The decision in *Noblett v. Hopkinson* turns upon the hour at which a material part of the contract had to be performed. The facts of that case are indeed very similar to the case I now have to decide but the defendant not having chosen to give evidence I have no data as to the actual terms of the sale and therefore the case is not very helpful to me.

As this case stands I am bound to hold that a sale of a bottle of whisky took place during prohibited hours and the question is were the licensed premises being kept open for such sale. It is idle to speculate as to how many times a door must be opened to constitute keeping open. I am satisfied that if a publican admits a person or persons into his licensed premises during prohibited hours, that is a sufficient keeping open since it shows that he is ready at hand to come down, unbolt the door admit and to deliver to such persons intoxicating liquor.

In this case Griffen manifestly got in from outside, admitted by appellant. If I am to hold that obtaining entrance by knocking on the door is not keeping open, it is clear that the statute will be constantly and easily evaded.

It is clear legal principle that the manifest intention of a statute must not be defeated by too liberal an adhesion to its precise language (*R. v. Vasey* [1905] 2 K.B. 748 per Lord Alverstone, C.J., p. 751) which case by the way was a case on a quasi penal statute.

The object of s. 13 (1) is to enact that licensed premises shall not be open during certain hours. This does not mean merely that the doors of the premises shall be shut, barred or locked. The manifest intention of the legislature is that no liquor shall be supplied during those hours to a casual purchaser and accordingly when there is proof that such a purchaser has obtained entrance to the licensed premises and issues therefrom with intoxicating liquor in his possession I hold that in the absence of satisfactory explanation from the licensee, the offence of keeping open is complete. Appellant was rightly convicted by the learned police magistrate and this appeal fails and is dismissed.

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re THE PUBLIC TRUSTEE OF NEW SOUTH WALES, *ex parte* REGISTRAR OF TITLES.

[Civil Jurisdiction (Maxwell Anderson, C.J.) July 15, 1930.]

Resealing of grant of Probate to a company—will valid in Switzerland —succession to land governed by lex loci rei sitæ—will invalid under Wills Acts—intestacy as to real estate in Fiji—whether company carrying on business in Fiji by acting as executor.

James Brand Simmons died in Switzerland. Probate of a will made in Sydney, New South Wales, was granted by the Supreme Court of New South Wales, to the Public Trustee of New South Wales. The estate included a parcel of land in Fiji and the title of the Public Trustee thereto was duly registered. Subsequently a later will, made in Switzerland, was discovered. The Supreme Court of New South Wales revoked the grant of Probate to the Public Trustee and granted letters

of administration with the Swiss will annexed to the Permanent Trustee Company of New South Wales Limited, the elected guardian of the sole legatee under the Swiss will, who was a minor. The Permanent Trustee Company of New South Wales Limited was not registered in Fiji under the Companies Ordinance, 1913[1]. The Supreme Court of Fiji resealed the grant of administraton to the Permanent Trustee Company, but upon that Company applying for transmission of the title to the land, the Registrar of Titles refused registration and referred the question to the Supreme Court under s. 97 of the Real Property Ordinance 1876.[2] From the certified copy of the Swiss will it appeared that the will did not comply with the Wills Acts, although the copy annexed to the letters of administration did.

HELD.—(1) The Supreme Court of Fiji in its discretion can direct the resealing of a grant of probate or administration validly made elsewhere in His Majesty's Dominions to a Company.

(2) Such resealing will entitle the Company to take both real and personal property in Fiji.

(3) A Company applying for such resealing must have complied with ss. 249 and 250 of the Companies Ordinance, 1913.[1]

(4) By acting as executor, etc. in Fiji a Company is not carrying on business so as to become liable for license fees under the Licence Ordinance, 1924.[3]

(5) Succession to land being governed by the *lex loci rei sitæ* a foreign will which does not comply with the Wills Acts amounts to an intestacy so far as real estate in Fiji is concerned.

[**EDITORIAL NOTE.**—(*a*) The Companies Ordinance, 1913, is repealed and replaced by the Companies Ordinance (Cap. 170) of 1944. The question as to whether a foreign company can acquire title to land in the Colony is disposed of by s. 326 of the Ordinance.

(*b*) the provisions of ss. 249 and 250 of the Companies Ordinance, 1913 (repealed) were in general terms similar to those of ss. 325 and 326 respectively of Cap. 170.

