beneficiaries some of the funds which would otherwise be paid away in tax; and I cannot see that the express power given to the court by s. 25 ought to be abandoned for that consideration."

In the result then both his Lordship and the Registrar appear to have considered (and as it seems to the writer, rightly so) that the fact that an application under s. 25 has for its object the avoidance of tax, is no bar to its success and the determining factor is one of benefit, in this case, to the children of the marriage. However, in their discussion of *Chapman* v. *Chapman*[77] neither his Lordship nor the Registrar made any reference to or analysis of the passages in the reports of that case, referred to above, relative to an application of this type. One would have thought that some consideration would have been given to these passages particularly in the light of the statement of the majority in the Court of Appeal[78] "that it is no part of the functions of Her Majesty's courts to re-cast settlements from time to time merely with a view to tax avoidance *even if they had the power to do so . . .* ".

It might at first have been thought that this passage from their Lordships' judgment would have been a bar to the success of the present proceedings. However, as was pointed out in the discussion of *Chapman* v. *Chapman*[79] above, the disfavour of the courts is directed not against the mitigation of taxation as an object in itself but against the possibility of their being resorted to for relief every time an adverse change is made in the fiscal legislation, so that where that possibility does not exist, a scheme to avoid tax which is otherwise in order may be approved.

The jurisdiction conferred by s. 25 must be exercised once and for all. There can be no reservation in an order under that section for further review, with the possible exception that provision may be made for the eventuality that facts which *then existed* were not brought to the notice of the court when the order was made.[80] That being so, the present scheme is not subject to variation to mitigate the effect of future taxation legislation, and therefore, not being tainted by the evil condemned in *Chapman* v. *Chapman*[81] was rightly approved. *G. J. NEEDS, LL.B., University of Sydney 1952, Solicitor of the Supreme Court of New South Wales.*

RECENT CASES ON CONTRIBUTION BETWEEN CO-TORTFEASORS

BITUMEN AND OIL REFINERIES (Aust.) LTD. v. *COMMISSIONER FOR GOVERNMENT TRANSPORT*

(With some related cases)

Since its inception almost every phrase of s.5(1) (c) of the Law Reform (Miscellaneous Provisions) Act, 1946 (N.S.W.)[1] has been the subject of considerable judicial controversy. This sub-section, transcribed from the identical English provision, s.6(1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, (Eng.)[2] provides: "Where damage is suffered by any person as a result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . .". Intended to remedy the position where one tortfeasor was sued at the plaintiff's discretion and had no right of contribution against the other, it has in its short history demonstrated that it is capable of causing considerable confusion and hardship. In the words of the High Court in *Bitumen and*

[77] (1954) A.C. 429. [78] (1953) Ch. at 266.
[79] (1954) A.C. 429.
[80] *Gladstone* v. *Gladstone* (1876) 1 P.D. 442, 444; *Benyon* v. *Benyon and O'Callaghan* (1890) 15 P.D. 29, affirmed on appeal (1890) 15 P.D. 54, 58; *Coutts* v. *Coutts* (1948) N.Z.L.R. 591, 605, 611, 617; and see s. 28, Matrimonial Causes Act, 1950 (Eng.) which makes no reference to s. 25.
[81] (1954) A.C. 429. [1] Act No. 33, 1946 — Act No. 59, 1951. [2] 25 & 26 Geo. 5, c. 30.

Oil Refineries (Aust.) Ltd. v. *Commissioner for Government Transport*[3], it "represents a piece of law reform which seems itself to call somewhat urgently for reform".

