New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The Courts of Justice are illumined by eight lamps: the lamp of integrity, which has burned brightly for several centuries; the lamp of independence, which has been totally extinguished in some foreign countries: the lamp of dignity, exemplified by the very appearance of the Judge; the lamp of wisdom; the lamp of patience; the lamp of courage, which is necessary when decisions are given contrary to public opinion; the lamp of humour, which it is impossible and, indeed, undesirable to exclude; and, lastly, the lamp of truth, which burns but dimly at the commencement of a suit but which finally outshines all the others."

—MASTER W. VALENTINE BALL, at the United Law Clerks' Society Anniversary Festival Dinner, 1939.

Vol. XV. Tuesday, June 6, 1939. No. 10.

The Courts and Government Policy.

THE question of the Court's consideration of the policy of any particular Government when it is set the task of interpreting a statute or determining the validity of a regulation was referred to by Mr. Justice Callan in *Jackson and Co., Ltd. v. Collector of Customs* (to be reported). His Honour recalled the statement made by Mr. Justice Ostler in *Carroll v. Attorney-General*, [1933] N.Z.L.R. 1461, 1478:

> "The principles upon which the Court determines the validity of regulations made by Order in Council are well settled, and were recently enunciated in the case of *Kerridge v. Girling-Butcher*, [1933] N.Z.L.R. 646. The Courts have no concern with the reasonableness of the regulation; they have no concern with its policy or that of the Government responsible for its promulgation. They merely construe the Act under which the regulation purports to be made giving the statute, as was said in *New Zealand Meat-producers Board v. Attorney-General*, [1927] N.Z.L.R. 859, such fair, large, and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is *ultra vires* and void. Both sides admit that this is the correct principle, and therefore it seems to me quite unnecessary to cite cases in support of it, though many are to be found in the books, and very many were cited in argument. The objects and intention of the Act can, of course, be gathered only from the words used, and, in my opinion, the same rule applies to the construction of the regulations."

The ordinary principles which are applicable to the construction of written documents are applicable to statutes and to regulations. As Wood, V.-C., said in *Attorney-General v. Earl of Powis*, (1853) Kay. 186, 207, 69 E.R. 79, 88, 89:

> "I apprehend that, in construing an Act of Parliament, a deed, will, or whatever other instrument may have to be construed by the Court, I have a right to look at all the circumstances which the parties to the instrument, whether a testator, a donor, or the Legislature, who are executing a solemn act, had before them at the time, and were themselves contemplating, as proved, not, of course, by any extrinsic evidence, but by evidence afforded by the instruments themselves, and also such matters as can be proved by extrinsic evidence to have been the circumstances which surrounded them, and which may have affected the conclusion at which they arrived."

The Courts have no concern with the policy of the Government responsible for the promulgation of a regulation, as was said by Mr. Justice Ostler, in *Carroll v. Attorney-General* (*cit. sup.*). "That," said Mr. Justice Callan, in *Jackson v. Collector of Customs*, "is the ordinary rule, and it is very well settled." *

In *Kerridge v. Girling-Butcher* (*supra*) at p. 687, Mr. Justice Smith said:

> "It is plain that the Court is entitled to have evidence of the surrounding circumstances. It is equally plain that the Court cannot receive extrinsic evidence of the actual intentions of the Governor-General in Council, even if that evidence were offered. The Court must take the regulation, have regard to the circumstances out of which it arose, and determine whether it is in substance a regulation under . . . the statute. If it is, then the function of the Court is ended. All else has been entrusted by the Legislature to the Governor-General in Council subject to the control of Parliament."

In this same case, it was suggested that a monopoly in the picture-theatre business would be prejudicial to the industry and to the general welfare. Mr. Justice Ostler, at p. 672, said:

> "Whether that reason is a good one or not is a question of policy with which this Court has no concern. . . . If Parliament desires to carry out such a policy, it doubtless has the power to do so by appropriate legislation; and if Parliament desires to entrust such powers to the Governor-General in Council it can do so by appropriate language. But this Court is concerned to see that, where power is given to legislate by Order in Council, that power is not exceeded."

It is axiomatic that ascertainment of the intention of the Legislature is the only purpose in construing a statute. This has to be sought according to well-settled principles, from the words of the enactment itself. The policy of the Government in power when the statute was passed is, therefore, wholly irrelevant, as the statute itself expresses the will and intention of the Legislature as a whole, and not that of the political party for the time being in power in one or other branch of the Legislature, or in both. The policy of the Government which introduced an enactment in Bill form cannot be considered by such oblique methods as a reference to the parliamentary debates on its introduction, or during any portion of its progress to the statute-book, moreover, its construction cannot be determined by any reference to its original form, or to the motives for amendments which were subsequently incorporated before its final passing. This principle is well settled by a long line of decisions, from *Millar v. Taylor*, (1769) 4 Burr. 2302, 2332, 98 E.R. 201, 217, where Willes, J., said:

> "The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the House where it took its rise. That history is not known to the other House or to the Sovereign,"

* The rule applies in all British Courts: see, for example, *Gosselin v. The King*, (1903) 33 S.C.R. 255 (Canada). *Kadir Bakhsh v. Bhawani Prasad*, (1892) 1 L.R. 14 All. 145; *Reg. v. Sri Churn Chungo*, (1895) 1 L.R. 22 Calc. 1017 (India); *Bok v. Allen*, (1884) 15 A.R. 119; *Colonial Secretary v. Baker*, (1885) 6 N.L.R. 111 (South Africa).

down to *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, where Viscount Haldane in his speech, at p. 383, said, in answer to the point raised in argument that, in construing a statute, consideration should be given to what passed while the Bill was still a Bill and in the Committee stage in the House :

> " I do not think, sitting as we do, with the obligation to administer the principles of the law, that we have the least right to a look at what happened while the Bill was being discussed in Committee, and before the Act was passed. Decisions of the highest authority show that the interpretation of an Act of Parliament must be collected from the words in which the Sovereign has made into law the words agreed upon by both Houses. The history of previous changes made or discussed cannot be taken to have been known or to have been in view when the Royal assent was given. The contrary was suggested at the Bar, though I do not think the point was pressed, and I hope that it will not be thought that in its decision this Committee has given any countenance to it. To have done so would, I venture to say, have been to introduce confusion into well-settled law."

His Lordship then quoted the dictum of Willes, J., in *Millar v. Taylor* (*cit. sup.*), and added that that principle of construction was laid down in words, which had never, so far as His Lordship knew, been seriously challenged.

These observations were made in regard to the Attorney-General's submission that an entry in the Journals of the House did not fall within the principle ; but Lord Wrenbury, after saying that the contention was unsound and the evidence to be gathered from the Journals was inadmissible, summarized the principle afresh when, at p. 399, he said :

> " The debate upon the Bill, the fate of the amendments proposed and dealt with in Committee in either House, cannot be referred to to assist in construing the language of the Act as ultimately passed into law with the Royal assent."

Implied, though necessarily involved, in the rejection as inadmissible of any reference to parliamentary debates in the construction of a statute is the inadmissibility of evidence of the policy of the Government in power at the time of its being passed into law. In *In re Sooka Nand Verma*, (1905) 7 W.A.L.R. 225, 229, McMillan, J., said :

> " We have heard in the course of the argument something about the policy of the Ministry, but sitting in this Court we are not concerned with the policy of this, that, or any other Ministry. If the policy of the Ministry commends itself to the Legislature, and we find that policy crystallized in an Act of Parliament, then, and then for the first time, is it brought to our notice."

It is no part of the Court's duty to speculate on the policy in pursuance of which any statute was passed, whether it be Government policy or not. In his speech in *Murray v. Inland Revenue Commissioners*, [1918] A.C. 541, Viscount Haldane, at p. 553, gave the reasons for this.

> " As I have often had occasion to observe in this House, it is no duty of ours to speculate on the reasons which have influenced Parliament, largely for the good reason that we do not know them. I am quite ready to suppose that this section was framed as it was deliberately. What the reasons may have been I do not know ; they may have been good reasons, but we have nothing to do with them here."

Thus, too, the recommendations contained in a Report of a Royal Commission, used in an endeavour to show that a statute has followed those recommendations, are inadmissible to show that the words of a section were intended to give effect to them, and thus to show what was the intention of the Legislature in enacting the section. In expressing this view in his speech in *Assam Railways and Trading Co., Ltd. v. Inland Revenue Commissioners*, [1935] A.C. 445, Lord Wright, at p. 458, said :

> " On principle no such evidence for the purpose of showing the intention, that is the purpose or object of an Act is admissible ; the intention of the Legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate . . . It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible, and the Reports of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted."

