Act of 1913).

Article 10 (*3*). The provision that quotations and excerpts were to be accompanied by an appropriate acknowledgment of source required amendment of s. 2 (*1*) (*vi*) of the Act of 1911 (s. 5 (*1*) (*f*) of the New Zealand Act of 1913).

A " Qualified Person ".

The new Act creates a personality new in relation to the law of copyright—a " qualified person "—namely, in the case of an individual, a person who is a British subject or British protected person, or a citizen of the Republic of Ireland, or, not being any of these,

is domiciled or resident in the United Kingdom, or in another country to which any relevant provision of the Act is extended; and, in the case of a body corporate, a body incorporated under the laws of any part of the United Kingdom or of another such country. The result is that, whereas under the Act of 1911 copyright in published works depends on the place of first publication, under the new Act such works may enjoy copyright by reference to the nationality, domicile or residence of the author.

The new Act extends and clarifies the application of the doctrine of "fair dealing". It facilitates, in order to assist research, the copying of certain copyright material in libraries, and the copying and publication of ancient unpublished manuscripts in public archives. It contains a special exception, in order to avoid "double protection", in the case of an artistic work and a corresponding registered design (see s. 30 of the New Zealand Act of 1913). It retains the performing right in gramophone records which was established by the leading case of *Gramophone Co. Ltd.* v. *Stephen Cawardine and Co.* [1934] Ch. 450; but it contains exemptions in the case of certain residential premises and certain organizations whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare.

A matter which gave rise to considerable controversy during the passage of the Copyright Bill through Parliament was the special exception in the case of records of musical works, which confirms in substance the licence of right provided for by s. 19 of the Act of 1911 (s. 25 of the New Zealand Act of 1913). There was a petition signed by 594 British composers and authors asking for the deletion of this licence of right; but the Government's view prevailed. This was that, when a provision had worked for forty-five years, the onus must be on those seeking to change it; that it was in essence a device to spread the scope of a recording, and to get it to a wider body of the public.

The new Act deals with the right of action of a copyright owner for infringement, and there is a new provision applicable to the holder of an exclusive licence. There are miscellaneous provisions dealing with assignments and licences, testamentary dispositions, transmissions by operation of law, future copyright, Government publications, use of copyright material for education and false attribution of authorship.

The New Zealand Copyright Amendment Act 1924 provided for the extension of the benefits of the 1913 Act to British Protectorates.

Both these Acts will doubtless receive further consideration in New Zealand, in the light of the new United Kingdom statute, with a view to possible legislation enabling the Dominion to bring her law of copyright into line with present-day technical developments, and, if thought advisable, to rectify the Brussels Convention.

THE NEW COMPANIES ACT 1955.

Winding Up of Companies.

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

The winding-up provisions are contained in Part VI of the Companies Act 1955 and in the Companies (Winding-Up) Rules (S.R. 1956/215), both of which came into force on January 1, 1957. (These rules take the place of the Companies (Winding-Up) Rules 1934 (as amended), with the necessary alterations to adapt them to the Companies Act 1955. In the main, they appear to be based on the Companies (Winding-Up) Rules 1949 (U.K.).

Procedural Provisions.

In my last article (*ante*, p. 78), I set out the new provisions protecting the rights of minority shareholders. The new Winding-Up Rules are made to apply not only to proceedings in the winding up of companies but also, as far as applicable, to proceedings under s. 209, which relates to remedies in cases of the oppression of minorities among the members of companies. Thus, the new form 4 is the form of Petition by a Minority Shareholder; the new form 6 is of Advertisement of Petition by Minority Shareholder.

Rule 49 provides that applications by or against delinquent officers, directors, and promoters are to be made by motion, instead of by summons.

Particular attention is drawn to R. 157 prescribing new forms 79 to 83 relating to a voluntary winding up, being forms adapted from the corresponding United Kingdom forms.

The new Act contains several new provisions relating to the winding up of companies. In England, there has been quite a lot of case law since the coming into operation of the Companies Amendment Act 1947 (U.K.), now included in the Companies Act 1948 (U.K.).

Contributories.

