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CERTIORARI FOR ERROR.

III.—Remedy by Declaration.

AS we have already seen, one difficulty in the procedure of *certiorari* for error, as was shown by both Courts in *R.* v. *Northumberland Appeal Tribunal, Ex parte Shaw*, [1952] 1 All E.R. 122, was that the point of law has to appear on the face of the proceedings—" on the face of the record," as it is said. When the tribunal simply states its decision, without disclosing its reasons, that form of remedy is, in general, not available. What then can be done in cases where Parliament has intended that there should be no appeal, if a tribunal does not observe the law, and does not give its reasons for its decision ?

This question was raised, and answered to some extent, by the Court of Appeal in *Barnard* v. *National Dock Labour Board*, [1953] 1 All E.R. 1113. The matter in dispute was the suspension from work of certain lightermen by a port manager, a Mr. Hogger, to whom a local board had delegated its disciplinary function which had been delegated to it by the National Dock Board. Their appeal to the stationary appeal tribunal was disallowed. The lightermen brought an action against the National Board claiming a declaration that their suspension was unlawful.

The defendant Board raised the preliminary point that an action for declaration did not lie, since the Court had no jurisdiction to question the decisions of statutory tribunals save by proceedings for *certiorari*.

McNair, J., gave judgment for the plaintiffs on the preliminary point : see [1952] 2 All E.R. 424 ; and the action proceeded. He also found that the orders given to the plaintiffs were not unlawful ; that the local board had delegated its duties to the port manager ; that it had power to do so ; and, therefore the suspension of the plaintiffs was not wrongful. The plaintiffs appealed.

The Court of Appeal made short work of the Board's contention that, as the plaintiffs had appealed to the statutory appeal tribunal, and failed, they could not then be heard to say that their suspension was wrongful. As Singleton, L.J., tersely put it : if, as he thought, the notice of suspension was in each case a nullity, the fact that there was an unsuccessful appeal from it could not turn what was a nullity otherwise into an effective suspension.

Their Lordships held that, while an administrative function can often be delegated, a judicial function rarely can be ; and a judicial tribunal cannot delegate its functions unless it is empowered to do so expressly or by necessary implication. The local board had no power to delegate its judicial function or to varify subsequently a decision by a person to whom the power of suspension had been improperly delegated, and the suspension by the port manager was a nullity. The local board had been put in a judicial position between the men and the employers, and they were just as much a judicial tribunal as the tribunals which were considered by the Court of Appeal in *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226, and *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175, the only difference being that those were domestic tribunals and the National Board was a statutory one. The Board, by its procedure, recognized that before it could suspend a man it must give him notice of the charge, and an opportunity of making an explanation. Their Lordships said that was entirely consonant with the view that the Board exercised a judicial function and not an administrative one ; and they so held.

The main point for consideration was, however, whether the Court had power to grant a declaration or an injunction in some cases to prevent an injustice, where the decision of an inferior tribunal cannot be questioned by a writ of *certiorari*.

The judgments of their Lordships on this point will repay some study.

Singleton, L.J. referred to *Cooper* v. *Wilson*, [1937] 2 All E.R. 726, and *Andrews* v. *Mitchell*, [1905] A.C. 78, which supported the view that a claim for a declaration that a statutory body acted without jurisdiction can be dealt with in an action for a declaration that the decision in question was null and void. In the present case, as in *Cooper* v. *Wilson*, a writ of *certiorari* was of no use, because the plaintiffs did not know of the illegality which gave rise to the preliminary point until the time for taking out the writ had expired ; and the question which had been argued before the Court was not before the appeal tribunal at all. In the circumstances, His Lordship considered that the Court had power to grant the plaintiffs a declaration that their suspension was wrongful.

Denning, L.J., answered the contention of counsel for the Board that the Courts have no right to interfere with the decision of statutory tribunals except by the historical method of *certiorari*. His Lordship said :

> [Counsel] drew an alarming picture of what might happen if once the court intervened by way of declaration and injunction. It meant, he said, that anyone who was dissatisfied with the decision of a tribunal could start an action in the courts for a declaration that it was bad, and thus, by a side-wind, you could get an appeal to the Courts in cases where Parliament intended there should be none. I think there is much force in that contention—so much so that I am

sure in the vast majority of cases the Courts will not seek to interfere with the decisions of statutory tribunals—but I do not doubt that there is power to do so, not only by *certiorari*, but also by way of declaration. I know of no limit to the power of the Court to grant a declaration except such limit as it may in its discretion impose on itself, and the Court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done ? The remedy by *certiorari* is hedged round by limitations and may not be available. Why, then, should not the Court intervene by declaration and injunction ? If it cannot so intervene, it would mean that the tribunal could disregard the law.

The authorities show clearly that the Courts can intervene.

His Lordship instanced *Andrews* v. *Mitchell* (*supra*) and showed that, in both *Leeston* v. *General Council of Medical Education and Registration*, (1889) 43 Ch. D. 366, and *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, the Court of Appeal had assumed without question that it had power to intervene by declaration and injunction in the case of statutory tribunals just as it had in the case of domestic tribunals ; and he added, " I do not think we should admit any doubt on it."

His Lordship went on to say :

This is not, however, the occasion to lay down the bounds of the jurisdiction. We have to consider here two decisions : first, the decision to suspend the plaintiffs ; secondly, the decision of the appeal tribunal. So far as the decision to suspend is concerned as I see it, we are not asked to interfere with the decision of a statutory tribunal, but we are asked to interfere with the position of a usurper. Mr. Hogger, the port manager, is in the position of a usurper. He acted in good faith on the authority of the board ; but, nevertheless, he has assumed a mantle which was not his, but that of another. This is not a case of a tribunal which has a lawful jurisdiction and exercises it ; it is a case of a man acting as a tribunal when he has no right to do so. These Courts have always had jurisdiction to deal with such a case. The common-law Courts had a regular course of proceeding by which they commanded such a person to show by what warrant—*quo warranto*—he acted. Discovery could be had against him, and, if he had no valid warrant, they ousted him by judgment of ouster. In modern times proceedings by *quo warranto* have been abolished and replaced by a declaration and injunction : see s. 9 of the Administration of Justice (Miscellaneous Provisions) Act, 1938. Side by side with the common law jurisdiction of *quo warranto* the Courts of equity have always had power to declare the orders of a usurper to be invalid and to set them aside. So, at the present day we can do likewise. We can declare that the suspension ordered by Mr. Hogger, the port manager, was unlawful and void ; we can declare it to be the nullity which in law it was.

His Lordship, continuing, said that in the course of the argument, counsel was compelled to admit that, if the plaintiffs had no remedy by way of declaration, they had no remedy at all ; and counsel agreed that the plaintiffs could not have obtained redress by *certiorari* for the simple reason that they did not know the facts.

Singleton, L.J., at p. 1120, concluded : In *certiorari* there is no discovery, whereas in an action for a declaration there is. The plaintiffs only discovered the true position shortly before the trial, about two and a half years after the suspension. That shows that, but for these proceedings, the truth would never have been known. Mr. Hogger could have gone on indefinitely assuming a jurisdiction which did not belong to him, and the men would be subjected to penal orders which were null and void, and would have had no redress. I should be sorry to think that these Courts were powerless to put right such a situation. The plaintiffs felt that they had not been treated justly, and they sought redress in the Queen's Courts, which, it is said by the Board, have no power to interfere. Let us take that argument into account by all means ; but let us also remember that, if the plaintiffs cannot get redress here they cannot get it anywhere else. I think they are entitled to redress, and I agree with my Lord that we should declare that the suspension was unlawful.

Romer, L.J., said that, for the reasons that his brethren had given, there was good and sufficient ground for the Court's holding that in the circumstances of the case it was open to the Court to make a declaration.

Lord Justice Denning, in *The Changing Law*, comments, after reference to *Barnard's* case :

So the process goes on. Gradually, the Courts are seeing that statutory tribunals obey the rule of law ; and not only statutory tribunals, but statutory committees also. These, too are a significant feature of the Welfare State. Suppose they go wrong in law, can they be put right ?

His Lordship then refers to *R.* v. *Manchester Legal Aid Committee, Ex parte R. A. Brand and Co., Ltd.*, [1952] 1 All E.R. 480, which, he said, went further than any case had done before by showing that new statutory committees are not allowed to be a law unto themselves. He concluded :

" The Court of Queen's Bench has always claimed the right to control inferior Courts, but it has been very cautious in exercising control over administrative bodies. It will not seek to control them in regard to questions of policy, but it will interfere when they go wrong in law on a matter which it is their duty to decide according to law."

SUMMARY OF RECENT LAW.

ANIMALS.

Cattle Trespass and the Scienter Rule. *98 Solicitors' Journal*, 295.

BANKRUPTCY.

Proof of Debt—Rejection by Official Assignee of Proof of Debt Lodged just over One Month after Expiry of Two Months from Adjudication—Application to reverse Such Decision—Official Assignee acting administratively—Court to form Its Own Opinion on Available Material—Facts to be considered as a Whole in determining whether " special circumstances " exist, and whether Same Sufficient to excuse Delay—" Special circumstances " —Bankruptcy Act, 1908, s. 100 (9). In determining whether there are " special circumstances " within the meaning of those words as used in s. 100 (9) of the Bankruptcy Act, 1908, and whether those special circumstances may be approved as sufficient to justify the delay in lodging a proof of debt, the facts must be considered as a whole. (*In re Nigro*, [*1926*] N.Z.L.R. 501 ; [1926] G.L.R. 283 ; *In re Campbell*, [1927] G.L.R. 516 ; *In re Swinson, Ex parte Brodie and Public Trustee*, [1942] N.Z.L.R. 232 ; [1942] G.L.R. 161 ; and *In re Hooper*, [1949] N.Z.L.R. 379 ; [1950] G.L.R. 70, considered.) (*In re McMurdo*, [1902] 2 Ch. 684, referred to.) The Official Assignee acts administratively rather than judicially, and, in proceedings by way of appeal from a decision to reject a proof of debt as being out of time, it is for the Court to form its own opinion on the whole of the material available to it. (*In re Hooper*, [1949] N.Z.L.R. 379 ; [1950] G.L.R. 70, mentioned.) An order of adjudication was made on July 20, 1953, the company (in liquidation) being the petitioner. The debt on which the petition was founded was an order of the Supreme Court directing bankrupt to pay a sum of £960 for calls. The liquidator's proof of debt was lodged a little more than one month after the expiration of two months from the date of the adjudication, the company's claim having been at all times known to the Official Assignee. The Official Assignee rejected it on the grounds of lateness. There was correspondence between the Official Assignee, in the two months after the adjudication. The

liquidator claimed that he was led to assume that he was recognized as a creditor, and that a reasonable further time would be allowed for proof. On motion by the liquidator under s. 100 (9) of the Bankruptcy Act, 1908, for an order reversing the Official Assignee's decision to reject his proof of debt, *Held*, That there were "special circumstances" in this case, within the meaning of those words as used in s. 100 (9) of the Bankruptcy Act, 1908, which were sufficient to justify (in the sense of "excuse"), the delay; and the decision of the Official Assignee in rejecting the proof of debt should be reversed. *Re Hunter (A Bankrupt), Ex parte Exclusive English Imports, Ltd. (In Liquidation)* (S.C. Nelson. March 19, 1954. F. B. Adams, J.)

CHARITIES.

Professional Societies as Charities, *97 Solicitors' Journal*, 848.

CONTRACT.

Consideration (The *High Trees* Case) *97 Solicitors' Journal*, 261.

CONVEYANCING.

Appointments to Spouses. *98 Solicitors' Journal*, 280.

Restrictive Covenances in Leases. *217 Law Times*, 278.

The Drafting of Charitable Trusts. *217 Law Times*, 256.

CRIMINAL LAW.

Attempt and Preparation, *104 Law Journal*, 211.

Corroboration of an Accomplice. *104 Law Journal*, 308.

