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THE WORD "CHILD" IN STATUTES.

THE meaning of the word "child" or "children," as used in a statute, or in a will, or in a deed, is elusive. As has been pointed out, it has often been construed in two different senses in the same instrument. Broadly speaking, the term has no absolute or fixed meaning in law. Where used in a statute, it is to be construed by giving its primary meaning, —"a person under the age of twenty-one years"— as applied to the subject-matter. But there may be very strong ground, derived from the context or reason, why it should not be so construed: per Lord Esher, M.R., in *Hornsey Local Board* v. *Monarch Investment Building Society*, (1889) 24 Q.B.D. 1, 5. Or, to put it another way, in the words of Wigram, V.C., in *Dover* v. *Alexander*, (1843) 2 Hare, 275, 282; 67 E.R. 114, 117, the general principle of construction applies, namely, that the word must be given its primary meaning, unless there are any words by which that sense may be controlled, or anything in the context showing that the word is intended to be used in a secondary sense, or some extrinsic facts and circumstances, which show that the word "child" could not have been used in its only proper sense.

In general, the context determines the apt meaning; and, with a change of context, that meaning may be modified or extended from time to time. While from 1895 onwards, the word "child," as used in Part III of the Infants Act, meant a child under fifteen years of age, it was amended in 1939 to mean "a person under the age of twenty-one years." The word, as used in the Child Welfare Act, 1925, which originally meant a boy or girl under the age of sixteen years, was amended in 1927 to mean one under the age of seventeen years. In the Destitute Persons Act, 1910, the word "child" means any person under the age of sixteen years, unless a different intention appears. In these examples, the term "child" is used in contradistinction to that of a person of more than a particular age. But, in some statutes, the meaning is not found so easily.

We now take three illustrations to show the rules of construction, to which we have referred, applied to the meaning of the word "child" as used in statutes.

In one sense, we are all children, as, in the appropriate context, the word may denote persons of all ages. Thus, s. 48 of the Administration Act, 1908, which is still in force in respect of persons dying before January 1, 1945, provides that in the event of "the death of a child in the lifetime of a man or woman dying intestate, the child or children of such child shall take his or her parent's share." Here, there is no limitation on the age of the "child" or "children," who, as contemplated, have been parents, and may be even grandparents. The purpose of the statute is to regulate the descent of property, and the context shows that the word "child" or "children" in the section means legitimate issue of the first generation unlimited as to age.

The word "child" was used *simpliciter* in certain statutory regulations, and a question of its meaning was raised in *Rodger* v. *Varey*, [1942] 1 All E.R. 567. Lord Caldecote, L.C.J., at p. 568, said that a definition was unnecessary in the billeting regulations under notice, and that, in the ordinary use of the English language, a girl of fourteen years of age is a "child." He added that it was not open to the Magistrates to find otherwise. They were wrong in supposing that they must be supplied with a definition before they could find a young person a child. What they had to do really was to use their common sense, and apply a word which is perfectly well understood in its proper and ordinary meaning. His Lordship was asked to express some opinion as to when a person ceases to be a child. He said: "I do not propose to embark upon that voyage, which might take one into very remote places."

Where, however, there is no express definition in a statute, and no limitation as to age, we may be driven from the actual context to ascertain the purpose or object of the enactment which may so control the primary meaning as to set up a secondary sense of meaning. In *Kemp* v. *Lubbock*, [1920] 1 K.B. 253, to cite an example, a Transport Order provided that the sum of sixpence was payable in respect of each extra person carried, and it said "one child, or if there be more than one, two children under the age of ten counting as one person." Avory, J., in holding that the word "child," as there used, did not include an infant in arms, said that when he looked at the object and purpose of the regulations, it was clear to him that the object was to provide that the person who occupied an extra seat in the conveyance should be paid for; and, he added, the presumption was that an infant in arms did not occupy any seat or place in the conveyance.

When the word "child" is used in legal documents, it means, *prima facie*, a legitimate child. "The law does not contemplate illegitimacy. The proper description of a legitimate child is "child" said Lord Denman, C.J., in *Reg.* v. *Totley Inhabitants*, (1845) 7 Q.B. 596, 600; 115 E.R. 614. But, in some cases, a consideration of the context may require giving to the word "child" a wider meaning so as to include both legitimate and illegitimate.

In *E.* v. *E.*, (1915) 34 N.Z.L.R. 785, the word "children" in s. 33 of the Family Protection Act, 1908, was held to mean only legitimate children; and it required statutory authority to extend the meaning to include illegitimate children: Statutes Amendment Act, 1936, s. 26. So, too, the word "children" in s. 24 of the Property Law Act, 1908, has no application to illegitimate children: *In re S. B. H., Public Trustee* v. *B. F. H.*, [1936] N.Z.L.R. 757, 780. And the word "child" and the word "children" in s. 49 of the Administration Act, 1908, was held to mean a legitimate child or legitimate children: *In re Thomas, Winch* v. *Public Trustee*, [1925] N.Z.L.R. 555, 559. (That section has been repealed in respect of persons dying on and after January 1, 1945: Administration Amendment Act, 1944, s. 12 (1), and provision is made for the inclusion of illegitimate children as descendants under certain conditions.)

Notwithstanding the foregoing cases, the context of a statute may enlarge the meaning of the word children, even where used without any extension, to include illegitimate children. In *Woolwich Union* v. *Fulham Union*, [1906] 2 K.B. 240, 246,

> He [the appellant's counsel] relied upon the technical rule of law that the word "child" or "children" means a legitimate child or legitimate children, and that meaning must *prima facie* be given to the word whenever it occurs in a statute. It is, of course, true that that is only *prima facie* the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the meaning of the statute.

In *Morris* v. *Britannic Assurance Co., Ltd.*, [1931] 2 K.B. 125, MacKinnon, J., as he then was, applied this statement of the law when interpreting a section of a statute which had as its object insurance for provision for the funeral expenses to which parents and others are put on the death of children and relatives, and wherein the word "child" was used *simpliciter*, His Lordship said, at p. 131:

> It seems to me that the incidence of those expenses cannot depend upon whether before the birth of the particular child the mother did or did not go through a ceremony in a church or registry office. The nature of the duty or obligation as to which she is desirous of insuring is precisely the same whether the child happens to be legitimate or illegitimate. Having therefore regard to the purpose of the legislation, I think the context in these sections does require the word "child" to have the wider meaning, as being more consonant with the object of the statute, and includes an illegitimate child as well as a legitimate child.

Where there is no term in a statute placing an express limitation upon the word "child" as used therein, and nothing to extend a wider meaning to the term, the sense in which it is used must be considered and the context examined to ascertain whether there is anything to limit the primary or general meaning of the word. As generally used in a statute, it means a person under the age of twenty-one years. Thus, in the Guardianship of Infants Act, 1908, and the Divorce and Matrimonial Causes Act, 1928, the term "child" or "children" as there used, is always taken as referring to persons under the age of twenty-one years. This follows from the inference that when questions of guardianship and custody are in issue these statutes would necessarily refer to persons with whose custody and guardianship the Courts are normally concerned. On the other hand, there may be good reasons, from nature and object of the statute itself, for limiting the meaning of the word "child" to prevent extraordinary results arising from adherence to the primary meaning of the word "child," and, consequently, while avoiding any absurdity, for interpreting the word in a special sense consonant with the statute itself. In this way, to avoid an absurd result, a more rational meaning may be given to the word.

An instance of the avoidance of the extraordinary result which would follow if the word "child" as used in a statute were not limited to children who are infants in law is given by the recent decision of the Court of Appeal in *In re Carlton*, [1945] 1 All E.R. 559, aff. on app. [1945] Ch. 372. The Naturalization Act, 1870 (now repealed) provided in s. 10 (5) that where the father or widowed mother obtained a certificate of naturalization in the United Kingdom,

> every child of such father or mother, who during infancy had become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject.

The applicant was born in Roumania in 1887, and went to England in 1894, with his parents, with whom he continued to reside there until 1912. In April, 1910, his father was granted a certificate of naturalization, and the applicant claimed that, although he was then over twenty-one years of age, he became naturalized by virtue of s. 10 (5) as the result of the grant to his father of a certificate of naturalization. In the Court of first instance, Cohen, J., said that the question depended on the meaning of the word "child" in the section. The meaning of the word, which is of ambiguous import, must in every case depend on the context in which it appeared, and His Lordship came to the conclusion that the word "child" or "children" as used in s. 10 meant an infant child or infant children, as a change of nationality involved an important change of status on which a person of full age was entitled to make his own decision.

In his judgment, Lord Greene, M.R., said that he was content to accept the judgment of Cohen, J., on the question of construction; but he wished to add a few words of his own, and to mention a point which Morton, L.J., had suggested in the course of the argument. He had pointed out that the section began as follows: "The following enactments shall be made with respect to the national status of women and children." The word "children" there clearly did not mean all children. It was clearly, therefore, of some more limited meaning. His Lordship continued, at p. 377,

> I may myself add that, in a context such as "women and children," you would normally construe the word "children" as meaning, at any rate, something other than a fully-grown person. It must always, of course, depend on the context. As I pointed out in argument, if in a shipwreck the captain of a ship says, "Women and children first," he does not mean to include the child of a parent who has attained perhaps the age of forty years. Clearly he would be thinking of very much smaller children. The question how young a child must be in order to come within such an expression is a different matter. Similarly, here, the question is: Does the word "child" in subs. 5, include a child of any age or is it limited to some particular age? Mr. Carlton pointed out,

and quite rightly, that in a number of statutes reference is made to children of a particular age, or children of not more than a particular age. But that really does not assist him. What we are concerned with is the word "child" in this particular context. Bearing in mind that the section purports in terms to deal with the status of women and children, when we come down to subs. 5, and find the word "child," to what sort of child is it referring? It is referring to everybody who is in the relationship of a son or a daughter of a father, or is it referring to persons in that relationship who would come under the meaning of the word "child" if that word means infant child? I agree with Cohen, J. that, in the context of this section, it applies only to infant children.

