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IN DIVORCE: SOME RECENT IMPORTANT JUDGMENTS.

DURING the last few months our Courts have delivered some important judgments in their divorce jurisdiction. Two are concerned with desertion, and two with petitions for a decree of dissolution of marriage on the ground of failure to comply with a decree for restitution of conjugal rights.

We propose now, and in our next issue, to review them briefly.

1.—Desertion.

In *M.* v. *M.*, Mr. Justice Finlay had before him a petition by a husband on the ground of his wife's desertion, which was alleged to have continued from October, 1939, until October, 1942. In August, 1941, the wife had been committed to a mental hospital under a reception order, which, after renewal, was in full force and effect at the time of the hearing of the petition. The evidence of the superintendent of the mental hospital established that the wife was, and since her reception in a mental hospital had been, incapable of forming any rational decision in relation to her matrimonial affairs.

The petitioner's counsel relied on *Creighton* v. *Creighton*, (1906) 9 G.L.R. 273. In that case, the petitioner sought a decree for dissolution upon the ground of the respondent's desertion for five years and upwards. It appeared that the respondent had deserted the petitioner in the year 1892; but that in the year 1903 he had been, and still was at the date of the hearing, in December, 1906, confined as a lunatic patient in a mental hospital. Edwards, J., expressed some doubt as to whether a period of desertion under the statute must not be continuous up to the date of the presentation of the petition, and whether the respondent could be said to have deserted the petitioner during the period of his confinement. The case was adjourned to enable petitioner's counsel to consult authorities. The suit was an undefended one. The learned Judge later said:

> The authorities cited show that where a desertion has begun it continues, notwithstanding the fact that the party is prevented by imprisonment from returning to cohabitation. The same principle applies where the party is prevented from returning to cohabitation by his detention in a lunatic asylum.

In his judgment in *M.* v. *M.*, Mr. Justice Finlay pointed out that *Creighton's* case could properly be said to be of authority only upon the effect of confinement in a mental hospital upon a suit for dissolution where the full statutory period of desertion had already expired before the confinement commenced. In *M.* v. *M.*, however, he said, the insanity intervened before the statutory period had expired. His Honour was, therefore, concerned to determine whether a respondent could be said to have left the petitioner continuously deserted without just cause, or at all, when, for an appreciable part of that period she had been detained in a mental hospital under a reception order.

The learned Judge considered that the principles by which the case before him should be determined were unequivocally enunciated by the English Court of Appeal in *Williams* v. *Williams*, [1939] P. 365, [1939] 3 All E.R. 825, which decided the question raised in *M.* v. *M.* He referred to the fact that that case had been followed, and to some extent explained, in *Rushbrook* v. *Rushbrook*, [1939] 4 All E.R. 75, and accepted as authoritative, though distinguished, in *Monckton* v. *Monckton*, [1941] 3 All E.R. 133. After pointing out a difference between the English statute and our own, Mr. Justice Finlay applied the principle of *Williams* v. *Williams* with relation to the facts of the petition before him by reason of the fact of the existence of an *animus deserendi* and the possibility of its proof, if its existence is possible, were factors common to both. He said:

> If, as was held in *Williams* v. *Williams*, the capacity to have the *animus* to continue to desert is by law denied to a certified lunatic in respect of one part of a period of detention, then that capacity must be denied in respect of the whole period during which precisely the same conditions pertain.

His Honour then concluded:

> On the authority of *Williams* v. *Williams*, therefore, the respondent here cannot be held to have had the necessary *animus deserendi* since August 13, 1941. Even if she had, its existence could not, on the authority of *Rushbrook* v. *Rushbrook*, be made the subject of proof. . . . In the result, the petitioner has failed to prove that he had been deserted by the respondent for a period of three years, and the petition must be, and is hereby, dismissed.

From the foregoing, it appears that *Creighton* v. *Creighton* is authority, if authority be needed, for the principle that where the full statutory period of desertion has expired before the respondent became confined in a mental hospital, the petitioner is entitled to a decree. It is not authority for the proposition that, where desertion has begun, it continues notwithstanding the fact that the deserter is prevented from returning to cohabitation by detention in a mental hospital.

M. v. *M.*, on the other hand, decides that if the respondent has deserted the petitioner, but, before the full statutory period has ended, he has become confined in a mental hospital, and such detention continues at the date of the petition, the petitioner is not entitled to a decree, because, for the reasons given in the judgment, the statutory period had not concluded as it ceased to run in favour of the petitioner when the respondent became so confined.

We have justification for saying that it was at first intended to appeal against the judgment in *M.* v. *M.* The learned Judge himself would have facilitated such an appeal; but counsel for the petitioner, on consideration, was satisfied that *Creighton's* case would inevitably have been overruled in the Court of Appeal. Consequently, the matter will not go further.

While supervening insanity was held to suspend any existent *animus deserendi* that might have existed, decision of the question whether internment as an alien enemy had the like effect was the substantial part of the judgment of the same learned Judge in *Johnson* v. *Johnson*. The wife was the petitioner in an undefended suit for dissolution of marriage on the ground of three years' desertion. The parties were married in August, 1939, the husband being a German national who had not acquired New Zealand domicil. The husband had formally changed his name to "Johnson" before the marriage; and the wife was an office-assistant in Auckland until the end of the year 1939, and she almost exclusively maintained the matrimonial home, a flat, until the end of October, 1940. Then she became ill, and was in hospital in Auckland for thirteen days, during which period the husband did not visit her or communicate with her. On the day of her discharge, the husband met her and took her some clothing. He then informed her that he had "packed up the flat," said he had no money, and told her to go to her relatives. She went to her mother at Hawera, about November 19, 1940. She wrote to him early in 1941, regarding an operation for which the hospital authorities required his consent. He answered that letter, and his reply, in the words of the judgment, was "entirely devoted to a self-pitying account of his difficulties, chiefly monetary," but did not mention the consent his wife had sought. Two features emerged from this letter: The first was that, since parting from his wife, he had been for a time disabled, and for the whole of the time almost penniless; and the second, that he was urgently desirous of leaving New Zealand. Apart from that letter, the wife heard no more from her husband or about him, until about March, 1941, when she had official advice that he had been interned as a German national. The wife wrote to him, but, in his reply, he said that she was to write to him only if it was absolutely necessary, and that, if she went to see him, he would refuse to see her. In a letter, dated March 15, 1943, the husband discouraged any attempt by his wife to obtain his release, and reiterated his settled determination to leave New Zealand after the war. Notwithstanding a previous protest by the wife, the husband made no suggestion as to what, when he leaves, is to be done or arranged by him for his wife and child.

On the facts, as summarized above, three questions arose for determination in this undefended suit:—

1. Did the respondent desert the petitioner before his internment?

2. If he did so desert her, did his internment operate to suspend or determine the period of desertion?

3. Is the petitioner entitled in any event to petition for divorce, having regard to the fact that she is married to a German national who cannot be said to have ever acquired any domicil in New Zealand?

The learned Judge, with regard to the first question, gave careful consideration to the difficult position of an enemy alien in a British community, and the probability that the conduct and expressions of a man so placed were uncertain and confused. His Honour then reviewed the facts, and said that, taking a broad view, and without founding any conclusion upon any specific words or phrases, there was ample justification for the comment that the constant and dominating purpose of the respondent was to put and keep the petitioner at arm's length. He proceeded:

> There is thus evidence from which the only reasonable and proper conclusion is not that the husband merely neglected opportunities of *consortium* with the wife—which is not desertion: *Williams* v. *Williams*, (1864) 33 L.J. P.M. & A. 172—but that he intended and did by his misconduct cause her against her wish and desire to live separate and apart. This satisfies the whole definition of desertion as defined in *Purdy* v. *Purdy*, [1939] 3 All E.R. 779, and in numerous authorities in New Zealand such as *Biddle* v. *Biddle*, [1921] G.L.R. 632, to which counsel has referred me.

The learned Judge found, therefore, that the respondent deserted the petitioner at Auckland early in the month of November, 1940, a finding that raised for consideration the second question postulated above.

