New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes"

VOL. XXXI TUESDAY, MAY 17, 1955 No. 9

# CRIMINAL LAW: VARIATION OF SENTENCE ON APPEAL.

THE learned Attorney-General, the Hon. J. R. Marshall, deserves the congratulations of the profession on his achievement of a record in legislative celerity with the passing of the Justices of the Peace Amendment Act, 1955, which clarified a question arising in the criminal jurisdiction, which their Honours of the appellate Court in *Howe* v. *Roberts* (to be reported) described as being "of great practical importance and of considerable difficulty".

The judgment in *Howe* v. *Roberts*, delivered by a Full Bench of the Supreme Court (Finlay, Cooke, North, and Turner, JJ.) on April 29, showed a difference of opinion between their Honours on the question whether s. 326 of the Justices of the Peace Act, 1927, enabled the Supreme Court, on an appeal against sentence, to substitute a sentence of a different kind from that which had been imposed by the Magistrate.

In concluding their judgment, their Honours said that the question of jurisdiction which had arisen was one for the Legislature.

At this time, the House of Representatives had given a second reading to a Justices of the Peace Amendment Bill, which was confined to the creation of procedure for taking evidence of defence witnesses in summary and indictable proceedings at a distance, and the proof of service of summonses and other documents.

At once, s. 326 of the Justices of the Peace Act, 1927, was redrafted, and the draft was submitted to, and approved by, their Honours, the New Zealand Law Society, and the Crown Law Office. It was then introduced into Parliament as an addition to the pending Amendment Bill. The Bill, as so supplemented, was passed into law on May 6—exactly one week after the deficiency in the replaced statutory provision had been pointed out by their Honours in their judgment.

Now, as to the background of the amended s. 326 of the Justices of the Peace Act, 1927:

In the case before the appellate Court, the learned Magistrate had imposed a sentence of corrective training under s. 21 of the Criminal Justice Act, 1954. In the result, the Court agreed with the Magistrate's sentence, and the appeal was dismissed.*

Counsel for the appellant had, however, suggested that the proper sentence of the appellant should have been, not corrective training (as imposed in the Court below), but a period of twelve months' imprisonment, followed by a period of probation.

This submission raised the question whether the Supreme Court had jurisdiction to alter the kind of punishment imposed by a Magistrate when it was dealing with an appeal against sentence. In the case before the appellate Court, the sentence of the appellant had been confirmed; so the question of jurisdiction to impose another sentence (such as suggested by counsel, in lieu of corrective training) did not arise.

The Court, however, said that the question was one of great practical importance and of considerable difficulty; and that it was desirable to discuss it.

By s. 302 of the Justices of the Peace Act, 1908, a right of appeal was given against the convictions and orders there mentioned, and by s. 313 it was provided that the Court appealed to

> shall hear and determine the matter and make such order in relation thereto and such orders as to payment and amount of costs to either party, and to the Justice if appearing in support of his decision, as the Court thinks fit.

It was held in *Skipper* v. *Cummings*, [1917] N.Z.L.R. 886; [1917] G.L.R. 570, that, on an appeal brought under those provisions, the Supreme Court had no power to modify the sentence. There was, later, enacted s. 2 of the Justices of the Peace Amendment Act, 1923, by which the power conferred on the Supreme Court by s. 313 of the Justices of the Peace Act, 1908, to make such an order in relation to the subject-matter of an appeal under s. 302 of that Act as it thinks fit, was declared to include the power to confirm, reverse, or modify, within the limits warranted by law, the term of any sentence of imprisonment or the amount of any fine or other sum of money ordered to be paid. By s. 7 of the Justices of the Peace Amendment Act, 1926, there were added to that section the words "or to confirm, reverse, cancel, or modify any other penalty."

By the Justices of the Peace Act, 1927, the legislation was consolidated. Section 302 of the Justices of the Peace Act, 1908, became s. 315 of the Justices of the Peace Act, 1927, and s. 313 of the former statute became s. 325. Section 3 of the Justices of the Peace Amendment Act, 1923, as amended in 1926, appeared as s. 326 of consolidated statute 1927.

In *Dickie* v. *Cunningham*, [1939] N.Z.L.R. 1004; [1939] G.L.R. 593, the question arose whether the Supreme Court could modify the sentence when the appellant had pleaded guilty below, and had appealed by way of general appeal in order to obtain an alteration of his sentence. The answer was in the affirmative.

* In this place, in our last issue, we considered the Court's judgment in relation to the new statutory provision relative to corrective training.

Then came s. 2 of the Justices of the Peace Amendment Act, 1946, which was further amended by s. 6 of the Justices of the Peace Amendment Act, 1952. The relevant sections as they stood when the Full Court judgment was given were as follows :

315. (1) Except as expressly provided by this Act or by any other enactment, where, on the determination by a Justice of any information or complaint that he has power to determine in a summary way, any defendant is convicted, or any sum of money is ordered to be paid otherwise than as costs on the dismissal of any information or complaint, or whether any order for the estreat of a recognizance is made by Justices, the person convicted or against whom any such order is made may appeal to the Supreme Court.

(2) In the case of a conviction, the appeal may be against the conviction and the sentence passed on the conviction, or against the conviction only, or against the sentence only ; and in the case of an order for the payment of money the appeal may be against the order or only against the amount of the sum ordered to be paid.

325. The Supreme Court shall hear and determine the matter, and make such order in relation thereto, and such orders as to payment and amount of costs to either party, and to the Justice if appearing in support of his decision, as the Court thinks fit.

326. The power conferred on the Supreme Court by the last preceding section to make such an order in relation to the subject-matter of an appeal under section 315 hereof as it thinks fit is hereby declared to include the power to confirm, reverse, or modify, within the limits warranted by law, the term of any sentence of imprisonment or the amount of any fine or other sum of money ordered to be paid, or to confirm, reverse, cancel, or modify any other penalty.

In dealing with the question whether the Supreme Court could substitute a different kind of sentence for that imposed on the appellant by the Magistrate, their Honours thought it to be convenient first to refer to the provisions of s. 326. On this question, their Honours said :

We are of opinion that s. 326 gives the Court no power to substitute a different kind of sentence for the one imposed in the Court below, and this notwithstanding that such substitutions have in the past not infrequently been directed by this Court, for, on a careful reading of the section, it becomes apparent that the Legislature has classified the different kinds of punishments that might be imposed and has simply given the Court certain powers of confirmation, reversal, or modification without power to substitute one kind of punishment for another. We should say here that, in our opinion, corrective training and ordinary imprisonment within the meaning of the Criminal Justice Act, 1954, are punishments of a different kind. It follows, then, from what we have said that, for present purposes, no assistance can be derived from s. 326.

There remained the question whether, apart altogether from s. 326 and assuming that it need not be treated as containing an exhaustive statement of the power of this Court to interfere with punishments, the legislation conferred power, on an appeal from sentence, to substitute for the sentence imposed by the Magistrate such a sentence as is suggested by counsel. The Court went on to say :

In approaching this question, it is desirable first to go back to the decisions. The grounds of the decision in *Skipper* v. *Cummings*, [1917] N.Z.L.R. 886 ; [1917] G.L.R. 570, in substance were, first, that, where a statute confers a right of appeal from a conviction, without more, there is no power to amend the conviction, and no power to modify the sentence, and, secondly, that neither the words " shall hear and determine the matter " that were contained in the first part of s. 313 of the Act of 1908 (now s. 325 of the Act of 1927) nor the concluding part of that section, which it was held related merely to collateral matters, was sufficient to confer power to do either of those things. In *Dickie* v. *Cunningham*, [1939] N.Z.L.R. 1004 ; [1939] G.L.R. 593, however, *Myers*, C.J., in delivering the judgment of the Full Court, said :

" That s. 315 of the present New Zealand Act is wide enough to confer a right of appeal against sentence unless there is some other provision in the statute, such as s. 325 of the present Act if it stood alone, to limit the jurisdiction of the Court, is shown by *Harris* v. *Cooke*, (1918) 88 L.J.K.B. 253."

After careful thought, their Honours found themselves unable to agree with the view that s. 325 was a provision limiting the jurisdiction of the Court. They found, too, great difficulty in reconciling the above observations with *Skipper* v. *Cummings*, [1917] N.Z.L.R. 886 ; [1917] G.L.R. 570. The judgment continued :

It was there held, in effect, that the words of what is now s. 325 of the Justices of the Peace Act, 1927, were not explicit enough to confer power to modify the sentence ; but it was not suggested that the section had a limiting effect. It was, as it seems to us, merely held that the section, which contained a grant of jurisdiction but not a restriction of it, did not go far enough.

In *Harris* v. *Cooke*, (1918) 88 L.J.K.B. 253, on the other hand, in which there was also a right of appeal from a conviction, but in which there were apparently no such jurisdictional provisions as those contained in s. 325, the judgments in the Divisional Court appear necessarily to show that the Court took the view that the appellate Court, which, under the legislation there in question, was Quarter Sessions, had power to reduce the sentence.

It appears to us, therefore, that there is a conflict between *Skipper* v. *Cummings*, [1917] N.Z.L.R. 886 ; [1917] G.L.R. 570, and the observations based on *Harris* v. *Cooke*, (1918) 88 L.J.K.B. 253, that were made in *Dickie* v. *Cunningham*, [1939] N.Z.L.R. 1004 ; [1939] G.L.R. 593.

We think, however, that, even if the view that is implicit in *Harris* v. *Cooke*, (1918) 88 L.J.K.B. 253, should be preferred to that taken in *Skipper* v. *Cummings*, [1917] N.Z.L.R. 886 ; [1917] G.L.R. 570,—and as to this we express no opinion—the question of the power of this Court on appeal to substitute a different kind of punishment would remain unresolved.

In explaining our reasons for saying that, it is necessary first to say that, while it is implicit in *Harris* v. *Cooke*, (1918) 88 L.J.K.B. 253, that the statute there in question gave power on appeal to reduce the sentence, there is nothing in that decision to support a suggestion that such statute gave power to substitute a sentence of a different kind. Indeed it seems to some of us that, as it cannot be predicated that the exercise of a power to substitute a sentence of a different kind will invariably result in a determination that is less severe, there is, for present purposes, no difference in principle between such a power and a power to increase a sentence.

Bearing those considerations in mind, their Honours turned again to ss. 315 and 325. They said :

It is important to remember that the whole setting of those provisions was altered in 1946 by the enactment of what is now subs. (2) of s. 315. In that subsection, the Legislature went to the root of the matter and in express terms granted a right of appeal from sentence only. The purpose of a grant of such a right of appeal is to allow the sentence to be reviewed, and it would be opposed to common sense if any appellate Court to which such an appeal lay could do nothing but affirm or cancel the sentence. We think that this altered approach to the matter on the part of the Legislature would in itself be a sufficient ground for holding that the view that is implicit in *Harris* v. *Cooke*, (1918) 88 L.J.K.B. 253, is to be preferred to that taken in *Skipper* v. *Cummings*, [1917] N.Z.L.R. 886 ; [1917] G.L.R. 570, and for holding that there would be coercive reasons for treating s. 315 (2) or the power to hear and determine conferred by s. 325 not merely as conferring power to affirm or cancel the sentence, but as impliedly conferring power to reduce it.

Their Honours considered that it was unnecessary for their present purposes to pursue that particular aspect of the matter, because, assuming all that to be so, the crucial question that remained in this case is whether a further implication was justified, namely, whether there could be implied from s. 315 (2), or from any part of s. 325, a power to substitute a different kind of punishment. The judgment concluded :

It is, of course, well settled that a right of appeal and the jurisdiction of an appellate Court are purely the creatures

of statute and can be conferred only by express words or by coercive implication from the statutory language: see, for instance, the judgment of *Hosking*, J., in *Skipper* v. *Cummings*, [1917] N.Z.L.R. 886, 898, 900; [1917] G.L.R. 570, 577, 578. This principle appears to us to apply with to say the least, undiminished force when it is sought to imply, a power to substitute a different kind of punishment from legislation that confers a right of appeal on the defendant only.

The Court is, however, divided in opinion as to whether such an implication can be derived from the legislation in question here. In these circumstances, the whole matter is one that, as we respectfully think, should be brought to the attention of the Legislature.

A week later, the Justices of the Peace Amendment Act, 1955, by s. 5, repealed s. 326 of the principal Act, and the following section was substituted:

326. Without limiting the generality of the power conferred on the Supreme Court by section three hundred and twenty-five of this Act, it is hereby declared that the Court may—

(*a*) In the case of any appeal against conviction, confirm the conviction or set it aside:

(*b*) In the case of any appeal against sentence, confirm the sentence, or quash it and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as the Court thinks ought to have been passed, or vary, within the limits warranted in law, the sentence or any part of it or any condition imposed in it:

(*c*) In the case of any appeal against an order, confirm the order, or set it aside, or quash it and make such other order warranted in law (whether more or less severe) in substitution therefor as the Court thinks ought to have been made, or vary, within the limits warranted in law, the order or any part of it or any condition imposed in it:

(*d*) In the case of any appeal against the amount of any sum ordered to be paid, confirm the amount, or increase or reduce it within the limits warranted in law:

(*e*) In any case, exercise any power that the Court whose decision is appealed against might have exercised.