If this were not so, the learned Master of the Rolls said that the most extraordinary results would follow. The idea that national status is to be fixed for a person by somebody else, or by relationship to somebody else, has never been accepted to cover persons who are *sui juris*. By the Act of 1870 a wife acquired the same nationality as her husband. At common law, marriage, if he remembered aright, did not affect the nationality of a wife, but she acquired the nationality of her husband, whether she liked it or not, under the Act of 1870. The same happens with a child. Automatically a child, when born, has a nationality conferred on it, not of its own volition but by the operation of law. The argument of the applicant was that this subsection has had the effect of imposing on persons of full age British nationality, whether they want it or not, because their father has himself become naturalized. Lord Greene went on to say,

> That seems to me a most extravagant and unnecessary result, for the simple reason that, when once the child becomes of full age, he can elect whether he will acquire the same nationality as his father or whether he will elect to retain his original nationality. If the contention were right, you might get the curious result, with regard to a child of a foreigner, who lived with his father during the whole of his minority, that if after he had attained twenty-one the father became naturalized, the child would immediately acquire British nationality. It might happen that the father did not acquire his certificate of naturalization till many, possibly fifty years afterwards, and to his surprise, and possibly to his indignation, the son would find British nationality forced upon him. I am quite unable to construe this subsection so as to produce that result.

As to the words "during infancy" in s. 10 (5), Lord Greene was prepared to decide the appeal on the footing that they were redundant. On this point du Parcq, L.J. (as Lord du Parcq then was) agreed, but Morton, L.J., preferred to express no opinion.

In *Carlton's* case, all the members of the Court agreed with the judgment of the Court of first instance, having regard to the quite ridiculous results which would follow from any other construction of the word "child" as used in the subsection, that a person whose nationality of origin was foreign might find himself, after he became of full age, and perhaps years later, becoming a British subject without any act or volition of his own. Those results were avoided by limiting the meaning of the word "child" to infant child.

Finally, there must be a necessary word of warning that cases on the construction of wills, wherein the meaning of the word "child" is of importance in the proper interpretation, are of no assistance in construing that word as used in statutes: *Coleman* v. *Birmingham Overseers*, (1881) 50 L.J.M.C. 92, 93. Thus, while the word "children," as used in a will, has often been construed as meaning "descendants," or as including grandchildren, Blackburn, J., in *Maund* v. *Mason*, (1874) 43 L.J.M.C. 62, in holding that the word "children" in a statute did not include grandchildren, said that the rule as to the construction of wills has not been extended to the construction of statutes. In *Pulleng* v. *Public Trustee*, [1922] N.Z.L.R. 1022, Reed, J., held that the word "children" in s. 33 of the Family Protection Act, 1908, has to be given its primary meaning, as there is nothing in the statute which justified discarding that meaning, or extending it to include grandchildren.

SUMMARY OF RECENT JUDGMENTS.

BORACURE (N.Z.) LIMITED v. MEADS.

COURT OF APPEAL. Wellington. 1945. September 18, 19, 20; December 12. MYERS, C.J.; JOHNSTON, J.; FAIR, J.; NORTHCROFT, J.; CORNISH, J.

Master and Servant—Negligence—Liability of Master—Scope of Employment—Use of Inflammable Material—Servant, alleged to have lit same causing Damage, not called as Witness for Defendant Master—Direction inviting Jury to assume Adverse Inference thereon—Direction as to Servant acting within Scope of his Employment—Direction to regard Defendant, in relation to Damages, as Spoliator—Misdirection—New Trial granted.

Practice — Trial — Counsels' Addresses — Evidence — Plaintiff cross-examined on Document tendered to him—Document put in by Defendant—Defendant not calling Witnesses—Right of Final Address lost to Defendant.

On a motion for nonsuit, or, alternatively, for judgment for the defendant, in an action in which the liability of the defendant company was found by the jury, who awarded £3,938 damages to the plaintiff, Finlay, J., gave judgment for the plaintiff, as reported [1945] N.Z.L.R. 515.

On appeal by the defendant company from that judgment,

Held, by the Court of Appeal (Myers, C.J., and Johnston, and Northcroft, JJ., Fair and Cornish, JJ., dissenting), That a new trial should be granted on the grounds that the jury may have been misled by the learned trial Judge's summing-up and directions in the following respects:—

(*a*) The direction amounting to an invitation to the jury to assume that an inference adverse to the defendant company be made from the fact that the defendant company did not call as a witness its servant Bell, who was alleged to have struck a match in the vicinity of inflammable material thereby causing the damage.

(*b*) The direction as to whether Bell, if he struck the match and caused the fire, was acting within the course or scope of his employment.

(*c*) The direction leading the jury to regard the defendant company, in respect of the quantum of damages, as a "spoliator."

Per Myers, C.J., for the following further reason, That, although the defendant company's counsel said that he was calling no evidence, and the trial proceeded on the basis that he called no evidence, he had in fact already adduced evidence by placing before the plaintiff, cross-examining him upon, and putting in a document, and was allowed to exercise the right, which he had thereby lost, of last addressing the jury; and, if the learned trial Judge had taken the proper course of refusing to hear the application for nonsuit, which was made and argued, the whole course of the trial might have been changed.

Appeal from the judgment of Finlay, J., [1945] N.Z.L.R. 515, allowed, and a new trial ordered.

Counsel: *McGregor* and *Rowe*, for the appellant; *A. M. Ongley* and *J. A. Ongley*, for the respondent.

Solicitors: *G. E. Rowe*, Palmerston North, for the appellant; *A. M. Ongley*, Palmerston North, for the respondent.

HORNE v. SPEED.

COURT OF APPEAL. Wellington. 1945. October 2, 3, 4; December 15. JOHNSTON, J., FAIR, J., CORNISH, J.

Negligence—Invitee—Occupier of Premises—Dangerous Condition of Fire-escape—Contract for painting Hotel—Employee of Contractor injured owing to Defect in Fire-escape—Liability of Proprietor—Duty owed Invitee.

On appeal from the judgment of Callan, J., giving judgment for the plaintiff, reported [1945] N.Z.L.R. 467, where the facts sufficiently appear,

Held, by the Court of Appeal (*Fair* and *Cornish*, JJ., *Johnston*, J., dissenting), That the appeal should be dismissed upon the following grounds:—

Per *Fair*, J. That there was a duty upon the appellant as the occupier of the hotel to the respondent workman to see that the fire-escape was in a reasonably secure condition, whether that duty be based on (*a*) invitation before the delivery of possession by the owner; or (*b*) invitation after possession had been given for the purpose of performing the contract; or (*c*) a general duty towards those likely to be using the fire-escape, upon which basis the decision of the Court should proceed.

Indermaur v. *Dames*, (1866) L.R. 1 C.P. 274; aff. on app. (1867) L.R. 2 C.P. 311, *Glasgow Corporation* v. *Muir*, [1943] A.C. 448; [1943] 2 All E.R. 44, and *Excelsior Wire Ropes Co., Ltd.* v. *Callan*, [1930] A.C. 404, followed.

Per *Cornish*, J. That the appellant remained in occupation of the fire-escape during the painting of it, with the right in case of emergency for the use of it for himself, his guests, and servants; that he impliedly invited the respondent to go upon the fire-escape for the purpose of painting it and the rule in *Indermaur* v. *Dames* applied: and that the jury's findings on the other issues were reasonably open to them on the evidence.

Johnston, J., dissenting, was of the opinion that the jury had founded their verdict on a mistaken conception that they were entitled to lay down a rule as to the condition in which premises should be kept, and departure therefrom entailed liability for injury on the premises in all circumstances; and that, therefore, the appeal should be allowed, and a new trial ordered.

The judgment of *Callan*, J., [1945] N.Z.L.R. 467, was accordingly affirmed.

Counsel: *North*, for the appellant; *Gould*, for the respondent.

Solicitors: *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the appellant; *Morpeth, Gould, Wilson, and Dyson*, Auckland, for the respondents.

RYAN v. McDONALD: LAND v. McDONALD.

SUPREME COURT. Palmerston North. 1945. October 30, 31; December 18. BLAIR, J.

Negligence—Road Traffic—Horses being led along Street—Rule of the Road.

The common-law rule of the road as to led horses is that the horse should be led along the right-hand or off side of the street or road, with the man who is leading it, whether he is walking or riding, on the left-hand or near side of the horse

The case is reported on this point only.

Counsel: *Graham* and *B. C. Haggitt*, for both plaintiffs; *A. M. Ongley*, for the defendant.

Solicitors: *Treadwell, Gordon, Treadwell, and Haggitt*, Wanganui, for the first plaintiff; *Graham and Reed*, Feilding, for the second plaintiff; *A. M. Ongley*, Palmerston North, for the defendant.

KENTS BAKERIES, LIMITED v. MOON.

SUPREME COURT. Auckland. 1945. December 18. 1946. January 15. CALLAN, J.

Annual Holidays—Holiday Pay—Baker—Award providing for Increase of Hourly Pay for Work before 4.30 a.m.—Forty-four-hour Week inclusive of Such Hours—Whether Annual Holiday Pay computed with respect to such Increase—"Ordinary time rate of pay"—"Rate"—Annual Holidays Act, 1944, s. 2.

The word "rate" in the expression "ordinary time rate of pay" in the definition of "ordinary pay" in s. 2 of the Annual Holidays Act, 1944, imports a fixed and uniform figure, and "ordinary time" is time which excludes overtime and time worked before the starting times prescribed by an award, as there is a fixed and uniform "rate" for work done within these limits and any thing earlier than those hours is, under the award, not "ordinary."

An award prescribed payment for ordinary time, overtime, and penalty time—*viz.*, 2s. an hour for starting earlier than the prescribed starting time. A worker claimed the balance of his holiday pay calculated on payment for ordinary and penalty time, but excluding overtime. On the employers' appeal from the decision of a Magistrate,

Held, allowing the appeal, That the extra money earned by the respondent for penalty time, should be disregarded in calculating his annual holiday pay in terms of the Annual Holidays Act, 1944.

