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CRIMINAL LAW: PRESUMPTION OF GUILT, "UNLESS THE CONTRARY BE PROVED."

THROUGHOUT the web of the English Criminal Law one golden thread is always to be seen, said Viscount Sankey, L.C., in *Woolmington* v. *Director of Public Prosecutions*, [1933] A.C. 462, 481: "that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity*, and subject also to any statutory exception."

The presumption of innocence in favour of an accused person appears to be excepted in several recent emergency regulations, as in some of our statutes, and it would seem that the onus of proof of innocence is placed on the accused by the use of words, such as—to quote from Reg. 21 of the Licensing Act Emergency Regulations, 1942 (No. 2) (Serial No. 1942/186)—the following:—

> If . . . the evidence produced by the informant or the facts admitted by the defendant are sufficient to constitute a reasonable cause of suspicion that the defendant is guilty of the offence charged, the burden of proving that the offence was not committed shall be upon the defendant.

The same formula, or the words "unless the contrary is proved," and the phrase "without lawful excuse (the proof whereof shall lie on him)" appear in other regulations and in penal statutes—for example in certain sections of the Crimes Act, 1908.

A recent decision of the Court of Criminal Appeal, *R.* v. *Carr-Braint*, [1943] 2 All E.R. 156, is important upon the question of the degree of onus of proof (if it may so be called †) placed on the defendant by the use of such expressions, and as showing that they do not provide statutory exceptions to the general rule that the onus of proof is not shifted from the prosecution.

In the case under notice, the accused person was charged under s. 2 of the Prevention of Corruption Act, 1916 (Gt. Brit.), which provides as follows:—

> Where . . . it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body, . . . the money gift or consideration shall be deemed to have been paid or given and received corruptly . . . unless the contrary is proved.

The trial Judge directed the jury that the onus of proving his innocence lay on the accused, and that the burden of such proof was as heavy as rested ordinarily on the prosecution in any criminal case—that is to say, the accused had to prove his innocence beyond reasonable doubt. But the Court of Appeal (Viscount Caldecote, L.C.J., Humphreys and Lewis, JJ.) did not approve this statement, and upheld the appellant's contention that it amounted to a misdirection.

Their Lordships, in a judgment delivered by Humphreys, J., referred to *R.* v. *Ward*, [1915] 3 K.B. 696, which they considered to be of importance, having regard to the principle contended for. There, the appellant had been convicted of the offence created by s. 58 of the Larceny Act, 1861—reproduced as s. 282 of the Crimes Act, 1908—"having in his possession by night without lawful excuse (the proof of which shall lie on him) any instrument of housebreaking." The implements were such as would form part of an outfit of a bricklayer, and Ward was a bricklayer by trade. The Court quashed the conviction on the ground of misdirection, the trial Judge having told the jury that the appellant had to satisfy the jury that he was rightly in possession of the tools at the time, and had no unlawful intention. Lord Reading, L.C.J., in delivering the judgment of the Court of Criminal Appeal, at p. 697, said:

> . . . it was for the appellant to satisfy the jury that, in the words of s. 58, he had a "lawful excuse" . . . the tools being admittedly bricklayers' tools; the appellant had established *prima facie* that he had a lawful excuse for being in possession of the tools and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they

* "*McNaughton's* case, (1843) 10 Cl. & Fin. 200, 8 E.R. 718, stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional, and has nothing to do with the present circumstances. In *McNaughton's* case, the onus is definitely and exceptionally placed upon the accused to establish such a defence": *ibid.*, 475.

† The use of the terms "presumption of guilt" and "*prima facie* evidence of guilt" with reference to the possession of stolen goods has perhaps been too long indulged in by the Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. . . . "Presumptions" of guilt and "*prima facie*" cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged: *The State* v. *Brady*, (1902) Ia. 91 N.W. 801, quoted in *Woolmington* v. *Director of Public Prosecutions*, at p. 478; and in *R.* v. *Stoddart*, (1909) 2 Cr. App. R. 217, 233.

could, that the appellant was not in possession of the tools for an innocent purpose but for the purpose of housebreaking.

In the Court's opinion, the jury should have been directed that it was for the prosecution to satisfy them from the other circumstances of the case that, although the appellant was a bricklayer and the tools were bricklayers' tools, he had no lawful excuse for being in possession of those tools at that particular time and place.

The authority of *R.* v. *Ward* was, in the opinion of their Lordships in *R.* v. *Carr-Braint*, inconsistent with the notion that words throwing the onus of proof of certain matters upon the accused involve placing the accused in the same position as the prosecution in a normal case, so as to require of him that he should prove his case beyond reasonable doubt. Moreover, it appeared to their Lordships to be in accord with the principle of our law expressed in the judgment of Viscount Sankey, L.C., in *Woolmington* v. *Director of Public Prosecutions*, *supra* at p. 481, "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the person is part of the common law of England, and no attempt to whittle it down can be entertained."

The Court of Appeal went on to say that they saw no reason why the rebuttable presumption caused by the section of the statute under which the accused had been charged, and the words "unless the contrary is proved," should not be construed in the same manner as similar words in other statutes, or similar presumptions at common law.

Their Lordships agreed with, and adopted for the purpose of their judgment, the language of Lord Hailsham, L.C., in delivering the judgment of the Privy Council in *Sodeman* v. *The King*, [1936] 2 All E.R. 1138, 1140:

> . . . the suggestion made by the petitioner was that the jury might have been misled by the Judge's language into the impression that the burden of proof resting on the accused to prove the insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact there is no doubt that the burden of proof for the defence is not so onerous . . . it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged.

Their Lordships, in *Carr-Braint's* case, observed that, in so holding, Lord Hailsham, L.C., was in agreement with the decision of the majority of the Supreme Court of Canada in *Clark* v. *The King*, [1921] 61 S.C.R. 608, where Duff, J., in the course of his judgment, expressed the view that necessity for excluding doubt contained in the rule as to the onus upon the prosecution in criminal cases might be regarded as an exception founded upon considerations of public policy. They added that there can be no consideration of public policy calling for similar stringency in the case of an accused person endeavouring to displace a rebuttable presumption. Their Lordships then said:

> What is the burden resting upon a plaintiff or defendant in civil proceedings can, we think, best be stated in the words of the classic pronouncement upon the subject by Willes, J., in *Cooper* v. *Slade*, (1858) 6 H.L. Cas. 746. That learned Judge referred to an ancient authority in support of what he termed "the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict." The authority in question was the judgment of Dyer, C.J., and a majority of Judges of the Common Pleas in *Newis* v. *Lark*, (1571) 2 Plowd. 408, decided in the reign of Queen Elizabeth. The report contains this passage: "Where the matter is so far gone that the parties are at issue so that the jury is to give a verdict one way or another, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence."

The conclusions drawn by their Lordships in their statement of the law in *R.* v. *Carr-Braint* may be set out as follows:—

In any case where, either by statute or statutory regulation, or at common law, some matter is presumed against an accused person "unless the contrary is proved" (or words to the like effect), the jury should be directed (or a Magistrate in a summary proceeding should direct himself):

1. That it is for the jury (or the Magistrate) to decide whether the contrary is proved;

2. That the burden of proof is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt; and

3. That the burden may be discharged by evidence satisfying the jury (or a Magistrate) of the probability of that which the accused is called upon to establish.

The decision in *R.* v. *Carr-Braint* is of great local value and importance. In much of our recent legislation, and, in particular, in emergency regulations, which impose duties upon the citizen with respect to the everyday things of life, the onus of "disproof" of the charge is laid upon the person accused. It appears from the Court of Appeal judgment that "no matter what the charge or where the trial," the common-law principle, that the prosecution must prove the guilt of the accused person beyond reasonable doubt, cannot be whittled down unless the statute or regulation so provides by apt words incapable of being misunderstood. That has not been achieved by the use of such words, so far as we are aware, in any New Zealand statute or regulation.

Even where the statute or regulation does not contain words indicating that any onus lies on the defendant or accused person, but where he gives evidence in explanation of his act, it seems that the new rule laid down in *R. v. Carr-Braint* would apply. Thus, in an ordinary criminal case, there is no burden of proof cast upon the accused person, but he may give evidence that he had a lawful excuse to do the act with which he is charged; and he is entitled to give this evidence if he wishes. In *Woolmington's* case (*supra*) the prisoner was indicted for murder. He took it upon himself to show by evidence, and by examination of the circumstances adduced by the Crown, that the act which caused death was unintentional or provoked. Viscount Sankey said, at p. 482:

> If the jury are either satisfied with his explanation, or upon a review of all the evidence are left in reasonable doubt, even if this explanation be not accepted, that his act was unintentional or provoked, the prisoner is entitled to be acquitted.