The extraneous assistance to which His Lordship referred is confined to the consideration of such external or historical facts as may be necessary to enable the Court to acquaint itself with the law which existed before the Act was passed and the mischief or defect which the statute under construction was intended to remedy, which is analogous in principle to the rules in *Heydon's Case*, (1584) 3 Co. Rep. 7a, 76 E.R. 637 : see the observations of Lord Langdale in the *Gorham Case* (Moore, 1852 Ed., p. 462) ; and of Lord Halsbury, L.C., in *Eastman Photographic Materials Co. v. Comptroller-General of Patents and Designs and Trademarks*, [1898] A.C. 571, 575, explained by Lord Wright in the *Assam Railways* case (*supra*), 459 ; but although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are very slight : per Farwell, L.J., in *R. v. West Riding of Yorkshire County Council*, [1906] 2 K.B. 676, 716.

The meaning attached to a statute or a regulation by its framers cannot control the construction of its language. The question is not what alterations of the law they have intended, but what the Legislature has adopted : per Wood, V.-C., in *Farley v. Bonham*, (1861) 30 L.J. Ch. 209 ; and see *Land Board of Otago v. Higgins*, (1884) N.Z.L.R. 3 C.A. 66, 75. It is immaterial whether opinion as to this meaning is expressed prior to the passing of the statute, or afterwards. In *Carroll v. Attorney-General* (*supra*), at p. 1478, Mr. Justice Ostler spoke of the inadmissibility of an affidavit made by some Government official, and filed in the Court when legislation by Order in Council is attacked, in order to explain the object of the legislation. This seemed to be a growing practice in such cases, His Honour said ; and, he added, " such evidence is inadmissible as an attempt to usurp the function of the Court." And in the same case, at pp. 1483, 1485, Mr. Justice Smith said that the Court is to have regard to the circumstances out of which a regulation arose and determine its construction, but such circumstances do not include extrinsic evidence of the object which the Governor-General in Council actually intended to effect when making the regulation. A statement of the object which the Governor-General in Council intended to effect was inadmissible.

From the foregoing *dicta* it will be seen that the exclusion of considerations of Government policy is merely illustrative of the principle that, when considering a statute, the only question for the Court to determine is the true construction of the words used. As Lord Herschell, L.C., said in delivering the opinion of the Judicial Committee of the Privy Council in *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202, 215, 216 :

"The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact . . . The question is, not what may be supposed to have been intended, but what has been said."

The statute as finally printed and published is the final word of the Legislature as a whole, and antecedent debates and subsequent statements of opinion are not admissible. They would be untrustworthy in any case, because, as Farwell, L.J., pointed out in *R. v. West Riding of Yorkshire County Council* (*supra*), in the case of a statute dealing with a controversial subject ambiguous phrases are often used designedly, each side hoping to have thereby expressed its own view, and the belief of each that it has succeeded is more often due to the wish than to any effort of reason. "The generality of public understanding," he added, "is quite incapable of proof, and is beside the mark unless as an appeal to timidity. *Securus judicat orbis terrarum.*"

The Court, in construing an Act of Parliament or a regulation, must, as in construing a deed or will, do its best to put itself in the position of the authors of the words at the time when such words were written or otherwise became effectual; but this will no more justify the Court in admitting, as evidence on the construction of a statute or regulation, speeches in Parliament or outside it by members of the Cabinet or other members of the political party in power on the Government's policy in regard to a particular topic of legislation afterwards embodied in a statute, than it would justify the Court in admitting in the construction of a will the advice given to a testator by his solicitor or his near relatives, or the statements of himself or his expectant legatees of the effect of his will after he had executed it.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1939.
March 16:
April 27.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

WELLINGTON HARBOUR BOARD v. STANDEN.

Harbours—Statutory Limitation of Time for Bringing Action—Worker's Action for Damages for Injuries — Whether One Month's Notice necessary—"Worker"—Harbours Act, 1923, s. 248 (1)—Statutes Amendment Act, 1936, s. 31.

The proviso in s. 31 of the Statutes Amendment Act, 1936, merely enlarges the limitation of time for the commencement of the actions referred to from three to six months, and does not repeal the requirement of notice of intended action specified in s. 248 (1) of the Harbours Act, 1923.

Semble, The words in the said s. 31 "any worker in the course of his employment" are not confined to employees of Harbour Boards.

R. v. Dibdin, [1910] P. 57, applied.

Izzard v. Universal Insurance Co., Ltd., [1937] A.C. 773, mentioned.

So held by the Court of Appeal, reversing the judgment of Reed, J., [1938] N.Z.L.R. 1016.

Counsel: Stevenson, for the appellant; **Hardie Boys and Wild,** for the respondent.

Solicitors: Izard, Weston, Stevenson, and Castle, Wellington, for the appellant; **Hardie Boys and Haldane,** Wellington, for the respondent.

Case Annotation: *R. v. Dibdin*, E. and E. Digest, Vol. 42, p. 660, para. 689; *Izzard v. Universal Insurance Co., Ltd.*; *ibid.*, Supp. Vol. 29, para. 3217ee.

SUPREME COURT.
Dunedin.
1939.
February 14;
May 15.
Myers, C.J.

PAGE v. HARVEY.

By-law—Building Licensed as a Public Hall—Licensee prohibited from Bringing in or permitting the Bringing-in of Intoxicating Liquor—"During any function therein of which dancing forms a part"—Unreasonableness—Uncertainty—Invalidity—Repugnancy to General Law—Municipal Corporations Act, 1933, ss. 312, 364, 367.

The Dunedin City By-law, No. 23 of 1931, contained the following provisions:—

"20. (i.) No person being the licensee of any building licensed as a public hall shall bring or permit or suffer to be brought into such building any intoxicating liquor for use at or during any function therein, of which dancing forms a part; nor shall any such person permit or suffer any intoxicating liquor to be or remain in such building during any such function. For the purposes of this clause, the expression 'licensee of any building' shall mean and include the person named and described as the licensee in the license for the said building and any person or persons or body corporate for the time being entitled to the use and occupation thereof under or by virtue of any contract with the person so named and described in the license for the said building.

"(ii.) No person shall bring any intoxicating liquor into any building licensed as a public hall during any function of which dancing forms a part, nor shall he have any intoxicating liquor in his possession in any such building during any such function:

"Provided, however, that it shall be competent for the Council under the hand of the Town Clerk to grant permission for the use of intoxicating liquor at any such function on condition that the distribution of such liquor is strictly under the personal control of the licensee as hereinbefore defined . . . ."

On appeal from a conviction by a Stipendiary Magistrate for breach of such by-law, in that, being the licensee of a building licensed as a public hall in the City of Dunedin, the appellant permitted to be brought into such building intoxicating liquor for use at or during a function of which dancing formed a part without permission in writing under the hand of the Town Clerk,

P. S. Anderson, for the appellant; **Haggitt,** for the respondent.

Held, allowing the appeal, 1. That, for the reasons given in the judgment, the by-law was unreasonable and, consequently, invalid.

McCarthy v. Madden, (1914) 33 N.Z.L.R. 1251, 17 G.L.R. 61; **Scott v. Pilliner,** [1904] 2 K.B. 855; and **Miller v. City of Brighton,** [1938] V.L.R. 375, applied.

White v. Morley, [1899] 2 Q.B. 34, 39, and **Kruse v. Johnson,** [1898] 2 Q.B.91, referred to.

2. That the proviso at the end of the by-law reserving power to the Council to grant permission for the use of intoxicating liquor at any particular function could not make the by-law valid, if it is otherwise invalid.

Waite v. Garston Local Board of Health, (1867) L.R. 3 Q.B. 5, followed.

Held also, That, in view of the words, "function of which dancing forms a part," and their general application to any building licensed as a public hall under s. 312 of the Municipal Corporations Act, 1933, the by-law was repugnant to the provisions of that statute and to the general law; and, alternatively, the meaning of those words was vague and uncertain, and consequently the by-law was invalid on either of those grounds.

Solicitors: Brent and Anderson, Dunedin, for the appellant; **Ramsay and Haggitt,** Dunedin, for the respondent.