Police Offences—Rogue and Vagabond—Frequenting with Felonious Intent—Accused stopping Boy in Road on One Occasion and making Appointment with Him with "felonious intent"—Accused guilty of "frequenting" that Road—"Frequenting"—Police Offences Act, 1927, s. 52 (1) (j). The appellant, who had been declared to be an habitual criminal, had a considerable record of indecent offences against males. On March 21, 1954, he accosted a boy aged thirteen years in Mount Albert Road, his ostensible purpose being to ask to be directed to Staveley Avenue. The appellant quickly turned the conversation to a boat which he possessed and kept at Point Chevalier beach, and he invited the boy to visit him, offering him 10s. to help him to shift the boat. (It was proved that the boat was of light weight, capable of being shifted by one person). The first suggestion was that the boy should go to his place in Symonds Street on the following Friday night and spend the night with him. It was finally arranged that he should go from his home to Symonds Street—a distance of some four or five miles—on the Saturday morning travelling by bus. In order to ascertain the bus time-table, the appellant and the boy visited a nearby dairy to make the necessary inquiries. The boy was given 2s. to cover his bus fare. When the boy returned to his home and told his father of the meeting, the father went with his son, first, to Mount Albert Road and, later on, to Staveley Avenue where the boy identified the appellant. The appellant was charged under s. 52 (1) (j) of the Police Offences Act, 1927, with being a rogue and vagabond in that being a suspected person he did frequent a public place, to wit Mount Albert Road, with felonious intent. He was convicted and was sentenced. On appeal against conviction and sentence, *Held*, 1. That, when the appellant interrupted his journey with the object of intercepting the boy, the time involved must have been sufficient to gain the boy's confidence and to have made an appointment for a subsequent meeting; and, once the appellant used the occasion in that way, he commenced to "frequent" Mount Albert Road. (*Airton* v. *Scott*, (1909) 25 T.L.R. 250, followed.) (*R.* v. *Child*, [1935] N.Z.L.R. 186; [1935] G.L.R. 249 applied.) 2. That the only inference to be drawn from the facts was that the appellant stopped the boy and engaged him in conversation for the purpose of seeing whether he could make him a victim of his depraved habits, and, consequently "a felonious intent" on the part of the appellant was established. *Goundry* v. *Police*. (S.C. Auckland. May 27, 1954. North, J.)

Probation—Accused admitting Circumstances of Offence placed before Court and pleading "guilty"—Court's Jurisdiction to discharge Accused—"Evidence"—Offenders Probation Act, 1920, s. 18 (1) (a). A Magistrate has jurisdiction to discharge an accused person under s. 18 (1) of the Offenders Probation Act, 1920, after the entry of a plea of guilty, and the prosecutor has placed before the Court the circumstances of the offence and those circumstances have been admitted by the accused. The prosecutor's statement and its unqualified admission by the accused constitute "the evidence" within the meaning of s. 18 (1) (a). (*R.* v. *Recorder of Grimsby, Ex parte Purser*, [1951] 2 All E.R. 889, applied.) (*Harvey* v. *Church*, (1898) 17 N.Z.L.R. 19; 1 G.L.R. 20, referred to.) *Police* v. *B.* (Auckland. May 10, 1954. McCarthy, S.M.)

Proceeds of Crime—Application by Police for Order for Restitution of Moneys reserved as Proceeds of Crime to Persons entitled thereto—Moneys not sufficiently identified as received by Criminal Means—Application under Statute—Proper Proceeding as Evidence available on Oath—Police Force Act, 1947, s. 41. On an application by the Police, the Court was asked to make an order that the proceeds of the sale of property alleged to have been purchased by an accused with moneys obtained by criminal means should be returned by the Police to the persons alleged to be entitled thereto. The application was opposed on the ground that the moneys in question had not been sufficiently identified as being moneys obtained by criminal means. *Held*, That the Court had power in an appropriate case to make the order sought, but, as disputed questions of facts should not be dealt with in what amounts to an *ex parte* proceeding, the Court should not make the order (except on such general terms that it would not have practical effect) where it was not admitted that the moneys in question represented the proceeds of a criminal act. *Semble*, That a more apt form of proceedings is by way of an application under s. 41 of the Police Force Act, 1947, under which a procedure is laid down whereby evidence may be taken on oath, and claimants to the property concerned may be present. *Police* v. *Brown* (Auckland. May 27, 1954. Kealy, S.M.)

Rape—By Husband on Wife—No Separation Agreement or Order in Force—Divorce Petition presented by Wife.—Assault occasioning Actual Bodily Harm—Enforcement of Husband's Marital Rights—Mental Injury. In January, 1952, the wife left the husband, but did not apply for a separation order or for an order of judicial separation, and there was no separation agreement between the parties. In January, 1953, she presented a petition for divorce on the ground of adultery. On May 21, 1953, before the petition was heard, the husband had intercourse with her against her will. He was alleged to have used force against her, and, according to the evidence, she was in a hysterical and nervous condition afterwards. The husband was charged on indictment with rape and with assault occasioning actual bodily harm. On a submission by the defence that there was no case to answer, *Held*, 1. The fact that the wife had left the husband and had presented a petition for divorce did not amount to a revocation of the consent to marital intercourse impliedly given by her at the time of the marriage, and, as the implied consent had not been revoked either by an act of the parties or, by any order or decree of a Court, the husband could not be guilty of rape. (*R.* v. *Clarence*, (1888) 22 Q.B.D. 23, considered.) (Principle in *R.* v. *Clarke*, [1949] 2 All E.R. 448, applied.) 2. "Assault occasioning actual bodily harm" included an assault which resulted in an injury to the state of a person's mind for the time being; although the husband had a right to marital intercourse, he was not entitled to use force or violence for the purpose of exercising that right; and, if he did, he was guilty of an assault. *R.* v. *Miller*. [1954] 2 All E.R. 529.

Trial—Plea—Plea of Guilty—Withdrawal—Application before Sentence Pronounced—Discretion of Court. The question whether or not a prisoner should be allowed to withdraw a plea of guilty before he is sentenced is entirely a matter of discretion for the trial Judge, but, once judgment has been pronounced, a plea cannot be withdrawn. (*R.* v. *Sell*, (1840) 9 C. & P. 346, and *R.* v. *Plummer*, [1902] 2 K.B. 339, referred to); (*R.* v. *Blackemore*, (1948) 33 Cr. App. Rep. 49, not followed.) *R.* v. *McNally*. [1954] 2 All E.R. 372 (C.C.A.)

CURRENCY.

Gold Clause and International Payments, *104 Law Journal* 213.

Money of Account—New Zealand Government Inscribed Stock and Debentures issued in 1925, 1926 and 1927—Interest payable and Principal repayable in Melbourne "free of exchange"—"Domicil" in New Zealand—Subsequent Devaluation of both Australian and New Zealand Currencies—Restoration of New Zealand Currency to Parity with English Currency—Consequent Divergence between Currencies of Australia and New Zealand—Obligations under Stock and Debentures measurable in Money of Account of Place of Payment—State Advances Act, 1913, s. 18—(Finance Act, 1923, s. 3; Finance Act, 1924, s. 3)—New Zealand

Loans Act, 1908, s. 5—(New Zealand Loans Act, 1953, s. 3)—Judicature Amendment Act, 1952, s. 3. On February 1, 1951, the maturity date ,the plaintiff was the holder of certain parcels of Inscribed Stock and Bearer Debentures issued by the New Zealand Government in 1925, 1926 and 1927, and having an aggregate nominal or face value of £526,500. It was an express stipulation of all the contracts relating to these securities that payment of both interest and principal should be made in Melbourne and also (except in the case of the debentures) that such payments of interest and principal in Melbourne should be made there "free of exchange". At the time when the securities were issued, New Zealand currency was at parity with Australian currency; and, although both currencies were subsequently devalued in terms of English currency and there was for a period some divergence between them, the two currencies had again been at parity with each other for many years before August 20, 1948, when New Zealand currency was restored to parity with English currency with the result that £N.Z. 100 became worth £A.124. Thereafter, the Government continued to pay to the plaintiff at Melbourne interest at the rate specified in the securities on the nominal amount thereof expressed in terms of Australian currency, and, likewise, on the maturity date repaid to the plaintiff at Melbourne the nominal amount of the principal in Australian currency. The plaintiff, having claimed that the Government's obligations under the securities were measurable in the money of account of New Zealand, brought an action claiming the alleged short payments of principal and interest arising from the difference in value between the two currencies which occurred after August 20, 1948. *Held*, by *Fair*, *Hay* and *North*, JJ., (*Gresson* and *Stanton*, JJ. dissenting) That such obligations were measurable not in the money of account of New Zealand, but in that of Australia; and that the Crown had fully discharged its obligations both as to principal and interest by paying to the plaintiff the nominal amounts thereof in Australian currency in Melbourne. (*Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122 and *Auckland City Council* v. *Alliance Assurance Co.*, [1937] N.Z.L.R. 142; [1937] A.C. 587, followed.) (*Bonython* v. *Commonwealth of Australia*, [1951] A.C. 201, distinguished.) *National Mutual Life Association of Australasia, Ltd.* v. *Attorney-General.* (S.C. Wellington. May 31, 1954. Fair; Gresson; Stanton; Hay; North, JJ.)

DEATH DUTIES.

Gifts or Sales? *97 Solicitors' Journal*, 841.

DEATHS BY ACCIDENTS COMPENSATION.

Eleven-year-old Child Killed—Pecuniary Prospective Value of His Services to Parents for Jury to decide—Court's Function to decide whether Reasonable Relation between Amount of Damages awarded and Pecuniary Loss sustained. Parents claimed damages in respect of the death of their son, who had reached his eleventh birthday a month before he was struck by the defendant's motor-car and suffered injuries which caused his death. The jury awarded special damages in respect of the medical and funeral expenses and £440 general damages, reduced by ten per centum in respect of the deceased's share of responsibility for the accident. The jury found that there was reasonable expectation of pecuniary advantage to the parents if the deceased had continued to live. The defendant moved for non-suit, or, alternatively, for a new trial on the grounds that the verdict was against the weight of evidence (which was rejected by the trial Judge) and that the damages were excessive. *Held*, That the question in every case is whether there was a reasonable expectation of pecuniary benefit from the continuance of life, or nothing more than a mere speculative possibility of pecuniary benefit; and each case of this kind must be decided on its own facts. (*Barnett* v. *Cohen*, [1921] 2 K.B. 461; *Taff Vale Railway Co.* v. *Jenkins*, [1913] A.C. 1; and *Buckland* v. *Guildford Gas, Light and Coke Co.*, [1949] 1 K.B. 410; [1948] 2 All E.R. 1056, referred to.) 2. That the question whether or not there was any pecuniary prospective value to the parents was for the jury to decide, having regard to the age, health, intelligence, and general character of the child, and to all the relevant circumstances. 3. That it had been established that the deceased had rendered services which had some value judged by a pecuniary standard; the evidence as to his disposition and conduct afforded some evidence of a reasonable probability that his continuance in life would have carried with it a pecuniary benefit to his parents; and there was some evidence as to the probabilities of the future upon which the jury was entitled to form a judgment in the light of its own experience and knowledge of life. (*Taff Vale Railway Co.* v. *Jenkins*, [1913] A.C. 1, applied.) 4. That it was the function of the jury to assess the damages, and, in doing so to assess the prospective pecuniary value of the deceased had he lived, and to appraise the worth of what pecuniary advantage the parents might have enjoyed in the future if the deceased had lived, in respect of the value of the deceased's services, present and prospective, as compared with the cost of maintaining him; and it was for the Court to decide whether or not there was a reasonable relation between the amount awarded and the pecuniary loss sustained. 5. That the quantum of damages awarded could not be deemed so excessive as to warrant interference by the Court. *Cole* v. *Jones.* (S.C. Palmerston North. April 6, 1954. Gresson, J.)

DESTITUTE PERSONS.

Maintenance of Wife—Husband refused Order for Restitution of Conjugal Rights—Considerations applying to Supreme Court's Decision not necessarily Same as Considerations in Magistrates' Court on Application for Maintenance—Latter Court to have regard to all Circumstances and Make or Refuse Order on Evidence before It—Destitute Persons Act, 1910, *s.* 17. Considerations applying to the Supreme Court's refusal to make an order for restitution of conjugal rights are not necessarily the same considerations as are to be considered by the Magistrates' Court on the issue of maintenance. It is the duty of the Magistrates' Court to pay heed to the evidence before it, and, having regard to all the circumstances of the case, to make or refuse a maintenance order. *Foster* v. *Foster* (Auckland. March 31, 1954. Grant, S.M.)

DIVORCE AND MATRIMONIAL CAUSES.

Hotel Divorce Cases: "The Woman Unknown". *98 Solicitors' Journal*, 277.

FACTORY.