Counsel: *Alderton* and *Jenkins*, for the appellant; *Dickson*, for the respondent.

Solicitors: *Lisle Alderton and Kingston*, Auckland, for the appellant; *J. F. W. Dickson*, Auckland, for the respondent.

In re WILLIAMS (DECEASED), WILLIAMS AND OTHERS v. ATTORNEY-GENERAL AND OTHERS.

SUPREME COURT. Napier. 1945. November 8; December 20. MYERS, C.J.

Will—Construction—Legacies and Bequests—Foreign Charities—Direction to Trustees to stand possessed of Residue for "such charitable and religious purposes as my trustees may in their absolute discretion think fit"—Clause expressing Hope that Trustees would pay regard to any Memorandum left by Testatrix—Such Memorandum left including list of Foreign Charities—Whether Trustees empowered to award Parts of Residue to Foreign Charities—Validity of Bequest.

A will contained the following clauses:—

"xiii. If there be any surplus after providing for the foregoing legacies then I declare that my said trustees shall stand possessed of the said surplus for such charitable and religious purposes as my said trustees may in their absolute discretion think fit.

"xiv. I express the hope (but without in any way limiting the absolute nature of the discretion conferred on my said trustees by the last preceding paragraph of this my will that my said trustees will pay due regard to any suggestions made by me or at my request in writing and either left with my said trustees or one of them or found with my papers after my death."

The testatrix left a memorandum in writing for the trustees containing a list of charities, some localized in New Zealand, but many of them foreign, in England, China, India, and elsewhere.

On an originating summons for determination of questions arising out of the two clauses of the will above set forth,

Held, 1. That the trustees were empowered by the will to award any part or parts of the residuary estate to foreign charities.

Attorney-General v. *Delaney*, (1875) I.R. 10 C.L. 104, *Revenue Commissioners* v. *Doorley*, [1933] I.R. 750, *Blair* v. *Duncan*, [1902] A.C. 37, applied.

In re Mirrlees' Charity, Mitchell v. *Attorney-General*, [1910] 1 Ch. 163, distinguished.

2. That the memorandum left by the testatrix pursuant to cl. xiv of her will could be looked at in interpreting clauses xiii and xiv.

Johnston v. *Ball*, (1851) 5 DeG. & Sm. 85; 64 E.R. 1029, *In re Boyes, Boyes* v. *Carritt*, (1884) 26 Ch.D. 531, *Blackwell* v. *Blackwell*, [1929] A.C. 316, and *In re Keen, Evershed* v. *Griffiths*, [1937] Ch. 236, referred to.

Counsel: *Scannell*, for the plaintiffs; *L. W. Willis*, for the first defendant, the Attorney-General; *Hallett*, for the second defendant; *Byrne*, for the third defendant, the Commissioner of Stamp Duties.

Solicitors: *Scannell and Bramwell*, Hastings, for the plaintiffs.

KEENAN v. AUCKLAND HARBOUR BOARD.

SUPREME COURT. Auckland. 1945. August 13, 14, 15, 17; September 7, 26; November 26. CALLAN, J.

Defamation—Libel—Absolute Privilege—Industrial Man-power Emergency Regulations—Worker suspected of Serious misconduct—Letter to District Man-power Officer containing Particulars of Alleged Misconduct and requesting Permission to terminate Worker's Employment—Refusal by Man-power Officer—Employer's Letter alleged to be libellous—Whether such Letter absolutely Privileged—Industrial Man-power Emergency Regulations, 1944 (Serial No. 1944/8), Reg. 13 (1) (d).

A letter by an employer in an essential undertaking to the District Man-power Officer notifying him of the suspension of a worker as required by Reg. 13 (1) (*d*) of the Industrial Man-power Emergency Regulations, 1944, giving particulars of the worker's alleged misconduct and requesting permission to terminate his employment, is written upon an occasion to which the rule of absolute privilege applies, and, therefore, the question of malice is irrelevant.

O'Connor v. *Waldron*, [1935] A.C. 76, and *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405, applied.

Slack v. *Barr*, (1918) 82 J.P. 91, considered.

Collins v. *Henry Whiteway and Co.*, [1927] 2 K.B. 378, distinguished.

Counsel: *Haigh* and *Turner*, for the plaintiff; *Hamer*, for the defendant.

Solicitors: *F. H. Haigh*, Auckland, for the plaintiff; *Russell, McVeagh, and Co.*, Auckland, for the defendant.

In re **McKAY (DECEASED), GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. JOHNSON AND OTHERS.**

SUPREME COURT. Wellington. 1945. December 10, 18. MYERS, C.J.

Will—Construction—Codicil revoking Legacy to "beneficiaries who have predeceased me"—One such Beneficiary surviving Testator—Principle to be applied.

The revocation by codicil of a legacy grounded on an assumption of fact which is false, takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation; or in other words, unless the revocation is contingent upon the fact being true.

In the Estate of Southerden, Adams v. *Southerden*, [1925] P. 177, applied.

Campbell v. *French*, (1797) 3 Ves. 321, 30 E.R. 1033, *Doe d. Evans* v. *Evans*, (1839) 10 Ad. & E. 228, 113 E.R. 88, *In re Churchill, Taylor* v. *Manchester University*, [1917] 1 Ch. 206, and *In re Faris, Goddard* v. *Overend (No. 2)*, [1911] 1 I.R. 469, referred to.

By his will the testator gave a legacy to J. A codicil contained the following clause—

"I revoke the pecuniary legacies to the following beneficiaires who have predeceased me."

Such beneficiaries included J., who, alone among them, had survived the testator.

On originating summons for determining the question arising out of the revoked legacy to J.,

Held, 1. That, in determining the construction of the revocation, the following facts, that if J. had died before the date of the codicil the revocation of the legacy to him was unnecessary, that J. was a friend of the testator and the will gave to J.'s son a legacy which remained unrevoked, should be taken into consideration.

2. That the revocation was contingent upon the fact of the beneficiary whose legacy was revoked predeceasing the testator being true.

Counsel: *Virtue*, for the plaintiff; *Macarthur*, for the first defendant; *Wild*, for other defendants.

Solicitors: *Young, Courtney, Bennett, and Virtue*, Wellington, for the plaintiff.

MOTOR COLLISIONS WITH OVERTAKEN PEDESTRIANS.

A Consideration of the Law, and Alleged Usage.

By R. T. DIXON.

A fruitful source of accidents to pedestrians is the practice, indulged in by many, of walking along the roadway with back to overtaking traffic. The danger is accentuated at night by any of the factors of dark clothing, a wet night, or bitumen road surface.

Recently at Gisborne the Grand Jury returned a No Bill in respect of an indictment against a motorist for negligent driving at night in such a case, after being charged by the presiding Judge that to his mind the depositions disclosed no evidence of negligence. According to the newspaper report, the road was bitumen surfaced and the clothing of the pedestrians dark.

Motorists, who are also all pedestrians at times, will sympathize with this view, and would consider that it is based on common sense to a considerable degree. The prevalence of this type of case and the issues raised justify a close examination of the position in law.

The importance of the matter is enhanced by the fact that there is no distinction in New Zealand between negligence as the foundation of civil liability and negligence as the foundation of criminal liability: *R.* v. *Storey*, [1931] N.Z.L.R. 417.

It seems convenient to consider the law as applying first to pedestrians, and then to motorists.

(*a*) *The Pedestrian.* From the point of view of the pedestrian, there is no definite statute-law in this country. He is required to keep to the footpath "as much as is practicable" when "a reasonably adequate footpath is available": Reg. 27 of the Traffic Regulations 1936 (Serial No. 1936/86). Apart from the difficulty of deciding what is the meaning of "as much as is practicable" and "reasonably adequate footpath" in any case, the effect of this requirement in negligence proceedings is considered later in this article.

Under para. (*a*) of the *New Zealand Road Code* the pedestrian is enjoined " where no footpath is available, keep to the edge of the roadway, and, if you have a reasonably clear view ahead. keep to your right of the roadway " ; but this road code does not in itself purport to have any force in law, nor has it any legal effect except so far as it repeats the provisions of, *inter alia*, the above Traffic Regulations, 1936. In this respect, the New Zealand Road Code differs from that of Great Britain: see 20 and 21 Geo. 5, c. 43.

According to *Beven on Negligence*, 4th Ed. 684, in England the " custom or law of the road is that . . . foot passengers take the right-hand " side of the road " and this is judicially recognized without proof." No authority is cited for this statement. The writer has made considerable search for any other authorative reference to this " custom or law of the road " and, although he cannot claim that his search was exhaustive, he has not been able to trace any other support for it at all. Under " Custom or Usage " in *10 Halsbury's Laws of England*, 2nd Ed. 64, there is reference to the usage of drivers or riders keeping to the left when meeting, but no mention of a road usage for pedestrians. In *Browne's Law of Usages and Customs* there is a reference at p. 11 corresponding with that in *Halsbury*, again with no reference to pedestrian usage; similarly in *Taylor on Evidence*, 12th Ed. 6. In the several British cases examined by the writer for the purposes of this article and dealing with collisions with overtaken pedestrians, no reference is made to any such usage. It seems almost that Homer in this case must have nodded, and that the sentence in *Beven* containing tihs statement should be limited in its application to the usage for vehicles and horses. In any case a usage so little noted by legal authorities in the country of its origin would be unlikely to have judicial effect in this country, even if the road conditions were the same; but actually the conditions are quite different. The practice of pedestrians making along a road on their right side has its main value on straight open roads. It may be be positively dangerous on that type of road (so common in New Zealand, but less common in Britain) which has frequent bends and a steep bank of cliff on one or both of the sides. The point has been dealt with by the writer at length because, in *Cooper* v. *Symes*, [1929] G.L.R. 463, the present Chief Justice referred to the above statement in *Beven*, and while declaring that for the purpose of that case it was not necessary to decide whether the custom was in force in New Zealand, he indicated that this may have to be decided in a later appropriate case.