This, in principle, seems to be on all fours with the opinion expressed in *Carr-Braint's* case, where it appears that the limit of the obligation imposed on the defendant is to throw reasonable doubt on the inferences which the prosecution asks the jury to draw; and he himself is not called upon to prove anything beyond that.

A section in a statute or a regulation containing phrases such as "without lawful justification or excuse (the proof whereof shall be on him)" or "unless the

contrary be proved [by the accused]," or "the burden of proving that the offence was not committed shall be upon the defendant," do not cast upon the accused the duty of showing that he is not guilty beyond reasonable doubt; in other words, there is not cast upon him any onus of showing that his act did not amount to the crime or offence charged. He has only to show, as in *Cooper* v. *Slade* (*supra*) that, on the "preponderance of probability" he is not guilty; in other words, as was said in *R.* v. *Carr-Braint*, he is entitled to acquittal if he satisfies the jury of the probability of what the section or regulation called upon him to establish. He is not called upon to establish his innocence.

In fine, the prosecution, to succeed, must always establish guilt; and it fails if it leaves in the minds of the jury a reasonable doubt. To put it another way, the prosecution always fails unless it produces certainty; the defence must succeed if it establishes a reasonable doubt.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Auckland. 1943. September 28; October 1. *Callan*, J.

ABERCROMBIE v. BURNS.

Public Revenue—Customs Duty—Possession of Uncustomed Goods—Recovery of Penalty—"Any act done or omitted with respect thereto"—Presumption of Allegations in Information—Burden of Proof—Customs Act, 1913, ss. 223, 276—Customs (Visiting Forces) Emergency Regulations, 1942 (Serial No. 1942/203), Reg. 3—Customs (Visiting Forces) Proclamation, 1942 (Serial No. 1942/204), cl. 2.

By virtue of the combined effect of the Customs (Visiting Forces) Emergency Regulations, 1942, and the Customs (Visiting Forces) Proclamation, 1942, the Minister of Customs was empowered to permit any goods imported into New Zealand or therein entered for home consumption by or on behalf of and for the exclusive use of the Armed Forces of the United States of America to be imported or entered free of all Customs duties and charges in the nature of Customs duties, and to be exempted from sales tax.

The appellant was convicted by a Stipendiary Magistrate and fined £25 upon the following information:—

> "You the said Walter Burns on or about the 1st day of December 1942 at Auckland were found in possession of uncustomed goods, to wit—10,000 cigarettes, 15 pounds of tobacco, 120 dozen boxes of matches—which said goods were of American manufacture intended for the sole use of American troops serving outside America and wrongfully landed or imported or otherwise dealt with without having paid duty thereon or in pursuance of an import license."

Upon a general appeal under the Justices of the Peace Act, 1927, from such conviction and fine, it was established that the goods in question were found in the possession of the appellant, who neither gave nor called any evidence. A Customs officer, however, proved that he and other searchers called at the premises of an importing company of which appellant was manager, and the appellant denied that he had any American goods on his property; but the goods in question were found marked on the outside of the cartons containing them as being for Navy Stores of the United States Forces. The Customs officer further said that when these goods were discovered the appellant called him aside and said that they belonged to an American whom the appellant had met at a party, whose name he did not know, but who had asked the appellant to allow him to store the goods at the appellant's warehouse and had called once or twice thereafter to take some of the goods away.

Held, dismissing the appeal, 1. That the prosecution was brought under s. 223 of the Customs Act, 1913.

2. That there were allegations in the information "as to the payment of any duty thereon as to any act done or omitted with respect thereto by any person" within the meaning of those words as used in s. 276 of the Customs Act, 1913.

3. That the combined effect of the allegations made in the information and the provisions of s. 276 was that, unless the appellant established that duty had been paid on these goods, or that they came in by a method which, in law, permanently exempted them from duty, the appellant must be convicted.

4. That the appellant had not shown that the goods in question had not been stolen before entry and then smuggled in, a possibility that should not be disregarded.

5. That (assuming, without deciding, as submitted by appellant's counsel, that once goods had been let in under a permit pursuant to the regulations and Proclamation, nothing that might happen thereafter could create a liability for ordinary Customs duty on the goods, although there might be liability for penalties) the effect of the allegation in the information was that the goods entered the country unlawfully, without any permit being obtained, and the appellant had not discharged the onus of proof thrown upon him by s. 276 by establishing as a fact that had not happened.

Weiss v. *The King*, [1928] Ex. C.R. 106, and *The King* v. *Doull*, [1931] Ex. C.R. 159, referred to.

Counsel: *Finlay and Henry*, for the appellant; *Meredith*, for the respondent.

Solicitors: *G. P. Finlay*, Auckland, for the appellant; *Crown Solicitor*, Auckland, for the respondent.

SUPREME COURT. Christchurch. 1943. October 1. *Northcroft*, J.

HORNBY. v HORNBY.

Divorce and Matrimonial Causes—Desertion—Act of Sexual Intercourse by Wife in Hope of Reconciliation—Husband's Pretence of Intent of resuming Cohabitation—Whether Condonation or Resumption of Cohabitation—Divorce and Matrimonial Causes Act, 1928, s. 10 (b) (i).

In the case of a petition by a wife for divorce upon the ground of desertion, an act of sexual intercourse is not conclusive on the question of condonation and does not raise an irrebuttable presumption that cohabitation has been resumed.

Such an act permitted by a wife in the hope of effecting a reconciliation with a husband who has deserted her, but who had no intention of resuming cohabitation, although he made a pretence of doing so, is neither a condonation nor does it amount to a resumption of cohabitation so as to have the effect of bringing the period of desertion to an end.

Taylor v. *Taylor*, [1918] N.Z.L.R. 724, G.L.R. 467; *Stewart* v. *Stewart*, [1915] V.L.R. 50; and *Mummery* v. *Mummery*, [1942] 1 All E.R. 553, applied.

Quaere, Whether the same considerations apply in the case of a wife's petition for divorce on the ground of separation.

Bennett v. *Bennett*, [1936] N.Z.L.R. 872, G.L.R. 624, referred to.

Counsel: *C. S. Thomas*, for the petitioner.

Solicitor: *C. S. Thomas*, Christchurch, for the petitioner.

THE STUDENTS' SUPPLEMENT.

Owing to depletions from the ranks of the Law Students by reason of war-service, those who have undertaken the compilation of the Students' Supplement to this year's JOURNAL have been unable to complete their task for publication before the end of the year. In an early issue in 1944, it is hoped that the Students' Supplement will appear, so as not to break the continuity of annual appearances it has so far maintained.

OPTIONS TO PURCHASE AND THE PERPETUITY RULE.

Sixty Years with Gomm's Case.*

By I. D. CAMPBELL.

(*Continued from p. 250.*)

In support of the view that the Court of Appeal here misinterpreted and misapplied the earlier decision it is interesting to note that Farwell, L.J., himself had previously held that in an action between the original covenanting parties (corporations in this instance) a clause creating a remote interest in land could not be specifically enforced: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352. On the assumption that a right of pre-emption or "first refusal" gave an interest in land (on which point the Judge was reversed by the Court of Appeal, [1901] 2 Ch. 37, 50), he said: "In an agreement *inter partes* between these two companies, clause 3 [giving "first refusal"] would clearly be void for perpetuity, because there is no limitation in point of time."

In *Gomm's* case Jessel, M.R., had said, at p. 580: "If it is a bare or mere personal contract it is of course not obnoxious to the rule." But the whole gist of the decision was that an option to purchase is *not* a bare or mere personal covenant, but is a covenant creating an interest in land and to that extent directly within the perpetuity rule.

None of this escaped the late Cyprian Williams, and he produced two further articles criticizing the Court of Appeal's decision: 54 Sol. Jo. 470, 501. He argued—or rather, conclusively demonstrated—that the decision led to results which he did not hesitate to describe as absurd, and which reduce the decision to the ridiculous.†

When an option is unlimited in point of time there are two ways in which it may escape wholly or partially from being void for perpetuity even if the *South Eastern Railway* case was wrongly decided. The first is where there is no reference to personal representatives or assigns and it appears from the document and the circumstances of the case that the option was personal to the covenantee or exercisable only against the covenantor while he lived. If the covenantee in the first case, or the covenantor in the second case, is a natural person, the option must be exercised, if at all, within a life in being. Should they be corporations this exception could not apply.