Floor—Opening—Dry Dock—Safe Means of Access—Re-concreting Wall—Workman Working on Ledge containing Open Culvert—Bridge over Culvert—Factories Act, 1937 (c. 67) s.s 26 (1)—(Factories Act, 1946 (N.Z.), ss. 47 (1) 48 (3)). A workman, employed by the defendants, was engaged in re-concreting the walls of a dry-dock, which involved the erection of a timber framework against the dock walls, a process known as "shuttering". In order to carry out this work, it was necessary for the workman to stand with his back to the well of the dock, at the edge of a ledge or "altar" some two feet six inches wide, along the centre of which ran an open culvert. Some yards away from the point at which the workman was engaged, the cluvert was traversed by a small concrete bridge. When returning to his position on the altar the workman stepped across the culvert, stumbled and fell over the edge of the altar and fell into the dock below, receiving fatal injuries. In an action by the widow and the administrators of the deceased under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiffs alleged that the defendants were guilty of negligence at common law, and were in breach of their statutory duty under the Factories Act, 1937, s. 25 (3) and s. 26 (1). *Held*, 1. A dry-dock was not an opening in the floor of a factory within s. 25 (3), and there was, therefore, no breach of that sub-section; nor were the defendants in breach of s. 26 (1) because they had provided the concrete bridge which afforded safe means of access over the culvert. 2. The defendants were guilty of negligence at common law in failing to provide a protecting fence or guard-rail along the outside edge of the altar, and the plaintiffs were, therefore, entitled to recover damages. *Bath and Another* v. *British Transport Commission.* [1954] 2 All E.R. 542 (C.A.)

INFANTS AND CHILDREN.

Marriage of An Infant. *98 Solicitors' Journal*, 310.

MAORIS AND MAORI LAND.

Tikitere Development Scheme—Persons to be nominated as Occupiers of Land in Scheme—Fiduciary Relationship whereby Crown, through the Minister or Board of Maori Affairs, became Trustee for Owners—Maori Owners thereby becoming beneficially entitled to Acquired Lands and Interests for which they, in effect, provided the Purchase Moneys—Maori Land Act, 1931, s. 71—Maori Land Amendment Act, 1936, ss. 1, 16, 24, 37. In an application by the Board of Maori Affairs pursuant to ss. 16 and 24 of the Maori Land Amendment Act, 1936) to the Maori Land Court at Rotorua, that Court was requested to make recommendations with regard to the person or persons to be nominated as occupiers of the various lands included in the Tikitere Development Scheme, and the terms and conditions

on which such occupation should be granted to such person or persons. Doubts arose on the hearing of the application as to the beneficial ownership of certain lands and interest in land which had been acquired in connection with the scheme; and the Maori Land Court, with the sanction of the Chief Judge stated a case for the opinion of the Supreme Court. The questions submitted for the opinion of the Court were: 1. Whether the lands and interests in land so acquired in the name of the Crown are impressed with any trust in favour of the owners of the Maori lands included in the scheme, or of any other person or persons. 2. Whether the Crown was under a duty as trustee either to make application for an adjustment of the liabilities of the scheme lands under the Mortgagors and Lessees Rehabilitation Act, 1936, or to make a voluntary adjustment of such liabilities. *Held*, 1. That, on the facts as set out in the judgment the Minister in the first place, and latterly the Board of Maori Affairs, became a trustee of the Maori lands in the scheme immediately in the case of each block of the issue of the statutory notice; and while there was no vesting of the land in the Minister or the Board pursuant to the notice, the complete power of control of the land passed with the notice, and none of the beneficial owners, except with consent, was entitled to exercise any rights of ownership. 2. That a fiduciary relationship was set up whereby, in effect, the Crown through the Minister or the Board (as the case may be) became a trustee for the owners. (*Aotea District Maori Land Board* v. *Commissioner of Taxes*, [1927] N.Z.L.R. 817; [1927] G.L.R. 464, distinguished.) 3. That the legal position resulting was that the Maori owners became beneficially entitled to the acquired lands and interests, the purchase moneys of which were in effect provided by them by reason of the fact that their own lands were charged as security for payment of the advances made by the Crown. 4. That, accordingly, the acquired lands and interests in land (as enumerated in the Case) are held by the Crown upon trust for the owners of the Maori Lands included in the Tikitere Development Scheme. 5. That the Court should decline to answer the second question whether there the Crown was under a duty to make application for an adjustment of liabilities under the Mortgagors and Lessees Rehabilitation Act, 1936, as it was not a question of law which arose on the proceedings before the Maori Land Court in terms of s. 71 of the Maori Land Act, 1931; and, further, that there was insufficient data before the Court to enable it to express an opinion on the question, even if it were permissible to entertain it at all. (*Watson* v. *Miles*, [1953] N.Z.L.R. 958, applied.) *Quaere*, Whether the provisions of the Mortgagors and Lessees Rehabilitation Act, 1936, have any application to a scheme of development under Part I of the Maori Land Amendment Act, 1936. *In re Tikitere Development Scheme*. (S.C. Hamilton. March 29, 1954. Hay, J.)

MENTAL DEFECTIVES.

Committee—Application by Trust Company—Onus on Applicant to establish Some Sufficient Reason for Appointment in Preference to Public Trustee—Qualification of Applicant Company to act as Committee, Its Appointment as Executor under Patient's Will, and Bare Consent by Patient's Sons to Appointment as Committee—Insufficient Reasons for Appointment—Mental Defectives Act, 1911, s. 115 (1). An applicant for appointment under s. 115 (1) of the Mental Defectives Act, 1911, as the Committee of the estate of a mentally defective person in preference to the Public Trustee must discharge the onus of establishing that there is some sufficient reason, having regard to the circumstances of the particular case, why such application should be made. The following do not constitute a sufficient reason: (*a*) The fact that a trustee company is empowered by law to act as the committee of a mentally defective person, and that it is fully qualified to undertake the office; or (*b*) The fact that it has been appointed executor under the patient's will; or (*c*) The filing of a bare consent by the patient's sons to the proposed appointment, not purporting to show any strong desire that the appointment should be made in preference to the Public Trustee, (*In re Q.*, [1953] N.Z.L.R. 327, applied.) *In re W.* (*A Mental Patient*) (S.C. Dunedin. April 26, 1954. Archer, J.)

SALE OF GOODS.

Warranty—Sale of Cows—Warranty of Soundness and of Calving by Stated Date—Warranty relating to Purpose for which Cows being acquired—Immaterial whether Soundness at Time, of Sale or on Calving—Measure of Damages—Sale of Goods Act, 1908, s. 54. An agreement for the sale and purchase of *inter alia*, forty cows, contained the following clause: "14. This sale includes the following live and dead stock in respect of which cows the vendor undertakes to be sound and in calf by October. 40 cows at £25 each . . . " The evidence established that two cows were empty, that two cows were unsound by reason of fistulas into the teat canals of the right front teats, half way up the teats the result of tears, which caused continuous dripping; that one cow proved unsound by reason of two infected quarters; and that five cows did not calve until some months after October. In an action against the vendor, claiming damages from him for breach of warranty in respect of those cows, *Held*, 1. That the warranty given in cl. 14 of the agreement for sale and purchase meant that the defendant warranted that the cows were in calf, would calve in or before the month of October following, and would be sound in calving; or, in other words, the cows "would come in sound." (*River Wear Commissioners* v. *Adamson*, (1877) 2 App. Cas. 743; and *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182, applied.) 2. That it was not of any moment whether the warranty related to the soundness of the cows at the time when it was given or to their soundness in calving. 3. That the warranty related to the purpose for which the animal was being acquired, and that it covered the seeds of disease which would in its progress diminish the usefulness of the animal by its progress. (*Kiddell* v. *Burnard*, (1842) 9 M. & W. 668; 152 E.R. 282; Anon., (1773) Loft. 145; 98 E.R. 579; and *Kyle* v. *Sims*, [1925] S.C. (Ct. of Sess.) 425, applied.) (*Jackson* v. *Townsend*, (1913) 33 N.Z.L.R. 242; and *Stratford* v. *O'Donoghue*, [1919] G.L.R. 271, followed.) 4. That the plaintiff was entitled to recover the difference in value between the cows if they had been as warranted and their value as they were; but he was not entitled to recover loss of profit. (*Stratford* v. *O'Donoghue*, [1919] G.L.R. 271, followed.) *Christofferson* v. *McLachlan* (Hamilton. September 18, 1953. Paterson, S.M.)

TOWN-PLANNING.

Offences—Building on Section in "Residential district" used by Owner for Storing Goods when Town-planning Scheme came into Operation—Nothing to indicate Building used for Trade Purposes—Tenant later using Section for carrying on Extensive Motor-car and Implement Dealer's Business—Use "not of the same or similar character"—Tenant convicted—Statutes Amendment Act, 1941, s. 71. On June 17, 1952, there came into force in the Borough of Mosgiel a "Town-planning Scheme" which had been duly approved by the Town-planning Board pursuant to the provisions of the Town-planning Act, 1926, and its amendments. One M. owned a section in Glasgow Street, Mosgiel, which, under the scheme, was in the "Residential District". When he retired from the business of a grocer (which he had carried on in another part of the town) in 1945, he stored certain chattels, for the sake of convenience, in an old and dilapidated building on the section, his intention being to dispose of them from time to time as opportunity offered. The premises were not opened regularly, perhaps on three or four days a week, and then either in the morning or the afternoon. No sign was erected indicating that the premises were in any way open for trade. In May, 1953, the defendant became the monthly tenant of the premises, carrying on there a substantial business of buying and selling motor-vehicles and implements, which he stored on the section; and he advertised extensively under the style of the "Taieri Car and Implement Exchange." He was repeatedly warned both verbally and in writing that he was acting in breach of the local town-planning scheme in so doing, but he persisted in his action. Clause 7 of the Mosgiel Borough Town-planning Scheme, so far as material, provided: "Nothing in the foregoing clause 6 hereof shall apply to any use of land or of an existing building so long as: (*a*) Such land or building is used continuously only for a purpose for which it was lawfully used on the material date. Provided that in this clause 'purpose' means general purposes (*e.g.*, shop as a class), and not the particular purpose (*e.g.*, butcher's shop as distinguished from grocer's shop)." In this case the material date was June 17, 1952. The defendant was charged with conducting in breach of the town-planning scheme, the business of a motor-car and implement exchange in an area classed as a "Residential District." *Held*, That there was no resemblance between the purpose for which the defendant was using the premises and that for which it was used by M., as they were not of "the same or a similar character," within the meaning of those words as used in s. 76 (4) of the Statutes Amendment Act, 1941, and neither that section nor the proviso to cl. 7 of the Mosgiel Borough Town-planning Scheme afforded any defence to the defendant. *McLean* v. *Archer* (Dunedin. February 22, 1954. Willis, S.M.)

TRUSTS AND TRUSTEES.

Common Good Trusts, *97 Solicitors' Journal*, 857.
Sale to the Wife of the Trustee. *104 Law Journal*, 262.

VENDOR AND PURCHASER.

Freehold Title to Flats, *28 Law Institute Journal*, 133.

WILL.

Condition—Condition Precedent or Qualification—Certainty—Devise to Person "who shall be a member of the Church of England and an adherent to the doctrine of that church." By a codicil dated November 10, 1907, to his will, dated November 4, 1906, a testator who died on November 25, 1908, devised real property, subject to prior limited interests which determined in 1952, to the eldest son of F. "who shall be a member of the Church of England and an adherent to the doctrine of that church", and, in case there should be no son of the said F. "who shall be a member of the Church of England or an adherent to the doctrines of that church", then the testator devised the property to W. *Held*, Having regard to the fact that the words of the codicil comprised a qualification or limitation or condition precedent and not a condition subsequent, the first requirement was not void for uncertainty and it was open to a son of F. to prove that he was a member of the Church of England; similarly (*Romer*, L.J., dissentiente), it could not be said that no one could prove adherence to the doctrine of the church; and, therefore, a claimant under the codicil ought to have the opportunity of satisfying the Court by evidence that he had substantially complied with the requirements which the testator intended to impose. (*Re Perry Almshouses, Re Ross' Charity* [1899] 1 Ch. 21, applied.) (*Clayton* v. *Ramsden* [1943] 1 All E.R. 16, distinguished.) (*Re Biggs* ([1945] N.Z.L.R. 303), considered. (Decision of *Vaisey*, J. ([1953] 1 All E.R. 308), reversed.) *Re Allen (deceased). Faith* v. *Allen and Others* [1953] 2 All E.R. 898 (C.A.).

