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"*To-day, for some extraordinary reason, there is a spirit of war or fear of war which concerns men's minds when one would have thought that their real function after a great war was only to discover how many swords they could beat into ploughshares and how remote they could put the danger of war. Here the system of International Law comes into its own, because it commands men to think whether there are not better methods of settling disputes, however deepseated the origin of those disputes may be.*"

—LORD HANWORTH, M.R.

Vol. XI. Tuesday, July 2, 1935 No. 12

Ignorance of Contents of Libellous Matter as a Defence.

THE question sometimes arises as to how far the vendors and distributors of books, newspapers, and other periodicals, who are not the printers or first or main publishers, are liable for libel contained therein, though their dissemination of such matter may be innocent in itself.

The law of libel is, in some respects, a very hard one. Every person who publishes or distributes a libel is *prima facie* liable to an action for damages, notwithstanding the fact that he may have acted innocently in the matter, as the law raises a presumption of malice from the mere fact that there has been publication of something which is defamatory. Thus, a defence of lack of knowledge will not prevail. In an *Anonymous* case (1774) Lofft. 544, 98 E.R. 791, when, on an information for libel, a printer declared he was not privy to the contents, or to its being put into the paper, and he was greatly concerned as to its ever having been published, Lord Mansfield said that a plea of ignorance of contents went for nothing, as it would be an excuse for all kinds of infamy.

Notwithstanding the rigour and severity of the law on this subject, it has now been definitely decided that there has been no publication to constitute an action for damages, if the person disseminating the libel can prove: (*a*) that he had no knowledge that the article or book complained of at the time of its sale contained libellous matter; (*b*) that his ignorance was not due to any negligence on his part; and (*c*) that he did not know, and had no ground for supposing, that the article or book was likely to contain libellous matter. If he can prove those facts, he is not a publisher of the libel.

The foundation of the law, so stated, is *Emmens v. Pottle* (1885) 16 Q.B.D. 354, 358, before which there is no trace of this doctrine. There the defendants, who were newsvendors carrying on business on a large scale, sold copies of a periodical, *Money*, containing libellous matter against the plaintiff, and the jury having found for the defendants on the above three headings, it was held that there was no publication of the libel and that the defendant was not liable, Bowen, L.J., stating:

> "A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury. It seems to me that the defendants are no more liable than any other innocent carrier of an article which he has no reason to suppose likely to be dangerous. But I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it, if he knows, or ought to know, that the paper is one which is likely to contain a libel."

This has been quoted with approval in all of the cases which have since been heard in the Court of Appeal.

Of course, the first question for the jury is, before any question arises as to liability on the part of any publisher: Is the document a libel? Libel or no libel is for the jury, but if no reasonable jury could find on the material before them that the document is defamatory of the plaintiff, the Judge may intervene and decline to leave the question of libel or no libel to the jury. It is, however, the application of the rule in *Emmens v. Pottle* that usually presents the difficulty in this class of action, after it has been established that the matter was libellous. No definite standard or principle can be laid down as to what amount of care a person must use to show there was no negligence on his part. Each case, therefore, must depend on its own merits.

In *Vizetelly v. Mudie's Select Library, Ltd.* [1900] 2 Q.B. 170 all three Judges in the Court of Appeal quoted with approval the decision in *Emmens v. Pottle*. In that case the proprietors of a circulating library circulated copies of a book, *Emin Pasha: his Life and Work*, which, unknown to them, contained a libel on the plaintiff. It did not appear that anyone on their staff had looked into a well-known trade organ, or had seen in the *Athanaeum* a notice which had appeared in both periodicals, stating the publishers of the work wanted a return of Volume I for cancellation of a page, and the substitution of another. It was admitted in cross-examination by one of the two managing directors that they had circulated books containing libels but no action had been brought against them, and that they did not employ a reader, because it was cheaper to take the risk of being sued for libel than to do so, and the jury having been directed to consider whether the defendant had used due care in the management of his business, awarded the plaintiff £100. Smith, L.J., said:

> "It seems to me that out of the mouth of Mr. Mudie [referring to what he had admitted in cross-examination] there was sufficient evidence to justify the jury in coming to the conclusion that the defendants had failed to prove their defence, and that it was through negligence on their part that they did not find out that the book contained a libel on the plaintiff."

In the same case, at p. 178, Vaughan Williams, L.J., said:

> "The case of *Emmens v. Pottle* seems to me, when carefully read, to be in consonance with the whole law of libel. The basis of the action for libel is that the defendant has falsely and maliciously published defamatory matter concerning the plaintiff. . . . What I understand that case really to decide is that the innocent publication of defamatory matter, *i.e.*, its publication under such circumstances as rebut the presumption of any malice, is not a publication within the meaning of the law of libel. That seems to me to be good sense."

And Romer, L.J., at p. 180, said:

> "As regards a person who is not a printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he

succeeds in showing: (1) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was *prima facie* publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury."

It will be seen from the foregoing that Vaughan Williams, L.J., made the distinction between publication and non-publication turn on this: if a defendant did not know, and ought not to have known, he did not maliciously publish. That proposition involves an investigation into what is meant by what Scrutton, L.J., afterwards termed " the time-honoured words ' malicious publication,' " when a plaintiff puts forward a claim for libel. A. L. Smith, L.J., considered the case turned on the particular facts: one that the defendants subscribed to *The Publishers' Circular* and *The Athenaeum*, but had not read them, for if they had they would have seen that the publishers requested a return of all copies of the book in question so that they might cancel a page; and the other was the answer of one of the two managing directors to a question in cross-examination. These two matters, A. L. Smith, L.J., thought would make the defendants liable for publication. Romer, L.J., simply stated as law the three questions in *Emmens v. Pottle*, but put the third question before the second.

But in the later case of *Weldon v. The Times Book Co., Ltd.* (1912) 28 T.L.R. 143, where the defendants, who were book distributors, sold two books, entitled *Gounod*, which were published in the French language in Paris, and which the plaintiff alleged contained libellous statements regarding her, the defendants were held not liable, notwithstanding the fact that the book had not been read and examined before it was offered for sale. Cozens Hardy, M.R., stated:

"It is quite impossible that distributing agents such as the respondents should be expected to read every book they had. There are some books as to which there might be a duty on the respondents or other distributing agents to examine them carefully because of their titles, or the recognised propensity of their authors to scatter libels abroad. Beyond that, the matter cannot go. It is impossible to say there is a liability to examine the contents of books like the two in question, which are by authors of high character and relate to a distinguished musician who has been dead for over a quarter of a century."

Then there is the case of *Martin v. The Trustees of the British Museum* (1894) 10 T.L.R. 338, where the librarian handed to four or five readers two pamphlets containing libellous matter and the defendants were held not liable, notwithstanding the fact that the jury found among their various findings (founded on *Emmens v. Pottle*) that the defendants had not discharged their duties with proper care, caution, and judgment, although they found that they were not guilty of negligence. Pollock, B., referring to these inconsistent findings, said:

"There is a vast public duty cast on the trustees to receive all books sent, and purchase others, and probably that influenced the findings of the jury, who thought they could not inquire into or know the character of all the books asked for and used."

In *Haynes v. De Beck* (1915) 31 T.L.R. 115, Darling, J., having directed the jury that a firm of wholesale newspaper agents which had distributed copies of a journal containing defamatory matter was not liable if the three conditions in *Emmens v. Pottle* had been established for the defence, the jury found that the distributing agents had not acted innocently and awarded 1s. damages, whereupon plaintiff was deprived of costs against the newspaper agents on the ground that the amount of damages showed that the jury considered there had been a mere slip that involved no kind of moral obliquity on the agents' part. In the same case, the learned trial Judge ruled that there was no joint publication by the wholesale newspaper agents with the other defendants, the editor and printers of the offending journal.

In *Bottomley v. F. W. Woolworth and Co., Ltd.* (1932) 48 T.L.R. 521, Lord Justice Scrutton in delivering the judgment of the Court of Appeal tested the verdict of the jury by the principles of *Emmens v. Pottle* as stated by Lord Justice Romer in the *Vizetelly* case, as set out above. The evidence showed that the defendants who were apparently in the habit of taking consignments of odd lots of magazines (amounting to 50,000 copies every week), innocently and without any knowledge on their part, sold copies of the *Detective Story Magazine* containing an article headed " Swindlers and Scoundrels —Horatio Bottomley, Editor and Embezzler." The defendants were held not liable, notwithstanding the fact that the jury found them guilty of negligence owing to the fact that they had failed to make a periodical examination of specimen magazines. The Court of Appeal, supporting the ruling of Horridge, J., held that there was no evidence to support such a verdict, as the examination of specimen copies, unless it was a specimen copy of the actual magazine containing the alleged libel, would not have disclosed the libel.

The whole question was exhaustively reviewed and carefully considered in the more recent case of *Sun Life Assurance of Canada v. W. H. Smith and Son, Ltd.* (1933) 150 L.T. 211. In a separate action, a verdict for £19,000 had been returned against the publishers of *The City Mid-Week* newspaper. In the action against W. H. Smith & Son, Ltd., who are the largest distributors of newspapers, etc., in Great Britain, it being stated in evidence that they had 1,400 bookstalls in London alone, the defendants pleaded they had acted without negligence and in their ordinary course of business as proprietors and managers of bookstalls in displaying the poster complained of; that they did not know, nor ought they have known, that the issue of the newspaper or the poster contained the alleged libellous matter; and that they had no grounds for supposing they contained such matter. It was stated in evidence that defendants had contracted to exhibit contents bills of the newspaper at twenty-four of their bookstalls. Their head office, dealing with a vast quantity of papers daily, had no time to read all of them or to open the parcels containing the posters which were sent at top-speed to their various distributing centres, and the manager of any of their bookstalls had no discretion as to whether he should withdraw a publication on the ground that it was libellous.

The Lord Chief Justice put to the special jury the question whether there was a libel, and the three questions in *Emmens v. Pottle*. The jury found the poster by itself was libellous, and that the defendants were innocent of any knowledge of the libel contained in the newspaper and in the posters, that there were no circumstances which ought to have led the defendants to suppose that the newspaper and poster contained a libel, and that there was negligence on defendants' part in not knowing they did contain a libel. Judgment

was entered for plaintiffs with £3,000 damages. The defendants appealed.

The judgments in the Court of Appeal considered the question of defendants' liability from the viewpoint of agency, as well as from that of negligence. Scrutton, L.J., *said* :

"Of course the company, as such, had no knowledge; the knowledge of the company is that only of some of its servants or agents. If you limit the meaning of "the defendants" to the defendants' directors, no doubt they had not the slightest knowledge of any libel contained in the newspaper or poster. If you limit the meaning of the word to those at the head office, who every morning are working at great pressure to send out any number of papers and any number of posters, they also were innocent of any knowledge. But if the question referred to the knowledge of the persons who in fact posted up the posters in such a way that they must look at them and see what was on them, as the knowledge of the defendants . . . the principle quoted from Mr. Bowstead's "Digest of the Law of Agency" (8th Edit.), art. 109 at p. 365, is correct: 'Where any fact or circumstance material to any transaction, business, or matter in respect of which an agent is employed'—stopping there for a moment, an agent here was employed for payment to post up, so as to publish, a poster; is it material to that transaction that he is asked to post up a libel? Obviously, it is. Where any such fact or circumstance, 'comes to his knowledge in the course of such employment'—that fact or circumstance did come to the knowledge of the manager of the bookstall in the course of his employment when he did what he was ordered to do, namely, post up these posters—'and is of such a nature that it is his duty to communicate it to his principal,'—it seems to me clear that where a principal does not know that a publication is a libel and has not seen it, and the agent has reasonable grounds to believe, on looking at it, that it is a libel, it is his duty to communicate that fact to his principal and to get further instructions—in that event 'the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed such duty.'"