Before giving a concluded answer to the second question, His Honour found it necessary, first, to say explicitly that the evidence satisfied him that the respondent had never in fact abandoned the *animus deserendi* to which he first gave effect by his conduct in November, 1940. As to that, his last letter was as convincing as words could well be. This being so, the case fell within the scope of the judgments in *Astrope* v. *Astrope*, (1859) 29 L.J. P. & M. 27, and *Drew* v. *Drew*, (1888) 13 P.D. 97. His Honour expressly refrained from relying on *Creighton* v. *Creighton* (*supra*) for the reasons he had given in *M.* v. *M.*, which is discussed above. His Honour added:

> Here, despite the internment of the respondent, there is a maintained *animus deserendi*, which distinguishes the case from all those in which, by reason of mental incapacity, the existence of such an *animus* is, as a matter of conclusive legal presumption, non-existent: see *Williams* v. *Williams*, [1939] P. 365, [1939] 3 All E.R. 825. I must, therefore, hold that the state of desertion, which began in November, 1940, and was then intentionally created by the respondent, continued uninterruptedly since then and down to the present time—a period in excess of the period of three years fixed by the statute.

This finding, in effect, disposed of the case. The learned Judge said that the wife satisfied the conditions recited in s. 3 of the Divorce and Matrimonial Causes Amendment Act, 1939, and was clearly entitled to main-

tain the suit in consequence. He drew the attention of counsel to the comments on that section in the judgment of MacGregor, J., in *Worth* v. *Worth*, [1931] N.Z.L.R. 1109, 1133.

In our next issue, we shall review the judgments dealing with the meaning of the word "home" in R. 6 of the new Matrimonial Causes Rules, 1943, and the kind of home to which the respondent is to be informed she might return. The rule is itself new, and the judgments on the point are of importance to all who are acting for the parties to a petition by a husband in which dissolution of marriage is sought on the ground that the respondent has failed to comply with a decree for restitution of conjugal rights.

SUMMARY OF RECENT JUDGMENTS.

FULL COURT.
Wellington.
1944.
March 8, 16.
Kennedy, J.
Callan, J.
Northcroft, J.

S. v. NEW ZEALAND LAW SOCIETY.

Law Practitioners—Practising Certificate—Neglect to apply for a Certificate for Two Years—Retrospective Effect of Statute—"Neglect"—"Fit and proper person"—Statutes Amendment Act, 1943, s. 20.

Section 20 of the Statutes Amendment Act, 1943, has retrospective effect. The words, "has neglected to apply," in subs. 2 of that section mean "has not applied" or "has failed to apply when it was possible to apply."

The Disciplinary Committee of the New Zealand Law Society on a reference to it under s. 20, and the Court on an appeal from the order of that Committee, in deciding whether the practitioner is a fit and proper person, has to consider the way in which that practitioner, even though of good character, is likely to discharge his duty to the Court and to his clients and particularly the effect of accrediting him to the public by the means of a certificate.

S. had failed to apply for a certificate for more than two years after the expiration of the certificate last issued to him. His application for a certificate as a practitioner was still pending when the Statutes Amendment Act, 1943, came into force. The Disciplinary Committee made an order prohibiting the Registrar from issuing such certificate. On appeal from its order,

Held, Dismissing the appeal, 1. That s. 20 of the Statutes Amendment Act, 1943, applied, and the Disciplinary Committee had jurisdiction to make an order thereunder prohibiting the Registrar from issuing a certificate to him.

2. That, after hearing the evidence, and after seeing and hearing the appellant in the conduct of his own case, it was established that the appellant had not such stability and judgment as to be a fit and proper person to practice as a barrister.

Counsel: *von Haast*, for the respondent Society; Appellant, in person.

Solicitor: *T. P. Cleary*, Wellington, for the respondent.

SUPREME COURT.
Wellington.
1943.
November 17;
December 6, 21.
Finlay, J.

M. v. M.

Divorce and Matrimonial Causes—Desertion—Supervening Insanity during Three Years' Period—No Continuance of animus deserendi*—Divorce and Matrimonial Causes Act, 1928, s. 10* (b).

Supervening insanity during the period of three years' desertion without just cause required by s. 10 (*b*) of the Divorce and Matrimonial Causes Act, 1928, prevents the continuance of that desertion, as it prevents the continuing existence of the *animus deserendi*.

Williams v. *Williams*, [1939] P. 365, [1939] 3 All E.R. 825, applied.

Creighton v. *Creighton*, (1906) 9 G.L.R. 273, distinguished.

Rushbrook v. *Rushbrook*, [1940] P. 25, [1939] 3 All E.R. 73, referred to.

Counsel: *T. G. Taylor*, for the petitioner; *Carrad*, for the respondent.

Solicitor: *T. G. Taylor*, Wellington, for the petitioner.

SUPREME COURT.
Auckland.
1943.
November 22.
1944.
January 31;
March 13.
Fair, J.
Callan, J.

MARELICH v. AUCKLAND HOSPITAL BOARD.

Practice—Special Jury—Application for Trial by Special Jury granted without calling on Defendant—Motion to review and rescind—Whether Further Affidavits admissible—"Special circumstances"—Grounds of insufficiency of further Affidavits—Statutes Amendment Act, 1939, s. 37—Code of Civil Procedure, RR. 410, 421.

A defendant applied for trial before a special jury of an action in which plaintiff alleged that, by certain acts of negligence on the part of the defendant's agents and servants, plaintiff suffered the loss of leg by amputation. Affidavits were filed in support of the defendant's application, but none by the plaintiff. An order for a special jury was made without calling upon defendant's counsel.

On a motion to review and rescind such order, defendant's affidavits were held not to comply with the conditions laid down in *Shiska* v. *National Trading Co. of New Zealand, Ltd.*, [1941] N.Z.L.R. 20, G.L.R. 593.

Leave was given defendant to file further affidavits subject to objection as to their admissibility.

On the hearing of the motion.

Held, That the fact that defendant's counsel was not called upon on the hearing of the application for a special jury and, therefore, was not required to consider whether he should ask for an adjournment of the hearing to enable him to supplement his affidavits prior to consideration of the motion in Chambers constituted "special circumstances" under R. 410 of the Code of Civil Procedure which would have enabled him to have renewed his application.

In re Munns and Longden, (1884) 50 L.T. 356; *Alexander* v. *Porter*, (1842) 1 Dowl. (N.S.) 299; *Edwards* v. *Martyn*, (1851) 17 Q.B. 693, 117 E.R. 1448; and *Braund* v. *McLean*, (1906) 26 N.Z.L.R. 270, 8 G.L.R. 737, referred to.

Held, further, that the further affidavits referred to, the substance of which is set out in the judgment, did not comply with the conditions laid down in *Shiska* v. *National Trading Co. of New Zealand, Ltd.*, as, although they set out or referred to certain issues that were likely to require consideration they did not specifically state the facts that caused the issues to be difficult to decide nor did they specifically indicate the nature of the difficulties that might arise or establish that they were likely to arise.

Shiska v. *National Trading Co. of New Zealand, Ltd.*, [1941] N.Z.L.R. 20, G.L.R. 593, applied.

Duthie v. *Union Airways of New Zealand, Ltd.*, [1939] N.Z.L.R. 1050, G.L.R. 659, distinguished.

Counsel: *Haigh*, for the plaintiff; *V. R. S. Meredith* and *Goldstine*, for the defendant.

Solicitors: *F. H. Haigh*, Auckland, (agent for *C. J. O'Regan*, Wellington), for the plaintiff; *Goldstine, O'Donnell, and Wood*, Auckland, for the defendant Board.

COMPENSATION COURT.
Auckland.
1944.
March 10, 14.
O'Regan, J.

PENBERTHY v. MARTHA GOLD-MINING CO. (WAIHI), LIMITED.

Workers' Compensation—Notice—Delay in Notification—Abrasion of Foot invisible until Two Days after Accident—Employees' Rules requiring Notice of Abrasions, however slight at Dressing-station as well as to Tally-clerk at Mine—Rule including Notification of reprisal to pay Compensation on non-observance—Employee reporting Accident to Tally-clerk and not at Dressing-station—Whether Neglect to give Notice as soon as practicable after the Happening of Accident—Workers' Compensation Act, 1922, s. 20.