As a perusal of the newly-substituted s. 326 will show, the difficulties of jurisdiction raised by their Honours have been completely removed.

# SUMMARY OF RECENT LAW.

## ACTS PASSED.

No. 6. Amusement Tax Act, 1955.
No. 8. Finance Act, 1955.
No. 1. Imprest Supply Act, 1955.
No. 11. Judicature Amendment Act, 1955.
No. 12. Justices of the Peace Amendment Act, 1955.
No. 13. Magistrates' Courts Amendment Act, 1955.
No. 3. National Roads Amendment Act, 1955.
No. 2. Police Force Amendment Act, 1955.
No. 5. Potato Growing Industry Amendment Act, 1955.
No. 9. Social Security Amendment Act, 1955.
No. 7. Stamp Duties Amendment Act, 1955.
No. 10. War Pensions Amendment Act, 1955.
No. 4. Water Supply Amendment Act, 1955.

## COMPANY LAW.

*Winding-up—Disclaimer of Lease—Application by Company in Voluntary Liquidation for Leave to Disclaim—Lessor, consenting to Assignment of Lease to Company, on receiving Covenant by Lessee that such Assignment should not release Lessee from Liability under Lease—Company covenanting to indemnify Original Lessee against Liability under his Covenants in Lease—Disclaimer Ineffective in Practical Effect—Leave to Disclaim refused—Alternatively, Order vesting property in Original Lessee not to be made except on Application by Person seeking Such Order and after Notice to Affected Parties—Companies Act, 1933, s. 261.* A lease of a property, was given to K. for a term of five years from November 1, 1950. On August 1, 1952, the company, in consideration of the Lessor's consenting to an assignment of the lease to it, entered into a deed of covenant with K. to pay the rent and observe the terms and conditions of the lease. The deed contained a covenant by K. that notwithstanding the assignment, he should remain personally liable in respect of the covenants expressed or implied in the lease. On July 31, 1953, K. assigned to the company his estate or interest in the land comprised in the lease for the unexpired residue of the term, and the company covenanted with K. to pay the rent and observe the covenants in the lease, and to indemnify him from and against all claims, demands, costs, and proceedings. On September 16, 1954, the company ceased to carry on the business it conducted on the demised premises, and, on November 22, 1954, went into voluntary liquidation. The company was insolvent. On an application by the company under s. 261 of the Companies Act, 1933, for leave of the Court to disclaim the property, *Held*, 1. That, if the liquidator, pursuant to s. 261 (1), with the leave of the Court, disclaimed the property, the company would obtain an advantage in that all liability for future rent would be discharged; but the persons who might be affected by such disclaimer would be the lessor and the original lessee, who would remain liable upon his covenant. (*Hill* v. *East and West India Dock Co.*, (1884) 9 App. Cas. 448, applied.) 2. That the application for leave to disclaim should be refused, as a disclaimer by the liquidator would not relieve the original lessee of liability to the lessor for rent, a disclaimer would, in practical effect, be ineffective, and the company would receive little or no advantage. (*Stacey* v. *Hill*, [1901] 1 Q.B. 660, distinguished.) *Semble*, 1. That, even if the effect of a disclaimer would be to discharge the original lessee from liability, that would be an added reason for the refusal of leave to disclaim, as it would be inequitable that the lessor who had contracted originally with a solvent lessee should suffer the loss of the future rent, and that the original lessee, while still in a position to pay, should obtain a release of his liability by the insolvency of his lessee. 2. That an order for the vesting of the property in the original lessee under s. 261 (6) of the Companies Act, 1933, should not be made except on a substantive application by the person asking for such an order, and after notice to such persons as might thereby be affected. *In re Ice Rinks (Timaru), Ltd. (In Voluntary Liquidation)*. (S.C. Timaru. May 2, 1955. McGregor, J.)

## CONTRACT.

*Penalty—Hire-purchase Agreement—Three-quarters of Purchase Price payable as depreciation if Agreement determined under Certain Conditions.* The first defendant entered into a hire-purchase agreement with the plaintiffs, who were a hire-purchase finance company, for the acquisition of a second-hand car. The second defendant was guarantor of the first defendant's payments under that agreement. The total price payable was £558 8s., of which £525 was the price of the car and £33 8s. was a finance charge. Clause 6 of the agreement provided that, if the first defendant should return the car or if the plaintiffs should re-take it under the conditions provided for in the agreement, the first defendant should pay to the plaintiffs a sum sufficient together with the sums already paid or then payable to amount to £425, as compensation for the depreciation of the car. The figure of £425 was approximately three-quarters of the total purchase price. The first defendant paid £175 in cash at the time of the agreement and subsequently paid the first four of the twelve monthly instalments of £31 19s., making a total payment of £302 16s. The first defendant having failed to pay the fifth instalment, the plaintiffs re-took the car in accordance with the agreement and re-sold it for £270, thus making a total sum received by them of £572 16s. The plaintiffs sued the defendants under cl. 6 of the agreement for a further £122 4s., being the difference between £425 and the first defendant's payments amounting to £302 16s. *Held*, The sum agreed to be paid under cl. 6 of the agreement was not a genuine pre-estimate of damage, but was a penalty, and the plaintiffs' claim failed. (*Cooden Engineering Co., Ltd.* v. *Stanford*, [1952] 2 All E.R. 915, followed.) *Landom Trust, Ltd.* v. *Hurrell and Another*, [1955] 1 All E.R. 839. (Q.B.D.)

## DIVORCE AND MATRIMONIAL CAUSES.

*Nullity—Bigamous Marriage—Children of Marriage—Custody—Power of Court to make Order—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 26 (1).* On October 23, 1941, the petitioner and respondent were bigamously married, the respondent having a wife still living at that date. There were two children of the bigamous marriage born in 1942 and 1947 respectively. In 1948 the respondent's prior lawful marriage was dissolved and

on September 9, 1948, he and the petitioner went through a second ceremony of marriage. On October 14, 1954, the petitioner was granted a decree of nullity of the bigamous marriage and a decree of dissolution of the second marriage of September 9, 1948. On an application by her for an order under the Matrimonial Causes Act, 1950, s. 26 (1), for the custody of the children of the bigamous marriage, *Held*, The jurisdiction of the Court under s. 26 (1) of the Matrimonial Causes Act, 1950, extended to children of a marriage which was null and void, since the wording of the subsection expressly covered children, the marriage of whose parents was the subject of nullity proceedings; accordingly an order for custody should be made in favour of the petitioner. (*Galloway* v. *Galloway*, [1954] 2 All E.R. 143, distinguished.) Appeal allowed. *Bryant* v. *Bryant*, [1955] 2 All E.R. 116. (C.A.)

*Petition—Petition pending—Respondent in such Petition filing Second Petition against First Petitioner—Practice undesirable, but not Abuse of Proceedings.* The filing of a second petition by the opposite party to the earlier petition who could have included in an answer to the earlier petition a prayer for relief, or have amended an answer accordingly with the leave of the Court though undesirable, is not an abuse of the proceedings; but a decree will not be granted on the second petition until the earlier petition has been disposed of. (*Masters* v. *Masters*, [1954] N.Z.L.R. 260, followed.) (*Sherwood* v. *Sherwood*, [1939] N.Z.L.R. 159; [1939] G.L.R. 94, distinguished.) (*Norton* v. *Norton*, [1945] P. 56; [1945] 2 All E.R. 122, mentioned.) *Downes* v. *Downes*. (S.C. Timaru. April 29, 1955. McGregor, J.)

Recognition of Foreign Decrees. *105 Law Journal*, 179.

Recognition of Foreign Divorce Decrees: A New Doctrine. *99 Solicitors' Journal*, 193.

*Seven Years' Separation—Desertion—Petitioner living in Adultery after Unilaterally Ending* Consortium*—Commencement of Desertion by One Spouse without Other's Knowledge—Guilty Spouses eligible for Relief on Ground of Seven Years' Separation, subject to Court's Discretion—"Living Apart"—"Reconciled"—Divorce and Matrimonial Causes Act, 1928, s. 10* (jj). The purpose of s. 10 (*jj*) of the Divorce and Matrimonial Causes Act, 1928 (added by s. 7 (1) of the Divorce and Matrimonial Causes Amendment Act, 1953) is that even guilty spouses may get relief where their marriages have ceased to be real unions, subject to the discretions given to the Court by ss. 16 and 18 of the statute. The expression "living apart" in s. 10 (*jj*) is satisfied where one spouse has been in desertion throughout the relevant period. The word "reconciled", as used in s. 10 (*jj*), is the antithesis of "living apart"; and all that is required is that it must be unlikely that the parties should ever be reconciled, in the sense of mutually consenting to live together again. *Consortium* can be terminated by the unilateral conduct of one spouse unknown to the other; and an *animus deserendi* supervening upon a *de facto* separation is enough, notwithstanding that the separation may have been brought about by circumstances beyond the control of the spouses, as by the committal to a mental institution of the respondent. (*Beeken* v. *Beeken*, [1948] P. 302, applied.) Desertion by one spouse may commence without its being communicated to or brought to the knowledge of the other spouse, and a spouse may be deserted without knowing it. (*Pulford* v. *Pulford*, [1923] P. 18, and *Sotherden* v. *Sotherden*, [1940] P. 73; [1940] 1 All E.R. 252, referred to.) A petitioner established that she and the respondent had been "living apart" for seven years and upwards, and there was no likelihood that the petitioner would in any circumstances resume cohabitation. There had been a physical separation brought about by the respondent's committal to a mental hospital in Australia, but an *animus deserendi* continuously by the petitioner since then; and, for fifteen years before her petition on the ground set out in s. 10 (*jj*), her desertion had taken the form of living in New Zealand as the pretended wife of another man. *Held*, 1. That, as there was no likelihood that the petitioner would in any circumstances resume cohabitation, the parties were "unlikely to be reconciled" within the meaning of s. 10 (*jj*). 2. That the petitioner, by proving desertion on her own part, had established that she and the respondent had been "living apart" within the meaning of s. 10 (*jj*) since January, 1938; and there would accordingly be a decree *nisi* for divorce. (*Wilson* v. *Wilson*, [1955] N.Z.L.R. 175, distinguished.) *McRostie* v. *McRostie*. (S.C. Christchurch. March 15, 1955. F. B. Adams, J.)

## EVIDENCE.

Crown Privilege. *105 Law Journal*, 166.

## EXECUTORS AND ADMINISTRATORS.

*Advertisement for Claims—No Claims by Beneficiaries—Estate wound up—Balance of Estate transferred to Crown as* bona vacantia*—Grant of Administration* de bonis non *to Next-of-Kin—Effect of Grant—Form of Advertisement—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 27.* By her will dated January 29, 1948, a testatrix appointed C. to be her sole executor, and gave a legacy to him and his wife, but made no other disposition of her estate. On February 3, 1948, the testatrix died, and probate was granted to C. He advertised pursuant to the Trustee Act, 1925, s. 27 (1), in the *London Gazette*, *The Times* and a local newspaper, giving notice in the newspapers "that all persons having any claims against the estate of the [testatrix] . . . are required to send particulars to the undersigned solicitors to the executor" before a certain date "after which date the executor will distribute the estate having regard only to claims then notified." C. received no claim from next-of-kin of the testatrix in respect of that part of her estate as to which she died intestate, and he paid the debts and funeral and testamentary expenses, and retained the legacy. On September 10, 1949, C. paid the residue of the estate to the Treasury Solicitor on the footing that the testatrix had left no lawful next-of-kin and that the residue was *bona vacantia*. On March 3, 1953, C. died intestate and no grant of representation to his estate was obtained. On March 11, 1954, the plaintiff, who claimed to be one of the next-of-kin of the testatrix, obtained a grant of administration *de bonis non* to the estate of the testatrix. The Treasury Solicitor refused to recognise the plaintiff's title to give a good discharge for the assets which the Treasury Solicitor had received from C., but (without admitting liability) was prepared to account for and transfer those assets to any persons who established their claims to be next-of-kin of the testatrix. *Held*, 1. The testatrix's estate having been administered by C. according to law and the assets having been distributed after advertisements had been published under the Trustee Act, 1925, s. 27, the plaintiff could not give the Treasury Solicitor a good discharge in respect of those assets as they were not unadministered at the date of the grant of administration *de bonis non* to the plaintiff. (*Harvell* v. *Foster*, [1954] 2 All E.R. 736, distinguished.) 2. In view of the voluntary recognition by the Treasury Solicitor of the next-of-kin as the persons entitled to the assets, an inquiry as to the next-of-kin of the testatrix would be ordered. Observations on the form of advertisement under the Trustee Act, 1925, s. 27 (1). *Re Aldhous (deceased)*, *Noble* v. *Treasury Solicitor*, [1955] 2 All E.R. 80 (Ch.D.)