So far as common law is applicable, it appears that, while there is an obligation that a pedestrian take reasonable care in his use of the road (*Harris* v. *McKinnon*, [1933] N.Z.L.R. 153), the fact that he is making along a road with his back to oncoming traffic does not in itself demonstrate lack of care: *Cooper* v. *Symes* (*supra*).

(*b*) *The Motorist.* The motorist at night when overtaking pedestrians has two requirements to consider which, if ignored, should create difficulty for him in an action founded on negligence, or proceedings in which negligence is an ingredient. Under Reg 7 of the Traffic Regulations 1936, as amended by Reg 5 of Amendment No. 1 (Serial No. 1939/76), he is required to have headlights on his vehicle which are of sufficient power to make " substantial objects " clearly visible to a driver of normal vision for 150 ft. in front of the vehicle. Under Reg 17 (1) of the 1936 regulations, it is an offence to drive a motor-vehicle " at such a speed that the vehicle cannot be brought to a standstill within half the length of clear roadway " visible ahead, with an exception to meet the case of one motor-vehicle following another. That a pedestrian is a substantial object and that the roadway in front of a motorist is clear only up to a pedestrian on it, and not further, appear to be matters of course. Therefore, the duty of the motorist under the regulations is obvious—namely, at night ,subject to the above exception, he should drive at no greater speed than will enable him to stop within at least half the distance of clear vision provided by his lights. When the night is rainy, or when other causes reduce the normal penetration power of the lights, Reg 17 (1) makes it obligatory that speed should be reduced accordingly, so that the requirements of the regulation may be complied with even under the adverse conditions: See *Dickson* v. *White*, [1931] N.Z.L.R., 849, and the unreported case, *Page* v. *Richards and Draper*, as set out in *Tart* v. *G. W. Chitty and Co. Ltd.* (1933) 149 L.T. 261 at p 263. Therefore, it seems that a motorist who overtakes and injures a pedestrian would find it difficult to escape a charge laid under one or other of the above regulations.

Nevertheless, the fact that a breach of the regulations has been committed does not of itself provide assurance that a charge involving negligence would succeed at law, even leaving out of consideration the well known whimsies of jurymen in this class of motoring case. A review of the law on this point would provide an article in itself. The position is summarized in *Mazengarb's Negligence on the Highway*, 260, as follows :—

> The law and practise of the highway define what is or is not reasonable conduct, and if an accident occurs from contravention of the law or practise of the highway, then *prima facie* the contravention is negligence causing or contributing to the accident.

It seems evident that the requirements for motor-vehicles to display good headlights at night and for the driver so to regulate his speed as to be able to stop within at least half the range of visibility provided by those lights, are in accordance with reasonable usage or practice on the highway. They would figure among the accepted precautions of the " ordinary prudent man " (who so often makes his synthetic bow in negligence cases), irrespective of the existence of positive laws on the subject. The same considerations apply also to the requirement mentioned earlier that a pedestrian keep to the footpath " as much as practicable " when it is " reasonably adequate ".

Nevertheless, it has been held by highest authority that " negligence is a question of fact not of law; each case must depend on its own facts; there is no rule of law which in every case disqualifies a motorist from recovering damages where he had run into a stationary unlighted object " (and presumably makes him liable for such damages in similar case); Ostler, J., quoted with approval in the Privy Council appeal decision *Stewart* v. *Hancock*, [1940] N.Z.L.R. 424, 428. While, therefore, one is tempted to assume a *prima facie* case of negligence against the motorist when he collides with an overtaken pedestrian, and this is borne out by several cases (*vide Dickson* v. *White*, *Page* v. *Richards and Draper* (*supra*), and *Mazengarb's Negligence on*

on the Highway, 279, 280, notes (*i*) (*j*)), each case must be dealt with on its own facts. Perhaps one may respectfully extend the *dictum* of Ostler, J., quoted above, by stating that there is no rule of law which in every case makes a motorist liable for damages when he collides with an overtaken pedestrian. On the other hand, it appears from examination of the law and authorities, as outlined in this article, that a Judge would give very grave consideration to the circumstances and he would weigh them with the utmost care, before directing a jury in favour of a driver whose vehicle has collided with an overtaken pedestrian.

* * * *

Since completion of this article, the recent case, *Ryan* v. *McDonald*, *Lane* v. *McDonald*, [1946] N.Z.L.R. 113, has been reported. In his judgment in this case, Blair, J., at p. 116, said :

> It is now commonly advocated that when pedestrians are walking along the road at night time they should walk on the off side of the road, because by doing so they then face approaching traffic and can keep out of its way. The rule of the road sanctioning the keeping of a led horse on the off side of the road is made because that puts the ridden horse between approaching traffic and the led horse.
>
> When the case was opened, counsel for the plaintiff mentioned the rule, but said that he had been unable to find in Palmerston any authority for it. I was able later on to refer to a textbook reference to it : see *Charlesworth's Law of Negligence* (1928), 70, where it said :
>
> > The rule of the road as to led horses or other animals is different from the rule applicable to ridden or driven horses or vehicles. The Highway Code expresses it as follows :
> >
> > "When leading an animal always place yourself between it "and the traffic and keep the animal to the edge of the "road. This rule applies equally whether you are yourself "walking or riding." This is presumably intended to embody the common-law rule, which is, that the horse should be led along the right-hand or off side of the road, with the man who is leading it on the left-hand or near side of the horse.
> >
> > That extract justifies the conclusion that the rule is intended to keep led horses as far away from approaching traffic as possible.
>
> There are no more recent references to this old rule which, no doubt, has its origin in the traffic existing in the days of horse traffic only.

With reference to the last sentence quoted from His Honour's judgment, it is worth recalling the provision of s. 4 (1) (*c*) of the Police Offences Act, 1927, which is as follows :

> (1) Every person is liable to a fine not exceeding ten pounds who, in or upon any public place— . . .
> (*c*) . . . rides any animal, and when meeting any other vehicle or animal, does not keep on the left or near side of the road or street, or, when passing any other vehicle or animal going in the same direction, does not go or pass, or does not allow any person desirous so to do to pass, when practicable, on the right or off side of such other vehicle or animal.

In view of this provision, it seems unlikely that the usage referred to by His Honour has any present application in this country. Although not relevant to the main subject of this article, the case is mentioned as being of interest in connection with a usage of the road other than those already considered.

LAND SALES COMMITTEES.

Revocation of Orders.

By C. C. CHALMERS.

A Land Sales Committee's power to revoke its consent order, after it becomes a Court order under s. 20 (2) of the Servicemen's Settlement and Land Sales Act, 1943, where there is no appeal, which was taken for granted in *In re A Proposed Sale, Lee to Taylor*, [1945] N.Z.L.R. 217, came up for definite decision in *In re a Proposed Sale, Fisher to Pitman*, [1946] N.Z.L.R. 61, *sub nom.* F. to P., *ante*, p. 10, where the judgment lays it down that a Committee has such power, but that it has no such power where there has been an appeal to the Court from the Committee's consent order. This latter differentiation will be discussed later.

The reasoning of the Court may be summarized as follows :

(1) A Committee's consent order, where there is no appeal, which becomes a Court order under s. 20 (2), remains, in essence, a Committee's order. It is an order of the Court "only by adoption." There is, accordingly, nothing "radical in the executive instrument which has power to make an order being given to revoke that order ".

(2) Apart from s. 52 there is, by common law, power in a Court to alter its judgment or order before, but not after, it has been perfected, that is filed and sealed.

(3) A Committee, as a "judicial tribunal," can, accordingly, by that common law rule, alter its order up to the point of time when it is sealed by the Court, and to limit the power of a Committee, under s. 52, to that point of time is "to impute to Parliament an intention to commit itself to . . . a nugatory proceeding," which "is impossible."

(4) The language of s. 52 (2) refers to a Court order, and not merely a Committee's order ; and, the judgment states,

(5) "That the right (of revocation) is unlimited in point of time anterior to settlement, and so may leave parties to suspended transactions in some measure of jeopardy, is an inescapable consequence."

The following comments on the judgment are submitted with the greatest respect to the Court, and mainly for the purpose of showing the need for the amendment of s. 52 :

(*a*) If, as the Court holds, s. 52 empowers a Committee to revoke a Court order, then there does not appear to be anything in the language of s. 52 to limit that right, as the Court does, to a Court order, where there has been no appeal. It would seem to follow, logically, that if s. 52 is not limited to a Committee's consent order before it is sealed by the Court, then it extends to every Court order, even one made after appeal, because the evidence on appeal may not reveal material facts which should have been submitted to the Committee. Moreover, there are probably appeals which are later abandoned, where the Court merely dismisses the appeal and confirms the Committee's order. In essence the Court's order, in these circumstances, is

still a Committee's order, and yet, by the judgment, s. 52 is inoperative, although matters may shortly afterwards come to light showing that the Committee's initial consent was obtained as the result of misleading statements, &c.

(b) The reasoning, set out in para. (3), *supra*, is, with respect, based on a misconception. A Committee's order (the Committee not being a Court of record, and not having a seal) is "perfected" when, under s. 20 (1) it is signed by the Chairman, or by a member, of the Committee, and filed in the Court, and, at the time of filing, the persons "affected by the order" are notified by the Committee of such filing. Once filed, time for appealing runs, which confirms the fact that the Committee's order has already been perfected. The subsequent sealing, where there is no appeal, is the act of, and something done in, the Court, with its own seal, and thereafter the Court itself cannot, under the common law rule, alter the order. Hence, s. 52 *was* necessary, if a Committee was to have power, after it had filed its order in the Court, to alter, or revoke, that order up to the point of time it was sealed by the Court.