Gift to bank "with the request that it will dispose of it in accordance with any memorandum signed by me"—No Communication of Wishes to Bank during Testator's Lifetime—Whether Bank Beneficially Entitled. By his will, a testator appointed a bank to be his executor and trustee and provided by cl. 2 that, if his wife should survive him for one month, then, but not otherwise, he gave and devised all his real and personal estate to her absolutely and beneficially. He further provided that, if his wife should not survive him for that period, the subsequent clauses of his will should take effect. By cl. 4 the testator provided: "I bequeath the following pecuniary legacies:—(*a*) To the bank the sum of £1,000 free of duty . . . with the request that it will dispose of it in accordance with any memorandum signed by me and I direct that any such memorandum is not to form part of this my will or to have any testamentary character and I request the bank that if the said legacy of £1,000 is not wholly disposed of in complying with such memorandum the balance not so disposed of shall fall into and form part of my residuary estate and I declare that the foregoing expression of my wish in connection with the said sum of £1,000 shall not create any trust or legal obligation even if the same shall be communicated to the bank in my lifetime". By cl. 5 the testator constituted his residuary estate and bequeathed it "as to . . . one third share thereof to the bank with the request that it will dispose of it in accordance with any memorandum signed by me and I direct that any such memorandum is not to form part of this my will or to have any testamentary character and I declare that the foregoing expression of my wish in connection with the said one third share shall not create any trust or legal obligation even if the same shall be communicated to the bank in my lifetime". On November 24, 1952, the testator died, and on December 2, 1952, the testator's wife died. No wishes were communicated to the bank during the testator's lifetime regarding the legacy or the one third share of residue bequeathed to it, but a memorandum was found amongst the testator's papers after his death indicating his wishes. It was not contended that the memorandum had any legal effect. On the question as to the beneficial entitlement to the legacy of £1,000 and the share of the residuary estate bequeathed to the bank, *Held*: on the true construction of the will, the bank was absolutely and beneficially entitled both to the legacy and to the share of residue. *Re Falkiner* ([1924] 1 Ch. 88), applied. *Re Rees* ([1949] 2 All E.R. 1003), *Re Hawksley's Settlements* ([1934] Ch 384) and *Re Boyes* (1884) (26 Ch.D. 531), mdistinguished. (*Re Stirling (deceased). Union Bank of Scotland, Ltd.* v. *Stirling and Others*, [1954] 2 All E.R. 113 (Ch.D.)

As to Gift to Executor with non-binding Request, see *33 Halsbury's Laws of England*, 2nd Ed., p. 106, para. 180; and for Case, see *43 E. & E. Digest*, p. 599, No. *470*.

Ineffective and Doubtful Wills. *6 Australian Conveyancer and Solicitors' Journal*, 123.

Wills in Contemplation of Marriage. *27 Australian Law Journal*, 520.

Dedication.

Nothing of worth is obtained without cost and danger. And so it is, I should imagine, with you. Of the cost of a career such as yours, of its real cost in terms of consecration to an ideal, of selfless dedication to an especial destiny within the common destiny of our day, and of the subtle dangers that hedge it round only you, who know it intimately and from within, can properly speak. But of the worth of what you are doing even I perhaps, an admirer on the outside, may be permitted to speak to-day for a moment.

Where, these days, lies the basic value of this thing you are doing? That question I should be inclined initially to answer by simply interrogating our contemporary experience, for therein we shall find that, whatever the modalities, whatever the varying forms under which it manifests itself, this much is certain and terrifyingly clear: it is recurrently the mind of man that is under attack; it is man's individuality oppressed by the nameless mass humanity that inexorably encroaches upon it; or it is man's freedom being wedged in the vise of authoritarianism; or it is man's dignity being brought low by the dead gravitational pull of the very machines which he himself has made; or, finally and most tragically, it is man's spirit suffocated and left spent by the assaults of the material upon him. Always, under whatever aspect you wish to consider it, it is the citadel of the mind of man that is being assailed and attacked.

And in every instance it is an assault which is the assault of lawlessness against law. Of lawlessness against law, because the mind of man is the reflex—pale, distant, partial, but reflex none the less—of the mind of God. And the mind of God is law—law in its origin and in its source, law in its fullness and eternity, in its inexhaustible fecundity, law in its simplicity. The mind of God is law. And the mind of man made to God's image is also law operative law, the lofty, spiritual individual, free participation in the desire of God for man.

And it is that which lawlessness basically assails, lawlessness which is featureless, nameless, everywhere. And it is that which you, as men of law, are dedicated, consecrated to defend, since your task fundamentally is to express, to determine, to clarify that natural law which is the reflection of the mind of God in the workings of the mind of man, and by so doing to protect the individuality of man, to buttress man's freedom to sustain man's dignity, yes, and to bow before man's spirituality.

So to-day, gentlemen, I do not lecture you upon your obligations, nor do I carp at your deficiencies, real or imagined, in fulfilling so difficult a destiny as this. Rather, before the spectacle of this high, exacting, dangerous, needful enterprise on which you are engaged, I do but one thing, and that genuinely and simply. Gentlemen, I salute you. (The Reverend Elmer O'Brien, S.J., S.T.D., at the annual Red Mass held in St. Michael's Cathedral, Toronto, on September 21, 1953, on the occasion of the opening of the Law Courts).

LEGAL ANNOUNCEMENTS.

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LIABILITY FOR DAMAGE BY ANIMALS

By A. G. Davis.

Having regard to the fact that England was for so many centuries a predominantly agricultural country and to the fact that its cattle population even to-day is numbered at more than ten millions, it is a matter for surprise that any question relating to the legal liability of an owner for damage done by domestic animals should, in the mid-twentieth century, remain unsettled.

One such question, with which the present writer dealt some years ago ("Damages for Injuries by Animals", (1945) *18 Australian Law Journal* 338) has been settled by the Court of Appeal in England in the recent case of *Wormald* v. *Cole*, [1954] 1 All E.R. 683. The facts, in outline, were that the defendant's cattle escaped from his land and trespassed on the land of the plaintiff. She and her man went out to prevent damage being done so far as it was possible. One or more of the beasts came into collision with the plaintiff, knocked her down and trampled on her, causing her severe injuries. There were, however, further findings of fact of importance :

1. The plaintiff's injuries were not the result of a vicious attack by the defendant's animals.

2. There was no evidence of negligence on the part of the defendant in allowing the animals to escape.

3. The plaintiff did nothing improper or negligent.

4. What happened was "the ordinary natural thing "which sometimes happens in such circumstances." This last was a finding by Croom-Johnson, J., in the Court of first instance : a finding which, as Singleton, L.J., said, at p. 691, gave considerable support to the case for the plaintiff.

On these facts, the Court of Appeal, reversing Croom-Johnson, J., held that the plaintiff was entitled to recover damages from the defendant.

In essence, the issue before the Court was : if a man's cattle trespass on the land in the occupation of another and there do personal injury to that other, is the damage too remote ? So stated, the question seems to be a simple enough one, but it has become involved by reason of dicta in various cases dealing with the liability for animals. It was left to the Court of Appeal to disentangle these dicta and to put them in their proper perspective.

It is important to notice that the plaintiff's cause of action was for cattle trespass. Any question of negligence or of *scienter* did not, therefore, arise.

Lord Goddard, C.J., traced the history of the action of cattle trespass and, noting that originally the damages in an action for cattle trespass were confined to damage to the surface trespassed upon and to the depasturing of the crop, showed that the rule had been extended to cases : (*a*) where the plaintiff's cattle were infected with disease by the defendant's trespassing beasts : *Anderson* v. *Buckton*, (1719) 1 Stra. 192 ; 93 E.R. 467 ; and (*b*) where the defendant's mare trespassed on the plaintiff's land and there kicked the plaintiff's horse with the result that it had to be killed : *Lee* v. *Riley*, (1865) 18 C.B.N.S. 722 ; 144 E.R. 629, and *Ellis* v. *Loftus Iron Co.*, (1874) L.R. 10 C.P. 10). He quoted with approval the words of Atkin, L.J., in *Buckle* v. *Holmes*, [1926] 2 K.B. 125, 129, the case of the trespassing cat :

> I think the conclusion in this case follows from *Manton* v. *Brocklebank*, [1923] 1 K.B. 212, which makes it clear that one who keeps a domestic animal is not rendered liable by the mere fact that the animal does damage in following a natural propensity of its kind to do damage in certain circumstances, *unless the animal is one for whose trespasses the owner is liable.*

(The italics are contained in Lord Goddard's judgment.)

Lord Goddard was careful, also, to point out the distinction between *Cox* v. *Burbidge*, (1863) 13 C.B.N.S. 430 ; 143 E.R. 171, and *Lee* v. *Riley* (*supra*). In *Cox* v. *Burbidge* a horse strayed on to the highway where it injured the plaintiff. As there was no proof of *scienter*, it was held that the defendant was not liable. In that case, the plaintiff could not maintain an action for cattle trespass as he was not the owner of the soil of the highway. The plaintiff in *Lee* v. *Riley* was the owner of the land trespassed on.

He concluded at p. 688 :

> I can find nothing that compels me to hold that, if the occupier of a close is injured by a trespassing animal, the damage is not too remote, at any rate where the injury is not the result of a vicious attack.

Singleton, L. J.,at p. 691 continued the quotation in *Buckle* v. *Holmes* :

> When the owner is liable for the animal's trespasses it may be material to consider whether the damage is the result of a normal propensity. For this damage the owner is liable, but for damage resulting from an abnormal propensity not known to him he is not in my opinion liable, though he would be liable for the ordinary consequences of the trespass.

Singleton, L.J. continued : "If a number of cattle trespass on land and do damage, the owner of the cattle is responsible for the damage reasonably and naturally resulting therefrom. If they eat crops or vegetables, damages are recoverable therefor, and the same applies in respect of vegetables trampled and knocked down. What is the difference in principle between knocking down vegetables or plants and knocking down the occupier who owns the vegetables ? . . . I see no reason for saying that the damage [to the occupier] is not the natural result of the trespass."

Hodson, L.J. was of the same opinion. He referred (at p. 694) to *Ellis* v. *Loftus Iron Co.* (*supra*) and said :

> The question was there treated as being one of remoteness of damage, and the damage was held not to be too remote. If that is the correct view, the action of the beasts in this case in knocking down and treading on the plaintiff in the course of their moving about her property in the dark caused damage which is no more remote than the damage inflicted on the plaintiff in *Ellis* v. *Loftus Iron Co.* and *Lee* v. *Riley*.

One very considerable hurdle which the plaintiff had to surmount was the statement of Lord du Parcq in *Searle* v. *Wallbank*, [1947] A.C. 341 ; [1947] 1 All E.R. 12. This was a case in which the defendant's horse had escaped from the defendant's land on to the highway and had there collided with and injured a passing cyclist—the plaintiff. The House of Lords held that the plaintiff could not recover. Lord du Parcq said :

> My Lords, it is a commonplace of our law that there is a

striking contrast between the liability of the owner of cattle for their trespass on another man's land and his liability for any injuries which they may cause to the person of another. The man whose cattle stray into his neighbour's field and consume or damage what belongs to that neighbour is liable to make good the loss although no negligence is proved against him. He is under no such liability for a trespass to the person by an animal which does not belong to an untamed and dangerous species unless it has, to his knowledge, some vicious or mischievous propensity.

Of that passage Lord Goddard said at p. 688 :

> I feel quite confident that the noble and learned Lord had not in mind facts such as the present. The House was concerned only with the question whether the owner of land abutting on the highway is under a duty to users of the highway to prevent his animals from straying thereon unless he knows them to be dangerous . . . Cattle trespass was not before the House.

And Singleton, L.J., said at p. 689 that the words of Lord du Parcq were not strictly relevant to the question before the House.

Fortunately for the plaintiff, therefore, the Court of Appeal refused to follow Lord du Parcq's statement, it being *obiter dictum*.

Wormald v. *Cole* has, until the House of Lords rules otherwise, settled a difficult problem and has rendered a decision which, it is respectfully submitted, is consonant with common sense.

One problem still remains. The Court found that the plaintiff's injuries were not the result of a vicious attack by the defendant's animals. Would the plaintiff have been denied a remedy if her injuries had been caused by a vicious attack by the animals and if what had happened was not " the ordinary natural thing which must sometimes happen in such circumstances " ? Lord Goddard adverted to this question when he said at p. 688 :

> I leave open the question whether it follows that, if a trespassing animal attacks the occupier, he can recover, though I incline to the opinion that he can. I do not think that question has ever arisen in a cattle trespass case and it does not arise here.