Executors "according to the tenor." *105 Law Journal*, 131.

Debts incurred by the Deceased. *105 Law Journal*, 164.

## INCORPORATED SOCIETY.

*Objects*—Ultra Vires*—Application of Doctrine—Association Empowered to "Provide . . . facilities for members . . . of a personal nature . . . in connection with their motor-vehicles"—Association Entering into Agency Agreement with State Fire Insurance Office to undertake Motor-vehicle Insurance as Association's Official Insurer—Association's Entry into such Contract and Acceptance of Commission not* ultra vires *its objects.* The doctrine of *ultra vires* ought to be reasonably, and not unreasonably applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which have been authorized, ought not (unless expressly prohibited) be held, by judicial construction, to be *ultra vires*. (*Attorney-General* v. *Great Eastern Railway Co.*, (1880) 5 App. Cas. 473, followed.) An arrangement between the appellant and the State Fire Insurance Office General Manager, provided for the appointment of the State Fire Office as "official insurer" for a specified term and for the issue of a motor comprehensive insurance policy headed "Automobile Association Policy," the terms and conditions of which were to be those of the Office's existing motor-vehicle policy, and were not to be altered without prior consultation and it was provided that a motor-vehicle policy "without franchise" and on other specified terms, would be issued to such members of the appellant Association as desired it. The State Fire Insurance Office was to pay to appellant a commission of 7½ per cent, and the arrangement or agreement was to continue for five years and be terminable thereafter as provided. The respondents brought an action in the Supreme Court claiming an order that the appellant, its councillors, agents, and servants be restrained from proceeding with the arrangement or agreement with the State Fire Insurance Office, and from expending its funds and utilizing its resources in pursuance thereof. The action was heard before the learned Chief Justice, who held that the Association was acting or proposing to act in a manner beyond its legal powers, and gave judgment in favour of the respondents. From this decision, the Association appealed. *Held*, 1. That the con-

tract was within the Association's powers, as the word "facilities" in object (g) ("To provide . . . facilities for members . . . whether of a personal nature or in connection with their motor-vehicles and the use thereof") was wide enough to include an arrangement with an insurance office whereby the Association's members might readily procure suitable insurance on favourable terms. 2. That the receiving of the commission was within object (q) as being "incidental or conducive to the attainment of [the Association's] objects or any of them." 3. That the canvassing or solicitation of its members was within the Association's powers as reasonably incidental to the furtherance or implementation of an arrangement which was within those powers. Appeal from the judgment of *Barrowclough*, C.J., allowed. *Automobile Association (Wellington) Inc.* v. *Daysh and Others.* (S.C. & C.A. Wellington. December 7, 1954. Stanton, Hutchison, F. B. Adams, JJ.)

**PRACTICE.**

*Costs—Allocation—Two Plaintiffs in Same Action Claiming Different Amounts as Damages—Judgment for Defendant with Costs—Allocation of Such Costs Between Unsuccessful Plaintiffs—Code of Civil Procedure, R. 555.* The first plaintiff, claimed £2,572 13s. 11d. and the second plaintiff claimed £245 13s. 11d. against the defendant as damages in respect of an accident to both plaintiffs. Judgment was given for the defendant with costs, amounting to £206 3s. 3d. On the question how the liability for costs was to be borne by the plaintiffs respectively, *Held*, That, in exercise of the discretion conferred by R. 555 of the Code of Civil Procedure, an order should be made directing the second plaintiff to pay £50 towards the costs, and the first plaintiff to pay the balance. (*English* v. *Bloom and London Passenger Transport Board*, [1936] 2 K.B. 550; [1936] 2 All E.R. 1592, referred to.) *Sutton* v. *Sutton and Another.* (S.C. Hamilton. April 4, 1955. Stanton, J.)

*Costs—Claim for Amount Due decided in Defendant's Favour—Small Accidental Error in Defendant's Payments—Judgment given for Plaintiff for such Sum—Exception to General Rule of Costs following Event—Judgment for Plaintiff for Amount of Error unjust to Defendant—Judgment varied to Judgment for Defendant with Costs—Code of Civil Procedure, R. 555.* The substantial issue between the parties was whether the plaintiff had agreed to do certain work for an agreed sum (as alleged by the defendant) or for a fair price (as alleged by the plaintiff). The Court decided that question in favour of the defendant. In the course of the evidence, it appeared that, in calculating what was payable under the defendant's version of the contract, a small accidental error of £12 0s. 6d. had been made by the defendant, who at once admitted that he was liable to pay that amount; and the learned Judge was satisfied that had it been discovered by the plaintiff and communicated to the defendant before the hearing, it would have been paid at once. In the circumstances, His Honour gave judgment for the plaintiff for the sum of £12 0s. 6d. On the question of costs reserved, *Held*, That the circumstances provided an exception to the general rule that costs should follow the event (which would be unjust to the defendant) and the judgment should be varied by giving judgment for the defendant on the claim with costs according to scale. (Judgment of *Edwards*, J. in *Cates* v. *Glass*, [1920] N.Z.L.R. 37; [1920] G.L.R. 89, and *Jones* v. *Curling*, (1884) 13 Q.B.D. 262, followed.) (*Anglo-Cyprian Trade Agencies, Ltd.* v. *Paphos Wine Industries, Ltd.*, [1951] 1 All E.R. 873, referred to.) *A. Christie (N.Z.), Ltd.* v. *W. M. Angus, Ltd.* (S.C. Wellington. April 4, 1955. Barrowclough, C.J.)

*Discovery—Originating Summons Proceeding—Such Proceeding "an action" in which Discovery may be obtained—No Special Discretion to refuse Discovery—Where Interpretation of Will sought, Class of Other Documents which may be subject of Order for Discovery—Code of Civil Procedure, R. 161.* An originating summons proceeding is "an action" within the meaning of those words as used in R. 161 of the Code of Civil Procedure; and an order for discovery against an opposite party may be obtained by the plaintiff in such a proceeding, including a proceeding for the interpretation of a will. (*Mills* v. *Isaac*, (1892) 11 N.Z.L.R. 434, distinguished.) The Court has not the special discretion to refuse discovery, conferred in England by R.S.C., O. 31, r. 12, in a case in which an English Court is satisfied that discovery will not be of any use. (*Downing* v. *Falmouth United Sewerage Board*, (1887) 37 Ch.D. 234, distinguished.) Although the real object of a proceeding by originating summons is to have the relevant provisions of a will interpreted by the Court, every document relates to "any matter in question in the action," within the meaning of R. 161, which not only would be evidence upon any issue, but also which it is reasonable to suppose contains information which may (not, which must) either directly or indirectly enable the party requiring the affidavit of discovery either to advance his own case or to damage the case of his adversary. (Dictum of *Brett*, L.J., in *Compagnie Financière du Pacifique* v. *Peruvian Guano Company*, (1882) 11 Q.B.D. 55, 63, followed.) *Auckland Society for the New Church* v. *Public Trustee.* (S.C. Auckland. April 6, 1955. Shorland, J.)

**PROPERTY LAW.**

*Right-of-way—Grant giving "Full and Exclusive" right to Grantees to use Right-of-way over Part of Grantor's Land—Reservation of Right to Grantor to use Right-of-way, "whilst the building now erected on [his] land shall be used as a dwelling-house"—Application for Modification of Grant to continue such, Reservation in Perpetuity—"Modify"—Property Law Act 1952, s. 127.* Section 127 of the Property Law Act, 1952, may in appropriate cases, be invoked so as to ask for an extinguishment or modification of a restrictive provision whereby the applicant's predecessor in title restricted his own user. *Quaere*, whether, by virtue of that section, an easement can be "modified" so as to enlarge it. The words of a grant of right-of-way purported to vest in the defendant company a "full and exclusive" right-of-way over part of the grantor's land, and reserved to the grantor the right to use the right-of-way while a building then erected on his land should be used as a dwelling-house. The grantor applied, under s. 127 of the Property Law Act, 1952, for the modification by the Court of the grant so as to omit from the reservation the words "whilst the building now erected on the said land shall be used as a dwellinghouse." *Held*, That the grantor had failed, on the facts, to bring his case within the words of s. 127 (1) (*a*) or s. 127 (1) (*c*), and it was not contended that s. 127 (1) (*b*) could apply. *Richardson* v. *Manawatu Tyre Rebuilders, Ltd.* (S.C. Palmerston North. March 16, 1955. Turner, J.)

**WATERS AND WATERCOURSES.**

*Defendant Owner of Higher Land—Natural Flow of Surface Water to Plaintiff's Lower Land—Open Drain in Existence on Higher Land Many Years before Either Party had purchased His Property—Drain overflowing and Surplus Surface Water flooding Plaintiff's Land—Collection in Drain of Surface Waters, naturally flowing from Higher to Lower Land not Entitling Owner of Lower Land to refuse to receive it after its being so received for Many Years.* The obligation of the inferior proprietor to receive the natural waters flowing from higher land is not an ordinary servitude which requires to be supported by an express grant or by registration to bind successors. It cannot be said, as a matter of law, that the collection of surface waters into one body *per se is not a natural user* of land, for this is a question of fact which requires to be determined in each case with due regard to the whole of the surrounding circumstances. If the facts disclose that the natural waters from the superior tenement had been cast on the inferior tenement in a certain place over a period of years, then, *prima facie*, at all events, the inferior proprietor is obliged to receive the surface waters in this way. The mere circumstance that surface waters had been collected into one body and so discharged on to the inferior tenement does not necessarily alter the nature of the right; and, therefore, no question of the need of an express grant or of registration need arise. (*Gibbons* v. *Lenfestey*, (1915) 84 L.J.P.C. 158, followed.) The natural fall of the defendant's land (Blocks 1, 2, 3, and 5), which was drained by a south-north open drain leading to the culvert on H. V. Rd., was to the north-west; and, consequently, in a state of nature, the surface waters from this area in times of heavy rain would have found their way to the road, 150 ft. to the north of the culvert, and, in so far as they were not diverted by the road, would have flooded the northern end of the plaintiff's original holding, (Block 4). In 1900, or earlier, and when Blocks 1, 2, 3, and 4 were in common ownership, an open drain was in existence leading to a 12 in. culvert on H. V. Rd., which connected with a drain on Block 4, running to the O. Stream. This earlier drain [substantially followed the line of the existing drain; but the culvert was of insufficient size to cope with flood-waters which, from time to time, reached the road, and consequently, on occasions, flood waters flowed down and across the road in a north-westerly direction. In 1937, the H. Town Board constructed the existing 30 in. concrete culvert for the purpose of disposing of the surface waters from the defendants' land and other surface waters led to the culvert by a road drain on the eastern side of the road. In times of heavy rain, the drain on Block 4 was incapable of coping with the waters which passed through this new and larger culvert, and, consequently, the land presently owned by the plaintiff was subject to flooding. In 1941, the defendants filled in the original south-north drain leading to the culvert and substituted earthenware pipes. These proved to be unsatisfactory, and the H. Town Board then called on the defendants to restore the original south-north drain. The defendants duly complied with this request. The defendants, in the ou-

dinary course of their agricultural operations, also constructed a number of small tile drains connecting with the new main open drain, but they did not thereby introduce water from another watershed. When the plaintiff purchased Block 4 he was fully aware of the nature of the existing drainage system, and he knew that, from time to time the drain on the land he was purchasing overflowed and flooded his low-lying lands. The existing drainage system protected the north end of Block 4 from periodical flooding; but, in a state of nature, none of the surface waters from the defendants' land would have reached the land presently owned by the plaintiff. Neither the plaintiff nor his predecessor in title granted an express drainage easement over Block 4. In an action in which the plaintiff sought an injunction restraining the defendants from discharging water and silt into the artificial watercourse or drain which passed through the plaintiff's property on its way to the O. Stream; alternatively, an injunction requiring the defendants to take steps to prevent the escape of water and silt from that drain on to his land; and damages in respect of the past flooding of his land, *Held*, That, as the existing drainage system had been adopted many years previously and before either the plaintiff or the defendants had purchased their respective properties, the drain had become the place where the waters from the higher land were deemed naturally to go; and that the mere fact that surface waters which naturally would flow from higher to lower land were collected in that drain did not entitle the plaintiff, the owner of the lower land, to refuse to receive it in that way after it had been so received for many years. (*Gibbons* v. *Lanfestey*, (1915) 84 L.J.P.C. 158, considered and followed.) (*Bailey* v. *Vile*, [1930] N.Z.L.R. 829; [1930] G.L.R. 443, applied.) (*Dawson* v. *Hopkirk*, [1940] G.L.R. 612 and *Eaton* v. *Dalgleish*, [1940] N.Z.L.R. 702; [1940] G.L.R. 481, referred to.) (*Crisp* v. *Snowsill*, [1917] N.Z.L.R. 252; [1917] G.L.R. 96; *Spear* v. *Newham*, [1926] N.Z.L.R. 897; [1926] G.L.R. 397, and *Spear* v. *Newham* (*No. 2*), [1936] G.L.R. 310, mentioned.). *Wilsher* v. *Corban and Others*. (S.C. Auckland. March 3, 1955. North, J.).

