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# TORT: THE RESPONSIBILITY OF INFANTS AND THEIR PARENTS.

THE responsibility of infants in tort, with the responsibility of the parent as a secondary line of approach, is a question which not infrequently arises in practice; and in these days, when young people are particularly advanced, this branch of the law is likely to come more and more into the foreground. There is no boy who does not think himself fit to drive the family motor-car either with or without permission; and youth on the motor-cycle accompanied by youth on the pillion is too common an occurrence to call comment. This is only one instance of how the opportunity for tort on the part of minors is increasing.

Under the ordinary common-law rule, an infant is just as much liable for tort as a person of full age, and can be sued in the Courts. If he has any property it may be made available for damages; execution may be levied, and, in the last instance, his wages or salary may be attached. But after stating this general principle, there are certain exceptions which must be noted. First, where the tort is one which may involve a mental intention, such as in some types of defamation and in deceit generally, it may be matter for consideration whether the person committing the tort is so young that the mental intention cannot be imputed. Such cases are on all-fours with the imputation of criminal responsibility in relation to children; and, while the rule is likely to be applied more strictly in matters of crime, and the benefit of any doubt more readily conceded, the root of the principle is the same, and should be remembered before an attempt is made to enforce liability against minors in torts of this character.

Subject to the well-known exceptions, an infant is not liable in contract; and so, when it comes to tort, an infant cannot be sued in tort when the tort arises directly out of a contract and is so closely associated with it as to be part and parcel of the same transaction. The line is hard to draw, and one must have recourse to the decided cases. There is the well-known case of *Burnard* v. *Haggis*, (1863) 4 C.B. N.S. 45, 143 E.R. 360, where an infant hired a mare for riding along the road, with an express understanding that she should not be jumped. The mare was put to a fence, and was injured. It was held that the infant was liable in tort inasmuch as the damage arose through his doing something that was distinct and separate and of a different nature from the original contract of hiring. As against this, there is cited the equally well-known case of *Jennings* v. *Rundall*, (1799) 8 Term. Rep. 335, 101 E.R. 1419, where an infant hired a horse and injured it by driving it too far. The owner of the horse failed in an action for damages on the ground that the so-called tort could not be dissociated from the original contract. The defendant was not using the horse otherwise than was contemplated in the contract, and the difference was not one of kind but of degree.

The reader may possibly regard these cases as examples of the hair-splitting proclivities of Judges in the past. That they are not by any means obsolete, however, is shown from the facts and the judgments in two modern cases. In *Fawcett* v. *Smethurst*, (1914) 84 L.J. K.B. 473, an infant, who was a public-school boy, hired a motor-car to go a comparatively short journey in order to fetch his bag. There was no chauffeur available, and, as he was accustomed to motoring, he drove the car himself. In the course of the drive he went somewhat further than the point stipulated in the hiring, and while he was on this part of the journey the car was badly damaged, though not through the driver's negligence. The proprietor of the garage sued the infant and sought damages, first, on the ground that the contract was one for a necessary, and that, in taking the car, the defendant had given an express undertaking to be responsible for damages however caused. In the alternative, it was contended that the defendant was liable in tort because he had used the car outside the scope of the contract, thus rendering himself liable as a trespasser for any damage that might arise in the course of the trespass. The case was heard before Atkin, J., (as he then was) who in the course of a judgment for the defendant discussed the direct bearing of the earlier decisions upon the point at issue. He held that the defendant would not be liable in tort because the extension of the journey was not essentially different from the contracted purpose, and he followed *Jennings* v. *Rundall* (*supra*). It was also held, on the question of the contract, that,

while it might be necessary for an infant such as the defendant to hire a car for the journey, the liability to replace damage to the car arising from no fault of his own would not attach to such a contract, and a contract by which an infant would render himself liable as the insurer of a car would be unreasonable, and not a contract for a necessary.

The learned authors of *Salmond on Torts*, 10th Ed., 61, say that on this point the law cannot be regarded as settled, but that the better opinion would seem to be that if liability for the tort exists, it is no defence that the act was also a breach of contract. They cite, as authority, *Burnard* v. *Haggis* (*supra*) and *Walley* v. *Holt*, (1876) 35 L.T. 631; and they express the opinion that *Jennings* v. *Rundall* (*supra*) was wrongly decided, as they consider it is a mistaken application of a correct principle—namely, that if the act of the minor is in reality merely a breach of contract, he cannot be made liable by being sued in tort instead.

In the more recent case, *Ballett* v. *Mingay*, [1943] 1 All E.R. 143, the Court of Appeal (Lord Greene, M.R., and Scott and MacKinnon, L.JJ.) did not go that far, but they distinguished *Jennings* v. *Rundall*. The facts in *Ballett's* case were that an infant was the bailee of a microphone and an amplifier, but he parted with their possession to a third party, contrary to the terms of the bailment. These facts, the Court considered, brought the case within the principle of *Burnard* v. *Haggis*. It was contended for the infant appellant that if he were found liable in tort, he would thereby be held liable for a breach of a contract which did not bind him. Lord Greene, M.R., with whom the other member of the Court agreed, said in the course of his judgment:

> It was argued that the attempt to make him liable in tort was a breach of the principle which is laid down in *Jennings* v. *Rundall*, where an infant, having hired a mare, rode it carelessly with the result that she was injured. As Byles, J., pointed out in the argument in a subsequent case (to which I shall refer in a moment), that was a case where the act of the defendant was not an act distinct from the contract of hire, but was an act which was within the four corners of the contract itself. In my opinion, the present case does not fall under that principle. On looking at the evidence, it seems to me that, when properly construed, the terms of the bailment of these articles to the infant appellant did not permit him to part with their possession at all. If it was the bargain that he might part with them, it was for the infant to establish that fact, and it seems to me that he has failed to do so. On that basis, the action of the appellant in parting with the goods was one which fell outside the contract altogether and that fact brings the case within the subsequent case, to which I have referred, of *Burnard* v. *Haggis*, (1863) 14 C.B. (N.S.) 45. There Byles, J., drew the distinction between that case and *Jennings* v. *Rundall*. He said that in *Burnard* v. *Haggis*, the action of the defendant was an act of tort just as distinct from the contract as if the defendant had run a knife into the mare and killed her. What had happened was that the undergraduate who had hired the mare, having been told that he must not jump her, lent her to a friend who jumped her, as a result of which the mare was injured and killed. Willes, J., there said at p. 53:
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> "It appears to me that the act of riding the mare into the place where she received her death-wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into a field and taken the mare out and hunted her and killed her. It was a bare trespass, not within the object and purpose of the hiring."
>
> In the present case it seems to me, therefore, that the infant was properly sued in detinue in that, on receiving a demand for the return of the goods, he refused or neglected to return them, and failed to prove that in parting with the goods he had not stepped outside the bailment altogether. On that basis, there is a remedy against the infant in tort because the circumstances in which the goods passed from his possession and ultimately disappeared were circumstances outside the purview of the contract of bailment altogether, or, at any rate, were not shown by him to be within it.

The Court of Appeal thus held that the burden of proof is upon the infant to show that he is within the contract—as here, to show that the contract allowed him to part with the possession of the articles. As he failed to prove this, his act was outside the terms of the contract, and he was liable in tort.

The type of case in which a minor has obtained a loan or the delivery of goods representing that he was of full age is not uncommon. Apart from criminal liability, there arises the question of civil action against him in contract or tort. Action in contract is out of the question, except in the unlikely event of the contract being for a necessary. It has been held again and again that in such cases an action in tort for deceit does not lie, inasmuch as the contract and the deceit are one and the same transaction. This puts the party who has been deceived completely out of Court as far as an action for damages is concerned. But under the well-known rule of equity that a wrongdoer is not entitled to retain the advantages of his own fraud, it has been held that, where an infant has obtained goods or even promissory notes by means of false pretences, he must hand them back to the owner: *Clarke* v. *Cooley*, (1789) 2 Cox, Eq. Cas. 173; 30 E.R. 80; *Burton* v. *Levey*, (1891) 7 T.L.R. 248.

The decisions perhaps go so far as to say that, where an infant has sold goods so acquired and still retains the purchase money, he must hand this money over by way of restitution: *Stocks* v. *Wilson*, [1913] 2 K.B. 235; but where a minor obtained a loan by false pretences the Court refused to enforce the return of the money in an action for deceit: *R. Leslie, Ltd.* v. *Sheil*, [1914] 3 K.B. 607. This would only have been a roundabout way of enforcing a contract for a loan against an infant, and that the Courts refuse to do as being contrary to the whole spirit of the law of infants' relief. This position is not a comfortable one for the lender of money who has been genuinely deceived, but neither is it a pleasant one for the infant when it is remembered that the criminal law can be put into operation against him.

The question of the responsibility of a parent for the torts of an infant narrows itself down to two considerations. The parent may be made liable if it can be shown that the relationship of agency exists, as when a child drives a motor-car on his father's business, or takes out the car to do some errand at his father's express or implied request. There are frequent cases where the parent's liability can be established in this respect, and the principles are almost identical with the liability of a master for the torts of his servant.

Thus, when a child commits a negligent act while driving his father's motor-car, the mere knowledge and consent of the parent is insufficient to justify the Court in imputing negligence to the father, as Reed, J., held in *Wood* v. *Freyne*, [1930] N.Z.L.R. 353. He distinguished those cases of strangers in blood in charge of the vehicle or animal concerned, where the relationship of master and servant or principal and agent, as between the owner and the driver, is inferred, and the onus is thrown upon the owner of proving the contrary. He continued, at p. 355,

> But in these days, when motor-cars are in such general use, and, in a large number of cases, are treated as family

cars and driven by various members of the family, it appears to me to be against common experience that the children of the family are engaged upon their father's business whilst in charge of a car. If, therefore, the usual thing to find is that when a youth is driving his parent's car he is on his own frolic, the law should not presume to the contrary—it should not presume that which by common experience is known to be contrary to fact.