His Lordship concluded that there was ample evidence on which the jury might very well have found that the defendants were carelessly carrying on their business as when, owing to the mass and volume of their business they were compelled to send out papers and posters unread, and so, not knowing what was in them, direct the managers of their bookstalls not to exercise any discretion or take any step to delay posting if they think, on looking at a poster, that it might be libellous.

Lord Justice Greer, after referring to *Limpus v. General Omnibus Co.* (1862) 7 L.T. 641, where the employer of a driver, who was told not to race and in racing another bus caused an accident, was liable notwithstanding the instructions not to race, said he could not conceive in the present case how anybody could contend the defendants were not liable—having instructed their manager to put up the posters, whatever they were and whatever they contained—having regard to the principles of law regarding the liability of a principal for the acts of his agent. He said that in the case of a libel which has been disseminated or published to some member of the public by a company or an individual whose business it is to exhibit documents similar to that which contained the libel in question, the question for consideration is whether the dissemination was innocent,

"And if a company leaves it to one of its salesmen to exhibit on his stall an invitation to buy the paper, it is just as much responsible for the state of mind the agent has when he disseminates the defamatory matter as if it was there itself as a person exhibiting the poster or selling the paper, as the case may be."

On the negligence point, he said :

"It is not sufficient for the defendants to say that it is inconvenient for them and difficult for them, having regard to their large business, to make any other arrangements than the arrangements they have in fact made. If those arrangements result in a breach of the duty to exercise reasonable care towards persons who may be damaged by defamatory statements, then there is negligence within the rules which have been laid down with reference to the question of innocent dissemination."

From a consideration of the cases, it is difficult to state with exactness the principles on which newsvendors and libraries and other institutions of that kind, who do not themselves write the libels or print them, but sell or otherwise pass on to others books or periodicals, or exhibit posters which in fact contain libellous matter, are freed from responsibility to the persons defamed. An illustration of the difficulty is found in the *Vizetelly* case, where the Court of Appeal did not disturb the jury's finding, but the three Lords Justices appear to have given three different sets of grounds for their decisions to explain why what had happened—the circulation and (or) selling of the books—was in that case publication, but might, in other circumstances, not be publication. In the *Bottomley* case all the members of the Court expressed some doubt as to what was the exact ground of the protection which was given to the defendants in proving a negative to the questions put to the jury in *Emmens v. Pottle*. In the *Sun Life Assurance* case, the Court expressed the latest view to be that the safest course for the trial Judge is to follow Bowen, L.J., "who is a very good man to follow," and that the effect of his judgment in *Emmens v. Pottle* is that the vendor of a newspaper will not be responsible for the libel contained in it, if he : (1) does not know, and (2) ought not to have known—that is to say, if he carried on his business carefully—that the paper is not one which did contain a libel, but which was likely to contain a libel. It would be better in future, in the opinion of Scrutton, L.J., if two questions are put to the jury on those lines : (1) Whether the defendant knew, and (2) Whether he ought to have known if he had carried on his business properly—that the document was one which was likely to contain a libel.

Summary of Recent Judgments.

COURT OF APPEAL
Wellington.
1935.
March 27, 28.
Myers, C.J.
Smith, J.
Fair, J.

BRITISH DOMINIONS FILMS, LTD.
v.
DOMINION PICTURE-THEATRES CO., LTD.

Contract—Agreement to Supply for Specified Term all Motion-picture films to be released in New Zealand by Company—Whether Implication raised of Obligation to Release and Supply.

In an action for breach of contract, paras. 2 and 3 of the Statement of Claim were as follows :—

"2. By agreement in writing dated the 22nd day of September, 1932 and made between the defendant of the one part and the plaintiff and other picture theatre proprietors (as to their respective theatres) of the other several parts the defendant agreed (*inter alia*) to supply and the plaintiff agreed to exhibit in the "Plaza" Theatre Auckland all motion picture films with sufficient supporting subjects to make a programme to be released in New Zealand by the defendant from the date of the said agreement until the 30th day of September 1933 in accordance with the terms and conditions in the said agreement contained.

"3. By the said agreement the plaintiff further agreed with the defendant that it would cause the said "Plaza" theatre to be immediately established as an "All British" theatre for the exhibition exclusively of the films the subject matter of the said agreement and would exhibit the first programme in the said "Plaza" theatre commencing on the 14th day of October 1932 and further would spend at least £60 per week in advertising for each week of the contract season."

Paragraph 5 of the Statement of Claim was as follows:—

"On or about the 26th day of July 1933 the defendant ceased to supply any motion picture films to the plaintiff for exhibition as provided in the said agreement and refused to supply any such films during the remainder of the term of the said agreement."

The appellant contended that it was under no obligation either express or implied to release in New Zealand and supply to the respondent any films at all.

In the action by the respondent against the appellant, *Herdman, J.*, gave judgment for the respondent for £600. On appeal from this decision,

O'Leary and **Buxton,** for the appellant; **F. L. G. West,** for the respondent.

Held, *per curiam,* dismissing the appeal, That there was on the true construction of the contract at the least an obligation on the part of the appellant to release and supply to the respondent all films which the appellant actually had from time to time in New Zealand available for release.

Semble, *per Myers,* C.J., That there was to be spelled out of the contract as a matter of mere construction an absolute obligation to supply films weekly to the respondent.

The Moorcock (1889) 14 P.D. 64, applied.

Solicitors: Bell, Gully, Mackenzie, and O'Leary, Wellington, for the appellant; **Jackson, Russell, Tunks, and West,** Auckland, for the respondent.

Case Annotation: *The Moorcock,* E. & E. Digest, Vol. 44, p. 104, para. 828.

SUPREME COURT
Auckland.
1935.
May 21;
June 6.
Fair, J.

WHITLEY & COMPANY, LIMITED v. GREEN.

Contract—Restraint of Trade—Vendor Selling Plant, &c. Used in my "business"—Agreeing to Refrain from Undertaking the "same class of business"—Admissibility of Extrinsic Evidence as to Work done by Vendor in Business and as to Conduct of Parties in Interpreting Meaning of "business"—Limit of Space—No Limit as to Time—Reasonableness.

An agreement whereby defendant agreed to sell to plaintiff "the plant, machinery, and goodwill of the Central Wire Mattress Co. and at present used in my business and contained in the list attached,"

contained the following clause:

"I refrain from undertaking the same class of business in any way whatsoever in the Dominion of New Zealand unless I have the written permission so to do from [the plaintiff]."

Johnstone, K.C., with him **Mackay,** for the plaintiff; **A. M. Goulding,** for the defendant.

In an action for an injunction, account, and damages,

Held, 1. That extrinsic evidence could be given to show, and the evidence adduced showed, that substantially the whole of the work done by the defendant in his said business was the manufacture of pedestal seats.

2. That the conduct of the parties was admissible to show the sense in which the word "business" was employed in the restriction.

3. That such restriction in the light of such conduct applied to the business of manufacturing pedestal seats and to no other business.

4. That, defendant having manufactured pedestal seats in breach of the agreement so interpreted, the restriction was not invalid either upon the ground that the area was unreasonable or that there was no limit in time as to the restraint.

The injunction was ordered to issue and an account ordered to be taken.

Watcham v. Attorney-General of the East Africa Protectorate [1919] A.C. 533, **Bank of New Zealand v. Wilson** (1886) N.Z.L.R. 5 S.C. 215, and **Fitch v. Dewes** [1921] 2 A.C. 158, applied.

Bridges v. Carson [1934] N.Z.L.R. 158, and **Escott v. Thomas** [1934] N.Z.L.R. 1046, referred to.

Solicitors: Joseph Stanton, Auckland, for the plaintiff; **Goulding, Rennie, Cox, and Cox,** Auckland, for the defendant.

SUPREME COURT
Hamilton.
1935.
June 8, 11.
Reed, J.

IN RE BEAMISH (A BANKRUPT), EX PARTE THE KING.

Bankruptcy—Property Passing—Unemployment-relief Tax—Unpaid Employees' Wages Tax in possession of Bankrupt—Whether held by him in trust for the Crown—Bankruptcy Act, 1908, ss. 2, 61 (d), 148—Unemployment Amendment Act, 1931, s. 23.

Money collected by an employer of labour by deduction of unemployment-relief tax from his employees' wages forms a debtor and creditor account between him and the Crown, and any such amount unpaid by him on his bankruptcy passes to the Official Assignee and is divisible among his creditors including the Crown.

Re Hallett's Estate, Knatchbull v. Hallett, (1880) 13 Ch. D. 696, mentioned.

Counsel: Gillies, for the Crown; **N. S. Johnson,** for the Official Assignee.

Solicitors: H. T. Gillies, Hamilton, for the Crown; **Bell and Johnson,** Hamilton, for the Official Assignee.

NOTE:—For the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Bankruptcy,* p. 466. For the Unemployment Act, 1931, see *ibid.,* Vol. 8, title *Work and Labour,* p. 1224.

Case Annotation: *Re Hallett's Estate, Knatchbull v. Hallett* 5 E. and E. Digest, title *Bankruptcy,* p. 720.

SUPREME COURT
Wellington.
1935.
June 5, 6.
Myers, C.J.

RE CAMPBELL.

Fugitive Offenders—Depositions taken before Magistrate—"In like manner"—Whether accused has Right to Audience or to Cross-examine Witnesses—Fugitive Offenders Act, 1881 (Imp.), s. 29—Justices Act, 1902, (N.S.W.), s. 36.

Section 29 of the Fugitive Offenders Act, 1881, (Imp.) is in part as follows:

"A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him."

Under that section, on the taking of depositions for the purposes of the Fugitive Offenders Act, 1881 (Imp.), the counsel of accused has no right to cross-examine the witnesses.

The words "in like manner" means "in like manner so far as applicable," and, so far as the rights of an accused person are concerned, the "manner" of taking the depositions is, in the absence of one who is a fugitive from New South Wales, limited to the requisites contained in subss. 1 and 4 of the Justices Act, 1902 (N.S.W.), which relate to the administration of the oath and the taking of the depositions respectively; and the right conferred by s. 3 of that section, which is as follows:

"(3.) The defendant may himself, or by his counsel or attorney, make full answer and defence, and may give evidence himself, and may examine and cross-examine the witnesses giving evidence for or against him respectively,"

can only be exercised by an accused person who is present.

Ex parte Lillywhite (1901) 19 N.Z.L.R. 502, referred to.

Counsel: R. E. Harding and **Arndt,** in support; **Evans Scott,** to oppose.

Solicitors: Meek, Kirk, Harding, and Coles, Wellington, for the prisoner; **Menteath, Ward, Macassey, and Evans Scott,** Wellington, for the Crown.

SUPREME COURT
Palmerston North.
1935.
Feb. 21;
May 28.
Myers, C.J.

MARK v. BARKLA.

Animals—Boar—Trespass—Injury to Owner of Land on which Boar was Trespassing while being Driven off by him—Whether Natural and Ordinary or Reasonable Consequence of Trespass.

A boar was trespassing on respondent's land, and, while being driven off by him and after being hit by him with a batten, suddenly turned upon and tossed him causing injury. A Stipendiary Magistrate awarded him damages for personal injuries so sustained.

On a general appeal from that decision,

H. R. Cooper, for the appellant; **Park,** for the respondent.

Held, allowing the appeal, 1. That the injury was not the natural and ordinary consequence of the trespass, as it is not ordinarily in the nature of a boar *domitae naturae* to attack a human being.