The defendant company had for some years had a dressing-station, presided over by a nurse, at which even the most minute accident had to be reported for the purpose of treatment, as soon as practicable after it opened following the shift during which the injury was received as well as to the tally-clerk before leaving the mine. On its notices the stipulations of which are incorporated in each man's contract of service, the company stipulated that it would refuse to pay to an employee failing to observe these rules compensation to which but for such failure he would otherwise be entitled.

When the plaintiff was at work on a Friday in the company's mine, a piece of rock, weighing about a couple of pounds, fell from the roof and struck his left foot at the base of the toe. He did not remove his boot or cease work, but reported the accident to the tally-clerk, and later, when having the usual shower-bath, examined the foot, but could see no injury. On the following Sunday evening he felt a burning sensation and then consulted a doctor, who found him suffering from cellulitis, which may arise from a trivial skin abrasion which might pass unnoticed by the sufferer.

The defendant company denied liability on the ground that in the circumstances of the case the plaintiff failed to give notice as soon as practicable after the accident.

Held, That the notice contemplated visible injuries; and that the plaintiff committed no breach of it, behaved throughout in good faith, and had reasonable cause for acting as he did and was entitled to compensation.

Heath v. *Waihi Gold-mining Co., Ltd.*, [1935] N.Z.L.R. 103, G.L.R. 175, followed.
Peacock v. *Martha Gold-mining Co.* (*Waihi*), *Ltd.*, [1936] N.Z.L.R. 25, G.L.R. 43, distinguished.
Ellis v. *Fairfield Shipbuilding and Engineering Co., Ltd.*, (1912) 6 B.W.C.C. 308, referred to.

Counsel: *Sullivan*, for the plaintiff; *Hore*, for the defendant.

Solicitors: *J. J. Sullivan*, Auckland, for the plaintiff; *Buddle, Richmond, and Buddle*, Auckland, for the defendant.

SOME NATIONALITY PROBLEMS.

Further Comment.

[CONTRIBUTED.]

On some minor points in the informative article published on p. 13, *ante*, additional comment may perhaps be usefully tendered; without, however, seeking to impair the major conclusions of the article, which appear to the present writer to be correctly drawn.

1. "In international law, the terms 'nationality' and 'citizenship' are, generally speaking, synonymous. 'The nationality of an individual is his quality of being the subject of a certain State, and, therefore, its citizen'." [*Oppenheim* is cited.] Thus, for example, the citizen of the United States is necessarily also a national of the United States." [*Hyde* is cited.] Down to recent years, this proposition could not have been questioned. The idea was that "subject" stressed a person's liabilities, and was apt for use in monarchies; "citizen" stressed his rights, and was the proper word for republics to use: but in law they meant the same, and either of them could be replaced by the colourless French word "national." There are nowadays, however, at least three current usages sufficiently widespread to justify one in maintaining that even with the qualification "generally speaking," at the present time in British law, and also in United States law, if not more widely, "nationality" and "citizenship" can no longer be regarded as synonymous. The usages referred to are these:—

(*a*) "Citizenship" is conveniently distinguished from "nationality" to denote the sub-nationality within the British Commonwealth of a State of that Commonwealth. The word has been adopted in this sense by text-writers: for instance, Professor Baker, in *The Present Juridical Status of the British Dominions*, p. 219, mentions "the nationality shared in common by all the subjects of the King," and then refers to "another kind of nationality or citizenship which is confined to the different Dominions, and not shared by those in other parts of the British Commonwealth. . . . For the most part, Dominion Parliaments have only admitted to their 'citizenship' those who would also qualify for British nationality." Professor Keith, in *Speeches and Documents on the British Dominions*, p. 456, says: "In addition to being British subjects certain persons have been defined to be Dominion citizens or nationals." Legislatures have also used the term; that of Eire, in its nationality law; that of Canada, in its Immigration Act (though the Canadian Nationality Act of 1921, consolidated in 1927, speaks of "Canadian nationals" and "Canadian nationality," and South Africa also uses the term "national"). Finally, the English Courts have also adopted the distinction—*e.g.*, *Murray* v. *Parkes*, [1942] 2 K.B 123, 131: "a national character as an Irish citizen within the wider British Nationality."

(*b*) "Citizenship" is used to describe the status of persons who belong to a territory which is not recognized as a sovereign state, or a dependency of one. If a country has no independent foreign relations, and accordingly does not issue passports in the name of its sovereign, it cannot lay claim to "nationals." It would be technically inaccurate, as well as rather comic, to speak of the "nationals" of, say, Togoland. Thus we have the Palestinian Citizenship Order, 1925 (U.K. Stat. R. & O., 1925, p. 474). In this sense the term "citizen" could conveniently be applied to the subjects of the Niẓam of Hyderabad or the Queen of Tonga, or to the "persons belonging to" any other protected, mandated, semi-sovereign, or sub-suzerain State or territory.

(c) Thirdly, " citizen " is used to describe the superior status, within that of nationality, of the inner circle of persons who enjoy full civil rights (or would enjoy them but for such reasons as minority, sex, couverture, mental defect, judicial deprivation, or other cause personal to the individual). Thus the United States Nationality Law of 1940 apposes the terms " United States national " and " United States citizen." The word " citizen " of the Constitution and the earlier legislation of Congress it does not seek to define. The term belongs to a simpler day when everybody was a citizen of one of the federated States and of the Union, or else an alien out-and-out, and the central Government had not become so far imperial as to be the owner of overseas possessions. The new Act however defines " national of the United States " to mean (1) a citizen of the United States or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It does not include an alien. It is noteworthy that the Act contains machinery for admission by naturalization into citizenship, but none for admission into nationality. Either an alien or a non-citizen national can be made a citizen-national; but an alien cannot be made a non-citizen national, at least by any machinery in the Act. (The Nationality Act also, by the way, speaks in some of its sections of " American " nationality and " American " citizens; whether in reference to the Americas at large, or because Congress thinks America to be virtually synonymous with the United States, has not yet been explained.) American Indians " belonging to " the United States have been officially described as " domestic subjects " of that country. They have no doubt always from the international view been United States nationals (*cf.* Jour. of Comp. Legislation, 3rd Ser., Vol. XVI, p. 86); but except for individuals and particular classes they were not United States citizens until 1924. In United States law, this distinction between nationals and citizens was recognized by the Courts many years before its formal statutory adoption; for instance in *Gonzales* v. *Williams*, (1903) 192 U.S. 1—if indeed it did not emerge very much earlier still, as in *American Insurance Co.* v. *Canter*, (1828) 7 Curtis 685.

This apposed use of " national " and " citizen," may be useful in translating the complexities of the present German nationality laws; in which " Reichsangehörigkeit " (German nationality) and " Staatsangehörigkeit " (in legislation, nationality of a constituent state of the Reich, but in passports answered by the description " Deutsches Reich ") are contrasted with " Reichsbürgerrecht "—(by the Law of 1935, " the Reich-citizens are the only holders of full political rights enjoyed by benefit of law "). The term in the Weimar Constitution rendered " citizen " by American translators might nowadays better be rendered " national," and so of " cittadinanza " and " cittadino " in the nationality laws of Italy. In the original United States constitution and in the older text-writers and judgments expounding it (including judgments of English Courts—*e.g.*, *Doe d. Auchmuty* v. *Mulcaster*, (1826) 5 B. & C. 771), the word " citizen " may in future require careful scrutiny if anything turns on the particular sense in which it is used. At the present time, though no doubt " the citizen of the United States is necessarily also a national of the United States," it would not be correct to say that a national of the United States was necessarily also a citizen of the United States.

(*d*) It is hardly worth complicating the matter by mentioning, except to dismiss them as irrelevant to international law, such usages as " citizen " in the domestic sense, to denote a burgess of a borough that is a city, or " Indian national " in the tendencious political sense. People who belong to British India and have no other nationality are British subjects; people who belong to Princes' India are British protected persons; in the present stage of constitutional development there are no Indian nationals in law.