(c) With regard to the language of s. 52 (2), if, as is submitted, the preceding subs. (1) refers to a Committee's consent (order) granted under s. 50, then subs. (2) must, it is submitted with respect, refer to the same consent order, and this removes whatever difficulty the interpretation of subs. (2) might, of itself standing alone, present. Subs. (1) says, "to whom consent has been granted under this Part of this Act," namely Part III, of which s. 50 is a portion; whereas a Committee's consent order becomes merged in, or is replaced by, a Court order under s.. 20 and 21, of Part I of the Act. Hence, subs. (1) appears to refer definitely to a Committee's consent order remaining as such. The object of s. 52 (2), it would seem, is not to allow the Committee's order, filed in the Court, to lie there and automatically become, in from seven to ten days, merged in an effective Court order under s. 20 (2), which would be bound to happen where the applicant for consent had made misleading statements, &c., because he would not be appealing. To prevent that the purpose of s. 52 (2), it is considered, is to impose an obligation on, and to give authority to, the person in whose favour the Committee has granted consent, to uplift that consent from the Court before it is sealed and the transaction validated. If the foregoing, thus far, is correct, the words in s. 52 (2), "shall not enter into complete or proceed with the transaction" could mean that the person to whom the Committee has granted consent is not to attempt to carry the matter further in any way.

(d) With regard to the effect of revocation (para. (5) *supra*), a sound reason why, it is considered, s. 52 was not intended to give jurisdiction to a Committee to revoke a Court order is the effect of revocation as set out in s. 52 (3). I refer to the words, "the Committee may by order revoke the consent, which shall *thereupon* be deemed not to have been obtained." The effect is twofold; the revocation is immediate in its effect, and at the same time the transaction is rendered illegal. It is strange, also, that revocation, which is serious, takes immediate effect; but the effect of the Committee's initial consent order is suspended until there can be an appeal.

If this revocation applied only to the Committee's consent, after it was granted under s. 50 and after it was filed in the Court, but before it was sealed there by the Court, the fact that the revocation took immediate effect would merely be placing the applicant in the same position as if the application had originally been refused under s. 50, before the transaction had been validated by a Court order; but leaving him with a right to appeal from such revocation order. It is reasonable to assume that subs. (3), of s. 52, was directed to that position. The result is, however, alarming, if, as the judgment holds, s. 52 applies to a Court order, because, when the Court order is made, the transaction is legalized. Then, on revocation of that order, the prior legality is converted into illegality until, and, if, there is an appeal, which may not be heard for several weeks. On the appeal, if the revocation is set aside, legality is again restored after a period of illegality! In the case of "suspended transactions" revocation will produce more complicated results, as this example will show: A. agrees to sell a farm to B. for £5,000, with £500 deposit, balance in 5 years. Consent is applied for and granted by means of a Court order under s. 20 (2). B., knowing he has the finance to complete in 5 years, forthwith erects buildings, &c., costing £1,000. Just prior to the expiration of the 5 years, the Committee, under s. 52 as interpreted, revokes the sale, by reason of misleading statements, &c., by the vendor, and, on appeal, this is sustained.

Obviously s. 52, as now interpreted, needs to be amended by circumscribing the powers of revocation by a Committee, in order to eliminate some of the serious uncertainties connected with transactions under the Act.

DEATH OF TENANT.

Effect on Statutory Tenancy under s. 16 of the Property Law Act.

The question is sometimes asked: Is a tenancy, to which s. 16 of the Property Law Act, 1908, applies, determined by the death of the tenant?

It was held in *Sievwright* v. *Marsh*, (1938) 1 M.C.D. 85, that it did not so determine, and the great weight of authority appears to support this view. A tenancy of the kind referred to in the question is different from a statutory tenancy under the Fair Rents Act, 1936. In respect to the latter, it has been held under the English Rent Restriction legislation that the right of a statutory tenant is a mere personal one and cannot be transmitted by will: *John Lovibond and Sons, Ltd.* v. *Vincent*, [1929] 1 K.B. 687. A contractual tenancy on the other hand is a different matter. In

Lovibond's case (*supra*), at p. 697, *Sankey*, L.J., (as he then was) said :

> It is to be observed that the facts in *Collis* v. *Flower*, [1921] 1 K.B. 409, and *Mellows* v. *Low*, [1923] 1 K.B. 522, . . . were different from those in the present case, for in each of those cases a contractual tenancy was in existence between the landlord and tenant at the date of the tenant's death. Regarding those two cases just referred to, *Bankes*, L.J., in *Keeves* v. *Dean*, [1924] 1 K.B. 685, 690, says "The two cases of *Collis* v. *Flower* and *Mellows* v. *Low* were both cases in which the original tenancy had not been determined at the date of the death, and in which therefore the position of a person claiming under a will, or as administrator, of a tenant dying after the statutory tenancy had begun did not directly come in issue."

Keeves v. *Dean* decided that statutory tenancy was not assignable.

In *Mellows* v. *Low* (*supra*), at pp. 524, 525, *Sankey*, L.J., dealt with the question of weekly tenancies thus (and his words apply with equal cogency to our monthly tenancies) :

> The first question is, what is the position of a weekly tenant ? It is vital to remember that the letting to a weekly tenant is not a letting which expires at the end of the first week or at the end of each succeeding week ; in the ordinary course . . . it is a letting for a period of time, which is determinable by due notice, generally regarded as a week's notice. In *Gandy* v. *Jubber* the Court of Exchequer Chamber pointed out that in the case of a tenancy from year to year there is no a reletting at the commencement of every year ; but there is a springing interest which arises and which is only determined by a proper notice to quit. *Bowen* v. *Anderson* applied the same principle to a weekly tenancy, the headnote to that case correctly stating that "a weekly tenancy did not determine without notice at the end of each week, but some notice is required to determine such a tenancy." The result therefore is . . . that on the death of Miss Biggs (the tenant) the tenancy did not *ipso facto* determine. . . . Upon letters of administration being obtained by Mrs. Low, her title related back to the death of Miss Biggs, and *prima facie*, therefore, she acquired the continuing interest of Miss Biggs in the tenancy in the absence of any notice to quit. That would be the position at common law, and I desire to repeat what I said in *Collis* v. *Flower*, that all tenancies, whether long or short, *prima facie* vest in the executor or administrator, as the case may be, upon the death of the tenant.

Again, in *Morton* v. *Woods*, (1869) L.R. 4 Q.B. 293, 306, *Kelly*, C.B., said :

> It was said that . . . were inconsistent with a tenancy at will, because a tenancy at will cannot be created so as to continue beyond the lives of the immediate parties. The whole law on this subject is based on very fine distinctions ; but when we come to look at the cases, it would rather seem that a tenancy at will may continue to subsist after the death of one of the parties, unless the heir or legal representative shall do somthing to manifest his intention to determine the tenancy.

In *Woodfall on Landlord and Tenant*, 21st Ed. 464, it is said :

> A tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives, who are entitled to give or receive the usual notice to quit.

But at p. 283 it is said, on the other hand :

> An estate at will may be determined by a demand of possession, or by implication of law : of the latter description will be the death of either party.

A case, however, having a direct bearing on the question is that of *Doe* v. *Porter*, (1789) 3 T.R. 13, 1 R.R. 626. In his judgment in that case Lord Kenyon, C.J., says :

> And the first question is, What title is proved to have been in W.S. at the time of his decease . . . ? And I think the only inference to be drawn from it is, that he had that interest which his administrator says he had—namely, a tenancy from year to year so long as both parties pleased. As between the original parties, so long as both of them lived, he could not have been dispossessed without six months' notice ending at the expiration of a year. But it is argued, that though this was the interest which W.S. had, a different interest devolved on his personal representative. On this question I do not know how to state a doubt ; for this was a chattel interest from year to year as long as both parties pleased ; and it seems clear to me, that whatever chattel the intestate had must vest in his administrator as his legal representative. Then it is supposed that some inconvenience may result from such a determination. . . . The tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences. And in order to obviate them, the Courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months' previous notice. And all the inconveniences which arise between the original parties themselves, and against which the wisdom of the law has endeavoured to provide by raising the implied contract exist equally in the case of their personal representatives.

The other members of the Court concurred.

In New Zealand, the Legislature, and not the Court, dealt with the question of tenancies of indefinite duration, by enacting s. 16 of the Property Law Act, 1908. As was said by Edwards, J., in *Tod* v. *McGrail*, (1899) 18 N.Z.L.R. 568, 572 :

> The object of the statute was to abolish all tenancies by implication of law, save that created by the statute itself, and to substitute one definite uniform rule for the determination of the nature of all indefinite tenancies, for the more difficult and complicated rules which prevail at common law. A mere general letting without specifying a term, undoubtedly creates a tenancy at will at common law . . . such a tenancy, which would be a tenancy at will by implication of the law at common law, comes, as it is clear that it does, within the statute.

However, it does not seem to be correct to call a tenancy governed by s. 16 a tenancy at will. "A tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end": *20 Halsbury's Laws of England*, 2nd Ed. para. 131 : "Anything which amounts to a demand of possession . . . , is sufficient to indicate the determination of the landlord's will. . . . The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with the continuance of the tenancy ; for example, when he re-enters to take possession . . . ." (*ibid.*, 132). It is stated in para. 134 of the same volume that "A tenancy at will is a personal relation between the original landlord and tenant, and is determined by the death of either of them."

It is not a tenancy at will because the tenancy continues until it is determined by either party by one month's notice to quit. Until such notice, it is clear on the authorities that the tenancy continues to subsist. It is on this view that we can appreciate the effect of the statement in para. 134, as to a tenancy at will creating a personal relationship between the parties. A statutory tenancy under the Fair Rents Acts, too, would indeed appear to create a similar relationship—as pointed out in some of the cases cited above. On the other hand, a tenancy to which s. 16 of the Property Law Act, 1908, applies results from a contractual relationship, and is thus on a different basis from a mere tenancy at will. Therefore the personal representatives of the deceased tenant have the same interest in the property as the tenant had.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 70.—D. to D.

Rural Land—Modern Residence in Remote Location—Consideration whether Cost and Value necessarily Equal—Absence of Market for Old Houses—Small Demand for New Residences—Question of Value—Evidence available.

Appeal from the determination of a Land Sales Committee.