Section 211 is the section which prescribes the liability as contributories of past and present members. Section 211 (1) (*g*) provides that a sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall not be deemed to be a debt of the company payable to that member, in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

The liquidator of the company took out a summons, one of the two defendants to which was a past member, and the other an unsecured creditor of the company. The past member claimed to be a creditor in respect of a sum of £65 due to her by way of *unclaimed* dividends declared while she was still a member of the company, and by the summons the liquidator asked whether he could treat that sum as a debt of the company ranking for dividend in competition with the unsecured debts of the company due to persons otherwise than in their capacity as members or past members

of the company. It was held that for the purposes of the statutory provision, a "member" included a past member, so that a debt due to a past member in respect of unclaimed dividends could not be admitted to rank in competition with the debts due to ordinary creditors: *Re Consolidated Goldfields of New Zealand Ltd.* [1953] Ch. 689; [1953] 1 All E.R. 791.

Section 211 of the Companies Act 1955 treats "members" as a genus of which there are two species—past and present members.

Definition of "Contributory".

The definition will be found in s. 212 of the Companies Act 1955: subs. (2) is new and is not in the United Kingdom statute: it makes it clear that the term "contributor", unless the context otherwise requires, includes a holder of *fully-paid* shares. In *6 Halsbury's Laws of England*, 3rd ed., p. 630, para. 1242, the opinion is expressed that, since every member of the company is primarily liable to contribute, subject to the proviso limiting the amount which he can be called on to pay, a holder of fully-paid-up shares is a contributory. But footnote (*i*) to that passage in *Halsbury* shows that in the United Kingdom there is a difference of judicial opinion on that point. Therefore, by enacting subs. (2) of s. 212 of the Companies Act 1955, the New Zealand Legislature has removed a doubt in this branch of company law.

Provisions as to Applications for Winding Up.

Section 219 (1) of the Act provides that an application to the Court for the winding up of a company shall be by petition, presented subject to the provisions of the section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately. A new provision authorizes the Attorney-General to present a petition for the winding up of a company as the result of a report from inspectors appointed under the inspection proceedings: in the United Kingdom this power to present a winding-up petition is vested in the Board of Trade.

In *Re a Company* (1950) 94 Sol. Jo. 369, where a company, which was solvent and had considerable resources, had delayed in paying a judgment debt, and the creditor presented a petition, the Court refused to grant an injunction restraining the creditor from proceeding with the petition on the grounds that in the circumstances the presentation of the petition had been justified.

Powers of Court on Hearing Winding-Up Petition.

These are set out in s. 220 of the Companies Act 1955. On hearing the petition the Court may dismiss it or adjourn the hearing, conditionally or unconditionally, or make any interim or other order that it thinks fit; but the Court cannot refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

Then follows a new provision designed to assist minority shareholders in resisting oppression by the majority, particularly in "deadlock" cases, and will make it easier to obtain a winding-up order on the ground that it is just and equitable. Subsection (2) provides that where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court, if it is of opinion that the petitioners are entitled to relief either by winding up the company or or by some other means; and that, in the absence of any other remedy, winding up would be just and equitable, must make a winding-up order, unless it is also of the opinion, both that some other remedy is available to the petitioners, and that they are acting unreasonably in seeking a winding-up order instead of pursuing that other remedy.

Avoidance of Dispositions of Property After Commencement of Winding Up.

Section 222 of the new Act is identical with s. 174 of the 1933 Act: it provides that in a winding up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the Court otherwise orders, be void. In *Re Miles Aircraft Ltd., Ex parte Barclays Bank Ltd.* [1948] Ch. 188; [1948] 1 All E.R. 225; 64 T.L.R. 278, a company having contracted to sell, *after* the presentation of a petition for winding up, certain leasehold premises of which it was the owner, but which were not required for its business, debenture-holders who desired to adopt the contract applied to the Court by summons for an order declaring the contract to be valid, in the event of an order being made to wind up the company. No order to wind up the company had at that stage been made. The Court held that at that stage it had no jurisdiction to make the order. In the course of his judgment, Vaisey J. said:

> The difficulty in saying that there is a winding up now in progress seems to me to be this, that, if the petition is ultimately dismissed or withdrawn, there never has been and never could be a winding up by the Court. All that there is now is a contingent future possible winding up, and I do not think that the section is so framed as to give me jurisdiction to adjudicate on this matter, so to speak, in advance.