In the second place, where the covenant is in favour of, or exercisable against, a natural person and creates an interest binding on representatives or assigns, it may be possible to sever the void from the valid interests. This was suggested by Cyprian Williams (42 Sol. Jo. 650; 54 Sol. Jo. 501) and has recently been supported by P. R. Watts (12 A.L.J. 115). If the defendant is the original covenantor, it is said that the objection of perpetuity could be met by severance of the remote limitations. Presumably if the action is brought by the original covenantee it is suggested that a similar course is open. In any event corporations, not being lives in being for the purposes of the perpetuity rule, could not avail themselves of this method.

If the action is against the original covenantor, these writers suggest that his promise is divisible into three distinct promises: (1) that if the option is exercised in his lifetime, he will convey; (2) that if it is exercised while the land is held by his personal representatives, they will convey; (3) that if it is exercised while the land is held by an assign, he will convey. Sever the last two promises from the first, it is said, and the first is within the perpetuity period and specifically enforceable.

It may be noted that in the reported cases this situation has not arisen, as the actions for specific performance have been against assigns or corporations. But it is submitted that severance in this way is contrary to a principle applied generally in cases of perpetuity. An interest which may remain contingent for a period exceeding that allowed by the rule is void *ab initio* and not valid for the perpetuity period. Take the case of an option given by A. (lessor) to B. (lessee), not being one limited to either of them personally. Under this covenant B. acquires but one interest. A.'s promises may be severable as suggested; but how is the equitable interest of B. (or of his personal representative, or of an assign) to be severed? B., for example, has from these successive promises but one enduring interest which continues beyond A.'s death or the assignment of the reversion. To avoid the perpetuity rule would involve, not a separation of void from valid interests, but cutting an interest short in order to confine it within the perpetuity period. Such severance of an interest during its currency seems contrary to well established principles.

On the other hand, the fact that the action is brought by B., the original covenantee, makes the case no better. On a contractual analysis it could be said that A.'s covenant was divisible into (1) a promise to B.; (2) a promise to B.'s personal representatives; (3) a promise to B.'s assigns. But B.'s equitable interest must be considered in terms of property, not contract. He has a contingent equitable interest which, as a property right, has been made transmissible, and it does not seem legitimate to say that the interest of B.'s representatives or assigns is any other interest than that which B. himself possessed and which they acquired by devolution or assignment. B.'s interest is therefore void for perpetuity, since a transmissible interest which is to become vested on a contingency that may fall outside the perpetuity period is void even if it be given to a living person: *In re Norton, Norton* v. *Norton*, [1911] 2 Ch. 27, 40; *1 Jarman on Wills*, 7th Ed. 276.

Neither a right of renewal in a lease nor a right of "first refusal" is governed by the rules applicable to an option to purchase. A right of renewal is an exception to the perpetuity rule, so recognized because covenants for renewal beyond the perpetuity period were enforced before the modern rule against perpetuities came to be formulated. Rights of pre-emption or first refusal differ

* *London and South Western Railway Co.* v. *Gomm*, (1881) 20 Ch.D. 562.

† See also the comments by Gray, *Rule against Perpetuities*, 3rd Ed. 308. The decision has, however, been defended by Charles Sweet, (1911) 27 L.Q.R. 150, on grounds which seem unconvincing, and by F. E. Farrer in *The Conveyancer and Property Lawyer*, (1937) p. 203 (which the present writer has not been able to consult). See P. R. Watts in 12 A.L.J. 115.

in that they create no interest in land. They confer neither an absolute nor a conditional right to call for a conveyance. An option-holder can at any time exercise his option so as to perfect his contingent interest in the property. One who has merely the first refusal has no stake in the property merely by reason of that right. The property may never be offered for sale during the period covered by the contract, and he has no means of compelling the owner to part with his land. His rights are purely contractual, and the period during which the right may be exercised is therefore unaffected by any question of perpetuity.‡

Where an intended sale would be a breach (actual or anticipatory) of a valid option to purchase, it is suggested that an injunction could be obtained against both parties to the agreement for sale and purchase, on the principle applied in regard to first refusals in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37.

‡ A right of pre-emption is, however, void if the terms are such as to operate as a total check on alienation, at all events where the right is annexed by way of condition to a devise. In such a case the condition is invalid not on the ground of remoteness but of repugnancy to the interest granted, and is bad regardless of the period for which the right is granted: *In re Rosher, Rosher* v. *Rosher*, (1884) 26 Ch.D. 801, followed in *In re Cockerill, Mackaness* v. *Percival*, [1929] 2 Ch. 131.

To summarize the main points of this article, the authorities establish—

1. That an option to purchase creates a contingent equitable interest in land and must be so limited that the interest is not void for perpetuity.

2. That if the interest created by the option is void for perpetuity, the covenant by which it is created is not specifically enforceable against assigns of the covenantor.

In addition, it is submitted:

3. That even between the original covenanting parties specific performance may not be had if the equitable interest created by the option is void for perpetuity, and that *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers* is unsound.

4. That if the option is void for perpetuity no action will lie for damages for breach of the option, and that, for the reasons stated by Cyprian Williams, *Worthing Corporation* v. *Heather* was wrongly decided on this point.

5. That if the option is void for perpetuity it cannot be made specifically enforceable in proceedings by or against the original covenanting parties by any method of severance.

(To be concluded.)

LONDON LETTER.

October 2, 1943.

My Dear En-Zers,

Lord Glanely.—The late Lord Glanely, who was killed recently by enemy action, will be remembered in connection with a leading case which excited a good deal of interest at the time it was decided: *Lord Glanely* v. *Wightman*, [1933] A.C. 618. It raised a question as to income-tax in respect of stud fees. Lord Glanely kept a racing stable in connection with a farm. The farm was run at a loss. The stud fees were a source of profit, and the question was whether the fees were chargeable to tax as profits of a business under Schedule D or in respect of the occupation of the farm under Schedule B. It was held by the House of Lords that the fees were profits derived from the occupation of the farm. The case is interesting, too, inasmuch as the present Master of the Rolls was the leading counsel for Lord Glanely, the present Lord Chief Justice was the leading counsel for the Revenue, and the first judgment was delivered by Viscount Buckmaster. It must have been a rare thing for Lord Glanely to carry on anything at a loss, but probably that is usually the result of taking up farming as a hobby. Nor was his career in connection with racing more than an incident in his life; in fact, his career was that of a successful shipowner and his success was due entirely to his own efforts. William James Tatem came from the little seaport town of Appledore, in Devon. He went to sea and suffered shipwreck, and then, entering a shipping office as a clerk, he became successful in shipping and ultimately controlled a number of shipping companies, and became chairman of the Cardiff Shipowners' Association. Though he was well known in racing circles and was a member of the Jockey Club, racing was not his main interest outside business. He was president of the University College of South Wales and Monmouthshire, and in 1918 was raised to the peerage. It is said that at the coronation of the present King he gave £30,000 for educational and charitable purposes.

The Diplomatic Service.—Two very interesting articles appeared recently in *The Times* on "Conduct of Foreign Policy" called attention to the change which has come over the business of diplomacy as it has long been known. Diplomacy has not been so much the alternative to war as the necessary procedure to be followed before the outbreak of war. Looking over the centuries which have passed since that blanket of night known as the Dark Ages followed the eclipse of the Greek and Roman civilizations, it might almost be said that war has been the normal state of relationship between independent states—the flashes of peace which intervened between these almost continuous wars only served as a foretaste of what civilization would be like when war had been abolished. Diplomacy was designed to lengthen these flashes of peace and delay the appeal to war which always lay in the background. But the haste of the modern aggressor to start war at the time most convenient to himself has made diplomacy useless as an instrument of delay and war may now break out by an attack delivered while the diplomats are still busy over the terms of an ultimatum. Diplomacy, in fact, has failed to prevent war. The failure of diplomacy was crystallized in Talleyrand's famous description of the Congress of Vienna: "The Congress dances, but it gets nowhere."