1. *The meaning of the word "Liable" where firstly it occurs in the sub-section.*

The facts of the *Bitumen and Oil Refineries Case*[4] were as follows: The original plaintiff, Vickery, whilst travelling on a tramcar owned by the present respondent, was seriously injured in a collision between the tramcar and a motor vehicle under the care, control and management of the servants of the appellant Company. Vickery having recovered substantial damages against the Commissioner for negligence, the latter sought contribution from Bitumen and Oil Refineries Ltd. as a co-tortfeasor, under the above sub-section. The Full Supreme Court of N.S.W.[5] dismissed an appeal from a judge's order made in chambers, by which the Company's summons to strike out portion of the declaration, was dismissed. The part of the declaration objected to by the Company was that which alleged that by virtue of the verdict and damages obtained by Vickery, the Commissioner was a "tortfeasor liable in respect of that damage". It was contended by the Company that the word "liable" where first it occurs in the sub-section meant "answerable at law" irrespective of whether Vickery had recovered judgment against the Commissioner. On this argument the question of the Commissioner's liability would have to be determined again in the present action for contribution and the finding of liability in the first action brought by Vickery would be irrelevant, the judgment being improperly pleaded and inadmissible in evidence. In other words, since the earlier judgment could not be submitted as evidence of the Commissioner being "any tortfeasor liable in respect of that damage" because the verdict was between Vickery and the Commissioner only, the Commissioner must establish that he was a tortfeasor and, as such, liable in the present action for contribution. Street, C.J. and Herron, J. (Owen, J. dissenting) upheld the Commissioner's argument that "liable" where first it occurs in the sub-section means "held liable" and that the words "any tortfeasor liable in respect of that damage" refer to tortfeasors who have previously been made liable in respect of that damage.

On appeal from the Supreme Court of N.S.W., the High Court[6] in a joint judgment upheld the former's decision that "liable" where first it occurs means "held liable" and that the sub-section refers to claimants who are tortfeasors previously made liable. Therefore evidence of the judgment against the Commissioner must be admitted and the portion of the Commissioner's declaration in dispute must be allowed to stand. However, both the Full Court and the High Court pointed out that the declaration was incomplete in that it did not properly allege that the Commissioner was a "*tortfeasor* liable" within the meaning of the sub-section, and to this extent should be amended.

2. *The meaning of the word "Tortfeasor" where firstly it occurs in the sub-section.*

An interesting feature of the case is the extent to which the High Court appears to differ, although agreeing on all other aspects with his judgment, from Street, C.J.'s interpretation of the word "tortfeasor" in the phrase "any tortfeasor liable in respect of that damage". In the latter's opinion, in order to prove that one is a tortfeasor entitled to contribution under the sub-section, one must prove firstly that one was held liable, and secondly that one actually committed a tort. Thus, his Honour said,[7] "in the present action the plaintiff Commissioner must show first that he was guilty of the tort alleged against him, secondly that the injured plaintiff has recovered judgment against him in respect of that

[3] (1955) 62 A.L.R. 325, 330; (1955) 28 *A.L.J.* 638, 641.
[4] *Ibid.*
[5] (1953) 54 S.R. (N.S.W.) 1.
[6] (1955) 62 A.L.R. 325; (1955) 28 *A.L.J.* 638.
[7] (1953) 54 S.R. (N.S.W.) 1, 6.

injury". Although the question is not discussed at any great length, the High Court appears to have taken the view that in order to be a tortfeasor entitled to contribution within the meaning of the sub-section, one must prove firstly that one was held liable, and secondly that the *action* in which one was held liable was an *action* for tort. Thus the Court said:[8]

> The declaration does not say expressly that the cause of action in the proceedings instituted by Vickery were for negligence or other tort. It may be desirable to allow the plaintiff to amend the declaration to make it quite clear that the recovery pleaded was for tort. It is logically consistent with the declaration that it might have arisen otherwise, as, for example, from a contract of indemnity or insurance.

Under Street, C.J.'s view, in addition to proving that he was held liable, the plaintiff must prove that he was guilty of the alleged tort — a rather embarrassing and anomalous position for any plaintiff. Under the High Court's view it is sufficient if the plaintiff proves that the action in which he was held liable was one for tort.