(*c*) There is at present no legislation in Fiji which recognises trust corporations nor legislation corresponding to the Administration of Justice Act, 1920, 10 and 11 Geo. 5, c. 81, s. 17 (Rep.) which gave express power to grant probate to a corporation or to s. 56 of the Administration of Estates Act, 1925, 15 Geo. 5, c. 23 and s. 161 (1) of the Judicature Act, 1925, 15 and 16 Geo. 5, c. 49.]

Cases referred to :—

(1) *Freke v. Lord Carbery* [1873] 16 L.R.E. 9, 461 ; 11 Dig. 364.

(2) *Pepin v. Bruyere* [1902] 1 Ch. 24 ; 71 L.J.Ch. 39 ; 85 L.T. 461 ; 11 Dig. 342.

(3) *Salmon v. Duncombe* [1886] 11 A.C. 627 ; 55 L.J.P.C. 69 ; 55 L.T. 446 ; 42 Dig. 676.

(4) *Ex parte Stephens* [1876] 3 Ch. 659 ; 46 L.J. 46 ; 42 Dig. 718.

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[1] *Repealed. Vide Editorial Note.*
[2] *Repealed. Vide now Land (Transfer and Registration) Ordinance (Cap. 120) s. 179 (Revised Editions, Vol. II, p. 1264.)*
[3] *Cap. 154, Revised Edition, Vol. II, p. 1682.*

(5) *Stradling v. Morgan* [1560] 75 E.R. 308 ; 42 Dig. 634.

(6) *Reg. v. Churchwardens of All Saints, Wigan* [1876] 1 A.C. 611 ; 35 L.T. 381 ; 42 Dig. 712.

(7) *In re The Goods of Martin* [1904] 20 T.L.R. 257 ; 13 Dig. 354.

(8) *In re Rankine* [1918] P. 134 ; 118 L.T. 670 ; 34 T.L.R. 294 ; 23 Dig. 253 ; 87 L.J.P. 114.

(9) *in re McLaughlin* [1922] P. 235 ; 91 L.J.P. 205 ; 127 L.T. 527 ; 38 T.L.R. 622 ; 23 Dig. 254.

(10) *Evans v. Tyler* [1849] 163 Eng. Rep. 1266 ; 23 Dig. 26.

(11) *Smith v. Anderson* [1879] 15 Ch. D. 247.

(12) *Re Griffen ex parte Board of Trade* [1890] 60 L.J.Q.B. 235.

Question referred to the Supreme Court by the Registrar of Titles (Real Property Ordinance, 1876, s. 97).

The Attorney-General, *P. A. McElwaine, K.C.*, for the Registrar of Titles :—It is common ground that the Trustee Company is not registered in Fiji and the first point is whether the letters of administration should have been resealed in Fiji either in favour of the company or of an individual. It is assumed that the will is a good and valid will by the law of Switzerland but it is at most a nuncupative will and is not sufficient to pass real property in Fiji. It is not executed as required by the Wills Act 1837, and the Act of 1861 does not apply to real property. See *Freke v. Lord Carbery*, 16 L.R. Eq. 461 and *Pepin v. Bruyere* [1902] 1 Ch. 24. Name of testator is put in the New South Wales probate grant but is not in the consular certified original.

The second point is—can a company hold land in Fiji apart from the provisions of the Companies Ordinance ? Trustee Company although British is a foreign company. Ordinance 7 of 1876, s. 198. (S. 18 Imperial Companies Act, 1862)[1] empowers a company to hold lands. S. 207 covers companies in England or Australia. Ordinance 8 of 1905 extends to companies of any British Colony. Then comes the Companies Ordinance 1913 (No. 4) which permitted even alien companies to acquire lands, but in 1914 s. 250[2] was amended to reduce permission to British companies only. Legislation therefore clearly indicates in ss. 249 and 250 of the Companies Ordinance the only way in which a non Fijian company can hold land in Fiji. Moreover no company can hold land unless its articles of association permit. There is no independent right to hold and Registrar of Titles has no knowledge of powers of company until s. 249, sub-s. (1) is complied with. See *Salmon v. Duncombe* [1886] 11 A.C. 634, *ex parte Stephens* [1876] 3 Ch. Div. 660, *Stradling v. Morgan*, 75 E.R. 316 and *Queen v. Churchwardens of All Saints, Wigan* [1876] 1 A.C. 629.