2. The statement of Lord Westbury in *Udny* v. *Udny*, (1869) L.R. 1 Sc. App. 441, that " the political status may depend on different laws in different countries, whereas the civil status is governed universally by one single principle—namely, that of domicil "—is one that has not altogether stood the test of time. Of international law as understood and applied by British Courts, it is no doubt substantially correct; but even there, not always where a *renvoi* is introduced. In other systems than British, however, nationality sometimes decides issues that British law would refer to domicil. According to Westlake, *Private International Law*, 7th Ed., p. 6, personal law " was anciently the *lex domicilii*, and to a great extent is so still; but the modern tendency is to substitute political nationality for domicile as the test of personal law, so far as possible." This applies particularly to Europe; yet other systems base personal law on the race or religion of the *de cujus*, or sometimes on both. At any rate, Lord Westbury's " universally " must be accepted with caution.

3. " A New-Zealand-born woman is, in New Zealand law, a British subject, and every one who is not a British subject, by birth or naturalization is, in New Zealand law, an alien." Rather, every one who is not by New Zealand law a British subject in New Zealand is here an alien. A person who under the old law received local naturalization in Australia is a British subject in Australia but not in New Zealand: *cf. Markwald* v. *Attorney-General*, [1920] 1 Ch. 348. The same is probably the case of persons made British subjects in South Africa under provisions which go further than " adoption " of the British Nationality and Status of Aliens Acts of the United Kingdom; just as, conversely, a person who obtains naturalization under s. 7 of the British Nationality and Status of Aliens (in New Zealand) Act, 1928, on the strength of residence in Western Samoa (which is not part of the British dominions), probably cannot claim British nationality outside New Zealand and Western Samoa—*cf. 11 Halsbury's Laws of England*, 2nd Ed. 120, note (c). In fact, doubts may arise whether any person naturalized in South Africa is a British subject in New Zealand; the nominal " adoption " of the British Act being so much modified (as, for instance, by abrogation of the requirement that the *de cujus* has a knowledge of the English language), that it might be held by the Courts to be no adoption at all within the meaning of s. 9 (1) of the parent Act. That section sets its own limits

of variation, and by inference would seem to admit no other elasticity of adoption. (Similar doubts might be raised, though hardly before a New Zealand Court, about the validity of New Zealand's adoption of the Act, in view of the terms of s. 7 already cited. Section 8, however, permitting naturalization of a Samoan who cannot speak English, is in a different position from s. 7. Unlike s. 7, and unlike the South African legislation, it does not pretend to confer on him British nationality universally operative, and may therefore be regarded as merely supplemental legislation outside the adoption and not impairing it. A New Zealand Court, it is suggested, must accept without questioning it the declaration of the New Zealand Legislature that the latter has "adopted" the United Kingdom Act, however specious the declaration may appear to be, or however much qualified the adoption.)

4. "According to the law of the United States, an 'alien' is one born out of the jurisdiction of the United States and who has not been naturalized." [*Kent* and *Bouvier* are cited.] To make this statement correct at the present day, the term "jurisdiction" must be understood in a very special sense. The jurisdiction referred to must be "complete and immediate." It did not, for example, include members of an Indian tribe till special legislation was enacted: *Elk* v. *Wilkins* (1884) 112 U.S. 94. A person belonging to Eastern Samoa, and certain other Pacific islands where the United States undoubtedly exercises jurisdiction of a very ample kind, was probably, at least until recently, regarded as born out of the jurisdiction of the United States. Whether the Department of State would now assert that he owes permanent allegiance to the United States, and is therefore its "national," or whether the Courts would so hold, if it be left to the Courts to decide the point, is not yet clear to the outsider. It may be material that it is officially stated that a passport granted to an indigenous inhabitant of Eastern Samoa should describe him as "an inhabitant of American Samoa entitled to the protection of the United States." This at first sight exactly homologates him to what is now called a "British protected person"; but it is possible that it marks the distinction of United States law between "national" and "citizen."

5. It is stated that s. 2 of the Cable Act corresponded, in effect, with s. 10 (2) of the British Nationality and Status of Aliens Act, 1933, adopted as part of the law of New Zealand by s. 2 (1) of the British Nationality and Status of Aliens (in New Zealand) Act, 1934-35. The correctness of this statement is questioned. The Cable Act was dealing with *acquisition* of nationality, and in the case of an alien woman marrying a United States husband declared that marriage alone would not naturalize her. The British law in the corresponding case is the reverse: an alien woman marrying a man who is by New Zealand law a British subject automatically acquires British nationality: subcl. (1) of cl. 10 of the Schedule to the 1934-35 Act. Subclause 2 of cl. 10 of the Schedule deals with *loss* of nationality. To some extent it restores the common-law rule that a woman's marriage had no effect on her nationality: *Piggott on Nationality*, Pt. I, p. 57. The branch of the rule that imports that an alien woman's marriage to a subject did not naturalize her is clearly set out in *The Countess de Conway's Case*, (1834) 2 Knapp 364, and *Count de Wall's Case*, (1848) 12 Jur. 145, and was reversed by the Aliens Act, 1844 (U.K.). The other branch, importing that a woman marrying an alien did not lose the status of British subject, is apparently not the subject of any express decision of the Courts; but it follows from the rule *Nemo potest exuere ex patriam* and the significant absence of any exception of marriage where the rule is discussed. This branch of the rule was reversed by the Naturalization Act, 1870 (U.K.). The position established in 1870 was maintained by the legislation of 1914 in the United Kingdom and 1923 and 1928 in New Zealand, but the common-law rule has now in part been returned to, to meet cases such as those which arise through the operation of the Cable Act and the United States Act of 1940 which replaces it. C.

[EDITORIAL NOTE.—We are glad to have the opportunity of publishing the foregoing contribution to a discussion which, we think, is of some general interest at the present time. On points where our learned contributor differs from the views expressed in our previous article, but without, as he says, questioning its major conclusions, we are content to leave our readers to weigh the considerations for themselves.]

TRANSMISSION UNDER THE LAND TRANSFER ACT.

By E. C. ADAMS, LL.M.*

One of the most important cases as to the *theory* of transmission under the Land Transfer Act is *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839, G.L.R. 529. A person who is registered by virtue of a transmission *represents* the former registered proprietor, whose interest has been transmitted to him; he is not quite in the same position as a registered proprietor registered in his own right or by virtue of a transfer: *In re Mangatainoka Block* (*infra*). In the *Public Trustee's* case, at p. 841, 530, Sir Charles Skerrett, C.J., said:

> The leading and the essential feature of our Land Transfer system is that title is given by registration. No person but the proprietor appearing on the official register is recognized as the owner or proprietor of the land affected by it. The title of the registered proprietor, with the statutory exceptions stated in s. 58, is paramount. It has been aptly and properly said that an estate conferred by registration under the Torrens system is neither the common law legal estate or seisin nor the statutory seisin of the Statute of Uses, but a new statutory estate—a registered estate: see *Hogg's Australian Torrens System*, 766.
>
> It is quite certain, however, that all derivative estates and interests must under the system be derived from a registered proprietor. Thus, a transfer or lease of the land must be from the proprietor actually on the Register. So the security of a mortgage on the estate or interest comprised in a certificate of title can only be created by a registered proprietor executing the appropriate prescribed instrument.
>
> The first thing to be done in the present case is to ascertain who is the registered proprietor of the land in question. The registered proprietor is the administratrix, Mary Ann Jack, under letters of administration of the estate of her husband granted by the Supreme Court. It is clear that the executor of her will is not entitled to represent the administratrix or the original intestate. A grant *de bonis non* or a grant under s. 37 of the Administration Act is necessary to enable

* For the first part of this article, see (1943) 19 N.Z.L.J. 262.

a person to represent the estate and interest of the original intestate.