The learned Judge went on to say that if it is desirable that parents should be held responsible for the negligence of their children when in charge of their parents' cars, it is the business of the Legislature to say so, and the Courts should not be required to make a microscopical examination of the evidence to see whether it is possible to pick out something from which it may be inferred that the child was on his father's business when the negligence occurred.

In *Wood's* case, Reed, J., refused to impute negligence to the father of a girl of eighteen who had a driver's license, and became involved in a collision while driving her father's car. The learned Judge said that to hold that, when a young girl takes her cousin, a youth of her own age, out for a drive she is acting as her father's servant because the youth happens to be a guest in her father's house, would be unjustified by the law or the facts. His Honour declined to follow the judgment of Sim, J., in *Timaru Borough* v. *Squire*, [1919] N.Z.L.R. 151, which (he said) appeared to go further than that of any previous case, with the exception, perhaps, of *Leary* v. *Osborne*, (1901) 20 N.Z.L.R. 416, both of which, he thought, required further consideration.

The position is different, of course, where a parent is riding in a vehicle owned by him, that is being driven by his child and the parent retains the right and duty of controlling the manner in which it is to be driven. As was held by the Privy Council in *Samson* v. *Aitchison*, (1912) N.Z. P.C.C. 441, the fact that a person asks another to drive the car is not enough to establish *per se* that he abandoned control of the car. Where the evidence sustains the fact of retention of control, the owner is liable for the other's negligence. The owner has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally: *Du Cros* v. *Lambourne*, [1917] 1 K.B. 40, cited by Williams, J., in a passage in his judgment approved by their Lordships. In *Samson* v. *Aitchison*, a mother and her young son were being taken on a demonstration run in a car owned and controlled by a third person, who, it was held, had not abandoned the control of the car, which *prima facie* belonged to him, when an accident occurred while the youth was driving it. Their Lordships, in dismissing the appeal, added:

> The mere fact that he [the appellant] had asked or permitted young Collins, while he sat beside him, to drive the car is in their Lordships' view not enough to establish *per se* that he had abandoned control of his car. And if the control of the car was not abandoned, then, it is a matter of indifference whether Collins while driving the car be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case that makes him responsible for the negligence which caused the injury.

The same principle applies when a parent, while driving in his car, allows his child to take the wheel, and injury results from the negligent act of the child; and *Samson* v. *Aitchison* was, in fact, applied by Smith, J., in *Black* v. *Macfarlane*, [1931] N.Z.L.R. 112, 115, where a mother was held liable for the negligence of her son who was driving her car while she was clearly in possession and control of it, and there occurred an accident, due to the son's negligent act, causing injury.

Apart from the application of the principles of the law of agency, a parent is not responsible merely because his infant child has acted negligently or has committed a wrong: *Moon* v. *Towers*, (1860) 8 C.B. (N.S.) 611, 141 E.R. 1307. But the parent is responsible for his child's negligence if the act of the child is the result of his own negligence. It was accordingly held in *Kawana* v. *Kenealy*, (1906) 26 N.Z.L.R. 1118, that where a father leaves an unloaded pea-rifle in such a place that he knew, or ought to have known, that it would come into the hands of his infant son aged ten years, and he knew, or ought to have known, that the son was able to produce cartridges and was likely to use the rifle recklessly, then if the rifle does come into the hands of the son, who obtains cartridges elsewhere, and the son in negligently using the rifle shoots and injures another person, the father's leaving the rifle about is a negligent act and is the reasonable and probable cause of the injury done by the son.

The general principle was stated by Cooper, J., in *Kawana* v. *Kenealy*, in the words of Fitzgibbon, L.J., in *Sullivan* v. *Creed*, [1904] 1 I.R. 317, as follows:

> Where an injury has been suffered which would not have happened but for the action of more than one person, no one of the several persons whose action led up to the injury will be answerable in damages for it unless his action *caused* it; and it should be held to have caused it if a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated the injury as a not improbable—"likely" is too strong—consequence of his action. If so, he is responsible, notwithstanding that the injury would not have happened but for the independent act of a third party. All third-party cases are difficult, because, in tracing the chain of cause and effect, circumstances often make it almost impossible to distinguish between a flaw and a break, or to say whether the intervention of a third party has not so far predominated in bringing about the injury as to make it right to say that the act of the original party was not an effective cause of the ultimate result.

Therefore, Cooper, J., added, a wrongful or negligent act of A. may create a state of things giving an opportunity for another wrongful or negligent act of B., and if harm is then caused by B.'s act which is of a kind that A. might reasonably have forseen, then A. as well as B. may be liable, whether B.'s act be wilful or not. *Engelhart* v. *Farrant*, [1897] 1 Q.B. 240, and *Clark* v. *Chambers*, (1878) 3 Q.B.D. 327, were decided upon this general principle.

The test, therefore, to be applied in each case must be, as stated by Fitzgibbon, L.J., in *Sullivan* v. *Creed*, (*supra*) at p. 341 (applied by Cooper, J., in *Kawana* v. *Kenealy*):

> Initial negligence of the father being shown, the question is reduced to this: whether the son's act, when he got the gun, was so independent of his father's negligence, and so far outside the range of reasonable anticipation, as to make it the sole cause of the injury, and to absolve the father.

The facts in *Kawana* v. *Kenealy* were, in the opinion of the Court of Appeal, when that principle was applied, too strong to remove the father's responsibility. The principle applied was the same as that applied where the defendant left his cart and horse unattended in a public street, and a child led it on and injury was caused to another: *Lynch* v. *Nurdin*, (1841) 1 Q.B. 28,

113 E.R. 1041; and where a young girl was sent to fetch a loaded gun: *Dixon* v. *Bell*, (1816) 8 M. & S. 198, 105 E.R. 1023.

Another finding of the Court of Appeal in *Kawana* v. *Kenealy* is of considerable interest to parents, though it is merely an application of the law of agency. At the time of the actual shooting and injury by the son, the father was in Auckland, a hundred and fifty miles away. He had left his wife in charge of his hotel and its contents during his absence from home. She was not simply looking after his house as his wife, but was in charge of his premises and business as his agent. Her failure, as his agent, to perform the duty of seeing that the boys did not get the pea-rifle was held to be evidence upon which the jury could, with the other circumstances of the case, properly find negligence on the part of the father.

A case having much in common, on the facts, with *Kawana* v. *Kenealy*, heard some ten years later, by a Divisional Court (Lush and Rowlatt, JJ.) was *Bebee* v. *Sales*, (1916) 32 T.L.R. 413. There, the boy, aged fifteen years, had broken a window with an airgun some time before he injured the plaintiff with a shot from the gun. Their Lordships held that, as the father had not exercised such reasonable care as a prudent person should have exercised when he left an airgun in his boy's hands, after having been warned (as was the father in *Kawana's* case) of the son's previous recklessness and that the airgun in his hands was dangerous to others. They said it made no difference to the father's liability whether the boy had broken the window by accident or on purpose; in either case there was evidence on which the father should have acted. Mr. Justice Lush, however, was careful to say that he left open the question of whether it was essential for the plaintiff to bring home to the father a knowledge of the son's previous recklessness in order to succeed. Here there seems to be a loophole for taking action against parents on a somewhat wider field than is usually contemplated. To be on the safe side, a father should not put it within the power of his infant son or daughter to handle dangerous articles or to drive his car unless he is assured of the competence of the son or daughter. To give this power in the absence of the knowledge, may be held to be negligence imputable to the parent and fixing him with responsibility for damage caused by his child in those circumstances.

It follows that in all these cases of the use of dangerous things by children causing injury to others, to render the parent liable it must first be proved that the injury sustained was the resultant effect of the father's initial negligence. It is material in considering that question to remember that it is the father's duty to take notice of anything in the ordinary nature of the particular child, and any mischievous tendency that he had: per Lord Esher, M.R., in *Williams* v. *Eady*, (1893) 10 T.L.R. 41. There remains the question of law, whether there was an unbroken chain of causation. As Cooper, J., pointed out in *Kawana* v. *Kenealy*, at p. 1144, the answer depends on a consideration of the particular circumstances proved, the nature of the article in respect of which the negligence has been established, and the persons to whom the article was likely to be accessible.

# SUMMARY OF RECENT JUDGMENTS.

## DAIRY FARMERS' CO-OPERATIVE MILK SUPPLY COMPANY, LIMITED v. FINDON.

SUPREME COURT. Dunedin. 1945. December 4, 7. KENNEDY, J.

*Sale of Food and Drugs—Samples of Milk taken by Inspector—Non-compliance with Statutory Provisions—Proceedings for Alleged Offence founded on Such Samples not maintainable—Sale of Food and Drugs Act, 1908, ss. 4, 5, 7, 12—Sale of Food and Drugs Amendment Act, 1924, s. 5.*

An Inspector, having inspected any food or drug under the authority of s. 4 of the Sale of Food and Drugs Act, 1908, may take samples thereof for the purpose of examination or analysis without complying with the provisions of ss. 5 and 7 of that statute, but, unless such provisions have been complied with, he may not take proceedings for any offence mentioned in s. 12 of the statute.

*Lincoln* v. *Sole*, [1939] N.Z.L.R. 176, *Middleton* v. *Incledon*, (1914) 34 N.Z.L.R. 182, *Enniskillen Guardians* v. *Hilliard*, (1884) 14 L.R. Ir. 214, and *Buckler* v. *Wilson*, [1896] 1 Q.B. 81, referred to.