The Extended Diplomacy.—Talleyrand's witticism also hit the feature of diplomacy which is now becoming obsolete. It was seen in the regulation that a candidate for entry into the diplomatic service must have a private income of £200 a year, or was it £400? That requirement was withdrawn some 30 years ago, and

since then the service has been open, like the rest of the Civil Service, to proved capacity. But the point made by the articles to which we have referred is that Foreign Office diplomacy, as it has been hitherto carried on, does not take account of the factors which under modern conditions really govern international relations. No one will dispute the utility of negotiation. Even in international affairs, while it has not stopped wars, it has played a great part. Least of all should lawyers dispute its utility, for the lawyer renders to his client the best service when he prevents litigation by a negotiated settlement. The criticism of the traditional functions of the Foreign Office is that they do not allow for the complications of foreign relations introduced by economic, financial and social, and, more recently, propaganda problems. The creation of a Ministry of Economic Warfare has been found essential, but it really trespasses on the functions of the Foreign Office; questions of finance have, in special cases, called for special envoys, as when the late Lord Balfour and Lord Reading were sent to the United States in connection with the last war. But now embassies find it necessary to have expert financial officers appointed. Perhaps the greatest intrusion upon the closed preserves of the Foreign Office has been made by the Ministry of Information and the B.B.C. The latter has, through the wireless, brought the peoples of foreign countries into direct contact with this country and made propaganda possible. Whether the writer of the article is correct in saying that the Foreign Office has treated this innovation with lofty disdain we do not know, nor are we competent to consider whether the Foreign Office really pays too little attention to the effect of modern conditions on international relations. But as with much else in public administration, it is probable that Lord Haldane correctly pointed out the real path of reform when he insisted, in his report on the machinery of government, on the necessity of a thinking and planning body from which the various ministries dealing with foreign affairs, whether diplomatic, economic or otherwise, should receive advice. The White Paper on the Reform of the Foreign Service which has just been issued, while it does not touch the question of the administration of foreign affairs, recognizes the need of still further broadening the base of the Diplomatic Service. This, the White Paper says, should be done by admitting some candidates up to the age of thirty without examination, and also by introducing without limit of age, men of proved capacity from outside the Government service, so as to ensure both wider knowledge and experience.

Yours ever, APTERYX.

TRANSMISSION UNDER THE LAND TRANSFER ACT.

By E. C. ADAMS, LL.M.

There is an excellent chapter on transmission under the Land Transfer Act, 1915, in *Goodall's Conveyancing in New Zealand*, 385, 386; the following notes are designed to supplement it, by regarding the matter from slightly different standpoints and by considering certain leading Australian and New Zealand cases dealing with this important conveyancing topic.

As amended by the Schedule to the Land Transfer Amendment Act, 1925, the definition of "transmission" is now as follows:—

> "Transmission" means the acquirement of title to any estate or interest by operation of law.

In *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839, 842, 843, G.L.R. 529, 531, Skerrett, C.J., said:

> In my opinion, this definition must be read as meaning the acquirement of title to an estate or interest of the last person whose name is entered in the ordinary way as the proprietor of the interest in his own right.

Until amended by the Schedule to the Land Transfer Amendment Act, 1925, the definition was more detailed and self-explanatory. "Transmission" previously meant the acquirement of title to any estate or interest consequent on the death, will, intestacy, bankruptcy, insolvency, or marriage of a proprietor, or by virtue of appointment or succession to any office, or as trustee under any will or settlement. The words "as trustee under any will or settlement" caused confusion and often misled conveyancers. Section 80 of the Trustee Act, 1883, provided that on the appointment of a new trustee the trust property should vest in the continuing and new trustees without the necessity for a conveyance or transfer. A new trustee, therefore, appointed while that Act was in force, acquired title. If the land was not under the Land Transfer Act, the legal estate became vested in him without registration, and, if it was under the Land Transfer Act, the legal estate became vested in him subject only to the registration of a transmission. Section 80 of the Trustee Act, 1883, however, was repealed by s. 8 of the Trustee Amendment Act, 1901, and the provisions as to vesting in new trustees expressed not to apply to land under the Land Transfer Act (s. 4 (4), *ibid.*). The present provisions (the Trustee Act) as to automatic vesting of trust property in the continuing and new trustees if there is a declaration by the appointor for that purpose, does not apply to mortgages or to land under the Land Transfer Act: s. 80 of the Trustee Act, 1908, and *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839, G.L.R. 529. Therefore the present position as regards land under the Land Transfer Act is that on a change of trustees the surviving registered proprietors must transfer to the continuing and new trustees except in certain exceptional cases. This often involves the prior registration by transmission by survivorship, where a registered proprietor has died. But the words "as trustee under any will or settlement" were retained in the definition of transmission under the Land Transfer Acts, 1908 and 1915, to cover cases where there had been an appointment during the operation of the 1883 Act, but had not

then been registered; the present definition would also include such cases.

There are at least two exceptions to the general rule that on the appointment of new trustees there is no automatic vesting in the continuing and new trustees. I refer to s. 2 of the Religious, Charitable, and Educational Trusts Act, 1908, and s. 43 (*b*) of the Public Trust Office Amendment Act, 1921: in these two cases no transfer need be registered: the Public Trustee or the continuing and new trustees may apply to the District Land Registrar by transmission. Other special statutory provisions which the conveyancer may meet in the course of his career are: Associated Churches of Christ Church Property Act, 1929; Baptist Union Incorporation Act, 1923; Congregational Union Incorporation Act, 1885; Wesleyan Methodist Church Property Trust Act, 1887, and several amendments thereof; Presbyterian Church Property Act, 1885, and several amendments thereof; Grand Lodge of Freemasons of New Zealand Trustees Act, 1903; and Friendly Societies Act, 1909. This list is not intended to be exhaustive.

A complementary section to transmission is s. 92 of the Land Transfer Act, 1915, which reads as follows:—

> Whenever any order is made by any Court of competent jurisdiction vesting any estate or interest under this Act in any person, the Registrar, upon being served with an office copy of such order, shall enter a memorandum thereof in the Register and on the outstanding instrument of title, and until such entry is made the said order shall have no effect in vesting or transferring the said estate or interest.

Note the words "by any Court of *competent jurisdiction.*" If *ex facie* the order has been made without or in excess of jurisdiction, then it is the duty of the District Land Registrar to decline to register it: per Hosking, J., in *Re Hinewaki No. 3 Block*, [1923] N.Z.L.R. 353, 362, [1922] G.L.R. 591, 594: *Templeton* v. *Leviathan Proprietary Ltd.*, (1921) 30 C.L.R. 34. Equally would it be his duty to stay his hand, if he had notice that a vesting-order had been obtained by fraud: in such a case he would probably interpose a Registrar's caveat.

Note also the words, "and until such entry is made the said order shall have no effect in vesting or transferring the said estate or interest." An exception to the rule that the registered estate or interest does not pass until registration of the vesting-order is a partition order made by the Native Land Court under the Native Land Act, 1931: under that Act a partition order (but not a succession order) does pass the legal estate without registration, the partition order itself constituting the legal title to the land: *The King* v. *Waiariki District Maori Land Board*, [1922] N.Z.L.R. 417, G.L.R. 128; *Re Hinewaki No. 3 Block* (*supra*); and *Titiana Wiremu te Hika* v. *Public Trustee*, [1918] G.L.R. 493, the last case dealing with a succession order.

To revert now to transmissions after this digression as to vesting-orders. In the case of the death of a registered proprietor (who does not hold in a representative capacity), the title to the estate of such registered proprietor probably vests *sub modo* in his common-law heir or devisee, as the case may be, until registration of transmission in favour of his legal personal representative: *In re Macleay, Macleay* v. *Treadwell*, [1937] N.Z.L.R. 230, and *Howie* v. *Barry*, (1909) 28 N.Z.L.R. 681, 11 G.L.R. 423. But the title of an executor or administrator upon registration of transmission in his favour has relation back to the date of death of the registered proprietor whom he represents: s. 4 of the Administration Act, 1908.

In the case of acquisition of title by *survivorship* by the survivor or survivors of proprietors registered as joint tenants (and except in the case of land owned by aboriginal Natives, registered proprietors hold the legal estate or interest as joint tenants unless they *expressly* hold as tenants in common—s. 57 of the Land Transfer Act, 1915) it is the writer's opinion that there is a legal vesting on death and before registration of transmission. This appears to follow from the very nature of a joint tenancy: at law joint tenants are regarded as one. In transmission by survivorship it would appear that the transmission is merely evidential of the prior vesting in the survivors or survivor. And I think that Sir John Salmond must have had joint tenancy in mind when he said in *The King* v. *Waiariki District Maori Land Board*, [1922] N.Z.L.R. 417, 424, G.L.R. 128, 132:

> It may well happen in the case of land under that Act—*i.e.*, the Land Transfer Act—that a person acquires the legal estate before he becomes registered as proprietor. The registration in such a case is evidentiary of his legal title, but not constitutive of it.