**WILL.**

*Construction—Bequest of Building Society Shares—Such Shares not held by Testatrix at Time of Making of Will or at Her Death—Proceeds of Previous Holding of Such Shares held by Building Society on Fixed Deposit—Testatrix's Intention, as shown by wording of Bequest, to include Such Proceeds—Evidence—Court entitled to Information available to put Itself in Position of Testatrix when She made Will—Affidavit of Building Society's Secretary, to prove Surrounding Circumstances when Will made, admissible.* The testatrix, who died on September 3, 1952, left a will dated February 21, 1950, in which, after providing for a number of pecuniary legacies, she made the following bequests: "2. I give and bequeath: (*b*) All shares owned by me at my death in 'A' group of the Wellington Permanent Building Society and all moneys standing to my credit at my death in the said Society and the benefit of all ballots and other rights accrued to me at my death in respect of the said shares subject however to and charged in exoneration of the other assets of my estate with the payment of all mortgages encumbrances and other charges subsisting on the foregoing at my death to my niece Rita Saunders. (*c*) All shares owned by me at my death in 'B' group of the Wellington Permanent Building Society and all moneys standing to my credit at my death in the said Society and the benefit of all ballots and other rights accrued to me at my death in respect of the said shares subject however to and charged in exoneration of the other assets of my estate with the payment of all mortgages encumbrances and other charges subsisting on the foregoing at my death to my niece Dorothy Palmer." At the date of her death, the testatrix was the registered owner of twenty "A" shares in the Wellington Permanent Building Society (hereinafter called "the Building Society") but she did not, at any time between the date of her will and the date of her death, hold any "B" shares in the Building Society. The testatrix had, however, a number of transactions with the Building Society in respect of "B" shares, which transactions may be summarized as follows: (*a*) On February 18, 1927, twenty "B" shares were allotted. These shares matured in accordance with the Rules and on March 9, 1938, the testatrix became entitled to the sum of £500. (*b*) The testatrix agreed that such sum of £500 should remain on fixed deposit for a specified term, which was from time to time extended by mutual agreement with the Building Society. The Building Society has power under rule 54 to accept money on deposit. (*c*) On or about May 19, 1947, a sum of £50 was repaid to the testatrix, leaving a balance of £450 on fixed deposit. (*d*) On or about May 19, 1951, the testatrix and the Building Society agreed that such sum of £450 be held on fixed deposit for a period of three years with interest at the rate of 2¾ per cent. per annum. This agreement was still in force on the date of her death. The testatrix had one other transaction with the Building Society in connection with "B" shares. On or, about April 11, 1938, she applied for, and had allotted to her twenty "B" shares. These matured on September 14, 1945, when a cheque for £500 12s. 8d. was paid to her in full settlement of the amount. On originating summons for the interpretation of the will of the testatrix, the Court was asked to determine the following question: Did Dorothy Palmer become entitled by virtue of the provisions of Clause 2 (*c*) of the will of the said Gertrude Mary Foley, deceased, to the fixed deposit of £450 with the Wellington Permanent Building Society belonging to the said deceased at the date of her death and to the interest then accrued or thereafter accruing in respect of such deposit? *Held*, 1. That, as the Court was called upon to declare what the testatrix meant when she used the words in cl. 2 (*c*) of her will, it was entitled to such information as might be available to put itself in the situation of the testatrix when she was making this will; and that an affidavit by the secretary of the Building Society to prove the circumstances surrounding the testatrix when she made her will was admissible. 2. That, if the later words in cl. 2 (*c*) "in respect of the said shares" qualified the gift of "all moneys standing to my credit at my death in the said Society", the context and the surrounding circumstances required the words "said shares" to be construed as meaning "'B' shares" and not "'B' shares owned by me at my death." 3. That, when the testatrix used the words "all moneys standing to my credit at my death in the said Society" in a clause dealing solely with "B" shares, after she had similarly dealt with her "A" shares, she meant to include, and did include, the moneys in question, which she kept as a credit with the Building Society in respect of her dealings in "B" shares. 4. That, accordingly, cl. 2 (*c*) was sufficient to include the credit on fixed deposit with the Building Society. *In re Foley* (*deceased*): *Public Trustee* v. *Palmer and Others*. (S.C. Wellington. March 21, 1955. Henry, J.)

*Construction—Power of Appointment—Testator giving Residue on Trust to His Trustees for Such Persons (including Such Trustees) as Trustees might by Deed appoint with Gift Over—Mere Power of Appointment, and not Power in Nature of Trust—General Power, and not invalid as Delegation of Will-making Power.* By his will, the testator appointed S.D. and W.J.S. his executors and trustees, and, after a number of pecuniary bequests, he gave the residue of his estate to his trustees for conversion into money, and, after payment of debts, funeral, and testamentary expenses to stand possessed of the proceeds, "Upon Trust for such person or persons (including the said Sydney Day of Wellington, Plasterer and William John Stacey of Wellington, Solicitor, either jointly or severally for themselves personally and beneficially and absolutely free of any trust express or implied) as my Trustees may by any deed or deeds at any time or times within a period of ten years from the date of my death appoint AND in default of any such appointment or appointments and in so far as the same shall not extend UPON TRUST for my son Ronald Albert McEwen." On originating summons for interpretation of the will, *Held*, 1. That the will conferred no more than a mere power of appointment (not a power in the nature of a trust), which the donees might or might not exercise, as they chose, with the result that the trustees who held the property as personal representatives, were given personally a power, which there was no duty to exercise, and which was a mere discretionary power. (*Chichester Diocesan Fund and Board of Finance* (*Inc.*) v. *Simpson*, [1944] A.C. 341, 348; [1944] 2 All E.R. 60, 62, *In the Goods of Smith*, (1869) L.R. 1 P. & D. 717, *Blair* v. *Duncan*, [1902] A.C. 37, *Grimond* v. *Grimond*, [1905] A.C. 124, *Houston* v. *Burns*, [1918] A.C. 337, *Attorney-General* v. *National Provincial Bank*, [1924] A.C. 262, *Attorney-General* v. *New Zealand Insurance Co., Ltd.*, [1937] N.Z.L.R. 33, *Morice* v. *Bishop of Durham*, (1805) 10 Ves. Jun. 522; 32 E.R. 947, *Yeap Cheah Neo* v. *Ong Cheng Neo*, (1875) L.R. 6 P.C. 381, *Fenton* v. *Nevin*, (1893) 31 L.R. Ir. 478, and *Re Carville, Shone* v. *Walthamstow Borough Council*, [1937] 4 All E.R. 464, explained). 2. That the power given was a general power of appointment. 3. That the trust was not invalid as a delegation of will-making power; since there was a general power of appointment given to the trustees to dispose in favour of any person, including the trustees as donees; and, for all practical purposes, the donees were in the position of beneficial owners of the property and could dispose of it freely or effectually as if it were their own. (*In re Hughes*: *Hughes* v. *Footner*, [1921] 2 Ch. 208, *In re Van Hagan*: *Sperling* v. *Rochfort*, (1880) 16 Ch.D. 18, *In re Combe*: *Combe* v. *Combe*, [1925] Ch. 210, *In re Park*: *Public Trustee* v. *Armstrong*, [1932] 1 Ch. 580, followed.) (*In re Harvey*: *Banister* v. *Thirtle*, [1950] 1 All E.R. 491; [1950] 1 T.L.R. 609, and *In re Gestetner Settlement*, [1953] Ch. 672; [1953] 1 All E.R. 1150, referred to.) *Quaere*, Whether the power could be validly operated by the survivor of the two donees. *In re McEwen* (*deceased*): *McEwen* v. *Day and Another*. (S.C. Wellington. January 17, 1955. Gresson, J.)

# INVALIDITY OF GENERAL ELECTION.

## Failure to Perform Statutory Duty.

By A. G. Davis.

My colleague, Dr. J. F. Northey, has dealt with many of the important aspects of the decision in *Simpson* v. *Attorney-General*, [1955] N.Z.L.R. 271, but a further consideration of the facts of the case and more particularly of the surrounding circumstances, leads one to the conclusion that, as the Queen of Sheba said, "the half was not told."

Briefly, the plaintiff's contention was that the General Election held in November, 1946, was void, and that, consequently, all legislation purported to have been enacted by the New Zealand Legislature in and after 1947 was invalid and of no effect. Whether that contention was correct or not was the very matter which the Court had to decide. But one of the members of the Court of Appeal which heard the case, McGregor, J., owed his appointment to legislation enacted in 1953 which was, therefore, included in that which the plaintiff alleged was invalid. By sitting to hear the appeal, therefore, McGregor, J., was assuming the validity of the legislation which authorized his appointment and consequently of his appointment and also assuming the validity of all post-1946 legislation. With respect, His Honour was begging the question.

Indeed, the members of the Court of Appeal were not unconscious of the situation. Stanton and Hutchison, JJ., at p. 277, said:

> . . . when the effect of the appellant's argument became clear, it seemed to the members of the Court, one of whom had been appointed under an amendment of the Judicature Act passed in 1953, and, all of whom were affected by the fact that the salaries of Judges had been increased during the period, that they were personally interested in the argument and might hold themselves disqualified from hearing it in the absence of consent by the appellant. This consent Mr. Simpson very readily gave.

But, it is submitted, while Mr. Simpson might have given his consent to properly-appointed Judges, who might have an interest in the decision, hearing the appeal, he could not, by giving that assent, elevate an improperly-appointed person to the status of a Judge of the Supreme Court and as such, a member of the Court of Appeal.

It is submitted, with respect, that in their brief consideration of the question whether one member of the Court was disqualified from sitting, Stanton and Hutchison, JJ., did not go far enough back in the statute-book. Before January 1, 1947, which, for the purposes of convenience, may be taken as the dividing line between valid and allegedly invalid legislation, the Supreme Court, by virtue of the Judicature Act, 1908, and the amendment of 1935, consisted of the Chief Justice and nine other Judges. It was only by virtue of s. 25 of the Statutes Amendment Act, 1948, that the creation of an additional puisne Judge was authorized. When Mr. Justice Hay was appointed to the Bench in January, 1949, there were in office nine puisne Judges. Therefore, if the plaintiff's contention was correct, Hay, J.,'s appointment was invalid. For a similar reason, the appointment of Turner, J., in June, 1953, which legislation passed in November purported to confirm, was invalid. But if Turner, J.,'s appointment was invalid, then McGregor, J.,'s appointment was valid, because in the meantime Northcroft, J., had died, and there were consequently in office only eight puisne Judges, the validity of whose appointment was beyond dispute.

In any event, whichever way the issue is approached, it is submitted that whether McGregor, J., was qualified to sit in the instant case was in doubt. It is further submitted, with some diffidence and with great respect, that no qualified Court of Appeal has determined the validity of the post-1946 legislation. There remains, therefore, the judgment of Sir Harold Barrowclough, C.J., who held that the plaintiff's action failed. But a constitutionalist, basing his argument on convention and not on strict law, could allege that even the appointment of the Chief Justice was invalid. In the appointment of a Chief Justice, the Governor-General must, by convention, be advised by the Ministers of the Crown. But if the plaintiff's contention was correct, when the Chief Justice was appointed in 1953, there were no Ministers of the Crown in existence in New Zealand. The Labour Ministers resigned in December, 1949, and were *de facto* replaced by the National Party Ministers. But, again by convention, Ministers must be members of the Legislature; and, as alleged by Mr. Simpson, there being no Legislature after 1946, there could be no Ministers. This argument, however, leads one into strange realms in which the present writer has no wish to wander. One conjures up a vision of hundreds of people who, imagining themselves to be validly divorced, have remarried and had issue. Are those issue legitimate? Are the criminals who have been sentenced to imprisonment by irregularly-appointed Judges, falsely imprisoned? It is not to be wondered at that the learned Chief Justice said (at p. 275) that to hold the post-1946 legislation to be invalid would work "serious general inconvenience."