A recent example of an order being made under s. 227 of the Companies Act 1948 (U.K.) (which is identical with s. 222 of the Companies Act 1955), is *In re Steane's (Bournemouth) Ltd.* [1950] 1 All E.R. 21; 66 T.L.R. 71. It was an application by a director of the company for an order under the section, that the disposition made by the company *after* the beginning of the winding up of the company by the issue by the company to the applicant of a debenture to secure the repayment of a present advance of £696 and future advances up to £5,000 and charging by way of specific charge the real and leasehold estate of the company and its goodwill, and, by way of floating charge, all its other assets, should not be void but should be treated as valid. It was held that the advances having been made in good faith, and used for the benefit of the company, the Court would order the debenture to be treated as a valid security for the total sum advanced, notwithstanding that part of the money had been advanced after the beginning of the winding up. Towards the end of his judgment, Vaisey J. said:

> I have come to the conclusion that I ought . . . to make the order in the terms asked for by the summons, including the provision for adding the costs of the applicant to his security, following in this respect, *In re Park Ward and Co. Ltd.* [1926] Ch. 828. The Legislature, by omitting to

indicate any particular principles which should govern the exercise of the discretion vested in the Court, must be deemed to have left it entirely at large, and controlled only by those general principles which apply to every kind of judicial discretion.

Two Classes of Voluntary Winding Up.

As from the coming into operation of the Companies Act 1933, there have been two classes of voluntary winding up :

(1) a members' voluntary winding up.

(2) a creditors' voluntary winding up.

In New Zealand, during the continuance of the Companies Act 1933, the more popular method was that of a *members'* voluntary winding up : I suppose it did not sound so bad as a *creditors'* voluntary winding up. The differences in this branch of company law introduced by the Companies Act 1933 are thus clearly stated in *Morison's Company Law*, 2nd ed., 419, 420 :

> The Act of 1933 contains new provisions whereunder, broadly speaking, the creditors of an insolvent company are given the right to nominate the liquidator, to appoint a committee of inspection, to fix the liquidator's remuneration, and to put an end to the powers of the directors, and to fill any vacancy in the office of liquidator. A voluntary winding up in which the creditors have these powers is called a " creditors' voluntary winding up ". Where the creditors have not these powers, it is known as a " members' voluntary winding up ". In order that there may be a members' winding up there must be made a declaration of solvency under and in accordance with s. 226.

Members' Voluntary Winding Up.

These provisions and distinctions have been continued in the Companies Act 1955, but the procedure relating to a members' voluntary winding up has been considerably tightened up following recommendations made by the *Cohen Committee.*

The provisions as to the declaration of solvency (s. 274 and R. 157 (1)) have, as in the United Kingdom, been altered so as to provide that :

(a) The declaration must specify the period (not exceeding twelve months) within which the directors consider that the company will be able to pay its debts in full.

(b) The declaration must embody a statement of the company's assets and liabilities.

(c) The declaration must be made within five weeks before the resolution for winding up.

(d) The declaration need not be made before the notices of the meeting at which the resolution is to be proposed are sent out.

(e) The declaration must be registered before the resolution is passed, instead of before the notices of the meeting are sent out.

(f) The declaration must be in the form prescribed by Winding-up Rule 167 (1), i.e. form 79, to which must be appended a statement of estimated assets and liabilities.

(g) A director making the declaration is made liable to penalties if he makes it without reasonable grounds : and if the debts are not paid or provided for in full within the period stated in the declaration, the burden of proving reasonable grounds is put on the director.

A new provision is s. 279, which provides that if the liquidator is at any time of opinion that the company will not be able to pay its debts in full within the period stated in the declaration under s. 274, he shall forthwith summon a meeting of the creditors, and shall lay before the meeting a statement of the assets and liabilities of the company. And, in connection with s. 279 of the Act, one should read s. 282, another new provision : it contains alternative provisions as to annual and final meetings in cases of insolvency, and reads as follows :

> 282. Where section two hundred and seventy-nine of this Act has effect, sections two hundred and ninety and two hundred and ninety-one thereof shall apply to the winding up to the exclusion of sections two hundred and eighty and two hundred and eighty-one of this Act, as if the winding up were a creditors' voluntary winding up and not a members' voluntary winding up :
>
> Provided that the liquidator shall not be required to summon a meeting of creditors under the said section two hundred and ninety at the end of the first year from the commencement of the winding up, unless the meeting held under the said section two hundred and seventy-nine is held more than three months before the end of that year.