Counsel: *Ward*, for the appellant; *A. N. Haggitt*, for the respondent.

Solicitors: *Ward and Dowling*, Dunedin, for the appellant; *Ramsay, Haggitt, and Robertson*, Dunedin, for the respondent.

## GIBBONS AND PATERSON, LIMITED v. WATERHOUSE MANUFACTURING COMPANY, LIMITED.

SUPREME COURT. Wellington. December 11, 19. MYERS, C.J.

*Sale of Goods—Implied Conditions as to Quality and Fitness—Imported Article in General Use unobtainable owing to War Conditions and Import Restriction—Substitute manufactured locally—Inferior to Imported Article—Whether reasonably fit for Purpose required and of Merchantable Quality—Sale of Goods Act, 1908, s. 1* (a), (b).

When, owing to import restriction and war conditions, the market is bare of an article previously in general use, and local manufacture has provided a substitute, such substitute may not be comparable in quality or in efficienc with the imported article formerly on the market and yet may satisfy the requirements of s. 16 (*a*) and (*b*) of the Sale of Goods Act, 1908; but such substitute must, nevertheless, be reasonably fit for the purpose for which it was sold, and must be of merchantable quality.

*Taylor* v. *Combined Buyers, Ltd.*, [1924] N.Z.L.R. 627, *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85, and *Manchester Liners, Ltd.* v. *Rea Ltd.*, [1922] 2 A.C. 74, applied

Counsel: *Cleary*, for appellant; *Free*, for the respondent.

Solicitors: *Barnett and Cleary*, Wellington, for the appellant; *A. W. Free*, Wellington, for the respondent.

# INTERPRETATION OF STATUTES.

## Illustrated by Cases decided since 1939.

By Professor R. O. McGechan.

The following article is a by-product of a series of lectures given as a refresher course to returned servicemen. The aim of those lectures was simply to recall to those who had been away from the profession for a few years some of the more important rules relating to interpretation of statutes, and, wherever possible, to illustrate those rules from cases which had been decided since 1939. These notes suffer from the imperfections this origin makes inevitable and even more from being but a selection of the selection originally made for those lectures. The writer hopes the material may for all that prove of interest to the JOURNAL'S readers.

### I. The Cardinal Rules.

These rules are really two. The first is known as Lord Wensleydale's Golden Rule, and is: "In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to an absurdity or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnancy or inconsistency, but no further": *Grey* v. *Pearson*, (1857) 6 H.L. Cas. 61, 106; 10 E.R. 1216. The first rule is to give the words their literal meaning.

The second rule is that the meaning must be collected from the whole instrument: *Turquand* v. *Board of Trade*, (1886) 11 App. Cas. 286, 291.

These rules of course are not contradictory. Primarily the words must be given their plain, ordinary or literal meaning. But one reads the whole statute, and that reading may show that the use of the word or phrase in question is ambiguous. If it does, one must look to the context, the whole statute, to ascertain which meaning Parliament attached to the word. If after doing so no good reason to depart from the plain meaning of the word emerges, then, no matter how absurd the consequences, the plain meaning must have its effect: *Cibley* v. *Dale*, [1851] L.J.C.P. 233, 235. So in *Davies* v. *Warwick*, [1943] 1 All E.R. 309, the Rent Restriction Act, 1939 (Eng.) had fixed a standard rental in the case of a house not let at September 1, 1939, as a maximum by reference to the "rent at which it was last let before that date." A cottage had been let last in 1916 at a rental of 3s. 9d. per week, subsequently raised to 4s. 3d. The owner had resumed possession in 1931. The property was sold in May, 1939. In October, 1939, it was let at 12s. 6d. per week, neither tenant nor owner knowing of the prior rental. Even 12s. 6d. was below the rental value in the locality. Now if the plain words were given their plain meaning a cottage let last 500 years ago but never thereafter must have its standard rental at the rentals of the fifteenth century. Yet the Court of Appeal gave the words this plain meaning.

The plain meaning can often be found in the *Oxford English Dictionary*. In *Re Whitley*, [1944] 1 All E.R. 299, the question was whether unmounted cut diamonds were "jewellery." The *Oxford* defined "jewellery" as "Jewellers' work, gems or ornaments made or sold by jewellers; jewels collectively or as a form of adornment." The Court held that gems sold by jewellers covered unmounted cut diamonds. But an ordinary meaning as everyone knows may not always have got into the *Oxford* Dictionary. That work defined furniture as "movable." But everyone knows that some furniture these days is built in. And in *Gray* v. *Fidler*, [1943] 2 All E.R. 289, the Court held that in its ordinary meaning "furniture" included wardrobes, beds, cupboards, &c. screwed to the walls.

The ordinary meaning is generally to be preferred to the technical meaning. This preference has its *cause célèbre* in *Hickman* v. *Peacey*, [1945] 1 All E.R. 215, the *commorientes* case. The Law of Property Act, 1925 (U.K.) s. 184 (our Property Law Act, 1927, s. 6), provides that in cases where two or more persons died in circumstances rendering it "uncertain" which of them survived the other or others, &c., Viscount Simon took the view that a thing was not uncertain if it were proved according to the requirements of legal proof. But the majority of the House thought it was uncertainty "in its ordinary acceptation as denoting a reasonable element of doubt" that the Legislature intended. See also *Berriman* v. *London and North Eastern Railway Co.*, [1945] 2 All E.R. 1, 4.

But the word may have two or a number of ordinary meanings. Even here sometimes the problem involves no more than ascertaining whether the given thing or fact fits into any one of the number of ordinary meanings the word has. This was all that was involved in *Re Whitley* (*supra*). But if one has to choose between ordinary meanings, the Golden rule is of no assistance. The context must be our guide to which of the possible ordinary meanings we are to follow. The use of the word in such cases is ambiguous and the rule is that the context is referred to to resolve the ambiguity. The process is, of course, the application of the second rule. The word "tax" for example has two ordinary meanings, one including the other excluding local rates. "The word may be used in either the more limited meaning or the wider meaning, which would include rates and the question as to which meaning is intended must fall to be decided on the terms of the ordinance in question": *Patriarchate* v. *Jerusalem Corporation*, [1944] 1 All E.R. 130, J.C. On reference to other parts of the ordinance it appeared that taxes and rates were there distinguished, so taxes did not include rates; see also *McVittie* v. *Borough of Bolton*, [1945] 1 All E.R. 379.

A further application of the reference from clear words to context is provided by the rules of construction as to reference to a proviso. It is not enough to say that if the enacting part is clear it cannot be controlled

by the proviso. Lord Russell in *Jennings* v. *Kelly*, [1940] A.C. 206, 218, 219, points to a necessary qualification:

> Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of two or more possible meanings is the right one to attribute to them.

In that sense it can control the enacting part; see also Lord Goddard in *Bretherton* v. *U.K. Totalisator Co., Ltd.*, [1945] 2 All E.R. 202, where the same point is reiterated after denying to a proviso the enabling of something to be done which is not enabled in the enacting part. Lord Goddard also warns that:

> [A proviso] may . . . be inserted, as is sometimes the case, *ex abundanti cautela* to prevent a possible construction which was not intended being placed upon other provisions.

The context can do more than determine which of two ordinary meanings applies, it may qualify the plain ordinary meaning. This is illustrated by the relationship dealt with later between the rule that general words are to be generally understood—(*i.e.*, they are to be given their ordinary meaning) and the *ejusdem generis* rule which limits general words by reference to context. This relationship is only a particular application of the wider rule that words must be read in their context. Another illustration is *R.* v. *Fogden*, [1945] N.Z.L.R. 380, where a trial had proved abortive because the jury had disagreed. Section 442 of the Crimes Act, 1908, provides:

> The Court before which any accused person is tried may, either during or after trial, reserve any question of law arising . . . for the opinion of the Court of Appeal in manner hereinafter provided.

The question was whether the section applied to an abortive trial as well as to trials resulting in conviction or acquittal. The Court divided on the question. Fair and Cornish, JJ., favoured the plain meaning of the words. But the majority found that other sections (s. 445 in particular) raised a doubt as to that being the legislative intention. Other parts of the Act and the history of the section led the Court to limit the operation of s. 442 to trials resulting in conviction or acquittal—not the plain meaning of the words used.

Context can lead us farther still away from the literal meaning of the words. The interpretation of any words used in any legal document depends on the intention of the author. This intention is to be got from the words used in the document. But the words are to be read as the words of the author, used in the circumstances in which the author was placed. We do not read the document as that of a "normal" speaker of the language, speaking *in vacuo*, but as the work of a particular author, with particular circumstances in mind. As the Lord President Robertson said in *Edinburgh Street Tramways Co.* v. *Magistrates of Edinburgh*, (1894) 21 R. (Ct. Sess.) 688, 704:

> . . . there are times and places for everything, and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching business men metaphysics unawares . . .

This brings me to *Heydon's case*.

## II. Heydon's Case.

In *River Wear Commissioners* v. *Adamson*, (1877) 2 App. Cas. 743, 763, Lord Blackburn said that

> from the imperfection of language, it is impossible to know what that intention is without inquring farther and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.

The most up to date illustration of this classical statement is *National Association* v. *Bolton Corporation*, [1942] 2 All E.R. 425. The section in question gave to local authorities power to make payments during the war service of an employee of a local authority making up his war service pay to the amount he would have received if he had remained in the service of the local authority. The union sought a uniform rule of employment on this matter for all employees. Objection was taken to this before Arbitration authorities on the ground that the section only gave power to consider cases individually. Viscount Simon, L.C., at p. 430 rejected this argument:

> The statute, I venture to suggest, has a much wider scope . . . I cannot think that the legislation did not foresee that once the power was given claims would be made for assurances that it would be exercised, and that the claims would be made and settled by the usual processes of collective bargaining with which sensible masters and workmen are now familiar.