With the other strictly legal issues involved, Dr. Northey has dealt adequately, but it might not be out of place to mention the following points:

1. If s. 101 of the Electoral Act, 1927, is, as the learned Chief Justice and the Court of Appeal decided, directory only and not mandatory, what sanction can be brought to bear to compel the issue of the Warrant within the prescribed seven days? No penalty is prescribed for the neglect of the duty imposed by s. 101. If a Warrant issued seventeen days beyond the period prescribed is valid, what is there to prevent the issue of a valid Warrant seventeen weeks or seventeen months after the dissolution or expiry of the previous Parliament? Could not a potential dictator govern by executive decree for a longer period than is envisaged in a democracy?

2. Is the main object of s. 101 of the Electoral Act, 1927, as the learned Chief Justice said (at p. 275) and as Stanton and Hutchison, JJ., (at p. 280) agreed, to sustain and not to destroy the House of Representatives? Is it not rather to ensure that no undue delay shall occur between the dissolution of one Parliament and the election of its successor?

It is of interest to note that in the English statute corresponding to the Electoral Act, 1927, viz., the Representation of the People Act, 1949, there is no provision similar to s. 101, the calling of a new Parliament in Britain being a prerogative act. There has been no need for such a statutory provision, as the Proclamation dissolving one Parliament announces that the Sovereign has given the order to issue out writs for calling a new Parliament: see *May's Parliamentary Practice*, 14th Ed., 25. If, as the Court of Appeal held, the prerogative power still exists in New Zealand, the length of time stipulated in s. 101 should be interpreted, it is submitted, as a provision inserted for the purpose of ensuring there is no delay in issuing the Warrant for electing a new Parliament and not as being one to ensure that there is a Parliament.

These questions, however, are difficult and involved ones, which, in view of the submission now to be made, it is not desired to discuss further. It is submitted with great respect that, inasmuch as there are doubts whether the Court of Appeal which heard Mr. Simpson's appeal was properly constituted, the appeal should be heard *de novo* before a Court of Appeal, the valid constitution of which is beyond doubt. Thus it would be certain not only "that justice was done, but was manifestly and undoubtedly seen to be done."

# CARRIERS: THE LAW OF COMMON CARRIAGE IN NEW ZEALAND.

By D. P. O'Connell, B.A., LL.M. (N.Z.), Ph.D. (Cantab.)

(*Concluded from p. 107.*)

Anachronism of Common Carriage.

"The extraordinary liability of the common carrier of goods", said Professor Beale fifty years ago, "is an anomaly in our law."[31] It is even more of an anomaly to-day. An attempt has been made in the previous issue of this *Journal* to demonstrate that this liability is an historical accident, and that it cannot be rationalized under the circumstances of modern society. All other insurers are entitled to charge rates that will compensate them for the extreme service they provide. This rate is determined upon the incidence of accident, and if the incidence increases, so must the rate.[32] The carrier, however, especially if a system of price control operates, cannot increase his charges commensurate with increasing risk. Nor is it desirable that he should, because the carrier who is protected by a premium loses any incentive to safeguard the goods he is carrying.

The anomalous character of the institution is all the more outstanding when the carrier in English law is compared with the carrier in Continental law.[33] Roman law treated carriers as any other bailees for reward. They were subject to a stringent duty not to lose or damage the goods, but this duty was by no means absolute. It could be ousted upon proof by the carrier that the goods had been lost from *casus fortuitus* or *damnum fatale* or *vis major*, which expressions connote considerably more than the "Act of God and King's Enemies" of English law. A *casus fortuitus* could be any unforeseen or unavoidable accident.[34] In the systems of law which derive from Roman law this is still the situation. In Italian law, theft of goods from a carrier does not render the carrier liable.[35] In the German Commercial Code,[36] a carrier is responsible for all damage arising from the loss of the goods unless he can prove that such damage resulted from (*a*) *vis major*, (*b*) condition of goods, (*c*) defects of packing. He is not liable for deterioration unless the nature and value of the goods has been declared.[37] The French Code[38] is similar, and the *Cour de Cassation* has held that the effect of a contract releasing a railway company from liability is only to reverse the burden of proof. The company has not in such case to prove, as it normally would, that loss was occasioned by *vis major* or inherent defects in the goods. In Scottish law, housebreaking and fire constitute *damnum fatale*[39]. Medieval law, as yet unaffected by Roman law, appears to have adopted a similar rule. In a case before the Court of the Hansa city of Frankfurt in 1401, a company of carriers which had lost goods pleaded that all care had been taken. It was held that the company was answerable unless the goods has been taken by violence.[40] Such a principle in English law would be much more satisfactory than that of absoulte liability. Let the burden of proof by all means rest on the carrier under the doctrine of *res ipsa loquitur*. In the case of ordinary bailment it is, for example, on the bailee to prove that theft of bailed goods did not occur through the bailee's neglect to take precautions. [41]

Attempts have been made to base the carrier's liability on the public service he provides in the trans-

[31] *Loc. cit.*, at p. 158.

[32] For a discussion of this aspect of the question see an editorial in 75 *Harvard Law Review*, 748.

[33] That the English law of carriage was influenced by Roman law was refuted by Cockburn, C.J., in a learned judgment in *Nugent* v. *Smith*, (1876) 1 C.P.D. 423, 428.

[34] Justinian, quoting the Praetorian edict, has led some writers to assume that the carrier in Roman law was in reality an insurer (See Stephen, "The Water Carrier and his Responsibility" in *12 Law Quarterly Review*, 118.): *Ait Praetor*: *Nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo*", (D. 4. 9. 1.) Ulpian, however, has explained the real meaning of this edict as merely laying the burden of proof of *vis major* on the carrier: "*Hoc edicto omni qui recepit tenetur, etiam si sine culpa ejus res perit vel damnum datum est, nisi si qiud damno fatali contingit. Inde Labeo scribit exceptionem ei dari. Idem erit dicendum si in stabulo aut in caupona vis major contingerit*". (Dig. 17.2.53. s. 3.).

[35] *Codice Civile*, art 1631.

[36] Arts. 395 and 607.

[37] Art. 395, 2; Art. 608.

[38] *Code Civil*: "*Ils sont responsables de la perte et des avaries des choses qui leur sont confiées a moins qu'ils ne prouvent qu'elles ont été perdues et avariees par cas fortuit ou force majeur*:" Art. 1754. See also Arts 1782-1786; *Code de Commerce* Art. 8. 98, 103.

[39] *Erskine's Institutes*, pp. 591, 592.

[40] Schuster, "Liability of Bailees according to German law," in *21 Law Quarterly Review*, 202.

[41] *Barton Ginger and Co. Ltd.* v. *Wellington Harbour Board* [1951] N.Z.L.R. 673, [1951] G.L.R. 367: See *Kahn-Freund*, *The Law of Carriage by Inland Transport*, (1949), 118.

portation of property.[42] Why then should other public utilities escape a corresponding liability? Why is the liability of a carrier different from that of an undertaking responsible for the distribution of water, gas, electricity and milk or for wharfage storage or accommodation of property? Why does a carrier cease to be absolutely liable the moment the goods are transferred from his truck into his warehouse? Considerations of this character prompted the passing of the Act of 1948. Like many variations of the common law, however, this piece of legislation merely tinkered without abolishing. The relevant provisions are as follows:

CARRIERS ACT, 1948.

4. (1) Subject to the provisions of this Act, every carrier between any places in New Zealand shall be liable for the loss of or any damage done to any goods in the receiving, carrying, forwarding, or delivery thereof, occasioned by the negligence of the carrier or any employee or agent of the carrier, notwithstanding any notice, condition, declaration, or contract given, made, or entered into by the carrier and purporting to exclude or limit in any way the liability of the carrier, in the same manner and to the same extent as if no such notice, condition, declaration, or contract had been given, made, or entered into.

(2) Subject to the provisions of section five of this Act, nothing in subsection one of this section shall be construed to prevent a carrier from making such special contracts or conditions with respect to the receiving, carrying, forwarding, and delivering of goods as are adjudged by the Court before which any question relating thereto is tried to be just and reasonable.

5. No special contract or condition made between a carrier and any other party with respect to the receiving, carrying, forwarding, or delivering within New Zealand of any goods shall be binding on or affect that party unless it is in writing signed by him or by the person delivering the goods for carriage.

6. (1) With respect to the receiving, carrying, forwarding, or delivering within New Zealand of any goods by any carrier the following provisions shall apply:—

(a) No person shall be entitled to recover for any loss of or damage to or in connection with any goods any greater amount than twenty pounds for any package or unit, thirty pounds for any horse, seventeen pounds ten shillings for any one head of cattle, five pounds for any pig, ten pounds for any dog, two pounds ten shillings for any one sheep, goat, or other quadruped not otherwise specified, and one pound for any bird, unless the person sending or delivering the goods to the carrier has given to the carrier a statement in writing declaring the nature and value of the goods, has obtained a receipt for the goods specifying the nature and value so declared, and has, if required by the carrier so to do, paid to the carrier by way of compensation for the increased risk and care thereby occasioned an amount, in addition to the ordinary rate of charge, not exceeding a reasonable percentage of the excess of the value so declared above the sum specified in this paragraph as applicable to the goods:

(b) Where the nature and value of any goods have been declared as aforesaid the liability of the carrier in respect of the loss of or damage done to the goods shall not exceed in amount the actual value of the goods or the value so declared, whichever is the lower, together with the amount of such additional charge as aforesaid:

(c) The proof of the actual value of the goods shall in all cases lie upon the person claiming compensation for the loss or damage.

LIMITATION OF LIABILITY.

Sections 4 and 5 are the same as s. 7 of the Railway and Canal Traffic Act, 1854, save for some refinements of language. It has already been pointed out that "this extraordinary section" as it has been described, has occasioned difficulty in interpretation. To it has been appended s. 6, which replaced the provisions relating to limitation of liability contained in s. 1 of the Act of 1830, and s. 20 of the Act of 1908. Its wording first appeared in the Statutes Amendment Act, 1944[43], s. 25 of which limited the liability of the Railway Department. That section has merely been reproduced in s. 6 of the Act of 1948, but has been made referable to all common carriers.

In enacting s. 6, the Legislature was making an attempt to oust the extreme liability of an insurer which previously attached to the institution of common carrier. This is evident from the terms of the proviso entitling the carrier to increase his charges proportionate to his risk, thereby putting him on the same basis as any commercial insurer.[44] The section, however, whether intended or not, goes further than to limit the liability of the carrier as an insurer. It also, it is believed, limits his liability for negligence. Such a construction upon the section would appear to be demanded by the words "subject to the provisions of this Act", which prefix the confirmation of the carrier's liability for negligence contained in s. 4. Even if s. 4 had not been made subject to the other provisions of the Act the effect of s. 6 would probably still be the same. The words limiting liability in s. 6 are substantially the same as those limiting liability in respect of certain fragile articles in s. 1 of the Act of 1830. Twelve years after the passing of this Act, the Court of Queen's Bench was called upon to determine the very question, whether s. 1 limited absolute liability only, or both absolute liability and liability for negligence. Denman, L.J., appears to have had no doubt about the matter:

> "The question for our decision" he said, "is whether, since the passing of the Act, a carrier is liable for the loss of goods, therein specified, by reason of gross negligence . . . In deciding upon this statute, we must, of course, be regulated by its language, and the state of the law at the time of its passing is material only so far as it enables us to discover the mischief for which it was intended to apply a remedy . . . By the first section the exemption of the carrier from liability is absolute and complete, unless the preliminary thereby made indispensible is complied with by the owner of the goods."[45]

*Drinkrow* v. *Hammond* confirms this conclusion in respect of s. 6 of the 1948 Act. The result of that section is therefore reasonably clear. A carrier is liable for loss of or damage to any "package or unit", only to the amount of £20, and in respect of animals the other sums mentioned, whether or not such loss or damage is occasioned by accident or the gross negligence of the carrier. Liability of the carrier may be increased, however, if the consignor informs the carrier in writing

[42] "*The Public Utility Concept in American Law*," (Robinson) in the *44 Harvard Law Review*, 277 *et seq.* It was stated in one American case that "the transportation of property is obviously of public concern and its regulation is an accepted governmental power:" *German Alliance Ins. Co.* v. *Lewis*, (1914) 233 U.S. 389 at p. 406.

[43] No. 25.

[44] In the debate on the Bill the Honourable Member for Hawkes Bay, who signified the Opposition's support, said "There was . . . very great dissatisfaction arising from the fact that the limits of compensation where there had been negligence on the part of the common carrier, or his servants, were such as to mean that only a small portion of damage might be recovered . . . This Bill increases the liability very substantially, and it may very well be that this will result in some increase in the cost of sending goods or carrying passengers, but even if that is so, it is only carrying into effect the general principle of insurance which spreads the loss in cases of this kind over all the parties getting the service, instead of perhaps, causing ruination to one particular unfortunate:" *284 Parliamentary Debates* (1948), 4163.