2. That, on the facts, there was insufficient proof of *scienter*.

Jenkins v. Turner (1696) 1 Ld. Raym. 109; 91 E.R. 969, followed.

Hudson v. Roberts (1851) 6 Exch. 697; 155 E.R. 724; **Jackson v. Smithson** (1846) 15 M. & W. 563; 153 E.R. 973; **Cox v. Burbidge** (1863) 13 C.B. N.S. 430; 143 E.R. 171, applied.

Hennigan v. M'Vey (1882) 9 R. (Ct. of Sess.) 411, not followed.

Solicitors: Cooper, Rapley, and Rutherfurd, Palmerston North, for the appellant; **Park and Adams,** Levin, for the respondent.

Case Annotation: *Jenkins v. Turner*, E. & E. Digest, Vol. 2, p. 243, para. 272; *Hudson v. Roberts, ibid.*, p. 244, para. 277; *Jackson v. Smithson, ibid.*, p. 243, para. 273; *Cox v. Burbidge, ibid.*, p. 243, para. 275.

SUPREME COURT
Blenheim.
1934
Nov. 22, 23;
1935
Feb. 9.
Blair, J.

MAINDONALD v. MARLBOROUGH AERO CLUB AND NEW ZEALAND AIRWAYS, LIMITED.

Negligence—Aircraft—Aeroplane repaired by Company for Club—Club's Passenger killed owing to Defect discoverable on Reasonable Inspection—Onus of Proof of Negligence not discharged by Plaintiff—Nexus not established in relation to Club—Whether, even if Negligence had been established, Repairing Company owed any Duty to Deceased.

M. met his death while travelling as a passenger for hire in an aeroplane operated by the M. Aero Club. His widow sued the Club and the N.Z. Airways Co., Ltd., under the Deaths by Accident Compensation Act, 1908, for damages in respect of his death. The machine crashed in consequence of one of the bolts in one of the bell-crank levers on the elevator-control line becoming unshipped owing to a defective cotter pin. There was an inspection door where this particular bell-crank lever was. As the result of a previous accident, the machine was repaired by the Company. The Club's contract with the Company was that the machine was to be repaired to Certificate of Airworthiness standard, and a certificate of airworthiness was obtained from the proper authorities. After a meticulous inspection by the Aviation authorities, the certificate of airworthiness was issued. The machine thereafter was restored by the Company to the Club.

P. J. O'Regan and **C. T. Smith,** for the plaintiff; **Macnab** and **James,** for the defendant Club; **J. P. Ward,** for the defendant Company.

The plaintiff rested her case against the Club on the failure to hold a ground inspection and breach of the statutory regulations in the non-holding of such inspection, but, on the evidence of plaintiff's witnesses, the ground inspection did not touch the defect causing the accident.

Held, so far as the defendant Club was concerned, That the necessary nexus between the injury to the passenger and the breach of the statutory duty had not been established.

Held, on the evidence, so far as the defendant Company was concerned, That the onus of establishing that the cotter-pin was not properly fixed in position when it left the Company's hands had not been discharged by plaintiff.

Semble, 1. There is no difference in principle between the liability of the manufacturer of goods to the ultimate consumer of those goods and that of the repairer of a machine to a person ultimately injured by reason of alleged defective repair.

2. Assuming that the cotter-pin was not put in, or, if put in, was not put in properly as alleged, the alleged defect being discoverable on reasonable inspection, the relations between the deceased and the repairing Company were not proximate, and, therefore, the repairing Company owed the deceased no duty and were not liable.

Farr v. Butters Brothers and Co., [1932] 2 K.B. 606, applied.
M'Alister (or Donoghue) v. Stevenson, [1932] A.C. 562, distinguished.

Solicitors: P. J. O'Regan and Son, Wellington, for the plaintiff; **A. A. Macnab,** Blenheim, for defendant Club; **Ward and Dowling,** Dunedin, for the defendant Company.

COURT OF ARBITRATION
Wellington.
1935.
May, 14.
Page, J.

CLAUSEN v. COUCHMAN CYCLE COMPANY, LIMITED.

Workers' Compensation—Accident "arising out of and in course of employment"—Youth employed as Messenger in Parcels-delivery Service—Provided with Cycle by Employers—Killed on his way to work on Cycle on morning after Delivery of a parcel after the closing-time of Employer's Premises—Total Earnings Nine Shillings per week—Whether Deceased's Mother a "Dependant"—Workers' Compensation Act, 1922, ss. 2, 3.

A firm of cycle-dealers carried on a parcels-delivery service, and engaged youths, each of whom they provided with a bicycle and a cape, for the transport and protection of parcels. Each youth was permitted to use the bicycle as a means of transport to and from his home. If a call came near closing-time, the messenger, having carried out his mission, would be compelled to take his bicycle home with him, there being no place at defendant's premises where he could leave it after closing time.

While plaintiff's son, one of the youths so employed, was riding the cycle and carrying the cape to which reference has been made, from his home on his way to work, after delivering a message shortly before closing-time on the previous evening, he was struck by a motor-vehicle and killed.

O. C. Mazengarb, for the plaintiff; **C. A. L. Treadwell,** for the defendant.

In an action for compensation in respect of his death,

Held, 1. That the accident arose out of and in the course of his employment.

Dictum of Lord *Wrenbury* in **Hewitson v. St. Helen's Colliery Co., Ltd.** [1924] A.C. 59, 95; 16 B.W.C.C. 230, 264, applied.

2. That, to the extent that after deducting the cost of maintaining the deceased boy there was a balance, the mother was dependent on the earnings of her son.

Peart v. Bolckow, Vaughan and Co., (1924) 17 B.W.C.C. 215, followed.

Solicitors: Mazengarb, Hay, and Macalister, Wellington, for the plaintiff; **Treadwell and Sons,** Wellington, for the defendant.

Case Annotation: *Hewitson v. St. Helen's Colliery Co., Ltd.*, E. & E. Digest, Vol. 34, p. 280, para. 2364; *Peart v. Bolckow, Vaughan and Co., ibid.*, p. 412, para. 3355.

NOTE:—For the Workers' Compensation Act, 1922, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Master and Servant*, p. 597.

The Late Mr. Justice Avory.

Great Criminal Lawyer and Judge.

The death of Mr. Justice Avory on June 15, lends great interest to Mr. Bernard O'Donnell's chatty book* on the career of the great criminal Judge who was known as " the Sphinx of the Courts," which the author says is an apt description of " the stern-visaged little man, who has sentenced more men to death, and presided over more murder trials than any other Judge of the King's Bench Division." The biography is only recently to hand.

The author writes of the Judge as he knew him from a seat in the Press Box in Sir Horace Avory's Court, and, as his knowledge of his subject goes back to the days when His Lordship was at the Bar, he is able to give a full-length portrait of him throughout his career. There is much ground to cover in the book, and, though its treatment is from the journalist's viewpoint rather than from that of the lawyer, it affords an introduction to a closer study of the many trials touched upon, most of which may be found in the larger scope of the *Notable British Trials* series to which many a reader will instinctively turn to consider for himself the legal issues involved in them.

While the present writer has a natural aversion from biographies written during the life-time of their subject, it must be admitted that Mr. O'Donnell has contrived to make his chapters interesting and, at times, dramatic. If he appears to be somewhat obsessed with the sternness and lack of emotion of Mr. Justice Avory, which he seems to consider as heroic judicial qualities, he does not omit to record his own view, established after many years as a crime reporter in Fleet Street, and after having attended all the big trials over which His Lordship had presided, that he was the most fascinating personality on the Bench in his day. Perhaps the fascination lies in that, as the author puts it,

> " He holds the scales of justice in skinny, attenuated hands. Holds them firmly—implacably. One tries to read the workings of the mind behind that mask-like face. This frail little man with the mummy-like emotionless face . . . is short. He is also thin to the point of spareness. . . . Implacable and awe-inspiring on the Bench, you would scarcely give him a second glance if you saw him in the street."

The author in a character-sketch of the Judge says, in part :

> " Were I ever so unfortunate as to find myself in the dock at the Old Bailey, or any other court, on a criminal charge, I would like to be tried by Mr. Justice Avory.
>
> " This in spite of his reputation for severity, and stern, unyielding attitude towards crime of every kind ; and this, after many years of Court life in the Press Box, where I have had every opportunity of watching his work, both as counsel and as Judge.
>
> Were I guilty—then I would not attempt to put any sort of bluff across this little man, for he has an uncanny knack of stripping a defence bare of all extraneous trappings. He can, on the other hand, place an unerring finger on the vulnerable weaknesses of a prosecution. And I have seen too many counsel withered by some caustic comment, witnessed too many prisoners routed by a single shattering question, ever to try and pull blinkers over the small, cold eyes of Mr. Justice Avory.
>
> " At the same time, were I innocent, I should feel that no matter how strongly circumstantial the evidence might be against me, no matter how black things might appear, I could rely on that diminutive figure, frigid and austere though he be, to listen to my story and unravel the truth for himself. And, once having done that, I could absolutely rely on that scrupulous impartiality which makes him the very embodiment of English law and British Justice."

That, in itself, is a tribute of which any Judge could reasonably be proud. The author works out and justifies his character-sketch incidentally to the trials that are dealt with in his twenty-five chapters.

Horace Avory was born in 1851 and brought up in the shadow of the Old Bailey, for his father was a well-known solicitor who practised there ; his brother was its Clerk for a long period, and he, according to Montague Williams, K.C., knew more law than " all the bench of judges put together." Horace Avory was educated at King's College, London, and later at Corpus Christi College, Cambridge, of which University he was Scholar, Honorary Fellow, and Doctor of Laws. In 1875 he was called to the Bar by the Inner Temple. From the outset he specialised in criminal cases, and his quality in that class of work was recognised when, in 1889, he was appointed Junior Counsel to the Treasury, and, in 1899, Senior Counsel, and this in a period when there was a galaxy of eminent competitors. His early cases, recorded in Mr. O'Donnell's pages, show that he was in the company of leaders such as Sir Charles Russell, Q.C., Bigham, Q.C., Charles Matthews, Charles Gill, Richard Muir, Henry Asquith, Bodkin, Travers Humphreys, the veteran Poland, and many others of like ability, yet he established his position as an advocate of exceptional quality.

The " Liberator"' trial ; the Jabez Balfour trial, which followed later ; the criminal trial of Oscar Wilde (in which he was junior to Charles Gill for the Crown) ; the Jameson Raid trial (in which he was junior to the Attorney-General, Sir Richard Webster, and the Solicitor-General, Sir Frank Lockwood) ; these were some of his early successes. On May 21, 1896, Mr. Avory was concerned in two sensational murder trials : that of Milsom and Fowler, who fought desperately in the dock, and of Amelia Dyer, the fifty-seven-year-old Reading baby-farmer, all three being sentenced to death on the same day. He was also engaged in the sensational Court drama that had Adolf Beck for its leading character, and, in this connection, the author goes to considerable trouble to show that Beck's grave misfortunes resulted from the stern desire of Mr. Horace Avory, the prosecuting counsel, to see that nothing should be allowed to creep into the trial that might prejudice the accused in the eyes of the jury. The double miscarriage of justice in the two Beck trials at an interval of eight years helped considerably in the establishment of the Court of Criminal Appeal. With Charles Gill, he also prosecuted the murderer of William Terriss, the actor, who was stabbed as he was entering the stage door of the Adelphi Theatre.