In other cases (and most certainly when the registered proprietor goes bankrupt) the registered estate or interest remains in the registered proprietor until registration of transmission: *Messiter* v. *Wollerman and Freeman*, (1907) 27 N.Z.L.R. 589, 10 G.L.R. 58, and *In re Mayall, Ex parte Galbraith*, [1936] N.Z.L.R. 270, G.L.R. 92.

It is now convenient to distinguish between a transfer and transmission under the Land Transfer Act. A transfer is the passing of any estate or interest in land under that Act whether for valuable consideration or otherwise by means of an instrument called a transfer by the registered proprietor. Transmission is the devolution of property upon some person by operation of law, unconnected with any direct act of the party to whom the property is transmitted, as by death, bankruptcy, insolvency, operation of the *jus accrescendi*, or by special statute or other enactment having the effect of a statute. (By the Land Transfer Regulations a fee of 10s. is prescribed for registering any vesting effected by Act of Parliament, unless otherwise provided by such Act.) The above distinction between a transfer and transmission is as explained by Starke, J., in *Wolfson* v. *Registrar-General of Land*, (1934) 51 C.L.R. 300.

In all cases where transmission is sought to be registered, the simple question to be answered is, has there (subject to the general rule that the legal estate or interest does not pass under the Land Transfer Act until registration) been a vesting at law or a passing of the legal estate or interest at law? In other words has the legal estate or interest been vested in the applicant as fully as it can be vested without registration? The District Land Registrar has the right and duty to satisfy himself on these grounds, and, if he is doubtful, to call for further evidence or to refuse to register the transmission, if he considers there has been no such vesting or passing at law. This may be illustrated both by an Australian and a New Zealand case.

We shall take the New Zealand case first. In *re Poharama*, (1906) 26 N.Z.L.R. 291, a European, the creditor of a Native who had died intestate, took out letters of administration to the Native's estate and

applied to the District Land Registrar to register a transmission to him as administrator of the deceased Native's share in a piece of land. But the District Land Registrar refused to register the transmission because s. 50 of the Native Land Laws Amendment Act, 1895, provided that no estate or interest in the land of any Native dying intestate should pass by virtue of letters of administration. There was a question involved as to whether or not a later amendment to the Native Land Laws had limited the said s. 50. The Supreme Court held that the District Land Registrar was justified in refusing to register the transmission: what was necessary in that case to pass the legal estate was the making of a succession order by the Native Land Court, and its registration in the Land Transfer Office. (The actual decision in this case would apply since March 31, 1910, the date of the coming into operation of the Native Land Act, 1909), to *Native* land owned by Natives but not to other property owned by Natives which (subject to registration requirements, if any), pass by a grant of administration by the Native Land Court, which has *exclusive* jurisdiction to grant administration in the estates of *Natives*, as defined in the Native Land Act, 1931.

In *Miller* v. *Registrar of Titles*, (1915) 19 C.L.R. 681, probate had been granted to Margaret Miller and John Henry Maddock of the will of Daniel Miller. Daniel Miller was registered as proprietor of the land, as executor of a deceased registered proprietor. Margaret Miller and John Henry Maddock applied by transmission to be registered as proprietors. The Registrar of Titles requisitioned for evidence that Daniel Miller was the sole executor appointed by the will of Margaret Miller in these words:

> The memorandum of registration of Daniel Miller as executor to whom probate of the will of Margaret Miller was granted is quite consistent with the said Daniel Miller having been the only proving executor of the will of Margaret Miller and leave may have been given to other executors to come in and prove and one or more of such other executors may have come in and proved or may still have the right so to do, in either of which cases the executors of Daniel Miller would not become the executors of the will of Margaret Miller unless the executors to whom leave was so reserved have died or have renounced or have been cited to come in and prove and have failed.

The highest Court in Australia held that the Registrar's requisition was justified, per Isaacs, J.:

> This appeal should be dismissed and in my opinion solely on the ground that the appellants have failed to prove that Daniel Miller was the sole executor of Margaret Miller.

(There were two persons named Margaret Miller, one was the original registered proprietor and the other was an executor under the will of Daniel Miller.)

The question as to whether or not there has been a vesting or passing of land registered under the Land Transfer Act, 1915, must be determined in accordance with the *lex situs—i.e.*, the law of New Zealand. The fundamental principle is that the title to *land* (including leaseholds but not mortgages of land: *In re O'Neill, Humphries* v. *O'Neill*, [1922] N.Z.L.R. 468, G.L.R. 112) is governed by the *lex situs*. Considerations of convenience and of comity could not, and have not overcome this rule. This principle is illustrated by *Lewis* v. *Belshaw*, (1936) 54 C.L.R. 188. To follow the headnote which correctly summarizes the judgment, a testatrix who was domiciled in England, died possessed of movable and immovable property in New South Wales. The executor named in the will obtained a grant of probate in common form in England, and, as a person entitled to probate who was out of the jurisdiction, brought a suit in the Supreme Court of New South Wales for the grant to his attorney of administration with the will annexed. The suit was contested by a caveator who claimed that the will was invalid. It was held that the validity of the will as a disposition of *immovables* and as a *title to administer them* must be determined independently of the English grant, and that the caveator's objection should therefore be heard and determined upon the merits. It was suggested in the course of argument (and the writer of this article concurs with the suggestion) that the following part of the decision of the Supreme Court of New Zealand in *In re the Will of Ronaldson*, (1891) 10 N.Z.L.R. 228, was erroneous.

The facts in *In re the Will of Ronaldson* (*supra*) were that the testatrix who died domiciled in Scotland owned land in New Zealand: she left two unattested holograph wills which had testamentary effect according to Scottish law. The executor appointed by such wills applied for probate in New Zealand in respect of the New Zealand realty. It was held that probate should be granted in New Zealand of both wills. As the title to land in New Zealand was concerned, it appears that probate should not have been granted, for the wills did not comply with the Wills Act, 1837, which is in force in New Zealand.

The proposition that the vesting must be in accordance with New Zealand law (the *lex situs*) does not mean that the vesting must be pursuant to a statute or other enactment of the Legislature situated in New Zealand. Thus various parts of the English Lunacy Act and Bankruptcy Act purport to apply to real and personal property situated in His Majesty's possessions and thus apparently are part of the *lex situs —i.e.*, of the law of New Zealand: see *Dicey's Conflict of Laws*, 4th Ed. 545, 370, 476. The suggestion put forward on behalf of the Registrar of Land Titles in *In re Annand*, (1888) 14 V.L.R. 1013, that orders made in England under the Lunacy Act had to be implemented by orders of the Victorian Courts before they could affect land in Victoria, appears to have been rejected by the Full Court of Victoria. What is required is that there should have been (subject to New Zealand registration requirements, if any), a vesting or passing of the legal estate or interest, *according to New Zealand law*, and New Zealand law means all the law in force in New Zealand, and not merely statutory or other law of the legislative body situated in New Zealand itself.

Rather a curious corollary to this rule is that where a grant of administration made in another part of His Majesty's possessions is entitled to be resealed in New Zealand by virtue of s. 43 of the Administration Act, 1908, the grant, although it may affect only movable property in its country of origin, will, when resealed in New Zealand, affect the title to land in New Zealand: *Re Whyte, Re Humphrey*, [1923] N.Z.L.R. 154, [1922] G.L.R. 450. In these cases it was held by the late Sir John Hosking that Scottish confirmations and exemplifications under the seal of the Sheriff Court of Scotland were entitled to be resealed in New Zealand; this would be subject to the rule in *Lewis* v. *Belshaw* (*supra*), that, if there is any dispute by interested parties as to their validity as regards tc title to land in New Zealand, the proper tribunal is the New Zealand Supreme Court and the appropriate law, the law of New Zealand, and the Scottish grant may or may not be followed.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Ex-Judge v. Ex-Minister.—In a recent address to the Howard League for Penal Reform, Dr. McMillan, who held for a few months the portfolio of Minister of Prisons, made certain rather sweeping criticisms of the prison system of this country. One would have expected the present Minister, or the Controller-General of Prisons to have answered the strictures, but, curiously enough, this was not done. Then, after a fortnight or so, Sir Hubert Ostler entered the lists with a reply that was full of forthrightness and vigour. Most lawyers will agree that Sir Hubert, at all stages, had much the better of the combat. To-day far too many people seem ignorant of the essential truth which the ex-Judge stated so clearly:

> Prisons are not intended to be places of comfort and amusement at the public expense, but are for the protection of society. The object of a sentence of imprisonment is to deter the prisoner and others from committing offences against the law; the period of imprisonment is used for the purpose of reformation whenever reformation is possible.