[45] *Hinton* v. *Dibbin*, (1842) 2 Q.B. 646; 114 E.R. 253: see also *Great Western Railway Co.* v. *Rimell*, (1856) 18 C.B. 575; 139 E.R. 1495.

of both the character and the value of the goods, and receives a receipt specifying both their character and value. It might be argued that the section is perfectly reasonable in view of the possibility of contracting for increased risk. Such an argument fails to take account of our present system of transportation. What householder gives a written declaration of the nature and value of his furniture to the carrier who is to remove it ? The man who buys a grand piano at an auction and arranges for delivery by carrier to his home would probably never reflect upon the necessity of entering up particulars of the nature and value of the piano. But should the carrier negligently permit the piano to fall off his truck his liability is limited to £20, despite the fact that the " nature " of the object carried, and its approximate value are patently evident to him. To take a more extreme example, every owner of a motor-car crossing Auckland harbour on a vehicular ferry is required to make a declaration of nature and value to the company and obtain a receipt before the company can be liable to an amount above £20. If the ferry is sunk through the negligent navigation of its master it will in no way avail the motorist to protest that the " nature " of the object carried and its value can be ascertained.

The piano-owner or the motorist might, in the suggested cases, argue that a furniture remover and a ferry company are not common carriers. As was pointed out earlier, however, so long as the traditional test is applied in our Courts, a furniture remover and a ferry company must be held to be common carriers.

The injured party might also argue that the section was intended to limit the liability of the common carrier to small articles wrapped up in parcel form, the value of which is not immediately apparent. Unfortunately he will derive small comfort from reflecting upon the sweet reasonableness of the Legislature's intentions. As the section reads it catches everything, it is believed, from china dolls in cartons to pre-fabricated houses. The 1830 Act took care to restrict its operation to " parcels containing articles of great value in a small compass." It employed the words " article or articles or property of certain kinds, contained in any package." The 1948 Act substitutes for these words the following :—"No person shall be entitled to recover for any loss of or damage to or in connection with any *goods* any greater amount than twenty pounds for any *package or unit*." " Goods " is defined in the interpretation section as " chattels of any description." The words " package or unit " are much more ambiguous, and should not have been introduced into the section without very careful consideration. They were taken ultimately from the Hague Rules on carriage by sea,[46] in which context their application is different from the effect they have in the Carriers Act, 1948.

The word " unit " could scarcely be construed as *ejusdem generis* with " package "[47]. Nor is the term " package " limited to something wrapped in brown paper. It was held, for example, in *Whaite* v. *Lancashire and Yorkshire Railway Co.*[48] that a railway truck containing a picture valued at more than £10 was a " package " within the meaning of the Carriers Act of 1830. Until *Drinkrow* v. *Hammond* there had been no judicial interpretation of the word " unit " but some observations of Goddard, J., (as he then was) in *Studebaker Distributors, Ltd.* v. *Charlton Steam Shipping Co., Ltd.*[49] were relevant to this question. The case concerned the interpretation of the word " package " in a contract subject to the Harter Act. The learned Judge himself felt incapable of holding that " a motor-car, put on a ship without a box, crate, or any form of covering, is a package." He suggested, however, that if the words " package or unit " had been used the situation might have been different, and implied that the word " unit " would cover any individual piece of cargo. If a motor-car is a " unit," it is difficult to see where the interpretation stops; and in *Drinkrow* v. *Hammond* it has been held that a bulldozer is a " unit."

The net result of the section is, therefore, to limit the carrier's liability for negligence, and possibly even fraud on the part of his servants,[50] to £20 irrespective of the character of the goods carried, and regardless of whether this character is patently obvious. If the legislature intended this consequence the reasonableness of it is not immediately apparent. If it did not intend it one can only conclude that the Act is another example of ill-considered draftsmanship. It is, of course, not permitted to counsel to investigate the purposes of legislation by resort to *travaux preparatoires*. In the interests of jurisprudence and legal criticism, however, it is appropriate to make reference to the debates on the bill. At no stage of the passage of the bill did any one of the honourable members make refreence to the fact that s. 6 extended to the carriage of tractors worth £6,000, of hydro-electric turbines, and even of jet aircraft.[51] It is doubtful if the Legislature adverted to the probablity of the consignor of such goods declaring their nature and value in writing and receiving a receipt for same. The discussion on the bill was principally directed to the position of the Railway Department and the limitations upon its liability. The Railway Department has the machinery for making declarations of nature and value, and giving receipts, whereas the furniture remover and haulage contractor normally have not.

Even if this probability was envisaged, the reasonableness of insisting that the consignor of a bulldozer shall state in writing that he is consigning " one bulldozer " may well be doubted. The " nature " and approximate value of the " unit " carried would be

[46] For the Hague Rules, see *42 Law Quarterly Review*, 30 *et seq.*

[47] See *Magnhild* v. *McIntyre*, [1920] 3 K.B. 321, 325.

[48] (1874) L.R. 9 Exch. 67.

[49] [1937] 4 All E.R. 304, 308.

[50] Although it has been held that the Act of 1830 did not extend to misfeasance or conversion: *Morritt* v. *North Eastern Railway Co.*, (1876) 1 Q.B.D. 302; *Millen* v. *Brasch*, (1882) 10 Q.B.D. 142. But see *Drinkrow* v. *Hammond*.

[51] The Attorney-General, in introducting the Bill said, " Opportunity is taken to deal with . . . the carriage of goods. This is largely covered in existing law, and the change made here is not very extensive. It is convenient, however, to have the law relating to carriers in the one place, and that is one of the reasons that the matter is dealt with. I do not mean that there is no change in the law; there is. Honourable members will see that there is a scale affecting the liability of carriers. A common carrier here may make restrictive conditions, but he may not restrict his liability in a manner inconsistent with the clauses of the Bill. That being so, it is only fair that there should be some protection for the common carrier, and clause 6 sets out that protection . . . Honourable members will reckon that this is a reasonable limit for the losses which may be anticipated in respect of parcels and animals of the description there set out . . . I think that the scheme under that clause will commend itself to honourable members, and that they will consider that the figures there given have a reasonable relationship to the value of ordinary animals of the description they have in the clause ". *loc cit.*

should the carrier be virtually exempted from liability obvious to the carrier or his servants. Why then for gross negligence because the consignor failed, through ignorance of the law or mere neglect, to fill up forms? Why should the carrier for reward now have much less liability than a gratuitous bailee?[52] Why should his liability be different from that of the warehouseman? Why should the carrier's liability still be that of an insurer when he is carrying a sack of potatoes worth £1, and be limited to one-fiftieth of value when he is carrying a grand piano? Instead of abolishing the carrier's liability as an insurer, the Legislature has merely nibbled this liability away, and the consequence is one which can scarcely be contemplated with satisfaction.

### Special Contract.

Sections 4 and 5 must be read together, as they were originally in the Act of 1854. The general effect of their enactment may be summarized in the words of Jervis, C.J., in *London and North Western Railway Co.* v. *Dunham*:[53]

> A general notice is void; but the company may make special contracts with their customers, provided they are just and reasonable and signed.

Difficult questions of interpretation arise, however, which may be solved by reference to cases on the 1830 and 1854 Acts.

The first question is this: If a carrier enters into a special contract, is his character of common carrier extinguished? This question arose first in *Smith* v. *London and North Western Railway Co.*,[54] where Roche, J., seems to have taken the view that a special contract in some respects inconsistent with a common carrier's liability is enough to negative that liability altogether. In *Crouch* v. *London and North Western Railway Co.*,[55] however, Maule, J., indicated that a contract merely varying in some respects the carrier's liability did not, in his opinion, affect the rest of the carrier's liability. The issue was aired at length in *Baxendale* v. *Great Eastern Railway Co.*,[56] in which a carrier of pictures, who had limited liability by a bill of lading, sought further protection from the Act of 1830 which limited liability for pictures to £10. The plaintiff replied that, by virtue of the special contract, the defendant had ceased to be a common carrier, and could not, therefore, invoke the Act. It was held that the question whether or not a special contract destroys the basis of common carriage is one of fact to be determined from the terms of the contract. This decision was approved by Scrutton, L.J., in *Great Northern Railway Co.* v. *L.E.P. Transport and Depository Ltd.*[57] in 1922, where he said that "*prima facie* he remains a common carrier, except in that respect in which he has varied his liability by special contract."

The question then arises, what is the effect of a bill of affreightment which negatives liability completely? There is nothing in the Act which suggests that an exclusion of insurer's liability shall be subject to judicial review, and the conclusion must, therefore, be that a consignor has an action only if there has been negligence on the part of the carrier, and only if the Court is of opinion that the exclusion is not "just and reasonable." The burden of proving that the contract is just and reasonable rests on the carrier.[58] It has been held that "a special contract altogether exempting a carrier from liability is just and reasonable where the carrier offers a *bona fide* option to have the goods carried at a reasonable rate with liability on the company as a common carrier."[59] On the other hand, it has also been held that a contract purporting to exempt the carrier from responsibility for negligence without any qualification is "*prima facie* unjust and unreasonable, and it is insufficient to show that it has been acquiesced in by the owner."[60]

Should the liability undertaken by the carrier in the special contract be greater than that prescribed in s. 6: which is to prevail, the contract or the section? This question arose in *Baxendale's* case,[61] already considered, when the defendant claimed to be able to rely on the limitation of liability to £10 in respect of pictures under the terms of the Act of 1830, irrespective of the terms of a bill of lading to which it was a party. It was held that the contract was to prevail.

Any special contract must be in writing, signed by the consignor. It has been held, however, that all the terms of such a contract need not be reduced to writing.[62] The practical effect of s. 5 is to render a condition excluding liability on the back of a ticket ineffective unless signed by the owner of the luggage. Such a condition offering a passenger the alternative of having twenty cubic feet of luggage carried free of charge at owner's risk, has been held to be a special contract and was required to be signed.[63] If the terms of the contract are such as to destroy the basis of common carriage altogether, the contract is not a "special contract" within the meaning of s. 5, and therefore does not require to be signed.[64]

### Conclusion.

It is now possible to assess the position of a common carrier of goods in New Zealand, in terms of the following formula:

A common carrier is anyone who holds himself out to carry for all and sundry without qualification (and, it is suggested, if his operation has the characteristics of "regularity") all or specific classes of goods.[65] He exercises a public office and therefore cannot refuse to carry the class of goods he holds himself out to carry,

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[52] See Paton, *op. cit.*, ph. 3.

[53] (1856) 18 C.B. 826; 139 E.R. 1596. This interpretation was followed in *Peek* v. *North Staffordshire Railway Co.*, (1863) 10 H.L. Cas. 473; 11 E.R. 1109.

[54] (1918)88 L.J. (K.B.) 742.

[55] (1854) 14 C.B. 255; 139 E.R. 105.

[56] (1869) L.R. 4 Q.B. 244.

[57] [1922] 2 K.B. 742, 766.

[58] *Marsden* v. *The Westport Coal Co.* (1909) 29 N.Z.L.R. 787, 792; 12 G.L.R. 337, 339.

[59] *ibid.*

[60] *Staples* v. *Joseph*, (1887) 6 N.Z.L.R. 236.

[61] (1869) L.R. 4 Q.B. 244: "The special contract of s. 6 [of the Act of 1830] is inconsistent with the exemption claimed by carriers under the first section. Any contract which would render carriers liable for the loss of goods beyond £10 is a special contract which is not affected by the Act."

[62] *Marsden* v. *Westport Coal Co.*, (1909) 29 N.Z.L.R. 787, 12 G.L.R. 337.

[63] *Union Steam Ship Co., Ltd.* v. *Morton*, (1890) 8 N.Z.L.R. 747.

[64] *Wilson* v. *New Zealand Express Co. Ltd.*, [1923] N.Z.L.R. 201, 204; 1923 G.L.R. 214, 215; *Great Northern Railway Co.* v. *L.E.P. Transport and Depository Co. Ltd.*, [1922] 2 K.B. 742; *McManus* v. *Lancashire and Yorkshire Railway Co.*, (1859) 4 H. & N. 327; 157 E.R. 865; *Scaife* v. *Farrant* (1875) L.R. 10 Exch. 358; *Sutton* v. *Ciceri*, (1890) 15 App. Cas. 144; *Price and Co.* v. *Union Lighterage Co.* [1904] 1 K.B. 412.