This brings us to another point, that the title of a person registered by virtue of a transmission is subject to all equities existing against the registered proprietor from whom he derives title; he merely stands in the shoes of his registered proprietor, and does not obtain any better title: s. 124 (2) of the Land Transfer Act, 1925. Thus the rule of indefeasibility of title (exemplified in such leading cases as *Assets Co.* v. *Mere Roihi*, [1905] A.C. 176, N.Z.P.C.C. 275, and *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, G.L.R. 489, does not apply in its entirety to a transmission. In *In re Mangatainoka Block*, (1912) 33 N.Z.L.R. 23, 15 G.L.R. 489, the Governor's Warrant contained a restriction against alienation. The District Land Registrar in endorsing the restrictions on the certificate of title and register-book (and in this respect his duties were merely ministerial) erroneously departed from the restrictions on the Warrant. The restrictions appearing on the certificate of title and register-book allowed of alienation by will, while the restrictions as set out in the Governor's Warrant did not. A transmission to the executor of one of the deceased Natives was registered before the error was discovered; and before the restrictions on the certificate of title and register-book were corrected. It was held that the District Land Registrar could correct the restrictions so as to accord with the Governor's Warrant, and that he could cancel the registration of the transmission to the executor, as he (the executor) was not a person taking by transfer from the registered proprietor.

Although a person registered as proprietor by virtue of a transmission holds the estate or interest transmitted subject to all equities, yet for the purpose of any dealing therewith he is deemed to be the absolute proprietor thereof: s. 124 (2) of the Land Transfer Act, 1915. This means that, unless the Registrar has entered a caveat (and if a transmission and a dealing from the transmittee are presented for registration simultaneously, the Registrar can interpose a caveat and so prevent an unauthorized dealing—in *Re Griffen, Flynn* v. *District Land Registrar*, (1898) 1 G.L.R. 101); or unless the dealing *appears* to be in breach of trust or otherwise improper—*Templeton* v. *Leviathan Proprietary, Ltd.*, (1921) 30 C.L.R. 34; and he cannot *assume* in the absence of evidence or notice that the dealing is improper, *In re Fairbrother to Allen*, (1896) 15 N.Z.L.R. 196—the person registered by virtue of a transmission has the same powers of conferring an indefeasible title by means of registered instruments, as a proprietor registered in his own right. It is laid down in *Burke* v. *Dawes*, (1938) 59 C.L.R. 1, that a person claiming from an executor registered under the Torrens system gets an indefeasible title.

The *representative* nature of the title of a person registered by virtue of a transmission brings us to another important rule exemplified in such cases as *In re Clover*, [1919] N.Z.L.R. 103, [1918] G.L.R. 703; *Maddock* v. *Registrar of Titles*, (1915) 19 C.L.R. 681, and the above cited case of *Public Trustee* v. *Registrar-General of Land* (*supra*): the rule is that s. 4 of the Administration Act, 1908, has not altered the old rules as to chain of representation of title. Although the executor of an executor or of a last surviving executor where there have been more than one (except where more than one was appointed by deceased and all have not applied for probate, been cited, or renounced probate) represents the original deceased (and this applies to the resealing of foreign probates: *Drummond* v. *Registrar of Probates*, (1918) 25 C.L.R. 318), an administrator cannot transmit his office to either his executor or administrator, nor does the title of executor devolve on *his* administrator. Where the chain of representation of title is thus broken, letters of administration *de bonis non* must be taken out, or a new administrator appointed under s. 37 of the Administration Act, 1908, except in cases coming within the exception explained in the paragraph next following. An apparent example of a transmission having been wrongly registered in disregard of the above rule as to chain of title is *McCormack* v. *Lee*, [1941] N.Z.L.R. 114, G.L.R. 27: it is confidently submitted that, if the second transmission in that case had not been registered, the ensuing confusion and litigation would not have occurred: in that case when the second transmission was registered, the estate of the first deceased had not been fully administered.

The exception to the necessity for a new grant of administration where the chain of representation of title is broken, is where the person registered by virtue of a transmission holds both the legal and beneficial estate or interest. This will happen where he is the sole beneficiary and the estate has been fully administered, *i.e.*, the debts, legacies, and death duties have been fully paid and discharged. In such cases the person registered by virtue of a transmission has both the legal and equitable ownership vested in him, and as Sim, J., asked in an unreported case, what more can a purchaser desire than such a title? See also *In re Martin*, [1912] V.L.R. 206. But the District Land Registrar must be satisfied by whatever evidence he reasonably thinks necessary that the estate has been fully administered. Two examples will tend to explain this exception, the subject-matter of this paragraph. *First example*: A. died leaving a will and appointed X. executor—and devised to W. absolutely, A.'s wife. X. predeceased A. Administration *cum testamento annexo re* A.'s estate granted to W. as administrator, and transmission *re* A.'s estate is registered in W.'s favour. W. is now dead and Z. her executor has taken out probate. Transmission to Z. is now presented for registration: such transmission must be registered, if the District Land Registrar is satisfied that A.'s estate has been fully administered. *Second example*: B., a bachelor, dies intestate in 1940 and administration is granted to F., his father, who does not register transmission in his favour. F. dies in 1942, and W., his widow, is appointed executrix and takes out probate in F.'s estate. If F. had fully administered B.'s estate, then W. can have transmission registered in her favour. Only one registration fee is payable, as it is not considered by the Land Transfer Department that the transmission has a double operation for registration purposes.

It would appear that where a person registered by virtue of transmission has a duty to transfer the land to a third person, and dies without having executed the transfer, the estate which he represents has not been fully administered: see *In re Allan*, (1912) 18 Arg. L.R. 217, and *Burke* v. *Dawes*, *ante*. Generally speaking administration of a deceased person's estate will be granted, where such is necessary for the purpose of perfecting title: (1907) V.L.R. 717, 657. Hosking, J., suggested in *In re Clover* (*supra*) that where the object of obtaining a fresh administration is merely

to enable title to be perfected, administration limited to that particular purpose might be applied for.

Where a person registered by virtue of a transmission is also the sole beneficiary, the better and more correct procedure appears to be for him to transfer the land from himself as legal personal representative to himself as beneficiary, all the relevant facts being recited in the transfer. The recital in a Land Transfer instrument of a trust about to be extinguished is not objected to by the Land Transfer Department. Thus in *McConnell* v. *Commissioner of Stamp Duties*, [1941] N.Z.L.R. 599, at p. 600, l. 24, Ostler, J., expresses a view that appears to coincide with the concept of transmission as set out in *In re Mangatainoka Block* (*supra*) and *Public Trustee* v. *Registrar-General of Land* (*supra*).

(To be concluded.)

ANNUAL MEETINGS.

Wellington District Law Society.

The sixty-fifth annual general meeting of the Wellington District Law Society was held on Wednesday, March 1, when there was an attendance of forty-one members.

The President (Mr. T. P. Cleary) occupied the chair until the election of his successor.

The late Sir Hubert Ostler: Deceased Members.—The President referred to the loss sustained by the profession due to the death of Sir Hubert Ostler, Kt., and the following resolution was carried, members standing in silence as a tribute of respect to the late Judge:—

> "That this meeting of the Wellington District Law Society records its profound regret at the death of the late Sir Hubert Ostler and expresses to Lady Ostler and her family its sincerest sympathy with them."

Reference was also made to the death of Messrs. W. P. Rollings, A. B. Croker, P. B. Broad, H. Lawson, J. H. Lawson, J. M. Douglas, P. W. Jackson, A. F. Wiren, and also to the recent tragedy when Messrs. R. I. M. Sutherland and E. W. R. Haldane lost their lives.

Report and Balance-sheet.—In moving the adoption of the report and balance-sheet the President welcomed members who had returned to New Zealand from overseas service with the Forces.

Many interesting letters had been received from the recipients of the Christmas parcels which had been sent by the Society and to which the Wellington Judges had again made a substantial donation.

The scheme for the rehabilitation of returning practitioners and clerks had not been lost sight of during the year and the Wellington Committee which was also appointed a New Zealand Committee and of which Professor McGechan, the Dean of the Law Faculty of Victoria University College was a member, had drawn up a scheme of refresher courses which consisted mainly of lectures, with which was to be co-ordinated a system of moots and also a conveyancing class, the moots and class to be conducted by voluntary services of practitioners.

Some of the Wellington members had given considerable assistance to Mr. Watson in connection with the Land Sales Act and also in other matters arising out of recent legislation.