Case Annotation: *Scott v. Pilliner*, E. and E. Digest, Vol. 25, p. 436, para. 333; *White v. Morley*, *ibid.*, Vol. 13, p. 328, para. 652; *Kruse v. Johnson*, *ibid.*, p. 326, para. 631; *Waite v. Garston Local Board of Health*, *ibid.*, Vol. 26, p. 553, para. 2490.

Assent by an Executor.

Its Necessity, Nature, Effect, and Importance.

By K. M. Gresson.

To understand properly the importance of assent by an executor requires first that there be a clear appreciation of the difference between an executor and a trustee. The appointment of the same persons as executors and as trustees under a will is a very common practice, and it is difficult in many cases to fix with precision the exact moment when the representative ceases to be executor and becomes a trustee. Nevertheless, it is important that the distinction be kept in mind and the nature of the two offices be clearly understood since the rights, powers, and obligations appertaining to each respectively differ considerably; and it is no idle or academic inquiry in what capacity a person appointed to both offices was acting at some given time or in relation to some particular property.

Executors and Trustees.

The two positions are in some respects very similar, and in a loose way of speaking, executors, when they are nominated as well trustees of the will, hold the property of the deceased upon trust (subject to payment of debts) for those beneficially entitled under the will. But it is trusteeship, if it can be so called at all, so different from ordinary trusteeship, that we shall think more clearly and act more prudently if we cease to regard an executor as in any sense a trustee, but rather as one who, at some stage in his administration, may become, in a true sense, a trustee of property which hitherto he has held as executor.

> "There is an interpretation clause to the will which makes the executors equal to trustees, and the trustees equal to executors, in the sense that these terms are used, as I gather, interchangeably, but, of course, without altering the nature of the duties which fall upon persons who stand in that capacity according as they have or have not completed the execution of the will and become trustees in respect of the estate falling under it."

Per Lord Hanworth, M.R., in *Inland Revenue Commissioners v. Smith*, [1930] 1 K.B. 713, 725.

> "The property which on the death of the testator vests in the executor does not remain vested in him for ever. So soon as he assents to the dispositions of the will becoming operative and to the trusts taking effect the estate vested in him as executor is divested and vests under the dispositions of the will in the trustees of the will."

Per Lawrence, L.J., *ibid.*, 736.

Consider some of the differences between an executor and a trustee. Trustees must act together; concurrence of all trustees is essential; the act of one of several trustees availeth nothing. But co-executors, however numerous, are regarded in law as an individual person and in consequence (except, perhaps, as to real estate) the act of one is the act of all, whether it be the release of a debt, settling an account, or confessing a judgment. Even assent to a legacy—which this paper suggests is a matter of great importance—can be effectively given by one of several executors; moreover, if one of the several executors is himself a legatee, his own assent to his own legacy will vest a complete title in himself. And probably, though there have been statements to the contrary, one of two administrators stands in the same position as one of two or more executors. Further, if the Statutes of Limitation should be in question, the distinction becomes at once of first importance, and a defendant may shun the character of an executor to court that of a trustee: see *In re Timmis, Nixon v. Smith*, [1902] 1 Ch. 176. Executors, trustees, and the Statutes of Limitation is a subject which requires a paper and indeed more than a paper to itself, and I am not going to venture in those insufficiently charted waters. It is sufficient for this paper to assert that where the Statutes of Limitation are being applied, the question—executor or trustee—is fundamental.

From the angle of practical administration, the distinction between executor and trustee is not less important, for the statutory provisions of the Administration Act, 1908, cease to be applicable when the personal representative acquires his new character of trustee, and he must look, instead, to the Trustee Act or the Settled Land Act for assistance, as the late Sir John Salmond stated in *In re Johannes Anderson*, [1921] N.Z.L.R. 770, dismissing an application brought under s. 7 of the Administration Act, 1908, by trustees for leave to sell:

> "It does not apply to trustees as such, and it makes no difference that the testator has appointed the same persons both as executors and trustees. When such persons, by completing their executorship and assenting to the trusts imposed upon them by the will, have ceased to hold the property as executors and have commenced to hold it as trustees, they cease in respect of that property to have the rights, powers, and obligations of executors and have the rights, powers, and obligations of trustees in lieu thereof,"

and went on to bid them invoke the aid of the Settled Land Act.

Without daring for one moment to question the words of that eminent Judge, it may, however, be pointed out that s. 9 of the Administration Act, 1908, authorizes the Court, on the petition of an administrator of an estate *or any person beneficially interested therein*, to make orders and directions in relation to the time and mode of sale of real estate, sundry other matters, and generally in regard to the administration of the estate for the greatest advantage of all persons interested. Where, therefore, as often is the case, the trustees are "persons beneficially interested," the Administration Act, while not enabling the granting to them of leave to sell, does, where they have a power of sale, authorize "directions" which have gone so far as to sanction in a proper case a deviation from the strict letter of the trust upon the principles laid down in the leading case of *Re New*: see *McCrostie v. Quinn*, [1927] G.L.R. 27, and cases therein cited.

How far the Trustee Act is available to the executor or administrator cannot be so simply or so shortly answered. It cannot be said that all the provisions of the Trustee Act are available to executors and administrators, as is the position in England. The Trustee Act, 1925 (Gt. Brit.), defines the expressions "Trust" and "Trustee" as extending to the duties incident to the office of a personal representative, and "Trustee" where the context admits as including a personal representative (the last words were added in 1925). Moreover s. 69 enacts that the Act, except where otherwise expressly provided, applies to trusts including so far as the Act applies thereto executorships and administratorships constituted or created either before or after the commencement of the Act.

The Trustee Act, 1908 (N.Z.), enacts that "Trust" and "Trustee" include implied and constructive trusts, and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and includes (at this point the verb goes into the singular) also the duties incident to the office of

personal representative of a deceased person. One has not, however, to rely on an interpretation clause somewhat vaguely expressed because there are many sections where the executor, administrator, or personal representative is expressly mentioned. The Act authorizes the Court to make a vesting-order in respect of stocks standing in the name of a deceased person whose personal representative is out of the jurisdicition or not known for certain to be either living or dead, or who refuses to transfer according to the directions of the person entitled. Executors and administrators as well as trustees may pay money into the Treasury under s. 66. The provisions regarding distribution after the giving of such notices as the Judge may direct are applicable to executors and administrators only (s. 74). An executor or administrator as well as a trustee may apply, under s. 75, for directions regarding management or administration; and finally a whole block of sections from s. 84 to s. 107 include, by virtue of s. 108, the Public Trustee and an executor or administrator. It is apparent, therefore, that a personal representative receives a great deal more statutory assistance in the discharge of his duties than does a trustee, and from this angle, therefore, it is very material whether executorship or administratorship has ceased and trusteeship begun.

In *Public Trustee v. J. A. Kidd*, [1931] N.Z.L.R. 1, an application under the Family Protection Act made nineteen months after probate, was dismissed upon the grounds that the estate had been distributed. The executors had at an earlier date completed their duties as executors, and consequently held the property thenceforward as trustees for the beneficiaries and it had ceased to be part of the estate of the testator. Although actually still in the same hands, it had been appropriated to the trusts of the will and so held to have been "distributed" within the meaning of the Act.

Sufficient has been said to show that the distinction between executor and trustee is too important not to be kept constantly in mind, and assent by an executor owes much of its importance to the fact that when executors who are as well trustees under the will have assented, they cease to hold the property as executors and henceforth hold it as trustees. But the assent does more than merely make a change in the character of the executor's holding; it is the establishment of the legatee's title to the property given. It is not a correct view to regard the testator's estate as the property of the beneficiaries subject to a kind of executor's lien for the amount necessary for payment of debts and administration expenses. The true position is that the testator's estate and the whole of the assets are the property of the executors until by assent, or it may be by conveyance, they confer a title on the legatee, or complete what was before a very imperfect title, if title at all.

We shall pass on to consider in some detail the nature, effect, and importance of assent by an executor.

The Nature, Effect, and Importance of Assent by an Executor.