A Fair Division.—Gilchrist Alexander in his *The Temple of the Nineties*, tells of Wildey Wright, a well-known, but not highly successful, barrister of the 'nineties. Wright was a counsel of the oratorical type, and one day he and T. Willes Chitty were opposed in a common-jury action before Darling, J. Chitty had a bad cold and had almost lost his voice. He apologized to the Judge and Wildey Wright, in loud booming tones, commiserated with his learned friend. A premonitory twinkle came into the eyes of Darling, J., as he leaned forward and said: "Mr. Chitty, perhaps your opponent will be willing to share his voice with you."

Local Government Run Riot.—There were recently submitted to the Wellington City Council some draft by-laws relating, *inter alia*, to boarding and apartment houses. The Mayor (T. C. A. Hislop) made some trenchant and well-founded criticism of some of the provisions—*e.g.*, a provision requiring the keeping of a register showing the sex of the occupants and whether they were married or single; another requiring the keeping fully open of the windows in every sleeping apartment from 10 a.m. to 3 p.m., except where weather prohibits or where any bed in the room is occupied by any boarder suffering from sickness; another requiring that bedrooms other than those for occupation by married people should be furnished with single, and not double, beds. Lawyers throughout the Dominion will agree with Wellington's Mayor. The time has come to call a halt in the enactment of regulatory puerilities of this sort. One Councillor claimed to justify the provisions by pointing out that they followed, to a considerable extent, by-laws of the London County Council, "the largest local body in the world," and that they had been approved by the New Zealand Standards Institute. Such arguments afford a useful illustration of the methods of bureaucracy. Vest officialdom, public or local, with the appropriate power, and give it a copy of the London County's By-laws, and its attitude will always be: "How *much* of this *can* we copy?" Until it can be induced to alter its method of approach to "How *little* of this *need* we copy?"—there is little hope for real freedom. Lawyers, before all others, owe a duty to the public to raise their voices in protest; and Wellington's Mayor is to be congratulated on his stand.

Our First Johnston, J.—Alexander James Johnston held office as a Judge of the Supreme Court from November, 1858, till June, 1888—just a few months short of thirty years. Prior to his appointment he was an English barrister practising on the Northern Circuit and he was Deputy Recorder of Leeds. Those who have read Alpers, J.'s, *Cheerful Yesterdays* will remember the story there told of this early Judge when he went on circuit for the first time after his arrival in New Zealand. The circuit town was Napier, and the Judge reprimanded the Sheriff for not having arranged for javelin men in accordance with English custom. On his next visit to Napier, the omission was duly rectified. The Judge was heralded by four javelin men, members of a travelling theatrical troupe, "rigged out in tawdry finery, theatrical 'properties,' with helmets and breastplates of tin and with buskins of tragic impressiveness; they carried javelins of lath, the blades pasted over with tinfoil." But the Judge soon became accustomed to colonial ways and informality. He was a sound Judge and a particularly hard-working one. On one occasion, when the Banco work awaiting hearing at Dunedin was in considerable arrears, Johnston, J., went there temporarily and soon relieved the situation. Each day he would hear argument and the next morning he would deliver his judgments in the cases dealt with the previous day. Johnston, J., published the *New Zealand Court of Appeal Reports*, and also our first *Practice of the Supreme Court*.

A Point in Pleading.—Edward Bullen, of *Bullen and Leake* fame, was, as one would expect, a precise draftsman of pleadings; but there was an occasion when precision was carried to an unusual degree. He was briefed for the defendant in an action for seduction, and the statement of defence had been drawn in his chambers. Much merriment was caused in Court when the following paragraph of that document was read "The defendant denies that he is the father of the said twins *or of either of them*." Bullen explained the matter to the Court as an accident in his pupil-room; but his friends were reluctant to accept this statement.

Immovable Furniture.—In the recent case of *Gray* v. *Fidler*, [1943] 2 All E.R. 289, the English Court of Appeal has differed as to the meaning of the word "furniture" as used in the Rent Restriction Act, 1939. Greene, M.R., adopted the definition in the *New Oxford Dictionary*, and held that furniture must be movable; MacKinnon and du Parcq, L.JJ., took the contrary view. The contest related to fitted articles—wardrobes, bed-cupboards, and beds, and other fitted cupboards—but neither Greene, M.R., nor MacKinnon, L.J., could resist the very human temptation of referring, by way of illustration, to the water-closet with its fitted lid; and, curiously enough, these two differing Judges were agreed that it is not "furniture." Speaking of the hinged lid and other hinged devices, Greene, M.R., observed that "the fact that their functions might have been performed by loose articles is nothing to the point"!

OBITUARY.

MR. DAVID FINLAYSON, Lawrence.

The Oldest Practising Solicitor.

Mr. David Finlayson, who died recently at Lawrence, had been a member of the Otago District Law Society for sixty-four years. He was born in Perthshire, Scotland, and educated at the Stirling High School and Edinburgh University. He was articled for five years to a firm of solicitors in Edinburgh. He sailed from Greenoch, in the sailing-ship *Parsee*, with his three brothers, on June 12, 1874, and on September 4 they arrived off the entrance to Otago Harbour.

Mr. Finlayson was articled to Messrs. Stewart and Denniston of Dunedin, and was admitted to the Bar in 1879 and commenced to practice in Lawrence in July, 1880. It was not the Lawrence of to-day, when Gabriel Read discovered gold near the township in 1861. Thousands of diggers from all over the country and from overseas flocked to the scene and the town of Tuapeka (later called Lawrence) grew into being. By 1880 all the glory of the original mining-town had departed; and when Mr. Finlayson arrived the place had still a prosperous look. He recalled the time when several hundred Chinese lived in the district, for many of whom he transacted business. At that time the Magistrates' Court sat every Monday, the Warden's Court every Friday, the District Court twice a month, and the Supreme Court once a month. When Mr. Finlayson arrived, there was a big Police Force, including a Sergeant-Major and three Constables. There was also a Clerk of Court and a Bailiff.

While in Edinburgh, Mr. Finlayson displayed a keen interest in the affairs of the Presbyterian Church in that city, where his uncle, Dr. Finlayson, was minister of one of the largest Presbyterian Churches.

The deceased was associated with the Lawrence Presbyterian Church for over sixty years, being a Sunday School teacher, for a lengthy period, and also a member of the Management Committee. He was an Elder for many years and held the position of Session Clerk for thirteen years. For several years, he served as a member of the Lawrence Borough Council, and was a Director of the Tuapeka Times Newspaper Co., Ltd., holding for some time the position of Managing Director. He rendered invaluable service to the Lawrence Athenæum and Mining Institute of which he was a member of the Committee for a lengthy period.

Before the commencement of the Magistrates' Court in Lawrence in the week following Mr. Finlayson's death, Mr. R. C. Moore made feeling reference to his passing. Mr. Finlayson had been an honoured member of the legal profession for over sixty years. Mr. H. J. Dixon, S.M., said that he had many pleasant recollections of his associations over many years with the late Mr. Finlayson. A characteristic of their late friend was his exactness in all cases. He was a man of integrity and was held in high esteem. He had earned the distinction of being the oldest practising barrister and solicitor in the Dominion. His Worship said that wherever he went Lawrence was always associated with the name of David Finlayson. Lawrence would be the poorer for his death.

At a meeting of the Otago District Law Society, held on September 21, the following resolution was passed:—

"The Council of the Otago Law Society desires to place on record its regret at hearing of the death of Mr. David Finlayson, who has been a member of this Society for the last sixty-four years. The late Mr. Finlayson was a highly respected member of the Society and was well-known throughout the whole of Otago as one of the solicitors who had practised in the early days of the gold-diggings of Central Otago. As such he no doubt was one of those who helped to formulate the mining laws of this country—laws which have had the compliment paid to them of being copied by most other mining countries. Mr. Finlayson probably was the last survivor of those pioneer practitioners and we know it was a source of much satisfaction to him and, incidentally to the Otago Law Society, that Mr. Finlayson had the distinction of being probably the oldest practising solicitor in New Zealand at the date of his decease. Apart from his professional career, the deceased over a long period of his life had been an honoured and useful citizen of the Town of Lawrence where he lived. The Society further desires to extend to Mrs. Finlayson its sincere sympathy in her bereavement."

MR. G. H. HARPER, Otaki.

Mr. George Herbert Harper, who died on November 30, in a hospital in Wellington, was the eldest son of the late Sir George and Lady Harper of Christchurch, and a grandson of the late Bishop Harper, the first Bishop of Christchurch. He was born in Christchurch in 1872, and was educated at Christ's College, Christchurch, and St. Patrick's College, Wellington. He practised law at Otaki from 1899 to 1924, when he retired to take up farming.