Minor Alterations In Creditors' Voluntary Winding Up.

Section 290 of the Companies Act 1955 deals with the duty of a liquidator to call meetings of the company and of creditors at the end of each year, and is identical with s. 299 of the United Kingdom Act of 1948, except that the functions of the Board of Trade in the United Kingdom Act are in New Zealand exercised by the Registrar of Companies.

Section 290 (1) provides that in the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of the creditors at the end of the first year from the commencement of the winding up and of each succeeding year, *or at the first convenient date within three months from the end of the year or such longer period as the Registrar may allow*, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year. The words which I have italicized are new, and take the place of the words " or as soon thereafter as may be convenient " in the corresponding section of the Companies Act 1933.

Section 291 (1) of the Companies Act 1955 (as did s. 241 of the Companies Act 1933) provides that as soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors, for the purpose of laying the account before the meetings, and giving any explanation thereof.

Subsection (7) is new and enacts that, if the liquidator fails to call a general meeting of the company or a meeting of the creditors as required by the section, he shall be liable to a fine not exceeding fifty pounds.

Payments of Debts of Company By Liquidator.

The liquidator must pay the debts of the company and adjust the rights of the contributories among themselves : *6 Halsbury's Laws of England*, 3rd ed., 741.

There are several recent English cases as to the debts of a company which the liquidator must or must not pay.

(Concluded on p. 196.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Reasonable Man.—"As your Lordship pleases . . . In a case a Judge laid down a well-known . . . dictum, in which he said that the reasonable man is the man of the Clapham Omnibus. In this case . . ." "Mr. Heldon, I am fully cognizant that this remarkable creature, the reasonable man, is enshrined and honoured in our laws. I am equally well aware of his many virtues. He contemplates all the consequences of an act before the act occurs, he foretells the future, has an all-embracing knowledge of dynamics, ballistics, psychology, child welfare, is on speaking terms with the last world and the next, knows far more law than the most brilliant of Her Majesty's Judges—and the only flaw is that never, since the Clapham Omnibus first ran, has he ever travelled on it." This is an extract from *Wiggery Pokery* (W. H. Allen, 1956) a light-hearted novel by Hastings Draper on the life and interminable struggles of a young barrister briefed in an action for damages against a firm of patent medicine manufacturers which advertised their product "Nodoze" with a guarantee, "If she won't look at you—take Nodoze. And if you can't find her, or she won't say that all important 'Yes' after you've taken Nodoze . . . we'll find her for you." The author is not as experienced a literary craftsman as Henry Cecil in his recent trilogy of the vagaries of legal life, but his book is full of amusing passages, and can be fully recommended to those who enjoy a measure of debunking of their profession.

Disappointed Litigant.—Aptly described by a critic as the world's worst novelist, Amanda Ros, author of *Irene Iddesleigh*, of which a Nonesuch Press edition appeared some years ago, is said to have lost a considerable sum of money in a High Court action over a will, and as a result she became the bitter enemy of lawyers, as well as a persistent litigant. At one period of her lawsuits, six firms were involved. Of these, two who acted for her opponents had offices in Cross Street, Larne, a narrow lane running from the main thoroughfare. During the protracted proceedings, it was this lady's habit on market days to drive through this street in a rubber-tyred trap, upon which she had hoisted a banner bearing the announcement that she had been shamefully victimized by two lawyers "Jamie Jarr" and "Mickey Monkeyface McBlear." Stopping in front of their offices, she would arrest attention by blowing upon a toy trumpet and then denounce their villainy towards her and the villainy of lawyers in general. As a sample of her style, Scriblex refers to that passage in *Irene Iddesleigh* when Sir John Dunfern finds that *Irene* has run away with a young man Oscar Olwell and, upon arriving in America, has bigamously married him. Sir John:

> "at once sent for his solicitors, Messrs Hutchinson & Harper, and, ordering his will to be produced, demanded there and then that the pen of persuasion be dipped into the ink of revenge and spread thickly along the paragraph of blood-related charity to blank the intolerable words that referred to the woman he was now convinced, beyond doubt, had braved the bridge of bigamy."