It must be remembered that the executors by virtue of the Administration Act acquire the whole of the estate of the deceased, and are bound to apply it, in the first place, in payment of the debts and testamentary expenses, and will not, of course, distribute any portion until satisfied that such debts have been paid or are adequately secured. The title of claimants to the deceased's property, whether as devisees, legatees, or persons entitled on intestacy, is not complete except by some act of the personal representative. This act, according to circumstances, consists in either an assent or a conveyance. Pending such assent or conveyance a beneficiary has only an imperfect or incomplete right. He cannot without the authority of the representative take possession of the property bequeathed or devised, and even if in possession must yield it up if demanded; but the executor can be compelled, by appropriate action, to give his assent if it is refused without cause. Whether there has been such an assent as the law requires is, of course, generally a question of fact; it need not be in any particular form, may be expressed or implied, may even be presumed, as, for instance, where a legatee possesses himself of property given and retains it for some considerable time without complaint by the executor. An assent, at any rate of personalty, may be made by any one or more of the personal representatives. The assent when given relates back to the time of the testator's death and vests in the legatee from that time the property in the legacy, when specific. But that principle has no application, and cannot, in the nature of things, have any application whatever to a legacy of the residue, which is, as its name indicates, only the property or fund which remains after all claims upon the testator's estate have been satisfied.

Here is a practical illustration: a testator who died in 1914 bequeathed the residue of his estate—mostly stocks and shares—to Dr. Barnardo's Homes. It was the end of 1916 before the residue was finally ascertained and handed over. During that period, the executors had received the income of the estate, from which, however, income-tax had been deducted at its source. Dr. Barnardo's Homes, as a charity, exempt under the Act from income-tax, sought a refund; but it was held that until the date when the residue was ascertained the institution had no property in any specific investment forming part of the estate or in the income therefrom; that the payment by deduction of income-tax made by the executors in respect of income was not made on behalf of the institution, and that the institution was, therefore, not entitled to any refund. The ascertainment of the residue was the earliest date at which assent could be given or conveyance effected, and until then both the corpus and the income of the estate were the property of the executors, applicable by them for the purpose of administration and in no legal sense the property of Dr. Barnardo's Homes: *Dr. Barnardo's Homes v. National Incorporated Association Special Income Tax Commissioners*, [1921] 2 A.C. 1.

The case of *Wise v. Whitburn*, [1924] 1 Ch. 460, may also be given by way of illustration. A specific bequest of a leasehold property was made to the wife for life, followed by a life estate to her son with the remainder to his children. The executors permitted the wife to reside in the property for ten years, until her death in 1922 when the leasehold interest was sold, and soon afterwards resold. But the second purchaser took the objection that when the executors assented to the specific bequest they became thereby trustees, and had not been in a position at the widow's death in 1922 as legal personal representatives to convey the premises, and had, in fact, no continuing power to sell vested in them. It was held by the Court that, as a matter of fact, there had been an assent. The executor stoutly denied that he had given any assent,

verbal or written, but Eve, J., said that upon the acts and conduct of the parties he ought to hold, and must hold, that the legacy was assented to at some date very soon after the testator's death, at any rate long before the property was offered for sale in 1922; and he proceeded to inquire, with what result—holding by way of answer, that the effect of the assent was to strip the executors of their title as executors and to clothe them with a title as trustees, and that as trustees they had no power to sell.

I refrain from attempting to examine the executor's assent in relation to real property, because to do so would enlarge this paper beyond permissible limits, and, too, because some notice would have to be taken of the proposition laid down by their Lordships of the Privy Council in the recent case of *In re Macleay, Macleay v. Treadwell*, [1937] N.Z.L.R. 230, that, notwithstanding our Administration Acts, the old heir-at-law remains in New Zealand as an existing personage, and has vested in him for an interval of indefinite duration, it may even be permanently, the New Zealand real estate of every owner who dies possessed of such property; and, further, that during that term of vesting the rights of ownership with reference to the property are not in suspense and the status of the heir-at-law is brought literally within Blackstone's definition of an heir as one "upon whom the law casts the estate immediately upon the death of the ancestor." This proposition must, it seems to me, cause students of the law of real property or the law of administration furiously to think. What happens to the doctrine of relation back, their Lordships do not say.

As regards personalty, it is clear that a purchaser or mortgagee who deals with an executor (or administrator) runs the risk that he may find that the property he is purporting to purchase or to acquire a charge upon is property in respect of which an implied assent has been given at some earlier time, so as to vest the property in the legatee under the will; or even that the property formed part of the residue of a testator and by virtue of the passing of the residuary account or some other conduct of the personal representatives has ceased to belong to the personal representatives. The well-known case of *Attenborough v. Solomon*, [1913] A.C. 76, is a striking example and a case well worthy of close attention. The testator died in 1878, appointing his two sons A. A. and J. D. Solomon executors and trustees. In 1907, A. A. Solomon died and one, Chadwick, was appointed trustee jointly with the other son, J. D. Solomon. But it was discovered that in 1892 A. A. Solomon had pawned certain plate, part of the residuary estate. At the date of the pledge the debts, funeral, and testamentary expenses had been paid, but the beneficiaries had not yet received all their shares in the estate. The residuary account had, however, been passed. Joyce, J. ([1911] 2 Ch. 159, 164), expressed himself thus:

> "An executor does not cease to be executor as soon as the debts, pecuniary legacies, and funeral and testamentary expenses are paid or discharged, especially if the residue be not ascertained and distributed. So far as concerns personal estate not previously alienated and excluding chattels comprised in a specific bequest to which the executor has assented, an executor may sell, mortgage, or pledge any part of it even after twenty years, and, if he does so, will be presumed to be acting in the exercise of the duties imposed upon him by the will, so that the purchaser or mortgagee or other assignee will be under no liability to creditors or legatees."

But in the Court of Appeal ([1912] 1 Ch. 451, 457, 458), Lord Justice Fletcher Moulton examines the particular circumstances that—

> "There were very few specific legacies and very few debts: of that we have the clearest evidence. The accounts were passed within a year, and it appears that the whole of the administration business had by that time been brought to a termination by the executors and there is no suggestion that they had overlooked anything. In signing these accounts the executor who performed the duty states that he holds the rest of the estate on the trusts of the will; and I have not the slightest doubt either as a matter of law or as a matter of fact that from and after that time the possession of the estate by these two gentlemen was a lawful possession by them as joint trustees. . . . I perfectly agree with the learned Judge that one can put no limit of time to the office of executor; nor do I think it can be said that an executor has ceased to be an executor because he has passed his accounts. Some claim might turn up and it would find him an executor—not recreate him an executor. . . . The question here is, whether the executors had handed over the estate to the persons entitled to it under the will. In my opinion they had as executors handed it over to themselves as trustees. . . . The consequence is that what we are deciding now does not in the least decide that these executors might not have kept part of the estate in their hands for a longer period; and if they had, then during that period even one executor would have been able to deal with it under the well recognized powers of a single executor. . . . In this case therefore, in my opinion, it is clear that the plate had passed out of the hands of the executors, and had passed into the hands of the trustees for the persons to whom it was left."

In the House of Lords ([1913] A.C. 76, 83) the Lord Chancellor (Viscount Haldane) has the last word: alluding to the basis of the judgment of Fletcher Moulton, L.J., that the executor had ceased to hold the plate as executor and that the property in it had, from the date of the residuary account, been in the trustees, so that there was no title to deal with these chattels which existed in A. A. Solomon in 1892, he says:

> "The executor's office remains intact and he may exercise his functions at any time. . . . The office of executor remains, with its power attached, but the property which he had originally in the chattels that devolved upon him, and over which these powers extended, does not necessarily remain. So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of this assent . . . "

And he goes on, at p. 84:

> "In point of fact the executors assented at a very early date to the dispositions of the will taking effect. It follows that under these dispositions the residuary estate, including the chattels in question, became vested in the trustees as trustees: that they were the same persons as the executors does not affect the point. . . . The executors had long ago lost their vested right of property as executors and become so far as the title to it was concerned trustees under the will. Executors they remained, but they were executors who had become divested by their assent to the dispositions of the will of the property which was theirs *virtute officii*; and this right *in rem*, their title of property, had been transformed into a right *in personam*—a right to get the property back by proper proceedings against those in whom the property should be vested, if it turned out that they required it for payment of debts for which they had made no provision. . . . That right always remains to the executors and they can always exercise it, but it is a right to bring an action, not a right of property, and not such a right as would enable such a pledge as this to be validly made. I have, therefore, arrived at the clear conclusion that, at the time when the pledge to Messrs. Attenborough was attempted, A. A. Solomon had no title in virtue of which he could make it."