He held the office of District Coroner and was Chairman of the No. 2 Wellington-Manawatu Adjustment Commission set up under the Mortgagors and Lessees Rehabilitation Act, 1936, He spoke the Maori language fluently and was a trusted and firm friend of the Maori people.

Mr. Harper was a man of strong faith; of great kindliness of manner; sympathetic, courteous, and understanding to a marked degree; and these qualities, with many others, have endeared him to a large circle of friends. His life was full, long, and active; and he has gone to his last rest leaving behind a record which will be an inspiring memory and source of great pride to all who were privileged to enjoy his friendship.

He is survived by his widow and two sons, Messrs. B. E. Harper of Cambridge and A. Harper of Te Horo, and two daughters, Mesdames H. Derham of Te Horo and F. Neate of Otaki: and by one sister, Mrs. J. Loughnan, and a brother, Mr. Robin Harper, both of Canterbury. The Harper family has an outstanding and inspiring War record.

A son, Private T. A. G. Harper, was killed at Sidi Resegh, Libya, in 1941, while serving with the 2nd N.Z.E.F.; while four brothers of Mr. G. H. Harper also served with great gallantry and distinction during the last War. Captain Robin Harper commanded the Machine-gun Squadron in the New Zealand Mounted Brigade in Palestine and was awarded the D.C.M., M.C., and D.S.O., and was commissioned in the field. On one occasion while covering a difficult withdrawal he was wounded in three places and was brought to safety by two courageous gunners who carried him down to a river and swam across with him to a place of safety. Lieut. Gordon Harper, who was also commissioned in the field, served with the same unit and was awarded the D.C.M. and M.C. He, and a third brother, Trooper Eric Harper (who was one of the 1905 All Blacks) were both killed in action. A fourth brother, Major P. H. Harper, served with the N.Z.E.F. in France and on his return to New Zealand practised law in Levin and subsequently became a Stipendiary Magistrate at Gisborne, where he died while in office. A fifth brother saw service in the Boer War and he died after his return to New Zealand from the effects of war service.

Amgot.—The invasion and occupation of Sicily by the Allies made it necessary to provide for the civil administration of the country. For this purpose the system known as the Allied Military Government of Occupied Territory (for short, Amgot) was introduced. The rule of International Law applicable to such cases requires the civil administration to be left to the local civil authorities, while it is, of course, essential that military authority should be preserved and order maintained. Any such general rule is, of course, subject to the actual circumstances. Thus Palermo, a city of some 362,000 inhabitants, had been practically abandoned by the population and only those entrusted with the duties of maintaining order and carrying on essential services remained at their posts. There was thus an absence of the ordinary civil administration, which made it necessary for the Allied forces to supply, to a large extent, the place of the local officials. This they did, even in such matters as national insurance, and incidentally they discovered the extent of the corruption which had prevailed under Fascist rule. That shows the thoroughness with which Amgot is performing its functions, but an amusing feature is introduced in connection with the maintenance of order. "Each department is staffed by equal numbers of British and American officers, and British police officers are almost wholly drawn from the Metropolitan Police Force. The London bobby is already recognized in Sicily as the same imperturbable friend of the people as at home."

—APTERYX.

PRACTICAL POINTS.

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1. Stamp Duty.—*Transfer to Incorporated Society—Assessment of Duty.*

QUESTION: Two settlers who are registered as joint proprietors of a piece of land on which a public hall is built are the trustees for a body of settlers in the district who had formed themselves into a Public Hall Association. This Association has now been incorporated under the Incorporated Societies Act and the trustees are asked to transfer the property of the old association to the incorporated one. What is the correct stamp duty on the transfer?

ANSWER: The correct duty is 15s., as a deed not otherwise chargeable under s. 168 of the Stamp Duties Act, 1923. The transfer is by way of confirmation of title merely: *Pattison* v. *Commissioner of Stamp Duties*, [1940] N.Z.L.R. 93. When an unincorporated body is incorporated under the Act, the property of the former body belongs to the incorporated society: *Hastings Volunteer Fire Brigade (Inc.)* v. *Brausche*, (1915) 17 G.L.R. 653.

Another reason why the transfer is exempt from *ad valorem* conveyance duty is that a trust for a public hall is *charitable*: see *Re Spence's Estate, Barclay's Bank, Ltd.* v. *Stockton-on-Tees Corporation*, [1937] 3 All E.R. 684; s. 81 (*f*) of the Stamp Duties Act, 1923.

2. Landlord and Tenant.—*Notice to Quit—Specified Date of Expiry.*

QUESTION: *Wylie's Magistrates' Courts Practice*, 381, dealing with the recovery of tenements, says that in order that a weekly tenancy may be determined by a notice to quit the notice must be one which expires at the end of a periodic week from the commencement of the tenancy; if the landlord is doubtful when the week ends, the notice must say that the tenant has to quit on the proper day of expiry next after one week from date of service of notice: *How* v. *Mansfield*, [1925] N.Z.L.R. 91.

Does the above conflict with the paragraph on page 382 taken from the decision of *Herron* v. *Yates*, (1911) 31 N.Z.L.R. 197? It would appear to me that these decisions conflict.

ANSWER: The two decisions referred to do *not* conflict. In *Herron* v. *Yates* the matter was determined under s. 16 of the Property Law Act, 1908. There was a tenancy and no agreement as to its duration. Therefore, there was created a *statutory tenancy at will* but with the condition that a month's notice must be given to terminate it.

3. Stamp Duty.—*Transfer to Devisee of Purchaser under Agreement for Sale and Purchase—Stamp Duty payable.*

QUESTION: A., in 1933, agreed to purchase a parcel of land from B. for £500, and *ad valorem* duty amounting to £5 10s. was paid thereon. A. died in 1942, devising this land to his son D. All moneys owing under the agreement for sale and purchase have been paid, and C., A.'s executor, has requested B. to transfer the legal estate in fee-simple direct to D. What is the stamp duty payable on the transfer from B. to D., to which C. will be made a party?

ANSWER: At first the question discloses a *casus omissus* in the Stamp Duties Act, 1923. It is submitted, however, that by a parity of reasoning adopted by the Court of Appeal in *Commissioner of Stamp Duties* v. *Thompson*, [1926] N.Z.L.R. 872, G.L.R. 580, in its interpretation of s. 81 (*d*), the word purchaser in s. 91, would be construed by the Courts as embracing the devisee of a purchaser: in other words, for the purpose of the exemption D. ought to be entitled to stand in the shoes of A. The crux of the decision in *Phillips* v. *Commissioner of Stamp Duties*, [1928] G.L.R. 518 (a transfer to the guarantor of a purchaser under agreement for sale and purchase, where it was held that s. 91 did not apply), was that in fact there had been *two* sales. Here there has only been one; and it is submitted that the correct stamp duty on the transfer from B. to D. is 3s.

4. Lease.—*Memorandum of Extension of Lease—Stamp Duty.*

QUESTION: What is the correct duty payable on a memorandum of extension of lease under the Land Transfer Amendment Act, 1939? The stamp duty on the original lease was £1 15s., as on a yearly rental of £500.

ANSWER: Memoranda of extensions of leases are in substance new leases and come within the definition of "lease" in Part VI of the Stamp Duties Act, 1923. Therefore, unless the extension in question alters the consideration in any way, the duty thereon will be the same as in the original lease—*i.e.*, £1 15s.

5. Costs.—*Writ of Summons—Possession of Land and Arrears of Rent—Judgment by Default—Costs.*

QUESTION: A writ of summons has been issued for possession of land and arrears of rent. No defence has been filed, and it is desired to enter judgment by default. Can the costs of the action be included in such judgment?

ANSWER: Under R. 227 of the Code of Civil Procedure judgment by default for possession of land can be entered, but the costs of such action cannot be included: see *State Advances Superintendent* v. *Harwood*, [1934] N.Z.L.R. 828, which, however, dealt with the position where possession only was claimed. There was no claim for arrears of rent.

Applying R. 226, dealing with judgment by default in the case of liquidated demands (as where rent is claimed), a judgment by default for the rent claimed, in addition to possession of the land, and for costs, at any rate to the extent of the amount of rent claimed, could be entered. To remove any doubt, the question of costs, by default, in such case might be tested by moving for judgment under R. 232A, or setting down the case for hearing under R. 232B.

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THE OFFICE OF JUDGES.

