RECENT QUEENSLAND CASES

(Contributed by the Students' Editorial Committee)

THE NOMINAL DEFENDANT

The Motor Vehicles Insurance Acts Amendment Acts 1963 repealed s.4F(4)(b) of *The Motor Vehicles Insurance Acts* which gave a court power to extend the time for making a claim against the Nominal Defendant where the failure to make or give notice of the claim within the three months period was "caused by the death of any person by any other cause deemed by the court to be a reasonable excuse." The 1963 amendment substituted a new s.4F(4)(b) which gives the court power to extend time when it is satisfied that the failure to make or give notice of the claim within the three month period was "caused by the death of any person or by any other cause which, . . ., the court is satisfied was not occasioned by any act or omission of the claimant or any person acting on his behalf".

Cases determined during the period 1965-66 elucidate the nature of the enquiry by which a court will determine whether the discretion to extend time arises and the principles which govern the exercise of the discretion.

The determination of whether the facts give rise to a discretion to extend time.

(1) The question is to be determined by having regard only to the circumstances during the three months period.[1] This is the period which must be explained away. Of course, if the discretion is held to arise, subsequent events may be very relevant to show how it should be exercised.

(2) The claimant must satisfy the court as to the cause of the failure to give notice (e.g. a prolonged period of unconsciousness, mental incapacity, extreme infancy, a belief that the vehicle was registered, or ignorance of his legal position). Only where the cause of the failure is ascertained with certainty can the court be affirmatively satisfied that the failure was not occasioned by an act or omission of the claimant or a person acting on his behalf.[2]

(3) Once the cause of the failure to give notice has been isolated the court must further scrutinise the chain of causation and determine whether the cause of the failure was itself caused by an act or omission of the claimant.[3]

(4) The words "omission of the claimant" in s.4F(4)(b) refer to something which the claimant has neglected to do but which

1. *Halliday* v. *The Nominal Defendant* [1965] Qd.R. 7.
2. *Smith* v. *The Nominal Defendant* [1965] Qd.R. 1.
   Halleday v. *The Nominal Defendant* [1965] Qd R. 7, 10-11.
3. *Facey* v. *The Nominal Defendant* [1966] Qd.R. 65.

he ought to have done.[4] Thus, where the failure to give notice is due to the claimant's ignorance of his legal position, the discretion will arise only where the applicant has made the enquiries which he ought reasonably to have made having regard to all the circumstances of the case.[5]

The exercise of the discretion

In exercising the discretion the Court will have regard to the degree of fault on the part of the applicant and the actual or possible prejudice to the Nominal Defendant.[6] It should be borne in mind that the likelihood of prejudice is less in a case where the vehicle is unregistered than in a case arising under s.4F(3) where the identity of the vehicle causing the injuries cannot be established.

CRIMINAL LAW

*The Criminal Code s.*600*—Discretion of judge to substitute plea of not guilty for plea of guilty.*

S.600 deals with the procedure with respect to persons committed for sentence. When such a person comes before the Court he is to be called upon to plead. If he pleads that he is not guilty, the Court, if satisfied that he duly admitted his guilt on the committal proceedings, is to direct a plea of guilty to be entered; and a plea so entered is to have the same effect as if it had been actually pleaded. But if the Court is not so satisfied, or if, though the accused pleads guilty, it is not satisfied on the depositions of guilt, a plea of not guilty is to be entered and the trial is to proceed.

In *Reg* v. *Popovic*[6a] the accused pleaded guilty both on the committal proceedings and before the Court, but gave in mitigation an explanation which amounted to a denial of guilty. The District Court Judge held that he was precluded by the provisions of s.600 from directing that the plea of guilty be withdrawn and a plea of not guilty to be entered.

On appeal, the Court of Criminal Appeal pointed out that an accused who actually pleads guilty has the right to appeal to the Court's discretion at any time before sentence to be allowed to withdraw that plea and substitute a plea of not guilty;[7] and that as s.600 is directed only to the *entry of the plea* there was

4. *Ibid.*, 70.
5. *H. E. J. Smith* v. *The Nominal Defendant* [1966] Qd.R. 55.
   Moon v. *The Nominal Defendant* [1966] Qd.R. 59.
   Morrison v. *The Nominal Defendant* [1966] Qd.R. 28.
6. *Facey* v. *The Nominal Defendant* [1966] Qd.R. 65, 72.
   Moon v. *The Nominal Defendant* [1966] Qd.R. 59.

6a. [1964] Qd.R. 561.

7. See, for example, *Reg.* v. *Fraser Brown* (1955) Q.W.N. 55. Strictly speaking this was sufficient to dispose of the present case, but the Court went on to deal with the broader issue.

no reason why the same appeal to discretion should not be held to exist in the case of a plea entered under s.600.

However, where the accused pleads guilty before the court to which he has been committed for sentence, the discretion will be exercised only in exceptional cases. The fact that such a person has also pleaded guilty before the Magistrate, all requisite formalities having been observed, weighs heavily against the exercise of the discretion.