The words were understood in the light of current industrial practice well known to the Legislature.

Lord Blackburn's words are really a restatement of Lord Coke's in *Heydon's case*, (1584) 3 Co. Rep. 7*b*, 76 E.R. 637, which need no repetition. The law before the Act and the mischief to be remedied are the most important surrounding circumstances against which the words of the Act are to be seen. The authority of *Heydon's case* and its limitations were reaffirmed by Viscount Simon in *Hickman* v. *Peacey* (*supra* at pp. 218, 219):

> Something was said in the course of the argument as to the maxim that in order to arrive at the real meaning of a statute it is legitimate to consider what was the mischief or defect for which the previous law had not provided. This proposition is derived from *Heydon's* case. There is no doubt that, within its proper range, this rule of interpretation is valid . . . But this maxim has a valuable application only when the language of the statute which is being construed needs to have this additional light thrown upon it. The words we are considering do not in my opinion leave any doubt as to what they say and mean. Moreover, in order to make a useful application of the maxim it is first necessary to be certain what the previous mischief was.

And then he goes on to consider cases decided prior to the statute "which may have been thought to call for this statutory alteration." If the words are clear there is no reference to either surrounding circumstances or mischief any more than there is to context. But if the words are not clear, and the mischief may itself show they are not, then the maxim in *Heydon's case* will be applied to determine the meaning of the words. Lord Macmillan, in the same case, relied strongly on the mischief as governing the construction. Of the opposite view he remarks:

> Having set out . . . to remedy the law as to *commorientes* . . . the Legislature is ironically found not to have made any provision for the case of *commorientes* who die together, but to have dealt only with persons proved to have died consecutively.

And he found that the section applied to both types of *commorientes*.

More obvious occasion to refer to prior case law occurs where a decision of the Court has occasioned general disapproval, often voiced by the Court itself: see *Kain* v. *Kain*, [1943] N.Z.L.R. 342. The Frustrated

Contracts Act, 1944, needs to be construed in the light of criticism by their Lordships of the law they had just enunciated in the *Fibrosa* case, [1942] 2 All E.R. 122.

The relevance of statements made in Parliament on the construction of Acts of Parliament has some applications which are not as clear as they might be. There has been an exhaustive review of the matter by the Hight Court of Australia in *South Australia* v. *The Commonwealth*, [1942] 65 C.L.R. 373, where all the important authorities are dealt with. The New Zealand Court of Appeal has moreover on two occasions dealt with the relevance of a commissioner's memorandum accompanying a consolidating Act: see *R.* v. *Crossan*, [1943] N.Z.L.R. 454, 463, and *R.* v. *Brooks*, [1945] N.Z.L.R. 584, 596. The memorandum, it would seem, may be referred to.

### III. Particular Rules and Maxims.

*Generalia verba sunt generaliter intelligenda* and its qualifying *ejusdem generis* and *noscitur a sociis* rules have been considered in a number of recent cases.

The *ejusdem generis* rule may be applicable when a number of particular words are followed by a general word or phrase. The Cruelty to Animals Act, 1850 (U.K.), defined animals by reference to nineteen named animals and added "or any other domestic animal." If these general words were literally effective as required by the maxim *generalia verba sunt generaliter intelligenda* clearly the domestic fowl, and more particularly fighting cock, was included. But the nineteen animals particularized were all four-footed. They could be grouped within the genus animal as opposed to bird, and the general words must be limited also to four-footed animals.

The recent cases illustrate two requirements to application of the *ejusdem generis* rule. First, it must be possible to bring all the particulars within some genus; and second, that genus must not be exhausted by the particulars, for if it were the general words would be redundant, and it is a first rule of construction of statutes that every word must pull its weight. The first requirement was found lacking in *Alexander* v. *Tredegar Iron and Coal Co., Ltd.*, [1945] 2 All E.R. 275, where the House of Lords rejected the *ejusdem generis* rule because the particular word preceding the general was used by way of illustration not genus. The words, used of mining, were "every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions."

Both requirements were in issue before the Court of Appeal in *Sluggish River Drainage Board* v. *Oroua Drainage Board*, [1944] N.Z.L.R. 445; and see also *Cook* v. *Nelson Hospital Board*, [1945] N.Z.L.R. 110. In that case, the words involved were: "deepen, widen, straighten, divert or otherwise improve any existing watercourse." The question was whether the erection of a certain flood-gate was within the meaning of these words. It was an improvement and if the maxim *generalia verba* were applied clearly it was. Did the preceding particulars yield a genus or category? Sir Michael Myers, C.J., held that they did; the deepening, widening, straightening and diverting were all, to use His Honour's phrase, "navvying" work. Providing a flood-gate was not within the category of navvying work, it was engineering.

The second requirement had then to be met. Did not "deepen, widen, straighten, divert" exhaust the category navvying, so that there remained no other way to improve by navvying and the words "otherwise improve" were meaningless? His Honour said no, because raising the embankment was not included in the particulars, was navvying, and was improving. The *ejusdem generis* rule was therefore applied.

But in *National Association of Local Government Officers* v. *Bolton Corporation*, [1943] A.C. 166, [1942] 2 All E.R. 425, the House of Lords held the rule inapplicable because the suggested genus was in fact exhausted by particulars preceding the general words. The words were: "manual labour, clerical work, or otherwise." Lord Porter found it "difficult to extract out of the two words 'manual' and 'clerical' a class within which the other type of work is to be confined."

A Divisional Court in England has held that the *ejusdem generis* rule is inapplicable where a single particular is followed by general words. The words in that case were "theatre or other place": *Allen* v. *Emmerson*, [1944] 1 All E.R. 344, 347. This conclusion seems to have been due to the failure of counsel to cite authority to the contrary (*ibid.*). New Zealand counsel need not so embarrass their own Courts for in the Court of Appeal in *Hanna* v. *Auckland City Corporation*, [1945] N.Z.L.R. 622, per Sir Michael Myers, C.J., at p. 630, there is explicit authority to the contrary. And *Alexander* v. *Tredegar Iron and Coal Co., Ltd.* (*supra*), at least proceeds on the assumption that the *ejusdem generis* construction can be applied to general words following one particular only.

The related *noscitur a sociis* rule found a lowly illustration in *Sandford* v. *Graham*, [1944] N.Z.L.R. 16, where an intoxicated gentleman was, after an accident which had rendered his car immobile, found in the car. He was charged and convicted by a Magistrate under s. 28 of the Motor-vehicles Act, 1924, with "being in charge of a motor vehicle while in a state of intoxication on any road, street or place to which the public have access." If the generality of the subsection in terms of which this charge was framed was to be given its literal effect, no doubt he was guilty. But the learned Chief Justice, at p. 17, pointed out that "all four offences created by s. 28 of the Act involve the idea of actual or potential danger to the public or individuals by reason of the handling of what I may call a 'live' motor-vehicle. The first three all have reference to a car which is being actually driven and, in my opinion, the fourth, which deals with the case of a person while in a state of intoxication being in charge of any motor vehicle on any road . . . is either being driven or at least is capable of motion: it does not apply to a car which is in such a condition as to be altogether incapable of motion."

*Expressio Unius Exclusio est Alterius.* Smith, J., applied this maxim to Part III of the Economic Stabilization Regulations, 1942 (Serial No. 334/1942) exclude variation in rent with the cost of living because this was specifically provided for in Part IV dealing with wages.

And it was applied by the Court of Appeal in *Sandilands* v. *Carus*, [1945] 1 All E.R. 374. The Summary Jurisdiction (Married Women) Act, 1895 (U.K.) provides in s. 5 (*a*) for separation orders and in s. 5 (*c*) for maintenance orders. Section 5 (*a*) provides that a separation order was to have the effect of a decree of judicial separation on the ground of cruelty, which would negative recovery by the wife under her common-law right to pledge her husband's credit for necessaries. Section 5 (*c*) contains no such provision. du Parcq, L.J., at p. 376, puts it:

> The fact that provision is thus made in s. 5 (*a*) for the exclusion of that common-law right in one event only, is we think, a strong indication that in other cases, falling within the same section Parliament did not intend the common-law right to be abrogated or diminished.

### IV. Formal Matters.

Cross Headings. A cross heading—*i.e.*, a heading to a group of sections, but not to a division or part of an Act, is more than a marginal note, and, *semble*, can be referred to in construing the Act. Cohen, J., referred to it in *Re Carlton*, [1945] 1 All E.R. 559, to assist him in construing s. 10 (5) of the Naturalization Act, 1870. That subsection provided that—

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

The question was whether a child more than twenty-one years of age at the time his father was naturalized was within s. 10 (5). The cross heading—and it was a cross heading to s. 10 only—was "National status of married women and infant children." Cohen, J., held that the subsection was ambiguous and the cross heading resolved the ambiguity. Only infant children were included in the naturalization. But he also cited with approval Lord Collins for the Privy Council in *Toronto Corporation* v. *Toronto Railway*, [1907] A.C. 315, 324, that such a heading is "to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation," words which seem to give the heading a much larger function than to resolve an ambiguity. The Court of Appeal while agreeing with the view Cohen, J., took of s. 10 (5) were unwilling to commit themselves on reference to cross-headings: see *Re Carlton*, [1945] 2 All E.R. 370.