Hodson, L.J., was, however, concerned to rationalize the law on this point, for it would surely be absurd if, as the plaintiff's counsel conceded, the plaintiff could not recover if her injuries had been caused by a savage attack whereas she could recover if the injuries had been caused as a result of the animal's normal propensity. The learned Lord Justice quoted further from the judgment of Lord du Parcq in *Searle* v. *Wallbank* (*supra*) :

> The present case is only distinguishable from that supposed by Holt, C.J. [in *Mason* v. *Keeling*, (1699) 1 Ld. Raym. 606)] in that the horse in the illustration did a vicious act, whereas the horse with which we are concerned may have been only heedless or clumsy, but I take this to be an immaterial distinction. As was said by Romer, L.J. (as he then was) in *Deen* v. *Davies*, [1935] 2 K.B. 282, 293, it would be strange if the owner of a horse which strays on the highway were to be free of liability if his horse kicked a passenger but liable if the passenger were injured " merely by the horse trotting along the highway in the natural manner." My Lords, no such paradoxical conclusion is to be drawn from the authorities. The law was accurately stated by Blackburn, J. in *Smith* v. *Cook* ((1875), 1 Q.B.D. 79) at p. 82 when he said that the owner of animals " . . . not of mischievous nature . . . is entitled to suppose that they will not injure anyone until he has actual knowledge to bring him to a contrary opinion."

Hodson, L.J., said :

> The paradox referred to by Lord du Parcq is present here, for the plaintiff does not contend that she could recover if the behaviour of the animals had been vicious and it is not wholly satisfactory to make the decision turn on the disposition of an animal. It may be, however, that the paradox can be resolved by eliminating the distinction between vicious and non-vicious acts in cases of cattle trespass provided the damage caused is direct.

It is submitted, with respect, that there is much force in Hodson, L.J.'s suggestion. Liability for damage by animals may be based on one or other of three heads : (*a*) negligence ; (*b*) *scienter* ; and (*c*) cattle trespass. Much of the confusion which has crept into the law on this subject has been caused by confusing these various heads of liability and by applying to one head principles strictly applicable to one or both of the other heads. It is to be hoped that, when the question arises, the suggestion of the learned Lord Justice will be followed.

Wormald v. *Cole* is of particular interest in New Zealand by reason of the decision of Sir Michael Myers, C.J., in *Mark* v. *Barkla*, [1935] N.Z.L.R. 347. In that case, a boar was trespassing on the respondent's land and, while being driven off and after being hit by the respondent with a batten, suddenly turned upon and tossed the respondent, causing him injuries. The Chief Justice held that the appellant (the defendant in the Court below) was not liable. He held that the personal injury caused to the respondent did not naturally flow from the trespass, was not an ordinary consequence of the trespass, and was too remote. Much of the learned Chief Justice's judgment was concerned with the question whether a boar was or was not a domestic animal : an issue which, it is submitted, is not relevant in an action of cattle trespass. The authorities do suggest that the true test is whether the damage is produced by acts not alien to the nature of the animal. For such damage the defendant is liable ; it is not too remote. Authority for this proposition may be found in the words of Lord Sterndale, M.R., in *Manton* v. *Brocklebank* (*supra*) at p. 223 :

> When a cause of action . . . in trespass . . . has once been established, the defendant may well be liable for any damage produced by acts not alien to the nature of the animal.

The learned Chief Justice was, therefore, on firmer ground when he considered the question whether it was alien to the nature of a boar to attack human beings and, holding that such an act was alien to a boar's nature, held that the damage was too remote.

Mark v. *Barkla* was not, apparently, referred to in *Wormald* v. *Cole*, but it stands as authority for the proposition that, if an animal, while trespassing on the plaintiff's land, makes a savage attack on the plaintiff, the defendant will not be liable : a question which Lord Goddard left open in *Wormald* v. *Cole*. A rationalization of the law on this point on the lines suggested by Hodson, L.J. (*supra*) would appear to be long overdue.

The Committee on the Law of Civil Liability for Damage done by Animals (1953, Cmd. 8746) has recommended the retention of the action of cattle trespass but that the damage recoverable should be limited to damage done to land or crops. Such a legislative change would clear up the present confusion. But, if some degree of simplicity on this involved question is desired, it would probably be better to adopt the suggestion of Professor Glanville Williams, who was a member of the Committee, and abolish the action for cattle trespass, leaving the owner of animals liable only for negligence or *scienter*.

THE FOUNDATIONS OF LAW

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Master of University College, Oxford, since 1951 ;
Professor of Jurisprudence, Oxford, 1931-1951.

The other day at Oxford we were discussing the question : What is the greatest contribution England has made to the civilization of the world ? As is natural, we each tended to emphasize the importance of our own subject. The political scientist suggested that England could claim the honour of being the mother of Parliaments, and that true democracy can be found only in such a form of government. He acknowledged that parliamentary procedure was not suited to all peoples, but nevertheless he thought that it furnished an ideal standard by which other systems could be measured. The professor of English, on the other hand, felt that this country's greatest contribution had been made in the realm of poetry, with Shakespeare, of course, as the supreme example. Only ancient Greece, he said, could rank with England in this highest form of literature. The economist thought that the outstanding English contribution had been to industry and commerce : the remarkable industrial development of the world in the past two centuries was due, he said, in large part to the lead given by this country.

"GOLDEN THREAD" IN ENGLISH HISTORY.

As a lawyer, I agreed that each of these contributions has been of major importance, but I suggested that there was one other which transcended all of them. This contribution may be described as the conception of the supremacy of law. It is on this conception that our freedom is based, and it is here that the essential distinction between a totalitarian theory of the state and ours can most clearly be seen. It is here, I believe, that the final hope against universal destruction by the hydrogen bomb can be found. I am not suggesting, of course, that the conception of the supremacy of law is a purely English one, or that it has not been recognized in other countries, but I think it is true to say that nowhere else has it been so completely accepted. It runs like a golden thread through what Maitland has called the seamless web of English history. We find it in Art. 39 of Magna Carta, in Bracton, in the Bill of Rights, and in the constitutions of all the Dominions.

To explain what I mean by the supremacy of law, I want to go back to a scene in the Palace of Whitehall in June, 1616. James I, who has been described as the wisest fool in Christendom, had given orders to Sir Edward Coke, the Lord Chief Justice of the Court of King's Bench, and his fellow Judges not to proceed with the hearing of an action in which the King's prerogative was questioned. They answered in a letter, written by Coke, that they were bound by their oaths not to regard such commands. The King sent for them to attend his Council, and they humbled themselves, all except Coke : he steadfastly maintained that, if such a command came, he would do what an honest and just Judge ought to do. Coke was dismissed from his office, and he risked his life, for James maintained that it was treason to affirm that he, the King, was under the law, but the Lord Chief Justice had struck a blow for freedom which has never been forgotten. Dr. Trevelyan, in his *History of England*, has summed up the matter in these words : .

> In essence the quarrel was this : James and Charles held, with the students of Roman Law, that the will of the Prince was the source of law, and that the Judges were " lions under the throne," bound to speak as he directed them. Coke, on the other hand, in the spirit of the English Common Law, conceived of law as having an independent existence of its own, set above the King as well as above his subjects, and bound to judge impartially between them.

This doctrine of the supremacy of the law is found in every country within the British Commonwealth of Nations. Two years ago, in the famous case of *Harris* v. *Donges*, the Appellate Division of the Supreme Court of South Africa held that the Parliament of South Africa could not disregard the entrenched clauses of the South Africa Act, 1909, which established its constitution. Up to the present time, Dr. Malan has unwillingly recognized the authority of that decision. Again, even though Ireland has left the British Commonwealth, it has included in its Constitution the supremacy of law as an essential principle. It is one of the corner-stones on which the American Constitution has been based, because the American Bill of Rights, as it has been called, guarantees to every American citizen certain fundamental rights which not even the state can infringe. These rights are nothing more and nothing less than the basic rights of the common law. If the common law were merely an expression of governmental force it would not be, as Sir Winston Churchill pointed out the other day, almost the strongest bond between Great Britain and the United States ; its strength lies in the fact that it is an expression of freedom and of justice.

It is for this reason that the conduct of Senator McCarthy in disregarding the common-law rights of some of the witnesses who are called before his committee, especially the right against self-incrimination, seems to some people to be so threatening, because, if those in power violate the fundamental principles on which justice is based, then the whole constitutional system may fall into danger. We must remember that the doctrine of the supremacy of law is not limited to the Courts alone : it means that the three branches of government—the Legislature, the Executive, and the Judiciary—are equally bound by the law. If the two former violate the limits which the basic law of the state has placed on their powers, then they have acted unconstitutionally even though there may be no recourse to the Courts. After all, the Judges have no power themselves to enforce their judgments : if the executive should wilfully disregard their decisions, then these would be so much waste paper. It is difficult to believe that that could ever happen here, but it has happened in some other countries.

I have said that the basic distinction between the totalitarian theory of the state and ours can be found in the supremacy of law. Let me give you a simple illustration. Look at the door of the room in which you are now sitting. No official of the Crown, whether

a Minister of State or a Police constable, can enter that door without the authority of the law. In a totalitarian state, on the other hand, any member of the Gestapo or of the M.V.D. could break in, and you would have no redress. Some time ago, I visited the eastern sector in Berlin, and it was an odd feeling to realize that at any moment one could be arbitrarily seized and imprisoned, and that one might disappear for ever into the unknown. If in a state this arbitary power is given to any body of men—if they are not subject to the supremacy of the law—then freedom, as we know it has gone.

Battlefield of Freedom.

What I have been saying so far is comparatively simple and self-evident, but now we come to the really difficult problem. How can we explain this supremacy of the law of which I have been talking? If law is merely an expression of the will of those who hold the supreme power in the state, then how can the law limit that power? If law is nothing more than organized force, as it has been called, then how can it control that force? I think that the answer is to be found in the fact that we do not think of law in terms of power or force. It is not a necessary evil to which we are compelled to submit, as Jeremy Bentham incorrectly said, but the foundation on which our free society is based. There is all the difference in the world between obedience based on fear and obedience based on a sense of duty. We turn to the law to protect us against force. That is why the basic constitutional principles —independence of the judiciary, protection against arbitrary arrest, freedom of conscience, and freedom of speech—have all been established in the Courts of law. The battlefield of English freedom, it has been said, has been the ordinary legal trial. There is no more stirring vindication of liberty than Lord Mansfield's judgment in *Sommersett's Case*, in 1771, when he freed a Negro slave held in chains in a ship lying in the Thames. "The air of England is too pure for any slave to breathe", he said, "Let the black go free".

The roots of our law are found in the traditions of the people, in their sense of justice, and in their respect for their fellow men. This last is of the greatest importance, because I think it is true to say that in no other country of the world is there so clear a recognition of the rights of other people. That is why the English are always prepared to stand in queues, and need no Policeman to keep them in order. In the same way, they rush to the defence of anyone, however unattractive or unimportant he or she may be, whose rights they think have been violated. The public meetings that are held and the letters of protest that pour into the newspapers on such an occasion are a sign that law is still regarded as something worth fighting for. Some of you may remember the *Irene Savage* case, more than twenty years ago, when the Police were thought to have treated a young woman unfairly. That was a tawdry case, but in its vindication of justice it represented a spirit which other countries might well envy. I think that the common law throughout its long history has somehow made it clear that it is something which we share in common, and that the rights of the other man are just as important to us as are our own.

It would, of course, be absurd to suggest that this conception of the law as based on recognition of duty rather than on force exists in all completeness, because there will always be a small minority of men in every society who will obey only because of fear. It is with the great majority, however, that we are concerned: they intuitively recognize that the law is something much greater than organized force, and that its supremacy has enabled the people of this country to live their lives without fear and without oppression. Chief Justice Stone, of the United States Supreme Court, once said: "It is the sober second thought of the community which is the firm base on which all law must ultimately rest".