Of Avory, as counsel, a contemporary of his at the Bar has written :

> " He was not subtle. Nobody was less of an orator. He had none of the genial adroitness that characterised Gill. His forensic manner was unadorned and even repellent. But he was without a peer in the precise and orderly statement of a case, and he knew every move in the game. Add to that that he was endowed with a composure that nothing could disturb, and you have the secret of his success as advocate and judge. In his appearances before a Divisional Court he would sometimes show both his composure and his passion for preciseness in a manner that made men admire, but which no one, as far as I am aware, has ever ventured to imitate. When the Court puts a troublesome question counsel usually feels obliged to answer promptly, hit or miss. Not so Horace Avory. He took his own time. There would be an interval

The Trials of Mr. Justice Avory, by Bernard O'Donnell. London : Rich and Cowan, Ltd. Royal 8vo., 280 pp. Illustrated.

of deathly silence during which one might hear the clock tick thirty seconds, a minute, perhaps even two minutes, but the Court had to wait while counsel thought out the exactly right answer and cast it in the exactly right form."

While Queen Victoria was still alive, Horace Avory applied for silk; but the Queen's death deferred his appointment, and he made his declaration in the reign of King Edward VII. It was a step that demanded no little courage, for it meant relinquishing the appointment of Senior Treasury Counsel after a tenure of only two years. It was justified by his considerable practice during the next nine years. His first brief in the front row was for the defence of Dick Burge, the well-known boxer, who was implicated in the Liverpool Bank Frauds. Next he prosecuted Whittaker Wright, whose suicide in the cells of the Court immediately after sentence was the final scene in a sensational financial crash. Several other trials which stirred the imagination of the public at the time, follow, including the Druce case in which Avory, K.C., achieved a great triumph. Bottomley, the best lay-lawyer of his day, was opposed by Mr. Avory when charged with conspiracy to defraud in connection with the Joint Stock Trust and Finance Corporation, Ltd. The trial at the Mansion House lasted for twenty-eight days, and, though it resulted incidentally in two convictions of Bottomley for contempt of Court arising out of the proceedings, he was acquitted on the charge. What followed was characteristic of Bottomley, who concealed much vindictiveness under his pose of the jovial adventurer and good sportsman. Not content with his victory, he used the pages of *John Bull* (then at the height of its popularity) for a prolonged and serial vituperation of Mr. Avory. The object of these attentions, however, paid not the slightest heed, and his elevation to the Bench presently closed the episode.

In August, 1910, Horace Avory, K.C., became Mr. Justice Avory and received his knighthood. His appointment, we are told, created surprise in legal circles. It was asked whether any good thing could come out of the Old Bailey; but it was soon realised the he was as sound and painstaking a Judge as he had been counsel. The author discusses the first conviction for murder quashed by the Court of Criminal Appeal; it resulted from a trial over which Mr. Justice Avory presided. It was an exception that proved the rule, and does not alter the fact that for downright efficiency as a Trial Judge he had few equals. Examples of his ability abound: thus the Lancaster Castle murder case, which resulted in an acquittal, is given as evidence of the force of the presiding Judge's analytical summing-up and his making clear the weaknesses in the case for the Crown.

The trial of Roger Casement has many points of interest. The Lord Chief Justice, Lord Reading, presided, and with him were Avory, J., and Horridge, J., both of whom had been made Judges at the same time. The author recalls a contemporary doggerel:

"Well, brother, well," says Mr. Justice Avory,
"We're judges now—
I have gained extensive knowledge
Of crime and criminals."
"And so of knavery
You'll be the scourge," says Mr. Justice Horridge."

The question of the guilt or innocence of Louis Voisin, who was tried before Mr. Justice Avory, is the subject of another chapter; Mr. O'Donnell sums up the evidence and comes to a conclusion which, as it was the view of those who knew most of the circumstances, seems to his mind the most likely. Then comes Marshall Hall's battle for the lives of Field and Gray, though J. D. Cassels, K.C., actually appeared for the latter. The trials of Thomas Henry Allaway, George William Iggulden, Vaquier, Mahon, Wardell, Browne and Kennedy, are some of the murder trials which are dealt with as part of the judicial career of the late Judge. Variety is lent by the trial of Clarence Hatry whom Mr. Justice Avory sentenced to fourteen years' penal servitude. The story of the trial of Donovan, Taylor, and Weaver, for the murder of one Smith, which resulted in the conviction of all three with a triple death sentence, is a fine testimony to Mr. Justice Avory's handling of a difficult set of facts. However, all were reprieved at the last moment, and Donovan became the hero of the Dartmoor mutiny.

In a final chapter, the author sums up his hero in a vivid pen-sketch, and gives a clever delineation of his character. Mr. Justice Avory had no political connections, says the author:

"I think he was wise! I cannot somehow picture him as the central figure in some heated political discussion or frenzied election scene. I am convinced that the frigidity of his appearance would have frightened away, rather than wooed, electors to the polls."

From what one reads in Mr. O'Donnell's pages, Mr. Justice Avory must have been at his frigid best in the recent action of Princess Youssuopoff arising out of the *Rasputin and the Empress* film, for, above all, he disliked popular clamour or sentimental appeal in cases before him.

The author recalls that Mr. Justice Avory was called "the Acid Drop" on account of the general acerbity his comments in Court, although occasionally he displayed a mordant humour. At times, his satire was allowed full play; for example, once, in addressing a Grand Jury, he spoke of the practice of hiding the identity of persons referred to in indictments behind cryptic symbols. He said: "I cannot enlighten you any further on this almost unintelligible document; and unless 'C.D.' satisfies you as to who are 'A.B.' and 'E.F.,' and that 'A.B.' has committed one or more of the offences alleged, you will know what to do with this bill." The grand jury returned a "no bill." Mr. Boyd Merriman (now the President of the Probate, Divorce, and Admiralty Division) once asked the Judge: "Does your Lordship seriously suggest that?" Mr. Justice Avory quietly replied: "I never suggest anything in a court of law unless I suggest it seriously." The examples of the Judge's humour given by Mr. O'Donnell merely confirm Sir Horace Avory's reputation for habitual seriousness while presiding in his Court. Off the Bench, however, he unbent on occasion, as reports in the legal periodicals of his after-dinner speeches have reminded us. And, as a Wellington barrister who was a fellow-guest with him at a country house tells, His Lordship could enter into fun of quite a boisterous nature.

Someone said of the late Judge, in regard to his murder trials: "It is on the whole a good thing that the ancient and honourable tradition of the 'hanging judge' should be kept alive in the person of Mr. Justice Avory." Mr. O'Donnell would agree with this, with qualifications: his impartiality, his analytical brain always applied to the evidence being adduced, whether it favoured the prisoner or not, and his unbending sense of justice which favoured the innocent if it condemned the guilty. The book under notice shows that Mr. Justice Avory was pre-eminently a criminal Judge of the first class, and that he brought to his work an austere efficiency and a strict regard for the maxim *Judex damnatur cum nocens absolvitur*.

One is inclined to think that Mr. O'Donnell overdoes the " austerity " of the late Mr. Justice Avory. For instance, he says,

" I have tried to portray the powerful personality of this diminutive man of frail physique, and reveal the intellect that lies like a sword hidden in a velvet scabbard.

" Ruthless in the face of guilt, never permitting sentiment to obscure justice, yet equally as ruthless in ensuring that no injustice shall be done through sentiment, his very visage bespeaks the stern letter of the law. Yet no prisoner need ever be afraid that he or she will suffer harm from anything which strays even a hair's breadth from that law which Mr. Justice Avory has sworn to administer.

" There is an appearance of age-old parchment in his face. There is a parchment quality in the crackling of his voice. There is the lack lustre of parchment in the expressionless eyes which gaze out at the Court from beneath heavy lids. . . . Yet every faculty is vividly alert. He is very thin. I once heard an old-timer remark, 'He looks more like a *table d'hote* chicken every day.' Yet every faculty is vividly alert. Nothing escapes him, either in the evidence given, or the demeanour of a witness or prisoner. And, above all, there is that unerring instinct of putting his finger right on the vital spot in any argument."

With this, one may quote what " Sergeant Buckram " said about Mr. Justice Avory in the *Law Journal* (London) over ten years ago, and it seems that the author of *The Trials of Mr. Justice Avory* has given an accurate portrait :

" His austerity, indeed, is almost uncanny. He has no graces of manner, except humour—a queer, crackling kind of humour that never flashes, but flickers intermittently with a cold bright flicker like an electric spark. It is his only grace, and it is a saving one, for without it his rigid preciseness might be more than forensic flesh and blood could bear. But, unlike certain brethren, he enjoys no public reputation as humorist, and that for the simple reason that his humour, though unfailing, is always severely relevant to the purpose in hand. It would never occur to him to make a joke for the joke's sake. That is why he has never been known to make a bad one."

In the JOURNAL (1932) Vol. 8, p. 31, our own " Inner Templar " discussed Mr. Justice Avory, and, after saying that " Kapp's " well-known cartoon of him gives an exact impression to those who had not seen him, he referred to the Judge's cold impassivity :

" But then : is it a Judge's business either to be kind or to show favour according to years ? I think not ; certainly Mr. Justice Avory thinks not ; exactitude of thought, demeanour, deportment and conduct is his whole principle of professional life ; and when you get a man who exercises that principle both ways, so (that is) that if he never gives you a friendly smile he never gives you a nasty knock, unless you deserve it, and who arrives at his fine old age still a model of the character he has chosen as the proper one . . . well, then you may concede that admiration need know no bounds. . . . O, New Zealand, if you want to see the model of all exactitude, in criminal and other law administration, come over and see Mr. Justice Avory, before, as a Judge, he goes forth and is no more to be seen."

These independent appreciations of the late Judge surely justify Mr. O'Donnell's conception of his character and ability.

In fine, it may be said that *The Trials of Mr. Justice Avory* is much more than a " resurrection " of the cases in which, as counsel and Judge, he took part : it is a competently drawn and well-sustained portrait of a great criminal lawyer and Judge, an interesting personality cast in an unusual mould.

Now, at the age of eighty-three years, this capable and hardworking Judge has died, as it were, in harness, presiding in his Court until a day or two before his death. It is certain that he will become a tradition of English legal history, if, indeed, he did not become a tradition in his life-time.

Foreign Commercial Usage.

As Interpreted in English Courts.

In interpreting a foreign commercial usage an English Court is entitled to consider how a competent foreign authority interprets that usage, as the House of Lords held recently in *De Beéche (since deceased) v. South American Stores (Gath and Chaves), Ltd.*, (1935) 51 T.L.R. 189.

The respondent lessees covenanted to pay the appellants' rent monthly in advance in Santiago de Chile for premises there " by first-class bills on London at 90 days' sight." In 1931 and 1932 two statutes were passed in Chile whereby (the respondents said) it became illegal to acquire foreign exchange in Chile or to pay the rents by drafts on London without the authorization of the central committee set up under those statutes. This authorization, despite requests, was unobtainable and the respondents paid the rents into Court in Chile.

The appellants sued the respondents for £53,359, the agreed amount in sterling of the arrears of rent, with accrued interest.

Du Parcq, J., gave judgment for this sum. He did not think that the term " first-class bills on London " meant " bills drawn by persons of well-known credit in Chile on bankers in London." He thought that payment might have been made by a bill drawn by a banker in Chile on a banker in London.

This judgment was reversed by the Court of Appeal. Scrutton and Lawrence, L.JJ., held that, without authorization, it was impossible to obtain in Chile " first-class bills on London " within the true meaning of that term. Greer, L.J., agreed with the interpretation of du Parcq, J.

The House of Lords dismissed the appeal. Viscount Sankey, L.C., at p. 191, said :

" . . . the law of this country will not compel the fulfilment of an obligation the performance of which involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do."