Twice during the past year the Council had been very concerned at the position which arose on the death of a sole practitioner in respect to moneys held on behalf of clients in the trust account of the deceased. The Council was of opinion that the Society should be able to take steps to take control of the trust account in such circumstances and for this purpose had written to the New Zealand Law Society requesting that an amendment be made to the Law Practitioners Act to provide for such an exigency.

In conclusion, the President stated that he considered it was sometimes unfortunate that under the constitution the "oldest inhabitants" of the Council compulsorily retired, especially such men as were Mr. A. B. Buxton and Mr. E. P. Hay. Their sound judgment and ripe wisdom had been of the utmost help to the Council. The President thanked all his colleagues on the Council for their support and willingness to share in the year's work.

The Treasurer, Mr. W. P. Shorland, seconded the motion, and the annual report and balance-sheet were then formally adopted.

Staff.—The President stated that the Society was under a debt of gratitude to the staff for their work during the year. In particular the loyal and efficient service that had been rendered by Mrs. Gledhill merited the warm thanks of all members.

Election of Officers and Council.—The result of the election of officers and members of the Council was as follows: President, Mr. A. M. Cousins. Vice-President, Mr. H. R. Biss. Treasurer Mr. W. P. Shorland. Members of Council, Messrs. J. R. E. Bennett, T. P. Cleary, P. B. Cooke, W. E. Leicester, A. J. Luke, N. H. Mather, G. C. Phillips, F. C. Spratt. Members elected by branches: Palmerston North, Mr. J. W. Rutherfurd. Feilding, Mr. J. Graham. Wairarapa, Mr. R. McKenzie.

Delegates to New Zealand Law Society.—Messrs. H. F. O'Leary, G. G. G. Watson, and A. M. Cousins.

Mr. G. G. G. Watson.—Mr. Buxton drew attention to the fact that, since 1932, the Wellington Society has continuously elected Mr. G. G. G. Watson as a representative to the New Zealand Law Society. Mr. Buxton stated he had seen something of the work of Mr. Watson in recent years, and what it entailed; and it seemed that it would be more fitting for the members of the Wellington Society to thank Mr. Watson than it was for him to thank the Society for his election. For geographical reasons, the Wellington delegates formed the Standing Committee of the New Zealand Society and this Committee were asked to deal with many of the matters which could not be finally dealt with at the quarterly meeting. Having done this, they then prepared a report and such recommendations as were considered necessary. Such procedure often took many hours of a delegate's time. The last year's duties had been very onerous, and he felt that Mr. O'Leary, if he had been at the meeting, would agree that the greater share had been borne by Mr. Watson. Mr. Watson had attended the meetings very regularly, and had not missed any of the arduous jobs that had been handed to the Standing Committee. A special resolution of thanks to Mr. Watson had been passed at the December meeting of the New Zealand Council. Mr. Watson was not a Vice-President and held no office in the New Zealand Society although he had often represented the Vice-President of the Society. Mr. Buxton said he wanted Mr. Watson to know that the Wellington members appreciated the time and talent he had devoted to the profession.

Mr. Watson thanked the members for their remarks. He then reported on the work of the New Zealand Law Society, and referred first to the loss through death of Mr. H. B. Lusk, the best friend that the profession had ever known. Mr. Watson stated that Mr. O'Leary's absence was due to the fact that he had been engaged on public work and that when he returned to Wellington he would undoubtedly take up the work with the same zeal that he had shown in the past. He referred to the work of Mrs. Gledhill and the staff and said that the work of the office of the Society had never been better carried out or been done more willingly than by the present members of the staff.

Soldier-Solicitors.—Mr. T. G. Taylor, recently returned from overseas, thanked the Society for the interest taken in the solicitors serving overseas and assured them that the Christmas parcels sent had been greatly appreciated.

The late Mr. H. B. Lusk.—It was proposed by Mr. Spratt that an appropriate letter be sent to the Hawke's Bay Society, expressing sympathy with them in the loss of their President.

Mr. E. D. Bell.—The President stated that the Secretary had drawn attention to the fact that Mr. E. D. Bell, who had been President of the Society in 1898, had recently retired from active practice. It was unanimously decided that a suitable letter conveying the good wishes of the Society be sent to Mr. Bell.

Other Members.—It was also decided that the good wishes of the Society should be sent to Mr. H. J. V. James, Mr. F. J. Courtney, and Mr. E. M. Sladden.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

"**Ladies and Gentlemen of the Jury**"?—Our curious and ill-considered Women Jurors Act providing for *voluntary* jury service for women has so far, and fortunately, had little effect on the jury panels. However, an experienced counsel, who believes in being always prepared for the worst, has inquired how he should address a jury in the unlikely event of any volunteering member or members of the fair sex escaping the net of his six peremptory challenges. Should he say, "Ladies and gentlemen of the jury?" The newspapers seem to have reported only one instance of a woman actually sitting as a member of a jury—a case in Auckland—and Scriblex has no information as to the method of address adopted on that occasion, or on any other occasion that may have arisen in this country. The practice in England is, however, clear and long settled—the jury must be addressed, not as "ladies and gentlemen of the jury," but as "members of the jury." *The Law Journal* (London) of October 29, 1927, records that a few days previously, counsel appearing before Horridge, J., and a mixed jury had begun his address with the phrase "ladies and gentlemen of the jury." The Judge immediately interposed, pointing out that the jury should not be addressed in that way:

> The matter was considered by the Judges long ago and has been reconsidered. They have unanimously come to the conclusion that the proper way to address the jury is "members of the jury," for the jury is a composite body.

Darling, J.'s, Black Cap.—In his book *On Circuit*, MacKinnon, L.J., says that very shortly after his appointment to the Bench he was presented by Lord Darling with the black cap which the latter had used throughout his judicial career. This may recall to some readers—though MacKinnon, L.J., quite naturally, does not mention it—Max Beerbohm's famous and clever, though somewhat cruel, cartoon of Darling, J. The Judge was depicted as asking his marshal to have some bells sewn on his black cap!

Chief Justiceship of Canada.—The Rt. Hon. Sir Lyman Poore Duff, P.C., retired from the Chief Justiceship of Canada, last December, just under the age of seventy-nine. He was appointed to the Bench of British Columbia in 1904, and in the following year was made a Judge of the Supreme Court of Canada. In 1933 he was promoted to the position of Chief Justice of Canada. His term of office was to have expired in 1940, but it was extended by the Canadian Parliament, first, in 1939, for three years, and then again, in 1943, for another year. He was made a Privy Councillor in 1918 and for many years went to England each summer to sit as a member of the Judicial Committee. He was knighted in 1934, when the Bennett Government lifted the ban on titles. Sir Lyman Duff is succeeded in office by Rinfret, J., who has been a puisne Judge of the Supreme Court of Canada since 1924. For over thirty-five years Canada has followed the policy of filling vacancies in the office of Chief Justice by promotion from the ranks of the Court itself. But whatever attraction that policy may have in Canada, New Zealand takes, and has always taken, the view that the complete independence of the Judges of our Supreme Court is best assured by making it an absolute rule that the Chief Justiceship should never be filled from the ranks of the puisne Judges. There are few, if any, who would care to see the Canadian practice adopted in New Zealand.

The Law Revision Committee.—It seems to have been thought that our Law Revision Committee should not function during war-time, for the fact is that the Committee has not met since April 12, 1940. It is pleasing to note that this view, which many have found it difficult to understand, has now been abandoned. The Committee has been resuscitated and is to meet again next month.

A Precedent in Point.—When Denniston, J., was in practice at Dunedin his highly-strung temperament led to many a brush with opposing counsel and to many a "scene in Court." On one occasion, before the Resident Magistrate, Denniston was so infuriated by some of the observations of his opponent that he snatched up a heavy metal ink-pot and threatened to throw it at his head. The Magistrate hastily adjourned the Court until the afternoon, when he read a carefully prepared written reprimand to both counsel, and indicated that further trouble would result in one or other of them being committed for contempt of Court. The *Otago Daily Times*, in its weekly humourous column, "Passing Notes," published a paragraph commenting on this incident. Denniston was likened to a mad dog snapping at whatever came its way, and his conduct was referred to as the pure frenzy of a psychological curiosity. Denniston brought an action for libel against the *Otago Daily Times*, but the jury awarded him only a farthing. Years afterwards, E. G. Jellicoe was appearing for the defendant in an action for libel tried before Denniston, J., and a jury. The plaintiff was a solicitor, but Jellicoe argued that this fact was no reason for awarding him large damages, and he went on to urge the jury to give the plaintiff nothing more than a verdict for the lowest coin of the realm. "His Honour will correct me if I am wrong," said Jellicoe to the jury, "when I tell you that the sum of one farthing has been previously awarded in this Court by an intelligent jury to a solicitor who afterwards attained the eminence of a seat on the Bench of this Court."