Schedule.—The provisions of the Code of Civil Procedure (in particular RR. 245-8, 291) were held to control the construction of s. 64 (d) of the Judicature Act. This is an unusual force to be given to words of a schedule; but then of course the Code is of rather more importance relative to the statute to which it is annexed, than is the normal schedule. The normal rule was applied by Smith, J., in *Lewis* v. *Lewis*, [1944] N.Z.L.R. 401, to the forms set out in the Schedule to the Matrimonial Causes Rules, 1943.

Title.—Lord Greene, M.R., in *Butcher* v. *Poole Corporation*, [1942] 2 All E.R. 572, 575, 576, restates the law in these words:

> It is, of course, quite settled that the title to an Act of Parliament is not to be taken as limiting the provisions of the enactment itself. The greatest use that can be made of it is to aid in construing words of doubtful or ambiguous import in the Act, and it is legitimate to use it for that purpose.

It was so used by the Court of Appeal in *Watkinson* v. *Hollington*, [1943] 2 All E.R. 573.

Statutes in pari materia.—It would appear that the modern trend is away from the older view of the text books that subsequent statutes cannot be regarded as *in pari materia* and so assist in the construction of earlier: see per Smith, J., in *Sluggish River Drainage Board* v. *Oroua Drainage Board*, [1943] N.Z.L.R. 574, and *per* Callan, J., in the same case on appeal, [1944] N.Z.L.R. at 457. Smith, J., relied on *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, [1921] 2 K.B. 403, 414, and *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143.

Generalia Specialibus non Derogant.—A useful illustration occurred in *Lewers* v. *Barber*, [1943] 1 All E.R. 386 (see especially at p. 393), where the Court of Appeal held that the Limitation Act, 1939 (U.K.) did not apply to Workers' Compensation proceedings under an Act prior to 1939. The earlier Act was special; the later general Act was not meant to touch proceedings under the earlier; see also *Walker* v. *Hemmant*, [1943] 2 All E.R. 160, and *Tauranga Borough* v. *Tauranga Electric-power Board*, [1944] N.Z.L.R. 155 to 165.

## LEGAL LITERATURE.

**Chalmers' Sale of Goods Act**, 12th Ed. By Ralph Sutton, K.C., Reader in Common Law to the Council of Legal Education (England), and N. P. Shannon, of Gray's Inn, Barrister-at-Law. With New Zealand Supplement, pp. xlvi + 274. London: Butterworth and Co. (Publishers), Ltd. (New Zealand price 26s. plus 11d. postage: supplies just arrived in New Zealand.)

The draftsman of the Sale of Goods Act, 1895 (New Zealand) so closely followed the Sale of Goods Act, 1893 (Gt. Brit.) that, when he came to s. 22 of the parent statute—which deals with market overt—he included it in the New Zealand Act (now s. 24 of the Act of 1908) though it had no application to New Zealand; and he added subs. 3 in which it is declared that nothing in the section or elsewhere in the statute should be construed to create a market overt in New Zealand.

This evidence of the very close following of the English statute, as drafted by Sir M. D. Chalmers (who was responsible for the 1st to 10th editions of his standard work), renders the new edition of the well-tried text-book, *Chalmers' Sale of Goods*, for all practical purposes, an authoritative commentary on our own statute. To render the work even more useful to local practitioners, the publishers have added a New Zealand Supplement, which directs the reader to the corresponding section in our Act. For, though the statutory text is almost identical, there is a slight re-arrangement of section numbers in the New Zealand statute, mostly due to our preference for having the interpretation section at the beginning of the statute instead of at its end (which is the English preference or practice), and to the omission of two sections of interest only to Scotland.

The new edition of *Chalmers*, carefully revised by the learned editors, brings the law, stated in the last edition as of 1930, down to 1945. But, in their revision, they have not merely referred to cases decided during that period, but they have also brought in references to older cases that were not included in earlier editions, whenever they found them of value to their text. In all, including new cases, one hundred and ten cases have been added to those in the last edition.

A further utility to New Zealand practitioners has been the inclusion of annotations of the Law Reform (Frustrated Contracts) Act, 1943 (Eng.) because our own Frustrated Contracts Act, 1944, is exactly copied from that statute. With *Cheshire and Fifoot's Law of Contracts* (see p. 23, *ante*), they should have a complete text-book on this statute in relation to contracts in general and in its application to the sale of goods in particular.

—P.B.E.

# ILLITERATE FOREIGNERS.

## Affidavits, Statutory Declarations, and Deeds.

By E. C. Adams, LL.M.

Explanatory Note.

What would you do, if required to take an affidavit or statutory declaration or witness a deed affecting title to land, by an illiterate foreigner?

In *Goodall's Conveyancing in New Zealand*, 384, a form of attestation is supplied for a will by a foreign testator who is literate, but the late learned author does not appear to have provided for a case where the difficulty of illiteracy as well as of language presents itself.

It is to be borne in mind that it is the duty of a solicitor taking an affidavit or statutory declaration to see that the rules and the statute are observed and that the deponent or declarant knows what he is swearing or declaring to: *Bourke* v. *Davis*, (1889) 44 Ch.D. 110, 126, and *R.* v. *Habgood*, [1934] N.Z.L.R. 73, 84.

The first thing obviously is to obtain the services of a competent interpreter—one who has a sound knowledge of the language of the foreigner as well as of English.

It is obvious that in the circumstances R. 195 of the Code of Civil Procedure (which requires the solicitor taking the affidavit *himself* to read over and explain the affidavit to the illiterate deponent) cannot be complied with, unless perchance the solicitor has a good knowledge of the foreign language. There does not appear to be any rule exactly applicable, unless it be R. 197, which provides that, if an affidavit is in any other language than English, there shall be a translation thereof annexed thereto, together with an affidavit by an interpreter verifying the translation. But instruments in a foreign language would not be accepted by the Land Transfer Department.

Having regard to RR. 199 and 604 of the Code of Civil Procedure and to the procedure and forms as set out in *Stringer on Oaths and Affirmations*, 4th Ed. 116, 118, 119, it is suggested that the following procedure could be adopted in the case of an affidavit, and it could quite easily be modified to fit a statutory declaration, as it has been in the following Precedent No. 1.

After the affidavit has been prepared in English and read through by a competent interpreter to the deponent the following oath is administered to the interpreter:—

> I swear by Almighty God that I well understand the English and (Chinese) languages and that I have truly, distinctly, and audibly interpreted the contents of this affidavit to the deponent (C.D.) and that I will truly interpret the oath about to be administered to her (him).

An oath in the ordinary fashion is then put to the interpreter who interprets it to the deponent and the deponent signifies her (his) assent to it.

As to the swearing of oaths by heathens, see *Garrow and Willis's Law of Evidence*, 2nd Ed. 187, and *Phipson's Evidence*, 8th Ed. 453. It is understood that the present customary form of Chinese oath administered in the Dominion is as follows:—

> As I have blown out this match so may my soul for ever be put in darkness, if I do not speak the truth, the whole truth and nothing but the truth.

The former more dramatic methods of the Chinese witness breaking a saucer, or cutting off a cock's head, in Court, appear to have fallen (rather deservedly) into desuetude; though sanctioned by standard textbooks and still apparently perfectly legitimate, they manifestly had inconveniences and disadvantages, which are avoided by the simple but impressive act of blowing out a match.

(*Phipson* states that the breaking of the saucer procedure may have affinity to the ancient Roman custom, whereby the witness holding a flint stone in his right hand dropped it with the words: "*Si sciens fallo, tum me Diespiter, salva urbe arceque, bonis ejiciat, ut ego hunc lapidem,*")

For much of the information in this article, and for the following precedents, I am indebted to Mr. B. H. Rhodes, solicitor, Otaki.

Precedent No. 1.

Application for Transmission by an Illiterate Foreign Administrator.

In the matter of the Land Transfer Act 1915

and

In the matter of the estate of A.B. late of Wellington New Zealand Chinese market gardener deceased.

I, C.D. of Wellington widow do solemnly and sincerely declare as follows:—

1. I am the administratrix of the estate of the above-named deceased who died on or about the day of 194 .

2. Letters of administration with will annexed in respect of the said estate were granted to me by the Supreme Court of New Zealand at Wellington on the day of 194 under No. .

3. The deceased was at the time of his decease registered as proprietor of an estate in fee-simple in ALL THAT piece or parcel of land containing [*Set out area*] more or less being [*Set out official description of land*] and being the whole of the land comprised and described in Certificate of Title Volume folio Wellington Register.

4. No person or persons other than myself the above-named declarant has or have any interest in the estate or interest now applied to be transmitted except the beneficiaries under the said will.

5. I verily believe that I am entitled as such administratrix aforesaid to be registered as proprietor of the said piece or parcel of land.

6. I hereby apply to be registered as such proprietor accordingly.

AND I MAKE this declaration conscientiously believing the same to be true and under and by virtue of the Justices of the Peace Act, 1927

DECLARED at Otaki by the said C.D. this day of 194 (through the interpretation of G.H. of Wellington market gardener the said G.H. having first declared that he was well acquainted with both the English and Chinese languages and that he had truly and faithfully interpreted the contents of this declaration and of this application for transmission to the declarant C.D. and that he would truly and faithfully interpret the declaration about to be administered unto the said C.D. before me and I certify that this declaration and this application for transmission was read over in my presence to the declarant and that the declarant acknowledged through the interpreter that she perfectly understood the same and made her mark thereto in my presence—

C.D.
X
her mark.

E.F.
A Solicitor of the Supreme Court of New Zealand.

Correct for the purposes of the Land Transfer Act, 1915.
Solicitor for Applicant.

PRECEDENT No. 2.