Power of magistrate to vacate conviction

It should be borne in mind that the powers of a Magistrate are startlingly dissimilar. "Once a magistrate has announced a conviction he is *functus officio* in the sense that he cannot afterwards allow a plea of guilty to be withdrawn, although he may adjourn the hearing under s.88 of *The Justices Acts* for any sufficient reason, and, although, of course, his decision to enter a plea of guilty may be upset if it is wrong and if an appeal is instituted against it".[8]

It is thought by the writer that this lack of power leads to unnecessary inconvenience. See, for example, *Fitzgerald* v. *Newing*[9] where the magistrate assumed that, in submitting that there was no case to answer, counsel for the accused had elected not to call evidence and accordingly convicted. In such a case the magistrate has no power to vacate his conviction though the conviction will be set aside on appeal.

TORTS

Contribution between Tortfeasors.

Section 5 of the *Law Reform* (*Tortfeasors Contribution, Contributory Negligence and Division of Chattels*) *Act of* 1952, provides *inter alia*:

"Where damage is suffered by any person as a result of a tort (whether a crime or not) . . . . (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 . . .".

The right to contribution has been conferred not only against persons held liable in an actual suit but also against persons who, if sued, would in the hypothetical suit have been held liable. It has long been a moot point whether the hypothetical suit has a notional date—which is either the date of the action against the tortfeasor claiming contribution or the date of the claim for contribution—or whether the words "if sued" mean "if sued at any time between the date of the damage and the date of the claim for contribution." The former view has its origin in the

8. *Kimlin* v. *Wilson, ex parte Kimlin* [1966] Qd.R. 237, 242.
9. *Fitzgerald* v. *Newing* [1965] Q.W.N. 14.

dicta of Lord Reid in *George Wimpey & Co. Ltd.* v. *British Overseas Airlines Corporation*[10] and is supported by three decisions of the Full Court of New South Wales.[11] The latter view is supported by the decision of McNair J. (as he then was) in *Harvey* v. *O'Dell Ltd.*[12] and by both *Salmon*[13] and *Fleming.*[14] The objection to the first view is that where the claim of the injured party against one tortfeasor is subject to a shorter period of limitation than his claim against the other tortfeasor, the injured party is in a position to make the latter tortfeasor solely liable by not proceeding against him until the period of limitation applicable to the first tortfeasor has elapsed. Yet the cardinal purpose of the scheme embodied in *The Law Reform Act* is to deprive the plaintiff of the right to choose his target and to make solely liable only one of a number of persons whose tortious acts have contributed to his injury.

In *Re Guyder* v. *Lipscombe Brisbane Service Motors and Lyons; Brisbane Service Motors* v. *The Nominal Defendant (Queensland)*[15] the Full Court of Queensland was asked to choose between the two views. The Court adopted the view of McNair J. that the words "if sued" mean "if sued at any time".[16]

FAMILY LAW

In *National Provincial Bank Ltd.* v. *Ainsworth*[17] the House of Lords emphasised that the right of a wife to occupy the matrimonial home derives from her status and not from any leave or licence of her husband. In *Coles-Smith* v. *Smith and Others*[18] the Full Court of Queensland had cause to examine the nature of a wife's authority to take other persons into a home in the occupation and possession of her husband. It was held that a wife is entitled to issue all invitations which could be regarded as being given in pursuance or furtherance of the matrimonial *consortium.* So a wife has authority, arising from the fact of marriage, "to invite her friends there for afternoon tea, bridge, drinks, parties—the ordinary things that women ordinarily enjoy".[19] Where, however, the activities of her guests cannot be covered by the cloak of her right to *consortium* the guests will be liable in trespass.[20]

10. [1955] A.C. 169, 186-190, accepted by Viscount Simonds at p. 179.
11. *Seagrim* v. *Brown* [1956] S.R. (N.S.W.) 127.
Scanes v. *Richards* [1965] N.S.W.R. 358.
Coppins v. *Helmers* [1965] N.S.W.R. 348.
12. [1958] 2 Q.B. 78.
13. 13th edition, at p. 101.
14. 3rd edition, at p. 689.
15. [1966] Qd.R. 24.
16. *Ibid.*, 31.
17. [1965] A.C. 1175.
18. [1965] Qd.R. 494.
19. *Ibid.*, p. 502.
20. *Ibid.*, p. 503.

LANDLORD AND TENANT

Section 4A(1) of the *Landlord and Tenant Acts,* 1948 *to* 1961 provides:—

The provisions of this Act other than this section shall not apply (a) to any premises leased for the first time after the first day of December one thousand nine hundred and fifty seven; or (b) to any premises leased after the first day of December, one thousand nine hundred and fifty seven, and which were not leased at any time during the period of three years ending on that date.

In *The Queen* v. *Shepherd and Thomas; ex parte Salmon*[21] the Full Court held that where alterations are made to premises which were leased within the three year period ending on the first of December, 1957 and the altered premises are leased again, the question whether the premises have so changed character as to constitute a new unit of letting is to be determined by enquiring whether the area leased on the second occasion is identical with that leased during the prescribed period. This is a question of fact.

21. [1966] Qd.R. 452.