This, I believe, is the conception of law which in the past has been the greatest contribution which England has made to the history of the world. It has helped to bring freedom to many other nations who have followed the English example. It is a conception which may, I believe, be our only answer in the future to the hydrogen bomb. Force has now become so terrible that any attempt to rely on it may bring untold disaster. In its place we can only put a conception of international society which regards law not as an expression of force but as a body of rules which must be obeyed by all the nations of the earth if civilization is not to perish. World order cannot be maintained by a precarious balancing of hydrogen bombs. The days when every country could think that it was a law unto itself have passed; we must either become a society of nations in the true sense, recognizing our reciprocal rights and duties, or we must face the danger of destruction. In the homely words of Benjamin Franklin, we must all hang together or we shall all hang separately.

THEIR LORDSHIPS CONSIDER

By Colonus.

Fee Simple.—In a neat case concerning the revocation of part of a will, *Swinton* v. *Bailey*, (1878) L.R. 4 App. Cas. 70, the testator had devised realty to "Elizabeth Ely, her heirs and assigns, for ever"; and had subsequently deleted the words "her heirs and assigns, for ever." Discussing the legal effect of the alteration in the wording of the devise, Earl Cairns, L.C., said, at p. 78:

> I must say that if we are to resort to first principles, and to a technical examination of the character of the words which are here obliterated, as I understand the rule of law it is, that where you have a devise "to A.B. and to his heirs and assigns for ever," in the eye of the law that is a devise to A.B., and a devise to his heirs and assigns for ever. The law says what the words say,—that you have there a devise to all of those persons. No doubt the law goes on to say that where you have a devise made in that way the ancestor shall have the dispositive power over the whole fee simple; but that is for the reason that you have got the devise to the heirs *ad infinitum*, and the devise cannot have effect given to it in any other way except by treating the words as words of limitation.

Ecclesiastical Benefits: The *Earl of Eldon*, in *Macdougall* v. *Purrier*, (1830) 4 Bligh N.S. 433, 474; 5 E.R. 154, 168, recorded the following historial note regarding the remuneration of clergy in earlier times:

"After there had been a settlement of what were to

be the sums paid to the clergy of the City of London, the benefices of the City of London were augmented by means which were extremely singular. The clergy of the city were to be paid by some kind of offering, to be made upon a certain day in the week, and also upon every saint's day in the year ; the Pope thought proper to introduce into the calendar a large number of saints in addition to those that stood in the calendar, and by that innovation the clergy received from the inhabitants a larger sum than was originally intended ; so matters continued until the 37th Henry VIII ".

A Judicial Record.—" My Lords, there can scarcely be any terms too strong to express my great satisfaction at having had the assistance of your Lordships in the consideration of this case, your Lordships' minds being brought fresh to the whole of the arguments to which I have had so frequently to listen, and you being, perhaps therefore, more competent readily to form a clear and independent opinion. In this very case, the actual case which is now before your Lordships' House, I have here, for the third time, heard the arguments for and against the validity of the patent, and for and against the allegation of the defendants having infringed the patent. I heard them first on the motion for an injunction ; secondly, on the hearing of the cause ; and now, thirdly, at your Lordships' Bar. In four other cases it has fallen to me to hear arguments upon the same subject, differing only, of course, with reference to the infringement in each particular case ; and I believe in three other cases I have also heard arguments as to the infringement. Altogether I certainly have had occasion myself not less than seven times to give an opinion upon the validity of the patent, after having upon the whole subject heard between forty and fifty arguments of learned counsel " : Lord Hatherley, L.C., in *Neilson* v. *Betts*, (1871) L.R. 1 H.L. 1, 25.

Trade Custom.—" Without endeavouring to give an exhaustive definition of what evidence may be admitted, there are in cases like the present three conditions precedent to its being accepted :—(1) the evidence must not conflict with a statutory definition : (2) the evidence must be of a usage common to the place in question ; (3) the evidence must expound and not contradict the terms of the contract. In my view, the words " first class bills on London " in this context are a term of art, and point plainly to a specific thing which is to be handed over to the lessor, or his representative, as and for payment of rent at Santiago on the first working day of each month. The evidence to what that specific thing really was, was, in these circumstances, admissible." Viscount Sankey, L.C., in *De Beeche* v. *South American Stores Limited and Chilian Stores Ltd.*, [1934] A.C. 148, 158.

Residuary Clause.—" In fact, no testator, when he settles his estate specifically and strictly on various classes of issue, intends by a general residuary gift to make an indirect provision for other classes of that issue. He knows that what he gives as residue, if he gives it absolutely, may be dealt with and alienated to strangers. If he thinks of the other classes of issue, and desires to provide for them, he does it directly. In this case, the omission of daughters of daughters, and of sons of a second marriage, must have been either designed or accidental. If it was designed, which is improbable, it is unlikely that they were intended to be compensated by the possibility of an uncertain and precarious benefit at the option of others. If it was accidental, and owing to the unskilful construction of the will, which, I think, is obviously the true explanation, then no argument as to the intention of the testator can be founded on it." Lord Cairns in *Gordon* v. *Gordon*, (1871) L.R. 5 H.L. 254, 287.

FIFTY-EIGHT YEARS IN A LAW OFFICE

Mr. H. C. Hale retires.

Mr. Harold Charles Hale, a figure well-known in Wellington legal circles, retired from active practice on March 31, 1954. Mr. Hale entered the law in the employment of the late Mr. E. P. Bunny in 1896, remaining in the one employment until the date of his retirement. During that period, Mr. Bunny had several partners, and latterly the firm was known as Bunny, Gillespie, Carter, and Oakley, and more recently as Hogg, Gillespie, Carter, and Oakley. Mr. Hale had, at the date of his retirement, completed fifty-eight years in the law.

Down to the date of his retirement, Mr. Hale was managing clerk to the legal firm with which he had been connected, and, in that position, he had gained and held the highest respect by all who came into contact with him.

He was one of the few remaining " engrossers ", whose copperplate hand-writing was the standard mode for the preparation of documents, and samples of his work were featured in an article in the *Evening Post* a year or so ago. There are, no doubt, many examples of his ability in this respect in the records of the Supreme Court and of the Land Registry Office.

During the war years, Mr. Hale carried an extra burden on account of the absence of law clerks and the general shortage of staff. His loyalty was well exemplified during those years as it was of recent years when he was persuaded to remain in active practice to a time when he might well have been enjoying a well-earned rest.

In his earlier years, Mr. Hale was prominent in the field of sport and at one time was a Wellington Representative Soccer player. In later years, he took up bowls, where he met with a good deal of success. In 1953, he toured Australia with the New Zealand Bowling Team. Although now not a competitive player, he is still an enthusiastic member of the Kilbirnie Club.

On the occasion of his retirement and to mark his Golden Wedding, which was celebrated on March 30, Mr. and Mrs. Hale were entertained by the principals of the firm and their staff at a function at which Mr. R. Hardie Boys, the President of the Wellington District Law Society, and other speakers, congratulated the guests.

GRANT OF RIGHT OF WAY AND PARTY-WALL RIGHTS.

Short Form of Mutual Grant

By E. C. ADAMS, I.S.O., LL.M.

EXPLANATORY NOTE.

Precedent No. 2 hereunder is a concise form of mutual grant of right-of-way and party-wall rights over and in favour of adjoining parcels both subject to the Land Transfer Act.

The total width of the common right-of-way must not exceed twenty feet measured at right angles to its course, but at the blind end of the right-of-way and where it enters the highway it may be wider to permit of turning-places : s. 174 of the Municipal Corporations Act, 1933, as amended by s. 14 of the Municipal Corporations Amendment Act, 1953. This does not apply to land situate in a County, which, however, may be subject to the Land Subdivision in Counties Act, 1946. The consent of the municipality is necessary to the laying off, and of the grants of, the right-of-way, if the lands are situate in a City, Borough or Town District : s. 184 of the Municipal Corporations Act, 1933. In consenting to such grants of right of way, the municipality may impose whatever conditions it may see fit : these conditions constitute encumbrances against each title, and presumably run with the lands at law : s. 187 of the Municipal Corporations Act, 1933. Precedent No. 1 hereunder is an example of conditions imposed in practice by a certain Borough. The consent of the municipality, if imposed by separate instrument, must be registered before the transfer creating the easements. Alternatively, the consent of the municipality may be endorsed on the transfer itself, but, if conditions are imposed, it appears preferable to put the consent and the accompanying conditions on a separate instrument, as has been done in this case.

For the purposes of stamp duty and registration the transfer has two but not four operations. The total stamp duty, therefore, will be £1 2s., and the registration fee £4 8s.

As one tenement has been mortgaged, the consent of the mortgagee has been obtained to the grants : if the mortgagee did not consent, the easements would not be binding on him, and, if he exercised his power of sale, he or the Registrar of the Supreme Court, as the case may be, could confer title on the purchaser freed from the easements : s. 90 (1) of the Land Transfer Act, 1952. As easements of this nature are intended to be perpetual, it would be a pity to jeopardize their continued existence by failing to obtain the consent of any mortgagee.

PREDECENT NO. 1.

MEMORANDUM OF CONSENT TO A RIGHT-OF-WAY UNDER THE MUNICIPAL CORPORATIONS ACT, 1933.

IN THE MATTER of the Land Transfer Act, 1952.

AND

IN THE MATTER of a Private way off Street in the Borough of laid out on part of Lots and D.P.

PURSUANT to the provisions of the Municipal Corporations Act, 1933, the Mayor Councillors and Burgesses of the Borough of hereby consent to the laying out of a private way and the granting of rights of way thereover on the lands described in the Schedule hereto upon and subject to the following conditions :—

1. The said private way shall be properly formed and graded and shall be surfaced with some approved material and the said private way shall be maintained in good order and condition by the persons having a right to use or commonly using the said private way.

2. Provisions shall be made to carry storm water off the said private way in conformity with the Borough By laws.

3. A plate crossing of a type approved by the Borough Engineer shall be constructed over the kerbing of Street at the end of the said right-of-way for vehicles using the said right-of-way.

4. A gate shall be erected at the entrance to the said private way and shall be maintained in good order and condition during the whole time that the said private way shall be in existence.

5. Not more than one dwelling-house shall be erected on any Lot to which the said private way is appurtenant.

THE SCHEDULE hereinbefore referred to.

1. All that parcel of land containing (*Set out area*) more or less as shown coloured yellow on the diagram endorsed thereon being part of Lot on Deposited Plan (part of Section District) and part of land in Certificate of Title Volume Folio

2. All that parcel of land containing (*Set out area*) more or less as shown coloured blue on the diagram endorsed hereon being part of Lot Deposited Plan (Part of Section District) and part of land in Certificate of Title Volume Folio

DATED this day of 1954.

THE COMMON SEAL of the body corporate called the Mayor Councillors and Burgesses of the Borough of was pursuant to a resolution of the Borough Council passed on the day of 1954 hereunto affixed in the presence of :

Mayor

Councillors

Town Clerk

PRECEDENT NO. 2.

MUTUAL GRANT OF RIGHT-OF-WAY AND PARTY-WALL RIGHTS.

MEMORANDUM OF TRANSFER

WHEREAS A.B. of Hamilton, carpenter is registered as proprietor of an estate in fee simple subject however to such encumbrances, liens, and interests as are notified by memoranda underwritten or endorsed hereon, in that piece of land described in the First Schedule hereto and WHEREAS C.D. of Hamilton Widow is registered as proprietor of an estate in fee simple in all that parcel of land described in the Second Schedule hereto AND WHEREAS the parties hereto have each laid out a right-of-way on part of their respective lands as shown on the diagram endorsed hereon and marked "right-of-way" AND WHEREAS the parties hereto are desirous of granting to each other mutual rights thereover to the intent that the said rights-of-way shall be used and enjoyed as a common right-of-way in connection with each parcel of land described in the first and second schedules hereto AND WHEREAS each party hereto has constructed a garage on part of their respective lands to which the said right of way is intended to give access from Street AND WHEREAS the said garages adjoin each other the internal walls of which have been constructed as a party wall partly on the land of each respective registered proprietor as shown on the diagram endorsed hereon and marked "party wall" AND WHEREAS it has been agreed by and between the parties hereto that the said party wall and any wall substituted therefor should be and remain a party wall in the manner hereinafter appearing NOW THIS TRANSFER WITNESSETH that in pursuance of such agreement and in consideration of the premises each of

the parties hereto respectively doth hereby transfer and grant to the other of them the respective rights and easements hereinafter appearing to the intent that the same shall be forever appurtenant to and used and enjoyed together with and shall run with the said respective lands described in the First and Second Schedules hereto but subject to the respective obligations and liabilities hereinafter appearing:—

FIRST for the consideration of aforesaid the said A.B. doth hereby transfer and grant to the said C.D. her heirs executors administrators and assigns and her and their servants agents workmen and visitors and all persons having business with her or them a free and perpetual right-of-way ingress egress and regress on horseback or on foot and with or without implements and vehicles of every description loaded or unloaded by night as well as by day in at and upon that parcel of land containing (*Set out area*) more or less and coloured yellow on the plan endorsed hereon and marked "right-of-way" and the said C.D. doth hereby transfer and grant to the said A.B. his heirs executors administrators and assigns and his and their servants agents workmen and visitors and all persons having business with him or them a free and perpetual right-of-way ingress egress and regress on horseback or on foot and with or without implements and vehicles of every description loaded or unloaded by night as well as by day in at and upon that parcel of land containing (*Set out area*) more or less coloured yellow blue on the plan endorsed hereon and marked "right-of-way" AND IT IS HEREBY DECLARED AND AGREED by the parties hereto for themselves and their successors in title that the said parcels of land coloured yellow and blue and marked "right-of-way" shall be used and enjoyed as a common right-of-way serving the respective lands described in the First and Second Schedules hereto AND it is hereby covenanted by and between the parties hereto for themselves and their successors in title that each respective registered proprietor for the time being shall keep and maintain in good order and repair that part of the common right-of-way situate on his or her or their land and shall at all times comply with all requirements of the Borough Council in connection with such common right-of-way.