The question whether executors have become trustees has, therefore, to be determined not in a general way

as taking place at some particular point of time, but in regard to the particular assets which devolve upon them and their dealings in relation thereto. The executor is never in an abstract sense *functus officio*. If after the lapse of many years, perhaps even after the complete distribution of the estate, another asset of the testator is discovered, it will be for the executor to get it in and once having got it in, if it be not required for any purpose of administration to convey it to, or hold it on trust, for the person or persons entitled under the dispositions of the will. Although the office of executor remains long after his work is done, latent, ready to become operative if need should arise, yet it is inevitable that at some stage the executor's relationship to the property of the testator will be converted into that of trusteeship and as often as an executor assents to a disposition of a will *ipso facto* he becomes trustee of the property subject to those dispositions, or if his assent be in relation to chattels the complete property in the chattels vests in the legatee by virtue of the assent which at once renders operative the dispositions of the will. Executors assent *to a legacy* not to a legatee, and if they be mistaken as to the actual legatee and even transfer the specific property to the wrong person, nevertheless the assent—which was an assent to the dispositions of the will—operates to perfect the hitherto inchoate or imperfect title of the true legatee. Let me illustrate. A testator bequeathed specific shares to A., and these were duly transferred by the executors after probate and assent. Some years later a codicil was discovered which revoked the bequest to A. and gave the shares to B., but made no change in the executors. The original probate was, of course, revoked, and a fresh probate, including the discovered codicil, granted to the same executors. A. was prepared to yield up the shares, but sought to retain the income he had received from them on the grounds that for the time being they had been his shares. It was held that when the specific legacy was, in fact, assented to, the legal title and the right to sue for the legacy in common law had vested thereby in B., the true legatee, and that by virtue of that assent (though at that time he was not in contemplation) he became owner and could recover both the shares and income they had produced: *Re West, West v. Roberts*, [1909] 2 Ch. 180.

To sum up, this proposition seems to be justified: That the transition from executor to trustee is not made in one step as to all the estate at one time. What has to be determined is what is the relationship of the persons who under the will were nominated both as executors and trustees to any particular portion of the testator's estate; as to some of the assets they may still hold as executors; as to other property they may have by assent constituted themselves trustees. In the simple case of a specific legacy of a chattel the first duty of the executor is to consider whether he assents to it or not. If he assents to it, the property passes out of him and is in the specific legatee as from that moment. The legatee has, by operation of the assent, the whole legal estate. Some species of property of their nature require something more than assent to vest the legal title in the legatee—for example, insurance policies, company shares, inscribed stock—but that that is so is due to statutory provisions governing that type of property and in such cases, though the personal representatives may not immediately upon assent lose the legal estate pending a transfer in proper form, undoubtedly from the moment of the assent they become trustees for the legatee, bare trustees presumably, if one should use an expression as to which different opinions have been expressed by eminent judges as to its meaning. Of the assets that by virtue of the Administration Act the personal representatives acquired as from the date of the death of the testator or intestate, it will be the case that, at some later point of time as regards some, they have no longer any property in them at all, as regards others that they have by assent constituted themselves trustees; the balance they may perhaps still hold in an executorial capacity. Assent presents, as a rule, no difficulties when it is in respect of a specific bequest, but whether a residue has been ascertained, and that ascertainment been assented to by the executors whereby the testator's distributions become operative, is a question that has to be determined on the particular circumstances of each case. For an authoritative discussion on this point, see *Inland Revenue Commissioners v. Smith*, [1930] 1 K.B. 713, where it was held that there is no rule of law that the existence of an outstanding mortgage prevents the residue from being ascertained.

Judicial Knowledge.—Gone are the days when High Court Judges would ask for information as to the identity of Connie Gilchrist, George Robey, Walt Disney or his Donald Duck; and it is no longer necessary to adopt *Punch's* suggestion as to Evening Classes for the elementary education of Judges on the subject of Household Words.

Those who read the Law Reports cannot fail to have noticed how singularly well-informed our incomparable Judges are on topics of which, strictly speaking, they have no judicial knowledge. I will not dwell on the accuracy, bordering at times on immodesty, displayed by bachelor Judges on the facts as well as the law relating to Husband and Wife; nor on the musical knowledge of those who have no music, and whose responses (if any) to a call for the *Spring Song* at a "Humming Bee" contest would be a rendering of the National Anthem out of tune.

What I have in mind is rather the kind of knowledge of Morton, J., as disclosed without question in the recent case of *Compton v. Bunting*; a case, you may remember, in which the problem was as to whether the noise of certain children, arising in, out of or in the course of their instruction, constituted a nuisance. In that case, Morton, J., grasped without assistance the full meaning of such expressions as "prep school," "nursery kindergarten," "physical jerks," "percussion bands," "drums," "bells," "cymbals," "triangles," and "tambourines." For the plaintiff, a lady who was living in semi-detachment from the defendant's preparatory school, Morton, J., had the greatest sympathy; but could not give her the relief she claimed. He thought that any noise heard in rooms other than the plaintiff's dining-room was of a trifling nature. Having regard to the fact that it would, in his view, be possible for the plaintiff to move into another room and get relief while the music lessons were going on, and also to the fact that the lessons only took place two days a week, he had arrived at the conclusion that the plaintiff had not established such a nuisance as would entitle her to an injunction. The inconvenience, he said, "is one of those which people must put up with in modern life."—APTERYX.

Must Regulations be Reasonable?

The Practical Difficulty.

In *Wilson v. Weber County*, [1939] N.Z.L.R. 232, the Heavy Motor-vehicle Regulations, 1932, were examined, and the judgment contains this passage: "The learned Magistrate has held that the two clauses in question are *ultra vires* because they are unreasonable. I express no opinion on that ground. If clearly authorized by the Act under which they purport to be made, in my opinion they would be valid even though unreasonable." Although not a ground of decision, this dictum is worth noting as another contribution to the opinions of Judges on this point.

It is well settled that a by-law may be *ultra vires* on the ground of unreasonableness, and it is interesting to consider whether the same principle can and does apply to a regulation of general application made by the Governor-General in Council, the Governor-General out of Council, a Minister of the Crown, or similar authority who may be entrusted by the Legislature with the function of enacting regulations.

Previous New Zealand cases show some difference of opinion. In *Maxwell v. McCarthy*, (1903) 23 N.Z.L.R. 223, Williams, J., speaking of an Order in Council making rules for Magistrates' Courts, said: "I do not think that the construction which the Order in Council gives to the phrase [a phrase in the Act] is by any means an unreasonable construction." The inference is that if the construction had been unreasonable, this would have been a matter for the Court to consider. In *Jorgensen v. Ridings*, [1917] N.Z.L.R. 980, Stringer, J., said plainly: "A regulation, like a by-law, must be reasonable."

On the other hand, in *Hackett v. Lander*, [1917] N.Z.L.R. 947, appears the following passage:

> "It was also urged that Parliament could not have intended that it should be in the power of the Governor in Council to pass such a harsh prohibition, as it was termed, as that in question. The answer is that the intention of Parliament can only be ascertained from the words of the Acts it passes, and here we have a power conferred to make regulations the propriety of which is to be determined only by the opinion of the Governor in Council. It goes without saying, of course, that the Ministers of the Crown are answerable to Parliament, and in that is to be found some limitation upon unreasonable or unjust action. It is open also by proper means, and without awaiting a meeting of Parliament, to seek a repeal or modification of regulations that may be considered unjust or oppressive; but as I have pointed out, it is beyond the competency of this Court to interfere with them on those grounds."

This can only mean that unreasonableness in a regulation may be a topic for parliamentary debate, or a matter for political expostulation, but can never be a matter for the Court to decide.

The following is from the judgment of Myers, C.J., in *Carroll v. Attorney-General*, [1933] N.Z.L.R. 1461, 1472:

> "I agree at once that where the Governor-General is given power to make such regulations as he thinks necessary, and any particular regulation that he makes is within the ambit of the Act, this Court would have no power to interfere, or even to inquire into the reasonableness of the regulation."

It would seem that there are two cases. One is wher the regulation is plainly within the statute that purports to authorize it; no issue of interpretation arises, and there is no scope for introducing the doctrines of *ultra vires*; to question the reasonableness of the regulation would be the same thing as to question the reasonableness of the statute itself, and that is a purely extra-forensic pastime. The other case is where plain authorizing words cannot be pointed to, but only a power to make regulations couched in general language. Here, it would seem, by inference from the last-quoted judgment, the reasonableness of the regulation in the eyes of the Court may be a question requiring consideration. The passage cited above from *Wilson v. Weber County* appears to carry the same inference.