Two questions arose : first, the meaning of the term of payment ; secondly, the effect of the Chilean legislation. The experts submitted opposite views, but as against the view of a young man who had been called to the Chilean Bar only four years ago, Viscount Sankey preferred the view of a man who had forty-seven years' experience of banking in the City of London, and whose firm did large business in South America. He held that the words bore a " special mercantile meaning " :

" Bills drawn in Chile by one or other of a select list of bankers and mercantile houses in Chile on one or other of a select list of bankers and mercantile houses in London, and known technically as F.C.L. bills."

Was the evidence admissible ? It must be so, for otherwise the Court could not have properly understood what the words meant.

" Mercantile instruments have long been expounded according to the usage and custom of merchants, ascertained by parol evidence,"

said Taunton, J., in *Smith v. Wilson* (1832) 3 B. & Ad. 728, 734; 110 E.R. 266. Similarly, Coleridge, J., said in *Brown v. Byrne* (1854) 3 E. & B. 703, 715 ; 118 E.R. 1304 :

" Mercantile contracts are very commonly found in a language peculiar to merchants : the intention of the parties, though perfectly well known to themselves, would often be

defeated if this language were strictly construed according to its ordinary import in the world at large; evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning."

Evidence of usage must comply with "three conditions precedent," the Lord Chancellor said in the recent case,

"(1) The evidence must not conflict with a statutory definition; (2) the evidence must be of a usage common to the place in question; and (3) the evidence must expound and not contradict the term of the contract."

"First-class bills on London" was, in the context, "a term of art." This was the first question.

On the second question, *i.e.*, the effect of the legislation in Chile, the House, again, preferred the evidence of an advocate in Chile of twenty years' standing who had occupied several high offices of State, including the Ministry of Justice.

Was the Court entitled to go further, and to examine *for itself* the relevant statutes of Chile?

Taylor on *Evidence*, 12th Edn., Vol. 2, p. 906, says:—"When an expert, however, vouches a foreign code, an English Court may construe it for itself."

Lord Langdale, M.R., in *Earl Nelson v. Lord Bridport* (1845) 8 Beav. 527, 535; 50 E.R. 207, made several illuminating observations upon the proof of foreign law. He pointed out, first, how necessary the expert witness is, in the matter of foreign law, for there is

"an absence of all the accumulated knowledge and ready associations . . . He [the Judge] is constantly liable to be misled by the erroneous suggestions of analogies which arise in his mind."

Moreover, if a Judge does turn to a treatise, he has not

"in himself the means of distinguishing the correct from the incorrect proposition of a text writer."

But though a Judge is not to be deemed to know foreign law,

"You may impute to him such a knowledge of the general art of reasoning as will enable him, with the assistance of the Bar, to discover where fallacies are properly concealed; . . . and I am not disposed to say that there may not be cases in which the Judge may, without impropriety, take upon himself to construe the words of a foreign law . . . especially if there should be variance or want of clearness in the testimony."

Thus Viscount Sankey, L.C., said, in the recent case:

"While it is true that witnesses called to prove foreign law may refer to any passages in the code of their country as containing the law applicable to the case, the Court is at liberty to look at those passages and to consider what is their proper meaning."

He cited *Concha v. Murrieta* (1889) 40 Ch. D. 543, 550, where Cotton, L.J., said:

". . . if in their evidence they refer to passages in the code of the country whose law we are endeavouring to ascertain, it would, as it appears to me, be most unreasonable to hold that we are not at liberty to look at those passages and consider what is their proper meaning;"

and Lopes, L.J., at p. 554, said:

". . . if an expert witness called to prove foreign law states that any textbook, decision, code, or other legal document, truly represents that law, then the Court is at liberty to regard the legal document to which he refers, not as evidence *per se*, but as part of the testimony of the witness, and to deal with it, and give the same effect to it, as to any other portion of the evidence of the expert witness."

Reference was also made to the considered judgments of the Court of Appeal in *Buerger and Another v. New York Life Assurance Co.* (1927) 43 T.L.R. 601. The question was whether certain life policies were valid by Russian law. It was said that in 1919 the Russian Government annulled all life policies, but evidence was given that the Commissariat of Justice was charged with the "interpretation" of the laws and had held that life policies made by Russians with companies having assets in the United States which were not liable to confiscation, were valid. It was held that the Court could not make for Russia a law which its judicial system did not recognise. The plaintiffs could recover on the policies. Scrutton, L.J., dissented, holding that the words of the relevant enactment "annulling" life policies were clear, and that the purported "interpretation" was in effect a partial repeal.

But Atkin, L.J., usefully summarising the law, at p. 607, said:

"It is not sufficient to prove a foreign statute or code by a translation and then leave the Court to place its own construction on it. The code must be interpreted by an expert in the foreign law. It is, of course, true that when he vouches a statute to support his evidence the statute forms part of his evidence, and must be considered in the consideration of his evidence as a whole. And it is also true that where experts on the foreign law differ amongst themselves the Court will often have to resolve the conflict by looking at the statutes or documents and deciding for themselves the more probable contention. And this course will be more readily undertaken where the dispute is as to the effect of legislation, as in the United States of America, expressed in English in respect of jurisprudence which is known to the English Judges. And it may also happen occasionally that a foreign expert may arrive at results so extravagant and involving such a misunderstanding of conceptions familiar to lawyers of all countries that an English Court may have to reject his evidence, and eventually come to the conclusion that they can safely interpret the words for themselves, or fall back upon the presumption that the proper methods of construction coincide with the English."

Atkin, L.J., in his judgment in that case, referred to some important *dicta*, and perhaps the whole point of calling an expert has not been better put than in this sentence there quoted from in *Baron de Bode's* case, (1844) 8 Q.B. 208; 115 E.R. 854, where Coleridge, J., at p. 265, said:

"The question for us is, not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication."

Finally, Viscount Sankey referred to *Princess Paley Olga v. Weisz and Others* [1929] 1 K.B. 718, which concerned the confiscation of the plaintiff's moveables and their subsequent sale by the Soviet Government to the defendants. The English Government had recognised the Soviet Government, and the Court could not, accordingly, inquire into the validity of the acts of that Government.

To revert to the *De Beéche* case. In the Lord Chancellor's words,

"We are entitled and indeed bound to construe the relevant provisions [of the Chilean laws] and to determine their meaning and effect after consideration of the English version before us."

To purchase and to hand over a bill one had to go for leave to the committee of control, otherwise to the Bank of Chile. Without this leave, which was unable to be obtained, it would have been illegal, and indeed impossible, to pay the rent in the manner agreed.

"By English law an act is illegal if it necessitates something which is illegal. Beyond that an English Court will have regard not merely to their own views of the foreign law, but to the interpretation put on it by a competent foreign authority."

Lords Blanesburgh, Tomlin, and Macmillan agreed. Lord Russell of Killowen, in a short judgment, came to the same conclusion.

Posthumous Children.

And a Recent Decision.

By J. M. LIGHTFOOT, Conveyancing Counsel of the Supreme Court of Judicature.

The law has for a long time adopted a liberal and sensible policy with regard to posthumous children. If a family is to be provided for by a testator, a child *en ventre sa mère* at his death, and born afterwards, requires the provision equally with those who are then actually born. "It is," said Leach, V.C., in *Trower v. Butts* (1823) 1 Sim. & St. 181; 1 L.J. Ch. 115; 57 E.R. 72, "now fully settled that a child *en ventre sa mère* is within the intention of a gift to children *living* at the death of a testator; not because such a child (and especially in the early stages of conception) can strictly be considered as answering the description of a child living; but because the potential existence of such a child places it plainly within the reason and motive of the gift."

In *Blasson v. Blasson* (1864) 2 De G. J. & Sm. 665; 34 L.J. Ch. 18; 46 E.R. 534, Lord Westbury, L.C., agreed with this, and said that it was warranted by antecedent decisions in English Law, and he observed that the same rule prevails in other systems of jurisprudence. He quoted from the Digest: "*Qui in utero sunt, in toto paene jure civili intelliguntur in rerum natura esse.*" It is not often that I refer to *Justinian's Digest.* The "English and Empire" or "Mews'" generally satisfies my insular wants. But I have taken from its repose this little-used volume, and there the rule is in Book I. Tit. 5, par. 26, where it is said to come from the 69th book of Julian's Digests. So evidently Justinian's compilers had plenty of material, for Julian was only one of a number of famous jurisconsults on whose opinions The Digest was based.

But Lord Westbury found the same rule in an earlier paragraph of Title 5. This is para. 7, and there it is taken from Paul, who was, I believe, a still more famous lawyer, and Paul explains the rule as being based on the unborn child's benefit, "*quotiens de commodis ipsius partus quaeritur.*" This reason, Lord Westbury pointed out, was paraphrased and adopted by Voet in his *Commentary on the Digest*, but we have had enough Latin and now I will translate. According to Voet, children in the womb are by a fiction of law treated as already born where this is for their benefit. And he goes on to explain that where the benefit in question is not the benefit of the children in the womb, but of a third person, then the legal fiction by which they are treated as born, comes to an end, and does not help any other persons than the children.

Lord Westbury laid hold of this distinction, and said that it supplied the ground for the decision of the case —*Blasson v. Blasson*—with which he was dealing. The point was whether under a gift for certain children who should have been born and living at the death of the testatrix and should attain 21, the time of distribution should be postponed until two children who were *en ventre* at the death of the testatrix attained 21. This seems a small point on which to base a serious decision. Counsel for these two children, safe in the knowledge that their clients would share in the actual distribution, naturally did not oppose a distribution at the earlier period, and, indeed, they submitted that it was the proper period. Hence, it not being for the benefit of these unborn children that they should be treated as born at the death of the testatrix, so that the distribution should be postponed till the younger of the two attained 21, the fiction was not applied and distribution at the earlier period was directed.

So Lord Westbury, finding the rule that a child *en ventre* may be treated as in existence, at any rate for certain purposes, went to the Roman Law, perhaps rather needlessly, to find the limitation of the rule, and discovered from Julian and Paul—though he did not trouble, as I have done, to mention the ultimate sources—that the limitation lay in the condition that the result must be for the benefit of the child. So be it, and this limitation was adopted by Lord Loreburn in *Villar v. Gilbey* [1907] A.C. 139; 76 L.J. Ch. 339, but it still has to be shown that the benefit must be a direct benefit to the child. Lord Loreburn said that it might be difficult to say when a particular construction is for the benefit of the child. That may very well be the case, and it has not been doubted till the House of Lords did so in the case of *Elliot v. Joicey* (1935) 51 T.L.R. 261, last week that a benefit to a parent may well be a benefit to the child *en ventre.* In *Re Burrows, Cleghorn v. Burrows*, [1895] 2 Ch. 497; 65 L.J. Ch. 52 Chitty, J., was clearly of this opinion, and considered that it had in effect been so decided by Lord Eldon. "Then it is said that the rule is that a child *en ventre sa mère* is not deemed to be living except when there is a benefit passing to the child, and as the mother and not the child in this case takes the benefit, the gift over takes effect. But the question is covered by authority"; and Chitty, J., referred to the judgment of Lord Eldon in *Thellusson v. Woodford* (1805) 11 Ves. Jun. 112; 32 E.R. 1030. In the present case *In re Joicey, Joicey v. Elliot* [1934] 1 Ch. 140; 103 L.J. Ch. 23, the Court of Appeal (Lord Hanworth, M.R., and Lawrence and Romer, L.JJ.), who affirmed Clauson, J., took the same view.