The Court said: "This case presents some difficulty. It may be said at once that Mr. A., the District Valuer, is correct in his view that cost and value are not necessarily equal. Indeed, given the requisite circumstances, value might be only a minor proportion of cost.

"The question of the difference between the two becomes acute where, as here, what is involved in the appeal is a modern house, in good order, and containing every convenience. The intrinsic value of the house is not in question: what is disputed is the price at which the house could be sold having regard to its location. There are apparently only two or three other houses in Coromandel equally modern and commodious and equally well equipped. The owners of these other properties seem never to have endeavoured to sell them, so that the saleable value of any one of them or of any house like them is by no means easy to determine.

"Mr. C., for the appellant, testifies to the existence of a market for properties in Coromandel. He says that people who are not residents of that town are ready and willing to pay a reasonable price for houses there. This condition might well exist in respect of the modern houses in the place without Mr. A., being aware of the fact. His position, in common with that of all Government Valuers, is strong in that he has knowledge of all transactions actually effected, but weak in that the extent of his district and the volume of his work cuts him off from some elements of local knowledge, particularly where that knowledge is founded upon conditions which are not well marked nor widely known.

"It is possible that there may be some although perhaps only a weak market for the few modern homes in Coromandel, and Mr. A., not be aware of it. That this market does not extend to the more old-fashioned erections is proved by the sale prices given in evidence by Mr. A. They demonstrate the weakness of the property market generally and the lowness of sale values there as compared with replacement costs. The low prices paid in respect of some of the sales to which he referred seem to be due to particular circumstances, such as the sale from Mrs. T. to D. where a house containing 1,800 square feet with an outside washhouse was sold for £250 in November, 1944, despite the fact that the house was a kauri house in reasonable condition. It transpired that that sale was initially by an old lady who wanted to leave Coromandel and who had a mortgage for an oppressive amount on the property. The resale of the property at the same price later was explained by its being one element only in the sale of a somewhat considerable business as a going concern.

"Similarly, the purchase by Mr. G., in August, 1945, of a house in fair condition containing 1,384 square feet, with a storehouse, cow shed, and fowlhouse for £280 seems capable of explanation. This was apparently a family transaction.

"Despite such explanation in such particular cases, the evidence as a whole suggest that there is no market, substantially speaking, for old-type houses in Coromandel, and that in respect of them Mr. A., is right in assessing their sale value below replacement cost. The evidence which establishes this absence of market for old houses does not, however, go far enough to prove a similar absence of a market for the very few modern houses. As to that, the evidence is somewhat inconclusive.

"Such evidence as there is tends to support a contrary view. For instance, the property now under consideration was sold by the present purchaser to the present vendor for £2,500 in about October, 1941. Since then sheds have been built upon the property, the paddocks have been subdivided, water has been led into every paddock, and troughs erected. In addition, the house has been painted and hedges planted.

"The sale price of £2,500 on that occasion, although expressed to be in part satisfied by way of exchange, seems to have represented genuine value so far as the property given in exchange was concerned. The resale of the property at the same price, plus the cost of subsequent improvements, from the present vendor to the present purchaser is itself some faint suggestion that the value of the property is the present sale price.

"Upon the whole, therefore, there is no cogent proof that the basic value of the property is less than the sale price, and there is some scintilla of proof that the basic value and the sale price are equal. That being so, it is impossible to find that the Committee was in error in consenting to the sale at the sale price. As the success of the appeal by the Crown is dependent upon it being established that the sale price is too high, no course is open but to dismiss the appeal, and it is dismissed accordingly.

"It may not be undesirable to comment that, as the result of this appeal has accrued from an absence of proof, the production of that proof in any subsequent proceedings may produce a different result."

No. 71.—McI. to H.

Jurisdiction—Constraint of Vendor—Premises subject to Expiring and Non-renewable Lease—Owner's Application opposed by Tenant—Value—Local Goodwill—Premises in which sucessful Business carried on—Enhancement of Value by both Vendor and Purchaser.

Appeal by the vendor and purchaser from the decision of a Land Sales Committee relating to the sale by the vendor to the purchaser of premises at the corner of Antigua and Tuam Streets, Christchurch, on which a grocery business had been and was being carried on. One, A. G. Anderson, the present tenant and proprietor of the business, opposed the Application for consent to the sale. Anderson was holding under a three years' lease of the premises which expired on January 1, 1946.

The Committee considered that the proposed sale from the vendor to the purchaser would operate to deprive Anderson of the goodwill, which he must be assumed to have purchased when he took the lease and purchased from the vendor the stock and fittings in the premises, a goodwill which, by his industry, he had much augmented. There was a suggestion that the proposed purchaser designed, with the concurrence of the vendor, to acquire the goodwill without payment.

The Committee considered it had a discretion under s. 63 of the Servicemen's Settlement and Land Sales Act, 1943, and refused consent to the sale.

The Court said: "1. Two conceptions are basic to the decision of the Committee. The first is that the Committee has jurisdiction under the Servicemen's Settlement and Land Sales Act to alter, upon equitable grounds, the terms of a contract made some three years ago and now almost completely performed by both parties to it. The second is that the goodwill attaching to a business established in leasehold premises adheres and should adhere exclusively to the tenant-proprietor of the business and cannot and should not, in fairness, be regarded as creating any element of value in the premises.

"2. As to the first conception, little comment is required; it carries its own refutation on its face. The position in which Mr. Anderson, the tenant, finds himself is the natural and normal consequence of the contract which he made with Mr. McIntyre when he took the lease. Having arranged for a term of three years without any provision for renewal or extension of the term, and without any provision which would secure to him any benefit in respect of the business which he might develop in the leased premises, he of his own volition created precisely the position which now pertains. Any attempt, therefore, to secure to him anything in the nature of a paramount or primary claim upon the vendor or upon the property

necessarily amounts to an attempt to alter the terms and incidence of the contract he initially made and under which he has all along occupied the premises. Not only so, but the attempt is made when the contract is on the point of expiring by effluxion of time.

"The Act confers no jurisdiction to do or attempt to do anything of the kind. Mr. Anderson can only, in consequence, be regarded as a tenant whose lease is about to expire.

"Beyond the rights recognized by law which his character as tenant and the terms of his lease confer upon him, he is a stranger to the transaction with which the Committee is concerned. It would, in consequence, be an improper exercise of jurisdiction for the Committee to reach a decision deliberately designed to compel the vendor to sell to Mr. Anderson. Like any owner of property that is subject to an expiring lease, Mrs. McIntyre had and has an absolute right to sell to whom she pleases, and the Committee has neither the power nor the right to constrain or attempt to constrain the vendor to sell to any particular purchaser. The Court regards any such attempt at constraint as a serious invasion of private rights, unwarranted by Legislative authority.

"The short answer to the position adopted by the Committee is that s. 63 does not extend to such circumstances as here pertain. Incidentally, the Committee defines the terms of the contract for a lease between Mrs. McIntyre and Mr. Anderson as 'inequitable.'

"This conclusion is open to serious question, for no ground is anywhere alleged which would justify the Supreme Court in refusing to enforce the contract and it would still, so far as can be seen, regard the contract as valid for all purposes.

"3. No question of personal goodwill arises. The vendor has purported to sell none, nor is Mr. Anderson in any way restrained from his enjoyment of such goodwill. He is subject to no legal restraint: he can still and will at all times continue to be able to canvass and serve his old and present customers, and will at all times be entitled to compete with any business which may be conducted in the premises he now occupies.

"The only element of goodwill that will be lost to him is what in *32 Halsbury's Laws of England*, 2nd Ed. 449, is termed 'local goodwill,' that is, the goodwill attaching to the premises. His inability to enjoy that element of goodwill is not due to any legal restraint, but solely to the fact that by his contract made three years ago he failed to protect himself against its loss by agreeing to deliver up the premises at the expiration of the term of the lease. His loss is, therefore, due to circumstances which he voluntarily created and, incidentally, to circumstances which must have been present to his mind throughout the whole term of his lease.

"4. The Committee will necessarily have to consider to what extent the existence in the premises of an established business and the fitness of the premises for that particular business adds to the value of the premises.

"It is beyond question that where premises are of such a character or are so situated that they command a good trade, a purchaser will give more for them, in other words, they are of more value than they would otherwise be. This is a paraphrase of the language of Lord Justice A. L. Smith in *Cartwright* v. *Sculcoates Union* (1899) 1 Q.B. 667, 677. The somewhat similar language of Blackburn, J., in *Mersey Docks and Harbour Board* v. *Liverpool Overseer*, (1873) L.R. 3 Q.B. 84, 97), was adopted with approval, by Lord Davey in the House of Lords in *Cartwright's* case, [1900] A.C. 150, 158. The approved passage reads: 'If the hereditaments are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation.'

"The extent of the business has to be considered in determining the extent to which the business enhances the value of the premises. In that relation Lord Halsbury, L.C. in *Cartwright* v. *Sculcoates Union*, (1899) 1 Q.B. 667, 674, said: 'I am not aware that, as one test in ascertaining whether a house is capable of doing a good business or not, it would be inappropriate, whether it is a public house or a shop of any other kind, that somebody or another should be called as a witness to say, "I saw every day the house quite full of customers."'

"5. Guided by the principles here enunciated, the Committee will be enabled to deal effectively and properly with the application.

"The appeal is allowed and the application is referred back to the Committee for reconsideration. Appeal allowed."

NO. 72.—McD. TO C.

Rural Land—Productive Value—Necessary Regeneration Work—Court's Assessments of Income and Expenditure.

Appeal concerning a property comprising 562 acres with dwellinghouse and farm buildings, situated at Windsor Township near Oamaru.

The consideration was £10,119 6s. The Committee gave its consent to the sale at a price of £9,554. Appeals against the Committee's decision were lodged by the vendors and by the Crown.

The Court said: "1. The crucial feature which must be kept constantly in mind is that the basic factor calling for determination is the productive value of the property as at the date of sale. It is to that value that adjustments by way of addition or deduction have to be made both (*a*) in respect of those matter specifically defined by the statute, and (*b*) in respect of such other matters as the demands of justice require should be taken into account.