INDUSTRIOUS authors, and benevolent publishers, have devoted much time and thought in an endeavour to equip and to maintain the practising barrister in the arts and crafts of his profession. He is thus enabled to procure Guides to help him in ascending the heights. As the more or less busy years go on, he may sustain himself with the Hints that are his for the purchasing. When the shadows lengthen, there are sundry Lamps to be had for his advocacy (and no coupons required). And, in addition to the adventitious assistance of the written word, he is, throughout his forensic career, the recipient of much well-meant advice, gratuitously supplied by the members of the tribunals before whom it is his duty, if not always his pleasure, to appear.

Yet, in the ever-increasing bulk of legal literature, there is not to be found one comprehensive treatise containing sailing directions for one who is about to embark on the onerous duties that fall to the lot of His Majesty's Judges. For him there is no Guide; not even a Hint. And for lack of Lamps, the Judiciary seems to be condemned to wander in a perpetual blackout. Save with one notable exception, to which we shall refer, it would seem that the centuries of English legal history and learning have left the Judge in his exalted isolation to achieve and practise the art (or is it the science ?) of his calling by the simple method of trial and error.

There must be some explanation for this *liber omissus*. In the first place, upon appointment to the Bench, in these modern days, the voice of the elevated is stilled by reasons that will suggest themselves to the initiated. Mr. Justice Avory was asked some years ago by Lord Hewart, L.C.J., what he should say about the Judges in a forthcoming reply to a toast of their health. "Oh! say that we are well satisfied with the universal admiration in which we are held," was the ready answer. Lord Hewart tells us that he followed that suggestion, though a natural caution prompted him to interpolate the word "almost" before the word "universal." A glimmering of the reasons may be seen in Lord Bowen's remark when a committee of the Judiciary were considering an address to the Queen on the opening of the Law Courts. With the humility that cloaks true greatness, the draft prepared by Lord Selborne, L.C., contained the phrase, "We, Your Majesty's Judges, conscious as we are of our manifold shortcomings." Sir George Jessel, M.R., testily interjected that he was himself not conscious of manifold defects, and if he were he should not be fit to sit on the bench. "Why not say," suggested Lord Bowen, "'Conscious as we are of each other's manifold shortcomings'?" But his amendment was not adopted. In the second place it may well be that the real reason for a lack of literature on the duties of a Judge lies in the fact that the voice of him, who, from the ranks of the Bar where all text-books are written, would commit himself to advice or suggestion, is hushed where the Judiciary is concerned. Sensitive souls might take it to be implied criticism. *Quis custodiet ipsos custodes* ?

But, after all, Lord Bacon, in his Essay, "On Judicature," may have written, in a few pages, the last word on the theory and practice of the perfect Judge. To improve upon him may have been found impossible in the three hundred and fifty years since his writing. And there is consolation in the fact that a great Lord Chancellor—though even he did not practise all that he preached—has once and for all outlined the whole duty of a Judge. That is plain when we examine extracts from his matchless essay. How well might his precepts be adopted and acted upon by Judges of all time!

Lord Bacon begins by saying: "Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law." That there has been much judicial law-making since that advice was given is unquestioned; and even the Privy Council has legislated on occasion, to the discomfiture of the reversed. But then generations of Judges have told us that their judgments have not extended the common law; they have merely stated what it has always been. So we are professionally bound to an understanding that the more they change it, the more it remains the same thing.

Still Lord Bacon's advice is a counsel of perfection. At times, in its relation to statute law, a Judge has forgotten it, and has by no means confined his office to *jus dicere*, when he has ventured to rebuke the Legislature or the Executive whose function it is to *jus dare*. And, in so doing, not every one has expressed himself in the guarded language used by Chief Justice Vaughan, when, in *Harrison* v. *Burwell*, (1670) 2 Vent. 9, 10, 86 E.R. 278, 279, he said: "Perhaps if we, the Judges, had been makers of the law, this question had not been; but we are to proceed upon the laws as made, & cannot alter them. This is not a thing of our promotion, & this I speak to satisfy such as may object against us." The Judges, as Lord Bacon indicates, have nothing to do with policy; their duty is simply to ascertain the meaning of a statute as it stands: to construe the law, not to make or to criticize it.

Lord Bacon also wrote: "It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness or conceit in cutting off evidence or counsel too short; or to prevent information by questions, though pertinent." Of course, no Judge of any experience would nowadays interrupt a cross-examination by cutting off evidence or counsel too short. As counsel opens the plaintiff's case, the real issue becomes clear to the Bench. When a witness has been examined, cross-examined, and re-examined, that which is true and material in his evidence is quite plain. Howsoever difficult he may find it, the Judge, if he is to suspend judgment until both sides have been heard, must hear each side out.

It is true that many eminent Judges in recent times have adopted the Socratic method with counsel by way of getting at the real point at issue in an argument. Sir George Jessel did, and Lord Esher. Constant questioning from the Bench spoils the symmetry of an argument, and, by leading to reiteration of submissions, if carried too far, results in a costly waste of time. Some one, however, has said that truth is more than symmetry, and time must wait on justice. But a multitude of "questions, though pertinent" are disconcerting to the best of counsel, whose endeavour always is to elicit truth and to avoid unnecessary cost to his client, to whom time spent in litigation means money. It is recorded that that great Judge, Lord Watson, was once heard breaking into counsel's argument with frequent questions while pursuing a line of thought that had occurred to him. The case was the trade-union one, *Allen* v. *Flood*, [1898] A.C. 1, and the point at issue was what constituted "molesting." Lord Morris, who was beside him, endured these questionings for some time, but he was at last compelled to observe: "I think that the House quite understands now the meaning of molesting a man in his business." But the same Lord Watson once told a friend of his that he never interrupted a fool.

Correlative with the last precept is Lord Bacon's dictum, "Patience and gravity of bearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal." No one who has ever earnestly attempted to perform the duties of a Judge fails to realize these facts.

In an address given last year to the Society of Comparative Legislation, Lord Atkin said: "As a Judge, my experience has been that 80 per cent. of the cases try themselves if the Judge will only sit still and hold his tongue." Emphasis, too, is given to Lord Bacon's dictum by a recent incident in the Court of Appeal. The point at issue was a very short one, and the facts were within a narrow compass. One of the learned Lord Justices asked counsel who was addressing the Court why the argument in the Court below had extended over three days. Counsel was equal to the emergency. He replied: "It was this way, my Lord: His Lordship took a very great interest in the discussion."

And "gravity of bearing." There has always been some objection to "humour on the Bench." A high quality is nowadays the only justification for judicial wit. When a Judge is tempted to be funny, he should remember that there are usually two persons in Court to whom the suit may be anything but a joke; and one of them will probably have to foot the bill for the costs of the whole of the proceedings.

Not that wit or humour is always out of place in a Court of Justice: *Dulce est desipere in loco* is as true in a banco argument as it was on Horace's Sabine farm. Sir William Erle, L.C.J., told counsel who apologized for raising a laugh: "The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity." And how many delightful interludes there have been, when, in humorous vein, a Judge has attracted pointed attention to some constructive observation! To give one example, among the many: Once, before the late Mr. Justice MacGregor, counsel for the prisoner was addressing the jury on a count which charged his client with the possession of housebreaking tools. Counsel was telling the jury that the iron bar found in the accused's motor-car was merely a lever for taking off and replacing the tyres. "And," interjected the Judge, "you had better go on and tell the jury that the gelignite found on the back seat was for blowing them up again!"

But to proceed with Lord Bacon: "The parts of a judge in hearing are four: to direct the evidence; to moderate length, repetition, or impertinence of speech; to recapitulate, select, and collate the materia points of that which hath been said; and to give the rule or sentence." As to the last, Lord Esher said that "the business of a Judge is to find good legal reasons for conclusions of common sense." The tasks of the Judge have not become easier since Lord Bacon gave this synopsis of his duties. Nowadays, he has often to endure running-down cases, wherein, as a high judicial authority has it in one of his essays, there will be found "a person, or the relatives of a person, who has suffered bodily injury in a collision between two stationary motor-cars, each on its proper side of the road, and each keeping a good look-out, endeavouring to convince a Judge and jury that the liability rests upon the defendant, and to collect suitable compensation by way of damages."

Were Lord Bacon alive to-day, and in a writing mood, he would perhaps have some advice for a Judge presiding over a running-down action, maybe in this wise: "Neither hath this thing to be revealed to the jury (though peradventure they may wax wider in their knowledge, which is of all mankind), that the magnitude of the reparation is measurable, in the sum which hath been sought by the sower of suit, by the extent of the capacity of the unnameable pool to pay it. Salomon saith, *He that considereth the wind shall not sow, and he*