The point in the present case was that testatrix having a power of appointment over a large sum, appointed it to her three sons A, B, and C, in equal shares, but the shares were settled so that a son was entitled to the income only for 21 years if he should so long live, with a general power of appointment by will if he died. But if he should die within that period without having appointed, then, in the event of his "leaving any issue him surviving," the share was to be in trust for the son absolutely, and if he did not leave issue him surviving, then his share was to accrue to the other shares. In fact the provision of the will of the testatrix applied to her children generally, but there were only three sons concerned. C died intestate on May 11, 1932, without having exercised his power of appointment and without any child who had been born, but his wife was then *enceinte*, and a son was born on the following June 12.

As I have said, the Court of Appeal held that, under these circumstances, C died "leaving issue him surviving," one ground of decision being that it was for the child's benefit that his father's estate should take, and it was pointed out by the Master of the Rolls, adopting Clauson, J.'s view, that a direct benefit was not required by Lord Loreburn's judgment in *Villar v. Gilbey.* But the House of Lords (Lords Tomlin, Russell, and Macmillan) have added to the previous law, as settled, the requirement that the benefit must be direct. Accordingly C would take no share, and the child would lose this benefit in C's estate.

But in fact the case admitted of easy solution without referring to *Villar v. Gilbey* at all. Surely, on any sensible construction of words, C, who died in May, 1932, and whose child was born in June, *left issue him surviving*. To say that the child must be actually born is to give a quite needlessly literal meaning to "leave" and "survive." But the House of Lords did not adopt this obvious solution, though Clauson, J., did, and it would have been quite safe to follow him.

In fact since A appealed, but B did not, it seems that C's estate takes half the share under the judgment of the Court of Appeal—another singular result of the case. But the main point, the question of construction, will, I imagine, be regarded as an unnecessary and unfortunate departure from established law.

Actio Personalis Again.

A Difficulty Caused by the Rule.

A timely and curious instance of a difficulty caused by the rule, *actio personalis moritur cum persona*, is afforded by interlocutory proceedings in the case of *Nixon v. Methuen and Co., Ltd.*, a libel action in Northern Ireland, particulars of which appear in a recent number of the *Law Journal* (London). The plaintiff moved the High Court to have his evidence taken on commission, he being too ill to attend in person an early hearing of the case. The Court adjourned both the motion and the trial till the first trial day of the ensuing term, apparently in the hope that the plaintiff might by then be able to give his evidence in Court. The plaintiff's counsel asked the Court, rather than adjourn the hearing, to dismiss altogether the motion for evidence to be taken on commission, but this was refused.

The plaintiff appealed to the Court of Appeal of Northern Ireland. It was submitted that justice demanded a speedy trial, in view of the plaintiff's state of health, and of the maxim *actio personalis moritur cum persona*. Defendant, on the other hand, urged that the absence of the plaintiff would place the defendant at a serious disadvantage, and, it might well be, produce a miscarriage of justice of another kind. Many material facts, it was urged, could only be elicited if the plaintiff were put in the witness-box.

The plaintiff's case was strengthened by a further medical affidavit as to the seriousness of his condition, and the Court of Appeal allowed the appeal, and arranged for an immediate fixture for the hearing.

It is, of course, an inevitable difficulty when a material witness is no longer available; and the extension of the class of cases in which this may happen is one of the minor objections against abrogating the rule. It must, of course, be the defendant who will suffer by such abrogation. If it be the plaintiff's case that is destroyed for lack of evidence, the position is simply that the abrogation of the rule has, in the particular circumstances, been of no help to him. But to remove the unseemly necessity of having to weigh such a consideration as was the determining factor in the case mentioned, would, it is submitted, be a substantial advance in the administration of justice so far as it deals with Court procedure.

Tactics in Court.

By Wilfred Blacket, K.C.

Pour Encourager les Autres.—Addison, S.M., noted for his speed in clearing his list, sat on the Water-Police Court Bench. He faced a full house, for the previous day had been some occasion for rejoicing—last day for payment of income-tax or something of that sort—and the prosecuting constable, the defendant, and the Magistrate went through their little part-song with admirable precision and celerity. "John Jones drunk and disorderly how do you plead, guilty, five shillings or the rising,"—so the monotonous chant went on for the space of an hour, until—"William Johnson drunk and disorderly how do you plead." "Not guilty," said William Johnson. "Ten shillings or forty-eight hours," said Addison, S.M.

A Master of Craft.—At a country Police Court a long while ago, Denny O'Brien, J.P., sat with Saunders, P.M. There was only one case remaining in the list when Saunders, P.M., said "as the defendant in the next case is a neighbour of mine and as the charge of failing to register a dog is one that can be dealt with by one Justice, I propose to leave the Bench so that it may be disposed of by my learned colleague, Mr. O'Brien." Denny put an erroneous meaning on the phrase "disposed of" and thought the P.M. wanted him to "run crook" to oblige a neighbour. He girded up his loins and prepared to run his course accordingly. "Call on the case," said Denny, moving into the chair of the P.M. The clerk called it on, and said: "In this case, your Worship, the defendant has sent in a letter which I hand up to the Bench." Denny had never learned to read, so he looked at the letter, coggled his eyebrows, and handed it back to the clerk. "Read it out in open Court," he said. The letter stated that the defendant was sorry that although he had registered the dog in previous years he had forgotten to do so this year. As he was laid up with lumbago he sent along 5s. for fine and 4s. 10d. for costs, and was the Bench's obedient servant. Denny looked again for some time at the letter and then disposed of the matter. "In this case," he said, "I find there is a lot of doubt about the ownership of the dog so I dismiss the case." "And what will I do with the nine and ten?" asked the clerk. "Adjourn the Court" said Denny.

Covering up.—Sometimes the Judges display skill in their tactics in Court, as this and some following paragraphs may prove. Judge Wilkinson was sitting in Sydney District Court when *Smith, v. The Globe Newspaper Co., Ltd.*, an action for libel, was called on. Counsel for the defendant stated that the company was in voluntary liquidation and produced a copy of a resolution carried at a meeting of shareholders. Counsel for the plaintiff said that the resolution was ineffective, and loudly threatened a mandamus if the Judge refused to hear the case. Counsel for the defendant with much noise and vehemence threatened a prohibition if the Judge dared to hear it. His Honour with much patience, as was his wont, listened to the noise for some time and then delivered judgment in the words following: "I know perfectly well what I am going to do in this case. I will put it at the bottom of to-day's list, and if it is reached I will put it at the end of to-morrow's list, and if it is reached then I will put it at the bottom of the next day's list,

and so on from day to day, and in that way I shall avoid a mandamus on the one hand and a prohibition on the other. Call the next case." To round off this truthful tale it is only needful to add that notoriously the last case in the day's list never was reached in His Honour's Court.

Sentencing Prisoners.—Upon the matter of sentencing I am moved to mention that when acting in Quarter Sessions Courts I always began my observations concerning the prisoner and his crime by pronouncing the sentence. Often in Court I have seen a prisoner tortured by a long dissertation as to crime generally and his own iniquities in particular, the while he waited in agonized wonder whether he was going to get ten years' penal servitude or six months' imprisonment. The men whom I had to sentence never had to endure such suspense, and I think for this reason they were all the more willing to consider any exhortation I addressed to them. I humbly ask whether this precedent of "Tactics in Court" is worthy of consideration by any other Judge.

"**Simmie.**"—Sir George Bowen Simpson, Justice of the Supreme Court of New South Wales, from his youth upward was of distinct decorative value to the community in which he moved with stately steps and at times contributed not a little to its gaiety. Well over six feet, with a large and florid countenance, up to mid-age flanked by first-prize gold-medal dundrearies, he was always careful that his dress should be worthy of his personal appearance. The combined effect was truly magnificent. At Yass the Court keeper and his wife always addressed him as "Your Royal Highness," and "Simmie" liked it. At Bathurst Assizes a witness being cross-examined by him as to where the parties stood in some racing disturbance said: "I am the ticket office, like, here, and you, Sir, *are the grand-stand*" and pronouncing it as he did, "grand" became a word of three syllables.

Some Leg Pulling.—Weigall was prosecuting Coram "Simmie" at Maitland Assizes. He tendered a by-law contained in the *Government Gazette*. Mr. Justice Simpson looked upon it as though it were something within the prohibited degrees and in accents of restrained surprise asked: "Are you tendering this, Mr. Weigall." The "Nark" admitted that he was doing so. "Ah well," said His Honour, "I suppose you have considered the matter; but it very often happens that young counsel put in documents that are not evidence and then convictions are quashed and Justice is delayed or defeated. But, however, you tender it; what do you say, Mr. Caphipps—do you consent to its going in?" Caphipps rose to the bait and indignantly refused. Then he argued the matter, and shrieked in horror at the thought that a man was to be tried by by-laws, and not by the jury of his peers as ordained by Magna Charta, and so on. It was rather a good flying-trapeze performance in oratory—he did not touch the ground once. Then Weigall still pressed it, knowing that His Honour was unerring on points of evidence; and "Simmie" said wearily: "Mark this by-law 'Exhibit C.' It is clearly evidence and I can't for the life of me see why it was ever objected to."

One afternoon in No. 1 Jury Court proceedings were dull and monotonous. "Simmie" started in to liven them up. George Reid, K.C., for the defendant, was taking an occasional note of the plaintiff's evidence. His Honour dropped his pen on the desk and the following conversation ensued. "I am letting all this evidence in, Mr. Reid, as you make no objection to its admission." "Oh, but we do object, Your Honour, we object most strongly; we can't have this kind of stuff going in, to the prejudice of our client." "Well, what are your grounds of objection to this evidence?" "Oh we object on all possible grounds; we have a number of grounds of objection."—Then, sensing the leg-pull, he added: "And I'll leave my learned junior to argue them all." Then, after a pause, His Honour asked: "Don't you intend to argue all those grounds, Mr. Broomfield?" "No, Your Honour, for I find that in the haste of his departure my learned leader took them away with him." Then after this interregnum of gaiety, dull decorum reigned once more, nor would it have been broken had not Reid been aware of his lamentable lack of knowledge of the rules of evidence.

On this occasion "Simmie" retired with all the honours of law; on another occasion he was not so fortunate. "Jock" Garland was prosecuting at Maitland Assizes when without any previous warning His Honour said: "Mr. Garland, you ought to know that it is a very serious thing to be wasting public time." "Does Your Honour say that I am wasting public time?" asked Garland. "I didn't say that I thought you were wasting public time, but if you ask me to say whether I think you are wasting public time, I shall not hesitate to say what I do think." "Well, I ask your Honour to say if you do think so." "Mr. Garland, I told you that if you asked me to say whether I thought you were wasting public time I would not hesitate to tell you what I did think; so now, as you have asked me to say whether I think you are wasting public time, I don't hesitate to say that I don't think you are. And now please get on with your case."

His Dignity.—When "G.B." presided, "my Court" was more than a mere court of law—it was a sanctuary. The blue bag of a junior on the Bar table, though it merely rested there while books were being taken from it, was the subject of prolonged comment of sarcastic quality, and any other forgetfulness of etiquette evoked his censure. Therefore, when Shand, K.C., came into the Divorce Court one motion day and saw D. G. Ferguson of the junior bar sitting at the table, he nudged him and said: "Let me in there, Fergie, or else old Simmie will be playing the giddy goat as usual." As Fergie moved out, His Honour said: "That's quite right, Mr. Shand. I heard you, and quite agree with what you said to your junior. He ought not to have been there. Juniors should always give way to their seniors."

Whitfield, who practised much in Divorce, incurred very just reproof on one occasion. He had said: "In fact, your Honour, the whole matter boils down to this"—and then the storm broke. "I wish you would remember where you are, Mr. Whitfield. My Court is a Court of Justice, not a low boiling-down establishment. We don't 'boil down' anything here. Please to be good enough to remember that in future." "Boils down"—what a hideous phrase it is! Almost as bad as that other abomination, "sly grog-selling."