The third point is—can probate of administration be granted in Fiji to any corporation at all whether such be incorporated or not ? That an original probate cannot be so granted is clear. See in *The Goods of Martin* [1904] 20 T.L.R. 257. An express power to grant probate is given by 10 and 11 Geo. V, c. 81, s. 17.[3] See *in re Rankine* [1918] P. 134. There is no such legislation in Fiji. See *in re McLaughlin* [1922] and *Evans v. Tyler*, 163 E.R., 1266.

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[1] *25 and 26 Vict., c. 89.*
[2] *Repealed. Vide Companies Ordinance (Cap. 170) s. 326.*
[3] **Administration of Justice Act, 1920.*

My submissions therefore are that : (1) there is, as regards property in Fiji, an intestacy ; (2) the company cannot succeed to real property in Fiji as an executor or administrator ; and (3) if it can so succeed, then it cannot do so until it has complied with s. 249 of Companies Ordinance.

H. M. Scott, K.C., for the Permanent Trustee Company of New South Wales Limited.

Ordinance 2 of 1893[1] gives this Court power to reseal any grant of probate but this Court cannot go behind the New South Wales grant and must therefore reseal. The executor must then (s. 82, Ordinance 6 of 1876)[2] register his title and the Registrar of Titles is bound by the Order of the Court. He must register title of the person or company to whom Court has made grant. With reference to the Companies Ordinance (4 of 1913) s. 249,[3] the company is not establishing a place of business in Fiji therefore paragraphs (*a*) and (*b*) of sub-s. (1) cannot apply to company. S. 250 is the only relevant section and that section allows a British company to hold lands in the Colony. The section is conclusive in my favour.

What is carrying on a business ? See *Smith v. Anderson*, 15 Ch. Div. 247, per Brett, L.J. at 277, also *in re Griffen ex parte The Board of Trade*, L.J. 60 Q.B. 235, per Esher, M.R. at 237. The real test is whether the effect of registering a title to land is a carrying on of business and if no place of business is established nor is there any resident bona fide agent there is no carrying on of business. Mere resealing of probate and registration of title of executor is not carrying on business. Finally provisions of Licence Ordinance[4] cannot apply to a company which comes under sub-s. (8) of s. 249 of Ordinance 4 of 1913.

The Attorney-General, *P. A. McElwaine, K.C.*, in reply :—

Ordinance 2 of 1893[1] is only permissive and as to effect see *in re McLaughlin* (*supra*). In his interpretation of s. 82 (6 of 1876)[2] my learned friend goes much too far. The section only contemplates a person who can by law be an example. Ss. 249[3] and 250 (4 of 1913) are quite independent of each other. S. 250 has nothing to do with trading or carrying on business. This company, if at all, comes under s. 249[3] since it is presumably going to administer the property and such administration must, it is submitted, be a carrying on of business.

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[1] *British and Colonial Probates Ordinance* (*Cap.* 29) *Revised Edition, Vol.* I, *p.* 480.

[2] *Real Property Ordinance*, 1876 (*Repealed*) *Vide now Cap.* 120, *s.* 99 (*Revised Edition, Vol.* II, *p.* 1243).

Repealed. S. 249 (1) *of the Companies Ordinance* 1913 *was as follows* :—

"(1) *Every company incorporated outside the Colony which shall establish a place of business within the Colony shall within one month within the establishment of the place of business file with the registrar of companies—*

"(*a*) *A certified copy of the charter statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of the company and if the instrument is not written in the English language a certified translation in the English language thereof ;*

"(*b*) *A list of the directors of the company ;*

"(*c*) *The names and addresses of someone or more persons resident in the Colony authorized to accept on behalf of the company service of process and any notices required to be served on the company ;*

and in the event of any alteration being made in any such instrument or in the directors or in the names or addresses of any such persons as aforesaid the company shall within the prescribed time file with the registrar a notice of the alteration."

[4] *Cap.* 154, *Revised Edition, Vol.* II, *p.* 1682.

MAXWELL ANDERSON, C.J.—This case which raises points of interest and importance both for the Crown and the public arises out of the refusal by the Registrar of Titles to register (without the direction of the Court) the title of the Permanent Trustee Company of New South Wales to certain lands situate within this Colony.