Miscellany from Overseas.—His Honour Sir Edward Parry, County Court Judge from 1894 to 1927, and author of *What the Judge Saw* (1912), *What the Judge Thought* (1922), *The Drama of the Law* (1924), and other works, died recently in England at the age of eighty. In 1898, while he was sitting on the Bench, he was shot at and severely wounded by a bailiff whose certificate he had cancelled; but he made a quick recovery and resumed his judicial duties within a few months. . . . Two men talked while a witness was being sworn in the English High Court. Croom-Johnson, J., required them to leave and had the witness sworn again, observing that he would have the oath taken solemnly. . . . Sir William Holdsworth, O.M., famed for his *History of English Law*, died recently in England. . . . H. B. Vaisey, K.C., has been appointed a Judge of the Chancery Division to fill the vacancy caused by the death of Bennett, J. The new Judge is sixty-five years of age. . . . Sir William Mulock, a former Chief Justice of Canada, celebrated his hundredth birthday early this year.

FIFTY YEARS IN PRACTICE.

Mr. J. P. Innes, Palmerston North.

On March 4, Mr. J. P. Innes, of Palmerston North, attained the fiftieth anniversary of his admission to practice. On March 15, he completed fifty years in practice in Palmerston North. On the evening of that day, his fellow-practitioners there gave him a complimentary dinner, and made him a presentation. The function was presided over by Mr. B. J. Jacobs, this year's President of the local branch of the Wellington District Law Society. In addition to Mr. Innes, the guests included Mr. H. P. Lawry, S.M., Mr. C. A. Loughnan, of Otane, who formerly practised for many years in Palmerston North, and Mr. C. O. Pratt, Clerk of the Court. All local practitioners attended, except three who were out of town; and, in addition, Mr. F. Haggitt, who formerly practised in Feilding, but who is now living in retirement in Palmerston North, and Mr. K. C. Clayton, who formerly practised in the latter town.

After the loyal toast, Mr. Jacobs proposed the health of the guest of honour, in his usual happy vein, making particular reference to the help Mr. Innes had been to young and not-so-young practitioners. He referred to the example set by Mr. Innes, who had done so much to set high standards for the profession and enhance the regard in which the profession is held by the public in general. On behalf of the local practitioners, he wished Mr. Innes many more years of practice in the profession.

Mr. Innes replied, partly in similar vein, warning those assembled that this was only the conclusion of his first fifty years of practice, and he hoped the function would be repeated at the end of the next fifty years. He took the function and particularly the attendance of Mr. Loughnan, who had come a long way in spite of bad health and present restrictions, as a very great compliment. After some comments on the years past, interspersed with suitable anecdotes, the guest of honour made a few observations which he felt may be of interest to the profession.

Mr. Innes referred to the present retiring age of Judges which, in his opinion is too young in the case of a Judge who is sound in mind and body. He felt that many practitioners who, in their sixties may be offered Judgeships, would be tempted to decline the honour on account of the compulsory retirement at the age of seventy-two. He also referred to the delay in probate matters, and suggested that the Magistrates' Court should have jurisdiction in matters of probate and bankruptcy, more or less along the lines of the old District Court system, pointing out that the Magistrates were eminently suitable for this work.

Mr. Innes also suggested that a Branch Office of the Stamp Department should be established in Palmerston North, in order to avoid numerous delays. Further, as the officers in charge of branches of the Stamp Department all appear to be well trained and capable men, there appears to be no justification for the delay occasioned in death-duty matters as a result of all death-duty accounts having to pass through the hands of one man in Wellington. Mr. Innes also referred to the appointment of Justices of the Peace, and expressed the opinion that appointments should be made of men who are fit to sit on the Bench, pointing out that often people's personal liberty was in the hands of Justices who are entirely unfitted to occupy the Bench, and in many cases had to ask the Clerk of the Court what to do.

Mr. Innes also made reference to the jury system, expressing the opinion that in civil cases except purely on an assessment of damages the jury system was scarcely justified.

Mr. H. P. Lawry, S.M., proposed the toast of the Law Society, and in doing so referred to the changes he had noticed in Palmerston North on his return here, recalling that he had commenced his legal career in Palmerston North forty-four years ago. This was responded to by Mr. C. A. Loughnan, on behalf of the legal profession. He showed that with the passing of years he had lost none of his former renowned gift as an after-dinner speaker.

MR. D. HUTCHEN RETIRES.

Farewell Gathering.

A large number of members of the Taranaki District Law Society met at New Plymouth on February 15, to farewell Mr. D. Hutchen on his retirement from the legal firm of Messrs Govett, Quilliam, Hutchen, and Macallan, in which Mr. Hutchen had been a partner for twenty-four years.

A former President of the Society, Mr. F. W. Horner, Hawera, said that Mr. Hutchen had been in active practice for fifty-eight years, and practitioners throughout the province desired to express goodwill towards him in his retirement. Mr. Hutchen had won the admiration and regard of members of his profession, continued Mr. Horner. His name was perpetuated in a volume of legal literature known as *Hutchen's Land Transfer Act*. Mr. Hutchen held the utmost goodwill, confidence, respect, and affection of members of his profession.

Mr. H. Billing supported Mr. Horner's remarks, and Mr. R. H. Quilliam, on behalf of Mr. Hutchen's former partners, said that the partnership had been a singularly pleasant and helpful association.

Mr. W. H. Woodward, S.M., paid tribute to the respect in which Mr. Hutchen was held by his fellow practitioners and by all who knew him.

In reply, Mr. Hutchen said his association with the law began before the days of telephones and typewriters, in the days of the old style of pleading. He was articled in 1881 in the office of Mr. W. B. Edwards, Wellington, who afterwards became Sir W. B. Edwards, a Judge of the Supreme Court. He had been associated with many well known legal firms at Wellington, Mr. Hutchen continued, and he gave details of early legal history at Wellington. He was admitted in 1886 and went to New Plymouth in 1894, where he practised continuously until the end of 1943.

The solicitors in practice in Wellington in 1881, to whom he referred in his speech, were Messrs. Brandons; Izard and Bell; Buckley and Stafford; Moorhouse, Edwards, and Cutten; Chapman and FitzGerald; and Buller, Lewis, and Gully; and he had recollections of Messrs. Travers, Ollivier, Gordon Allan, Quick, Forwood, and Sandilands. When he arrived at New Plymouth in 1894, Mr. Hutchen said that the practitioners in the town were Messrs. R. Standish, R. C. Hughes, C. W. Govett, O. Samuel, J. B. Roy, W. Kerr, J. Richmond, and Shailer Weston. He became a partner of Mr. J. H. Quilliam in 1919 in the firm of Govett, Quilliam, and Hutchen. He appreciated fully the goodwill expressed by former partners and fellow-practitioners towards Mrs. Hutchen and himself.

RULES AND REGULATIONS.

Revocation of the Citrus Fruit Price and Conditions Notice. (Marketing Amendment Act, 1937.) No. 1944/42.

Drainage and Plumbing Extension Notice, 1944. (Health Act, 1920.) No. 1944/43.

Employment Restriction Order, No. 4. (Industrial Man-power Emergency Regulations, 1944.) No. 1944/44.

Fertilizer Control Order, 1943, Amendment No. 2. (Primary Industries Emergency Regulations, 1939.) No. 1944/45.

Revocation of the Invercargill Licensing Committee Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/46.

Medical Advertisements Procedure Rules, 1943. (Medical Advertisements Act, 1942.) No. 1944/47.