SECONDLY for the consideration aforesaid it is hereby declared and agreed by the parties hereto for themselves and their successors in title that the existing party wall (or any party wall hereafter erected in substitution therefor) on part of the boundary line between the lands described in the First and Second Schedules hereto and shown as "party wall" on the diagram endorsed hereon shall be and deemed to be a party wall subject to the following covenants conditions and stipulations:

(*a*) Each party hereto and his successors in title shall keep that part of the said party wall situate on his her or their land in good order and repair.

(*b*) If either party or his or her successors in title shall fail or neglect to keep that part of the said party wall situate on his her or their land in good order and repair the registered proprietor for the time of the other tenement may enter on the land of the defaulting registered proprietor and effect the necessary repairs the cost of which shall be borne by the defaulting registered proprietor.

(*c*) Subject as aforesaid the cost of repairing and maintaining the said party wall shall be borne in equal shares by the respective registered proprietors for the time being of each tenement.

(*d*) Except for the purposes of effecting necessary maintenance or repairs neither party nor his or her respective successors in title shall at any time pull down, demolish or interfere in any way with the said party wall without the written consent of the registered proprietor for the time being of the other tenement.

(*e*) If any dispute shall arise between the parties hereto or his or her successors in title as to the construction of these presents, or as to the repair maintenance or use of the said party wall or as to the amount to be at any time paid in accordance with these presents by the registered proprietor for the time being of either tenement the same shall be referred to arbitration in accordance with the Arbitration Act, 1908

IN WITNESS whereof the parties hereto have subscribed their names this day of 1954.

FIRST SCHEDULE hereinbefore referred to

ALL that parcel of land containing (*Set out area*) more or less being part of Section District and being Lot on Deposited Plan Number and being all the land comprised and described in Certificate of Title Volume Folio Registry SUBJECT to covenant as to fencing contained in Transfer No.

SECOND SCHEDULE hereinbefore referred to

ALL that parcel of land containing (*Set out area*) more or less being part of Section District and being Lot on Deposited Plan Number and being all the land comprised and described in Certificate of Title Volume Folio Registry SUBJECT to Memo. of Mortgage Number

SIGNED, etc. (by A.B. as grantor, and by C.D. as grantor, respectively.)

CONSENT OF MORTGAGEE

The State Advances Corporation being the mortgagee of the land described in the Second Schedule hereto doth hereby consent to the foregoing grants of easements.

(*For form of attestation see Goodall's Conveyancing in New Zealand, 2nd Ed. p. 589*).

NEW ZEALAND LAW SOCIETY

Annual Meeting

The Annual Meeting of the Council of the New Zealand Law Society was held on April 2, 1954.

The following Societies were represented: Auckland, Messrs. J. B. Johnston (proxy), F. J. Cox, T. E. Henry, H. R. A. Vialoux (proxy); Canterbury, Messrs. A. I. Cotterill and A. L. Haslam; Gisborne, Mr. R. F. Gambrill; Hamilton, Mr. R. McCaw; Hawke's Bay, Mr. J. H. Holderness; Marlborough, Mr. A. G. Wicks; Nelson, Mr. I. E. Fitchett; Otago, Messrs. J. R. M. Lemon and J. C. Robertson; Southland, Mr. J. R. Mills; Taranaki, Mr. R. O. R. Clarke; Wanganui, Mr. A. A. Barton; and Wellington, Messrs. T. P. Cleary, E. T. E. Hogg, A. E. Hurley (proxy) and E. F. Rothwell.

The President welcomed members attending for the first time.

Supreme Court Code: Party and Party Costs.—It was reported that the following regulations setting out the amendments to the Party and Party Costs had been enacted:—Serial No. 1954/36—The Matrimonial Causes Rules, 1943, Amendment No. 3. Serial No. 1954/37—The Supreme Court Amendment Rules, 1954. Serial No. 1954/38—The Court of Appeal Amendment Rules.

It was resolved to thank the sub-committee for its work in connection with these amendments.

Royal Visit: Address of Loyalty.—The following letter was received from the Assistant Private Secretary to Her Majesty Queen Elizabeth II:—

26th December, 1953.

"The Queen has commanded me to write to you and ask you to convey her thanks to the Vice-President, Members of the Council of the New Zealand Law Society, and all Members of the Society for the Loyal Address which you have sent to Her Majesty. The Queen much appreciates this message and the kind good wishes which came with it."

The President said that a copy of the photograph of the address had been sent to each District Society.

Statements of Accused Persons to the Police.—The following letter was received from the Minister in Charge of Police:—"I have to acknowledge receipt of your letter of the 10th instant. The Commissioner of Police will be issuing instructions that a statement made by an accused person may be made available for perusal, on request, by the solicitor acting for the accused before he appears in Court, to enable him properly to advise his client as to his plea."

Restoration of the Inns of Court.—A letter was received from Sir Raymond Evershed thanking the New Zealand Law Society for its gift of £700 and advising that he had decided to divide the sum equally between the four Inns of Court.

The Treasurer of the Inner Temple wrote as follows:

"The Master of the Rolls has informed this Society of your most generous gift to the Four Inns of Court which is being

allocated equally among them. The Masters of the Bench of the Inner Temple request me to express their most sincere thanks for your most generous beneficence and to inform you that a special piece of furniture will be acquired to commemorate the gift with an appropriate inscription."

The Treasurer of the Honourable Society of the Middle Temple wrote as follows:

"I write on behalf of myself and all the Benchers of this Society to thank your Society for its most generous gift towards the restoration of the War Damage to the four Inns of Court. At a meeting of our Benchers recently the news was received with acclamation, and I was requested to send the warmest expressions of our appreciation. It is indeed a most handsome gesture. We are considering how best to spend our share. It will no doubt be a purchase of some permanent piece of furniture probably for our new library: and it shall be suitably inscribed. May I add that if any of your body visits this country, I hope he or she will let us know. so that we can have the pleasure of giving them a welcome, and offering hospitality."

The Deputy Treasurer of Gray's Inn wrote as follows:—

"Will you please convey to the Council and Members of the New Zealand Law Society the gratitude of this Society for the gift which they have so generously bestowed upon us. We intend to use the gift for the purchase of some article which will be for ever associated with The New Zealand Law Society."

Town Planning.—Mr. Rothwell reported as follows:—

"The Act was passed on November 26th, 1953. The origin of the activities in connection with the Bill was the complaint from the Otago Society that details of Town Planning schemes were not available except by going to the local authority. The improvements effected may be summarized as follows:

1. Representations were made prior to the Bill being introduced to Parliament with the result that provision was made for an approved scheme to be lodged with the District Land Registrar and the Chief Surveyor wherever land was affected.

2. Your Sub-committee renewed its representations to the Minister and later to the Local Bills Committee for similar lodgment of the scheme as soon as it has been recommended by resolution of the Council and before public notification for approval.

3. These representations were not successful in full but the Act as now passed provides lodgment of one copy of the scheme with the District Land Registrar at the same time as public notification and before approval (s. 22 (4)).

"It is felt that this is a substantial alleviation of the evils which led to the complaint by the Otago Society in the first place."

Tangiwai Disaster:—The Law Society, England, forwarded the following cable in January last:—

"On behalf of Solicitors in England the Law Society sends its deep sympathy in the disaster which must have marred this historic Christmastide. We share your grief."

It was resolved that the Council, on behalf of the lawyers of New Zealand, should express its thanks to the Law Society of England.

International Bar Association—The President reported that Messrs. G. C. Phillips and D. R. Richmond had been appointed the representatives of the Society to attend the Conference to be held at Monte Carlo in July next. The previous appointees, Mr. Justice Gresson and Mr. G. M. Lloyd, who had had to change their plans, were not now available.

Workers' Compensation Acts.—The following letter was received from the Canterbury Society:—

"My Council are concerned at the chaotic state of the statute law under the Workers' Compensation Acts. At the end of 1952 the statute law on this subject was contained in the principal Act and 18 amendments, and now the 1953 amendment grafts an entirely new basis of computation on to various bits and pieces scattered through the existing range of statutes. My Council feel that representations should be made for codification of the law on this subject."

It was resolved that, subject to the matter not being already under action, it should be referred to the Minister of Labour for his attention.

Joint Family Homes Act.—The Canterbury Society wrote as follows:—

9th March, 1954.

"My Council requests that the attached be referred to the New Zealand Law Society."

Enclosure:

"The following is a requisition received from the District Commissioner of Stamp Duties on the stamp accounts filed in a deceased estate:—

'As the value of the Joint Family Home forms part of the deceased's dutiable estate pursuant to Section 51 (e) of the Death Duties Act, 1921, as amended by Section 4 of the Joint Family Homes Amendment Act, 1952, please file a 16th Schedule together with a Valuation Certificate.'

The facts are that deceased purchased a dwelling in 1952 for £4,400, and then had it vested in himself and his wife as a joint family home. The effect of the Department's interpretation of the relative sections is that duty will be payable on the value of the joint family home, which we imagine will be in the vicinity of £4,400, reduced by the exemption of £2,000 as provided for by Section 4 of the above Amendment Act. In other words, approximately £2,400 will be added to the estate for duty purposes, thereby increasing the rate of duty and subsequently increasing the amount of duty payable. We feel confident that the great majority of people understood the Prime Minister when announcing the Government's intention to provide for joint family homes, to say that the home would be vested in the husband and wife jointly, and later in the survivor, without liability for stamp duty, gift duty, or death duty. The interpretation placed on the Act by the Department conflicts with the Minister's statements, and we suggest that urgent steps should be taken to see that the matter is brought to the Minister's attention with a view to the necessary amending legislation being passed in due course. In the meantime it would be helpful if the Minister could be persuaded to give a direction to the Department that the Act was not to be interpreted so as to impose duty on joint family homes. Otherwise, there will be considerable hardship through the payment of duty before the amending legislation becomes effective. We may say that in our view the Department's interpretation is correct.

Whether our view of the matter is correct or not, there would appear to be an oversight in Section 4 of the 1952 Amendment Act. The figure of £2,000 seems to be based on the original limit of £4,000 which was provided for in the original Act. This limit was later increased to £5,000, and the £2,000 should be increased to £2,500."

It was pointed out that the matter was brought to the attention of the Statutes Revision Committee when the last amendment was made, as a result of which an exemption of £2,000 was made.

After further discussion, it was resolved that the letter of the Canterbury Society be referred to the Hon. the Attorney-General.

1. *Election Committees:*

(a) *Management Committee:* Messrs. D. Perry, Sir Alexander Johnstone, Q.C.; E. T. E. Hogg, D. R. Richmond, and A. T. Young, the only nominees, were appointed.

(b) *Joint Audit Committee:* Messrs: J. R. E. Bennett and F. B. Anyon, the only nominees, were re-elected.

(c) *Conveyancing Committee:* Messrs. A. B. Buxton, J. R. E. Bennett, S. J. Castle, and G. C. Phillips, the only nominees, were re-elected.

(d) *Costs Committee:* Messrs. E. T. E. Hogg, D.R. Richmond, and D. W. Virtue, the only nominees, were re-elected.