Upon such refusal and by virtue of the provisions of s. 97 of the Real Property Ordinance 1876[1] the Registrar submitted to the Court a reference as follows :—

"1. Messrs. Wm. Scott & Co. on the 28th December last presented for registration a transfer " of certain freehold land in the district of Dreketi from the Public Trustee of New South " Wales as executor of the will of James Brand Simmons, deceased, to the Permanent Trustee " Company of New South Wales Limited as administrator of the estate of James Brand " Simmons, deceased.

"2. Letters of administration *cum testamento annexo* resealed in this Honourable Court " appointing the Permanent Trustee Company of New South Wales Limited administrator has " been filed with the said transfer.

"3. The Permanent Trustee Company of New South Wales Limited is not registered under " the Companies Ordinance 1913.

"4. I am informed by Messrs. Wm. Scott & Co. and I believe that—

"(*a*) the deceased (James Brand Simmons) held one piece of land in Fiji at the time of " his death ;

"(*b*) probate was granted to the Public Trustee of New South Wales in respect of a will " made in that State and this probate was duly resealed in the Supreme Court of Fiji " and the lands were transmitted to the Public Trustee as executor ;

"(*c*) later a will made by the deceased in Switzerland came to light and by an Order of " the Supreme Court of New South Wales probate granted to the Public Trustee was " revoked and letters of administration c.t.a.d.m.a. were granted to the Permanent " Trustee Company of New South Wales Limited. The letters of administration were " then duly resealed by the Supreme Court of Fiji.

"5. The Registrar of Titles is desirous of being directed as to whether he should refuse " registration of the said transfer on the ground that the transferee company is not registered " under the Companies Ordinance 1913.

"6. Messrs. Wm. Scott & Co. contend that 'the provisions of the Companies Ordinance were " never intended to apply to executors or administrators of deceased estates.' That Trust " Companies domiciled in New South Wales or elsewhere do not 'carry on' business in this " Colony within the meaning of Ordinance No. 4 of 1913 either through the medium of a " bona fide agent or otherwise nor has the Permanent Trustee Company of New South Wales " Limited established a place of business within the Colony under the provisions of s. 249 " (1) of the said Ordinance."

Upon the hearing of the reference it became apparent that the Crown might be interested in the determination of the matters in issue and accordingly directions were given that His Majesty's Attorney-General be served with notice of the reference and that should he desire intervene the matter be adjourned into Court for further argument.

The Attorney-General having intervened argued (*a*) that the will of James Brand Simmons through which the transferee derives title is not a valid will as far as real property is concerned ; (*b*) that the transferee as a company cannot become possessed of any lands in Fiji apart from, and unless the company complies with, the provisions of the Companies Ordinance 1913 ; and (*c*) that probate or letters of administration cannot be granted in Fiji to any company whether registered or not. The learned Attorney-General accordingly asked the Court to revoke the resealing of the letters of administration granted by this Court, to direct the Registrar of Titles to refuse registration of the transfer of the land, and to declare the will invalid as a disposition of real estate.

Sir Henry Scott for the transferee argues that this Court cannot go behind the letters of administration granted by the Supreme Court of New South Wales and at any rate so far as this case is concerned is bound to reseal. It is then argued that having regard to the provisions of s. 82 of the Real Property Ordinance, the Registrar must register the transfer, regardless of the provisions of the Companies Ordinance which

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[1] *Repealed. Vide now Land (Transfer and Registration) Ordinance (Cap. 120) s. 179 (Revised Edition, Vol. II, p. 1264).*

it is alleged cannot affect this case since the transferee company by the mere act of acquiring the title is not carrying on business in the Colony of Fiji.

I am greatly indebted to learned counsel on both sides for the able arguments which have greatly assisted the Court to arrive at a decision upon the points raised. I propose to deal with these *seriatim* and the questions I ask myself are these :—

1. Can probate or letters of administration issue in Fiji to any company whether incorporated or not ?
2. If the answer to the above be in the affirmative then—
   (*a*) Can the grant extend to real as well as to personal estate ?
   (*b*) Must the company comply with the provisions of the Companies (No. 4 of 1913) : *vide* ss. 249 and 250 ?
   (*c*) Is the company, acting as executor, etc., carrying on business in Fiji so as to become liable for licence fees under the provision of the Licence Ordinance (No. 3 of 1924) ?
3. Is the will of the deceased Simmons valid as a disposition of real estate situate in Fiji ?