"2. Having regard to the present state of the property (as to which there seems no substantial conflict of testimony) it is obvious that one witness for the appellant in his assessment of value completely lost sight of the fundamental factor above mentioned, whilst the other appears to have done so to some degree. The evidence of the former must, in consequence, be disregarded, whilst the evidence of the latter must be weighed with discrimination.

"3. A careful perusal of Mr. M.'s evidence—the opportunity of hearing him or, indeed, any of the witnesses, was not available to the Court—suggests that in assessing the carrying capacity of the property, he has to some extent anticipated the results of the necessary work of regeneration.

"The measure of his anticipation is likely enough expressed by his introduction to the property of dairy cows, pigs and poultry, in addition to a full complement of sheep. These may well find a place in the farming operations in the future; but it is very questionable if an average efficient farmer would concern himself with them whilst the heavy task of regenerating the pastures remained on his hands. They represent, in short, potential and not present sources of income.

"4. The necessity for repairs and regeneration is a cardinal feature in another respect. Having regard to the demands this work is certain to make on the time and energy of the owner, and particularly to the work involved in clearing the property of twitch which has extended over a considerable area, it is doubtful if any such extensive policy of cropping as Mr. M. envisages would or could be embarked upon for some time to come. At some later stage it may be. That is another element of potential, as opposed to present, value from the point of view of production.

"5. The conclusion seems inescapable that the nearer approach to the present productive value is that presented in the budgets produced by Messrs. F. and J.

"6. These latter budgest, however, conflict somewhat sharply in at least one important respect—namely, as to labour costs. For a gross return of £2,022 and a net return of £416 Mr. F. allows £589 for labour costs, whilst for a gross return of £2,211 and a net return of £380, Mr. J. allows £399 only for labour.

"Not only so, but the latter for his lower labour cost envisages the production of 2,025 bushels of wheat as against the 1,250 bushels envisaged by Mr. F. These figures are irreconcilable and there is nothing in the Crown evidence anywhere that would enable the Court to determine which is right and which wrong.

"On the other hand, Mr. M.'s assessment of labour cost at £610 for his much heavier programme of work is some indication that Mr. J.'s assessment is the more correct.

"7. If Mr. F.'s budget is adjusted by the elimination of his labour cost item and the incorporation of the labour cost assessment of Mr. J., the surplus income in Mr. F.'s budget will be £606, resulting in a productive value much in excess of the sale price even if deficiencies are allowed for at the maximum sum claimed by any witness.

"8. The process of substitution proposed in the foregoing paragraph is, however, neither logically justifiable nor satisfactory as a basis of determination. The only safe conclusion is that the Crown evidence is, as to labour reward, too conflicting and inconclusive to be made the basis of a decision.

"9. In the result, leaving all minor questions out of consideration, the Court is faced with the position that the evidence on both sides is unconvincing in its result. No question of personal integrity is, of course, involved. One set of witnesses merely seems to have failed to appreciate the true issue, whilst the other set are in conflict on a major item.

"10. As finality is doubtless essential to the parties to the transaction, the Court, instead of calling for fresh evidence which would entail much delay, has endeavoured to arrive at a just conclusion by spelling out proper assessments of income and expenditure from the evidence as a whole.

"By that process it has come to the conclusion that the decision of the Committee was, in its result, substantially fair. The appeals are therefore both dismissed. Appeals dismissed."

LAND AND INCOME TAX PRACTICE.

Compensation.

Compensation Received—Whether or not assessable. The recent English case, *Barr Crombie and Co., Ltd.* v. *Commissioners of Inland Revenue*, regarding the assessability of compensation received for loss of managerial fees, will be of interest to readers.

The appellants were a private limited company incorporated on November 3, 1916, to carry on the business of shipowners, shipping managers and agents. Another company called the Barr Shipping Company was formed on August 7, 1924, and carried on the business of shipping until its liquidation on November 5, 1942. The articles of association of the shipping company provided that the appellants should be managers of its ships and from the beginning of the shipping company's existence the appellants acted as their shipping managers under various agreements. By a minute of agreement dated May 25, 1937, the appellants were to continue to act as managers for the shipping company until January 1, 1951, and to receive a management fee of £500 per annum for each vessel, a commission of 1 per cent. on the price of any vessel built, purchased or sold, and a commission of 5 per cent. on the shipping company's profits as defined in the agreement. The remuneration to be paid to the appellants until the termination of this agreement was not to be less than £2,000 per annum. The fourth article of the agreement provided that should the shipping company go into liquidation, either voluntary or compulsory, or cease to carry on business for any other cause, then the remuneration to be paid by it to the managers in respect of the period from the date of liquidation until the date of expiry of the agreement, should become immediately due. On November 5, 1942, that is eight and a half years before the expiry of the agreement, the shipping company went into liquidation and paid to the appellants the sum of £16,306 16s. 11d. under the terms of the agreement. During the whole sixteen years from 1924 to March 31, 1940, 88.23 per cent. of the appellant company's income was derived from managing the shipping company, 1.78 per cent. from other managements, and 9.99 per cent. from sundry sources, such as interest on loans. In the following three years the company obtained the management of four ships from the Ministry of War Transport, but this was abnormal and temporary business. Over the whole nineteen years to March 31, 1943, the respective proportions were 84.32, 7.65 and 8.02 per cent. Upon the liquidation of the shipping company, the appellants lost their entire business apart from the abnormal business for the Ministry of War Transport, and in consequence it was forced to reduce its staff and salaries and to move to smaller premises. The appellants were assessed for income-tax on the sum of £16,306 16s. 11d., and appealed against the assessment on the following grounds:—

(1) The sum of £16,306 16s. 11d. received from the shipping company was compensation for loss of an agency which was fundamental to the appellants' business.

(2) That the minute of agreement with the shipping company represented a capital asset fundamental to the company's business, or alternatively that the sum was damages for breach of an agreement having a term of years to run and affecting the structure of the company's business, and was not a trading receipt in either case, within the principle of *Van den Berghs, Ltd.* v. *Clark*, [1935] A.C. 431, 14 A.T.C. 62.

The Commissioners of Inland Revenue contended that the sum of £16,306 16s. 11d. was a trading receipt of a revenue nature and assessable accordingly. The Special Commissioners upheld that decision on the grounds that the sum was remuneration under a service agreement and a trading receipt on revenue account.

On appeal to the Court of Session, however, the decision was reversed, it being held that the payment made by the shipping company to the appellants was a capital payment and not chargeable to income-tax as annual profit.

Trust of a Public nature—Whether or not charitable.—In *Trustees of Sir Howell Jones Williams Trusts* v. *Inland Revenue Commissioners*, [1945] 2 All E.R. 236, under a trust deed, executed on October 12, 1937, certain freehold hereditaments, situated in London, were held by the appellant trustees "for the purpose of establishing and maintaining an Institute and meeting place in London . . . for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history, literature, music and art." The term "Welsh people" was defined as meaning and including any person of Welsh nationality by birth or descent, born or educated or at any time domiciled in the principality of Wales or the country of Monmouth. The deed provided that the purposes for which any part of the settled properties could be used, should be of an educational social and recreational character, and also for any of the purposes of the young Wales Association, Ltd., a company limited by guarantee whose objects were similar. This company, which later changed its name to "The London Welsh Association," occupied and managed part of the Trust property as an Institute for the purposes set out by the Trust deed. The remainder of the Trust properties situated in Doughty Street, were let to tenants and in the trust deed the trustees were directed to apply the rents and profits therefrom to carry on the Institute.

The trustees applied for exemption from income-tax under Schedule A in respect of the Doughty Street houses, on the ground that the houses were vested in them for charitable purposes only within the meaning of the Income Tax Act, 1918, s. 37 (1). This claim was rejected by the Special Commissioners, whose decision was upheld by the Judge. On appeal, the questions for determination were:

(i) Whether the Doughty Street houses were vested in the appellant trustees at the relevant time for "charitable purposes" only within the meaning of the Income Tax Act, 1918, s. 37 (1) (*a*);

(ii) If so, whether the sums in question were "applied to charitable purposes only" within the meaning of the same subsection.

Held, (1) There being no common quality which united the potential beneficiaries into a class except a vague connection with Wales, either through local residence or education, or by descent, it was impossible to hold that a trust for such beneficiaries was a good charitable trust.

Since by the terms of the deed the trustees were empowered to apply the rents and profits for the maintenance of the Institute, one of the functions of which was that of an ordinary social club, such function would be sufficient to prevent the trust being a "public charity" or for the "benefit of a defined community." The properties in question were, accordingly, not vested in the trustees for charitable purposes only.

(2) It followed that the Special Commissioners were justified in holding that the sums which the appellant sought to free from Schedule A tax were not in fact applied to charitable purposes only.

Scott, L.J., in the course of his judgment said, in connection with the contention that it was a charitable trust, "To constitute such a charity there must be a purely public trust for the benefit of the definite community to be benefited and not a trust for the benefit of individuals: and it must be of such a general kind as will permit of the Court making a scheme for its administration, that being the only way in which the community can enjoy such a public charity . . . In the present case it is, in my view, impossible to say that there was any definite community such as could confer a public quality on the purposes of the trust. The definition of "Welsh people" in clause 1 of the trust deed includes persons of any nationality who have ever been "educated," or at any time "domiciled" in Wales; and clause 4 directs the application of the trust moneys to the establishment and maintenance of the Institute as a meeting place in London for anybody and everybody falling within that very wide definition, who might happen to be "resident in or visiting London," with a view to creating a centre for (*inter alia*) their social welfare . . . These specific provisions suffice of themselves to justify the conclusion of the Commissioners that an ordinary social club was, to say the least, a main object of the Institute. They thought it the Institute's dominant function; but even if it was only one function, it is enough to prevent the trust being, in the eye of the law, a "public charity" or for the "benefit of a defined community."