Tonkins, a solicitor whose name did not at all resemble the one I have used, suffered a still more severe reproof. "Yes, y'r Honour, I see there is a defect in the affidavit," he said, "that's a mistake made by one of the clerks in my office." "Mr. Tonkins," was the reply, "I don't believe you have any clerk in your office, and I don't believe you have any office." His Honour spoke upon information received. He was right on both points.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Transfer of Life Estate and Estate in Remainder.

1. NOTE.

It is provided by s. 82 (1) of the Land Transfer Act, 1915, that when any land under the Act is intended to be transferred, the registered proprietor may execute for the purpose of registration a memorandum of transfer in the prescribed form. Again, by s. 87 (1) it is provided that the registered proprietor may limit any estates, whether by remainder or in reversion, and whether contingent or otherwise, and for that purpose may modify or alter the prescribed form of transfer. Section 87 (2) further provides that in case of the limitation of successive interests the District Land Registrar shall cancel the certificate of title of the transferor, and shall issue a certificate in the name of the person entitled to the freehold estate in possession for such estate as he is entitled to, and the persons successively entitled in reversion or remainder shall be entitled to be registered by virtue of the limitations in their favour and each person upon his estate becoming vested in possession shall be entitled to a certificate of title for the same.

The certificate of title issued to the proprietor of the freehold estate in possession should show the class of persons entitled in reversion or remainder expectant on the death of the proprietor in possession, and the nature of their estates. Thus, the remainderman or reversioners may register against that certificate dealings with their respective estates: *In re the Land Transfer Act*, 1908, *Ex parte Matheson* (1914), 33 N.Z.L.R. 838. Alterations in a class of remaindermen by birth and death of persons within that class may probably be noted by transmission, and any dealing by a remainderman with his interest may be registered on the certificate of title in the ordinary way: *Ibid.*, at p. 841, *per* Edwards, J.

2. PRECEDENT.

Transfer by executors of life estate to life tenant with remainder to remaindermen pursuant to will of deceased.

MEMORANDUM OF TRANSFER.

WHEREAS A.B. and C.D. both of etc. (hereinafter called "the Transferors") are registered as proprietors of an estate in fee simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in ALL THAT etc.

AND WHEREAS the Transferors are so registered as executors of the will of E.F. of etc. deceased (hereinafter called "the Testator") by virtue of probate thereof granted to them by the Supreme Court of New Zealand at on the day of 19 under Number /19

AND WHEREAS the Testator by his said will devised the said land unto G.F. his wife (hereinafter called "the Life Tenant") for and during her life with remainder to their children H.F. K.F. and L.F. all of etc. (hereinafter called "the Remaindermen") as tenants in common in equal shares

AND WHEREAS all duties debts and funeral and testamentary expenses in the estate of the Testator have been duly paid and discharged

NOW THEREFORE IN CONSIDERATION of the premises and in pursuance of the trusts reposed in them by the said will the Transferors DO HEREBY TRANSFER unto the Life Tenant AN ESTATE FOR LIFE in the said piece of land above described TO THE INTENT that the Life Tenant shall henceforth have and enjoy the said land for and during her life

AND in further pursuance of the said trusts reposed in them by the said will the Transferors DO HEREBY TRANSFER unto the Remaindermen as tenants in common in equal shares AN ESTATE IN REMAINDER in the said piece of land expectant on the termination of the said estate for life of the Life Tenant TO THE INTENT that the Remaindermen shall from and after the death of the Life Tenant have and enjoy an estate in fee simple in the said piece of land as tenants in common in equal shares IN WITNESS WHEREOF the Transferors have hereunto subscribed their names this day of 19

SIGNED etc.

Correct etc.

Obituary.

Mr. D. G. A. Cooper, O.B.E.

The death occurred on June 26 of Mr. Daniel George Arthur Cooper, O.B.E., who was Registrar of the Supreme Court at Wellington for many years, and later a Stipendiary Magistrate.

Mr. Cooper was born in Waipawa in 1861, and was a son of the late Mr. G. S. Cooper, who was Under-Secretary for Education. Educated privately, and afterwards at the Wellington Grammar School and Wellington College, he became a cadet in the Lands Office in 1878. In the following year he was appointed secretary to the Chief Justice, Sir James Prendergast, a position he occupied from 1879 to 1882, when Mr. Cooper was appointed Deputy-Registrar to the Supreme Court, Wellington, and in 1889, he was promoted to be Registrar, a position he held with distinction from 1889 until 1914. In 1915 he was appointed a Stipendiary Magistrate, and also a member of the Pensions Board, positions he retained until 1929, when he retired on superannuation.

As a young man, Mr. Cooper was an enthusiastic Rugby player, a member of the Athletic club, and a Wellington representative from 1878 to 1886. He was a prominent oarsman of the Star Boating Club, and a skilful polo player. He was president of the New Zealand Hunts' Association from 1932 to the date of his death. For many years he was a steward of the Wellington Racing Club, and was one of the trustees of the general trust fund of the New Zealand Racing Conference. Mr. Cooper was unmarried.

Mr. Cooper was greatly respected by the legal profession, among whom he had scores of friends. This was evident at the service at St. Paul's Pro-Cathedral on the morning of June 28, when, in a representative congregation that filled the church, were included the Chief Justice, and Mr. Justice Reed, Mr. Justice Blair, Mr. Justice Smith, Mr. Justice Kennedy, and Mr. Justice Page, while Mr. Justice Herdman was one of the pall-bearers. The President and Vice-president of the New Zealand Law Society, Mr. H. F. O'Leary, K.C., and Mr. A. H. Johnstone, K.C., with representatives of all the District Societies and the whole personnel of the Wellington Law Society, were also present.

Mr. H. R. Cooper, Crown Solicitor at Palmerston North, is a brother of the deceased gentleman, and he, and his relatives, have the sympathy of the whole profession in the loss of one who was so generally beloved by all who knew him.

London Letter.

Temple, London,
My dear N.Z., April 30, 1935.

The outstanding event of the moment in London is the Royal Silver Jubilee, the celebrations in connection with which commence next week. Preparations for decorating the streets began before Easter and many of them are already gay with flags and garlands, while stands for viewing the Royal Processions are being erected in every possible place. Even the Law Courts, which open to-morrow for the Easter Term, are in fact almost closed by a large stand erected across the entrance, leaving a small hole about as large as a cottage doorway for the use of those who may have business within. Next Monday is, of course, the actual anniversary of the King's Accession and on that day, when the King and Queen will drive to St. Paul's Cathedral for a Thanksgiving Service, the Temple is to be closed altogether except to ticket holders, who will have an opportunity of viewing the Procession from the Inner and Middle Temple Gardens as it passes along the Embankment on the return from St. Paul's.

The Progress of Law Reform.—Further evidence has been given this month before the Royal Commission on Business in the King's Bench Division. Mr. Justice Clauson dealt with the suggestion that the Chancery Division should take over not only the work of the Probate Court, but also Revenue work, and said that he was authorised to state that the Chancery Judges were quite willing to take such work if their number were raised from six to seven. Lord Atkin, in giving evidence, expressed his opposition to any change in the circuit system and to the proposal to increase the jurisdiction of the County Court, but thought that criminal work on Assizes would be materially reduced and thereby much time could be saved by increasing the jurisdiction of Quarter Sessions. On the other hand Mr. Justice Swift, who gave evidence just before the end of last term, strongly advocated the reform of the circuit system, and suggested that certain of the smaller towns where Assizes are now held, but where there is little or no work, should be cut out without delay.

There seems to be a general opinion even now that there are not enough Judges, but in spite of the expressed opinion of some eminent members of the profession I rather diffidently state my own view to the contrary. Good progress was made with the lists last term in spite of the absence of two or three Judges on account of indisposition, and I cannot help feeling that once arrears are cleared off there will be no lack of Judges to undertake the work which is now coming along, especially if the reforms which are to be effected really result in a saving of time. There is no doubt that time is being wasted under the present system, as any one can see who visits the Courts about 3 o'clock in the afternoon. He will usually find that at that hour more than one Judge has risen for the day, having finished his list. That is all very well once in a way, but if even only one Judge loses one hour each day, the amount of time lost in a term is not inconsiderable. I make this comment with great respect to our Judges who have plenty of tiring work to do, but I do believe that the principal solution to the present problem is to be found in the arrangement of the Judges' lists.

The Law as to Straying Animals.—An interesting case came before the Court of Appeal at the end of last term concerning the liability of the owner of a horse for damage done by it while straying on the highway. In that case the horse belonged to a farmer who was in the habit of riding into a neighbouring town and tying his horse up in a stable adjoining the highway while he went about his business. One day he tied it up so negligently that it broke loose, trotted into the highway, and there caused a crippled woman to fall and injure herself. The crippled woman brought an action in the County Court against the farmer and recovered damages. In the Court of Appeal it was argued for the farmer that as there is at common law no duty to fence land adjoining a highway and no duty to prevent domestic animals from straying thereon, there can be no liability for damage done by them while so straying except in the case of an animal having a mischievous propensity which is known to its owner. But the Court of Appeal held that while this is a general rule, there is also a rule that if a person brings an animal on to the highway he must take reasonable care that it does no damage to other persons using the highway, and that each case must be decided according to its special circumstances. In this case, they said, the farmer had brought his horse into a town and had tied it up in a stable yard adjoining and open to the highway, knowing that if it got loose, it would naturally run into the street and make off in the direction of home. They therefore upheld the finding of the County Court Judge.

The South Eastern Circuit and the New Judges.—The dinner given by the South Eastern Circuit to Mr. Justice Bucknill and Mr. Justice Hilbery was a great success. More than a hundred members of the Circuit sat down to dinner in the Inner Temple Hall and were presided over by "Jimmy" Cassels, K.C., the Treasurer of the Circuit. Several other Judges, including Mr. Justice Avory, were present besides the two guests of honour. The toast of the evening was proposed by the Treasurer, who in the course of a witty speech produced the Circuit Books in which was recorded the election to the Circuit of the two newly appointed Judges and caused much laughter by reading out the entry that Alfred Bucknill had been proposed by H. Avory, K.C. The two new Judges replied to the toast and Mr. Justice Avory also spoke. Altogether a very successful and enjoyable evening.

The Bar Point-to-Point.—The Bar Point-to-Point Races were held on the usual ground at Kimble, near Princes Risborough, on the 13th of this month and provided a very enjoyable day for all who attended them. The weather was cold but dry (except for a slight shower or two), and the racing was excellent, one horse establishing a record by winning two races on the same afternoon. This was Campden Lass, which won both the Bar heavy weight and the Bar light weight events. If you meet that horse, back it, and I assure you you will at least have a run for your money. The attendance was as large as ever and included many well known figures in the legal world. I saw the Lord Chief there with Lady Hewart, Lord Justice Roche, Mr. Justice Du Parcq, Mr. Justice Lawrence and many others whose names would be equally well known to you.

The Long and the Short of it.—The Lord Chief dislikes any innovations in pronunciation and a story is told of a counsel who in the course of addressing him introduced more than once the phrase "sub judice," pronouncing the 'i' long. At each long 'i' the Lord Chief winced perceptibly, but without effect on the said counsel. Finally the Lord Chief began his judgment, "In this case my judgment will be short—as short as the 'i' in 'judice'."

Yours ever,
H.A.P.

Practice Precedents.

In Bankruptcy: Warrant of Arrest Transmitted by Telegraph.