[65] *Clarke* v. *West Ham Corporation* [1909] 2 K.B. 858, 877, 881; *Readhead* v. *Midland Railway Co.* (1869) L.R. 4 Q.B. 379, 382.

unless he had no space available in his transport.[66] He is subject to an action for damages if he does refuse.[67] He is an insurer of all chattels up to the value of £20, and of certain animals to specified sums, and is also liable for negligence up to these figures. He may exclude or limit his liability as an insurer, but he cannot exclude or limit his liability for negligence save by special contract reduced to writing and signed by the consignor.[68] Such a contract is subject to judicial review and is only binding if approved by the Court as being "just and reasonable". The carrier may contract to be liable for more than £20 in respect of chattels but only by a declaration of nature and value given to him by the consignor and a receipt on his part delivered to the consignor specifying such nature and value. He is entitled to demand an express declaration from the consignor of the contents of any parcel, but refusal to declare the contents does not justify the carrier in refusing to carry them.[69]

This complicated situation in which the carrier finds himself is very difficult to rationalize in terms of the common-law system of liability. The ordinary insurer incurs liability under contract; the negligent carrier incurs liability in tort; under what branch of the law does the common carrier incur liability as an insurer? Keener has suggested that such liability is essentially quasi-contractual,[70] but it can only be so because it is not referable either to contract or tort. It is not truly quasi-contractual since there is neither equitable obligation of a restitutionary character, nor an implied undertaking. It is a liability imposed *ab exteriore* by the common law, and it can only be described as an anachronism. In attempting to restrict this extraordinary liability, the Legislature has, it is believed, committed a greater injustice than it set out to relieve, and it is hoped that some effort will be made to limit the wide operation of s. 6, which is already proving an embarrassment to insurance companies, and will certainly prove a greater embarrassment in the future.

[66] *Johnson* v. *Midland Railway Co.* (1849) L.R. 4 Exch. 367; 154 E.R. 1254; citing *Lane* v. *Cotton* (1701) 12 Mod. 472; 90 E.R. 880, per Holt, C.J. *Clarke* v. *West Ham Corporation* [1909] 2 K.B. 858.

[67] *Crouch* v. *London and North Western Railway Co.*, (1854) 14 C.B. 255; 139 E.R. 105; At common law, the carrier could be indicted for refusing to carry (*Belfast Rope Works Ltd.* v. *Bushell*, [1918] 1 K.B. 210 at p. 212). This is probably obsolete in England (see *Kahn-Freund, op cit.*, p. 117) and certainly in New Zealand: Crimes Act, 1908, s. 5.

[68] In America, the carrier may contract out of absolute liability (*Southern Railway Co.* v. *Tollerson*, 135 Ga. 74) but not out of a duty to use due care (*Railroad Co.* v. *Lockwood*, (1873) 17 Wall. 357).

[69] *Boys* v. *Pink*, (1838) 8 Car. & P. 361; 193 E.R. 531; *Baxendale* v. *Hart*, (1852) 6 Exch. 769; 155 E.R. 755; *Rosenthal* v. *London County Council* [1924] W.N. 165; *Crouch* v. *London and North Western Railway Co.*, (1854) 14 C.B. 255; 139 E.R. 105.

[70] *Quasi-Contract*, p. 18.

# THE McNAGHTEN RULES.

## A Plea for Their Revision.

By W. J. Hall, M.A., LL.B.

In the year 1843 a man shot and killed Daniel McNaghten, secretary to Sir Robert Peel, against whom he fostered delusions of persecution. The jury found the accused "Not guilty" and, as a result, the House of Lords submitted certain questions to the Judges who answered as follows:

(1) Every man is presumed to be sane until the contrary is proved to the satisfaction of a jury.

(2) To establish a defence of insanity it must be clearly shown that, at the time of committing the act, the accused did not know what he was doing, or (if he knew this) did not know the difference between right and wrong.

It is on the basis of the McNaghten Rules that Judges have directed juries since 1843.

Psychiatrists have always been dissatisfied with the Rules which they maintain are unscientific, are built upon a misapprehension as to the true nature of mental disease, and to-day are hopelessly out of date.

In 1843 psychology hardly existed; psycho-analysis was not born; and psychiatry was in a crude state. Since that date these sciences have made a development that is little short of amazing, and have revealed a great deal that was previously unsuspected in the undercurrents that condition human behaviour.

Let us take the exact wording of the Rules. In order to establish a defence on the grounds of insanity it must be clearly proved that:

> at the time of the committing of the act the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

In the first place, we note that it is defect of *reason* that is stressed. In the days when the Rules were propounded the mind was arbitrarily divided into faculties of reason, feeling, etc. Nowadays such a division is as dead as the dodo. To-day it is recognised that it is the emotional driving forces that are all-important in the study of behaviour. The law tends to see in delusion the main, indeed, the only manifestation of insanity, and, in general, to take the attitude that, if the reasoning processes are in function, then insanity as a basis for excuse cannot exist. This is quite contrary to modern psychiatry which has ascertained that a considerable amount of mental abnormality and insanity is due to emotional upsets. Nowadays, any attempt to divide reason from the other faculties of mind is out-of-date. The mind must be considered as a whole, for all its various functions are integrated. However partial a mental abnormality may seem, nevertheless all the rest of the mind will, to some extent, be affected.

The Rules then, although they touch the matter of insanity at two points, make no attempt to define it. As the late Lord Hewat, Lord Chief Justice of England, stated:

> The law does not purport or presume to define insanity: that is a medical question. What the law considers is the

conditions which have to be satisfied in order that a person may be excused from criminal responsibility: that is a legal question.

The matter of the "uncontrollable impulse" has no mention in the Rules, although some profound lawyers and most psychiatrists have maintained that this is a factor that must be given due weight. They hold that a man may well know the nature and quality of his act, may know also that it is wrong and punishable by law, but may still, by reason of mental disease, be incapable of resisting the impulse to do the act.

The law is conservative and rightly so, and one appreciates at once the factors that have operated to keep the element of "uncontrollable impulse" out of the law. Is not every stupid action done then in the heat of temper excusable then on the grounds of uncontrollable impulse, and how is it possible to examine and ascertain the element of uncontrollability with any degree of certainty? Is it not better to make a blanket exclusion under this heading? Might not the opening of the door at all admit the thin end of the wedge which would eventually destroy an important safeguard in our criminal law? I think not. A few lawyers might agree with me: most psychiatrists certainly would do so. They are of the opinion that in certain well-defined and identifiable cases, cases of schizophrenia (split mind), epilepsy, kleptomania and pyromania (impulse to set fire to property), a man may well know the nature of his act and that it is wrong; but still be unable to resist.

As long ago as 1877, Sir James Stephen, the learned author of the *History of Criminal Law*, argued that the iron-clad Rules should be relaxed if the defence could prove an irresistible and uncontrollable impulse.

After the reprieve of Ronald True, in whose trial this matter was raised, the Lord Chancellor set up a committee under the chairmanship of Lord Atkin to report on insanity and crime. The committee recommended legislation to make "irresistible impulse" a defence in law. Later, ten out of twelve Judges consulted on the question advised against accepting this as a defence.

In 1950, before the Royal Commission on capital punishment, the British Medical Association advocated that an additional ground for a defence of insanity should be accepted if it could be proved that the accused was suffering from a "disorder of emotion such that, while appreciating the nature and quality of the act, and that it was wrong, he did not possess sufficient power to prevent himself from committing it." That defence is still not accepted in English law, although several of the American state courts admit this plea, and in Scotland juries are ready to bring a verdict of "capable homicide with diminished liability."

The McNaghten Rules have been discussed, and at times were under heavy fire, during the English trials of Ronald True, Heath, Haigh, Peter Griffiths and Straffen, and the New Zealand trial of Parker and Hulme, and it seems beyond doubt to anyone who reads the full accounts of these trials that, although all were convicted of murder, and several were hanged, some, at least, were suffering from advanced insanity, although in law it was not pleadable and did not save them from the gallows. Put bluntly, insanity is still no safeguard against hanging. That a man may be quite insane, but still condemned and hanged for his actions, is a state of affairs that should not be a matter for satisfaction in a civilized community.

Most doctors were agreed that Straffen's mental age was about nine and, at the trial, Mr. Justice Oliver said, "You might as well try a babe in arms."

Griffiths' mental age was probably also that of a child. His father had been confined in hospital with paranoid schizophrenia and Griffiths almost certainly suffered from the same disease. He had suffered a head injury as a child which kept him in hospital for two years. He had a long history of juvenile delinquency and a bad army record with two convictions for desertion in the field. He was unable to persevere with any one job and left often after the first day; and just before he committed the crime for which he was hanged he had suffered an erotic upset.

If a child, by reason of his immaturity, is regarded in law as incapable of forming the guilty intent which is an essential element in any crime, is it reasonable that an adult whose mental age is that of a child should be punished as if he were a responsible person? Yet the law takes notice only of chronological, and not of mental, age.

It is on record that one who attended the Straffen trial heard the sentence of death pronounced on the poor, half-witted prisoner with the discomfort he would have felt had a shrinking, bewildered infant been sent off to the condemned cell. Yet, under the McNaghten Rules, there could be no alternative.

"The Straffen case," declared a leading article in *The Times*, "has brought out sufficient evidence to satisfy the public that action is required. There should be a drastic overhaul of the criminal laws of insanity."

And if it should be argued that a murderer, even if insane, is better destroyed, both for his own sake and for that of society, I would point out that many remarkable cures are being effected of mental diseases of all sorts. In Broadmoor, for example, to which many criminals of unsound mind are sent in England, a team of expert psychiatrists is successful in making many complete cures.

No less an authority than Sir W. Russell Brain, former President of the Royal College of Physicians, expressed his grave doubts about the present position. In one brief sentence he has summarized the dangers of a too-rigid adherence to the century-old formula. "What of those who know what they are doing, and that it is wrong, but through mental disease fail to control their actions?" he asks. "The time has surely come to determine afresh in what circumstances mental illness should mitigate criminal responsibility. This is a question, not for lawyers or doctors, but for society, to decide. It should then be possible for experts to devise tests which are not only consonant with justice, but sufficiently clear and simple for use in its daily administration."

# ACCESS WAYS AND SERVICE LANES.

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

An access way may be described as a public easement for the purpose of providing more direct access for *pedestrians* from any road or street or reserve to any other road or street or reserve.

A service lane may be described as a public easement for the purpose of providing the public with side or rear access for *vehicular* traffic to any land; in other words, a public lane.

Although both access ways and service lanes have certain attributes of a public highway, they are not public roads or public streets. For example, they do not constitute road frontage for the purposes of s. 125 or s. 128 of the Public Works Act, 1928.

The *general* statute law, as to access ways and service lanes, will now be found in Part I of the Public Works Amendment Act, 1948, and its amendments. There are, however, provisions in other statutes dealing with access ways and service lanes, which the conveyancer will occasionally encounter in practice.

A precedent for the creation of an access way in a borough, under the Public Works Amendment Act, 1948, will be found in (1952) 13 NEW ZEALAND LAW JOURNAL, 205, and in *Supplement No. 2* to the *New Zealand Supplement to the Encyclopaedia of Forms and Precedents*, 217-219.

Section 6 of the Housing Amendment Act, 1940, authorizes the Minister of Works from time to time to lay out and construct on land, subject to the Housing Act, 1919, *access ways*; if situated in a borough such access ways may be vested by Order-in-Council in the Borough Corporation. Section 2 (3) of the Public Works Amendment Act, 1948, provides that Part I of that Act does not apply to any access way created under the Housing Amendment Act, 1940, unless it is declared an access way under s. 3 of the Public Works Amendment Act, 1948.

Special provisions as to access ways and service lanes under the Land Subdivision in Counties Act, 1946, are contained in s. 10 of that Act, (as enacted by s. 11 (1) of the Land Subdivision in Counties Amendment Act, 1953). It is provided in subs. 2 thereof that notwithstanding anything in s. 3 of the Public Works Amendment Act, 1948, an Order-in-Council shall not be necessary for the constitution of an access way or service lane under the provisions of the Land Subdivision in Counties Act. It is principally in this respect that the precedent hereunder printed differs from that hereinbefore referred to. No Order-in-Council is necessary for the constitution of the access way, which forms an integral portion of a scheme plan of subdivision duly approved by the Minister of Lands. Section 10 (5) provides that every proposed access way or service lane and every piece of land shown on the scheme plan as access way or service lane, which is not vested in the Crown as access way or service lane, shall be transferred to the Crown by instrument in writing, which shall be registered by the owner in the office of the District Land Registrar; and the Registrar shall refuse to register any such instrument unless he is satisfied that the requirements of the section have been complied with. The control and management of access ways and service lanes created under the section vest in the local authority, which shall have power to maintain and repair any such access way or service lane.

As there is a grantee—Her Majesty the Queen—it would appear that the instrument of dedication should be certified as correct, the principle of *Ex parte Wilson*, (1901) 21 N.Z.L.R. 53; 4 G.L.R. 170, apparnetly not applying. It is, however, unlikely that a District Land Registrar would insist on certification by a Crown Solicitor: it would appear reasonable in the circumstances to accept a certificate as to correctness by the solicitor to the local authority in whom the control and management of the access way or service lane is vested.