The matter is carried further by the judgment of Ostler, J., in *Carroll v. Attorney-General* (*supra*), at p. 1478:

> "The Courts have no concern with the reasonableness of the regulation, . . . they merely construe the Act under which the regulation purports to be made. . . . Then they look at the regulation complained of. If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is *ultra vires* and void. Both sides admit that this is the correct principle."

In *Jackson and Co., Ltd. v. Collector of Customs* (to be reported), this principle was expounded by Callan, J., as follows:—

> "A Court is not entitled to disallow regulations which appear to be within the intention of Parliament merely because the Court thinks them unreasonable, nor has it any power to allow regulations which are not within the intention of Parliament, merely because the Court thinks them reasonable. The duty of the Court is to search for the intention of Parliament and to support regulations that keep within that intention, and to disallow such as do not. The intention of the Legislature as revealed by its enactments is the controlling factor. But in discovering that intention, it is not inappropriate to consider what effects the regulations would have if valid."

Unreasonableness in a by-law is not a separate and original ground of invalidity; it is merely a special case of invalidity on the more general ground of *ultra vires*. The enabling power given by the Legislature, where conferred in general terms, is to be construed as a power to make by-laws that shall be reasonable: if they are unreasonable, it follows that they are such as Parliament could not have intended to authorize: they are outside the powers conferred. This is laid down by Lord Russell in *Kruse v. Johnson*, [1898] 2 Q.B. 91, in the following words:—

> ". . . Looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any by-laws so made under such conditions on the ground of supposed unreasonableness. . . . I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws made under any such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well

say Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*."

If this is the basis underlying the rule about unreasonableness, it is difficult to see why it should not apply with equal force to the regulations of the Central Government. To hold otherwise would involve reversing the rule of construction to be applied to the enabling legislation; and to say that where Parliament has entrusted a power of legislating to the Governor-General, it is to be construed as a power to legislate, if he so elects, unreasonably. This proposition has only to be stated to carry its own condemnation.

It would seem, however, that the test of reasonableness should be invoked only to decide the validity of a by-law or regulation within a predetermined field or ambit, and not to determine what that field may be. Whether a topic of enactment is in a list of particular powers conferred, or is included (if at all) only in some general words, it is conceivable that a by-law or regulation upon that topic may be so framed as to be held arbitrary, corrupt, or fantastic, so as to come within Lord Russell's description of what is unreasonable. If it is unreasonable in its terms, then although it may deal with a topic of enactment delimited in the plainest words, that will not save it; it is outside the authority that Parliament intended to give. There would seem to be no room, under the authorities dealing with by-laws, for such an argument as "It would be unreasonable for the delegated authority to legislate, in however reasonable terms, for such and such a topic; therefore the general words do not enable the delegated authority to legislate upon that topic." This would be to let the word "reasonable" escape from the meaning to which Lord Russell has tied it down.

It is just here, however, that the practical difficulty comes in. This is indicated by the final sentence from the passage in *Jackson and Co., Ltd. v. Collector of Customs* already quoted: "In discovering that intention [the intention of the Legislature] it is not inappropriate to consider what effects the regulations would have if valid." Proceeding to such a consideration the Court will find the effects (not of regulations that might have been made, but of regulations that actually have been made) to be such and such, and will then characterize these effects in terms which may vary with the judicial vocabulary, but which must amount, when all is said, to a pronouncement of reasonableness or unreasonableness. If the effects are stigmatized in substance as being unreasonable, this finding may, it seems, be used as a ground for saying that the regulations are *ultra vires*; not *ultra vires* because unreasonable, but because their effects are unreasonable. Such a process of ratiocination, it is submitted, tends to produce a stricter interpretation of statutes than is produced by the accepted treatment of a power to make by-laws. If a power to make by-laws is exercised unreasonably, that has no bearing on the scope of the enabling power, because there is an abiding presumption that such a power is to be exercised in a reasonable manner. The by-law is held bad, but the power remains unimpugned. If, however, the unreasonable character of a regulation be admitted to reflect on the power to make regulations, then the more "impossible" (to use a neutral term) the regulation is regarded as being, the greater is the probability that the alleged power to make the regulations will be declared not to exist.

Manufacturers' Duty to Consumers.

Recent Decisions Considered.

Since the decision of *Donoghue v. Stevenson*, [1932] A.C. 562, the snail in the bottle case, which was discussed in (1932) 8 N.Z.L.J. 189, there have been a number of decisions as to the precise extent of this liability to persons not under any contractual relationship. For example, it has been held to extend to a manufacturer of clothing so as to render him liable to a person, purchasing from a retailer, who has contracted dermatitis through deleterious matter in the clothing: *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85, a decision of the Privy Council. On the other hand, it has been held not to apply so as to render a builder liable to a purchaser of a house from some one other than the builder: *Otto v. Bolton*, [1936] 1 All E.R. 960. Nor does it apply in the case of a faulty article, where there has been an opportunity of examination between its leaving the manufacturer and the happening of the accident: *Dransfield v. British Insulated Cables, Ltd.*, [1938] 4 All E.R. 382.

Apart from this whittling down of the scope of *Donoghue v. Stevenson* in the lower Courts in England, its practical application has apparently been considerably curtailed by the decision of Lewis, J., in *Daniel and Daniel v. R. White and Sons, Ltd., and Tarbard*, [1938] 4 All E.R. 258, unless that case is to be confined within the limits of its own particular facts. That this may well be the case is suggested by the recent decision of Croom-Johnson, J., in *Mayne v. Silvermere Cleaners, Ltd.*, [1939] 1 All E.R. 693. Before considering this case it is proposed to review briefly the cases of *Donoghue*, *Grant*, and *Daniel*, in respect of the standard of proof required.

In *Donoghue's* case the allegation of the decomposed snail appeared on the pleadings as did the allegations of negligence, the question being whether the allegations in the pursuer's condescendence were relevant—in other words, did the pleadings disclose a cause of action? No evidence had been given. The House of Lords decided in favour of the pursuer on the ground that a manufacturer owes a duty to the consumer of his wares to take reasonable care to see that they are free from defects likely to cause injury to the consumer, at any rate, if there is no opportunity of intermediate inspection. The pursuer was then left to prove her case.

In *Grant's* case the evidence at the trial had lasted for twenty days! There the plaintiff established that he had contracted dermatitis from pants manufactured by the defendants, owing to the presence of bisulphite of soda therein. This was used in the process of manufacture, but should have been washed out. It was admitted that something might go wrong, some one might be negligent. No evidence was given that any one had in fact been negligent, and the manufacturers proved that they had treated over four and three-quarter million of these garments by a similar process and had received no other complaint. They also satisfied the Privy Council that the method of manufacture was correct, the danger of excess sulphites recognized and guarded against, and that the process was intended to be foolproof. The Privy Council held that the plaintiff had established negligence. In the words of Lord Wright: "The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he

did wrong." Accordingly, following *Donoghue's* case, they held that he should succeed against the manufacturers.

In the face of this decision of the Privy Council it is difficult to follow the reasons for the decision in *Daniel's* case. There the plaintiffs were husband and wife, and the husband bought a bottle of lemonade from the second defendant which had been manufactured by the first defendants. It contained 38 grains of carbolic acid. Both plaintiffs drank from it and both were injured, the wife far more severely than the husband. The husband recovered on the sale against the second defendant under s. 14 (2) of the Sale of Goods Act, 1893, without any serious difficulty. Both plaintiffs failed against the first defendants in their claim under *Donoghue's* case, for negligence, because the learned Judge considered that this had not been established.

The plaintiffs established their injuries and damages, the presence of the carbolic acid, that the bottle was in the condition in which it left the manufacturers, and that there had been no opportunity for independent examination. At the end of their case the defendants submitted no case; the plaintiffs relied on *res ipsa loquitur*, and Lewis, J., held that there was a case to answer, or at any rate that the defendants ought to give evidence. They then established that their system of washing and cleaning bottles was foolproof and that there was adequate supervision. On this the learned Judge held that, if it were a case of *res ipsa loquitur*, the defendants had discharged the onus upon them. In the result, that defendant who was admittedly wholly blameless except on a technicality, had to pay the plaintiff, who had suffered least, a sum which was no doubt quite inadequate to cover the costs that he had to pay the successful defendants, against whom a very strong suspicion of negligence lay; whilst the plaintiff who had suffered most recovered nothing and had to pay heavy costs.