3. *The Meaning of the Word "liable" where secondly it Occurs in the Sub-section.*

In interpreting the word "liable" in the phrase "any tortfeasor liable in respect of that damage" thus, the High Court paid particular regard to *dicta* of Viscount Simonds in the recent House of Lords decision of *George Wimpey and Co. Ltd.* v. *British Overseas Airways Corporation*[9]. Taking the view that the word "liable" where secondly it occurs in the sub-section meant "held liable", his Lordship said[10], "if the word 'liable' where secondly used in para. (c) bears the meaning which I have ascribed to it, I should be reluctant to give it any other meaning where it is first used in the same paragraph . . . ". The High Court pointed out that although this case was concerned with "liable" where secondly it occurs and therefore the decision was not directly relevant to the question in the *Bitumen and Oil Refineries Case*[11], this view expressed by Viscount Simonds regarding "liable" where first it occurs, was nevertheless of the highest persuasive authority.

The facts in *George Wimpey and Co. Ltd.* v. *British Overseas Airways Corporation*[12] were these: Littlewood, an aircraft cleaner, was injured in the course of his employment by B.O.A.C. as the result of a collision between the vehicle in which he was travelling and a motor lorry owned by Wimpeys and driven by their servant. More than a year later, Littlewood began an action against Wimpeys for negligence. Wimpeys denied negligence and issued a third party notice under the Law Reform (Married Women and Tortfeasors) Act, 1935 addressed to B.O.A.C., claiming contribution or indemnity under s.6(1)(c) in respect of Littlewood's claim. Some two and a half years after the accident Littlewood joined B.O.A.C. in the action. The trial judge, Parker J., held[13] that Wimpeys were two-thirds responsible for the damage to Littlewood; that B.O.A.C. was one-third responsible; that Littlewood was entitled to full judgment against Wimpeys but not to anything against B.O.A.C. because of s.21(1) of the Limitation Act, 1939 (Eng.)[14] (which establishes a one-year limitation period in which actions may be brought against a public authority); and that Wimpeys could not therefore claim contribution against B.O.A.C. Wimpeys appealed to the Court of Appeal[15], but Singleton and Morris L.JJ. (Denning L.J. dissenting) dismissed the appeal. A further appeal to the House

[8] (1955) 62 A.L.R. 325, 330; (1955) 28 *A.L.J.* 638, 642.
[9] (1955) A.C. 169.
[10] *Id.* at 178.
[11] (1955) 62 A.L.R. 325; (1955) 28 *A.L.J.* 638.
[12] (1955) A.C. 169.
[13] (1953) 1 W.L.R. 426; (1953) 1 All E.R. 583.
[14] 2 & 3 Geo. 6, c. 21.
[15] *Littlewood* v. *George Wimpey and Co. Ltd. and British Overseas Airways Corporation, and British Overseas Airways Corporation (Third Party)* (1953) 2 Q.B. 501.

of Lords[16] was dismissed by a majority (Lord Porter and Lord Keith of Avonholm dissenting).

The main point at issue in this case was the meaning of the word "liable" where secondly it occurs in the sub-section. The majority in both the House of Lords and the Court of Appeal took the view that "liable" meant "held liable" or "liable in judgment", the Court of Appeal adding that it possibly also meant "liable by admission" or "liable on payment". The argument accepted by the majority in the Court of Appeal and at least two of the judges in the House of Lords, ran as follows:

> Those from whom contribution can be sought are, in the words of the section, those who answer the description "any tortfeasor who is, or would if sued have been, liable". "Liable" means "held liable". The subsection contemplates two classes of persons only, those who have been sued and held liable and those who have not been sued but would, if sued, have been held liable. B.O.A.C. had been sued by Littlewood and held not liable and therefore could not fall into either of the above classes. Hence Wimpeys could not claim contribution from them.