MEMORANDUM OF TRANSFER BY AN ILLITERATE FOREIGN ADMINISTRATOR.

C.D. of Wellington widow being registered &c. [*Describe land*]. AND WHEREAS the said C.D. is so registered as the administratrix of the estate of A.B. late of Wellington in New Zealand Chinese market gardener deceased PURSUANT TO the trusts of the will of the said A.B. deceased the said C.D. doth hereby transfer to herself the said C.D. and to I.J. of Wellington market gardener as tenants in common in equal shares all her estate and interest in the said piece of land.

IN WITNESS whereof this Transfer has been executed the day of one thousand nine hundred and forty (194 ).

SIGNED by the above-named C.D. by making her mark she being unable to write in our presence— C.D. X her mark

G.H.
Market Gardener
Wellington.

E.F.
Solicitor,
Wellington.

CERTIFICATE OF INTERPRETER.

I, the said G.H. hereby certify that I have a knowledge of English and of the Chinese language as spoken by the said C.D. AND I DECLARE that before the said C.D. executed the above transfer I explained to her the contents thereof and she declared that she understood my interpretation thereof and voluntarily executed the same by making her mark thereto.

DATED at Wellington the day of one thousand nine hundred and forty (194 ).

G.H.

# IN DIVORCE: HUSBAND A UNITED STATES SERVICEMAN.

## Order for Substituted Service.

An inquirer in the JOURNAL'S "Practical Points" service has asked the following question :—

> Our client was married to a member of the United States military forces in Auckland in May, 1942. They lived together for about two months, there being no issue of the marriage. The husband went overseas on service in August, 1942, and since then has answered no letters or had any communication with his wife. She proposes to seek a divorce on the ground of desertion. She has been residing in New Zealand for the past three years and more, and intends to reside permanently here. Our difficulty is service of the respondent husband. May an order for substituted service be made in respect of a United States serviceman whose present whereabouts are unknown ?

As this matter may be of general interest, an extended answer is given.

The order made in *Preston* v. *Preston*, [1945] Q.W.N. 59, is a guide in the application for substituted service of the nature sought by the deserted wife here. The facts were similar to those indicated by the above question. The petitioner applied for directions as to the mode of service of the petition. (In Queensland, a writ and petition are required to be served.)

In an affidavit, Captain Vucurevitch of the military forces of the United States and adjutant and representative of the military forces of that country, deposed that communications should be sent directly to the respondent through the Adjutant-General of the Military Forces, Washington, District of Columbia, with a request that he forward any communications to the respondent urgently, and that the respondent should receive and be able to answer any communications at least twenty-one days from the date of receipt thereof by the Adjutant-General. Should the respondent be deceased, the petitioner would be notified of the fact by the Adjutant-General.

Sir William Webb, C.J., made an order for substituted service in the following form :

> Order that a concurrent writ of summons for service out of the jurisdiction be issued herein and that—
>
> 1. The forwarding by prepaid registered A.R. post addressed to the Adjutant-General of the United States of America Military Forces, Washington, District of Columbia, United States of America, of a letter containing :—
>
> (*a*) An envelope addressed to Sergeant Denny Charles Preston, Regimental Number 6268051, 435th Bombardment Squadron, 19th Bombardment Group, U.S.A. Forces, bearing the postage stamps required for the transmission thereof and of the contents thereof by registered A.R. post by air mail in the United States of America and enclosing an office copy of the petition of the writ of summons and of the concurrent writ herein and of this order and two forms (to be settled and signed by the Registrar of this Court) requesting the defendant to intimate to the Registrar of this Court whether or not he intends to defend this action, and
>
> (*b*) A letter requesting the said Adjutant-General of the United States of American Military Forces to cause the said envelope addressed to the said Sergeant Denny Charles Preston to be transmitted by registered A.R. post and to return to the Registrar of this Court the acknowledgment card thereof signed by the said Denny Charles Preston, and
>
> 2. The forwarding by prepaid registered A.R. post addressed to the said Sergeant Denny Charles Preston, Regimental Number 6268051, 435th Bombardment Squadron, 19th Bombardment Group, U.S.A. Forces, of an office copy of the petition, of the writ of summons and of the concurrent writ herein and if this order and of two forms (to be settled and signed by the Registrar of this Court), requesting the defendant to intimate to the Registrar of this Court whether or not he intends to defend this action, and the receipt by the defendant of the said documents shall be deemed to be good and sufficient service of the petition and the writ of summons and the concurrent writ herein upon the defendant.
>
> Further order that the defendant be allowed forty-two days from the date of the receipt of the said documents mentioned in paragraphs 1 or 2 hereof to enter an appearance herein.
>
> Further order that in the event of the defendant entering an appearance or intimating that he intends to defend this action the hearing of the action shall stand over as a Judge in Chambers may order ; but in the event of the defendant intimating that he does not intend to defend this action, or on his failing duly to enter an appearance, then on proof to the satisfaction of a Judge in Chambers that the petition and writ of summons and concurrent writ herein have been served on the defendant in compliance with this order the plaintiff may by leave of the Court or a Judge proceed in this action.
>
> Further order that the costs of and incidental to this application and this order be costs in the cause and that the plaintiff be at liberty to apply hereunder at any time.

# 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. 73.—P.T. TO S.

*Rural Land—Productive Value—Land suitable for Dairying—Used for fattening Stock—Varying Value of Different Parts of Farm—No Buildings—"Improvements normally required"—Potential Value—"Value"—Servicemen's Settlement and Land Sales Act*, 1943, *s.* 53 (2) (b).

This appeal involved two primary questions, first, the productive value of the land, and, secondly, the sum which ought to be deducted by reason of the land having upon it none of the building improvements normally required.

The Court said: "All parties are agreed that the land was suitable for dairy farming and that its true and full value lies in its use for that purpose. Unfortunately, however, the farm had not been used for dairying purposes, so that no indication of its carrying or productive capacity as a dairy farm can be gained from its actual use for that purpose. Its carrying capacity from the point of view of actual experience is further obscured by the fact that it has been used in conjunction with other lands for fattening purposes.

"There is an unusually wide difference of opinion between the witnesses as to the carrying capacity. Those opinions range from 100 cows to 150 cows with the usual replacement stock in each case.

"With a view to being in a better position to follow and understand the evidence, an inspection of the property was made after the hearing of the appeal.

"From the evidence it seems that two initial questions of importance arise. The first is as to the area of the property which should be regarded as waste, and the second as to the degree, if at all, to which the pasture becomes of lesser quality and value as one proceeds across the property from west to east. Taking the 135 acres on the west, which they consider is good, as a basis of comparison, the Crown witnesses say that the quality of the pastures deteriorates towards the east side of the property. This deterioration in the pasture, together with their classification of the 26.8 acres marked "D" on Mr. P.'s plan as, substantially speaking, waste land, largely accounts for the Crown witnesses' estimate of the carrying capacity being 100 cows and replacements, but no more.

"The evidence of the Crown witnesses can, with justification, be brought into contrast with the evidence given by Messrs. B., M., and W. The evidence of the last mentioned was that the property would carry 125 cows, and his opinion in that respect is confirmed by Messrs. B. and M. The latter produced returns from their own farms showing a production of 150 lb. of butterfat per acre from all those portions of their respective properties which are not waste. Mr. B. too, produced figures showing that over three years he recovered a little less than 150 lb. of fat per acre.

"The Crown claimed that Mr. B. was above average efficiency as a farmer, and the same was or might have been alleged of Mr. M. It appears, however, that some of Mr. B.'s land is not of the same quality as the land presently under consideration, whilst Mr. M. has been handicapped by lack of fertilizers. These are compensating factors that must be taken into account. Another factor which must be given weight is the fact that Messrs. B. and M.'s respective properties would not be so detrimentally affected by drought conditions as the property now under consideration.

"Taking every factor into account, it seems fair to conclude that the carrying capacity of the land was correctly assessed by Mr. W. at 125 cows.

"Having regard to the demonstrated production of Messrs. B. and M. and after making the necessary and proper adjustments, the estimate of Mr. F. that the cows would produce 240 lb. of butterfat per cow seems to be correct. The total production on that basis would be 30,000 lb. of butterfat, and it is not without interest to note that 200 acres producing 150 lb. of fat per acre would provide this total. Its recovery would, in any case, be insured by the regeneration of the 26.8 acres of worn out pasture on the area marked 'D' on Mr. P.'s plan. Such an assessment appears to be fully justified by the actual returns from comparable areas after making all proper allowances, including an allowance for any super efficiency in Messrs. B. and M.

"The Court is still all the more confident of the correctness of its conclusion by reason of the fact that the lower returns from Mr. R.'s neighbouring property to which the Crown witnesses referred and upon which, in a sense, they relied, have been proved to have been due to specific misfortune having no relation to the inherent carrying capacity of the property. In the years preceding the deterioration due to these causes the returns at least approximated those which the Court has concluded should be attributed to the land under appeal.

"As to the other property mentioned by the Crown witnesses, it admittedly had pastures inferior to the pastures on the land under appeal.

"In forming a conclusion as to the true basic value, some weight should be attached to the fact that the small areas marked 'H,' 'G,' and 'L' on Mr. P.'s plan can be brought into production by clearing, draining and surface sowing, whilst the area marked 'B' can also be made productive by clearing, heavy stocking and surface sowing. These areas have therefore some value.

"Then too, the area marked 'D' on the plan can be regenerated. All these are improvements which an average efficient farmer would effect and could effect at a reasonable cost. The existence of areas on which these improvements can be effected constitutes in itself an element of additional value. At the same time, the fact that the areas can be readily improved removes them from the category of waste lands.