If the matter rested there it would seem that the significance of *Donoghue v. Stevenson* had been much exaggerated, for unless a consumer could show that a manufacturer's system was inefficient, which would be very rare, or that an employee had been negligent, which the consumer could not know, he would not succeed. Indeed, although the manufacturer knew how the trouble arose he could keep it from the knowledge of the consumer and the Court, and content himself with showing what an excellent system he used, how efficient his supervision was, and how competent his staff were.

The decision of *Mayne v. Silvermere*, however, suggests that the Courts may not always approach the question in the same way. In that case the problem arose out of contract, for the plaintiff got dermatitis from a suit which he had sent to the defendants to be cleaned. It was not in dispute that to this contract of work and labour was annexed by law an implied term that the defendants would take and exercise due care and skill. The Court had to be satisfied that this care and skill had not been exercised, so that the plaintiff was in much the same position as the plaintiffs in *Grant's* and *Daniel's* cases. In this case the plaintiff seems to have established less and the defendants more, yet the plaintiff succeeded, for the plaintiff only proved that he had sent the suit to the defendants, that he had worn it in the condition in which it had come back from the defendants, that he had contracted dermatitis, that he was not unduly sensitive to this affliction, and that he had not contracted it before from the suit.

On the other hand, the defendants established that their plant was the "best possible plant," that no attack could be made on their machinery, implements, or the way in which their business was carried on. Nevertheless Croom-Johnson, J., held that the plaintiff should succeed because, as one of the defendant's witnesses admitted, that "under their system, this ought not to happen, and, therefore, if it does happen, it must be due to some negligent act. . . . "

It is to be hoped that Judges will follow this line in the future rather than that adopted in *Daniel v. White*.

Obituary.

Mr. S. V. Beaufoy, Gisborne.

On the death of Mr. S. V. Beaufoy, a member of the firm of Messrs. Beaufoy and Maude, the members of the Gisborne District Law Society, the members of the Gisborne Branch of the Justices of the Peace Association, and local Police Officers gathered at the Magistrate's Court on May 12, 1939.

In the absence of the Magistrate, Mr. Charles Blackburn, J.P., presided.

The President of the Gisborne District Law Society, Mr. J. de V. W. Blathwayt, in addressing the Court, said that the members of the legal profession of Gisborne were assembled to express their sorrow for the decease, and to pay tribute to the memory, of their late professional brother, Stanley Vivian Beaufoy. They knew that for the past few months he had been in ill health, and some of them were aware that for some years past his health had given cause for anxiety, but to all of them, after having seen him return to practice recently apparently his old self, his sudden death had come as an overwhelming shock.

"Mr. Beaufoy was a member of our profession for nearly twenty years, and during that period he showed himself to be always a stout advocate and a generous opponent and," the President continued, "he earned the esteem and affection of his brother practitioners. Many have earned the respect of those with whom they have come in contact, but few can have earned so great a measure of affection.

"There is one outstanding characteristic to which it is fitting that special reference should be made. That was our late friend's unfailing geniality and cheerfulness. When we come to remember that the hand of bodily affliction lay heavily on him throughout the years of his practice, we realize that this admirable characteristic was more than an unfailing cheerfulness. It was a high and noble courage with which he faced adversity in life—always with a cheerful outlook. It is a tragic fate that a man and friend of such outstanding quality should be taken from us at a comparatively early age, and his decease is a profound loss to us all."

In conclusion, Mr. Blathwayt said: "On behalf of all the members of the legal profession in Gisborne, I desire to offer our most sincere sympathy to those upon whom the blow has fallen the heaviest, our late friend's wife and children. And we can only hope that it may in some measure lighten their great sorrow to feel that it is shared to the full by all those who for many years worked alongside of him."

Mr. E. G. Rhodes, the Registrar of the Supreme Court, on behalf of Mr. E. L. Walton, S.M., who was absent on his official duties, and on behalf of the Court staff, Mr. G. B. Edwards on behalf of the District Police, and Mr. Charles Blackburn for the Justices of the Peace Association, also expressed their sorrow on the death of the late Mr. Beaufoy, and their sympathy with his relatives.

Practice Precedents.

Probate and Administration: Grant of Probate after Action in Solemn Form: Public Trustee Appointed by Executor.

An executor, instead of proceeding to obtain probate by order in Chambers, may, and if a grant of probate is opposed, and a Judge orders the right to be tried by action, must obtain judgment of the Court for the issue of the probate: Rule 531Q of the Code of Civil Procedure.

If, as is here assumed, a judgment has been obtained by an action tried in solemn form of law, the executor is then entitled to take out probate; but, in his place and stead, he may appoint the Public Trustee sole executor, subject to the consent of the Supreme Court or a Judge: Public Trust Office Act, 1908, s. 13.

Such an application to the Supreme Court or a Judge thereof may be by petition, or in such other manner as may be prescribed by rules made under s. 31 of the Public Trust Office Act, 1908, s. 31. The Court or Judge is given jurisdiction to make such order as it or he thinks fit.

The discretion conferred on the Court by the section is a judicial discretion which is applied very widely but must be exercised on some fixed principle, the interests of the persons entitled to the estate being the paramount consideration, and it should prevail, even over the wishes of the testator as to the person to administer the estate: *In re Duke*, [1916] N.Z.L.R. 1133; *In re Anderson*, [1931] N.Z.L.R. 507.

The procedure adopted in the present case is an application by way of motion, which is a usual form. The order appointing the Public Trustee is sealed, but usually a copy of the order is not taken out.

MOTION PAPER.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry. No.
IN THE ESTATE OF A. B. &c. deceased.

Mr. of Counsel for the Public Trustee to move before the Right Honourable Sir Chief Justice of New Zealand at his Chambers Supreme Court House on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER consenting to the appointment of the Public Trustee as executor of the will of the above-named A. B. deceased and for grant of probate of the will of the said A. B. to the Public Trustee as the appointee of the executor therein named UPON THE GROUNDS—

(*a*) That probate of the will of the above-named A. B. deceased bearing date the day of 19 was decreed in an action in solemn form wherein C. B. of &c. was plaintiff and E. F. of &c. was defendant.

(*b*) That C. B. of &c. the executor named in the said will has duly appointed the Public Trustee as executor in the place and in the stead of the said C. B. subject to the approval of the Supreme Court or a Judge thereof.

(*c*) That the Public Trustee consents to the appointment.

AND UPON THE FURTHER GROUNDS set out in the affidavit of the Public Trustee filed herein.

Dated at this day of 19 .
Certified pursuant to the rules of Court to be correct.
Counsel for applicant.

REFERENCE.—His Honour is respectfully referred to s. 13 of the Public Trust Office Act, 1908.

MEMORANDUM.—Because a caveat was lodged against grant of probate an action in solemn form was heard. Judgment was duly delivered. The executor appointed considers it is in the best interests of the estate to appoint the Public Trustee sole executor in his place and stead. The executor has appointed the Public Trustee, who consents to act, subject to the approval of the Court.

Counsel moving.

AFFIDAVIT IN SUPPORT OF MOTION.
(*Same heading.*)

I G. H. of the City of in the Dominion of make oath and say as follows:—

1. That I am duly appointed the Public Trustee of the Dominion of .
2. That I am informed and verily believe that A. B. &c. died at on or about the day of 19 as appears by the affidavit of filed in this Honourable Court.
3. That I believe the paper-writing now produced and shown to me bearing date the day of 19 and marked "A" to be the last will and testament of the said deceased.
4. That annexed hereto and marked "B" is a certified copy of the judgment of this Honourable Court wherein it is decreed in solemn form of law and this Honourable Court doth pronounce for the force and validity of the last will of the said deceased dated the day of 19 .
5. That C. B. of &c. is the executor in the said will named.
6. That I am informed and verily believe that the will referred to in paragraph 3 of this my affidavit is the same will as is referred to in the said judgment.
7. That the executor the said C. B. by writing in the form annexed hereto marked "C" duly appointed the Public Trustee sole executor of the said will in his place and stead subject to the consent of the Supreme Court or a Judge thereof.
8. That the Public Trustee will faithfully execute the said will by paying the debts and legacies of the said deceased so far as the property will extend and the law binds.
9. That according to my knowledge and belief the estate and effects of the said deceased in respect of which probate is sought to be obtained are under the value of £ .