By s. 88 of the Bankruptcy Act, 1908, the Court at the instance of the Assignee or any Creditor at any time after the filing of a petition in bankruptcy by or against a debtor, may by warrant cause such debtor to be arrested if it appears that there is probable reason for believing that the debtor is about to go abroad or quit his place of residence with a view of defeating, delaying or embarrassing proceedings under that Act. As to the requirements to be observed, see *Re Watters* (1887) 6 N.Z.L.R. 545, and *Re Williamson* (1907) 10 G.L.R. 93.

Any such warrant may, if the Court so orders, be transmitted by telegraph (the telegraphic charge being first duly paid) and executed on the telegraphic copy thereof, accompanied by a telegraphic copy of the order of the Court.

Apart from the provisions of s. 88 of the Bankruptcy Act, 1908, there is provision in the Post and Telegraph Act, 1928, for sending of notices by telegraph, "notice" being defined as any notice or other document which by law or agreement of the parties is required to be served on any person, or at his house or place of business, in order that such person may be affected thereby: see s. 179.

By s. 181 of the last-named Act, any person who desires to serve within New Zealand any notice upon another or at the place of abode or business of another may do so by depositing such notice with any telegraph officer at any of the telegraph-offices in New Zealand in the manner prescribed by or under the Post and Telegraph Act, 1928, and requesting that the same may be served by a telegraph officer thereunder. Sections 182 and 183 deal with evidence of service of a telegraphic copy of an original notice. The effect of service of a telegraphic copy of a notice served in the manner prescribed by the Act on a person, or at his place of abode, or at his place of business, shall, in terms of s. 184, have the same force and effect as if the original notice were served on such person.

For regulations under the Post and Telegraph Act, 1908, see 1914 *New Zealand Gazette*, p. 2105.

For form of Warrant of Arrest see Form No. 6 and Rule 25 of the Bankruptcy Rules 1893: 1893 *New Zealand Gazette*, p. 374, and 1907 *New Zealand Gazette*, p. 3291, and see also *Spratt on the Law of Bankruptcy*, p. 230 *et seq.*

MOTION FOR ARREST OF DEBTOR.

IN THE SUPREME COURT OF NEW ZEALAND

.....District. — No.
.....Registry. — In Bankruptcy.

IN THE MATTER of the Bankruptcy Act, 1908

AND

IN THE MATTER of A.B. of Importer a debtor

Ex parte

C.D. etc. a Creditor.

TAKE NOTICE that Mr. of Counsel for the above-named C.D. WILL MOVE this Honourable Court (in Chambers) before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Courthouse on day the day of 19 at 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard for the issue of a warrant for the arrest of the above-named A.B. UPON THE GROUNDS that there is probable reason for believing that the said A.B. is about to quit his place of residence and to go abroad with a view to defeating delaying or embarrassing bankrupt proceedings issued against him AND UPON THE FURTHER GROUNDS appearing from the affidavit of the said C.D. and of filed herein AND FOR AN ORDER that the said warrant be transmitted by telegraph and executed on the telegraphic copy thereof.

Dated at this day of 19 .

Counsel for applicant.

Certified pursuant to rules of Court to be correct.

Counsel Moving.

To the Registrar.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I, C.D. etc. make oath and say as follows:—

1. That I am a Hardware Merchant carrying on business at No. Street in the City of .

2. That on the day of 19 I obtained judgment in the Supreme Court at against the said A.B. for the sum of £ for goods sold and delivered.

3. That the said judgment is wholly unsatisfied and I have no security for the said judgment.

4. That on the day of 19 a bankruptcy petition was filed in this Honourable Court and a summons issued calling upon the said A.B. to show cause why he should not be adjudicated a bankrupt.

5. That the said bankruptcy proceedings have not been served on the said A.B.

6. That on the day of and again on the day of 19 I made inquiries at premises known as No. etc. where the said A.B. had resided for the past twelve months and was informed by one E.F. the proprietor of the said premises that the said A.B. was out but later on on the said day of 19 the said E.F. informed me that A.B. had left that morning for the town of with the intention of proceeding to England.

7. That I thereupon caused inquiries to be made at the said town of and I am informed and verily believe that the said A.B. has booked his passage in the said (steamer) leaving for England on day the day of 19 Hereto attached and marked "A" is a letter from my agent at the town of in which it appears that the said A.B. has booked his passage to England with the Shipping Company in the said (steamer).

8. That the said A.B. resided and carried on business at within the City of in the Judicial District of for a period of approximately two years immediately preceding the filing of the petition referred to in paragraph 4 hereof.

9. That the business premises of the said A.B. situate at are now vacant.

10. That X. the landlord of the said business premises informed me that A.B. had stated he was going to England to make a fresh start in life and had paid all rent and vacated his business premises.

11. That I am informed and verily believe that a private sale of the goods and stock-in-trade of A.B. was effected on the day of 19 to one Y. and that the purchase price for same was £ .

11. That I verily believe the said A.B. intends to depart from New Zealand with intent to defeat his creditors.

Sworn etc.

ORDER FOR ISSUE OF WARRANT OF ARREST.

(*Same heading.*)

day the day of 19 .

UPON READING the petition for adjudication filed herein the motion for the issue of a warrant of arrest and the affidavit in support of the said motion filed herein AND UPON HEARING Mr. of counsel for C.D. the abovenamed creditor IT IS ORDERED that a warrant of arrest be issued to the Sheriff of the District of to arrest the said A.B. and keep him in custody until he finds sureties to the satisfaction of this Court that he will attend from time to time as this Court orders or until he is discharged by this Court AND IT IS FURTHER ORDERED that such warrant be transmitted by telegraph and executed on the telegraphic copy thereof.

By the Court.

Registrar.

WARRANT OF ARREST.

(Same heading.)

To the Sheriff of the District of and
To the Keeper of His Majesty's Prison at .

WHEREAS at the instance of C. D. a creditor it has been made to appear to the satisfaction of this Court that there is probable reason to suspect and believe that the said A.B. of etc. is about to quit his place of residence and to go abroad with a view of defeating delaying and embarrassing proceedings under the Bankruptcy Act, 1908 THESE ARE THEREFORE to require you the said Sheriff of the District of to take the said A.B. and to deliver him to the said keeper of the above-named prison and you the said keeper to receive the said A.B. and him safely keep in the said prison until he finds sureties to the satisfaction of this Court that he will appear and attend from time to time as the Court may order or until he is discharged by this Court.

Dated at this day of 19 .

By the Court.

Registrar.

(To be continued.)

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

COPYRIGHT.

Copyright—Literary Work—Author Undisclosed—Publisher's Name—Presumption of Ownership—HOGG *v.* TOYE & Co., LTD. (C.A.).

Sec. 6 (3) of the Copyright Act, 1911, which deals with cases in which the author's name is not printed on a published work but the name of a publisher or printer is so printed, does not establish the right of such last-mentioned persons to copyright in the work.

As to sec. 6 (3) of the Copyright Act, 1911: see HALSBURY, 2nd Edn., 7, para. 908; DIGEST 13, p. 225.

CRIMINAL LAW.

Justices—Power of—Order to Enter into Recognisances—Jurisdiction—R. *v.* SANDBACH; *ex parte* WILLIAMS (K.B.D.).

A person convicted of obstruction under the Prevention of Crimes Act may be ordered to enter into recognisances although there is no evidence of any apprehended breach of the peace.

As to the power to bind over to be of good behaviour: see HALSBURY, 2nd Edn., 9, para. 331; DIGEST 14, p. 493.

DIVORCE.

Divorce—Evidence—Discretion Statement—BEVIS *v.* BEVIS (C.A.).

A "discretion statement" in a divorce suit may, in the absence of any rule of Court on the subject, be admissible as evidence in another suit.

As to discretion statements in divorce: see HALSBURY, 2nd Edn., 10, para. 1032; DIGEST Supp.

FACTORIES AND SHOPS.

Shop—Early Closing—Hairdresser—MOORE *v.* TWEEDALE (K.B.D.).

Where a customer enters a shop on an early closing day before the hour fixed for closing, no offence is committed if he or she remains and is attended to after the prescribed hour.

As to sec. 4 of the Shops Act, 1912: see HALSBURY, 2nd Edn., 14, para. 1313; Digest 24, p. 933.

HUSBAND AND WIFE.

Husband and Wife—Maintenance Order—Weekly sum—Income Tax—Deduction of—CLACK *v.* CLACK (K.B.D.).

A husband ordered to pay maintenance is entitled to deduct income tax from the weekly payments.

As to maintenance orders under the Summary Jurisdiction (Married Women) Act, 1895: see HALSBURY, 2nd Edn., 10, para. 1336 *et seq.*; DIGEST 27, p. 555 *et seq.*

MASTER AND SERVANT.

Workmen's Compensation — Accident — Compensation — Recovery—Finding of Arbitrator—CUNARD STEAMSHIP CO., LTD. *v.* MOORE (H.L.).

A finding of an arbitrator that incapacity has in fact ceased will not be disturbed if there is evidence on which it could be arrived at.

As to the duty of an arbitrator if incapacity has disappeared: see HALSBURY 20, para. 544; DIGEST 34, p. 451.

SHIPPING AND NAVIGATION.

Shipping — Charter-party — Hindrance — Delay — Demurrage—MUNROE BROTHERS, LTD. *v.* RYAN (C.A.).

Where a shipowner has entered into a charter-party by which an approximate loading date is fixed, and subsequently enters into a second charter-party with regard to the use of the vessel in the meantime, he cannot rely on an unavoidable delay in completing the second charter as being a hindrance beyond owner's control if he is thereby late in presenting the ship for loading under the first charter.

As to the readiness of the ship under a charter-party: see HALSBURY, 26, para. 268, *et seq.*; DIGEST, 41, p. 443.

Rules and Regulations.

Trade Arrangement (Belgium and New Zealand) Ratification Act, 1933. Applying the Duties and Exemptions from Duty provided for in the Act to Goods from Sweden.—*Gazette* No. 44, June 13, 1935.

Poultry-runs Registration Act, 1933. Regulations under the Act prescribing Additional Purposes for which Moneys of the New Zealand Poultry Board may be expended.—*Gazette* No. 44, June 13, 1935.

New Books and Publications.

Yearly Digest. Edited by W. S. Goddard, M.A., 1934. (Butterworth & Co. (Pub.) Ltd.) Price 28/-.

Butterworth Twentieth Century Statutes, 1934. (Butterworth & Co. (Pub.) Ltd.) Price 44/-.

Butterworth's Workmen's Compensation Cases; Vol. 27. Edited by Judge Ruegg, K.C., Edgar Dale and Alun Pugh. (Butterworth & Co. (Pub.) Ltd.). Price 42/-.

Literary Associations with the Middle Temple, 1935. By John Gover. (Pitman & Sons). Price 2/9d.

Forensic Medicine. By Douglas J. A. Kerr. (A. C. Black). Price 21/-.

Treasure Trove. The Law and Practice of Antiquity. By George Hill, 1934. From the Proceedings of the British Academy, Vol. XIX. (Oxford Press.) Price 4/6d.

Snell's Principles of Equity. By H. Gibson Rivington, M.A. 21st Edition, 1934. (Sweet & Maxwell, Ltd.) Price 42/-.

Laws of Palestine, 1932. By Moses Donkham. (Supplement to set.) (Stevens & Sons.) Price £2/2/-.

The Record Interpreter, 1910. By Charles Martin. Reprint. (Stevens & Sons.) Price 27/-.

Local Government Act, 1933. By Hon. D. Meston. (Sweet & Maxwell Ltd.) Price £1/3/6d. 1935.

The English Legal Tradition: Its Sources and History, 1935. By Henri Levy-Ullman. (Macmillan & Sons). Price 22/6d.

Law Quarterly Review: Index to Vols. 1-50. By E. Potton. (Stevens & Sons). Price 8/6d.