As might be expected, Oscar who is a school teacher is dismissed for intemperance and "arousing his wife (Irene) from sleep with monster oaths, inflicted upon her strokes of abuse which time could never efface."

Lord Denning.—The appointment of that eminent jurist, Sir Alfred Denning, to replace Lord Oaksey in the House of Lords has occasioned no surprise in English legal circles. In all the judgments he has delivered in the Probate, Divorce, and Admiralty Division, in the King's Bench Division, and in the Court of Appeal, the lucidity and vigour of his viewpoint and of his approach to the problem involved have placed him high in the ranks of outstanding Judges. His Hamlyn Lectures, gathered into his book *Freedom under the Law*, and his later *The Changing Law* (in which he develops his contention that as no one knows what the law is until Judges expound it, then it follows that they make it) are major contributions to the literature of our time. "If the common law is to retain its place as the greatest system of law that the world has ever seen," he maintains, "it cannot stand still while everything moves on. It must develop, too. It must adapt itself to the new conditions." Like all strong-minded Judges, he has not shrunk from giving rein to his critical faculties—in *Jones* v. *National Coal Board* and *Bunting* v. *Thorne Rural District Council:* see p. 165, *ante*.

Reason for Silence.—In a recent article on "Stare Decisis," the author draws attention to an observation said to have been made by Mr Justice Holmes: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." This reminds Scriblex of a pleasant tale concerning a Corsican on a TV Quiz programme, who is alleged to have been asked: "Who killed Henri IV in 1610?" He remained silent and thereby lost a prize of several thousand francs. Afterwards he commented to a friend: "I knew all along it was Ravaillac, but I'm no stool-pigeon!"

Retaliation.—Scriblex hears that some of the Automobile Associations are pressing for heavier penalties for flagrant breaches of the railway-crossing regulations. Times have indeed changed. E. S. P. Haynes, in his reminiscences, recalls an ancestor of his who, every morning, used to cross a local railway-line even after a passenger-bridge had been erected. When so doing one day he observed a solitary locomotive approaching him at 15 m.p.h. This required him to hurry over. A whistle blew; but the pedestrian merely hopped back as the engine drew up and whacking the driver with his umbrella, exclaimed: "That, sir, will teach you to drive your engine when a gentleman wants to cross the line!"

From My Notebook (Judicial Division).—"The duty of a Judge at first instance is to be quick, courteous and wrong; this does not mean that the Court of Appeal is to be slow, rude and right, for that would be to usurp the functions of the House of Lords."—Lord Asquith of Bishopstone.

"The Judicial Committee of the Privy Council has the phenomenal average age of 79. The Lords of Appeal—excluding those ancients who are also members of the Judicial Committee of the Privy Council—have an average age of 67. The Lord Chief Justice, Lord Goddard, became a Recorder in 1917, and is still judging hard at the age of 80. Judges, in short, are allowed to continue in a job which requires the keenest faculties at an age when other men are deemed suitable only for some gentle gardening. Do they, in fact, go on too long?"—*The Economist.*

THE NEW COMPANIES ACT 1955.

Winding Up of Companies.

(*Concluded from p. 194.*)

Claims Statute-barred.—Statute-barred debts may not be admitted in a compulsory or voluntary winding up, subject to this modification that in the case of a solvent voluntary winding up they may be admitted if all the contributories consent: *Re Art Reproduction Co.* [1952] Ch. 89; [1951] 2 All E.R. 984; [1951] 2 T.L.R. 97*K*; *6 Halsbury's Laws of England*, 3rd ed., 747. It may be stated, as a converse rule, that time under the Limitation Act 1950 ceases to run against a creditor on a winding-up order being made, and he is allowed to prove at any time before the company is dissolved, subject to the ordinary rule as to not interfering with dividends already paid. This rule applies also to a voluntary winding up: (*ibid.*, 657).