Lawrence, L.J., in referring to certain authorities on the point, said: "It is clear . . . that the law recognizes no purpose as charitable, unless it is of a public character, that is to say, for the benefit of the community or an appreciably important section of the community and not merely for the benefit of private individuals, or a fluctuating body of private individuals, and unless the section of the community is sufficiently defined and identifiable by some common quality of a public nature."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Rt. Hon. Lord Greene, M.R.—Scriblex's scouts who keep their ears close to the sacred ground whereon the judiciary is wont to tread inform him that Lord Greene, M.R., hopes to take advantage this year of the Long Vacation to make a trip to New Zealand. It would be pleasant indeed to meet one whose "clear and lucent mind" enabled him to have one of the most lucrative practices at the Bar. Called to the Inner Temple in 1908, he took silk in 1922, but in the intervening period he served on several fronts during the 1914–18 conflict, including three years in the trenches before becoming a staff officer. In 1925, he acted as chairman on the "Greene Committee" on Company Law, whose recommendations resulted in the present legislation. Ten years later, he was made a Lord Justice of Appeal; and in 1937 he became, in succession to Lord Wright, Master of the Rolls—the youngest on record to be so appointed.

The Indiscreet Wife.—Regarding the matter as one of very great importance, Lord Merriman in *Glenister* v. *Glenister*, [1945] 1 All E.R. 513, has dealt with a position that crops up for consideration frequently in separation and maintenance cases. The question is: what is the position of a husband who, unable to prove adultery, yet leaves his wife, where she has so conducted herself as to lead any reasonable person to believe, until she gives some explanation of her conduct, that she has committed adultery? Even if she is ultimately held not to have committed adultery, is the inference (honestly drawn by the husband from the facts that she has done so) sufficient to enable him to resist the charge of desertion or, on the other hand, should he be held to have left her without reasonable cause? In the view of Lord Merriman, if the latter proposition is the law, it puts the husband in an almost impossible position since, if the wife so conducts herself to the knowledge of the husband as to warrant the inference that adultery has been committed, and the husband continues to live with her, he is in danger of being held to have condoned her offence because he has taken her back with full knowledge of the circumstances from which adultery could be inferred. He should be absolved from the charge of desertion where she has so conducted herself as to give him reasonable ground for supposing that she has committed adultery.

Unidentified Motorists.—The Minister of Road Transport in England, in order to cover one of the gaps in the system of third-party insurance created by the Road Traffic Acts of 1930 and 1934, has announced that an insurer's association is to be set up by agreement with insurers who would keep it supplied with funds. Where judgment is not satisfied, the body is to undertake to pay any amounts awarded by the Courts to a third party in respect of liability required to be covered by the provisions of the Acts, but the agreement does not cover the case of a person injured by a motorist who cannot be traced. In such an instance, the insurers state that where there is reasonable certainty that a motor-vehicle is involved and that, but for its unidentity liability, a claim might lie, they will give sympathetic consideration to the making of an *ex gratia* payment. This arrangement appears to indicate a nervous reluctance on the part of the indemnifiers that was not evident in the case of the statutory insurers in New Zealand. Here, since 1931, by reason of agreement between the Crown and accident insurers, claims lie in respect of death or bodily injury caused by the use of motor-vehicles that cannot be identified. The only fly in the ointment seems to be that claimants must establish that legal liability arose when registration-plates were attached in the legal manner and that these were issued in respect of a period during which the legal liability arose. Thus, practitioners should particularly impress upon such clients as are likely to be hit by non-stop motor-vehicles that, before lapsing into a state of unconsciousness, they should make a careful note of the precise position of the number-plate and satisfy themselves that the number, although never seen by anybody, is yet current and not stale.

The Palsgraf Case.—As a test of the laymen's reasoning against that of the Courts, the *Reader's Digest* (January, 1946) gives the short facts of six perplexing cases. One of these is *Palsgraf* v. *Long Island Railroad Company* (1928) 248 N.Y. 339, where a railway guard, in helping a passenger who was attempting to board a moving train, knocked a package from his arms. Unknown to the guard, the package contained fireworks which violently exploded, knocking over some scales a considerable distance away. These, in falling, injured the plaintiff, Helen Palsgraf, who was an intending passenger. In the trial Court she obtained a verdict; the Appellate Division affirmed the judgment; but the decision by a majority of four to three was reversed by the Court of Appeals. Cardozo, J., speaking for the majority said: "Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right . . . One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person."

Cardozo must be ranked with the most eminent and judicial minds of this century. "In the American sociological jurisprudence," says Dr. Roscoe Pound, one of America's greatest writers on law, "the outstanding work is that of Mr. Justice Cardozo."

From My Note-book.—"The rules of pleading and procedure are the servants and not the masters of the administration of justice. We are not playing a game of forfeits or scoring by tricks; out task is to determine rights."—Chief Baron Palles.

"Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through."—Swift, in *Essays on the Faculties of the Mind.*

"What is said to be the uncertainty of the law is in truth an uncertainty of facts or an uncertainty of ill-drawn documents."—Lord Bramwell.

PRACTICAL POINTS.

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1. Company Law.—*Misfeasance alleged against director—Procedure to obtain Disclosure.*

QUESTION: (1) What is the procedure to force director A., who has controlling power, to disclose to the company details of a transaction he had with the company?

(2) As an ordinary shareholder, it seems that A. may take the balance of profit after satisfying the dividend payable to the preference shareholders. He has taken some of the company's products on account of this profit without accounting for such action. Possibly he is trustee of such assets (see *D. Henderson and Co., Ltd.* v. *Daniell's*).

(3) How may the company best establish its rights in (1) and (2) in one action?

ANSWER: The question is not sufficiently detailed to admit of a precise answer.

As to the fiduciary nature of a director's duties, in addition to the case cited, (1902) 20 N.Z.L.R. 722, aff. on app. N.Z. P.C.C. 48, see the House of Lords decision *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378, where it will be observed, three alternative causes of action were included in the one action.

Under the present law the rights of minority shareholders s not always adequately protected, and accordingly, the recent committee which sat in England, has recommended alterations to the statute. For example, the following passage from its report may fit this case:—

> *Excessive remuneration of directors.*—Another abuse which has been found to occur is that the directors absorb an undue proportion of the profits of the company in remuneration for their services so that little or nothing is left for distribution among the shareholders by way of dividend. This may happen where, for example, two persons trading in partnership form their business into a limited company and one partner dies, leaving his shares to his widow who takes no active part in the business. At present the only remedy open to the minority shareholder is to commence an action to restrain the company from paying the remuneration on the ground that such payment is a fraud on the minority, since the Court would not make a winding-up order in view of the alternative remedy.

Of course, a director is liable, if he pays dividends out of capital: *Morison's Company Law in New Zealand*, 2nd Ed., p. 148.

Reference, however, may be made to the following sections of the Companies Act, 1933, which may be of assistance: ss. 154, 155, 129, 131, 301 142, . X2.

2. Life Insurance.—*Policy for Benefit of Insured's Wife or Children—Payable at Insured's Death—Whether forming Part of his Dutiable Estate—"Estate"—Married Women's Property Act, 1908, s. 16 (2).*

QUESTION: A life insurance agent has been exhorting a client of ours to take out a life policy paya' le on death and expressed to be for the benefit of our client's wife and/or children. The agent states that the proceeds from such policy will not form part of our client's estate for death-duty purposes.

The agent claims authority for his statement in s. 16 (2) of the Married Women's Property Act, 1908, where it is provided that "the moneys payable under any such policy shall not . . . form part of the estate of the insured or be subject to his or her debts."

The law relating to death duties being such as it is, we think it unlikely that "estate" in the subsection mentioned means "estate for death-duty purposes." Will you please advise on that point?

ANSWER: The proceeds of the policy will be liable to death duty on the clients' death, by virtue of ss. 5 (1) (*f*) and 16 (1) (*e*) of the Death Duties Act, 1921, if deceased has paid all the premiums: *In re MacEwan, Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1945] G.L.R. 92.

If the client pays only some of the premiums, only a proportionate part of the policy-moneys will be eligible: *Adams Law of Death and Gift Duties in New Zealand*, 53.

If the client pays none of the premiums, there will be no liability for death duty on his death, because the wife and children have a vested interest from the first, s. 5 (1) (*g*) not applying: *Inland Revenue Commissioners* v. *Hamilton's Trustees*, [1942] S.C. (Ct. Sess.) 426. X2.

3. Administration.—*Partial Intestacy—Distribution of Shares—Issue of Surviving Brothers and Sisters—Whether such Brothers and Sisters must be "living at the death of the intestate"—Administration Amendment Act, 1943, ss. 6 (1) (e), 7 (1) (a).*

QUESTION: A., a bachelor, dies leaving a will: the whole of the estate is left to B. and C., brother and sister, as tenants in common in equal shares. C., the sister, predeceases A., and there is an intestacy as to the half-share. Section 6 (1) (*e*) of the Administration Amendment Act, 1944, provides that in such a case *brothers and sisters, living at the death of the intestate*, take. Does s. 7 (3) of the Act mean that the children of a brother or sister who predeceased the intestate take equally between them the share that the brother or sister would have taken had he or she not died?

ANSWER: Section 6 (1) (*e*) does not give the intestate portion of the estate to the brothers and sisters living at the death of the intestate. It states that "the estate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely . . . on the statutory trusts for the brothers and sisters of the intestate." Those statutory trusts are declared in s. 7 which first declares trusts in favour of the children of an intestate and the issue of deceased children and (applying the words of the statute to this particular case) afterwards (subs. (3)) provides that where the intestate portion of an estate is to be held on the statutory trusts for brothers and sisters, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate as if such trusts were repeated with the substitution in s. 7 (1) (*a*) of references to the brothers and sisters for references to the children or child of the intestate. When such substitution is made, it will be seen that the "*issue* . . . through all degrees" of a brother or sister who has predeceased the intestate take "according to their stocks"—that is, *per stirpes*—the share such brother or sister would have taken if he or she had survived the intestate. Accordingly, in the case under consideration, the *issue* of the intestate's sister who predeceased him take her share under the partial intestacy in equal shares *per stirpes* "and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking." Y2.