As to the first question I am of opinion that although an original grant of probate or of letters of administration cannot issue out of this Supreme Court to a company *qua* company yet since the terms of British and Colonial Probates Ordinance (No. 2 of 1893) are permissive and not mandatory, the Court in the exercise of its discretion can direct the resealing of a grant validly made elsewhere. In other words since the law of New South Wales permits of a grant to a company, this Court can direct the reseal of a grant of probate or of letters of administration although the grantee be not entitled within this Colony to an original grant. I hold therefore that the reseal in favour of the Trustee Company is good and valid.

The next point is—will the grant in Fiji entitle the Company to take real property in Fiji. Ss. 249 and 250 of the Companies Ordinance were discussed at great length during argument. I come to the conclusion that these two sections are not dependent the one upon the other. Tracing the history of s. 250 as outlined by the learned Attorney-General, I hold the view that a British company whether carrying on business or not in the Colony can by virtue of s. 250 become possessed of land in the Colony, subject however, to compliance with certain parts of s. 249 ; namely by filing with the Registrar the documents and particulars specified in paragraphs (*a*) (*b*) and (*c*) of sub-s. (1) of the said s. 249. It has been argued by Sir Henry Scott that as the Trustee Company is not carrying on business in the Colony (a point I shall come to later) sub-s. (8) of s. 249 will apply and that accordingly in any event only paragraph (*c*) of sub-s. (1) will be applicable. I dissent from this view. S. 250 in my opinion says and means that compliance with the provisions of sub-s. (1) of s. 249 is an essential part of the procedure to be had before the company can hold land and its provisions are not to be whittled down or away by any other sub-s. of the said s. 249. I hold therefore that the company must comply with the provisions of s. 250 in regard to the filing of documents as therein required and when such has been effected the grant extends to permit the holding of real estate.

I pass to the third part of question number two, namely is the company in carrying out an executorship carrying on business in the Colony. The first question one would ask oneself is this—is the office of an executor, a business and, secondly, are the acts of an executor, a carrying on of business. The expression " carry on " of necessity to my mind means a repetition of similar acts and looking at the duties and burdens of an executor I am unable to find in such anything amounting to the carrying on of a business. An executor might have to carry on the business of a deceased testator but that would be the testator's business, the executor merely standing in the shoes of the deceased and paying the same licence fees, if any, as the deceased himself had been liable for. That however is a very different question. The mere assumption of the ordinary duties of an executor does not in my view amount *per se* to carrying on a business, whether such executor be a company, the Public Trustee, or a private person and accordingly I hold that the Trustee Company is not liable as an executor or administrator for any fees under any Ordinance where such fees are chargeable in relation to a business being carried on.

Finally, the question arises as to the validity of the will. It is of importance to note, as the learned Attorney-General pointed out, that the certified copy of the original will—which is in my opinion the copy by which I must be guided—does not purport to be signed by the testator (and the words of the Notary would seem to make it appear that the document was not so signed) nor is the will stated to have been signed at his request or direction yet in the exemplification copy the testator's name has been typed in.

Succession to land is governed by the *lex loci rei sitæ* and on the authorities I hold that in Fiji the will is not sufficient to pass real property. Even if the original will is sufficiently executed by the law of Switzerland, it cannot be so regarded in Fiji as to real estate since the Wills Act 1861 applies only to wills of personal estate. There is accordingly an intestacy so far as the real estate in Fiji of the deceased is concerned and since the Crown has asked for a declaration of such, it must be so ordered. In view however of the fact that the original will is not before the Court and that the two copies which are, differ in the all important matter of signature, it may be that the defect can be cured after investigation. Accordingly time will be allowed for inquiry to be made and upon the Trustee Company undertaking not to part with possession of the land pending such inquiry it will be directed that the declaration of intestacy do not issue pending further order of the Court.

To sum up, the decision of the Court on the questions predicated is : 1. Yes. 2. (*a*) Yes. (*b*) Yes. (*c*) No. 3. No. The Registrar of Titles will be informed accordingly in reply to his submission which originated this case.