4. *The time at which the Tortfeasor's Claim for Contribution Arises.*

Several other related problems of interpretation of the sub-section are raised in recent cases. The first problem is at what time does the tortfeasor's claim for contribution arise for the purpose of applying limitation statutes? It was suggested by Birkett, J., in *Merlihan* v. *A.C. Pope Ltd.* (*Pagnello, Third* Party)[17] that the cause of action for contribution arises at the date of the accident. However, the better view appears to be that the cause of action does not arise, and time does not begin to run, until the liability of the claimant for contribution has been ascertained, that is, adopting the High Court's interpretation of "liable", on judgment being awarded against him. Cassels, J. in *Hordern-Richmond Ltd.* v. *Duncan*[18] said, "the cause of action which entitles a defendant to bring a third party before the court is the liability of the third party to make contribution or make an indemnity. That cause of action has not arisen until the liability of the defendant has been ascertained." This passage was expressly approved of by Jordan, C. J. in the New South Wales decision of *Nickels* v. *Parks*[19]. The High Court in the *Bitumen and Oil Refineries Case*[20] also adopted this view, since if the view of Birkett, J. were applied a tortfeasor would be given a cause of action for contribution before he had been called upon to pay anything. The problem was discussed in both the Court of Appeal and the House of Lords in *Littlewood* v. *George Wimpey and Co. Ltd.* [21] and *George Wimpey and Co. Ltd.* v. *B.O.A.C.*[22] and although there are *dicta* to the effect that the cause of action does not arise until judgment, it would appear that the question is still open, in England at least.

5. *The Application (if any) of Special Limitation Statutes to Claims for Contribution.*

Another problem is the extent to which special statutory limitations as to the time within which actions must be brought against certain bodies apply to claims for contribution brought by virtue of the sub-section. Normally of course the ordinary six-year period applies, but the question is what is the effect of such enactments as s.21(1) of the Limitation Act, 1939 (Eng.) reducing this six-year period under certain circumstances? In *Nickels* v. *Parks*[23] this question came directly before the court. The facts were these: A collision occurred between a tramcar, the property of the Commissioner for Government Transport, and a motor vehicle, the property of the defendants. The plaintiff, who was a conductor on the tram, was injured. Within twelve months, he commenced an

---

[16] (1955) A.C. 169.
[17] (1946) 1 K.B. 166.
[18] (1947) K.B. 545, 552.
[19] (1948) 49 S.R. (N.S.W.) 124.
[20] (1955) 62 A.L.R. 325; (1955) 28 *A.L.J.* 638.
[21] (1953) 2 Q.B. 501.
[22] (1955) A.C. 169.
[23] (1948) 49 S.R. (N.S.W.) 124.

action against the defendants. More than a year after the accident, the defendants added the Commissioner as third party in order that, if the plaintiff should recover damages, they might recover contribution. The Commissioner resisted this on the grounds that he had no notice as prescribed by s.28 of the Transport (Division of Functions) Act 1932 (N.S.W.)[24]; and that the defendants had taken no action against him within the twelve months period prescribed by s.27 of the Act; and that hence the defendants could not recover contribution from him if he were added as a third party.

It was decided by the majority of the Full Supreme Court, Jordan, C.J. and Davidson, J., that ss.27 and 28 of the Act had no application to actions for contribution brought under s.5(1)(c). In *Littlewood* v. *George Wimpey and Co. Ltd.*[25], both Denning and Morris, L.JJ., following the reasoning of the court in *Tuckwood* v. *Rotherham Corporation*,[26] were of the opinion that s.21(1) of the Limitation Act, 1939 (Eng.), does not apply to actions for contribution and that such an action may be brought at any time during the usual six-year period. It seems from these decisions that both the English and the local courts tend to exempt claims for contribution from these special statutory provisions. However, the question will always depend upon the construction of the statutory limitation itself.

6. *The Time at which the Hypothetical Action Suggested by the Words "would if sued" Must Be Regarded as Being Brought.*

A further problem raised by the sub-section arises in connection with the interpretation of the words ". . . or would if sued have been, liable in respect of the same damage". The question is: when must the hypothetical action suggested by the words "would if sued" be regarded as being brought? Both Lord Keith of Avonholm and Denning L.J. in their respective dissenting judgments in the House of Lords[27] and Court of Appeal[28] in *Wimpeys' Case* took the view that the time to envisage this hypothetical action is the time when the original plaintiff's cause of action arises. Amongst the other judges in the House of Lords there was a wide variety of opinions on the subject. Lord Reid, among the majority in the House of Lords, said[29]:

> A person may be held liable if sued at one time but not if sued at another time . . . . The words " would have been liable" show that the hypothetical action must be supposed to have been brought at some time between the date when the damage was suffered and the date when the claim for contribution is determined. . . . There are at least four possibilities. The meaning may be "would if sued immediately after the damage was suffered have been held liable", or it may be *"if sued when the tortfeasor claiming contribution was sued"*[30] or it may be *"if sued when the claim for contribution was made"*[31], or it may be enough that there was at least some time between these dates when the action would have succeeded.

His Lordship then went on to decide that one of the two possibilities in italics was correct, but did not express any preference for one or the other, Viscount Simonds said[32]:

> I do not find it necessary to discuss a question of great difficulty, viz., at what date is the hypothetical suit in which the "other tortfeasor . . . would, if sued, have been liable", to be presumed to have been commenced, and I will say no more than that having read and considered the opinion of my noble and learned friend, Lord Reid, I should upon this part of the case accept his conclusion.

Lord Tucker expressly left the question open.[33] Lord Porter in his dissenting judgment took a different view again[34]: "I have reached my opinion as to the

---

[24] Act No. 31, 1932 — Act No. 19, 1950.
[25] (1953) 2 Q.B. 501.
[26] (1921) 1 K.B. 526.
[27] (1955) A.C. 169, 193.
[28] (1953) 2 Q.B. 501, 514.
[29] (1955) A.C. 169, 186.
[30] Italics supplied.
[31] Italics supplied.
[32] (1955) A.C. 169, 179.
[33] *Id.* at 192.

true construction of the Act upon its wording alone without adding to or subtracting from its phraseology . . .". In other words, His Lordship adopted the view that the condition in the section is satisfied if the defendant in the contribution proceedings would have been held liable if sued by the original plaintiff at any time the plaintiff in the contribution proceedings can nominate.

The variety of opinions in the Court of Appeal and the House of Lords on this question is the more alarming because the correctness of the decision of the Full Court of the Supreme Court of New South Wales in *Nickels* v. *Parks*[35] is implicated. In this case, it will be recalled, the original plaintiff sued the original defendants, a private company, within twelve months of the accident in which he was injured. Outside the period of twelve months from the accident, the private company added the Commissioner of Transport as third party to pursue its remedy by way of contribution. The reasoning in the judgments in this case, as we have seen, centred round the question whether the special limitation period of twelve months relating to actions against the Commissioner applied to contribution proceedings and it was held that it did not. What was, however, given scant attention in this case was that whether or not the special limitation period applied to proceedings for contribution against the Commissioner, it unquestionably would have applied to any action which the original plaintiff could have brought against the Commissioner. And it was part of the case of the plaintiff in the contribution proceedings that such an action if brought would have been successful. The question of the time at which such hypothetical action should be contemplated as having been brought was therefore sharply relevant and yet was neglected.

The actual House of Lords decision in *George Wimpey & Co. Ltd.* v. *B.O.A.C.*[36] certainly leaves the correctness of *Nickels* v. *Parks*[37] open. The conclusion to which Viscount Simonds and Lord Tucker came depended on their view that because the defendant in the contribution proceedings before them had been sued he could not for that reason qualify as a person who would if sued have been held liable. Hence the vital fact on which their judgments turned was that the person from whom contribution was sought had been joined as a defendant by the original plaintiff. In *Nickels* v. *Parks*[38] this did not occur, the Commissioner merely being joined as third party by the original defendant. Lord Reid, the third member of the majority in the House of Lords, did not accept his brothers' reasoning, and his conclusion does depend on his view as to the time when the section regards the hypothetical proceedings as being brought by the original plaintiff against the defendant in the contribution proceedings. He considered that the contribution proceedings in the case before him failed because the defendant in those proceedings could not have been successfully sued by the original plaintiff *either* at the time when the tortfeasor claiming contribution was sued *or* at the time when the claim for contribution was made. The action would have been out of time in either case. In *Nickels* v. *Parks*[39], on the other hand, the original plaintiff would have been in time if he had sued the Commissioner at the time he sued the other tortfeasor, though out of time if he had sued the Commissioner at the time the other tortfeasor claimed contribution from the Commissioner. And which of these two dates is the relevant date is, as we have seen, a matter on which neither Lord Reid nor Viscount Simonds have made up their minds, though they both feel that it must be one of them.