PRECEDENT.

TRANSFER OF LAND TO CONSTITUTE AN ACCESS WAY WHEN LAND IS OUTSIDE THE BOROUGH, UNDER THE LAND SUBDIVISION IN COUNTIES ACT, 1946.

MEMORANDUM OF TRANSFER.

WHEREAS A. B. of Masterton, Company Manager, being registered as proprietor of an estate in fee simple etc. [*description of land*] (*area*) more or less being the piece of land marked "access way" on the plan lodged for deposit in the Land Registry Office at Wellington under Number and situate in Block of the Survey District being part of Section of the Block and being also Lot on the aforesaid plan and being part of the land comprised and described in Certificate of Title Volume Folio Wellington Registry SUBJECT TO ETC. AND WHEREAS it is desired to vest the said access way in Her Majesty the Queen NOW THEREFORE in consideration of the premises the said A. B. DOTH HEREBY TRANSFER AND DEDICATE as and for an access way to Her Majesty the Queen for ever all his estate and interest in the said piece of land

IN WITNESS WHEREOF, etc.

THE COUNTY COUNCIL being the controlling Authority within whose jurisdiction the above described land is situated doth hereby approve and accepts the foregoing transfer and dedication as and for an access way and doth hereby certify that all the requirements of the Land Subdivision in Counties Act 1946 and the Public Works Amendment Act 1948 have been complied with and satisfied in respect of such Transfer and dedication.

L. S.

[*Seal to be affixed pursuant to a resolution of the Council.*]

# LEGAL LITERATURE.

**Bingham's Motor Claims Cases,** Third Edition. By LEONARD BINGHAM. Pp. xliv + 660. London: Butterworth and Co. (Publishers), Ltd. Price 71s. 6d. (post free).

Over a hundred cases have been added to this well-known work by means of the new edition. There has been a new arrangement of Chapters, thus leading to easier reference to the many topics which are dealt with. This is an improvement in the method of presentation of the relevant case-law, which has been brought down to August of last year. The new edition should receive a warm welcome from practitioners, who have become accustomed to the use of this useful compendium of case-law on the subject-matter with which it deals.

The work is one which all practitioners dealing with running-down cases should have beside them, and the fact that provision is made for a Supplement should make its acquisition all the more desirable.

# IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"**An Echo of Horry.**"—Scriblex (*ante*, p. 47) drew attention to the fact that the decision in *R.* v. *Horry*, [1952] N.Z.L.R. 111, was approved by the English Court of Criminal Appeal in the *Onufrejczyk* case. Mr. J. G. Stanier has written to the *Law Times* (London) to point out that, in discussions of the latter case, *R.* v. *Perry*, (1660) 14 St. Tr. 1312, seems to have been ignored; nor does reference appear to have been made to it in the New Zealand one. The facts were that, in 1660, one John Perry, of Chipping Campden, confessed that he, with his mother, Joan Perry, and his elder brother Richard Perry, had murdered William Harrison and hidden or destroyed the body. The confession was accepted and all three were hanged. Harrison returned to Chipping Campden two years later with an explanation, never substantiated, that he had been kidnapped and sold as a slave to Turkish pirates from whom he had ultimately escaped. The playwright John Masefield used the story as the subject of a little play, in three scenes, published in 1907, in which it was the drunken and jealous elder son who, to be avenged on his prosperous and industrious younger brother, bribed Harrison to keep out of the way for a few months so that nothing would interfere with the consequences of his false confession.

**What Paper D'Ya Read?**

"Mr. Goosman has a moral victory in his favour."
—*Dominion* editorial. (12/5/55).

"Leading articles which have appeared point out that the case proves that newspapers should not use intemperate language. With this we heartily agree."
—*Standard* editorial (18/5/55).

"In the final analysis, the general result should be salutary. Political comment may be purged in future of some of its more extreme and offensive features."
—*Freedom* editorial. (18/5/55).

"The Minister of Works, Mr. Goosman, has just lost a criminal libel case against the Labour Party weekly newspaper, the "Standard" . . . ."
*New Zealand Truth* editorial (18/5/55)

**Criminal Libel.**—An interesting example of the use of criminal libel proceedings in appropriate circumstances was the prosecution in 1911 of Edward Frederick Mylius, a young man of Republican sympathies, for publishing in a journal called *The Liberator* a libel on King George V. The libel charged the King with having committed bigamy, with the aid and complicity of the prelates of the Anglican Church, his wife being alleged by the publisher of the libel to be the daughter of a British Admiral, Sir Michael Culme-Seymour, and the marriage said to have been contracted in Malta. The trial took place before the Lord Chief Justice, Lord Alverstone, and a jury. A request by the accused that the King be called as a witness was refused, whereupon he declined to cross-examine any of the Crown witnesses or to attempt to substantiate the truth of the libel. He was convicted and sentenced to twelve months' imprisonment. It must be conceded, however, that his opposition was rather strong for one who appeared as his own counsel. For the prosecution there appeared the Attorney-General, Sir Rufus Isaacs, the Solicitor-General, Sir John Simon, and Mr. Sidney Rowlatt (later Mr. Justice Rowlatt). In front of Crown counsel, and at the solicitors' table, sat the Liberal Home Secretary, Mr. Winston Churchill, who had an official interest in the trial.

**The Wandering Child.**—Where a child just under four and at a nursery school opened the school gates and slipped through a lane into a busy street, with the result that the driver of a lorry was killed in an endeavour to avoid running him down, it was held by the House of Lords that the presence of the child wandering alone in the street indicated a lack of reasonable precaution on the part of the school authorities who had given no reasonable explanation of the presence of the child there; and, since it was foreseeable that such an accident as happened might result from the child being alone in the street, the appellants were guilty of negligence towards the deceased and liable to his widow in damages: *Carmarthenshire County Council* v. *Lewis*, [1955] 1 All E.R. 565. Observed Lord Goddard: "If, then, an occupier is not liable for the escape of an animal is he to be held liable for that of an infant who from the standpoint of reasoning powers is much the same as a sheep or any other domestic animal?" "My Lords," said Lord Keith of Avonholm, "if I find two toddlers, not quite four years of age, unaccompanied in a busy street, exposed to all the perils of a traffic accident, my natural reaction is to think that someone has been thoughtless, or careless or negligent of their safety. This is not necessarily so, for, with that unpredictability which is characteristic of the very small, they may have eluded all reasonable vigilance of their guardians."

"**Cautioners.**"—A form of surety known to early Calvinist Scotland was that of "cautioner." Couples intending to marry were required to produce a "cautioner" as surety that they would not live together during the obligatory forty days of waiting after the calling of the banns. According to E. S. Turner, in *A History of Courting* (Michael Joseph, 1954) volunteers for this difficult task were not easily found since the Kirk elders had their own grapevine system of ascertaining all unlawful pregnancies. It seems that, by 1576, the Kirk Session of St. Andrews was prescribing imprisonment in the church steeple as a punishment for fornicators, and, thirty years later, Glasgow, for the same offence, was fining miscreants heavily, clapping them in irons, and branding a description of their crime upon their foreheads. Perth kept on its payroll a man whose duty it was "to shave the heads of fornicators and fornicatrixes," while other Scots towns "shaved, ducked, pilloried, or expelled incautious citizens according to taste." In England, when the Parliament of Praise-God Barebones took office in 1650, the penalty for fornication was imprisonment for three months: for adultery, it was death; and, as happens when laws are repugnant to the masses, juries, save in rare instances, refused to convict adulterers.

**No. 352087.**—T. E. Lawrence's *The Mint*, published originally at a cost prohibitive to the ordinary purchaser, is now available in a cheap and attractive edition. A reviewer in *Punch* says that Lawrence, who had enlisted in the Royal Air Force in 1922, under an assumed name, sent a copy of the first edition to Noel Coward. He sent a note of thanks beginning "Dear 352087 (may I call you 352?)."

# UNIMPROVED VALUES.

ADVOCATUS RURALIS.

After the 1914-18 war, a farmer living on the Coast, decided to cut his farm into four parts. To do this a considerable sum of money was expended and the valuers of that date decided to raise the unimproved value of the land because it was now served by a road. The farmer did not mind this method in so far as it affected sections 2, 3, and 4, but the furthest, section 1, was retained by the farmer, and as there was a question of land tax and rating on the unimproved value a much younger Advocatus took the matter up with the Valuation Department and, so far as section 1 was concerned, the Department decided the road was a capital improvement, having been made by the owner at his own expense, and the unimproved value was reduced accordingly. Might we interpose and explain that this was in that nostalgic period in a farmer's life when the farmer paid no income-tax.

Time marched on, and some twenty years later Advocatus found himself a member of a land-owning charitable Trust which Trust at that time could not get rid of its land except by act of Parliament. The Trustees did, in fact, subdivide their land—making a road which they could not dedicate. On a revaluation, Advocatus suggested that the Trustees' land should have a very different unimproved valuation from the sections immediately adjoining, which had over the years achieved roads through no effort of their own. This suggestion was rejected by the Valuation Department where a generation had arisen which apparently regarded itself as a Taxing Department bred by necessity. Advocatus's fellow-trustees are individually men of capacity, but in their group thinking they resemble those jurymen of whom the late Mr. Pope said "Wretches hang that jurymen may dine." They were not prepared to spend the thought required to challenge the valuation.

In the country for many years it has been customary to use gates or cattle-stops on fence boundaries on the road, thereby restraining the movement of stock. As the country gets more settled settlers further along the road endeavour to have these stock gates removed as they object to having to slow down to wake the sheep and cattle sleeping on the road.

On request from settlers, County Councils promptly issue notices to remove obstructions, and the farmer, once the notice is issued, has no redress and may well be faced with the uneconomic task of spending £1,000 on fencing to protect £500 worth of land. County Councils might hesitate if, as a result of this uneconomic fencing, there was a reduction of the valuation (and the rates). There is a Scottish case (which for the moment has eluded Advocatus) whereby as the result of feu rents, feoffment, and various rights known mostly to Scottish conveyancers, the unimproved value was rated as a minus quantity.

Advocatus has recently had to negotiate with the Commissioner of Crown Lands to convert certain leasehold into freehold. Advocatus endeavoured to point out that the true unimproved value was capitalised earning-power less cost of improvements. The system approved by the Crown is apparently: Write off all the improvements except Crown improvements but at all costs maintain the so-called unimproved value even though the property had been smothered with rabbits when the lease was granted.

In one case about eight years ago, Advocatus had a transaction where the vendor actually sold at less than the admitted value of the stock and lessee's improvements. If the stock had not been part of the transaction there would have been no sale. The Crown, however, maintained that its unimproved value was still there. Advocatus realizes with some apprehension that, if the Valuation Department had not thought of its five-year plan for revaluation, this Department would by now be running successfully—or, at any rate, running—on at least half its present staff.

# THEIR LORDSHIPS CONSIDER.

BY COLONUS.

*Bottles.*—In *William Leitch and Co.* v. *Leydon*, [1930] A.C. 90, mineral waters were sold by appellants, as manufacturers, to retailers, in bottles marked with appellant's name. It was a term of sale that the retailers should require a one-penny deposit from their customers. Respondent, a grocer, refilled these bottles, amongst others, from a soda fountain installed on his premises. Appellants then sought to restrain him from so doing, contending that on proof of their continued ownership of the bottles they had a right to insist that respondent should examine bottles tendered to him for filling and should refrain from filling them if they bore the appellant's name. Viscount Hailsham, with the House in this Scottish appeal, did not agree, and said at p. 98:

> "My Lords, in my judgment there is no foundation in law for this contention. It is conceded that there is no contractual relationship between appellants and the respondent, and the duty must arise, if at all, from the fact that the bottles are the property of the appellants. I cannot see that the fact that these bottles belonged to the appellants gives them any right to insist on persons with whom they are in no contractual relationship examining the bottles tendered to them in the course of their trade in order to be sure that they are not bottles belonging to the appellants and being used for purposes to which the appellants object. Counsel for the appellants conceded that unless he could establish that all bottles bearing their name were the property of the appellants his claim must fail, and that he could not impose upon the respondent the duty of investigation to find out whether any particular bottle belonged to the appellants or not; but he contended that there was a duty to examine the bottles, and he sought to justify that claim by saying that it was very easy to make the examination. I do not understand on what legal foundation this distinction rests. Unless the appellants can establish that there is a duty on the respondent to ascertain which bottles are the appellant's property it seems to me that their claim for an interdict must fail; if there is such a duty, then I do not see that it could make any difference in law whether the ascertainment is easy or difficult. In my judgment no such duty can be shown to exist, and therefore the action must fail."