Sworn &c.

CERTIFIED COPY OF JUDGMENT.
[*Same heading as in action.*]

An appropriate form of judgment may be found in *Rhodes's Practice Precedents*, 127.

APPOINTMENT OF PUBLIC TRUSTEE BY EXECUTOR IN PLACE OF EXECUTOR NAMED IN WILL.
(*Same heading.*)

I C. B. &c. the executor named in and appointed by the will of the said A. B. deceased under the power given by s. 13 of the Public Trust Office Act 1908 and subject to the consent of the Supreme Court or a Judge thereof being given hereto DO HEREBY APPOINT the Public Trustee sole executor of the said will in my place and stead as if the said deceased had himself made such appointment.

As witness my hand this day of 19 .
Signed by the said C. B. in the presence of— } [*Signature.*]
Name .
Address .
Occupation .

ORDER CONSENTING TO APPOINTMENT OF PUBLIC TRUSTEE.
(*Same heading.*)

day the day of 19 .

UPON READING the motion and affidavit of the Public Trustee of the Dominion of New Zealand herein this Court DOTH HEREBY CONSENT to the appointment of the Public Trustee as executor of the will of the said deceased dated the day of 19 in place and in the stead of the executor C. B. named therein.

By the Court.
Registrar.

PROBATE.

(*Same heading.*)

WHEREAS A. B. &c. deceased died on or about the day of 19 leaving a will bearing date the day of 19 and also a will bearing date the day of 19 AND WHEREAS by a Judgment of this Honourable Court in an action number after hearing the parties thereto it was decreed and pronounced in solemn form of law for the force and validity of the will of the said A. B. deceased bearing date the day of 19 NOW THEREFORE BE IT KNOWN TO ALL MEN that on this day of 19 the last will of A. B. deceased bearing date the day of 19 a copy of which is hereunto annexed has been exhibited read and proved before the Honourable [*Full names*] a Judge of the Supreme Court of New Zealand and administration of the estate effects and credits of the deceased has been and is hereby granted to the Public Trustee of the Dominion of New Zealand (the executor in the said will having under the statutory power conferred on him in this behalf with the consent of the said Judge appointed the Public Trustee sole executor of the said will) being first sworn faithfully to execute the said will by paying the debts and legacies of the deceased as far as the property will extend and the law binds.

Given under the seal of the Supreme Court of New Zealand at this day of 19 .

Registrar.

Recent English Cases.

COMPANIES.

Winding Up — Petition — Creditor — Local Authority to Whom Rates are Due—No Right to Bring Action for Rates—Companies Act, 1929 (c. 23), s. 170.

A local authority to whom rates are due is a creditor of a company so as to be entitled to petition for winding up.

Re NORTH BUCKS FURNITURE DEPOSITORIES, LTD., **[1939] 2 All E.R. 549. Ch.D.**

As to whom may petition for winding up: see HALSBURY, Hailsham end., vol. 5, pp. 549–551, pars. 887, 888; and for cases: see DIGEST, vol. 10, pp. 829–836, Nos. 5405–5473.

CONTRACT.

Impossibility of Performance—Frustration—Assignment of Part of Salary—Reduction of Salary—Restrictions on Employment—Public Policy.

Bankruptcy—Secured Creditor—Proof of Debt—No Valuation of Security—Loss of Right to Enforce Security.

A contract to pay a yearly sum of money out of salary will be frustrated if the earnings of the promisor are reduced so as to make payment of the sum impossible.

KING *v.* MICHAEL FARADAY AND PARTNERS, LTD., **[1939] 2 All E.R. 478. K.B.D.**

As to frustration of contracts: see HALSBURY, Hailsham edn., vol. 7, pp. 212–217, par. 296; and for cases: see DIGEST, vol. 12, pp. 383–385, Nos. 3159–3166.

As to secured creditor: see HALSBURY, Hailsham edn., vol. 2, pp. 299–306, pars. 394–406; and for cases: see DIGEST, vol. 4, pp. 364–389, Nos. 3383–3560.

DIVORCE.

Desertion—Insanity—Certification of Deserting Respondent—Statutory Period Interrupted—Duty of Justices to Find and State Date of Actual Desertion.

Supervening insanity prevents continuance of desertion.

WILLIAMS *v.* WILLIAMS, **[1939] 2 All E.R. 13. P.D.A.D.**

As to divorce on the ground of desertion: see HALSBURY, Supp., Divorce, par. 971; and for cases: see DIGEST, vol. 27, p. 319, Nos. 2974–2977.

Desertion—Previous Nullity Suit Abandoned and Believed to be Dismissed—Petition Inadvertently Left on File—Subsequent Cohabitation—Whether Desertion Continuing.

A petition which neither party knew to remain on the file is not a bar to a petition for divorce.

LYNCH *v.* LYNCH, **[1939] 2 All E.R. 593. P.D. & A.D.**

As to effect of petition on desertion: see HALSBURY, Hailsham edn., vol. 10, pp. 658, 659, pars. 968, 969; and for cases: see DIGEST, vol. 27, pp. 319–321, Nos. 2978–2999.

Nullity—Petition—French Person's Marriage in England—French Domicil—Marriage Invalid According to French Law—Nullity Decree Pronounced by French Court—Competency of English Petition—Jurisdiction.

The Courts will take notice of a decree of nullity pronounced by a foreign Court of competent jurisdiction.

GALENE *v.* GALENE (OTHERWISE GALICE), **[1939] 2 All E.R. 148. P.D.A.D.**

As to jurisdiction in nullity: see HALSBURY, Hailsham edn., vol. 10, p. 640, par. 935; and for cases: see DIGEST, vol. 27, p. 265, Nos. 2326, 2327.

NEGLIGENCE.

Dangerous Goods—Liability of Repairer—Repair of Motor Lorry—Accident on Highway—Latent Defect Due to Inefficient Repair—Defect not Discoverable on Inspection.

A repairer of a vehicle to be used on the highway is responsible for damage done thereon resulting from defects in the repairs which he knew or ought to have known.

STENNETT *v.* HANCOCK AND PETERS, **[1939] 2 All E.R. 578. K.B.D.**

As to principles in *Donoghue v. Stevenson*: see HALSBURY, Hailsham edn., vol. 23, pp. 632–634, par. 887; and for cases: see DIGEST, Supp., Negligence, Nos. 361*a*–364*l*.

Vehicle on Highway—Public Vehicle—Duty to Observe Time Schedule—Duty to Avoid Accident—Accident to Elderly Pedestrian.

A driver of a public vehicle may be negligent in not so driving as to avoid an accident, although such driving is necessary to conform to his time schedule.

DALY *v.* LIVERPOOL CORPORATION, **[1939] 2 All E.R. 142. K.B.D.**

As to vehicles on highways: see HALSBURY, Hailsham edn., vol. 23, pp. 637–644, pars. 894–906; and for cases: see DIGEST, vol. 36, pp. 59–63, Nos. 366–405.

WORKMEN'S COMPENSATION.

Alternative Remedies—Election Between Two Remedies—Receipt of Compensation—Knowledge of Workman—Workmen's Compensation Act, 1925 (c. 84), s. 29.

The mere receipt of money by an injured workman, knowing it to be compensation, does not necessarily amount to election in favour of compensation rather than his remedy at common law.

SELWOOD *v.* TOWNELEY COAL AND FIRECLAY CO., LTD., **[1939] 2 All E.R. 132. K.B.D.**

As to alternative remedies: see HALSBURY, 1st edn., vol. 20, Master and Servant, pp. 195, 196, pars. 430, 431; and for cases: see DIGEST, vol. 34, pp. 490–492, Nos. 4063–4071. See also WILLIS'S WORKMEN'S COMPENSATION, 31st edn., pp. 478–483.

Rules and Regulations.

Immigration Restriction Act, 1908. Immigration Restriction Regulations, 1930. Amendment No. 2. May 10. 1939. No. 1939/57.

Agricultural Workers Act, 1936. Agricultural Workers Extension Order, 1939. May 24. 1939. No. 1939/58.

Health Act, 1920. Camping-ground Regulations Extension Order, 1939, No. 2. April 28, 1939. No. 1939/59.

Public Service Act, 1912. Public Service Amending Regulations, 1939. May 15, 1939. No. 1939/60.

Finance Act, 1936. Factories Act Extension and Modification Order, 1939. May 24, 1939. No. 1939/61.