"The productive value the Court finds should be based on a production of 30,000 lb. of butterfat per annum, with a proper allowance for pigs. Manure should be allowed for on an adequate basis. If a proper allowance on this account is brought into the budgest prepared by Messrs. F. and W., the productive value of the former will be £8,555, and of the latter, £9,600. The difference is mainly accounted for by the smaller capital deduction made by the latter for buildings, plant and stock. The lowness of his assessment in these respects naturally reflects itself in his having a higher surplus for capitalization.

"Upon the whole, the Court is prepared to accept and does accept the sum of £8,555 as the productive value of the property.

"This leaves for consideration the question of the sum to be deducted by reason of the absence of buildings and the question of the necessity to add any sums referable to what might be termed potential value. As to the former, various basis of assessment were suggested but each, it appeared, might well react unfairly; some would be unfair to the Crown and some to the vendor. The Act itself appears to indicate the proper approach. Section 53 (2) (*b*) is the source of the authority for an addition to or a subtraction from the productive value according to the presence of surplus, or the absence of normal, improvements.

"It is significant that the subsection speaks of 'value' not cost. This language may well have been deliberately adopted to prevent the inequity which would result if, on two adjoining areas of equal acreage and of identical character and value, the presence of buildings sufficient for all practical purposes but worth much less than their replacement cost, were to preclude the making of any deduction from the productive value, whilst from the productive value of the other would have to be deducted, by reason of an absence of buildings, a sum equal to replacement cost, and that irrespective of the sum by which that cost might exceed the value of the buildings on the other area, or indeed, the value of the buildings on any substantially similar property in the general locality.

"Parliament may have been conscious that if cost were adopted as a basis, great disparities in value would result and that the measure of the disparity, having regard to the increase in the cost of the building in recent years, would depend upon

the date as at which the replacement costs were calculated. This is a very material factor as to which, despite its importance in such circumstances, the Act is completely silent. This is a significant feature and one which calls for consideration in such circumstances as here pertain.

"The Legislature may also have been influenced against the use of the word 'cost' by an appreciation of the fact that whilst building costs are high, purchasers will make do with the very minimum in buildings; so that where productive value is the index of worth to the owner, some disharmony results if two areas of equal productive value are treated as of too widely divergent values, and that on account of a factor which may endure only temporarily and may, in any case, well prove variable.

"These considerations suggest that the use of the expression 'the value of the improvements normally required' was designed to prescribe for a deduction on some basis other than the mere replacement cost as at whatever date calculated. What is drawn into juxtaposition by the language of the subsection is the value of the improvements (including, of course, buildings) actually in existence, and the notional idea of the value of the improvements which would normally be regarded as sufficient. Thus, contrast and alignment with the value of the improvements commonly and reasonably accepted as sufficient, is invoked.

"This construction of the enactment will, it is thought, operate fairly and avoid all the inequalities and disparities and all the injustices which would seem to follow upon the adoption of any other interpretation. Interpreted in this way, the subsection appears to invite determination of the question in this case of what the notional value of reasonably sufficient buildings would be.

"The conclusion the Court has reached after full consideration is that if there were buildings on the land now of a value of £1,950 they would, having regard to the locality and other circumstances, be accepted as sufficient. That sum must therefore be deducted from the productive value.

"Before proceeding with other topics it may not be inapposite to say that the basis upon which the allowance for building deficiency should be calculated has been discussed by numerous counsel in several cases. The submissions, generally speaking, conflicted, as is not perhaps surprising on a question of such difficulty. The method of assessment adopted by the Court avoids all of the inequalities, if not the inequities, to which most of the submissions made would lead. At the same time it provides a fair and just solution of the problem and one which is in accord with both the letter and the spirit of the Act.

"Beside the adjustment in respect of buildings, there are other adjustments which should be made in terms of the Act and in the interests of fairness. These are as follows:—

"1. The water supply, although sufficient for the purpose for which the land is now being used, is insufficient for its use as a dairy farm. The value of the land has been determined on the higher basis which its use for the latter purpose justifies, so that an adjustment to provide for a sufficient supply as a dairy farm is proper. The estimate of £450 made by the Crown witness seems to contemplate a supply of a range and quality far exceeding the supply generally found upon an average farm. It is thought that a deduction from the productive value of £200 on this account will be sufficient.

"2. The road fence is in need of repair, whilst the whole road frontage which is some 43 chains long is overgrown with gorse. There are isolated gorse patches elsewhere on the property. The repairs to the fencing and the clearing of the gorse must be regarded as deferred maintenance. A sum of £50 must be deducted on this account.

"3. There is a potential value in the property in that areas of it can be made reproductive or more reproductive by some little expenditure of money and by work that an average efficient farmer would himself do. This value can be fairly expressed in terms of money, by adding to the productive value a sum equal to £1 per acre over the whole area, that is, £269. From this must be deducted a sum of £134 which is the sum that, in the achievement of this result, will have to be outlaid in cash. The net addition on this account will be £135.

"In the result, the Court assesses the basic value as follows:—

| | £ | |
|---|---|---|
| *Productive value* .. .. .. .. | 8,555 | |
| Sum allowed for potential value .. .. | 135 | |
| | £8,690 | £8,690 |
| *Less*:— | | |
| Sum attributable to building deficiency.. | 1,950 | |
| " " " water deficiency .. | 200 | |
| Deferred maintenance .. .. .. | 50 | |
| | | £2,200 |

The difference, namely, the sum of £6,490, the Court finds to be the basic value of the property and so declares accordingly.

"This assessment differs widely from the basic value of £4,520 assessed by the Committee which appears to have, in the main, adopted the values deposed to by the Crown witnesses. A careful analysis of the evidence, aided by an inspection, has, however, satisfied the Court that the latter in this instance were, in many respects, more conservative and in some respects more condemnatory, than was wholly justified."

# PREPARATION OF DOCUMENTS.

### Supreme Court and Court of Appeal.

As a war measure, the Court of Appeal Amendment Rules 1940 (Serial No. 1940/181) added Rules 15A and 15B to the Court of Appeal Rules, permitted printing on both sides of the paper, and the use of paper of different size to that otherwise provided by the Rules.

By virtue of the Supreme Court Amendment Rules 1940, No. 2 (Serial No. 1940/182) a new rule was added to the Code of Civil Procedure, R. 597c, which provided that Court documents might be written or typewritten on both sides of the paper.

By the Court of Appeal Amendment Rules 1946 (Serial No. 1946/12) and the Supreme Court Amendment Rules 1946 (Serial No. 1946/13), the rules added as above have been revoked.

The present position is, therefore, that the rules relating to the preparation of documents for filing in the Supreme Court and in the Court of Appeal are now to be observed in the same manner as obtained before the now-revoked amendment, with the following temporary qualification:—

Matter printed or typewritten in manner complying with the revoked rules would be accepted for filing in the Court offices at any time up to February 28—which was the date on which the new regulations were notified in the *New Zealand Gazette*.

They may, however, be accepted at a later date.

# RULES AND REGULATIONS

**Bobby Calf Marketing Regulations, 1943.** (Marketing Act, 1936, and Agriculture (Emergency Powers) Act, 1934.) No. 1946/5.

**Customs Import Prohibition Order, 1946.** (Customs Act, 1913.) No. 1946/6.

**Expeditionary Force Emergency Regulations, 1940, Amendment No. 8.** (Emergency Regulations Act, 1939.) No. 1946/7.

**Purchase of Tallow Order, 1940, Amendment No. 1.** (Marketing Amendment Act, 1939.) No. 1946/8.

**Heavy Motor-vehicle Regulations, 1940, Amendment No. 3** (Public Works Act, 1928, and Motor-vehicles Act, 1924.) No. 1946/9.

**Phosphatic Fertilizer Control Order, 1945, Amendment No. 1.** (Primary Industries Emergency Regulations, 1939.) No. 1946/10.

**Industry Licensing (Hand-shovels Manufacture) Notice 1946.** (Industrial Efficiency Act, 1936.) No. 1946/11.

**Court of Appeal Amendment Rules, 1946.** (Judicature Act, 1908, and Judicature Amendment Act, 1930.) No. 1946/12.

**Supreme Court Amendment Rules, 1946.** (Judicature Act, 1908, and Judicature Amendment Act, 1930.) No. 1946/13.

**Revocation of the Scrap Rubber Control Notice, 1942.** (Supply Control Emergency Regulations, 1939.) No. 1946/14.

# IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

**The Aftermath of Restitution.**—In Christchurch recently, the Chief Justice had occasion to state in two classes of case—bookmaking and restitution—that he was bound to administer the law as he found it. In the prosecution for bookmaking, he informed the jury that during the whole of his service on the Bench he had never expressed his opinion on the gambling laws; but in the suit for a decree for divorce based upon non-compliance with a restitution decree he characterized the procedure as a "farce authorized by statute"—an observation that did not disguise his opinion upon this subject. Possibly the fact that this pronouncement followed the third of three such cases heard consecutively, may have led him to believe that the vice, if such it be, was assuming endemic proportions. On the other hand, the sins of the Legislature, it is respectfully submitted, should not be visited indiscriminately upon counsel or added to the miseries which matrimonial misfits already have to bear. In any event, both in England and New Zealand, restitution has always seemed an unruly offspring of an unhallowed union between the Ecclesiastical and the Divorce Courts. Instituted in England prior to 1884, mainly for the purpose of enforcing money demands, suits for restitution in that year became the foundation for a dissolution of marriage when adultery could also be proved. Non-compliance amounted to desertion and gave an immediate right to a judicial separation. This position has undergone such change that to-day the Matrimonial Causes Act, 1937, does not include non-compliance as a ground for divorce nor does it appear as formerly, to amount to desertion without just cause. In New Zealand, non-compliance with a decree for restitution as an immediate ground for divorce or judicial separation did not emerge until 1898: it disappeared in 1907 and, what the Chief Justice would no doubt regard as its better half—merely as a ground for judicial separation—was not restored until 1928. As a ground for divorce, non-compliance was then a lusty infant of eight, re-born to "this stormy sea of troubles" in the Divorce and Matrimonial Causes Amendment Act, 1920.