(e) *Disciplinary Committee:* Messrs. J. B. Johnston, L. P. Leary, Q.C.; H. R. Biss, W. H. Cunningham, M. R. Grant, A. N. Haggitt, A. C. Perry, and W. E. Leicester, the only nominees, were appointed.

(f) *Finance Committee:* Messrs. D. Perry, G. C. Phillips, D. R. Richmond, and A. T. Young, the only nominees, were re-elected.

(g) *Legal Education Committee:* Messrs. A. M. Cousins, G. C. Briggs, H. J. Butler, N. M. Izard, and A. C. Perry, the only nominees, were re-elected.

(h) *Judges' Library Committee:* Messrs. I. H. Macarthur and F. C. Spratt, the only nominees, were re-elected.

(i) *Council of Law Reporting:* Mr. W. P. Shorland was re-appointed a member of the Council of Law Reporting for a further term of four years ending the first Monday in March, 1958. Mr. E. C. Champion was appointed a member of the Council of Law Reporting for a term of four years ending the first Monday in March, 1958.

2. *Officers:*

The President proposed that the election for the office of President and Vice-Presidents of the Society do stand over, and that this meeting be adjourned until July 30, the present office-bearers remaining in office under the Rules.

Hon. Treasurer: Mr. D. Perry, the only nominee, was re-elected Hon. Treasurer.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Merits of Arbitration.—In a current article on "Eccentrics," Viscount Hailsham mentions an elderly gentleman who stood outside the Law Courts all day with a top-hat bearing the device "Arbitrate, don't litigate." This headpiece, he says, was fitted with vanes like a chimney cowl, and when a breeze sprang up the wind would blow the outside of the hat merrily round and round with a pleasant whirring sound like a flight of pigeons. Nevertheless, there is more than a modicum of soundness in the message sought to be conveyed; and the Courts might well save valuable time if, on appropriate occasions, more use were made of the power under the Code to order disputed facts to be determined by arbitration. Mr. Justice MacGregor, who sat on the Bench between September, 1923, and April, 1934, made constant use of the power—a fact no doubt due to his dislike for wearisome detail of a technical nature and a desire to reach by the shortest route the crux of the problem he had to decide. His judgments for the most part are models of conciseness and are worked out like a theory of Euclid. On the other hand, Mr. Justice Blair was afflicted by no such inhibitions. Scriblex remembers, and the memory is still painful, a building dispute that started before him five days before the Christmas vacation in one of the hottest summers on record. The plaintiffs were a voluble French couple; their principal witness, an architect, had given to the State Advances Corporation a report that bore little resemblance to his evidence in Court; and everything in and about the house was in dispute except a modern hot-water system which the plaintiffs had imported from France. When the local law offices were closing their doors for the vacation, the plaintiffs were still complaining about the machinations of the builder, and the builder was endeavouring to satisfy the Judge that what they expected for their £2,500 was a miniature Palace of Versailles. Blair, J., stated that he would personally inspect (in the presence of counsel) on the final afternoon and then give his decision. At 2 p.m. he decided to have a look at the hot-water system and at 4 p.m. he was still tinkering with it, if he had not by then actually taken it to pieces. Counsel in another part of the building sweltered in the heat, both concerned with the rearrangement of their holiday programmes and cursing the moment they had even seen their respective clients. Finally, counsel for the defendant turned to the other and said: "We were fools not to hand over the whole business to an expert to arbitrate. If I had known this would happen, I would even have agreed to your architect!"

Thinking and Submitting.—MacGregor, J., had the distaste of the average Scotsman for cant and humbug; but his impatience led him sometimes into difficulties. On one occasion, counsel was addressing him on behalf of a prisoner for sentence, and, in putting forward his client's story, was telling a tale that had the slight flavour of the Arabian Nights about it. "Do you really believe all this, Mr. Blank?" interrupted the Judge. "I'm only informing Your Honour of what I have been instructed is the position," replied counsel. "Well," said MacGregor, J., "you surely don't believe one quarter of it, do you?" This exchange was rightly the subject of comment at the time that what counsel does or does not believe is no concern of the Court's; nor, indeed, what he personally thinks. His concern is to "submit," and not to "think." Certainly, he has a discretion to mix the whisky of his instructions with a variable amount of water of doubt on the assumption, at least, that the presiding Judge, is not a complete moron; and if he is not entitled to "think" when he addresses the tribunal, then he should be immune from any Court probe as to what his real thoughts are. Experience teaches this lesson. The most successful advocates are probably those who do not think at all.

Judicial Detachment.—When Sir Laurence Olivier decided to make a film of *Henry V.*, he sought a really poetic countryside and found this at Enniskerry, near Dublin, an estate belonging to Lord Powerscourt whose family had a great military tradition and who readily consented to the filming there. The Irish Local Defence Force under semi-military discipline was provided; young men from all over Ireland, tempted by wages at £3 10s. weekly with an extra £2 weekly for their horses, converged upon Olivier's location; "farmers from as far off as the shores of Lough Neagh; ploughboys who turned the dark earth of Kilkenny; stable boys who could play truant, and even a Dublin cab-driver who removed his nag from between the shafts." Amongst the large number of players and extras, there was only one casualty. The cabby's old horse lost an eye, but at the conclusion of his (and its) film engagement the cabby returned to Dublin to ply his trade in the streets there. Within a few weeks, the cabby was involved in a petty traffic charge and said, "Sure, yer honour, an' you wouldn't be taking it out of an old war horse that lost an eye fighting for the Oirish at the Battle of Agincourt." Unfortunately, the Magistrate was about the only person in Ireland who knew nothing of the filming of *Henry V.* He promptly committed the cabby for contempt of Court.

From My Notebook (Miscellaneous Division).—"Writing a legal textbook for lawyers is no easy task; to write on law so that anyone can understand it, as does the author, is a notable achievement":—A. H. G. Craske in his introduction to *Your Legal Adviser* (Augustine Press).

"Every conviction for dangerous driving should be followed by a disqualification": Sir Carleton Allen, Q.C., D.C.L., speaking before a conference on "Road Safety and the Law."

"That marriage for love is profound mistake"—from the programme of forthcoming debates announced by the United Law Society.

"During my term of office as Chief Magistrate, it will be my earnest endeavour to avoid partiality on the one hand and impartiality on the other"—from the inaugural address following recent mayoral elections.

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: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Gift Duty.—*Deed of Separation—Matrimonial Home to be vested in Child upon Child attaining Twenty-one years or on Death or Remarriage of Widow—Alternative Suggestion to sell Home to Wife with Mortgage Back for Unpaid Purchase Money—Liability to Gift Duty.*

QUESTION: I am acting for the husband in respect of the enclosed separation agreement and Declaration of Trust pursuant thereto.

It appears to me that gift duty will be payable by the husband at the rate of 9 per cent.

As the house which will probably be valued at over £2,000 is subject to a rehabilitation mortgage of £1,300 and the furniture would be valued at £300, gift duty would be payable on upwards of £1,000. The husband is in no position to pay £100 or more in gift duty.

If the trust in favour of the child were deleted, then I think the declaration of trust could be stamped as a deed in wife's right to occupy the house until death or remarriage being a *pro tanto* satisfaction of the husband's obligation to maintain her in that period.

It was originally intended that the house be settled on the wife as a *pro tanto* satisfaction of the husband's obligation but in the event of the wife's remarriage then the husband and I would look rather foolish. The ultimate decision was to protect the wife until remarriage and then the child.

If the husband pays gift duty on the document as drawn and the child dies then there would be no refund of duty.

The husband cannot transfer to the wife taking a mortgage back from the wife to become due on her death or remarriage as I assume this would be a reservation apart from the practical difficulty of reducing such a mortgage in the meantime.

Do you think you could find a way out of the present impasse? As the document is dated the 16th instant I should like a reply well before the 16th of next month if the document is to be presented to the Stamp Office in its present form.

ANSWER: It is not the functions of Practical Points column to peruse draft instruments and advise on liability for taxation. However, it has been thought convenient to answer briefly the specific questions put. The better plan would be, as the instruments are not yet executed, to endeavour to obtain the opinion of the local Assistant Commissioner of Stamp Duties.

It is probable that gift duty would not be payable in the first instance at any rate at such a high rate as 9 per cent., as from the value of the gift to the child there would have to be deducted the value of the wife's life interest, and probably, also the contingent value of the child's interest in the remainder up to the age of 18 years, if in the event of the wife re-marrying before the child attained the age of 18 years, the Department re-assessed the instrument for gift duty.

It is the gift to the child which forms the element of gift. If the only beneficiary were the wife, then you could safely rely on the ruling of Stout, C.J., in *Commissioner of Stamps* v. *Pearce*, [1924] G.L.R. 338.

If the husband pays gift duty on the document as drawn (but not yet executed), and the child dies there would appear to be no chance of any refund of gift duty, for the child apparently will obtain a *vested* interest *instantly* on execution of the instrument.

It is stated that the husband cannot transfer to the wife taking a mortgage back from the wife to become due on her death or re-marriage as this presumably would be a reservation. But this does not appear to be so: see now s. 7 of the Death Duties Amendment Act, 1952. In any case s. 49 of the principal Act does not apply unless the transaction is in the first instance a gift.

X.2.

2. Limitation of Actions.—*Mortgage given in* 1921—*Mortgagor entering Mental Hospital Nine Years later and not Recovered—Position of Mortgagee—Limitation Act,* 1950, *s.* 2 & (*b*) (*e*).

QUESTION: In 1921, A lent his brother B £500 on registered mortgage over B.'s house. After nine years, A entered a mental hospital where he has been ever since and is incurable.

No interest has ever been paid under the terms of the mortgage and no written admission of any sort signed by B.

Could B successfully take action to clear the house of the mortgage or would A.'s disability prevent the Limitation Act, 1950, from running? The Public Trustee who took over A.'s other assets when he entered the mental hospital has never learnt of the existence of the mortgage.

ANSWER: The question of limitation in this case should be looked at first in respect of interest and secondly in respect of principal.

As to interest, s. 20 (4) of the Limitation Act, 1950, precludes the recovery of instalments of interest after the expiration of six years from the date on which the instalments respectively fell due, but the effect of this provision is suspended by s. 24 (*b*) which enables action to be brought before the expiration of six years from the date when A ceases to be under a disability or dies. As A is apparently still alive and under disability, the normal processes of limitation have not yet operated in respect of the bulk of the arrears of interest. Section 24 (*e*) however, sets an absolute bar after the expiration of thirty years from the date on which the right of action accrued to A. Applying the foregoing to the particular facts: (i) Interest accruing from 1921 to 1924 was statute-barred by the time B was committed: (ii) Interest accruing from 1924 becomes barred year by year, as the thirty years' limit moves forward. At the moment (1954) this limit is not of much help, but even if nothing is done it will have the effect of preventing B.'s liability from becoming any greater: (iii) A.'s committee apparently has, from now onwards, the right to demand arrears of interest (including penalties) for a period of thirty years from whatever time he proceeds in the matter: (iv) If B.'s liability is not disclosed until A dies or is discharged, then it is considered that, up till six years after A.'s death or discharge, B would be answerable for thirty years' arrears, but that thereafter he would not: (v) All of the foregoing is subject to the mortgagee's having the right to recover principal: *Elder* v. *Northcroft*, [1930] 2 Ch. 422.

As to principal: s. 20 (1) precludes the recovery of this after the expiration of twelve years from the date when the right to receive the money accrued; but, again, the effect of this provision may be suspended by s. 24 (*b*) and s. 24 (*e*). The question does not state the maturity date of the mortgage, but the following seems to set out the position under the various practical possibilities: (i) The over-riding provisions of s. 24 (*e*) should be considered first. If the mortgage provided a maturity date more than thirty years ago, B appears to have an obsolute defence. This practically covers the position up to A.'s committal. If the date of maturity was later than the date of committal, the thirty years' period is progressively overtaking the date of maturity, and when it does so, B can plead s. 24 (*e*).

(ii) Otherwise, it is considered that, at least until six years after A.'s death or discharge, B cannot successfully raise the statutory defence: s. 24 (*b*). (iii) If, however, the mortgage matures within twelve years of A.'s death or discharge, B would appear unable to raise the statutory defence successfully until the expiration of the full period of twelve years allowed under s. 20 (1). (iv) If the mortgage was strictly "on demand," demand has apparently not been made, and time has not yet begun to run in favour of B.

Q. 2.