To complete the picture, it may be added that the dissentient views in the Court of Appeal and House of Lords are all favourable to the correctness of the decision in *Nickels* v. *Parks*.[40]

The points settled by the *Bitumen and Oil Refineries Case*[41] and *George*

[34] *Id.* at 184.
[35] (1948) 49 S.R. (N.S.W.) 124.
[36] (1955) A.C. 169.
[37] (1948) 49 S.R. (N.S.W.) 124.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] (1955) 62 A.L.R. 325; (1955) 28 *A.L.J.* 638.

Wimpey & Co. Ltd. v. *B.O.A.C.*[42] are, in summary, seen to be rather fewer than the disputed questions they reveal. The cases will bring little satisfaction to the practitioner, though they may be enjoyed by students of jurisprudence. Theorists may be intrigued, for instance, by the opposite decisions reached by Viscount Simonds and Lord Porter in the latter case, while both of them stoutly insisted that they were adding nothing to the words of the section as they stood.[43]

W. HOWARD, Case Editor—Third Year Student.

VALUATION OF NOTIONAL ASSETS
SNEDDON v. *LORD ADVOCATE*

The recent decision of the House of Lords in *Sneddon* v. *Lord Advocate*[1] is likely to have important consequences in the attitudes taken by the Australian and British courts with regard to the question of valuation of "notional" assets in a deceased person's estate. The idea of "notional" assets arose when towards the end of the last century it was realised that it was not sufficient to tax the property actually passing on death, as many persons by making gifts shortly before death diminished considerably their taxable estates. Accordingly, the appropriate statutes were amended to provide for the inclusion in the estate for the purpose of assessment of death duty of certain classes of property, the most important of these being gifts made by the deceased within a number of years before his death. The term "notional" indicates that though the deceased did not actually own the property at his death, it was nevertheless deemed to be part of his estate.

These provision gave rise to several serious problems, for it became clear that the subject-matter of a gift would be liable to change in the period between the date of gift and the date of death. It might decrease or increase in value or be destroyed altogether. It might lose its original identity as where the gift had been monetary and had been used to purchase shares or other forms of property or the money might simply have been dissipated by the donee.

Though by legislative provision the date of valuation was fixed at the date of death, it did not resolve the doubt as to what had to be valued at that date. To that question two answers could be given. It might be that the property to be valued was the property originally given, whether still in existence or not. If it had since been destroyed, then it should be assessed as if it were still intact at the time of death at the value it would then have had. On the other hand it might be that the duty should be assessed on the property to which the original gift could be traced, such as shares which had been bought with the money given. On this view, if the money had been dissipated it could not be included in the dutiable estate, for there would be no property to which the money could be traced.

The latter approach was taken by the Australian Courts in relation to similar New South Wales and Commonwealth legislation[2]. In *The Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)*,[3] the deceased, Watt, had within a year before his death applied a sum of money for the benefit of a friend who was going overseas. He spent part of the sum in the purchase of a steamship ticket and gave the balance to his friend who spent it

---

[42] (1955) A.C. 169.
[43] *Id.* at 178, 184.

[1] (1954) A.C. 257.

[2] Stamp Duties Act, 1920 (N.S.W.), Act No. 47, 1920—Act. No. 41, 1952, s. 102 (2) (b); Estate Duty Assessment Act, 1914-1950 (Cwth.), No. 22 ,1914—No. 80, 1950, s. 8 (4) (a). The wording of the Australian statutes is not identical with that of the British statute, but it has never been suggested that anything turned on this.

[3] (1926) 38 C.L.R. 12.