**Retort Courteous.**—In common with all counsel who have earned the respect of a grateful Bench for their quick appreciation and mirthful reception of a judicial aside, Scriblex has a secret admiration for the witness who sometimes seizes the last word and uses it with devastating effect. There is an example culled, not from a manual on cross-examination, but from the last collection of the essays of Robert Lynd, better known as "Y.Y." of the *New Statesman and Nation*. It seems that a number of Dutch sailors, on arriving in Belfast, went to a dance hall in York Street where they became very drunk and were arrested on a charge of disorderly behaviour. This took the form not only of fighting but of biting people. The captain of the Dutch ship attended the trial to interpret the evidence given by his men, and at the end of the trial the Magistrate addressed him gravely and said: "It is very un-English to bite people, and I would like you to impress it on your men." To which the Dutch captain replied, equally gravely; "It is very un-Dutch too, Your Worship."

**Lord du Parcq.**—Appointed in 1932 a Lord Justice of Appeal in succession to Lord Justice Greer, Sir Herbert du Parcq became last month a Lord of Appeal in Ordinary, the vacancy having been created by the appointment of Lord Goddard as Lord Chief Justice. This is another of the many instances of a President of the Union at Oxford attaining high judicial rank. Sir Herbert was admitted to the Jersey Bar in 1926 and practised on the Western Circuit. A puisne judgeship in the King's Bench Division was conferred on him in 1932, shortly after his report on the "Dartmoor Mutiny." In this regard, he set a precedent that is not often followed. The convict uprising occurred on Sunday, January 24, 1931. Mr. du Parcq, K.C., as he then was, was appointed on the following day by the Home Secretary to hold an inquiry. Extensive evidence was taken; and a full and comprehensive report furnished on February 3, 1931.

**Ducks, Pearls, and White Rabbits.**—"There are many erroneous terms consecrated by common use. One which has been mentioned in the course of the argument, a glaring instance, is the term 'Bombay ducks' as applied to an Indian fish, and it is agreed that if anybody ordered Bombay ducks and somebody supplied him with ducks from Bombay the contract to supply Bombay ducks would not be fulfilled . . . Another instance where anybody would understand what was meant is if you spoke of Roman pearls. They are not pearls with which any oyster has anything to do, nor do I know that they are Roman. They indicate something which is probably neither Roman nor a pearl, just as it was said by a well-known historian that the Holy Roman Empire had for its chief characteristic that it was neither holy nor Roman nor an empire. One other instance occurs to me of a term consecrated, if I may say so, by common user which does not indicate the true fact, and that is when people speak as they commonly do of the judicial ermine, meaning merely any white fur when worn by a Judge." *Per* Darling, J., in *Leney* v. *Watson*, [1915] 3 K.B. 731.

**Simon.**—The late Philip Guedalla once said: "John Simon's a peculiar fellow; for months on end he passes you as if he had never seen you, and then, all of a sudden, without any warning he puts his hand on your shoulder and calls you by some other fellow's Christian name." This is a witty but acid picture of one who ascribed his success at the Bar to his being the possessor of a digestion that enabled him to eat his lunch in ten minutes without any ill effects. King's Counsel at thirty-five, Attorney-General at forty, he gave up legal practice fifteen years later when his income had reached a total estimated at £40,000 per annum. Lord Balfour once observed that Sir John (now Viscount Simon) was the only man who had ever been able lucidly to explain to him the intricacies of the income-tax. No trouble was too much for him; and it is said that, briefed in an important dispute over the request by a large railway company for increased traffic facilities, he spent a number of days in signal-boxes, checking and recording the traffic. It was the intense preparation that he put into this action that first enabled him to make his name.

# PRACTICAL POINTS.

**This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.**

**1. Water.**—*Riparian Rights—Grant of Water Rights to Non-riparian Owner Purporting to be in Priority to Lower Riparian Owners.*

QUESTION: (1) A. owns a farm property of 100 acres near a natural stream. If A. were to purchase from B. a small piece of land which abuts on this stream, would the purchase of this piece of land by A. give A. riparian rights over the stream in respect of the farm property of 100 acres owned by A. The piece of land in question which A. proposes to purchase from B. is separated from A.'s farm property of 100 acres by a public road.

(2) A spring issuing from B.'s land flows into a natural stream. B. by constructing an artificial water-course on his property has increased the flow of water into this stream. Could B. grant to A. the right to take water from this stream at a point where the stream runs through B.'s property in priority to the rights of lower riparian owners provided that the water to be taken by A. does not diminish the quantity of water which would have been available to the lower riparian owners had B. not increased the flow of water to this stream by the construction of such artificial watercourse?

ANSWER: (1) The answer to this question is in the negative: see *Skey* v. *Dunedin City Corporation*, (1905) 24 N.Z.L.R. 804. Land cannot have riparian rights unless it is in *contact* with a stream. In New Zealand the soil of a public road is vested either in the Crown or in the local body, and therefore after the transfer A. would own two separate parcels of land and not one physical unit: see also *33 Halsbury's Laws of England*, 2nd Ed., p. 593.

(2) Although there is no right of property in flowing water, B. could nevertheless grant to A. an easement of the nature proposed: *Paine and Co., Ltd.* v. *St. Neots Gas and Coke Co.*, [1939] 3 All E.R. 812, *Beauchamp* v. *Frome Rural District Council*, [1938] 1 All E.R. 595; *33 Halsbury's Laws of England*, 2nd Ed., para. 1050 (*g*).

It is considered, however, that no District Land Registrar would register such an easement, if it purported to be in priority to the rights of lower riparian owners. The grant from A. to B. could not prejudice their natural rights and would necessarily in the circumstances be subject to those rights; *33 Halsbury's Laws of England*, 2nd Ed., para. 1045, and see also the two chapters in *Salmond's Law of Torts*, 10th Ed., dealing with "Injuries to Servitudes."

The burden of proof would be on B., that his construction of the artificial water-course had *increased* the natural flow of water: *Portsmouth Borough Waterworks Co.* v. *London, Brighton and South Coast Rail Co.*, (1900) 74 J.P. 61, 26 T.L.R. 173; and the cases collected in *19 English and Empire Digest*, 146, 998.

X2.

**2. Executors and Administrators.**—*Secured and Unsecured Creditors—Mortgagee in Possession claiming Rents—Unsecured Creditors' Position—Administrator's Duty.*

QUESTION: We are acting for the administrator in a deceased estate. There are five successors, three of whom are infants. The main assets are blocks of shops having a capital value of approximately £7,500, which show a substantial return in rents. There are overdue Bank mortgages on the blocks amounting to approximately £6,900 and, should the properties be sold, there will be little left for distribution after the unsecured debts, amounting to approximately £800, are paid. The Bank mortgagee has demanded the net income from the shops to be applied towards interest under the mortgage and then in reduction of principal. This will result in the unsecured creditors receiving nothing and eventually taking action.

Is the administrator entitled to apply the rents, first, towards rates, insurances and interest under the Bank mortgages, and then rateably between the Bank and the unsecured creditors?

We appreciate that this action may force the Bank to apply for leave of the Court under the Mortgagees Emergency Extension Regulations, 1940, to enter into possession of the properties.

With careful shepherding, there is every prospect of the Bank mortgages eventually being paid off; but should the administrator be precipitated into selling the properties there is every likelihood of the Estate being unable to pay all its creditors.

ANSWER: From the figures given, it would seem that the estate should be administered under Part IV of the Administration Act, 1908, and the fact that the administrator is aware that there is a "likelihood of the estate being unable to pay all its creditors" makes it imperative for him to be specially careful in administering the estate.

Where an estate is clearly solvent, the administrator can pay the debts in any order he pleases; but any administrator with business knowledge would recognize that if a secured creditor does not receive preferential treatment in respect of the property over which he holds security, he will take steps to protect himself by entering into possession of such property or by exercising his power of sale, subject, in each case, to any necessary consent of the Court to the exercise of the power. It should be borne in mind that it is not necessary for a mortgagee to enter into possession of its mortgaged property in order to obtain the benefit of the rentals produced by the letting of that property: he may notify the tenants to pay the rentals to him without actually entering into possession: see *Moyes* v. *Pollock*, (1886) 32 Ch.D. 53. If, however, any rent is actually received by the mortgagor or his representative (the mortgagee not having previously required payment thereof by the tenant to him), the mortgagee has no special claim in respect thereof and has no charge thereon, see *23 Halsbury's Laws of England*, 2nd Ed., p. 323.

Such rent in the hands of the mortgagor's administrator is an asset available for payment of the secured and unsecured debts of the deceased generally. In the case under discussion the administrator could "play safe" and administer the estate as if it were being administered under Part IV; but the result would almost certainly be that the mortgagee would take the necessary steps to exercise his power of sale, or of entry into possession, or would apply for an order to administer the estate under Part IV, having of course obtained any consent necessary.

The administrator would probably be well advised to comply with the mortgagee's demand, as this course seems to give greater protection to the estate. The matter could be explained to the unsecured creditors with a request that they should give their consents to the course proposed.

Payment of the debts is, of course, the primary duty of the administrator; and beneficiaries come into the picture only when the liabilities have been paid.

Y2.