Claims based on Ultra vires Contracts.—Re Jon Beauforte (London) Ltd. [1953] Ch. 131; [1953] 1 All E.R. 634, deals with ultra vires contracts of a company in liquidation. Proof cannot be admitted of damages for breach of a contract which was ultra vires of the company in any case where it was so to the knowledge of the party seeking to prove. For this purpose the person contracting with the company is deemed to have had constructive notice of the memorandum. In this case a number of proofs of debts were lodged which were rejected by the liquidator on the ground that the contracts to which they related were ultra vires. The Court upheld the liquidator's rejection but held further that the rejection was without prejudice to any rights which they might have (i) of tracing any of their money or property, or (ii) of participating in the distribution of surplus assets, after provision had been made for the claims of proving creditors, costs and expenses.

Section 293 of the Companies Act 1955 provides that subject to the provisions of the Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities pari passu, and, subject to such application, shall, unless the articles provide, be distributed among the members according to their rights and interests in the company. It was held in *Government of India, Ministry of Finance* v. *Taylor* [1955] A.C. 491; [1955] 1 All E.R. 292, that for the purposes of the United Kingdom equivalent section the "liabilities" for which a liquidator was required to provide in the liquidation of a company did not include claims which were unenforceable in the Courts of the lex fori. The law of England (and *semble* of New Zealand) does not accord extra-territorial validity to the revenue legislation of oversea States (including Governments of the British Commonwealth). The facts in this case were that the Government of India sought to prove in the voluntary liquidation of a company trading in India, but registered in the United Kingdom, for a sum due in respect of income tax, including capital-gains tax, which arose from the sale of the company's undertaking in India. The House of Lords held that the claim could not be sustained in the liquidation of the company.

Claims based on Illegal Contracts.—The liquidator cannot accept a claim based on an illegal transaction, for example, in breach of the currency laws of a country: *Re Banque des Marchands de Moscou (Koupetschesky)* [1954] 2 All E.R. 746.

Claims by Employees entitled to Pensions.—In *In re Houghton Main Colliery Co. Ltd.* [1956] 1 W.L.R. 1219, a company which went into liquidation had agreed to pay annual pensions to two of its employees. The Court laid down a formula which when worked out by *an actuary* had the result that the capital sums for which the employees should be admitted to proof in respect of their pension expectations were found to be respectively £14,140 and £10,238. But the Court held that deduction should be made from those sums in respect of income tax and surtax in fixing the sums payable by the liquidator of the company.

Proof of Debts by a Lessor.

In *In re House Property and Investment Co. Ltd.* [1954] Ch. 576; [1953] 2 All E.R. 1525, a lessor unsuccessfully sought, on the liquidation of a company lessee, to have a fund set aside to secure payment of future rent and performance of other covenants. The headnote in the *All England Law Reports* correctly summarizes the principle laid down:

> Where a solvent company, having resolved to be wound up voluntarily, has assigned for value a lease which is beneficial to the assignee, the assignment being a permitted one, there is no absolute right (in the landlord) to have a fund set aside out of the assets of the company to answer the liabilities under its covenants in the lease. The landlord's remedy in such a case is to prove in the winding up.

It was agreed by counsel in that case that the sum for which a proof could be lodged is the difference, at the date of valuation, between the market value of the particular lease with the benefit of the original lessee's covenants, and the value of the same lease without the benefit of the original lessee's covenants.

This case may be compared with the New Zealand case, *In re Victoria Street Properties Ltd. (In Voluntary Liquidation)* [1927] N.Z.L.R. 95; [1927] G.L.R. 92. A company was incorporated in June, 1926, to take over the lease of certain land. The company duly became the lessee of the land under a lease for a term of 100 years containing onerous covenants on the part of the lessee. The company soon after its incorporation sold the lease to a new company at a profit, obtained the consent of the landlords and went into voluntary liquidation, leaving the new company to perform the covenants in the lease. One of the onerous covenants in the lease was a covenant to build. The Supreme Court held that so long as the onerous covenant to build was unfulfilled, it was the duty of the liquidator to retain the whole of the company's assets and to keep the company alive until the further order of the Court.

The writer is of opinion that, in so far as the cases may be inconsistent, the English one is to be preferred and likely to be followed in New Zealand.