Revoking Milking Machinery Control Order, 1942. (Primary Industries Emergency Regulations, 1939.) No. 1944/48.

LAND AND INCOME TAX PRACTICE.

1944 Taxation Returns.

The Department advises that supplies of forms will be available at the usual time. In general, return forms will be the same as last year—

Income-tax.—Salary or wages earners form (No. 3). A new form with slight alterations is being printed. The principal alteration is that the taxpayer's registration fee coupon-book number will be required to be shown. Surplus supplies of the 1943 form may, however, be used.

Farmers form (No. 3A). A new form is being printed, with one or two amendments. The coupon-book number is not required. Supplies of the 1943 form may be used.

Business and professional form (No. 3B). The same form as used for 1943 is being overprinted to apply to the year ended March 31, 1944.

Social Security Charge Declarations.—Persons form (S.S.C. 55). A new form is being printed, with slight amendments. Supplies of 1943 form may be used.

Trustees form (S.S.C. 55A). A new form will be available, but supplies of the 1943 form may be used.

Trustees' Statements.—The same form as used in 1943 will be used again for 1944.

Evacuees who are deemed to be ordinarily resident for the time being: In some cases evacuees from occupied territories are in New Zealand for the duration of hostilities and are deemed to be ordinarily resident in New Zealand for the financial provisions of the Social Security Act, 1938. Such persons are therefore liable for payment of social security charge and national security tax on salaries or wages and other income derived from New Zealand, and also on any income derived from overseas sources, whether remitted to New Zealand or not. On learning of the facts of individual cases, the Commissioner may indicate that if and when the person concerned actually leaves New Zealand permanently, consideration will be given to the question of reviewing the liability for social security contribution—*i.e.*, deeming the person to be not ordinarily resident, in which case a refund of all social security charge and national security tax paid would be due.

The limitation of time within which the Commissioner is authorized to make refunds of social security contribution is stated in Reg. 19 (6) of the Social Security Contribution Regulations, 1939 (Serial No. 1939/13), which, *inter alia*, provides that "no adjustment or refund shall be made unless written application in that behalf is made to the Commissioner within three years after the end of the month on the first day of which the instalment (if any) actually payable became due, or would in the absence of error have actually become due."

In order to preserve the right to obtain a refund in the event of the Commissioner deciding that an evacuee who has been paying the combined charge is to be deemed not "ordinarily resident" an application should be made within three years of the due date of the first instalment of charge paid after arrival in New Zealand, and annually thereafter. The amount of instalments not covered by an application in terms of the Regulation would not be recoverable.

Home Guard: Part-time Zone Commanders.—Military pay and allowances received by part-time zone commanders in the Home Guard is exempt from social security charge and national security tax. Such pay and allowances is however *liable for income-tax* and must be included in income-tax returns. Part-time zone commanders are not members of the Forces to whom Reg. 10 (*c*) of the Social Security Contribution Regulations, 1939, Amendment No. 1, is applicable, and are required to pay instalments of the registration fee.

Depreciation Claims, in Special Circumstances.—Except where a taxpayer has only one asset—*e.g.*, a motor-truck owned by a carrier, or a launch owned by a fisherman—the Commissioner of Taxes will not allow claims for depreciation unless the books of account are kept on a double-entry basis, and a copy of the profit and loss account and balance-sheet is furnished with the income-tax return to show that depreciation has in fact been written off in the taxpayer's books. If a taxpayer who keeps books on a double-entry system submits a return showing that he has written off depreciation on *any asset* at a rate lower than that allowed by the Department, the Commissioner will not accept an amended return showing depreciation written off at the higher rate, even though the taxpayer establishes that he was not aware of the higher rate allowed by the Department.

Furthermore, the Commissioner will not reopen an assessment already made if a taxpayer who has not kept books on a double-entry basis desires to open up a set of double-entry books and furnishes a copy of the accounts in order to write off depreciation on assets. This rule does not apply, however, where a taxpayer (not a company) who does not keep books on a double-entry basis establishes to the Commissioner's satisfaction that by reason of ignorance or oversight he has omitted to claim for depreciation on *buildings* (only) used in the production of assessable income, and provided that such a taxpayer claims depreciation in the form of the information required to be shown in income-tax returns.

Although the scale rates of depreciation have remained fixed for sime time, it is important from the taxpayer's point of view that he should obtain the maximum advantage possible. Practitioners are therefore urged to peruse the scale rates shown in the larger textbooks—*e.g.*, *Cunningham and Dowland's Taxation Laws of New Zealand* (2nd Ed.), and consider the advisability of opening up separate asset accounts if there is any advantage by doing so. The rates for the more common assets used in business and farming are given below :—

D.V. denotes diminishing value. C.P. denotes cost price *to the taxpayer*.

	Percentage Allowance.
1. Plant and Machinery (except as otherwise specified herein)—	
General (including agricultural plant and implements, but excluding motor-vehicles)	7½ D.V.
Operating sixteen to twenty-four hours per day	10 „
Affected by acid—*e.g.*, sulphuric	10 „
Affected by acid and operating sixteen to twenty-four hours per day	12½ „
Motor-vehicles (see item 6).	
2. Agricultural Plant and Implements (see items (1) and (8)).	
3. Bridges—	
Wooden	2½ C.P.
Other types	1½ „
4. Cash Registers	10 D.V.
5. Furniture, Furnishings and Fittings—	
In hotels, cabarets and restaurants (including tea-rooms, milk-bars, &c.)	10 „
Other cases	7½ „
6. Motor-driven Vehicles—all cases (including cars, taxis, buses, lorries, trucks, tractors, trailers, rollers, graders, &c.)	20 „ *

* In the case of a taxpayer whose business is essentially that of a licensed transport operator an allowance of 15 per cent. on cost price in lieu of 20 per cent. D.V. (at the option of taxpayer) will be made in respect of motor-trucks, provided the practice has been to write-off depreciation on the basis of a percentage of cost in respect of such assets and that basis is continued.

7. Office Calculating and Bookkeeping Machines (see also items 4 and 10)	10 D.V.
8. Pig-farms—	
Movable sties	7½ „
Buttermilk-distribution plant	10 „
9. Small articles requiring frequent renewal (tools, crockery, &c.)	Annual revaluation.
10. Typewriters and General Office Appliances (see also items 4 and 7)	7½ D.V.

Farmers' motor-cars :—

(i) Where a farmer has both truck and car—½ of 20 per cent. D.V.

(ii) Where a farmer has a car only—¾ of 20 per cent. D.V.

This is a general rule only, and if it can be established that a greater percentage of use of the car is applicable to the farm business, then application should be made for an increased allowance. No depreciation is allowable in respect of pipe lines, troughs, fences, sheep or cattle yards, &c. The cost of repairs or replacements is allowable in the year in which the expense was incurred.

(*To be continued.*)

PRACTICAL POINTS.

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

1. Life Insurance.—*Father effecting Policy on Son's Life—Policy handed to Son at Twenty-one Years — Subsequent Premiums paid by Son—Subsequent Death of Father—Whether Policy Part of Father's Estate—Whether Death or Gift Duty payable.*

QUESTION: A. insures the life of his son B., aged five years. The policy provides that in consideration of the payment by A. of the premiums until B. is twenty-one and thereafter by B., the insurance company will, if B. dies under twenty-one, refund premiums paid by A., but if B. dies over twenty-one will pay the sum assured to B.'s executors. A. pays the premiums until B. is twenty-one. A. then hands the policy to B. at the same time verbally informing B. the policy is B.'s and thereafter B. pays the premiums. Some years after the delivery of the policy A. dies. Does this policy form part of A.'s estate for the purpose of death duty?

ANSWER: The apparent difficulty arises from the fact that there is no contract in the first place between B. and the company; and A. cannot bind B. to pay premiums. But the company holds out (by virtue of the terms of its policy) a continuing offer to A. and B. that it will enter into a novation of the contract, substituting B. for A. on the former reaching twenty-one years.

A.'s delivery of the instrument to B. and the latter's acceptance, and his subsequent payment of premiums, all evidence a novation pursuant to the terms of the policy. The only event entitling A. to anything, is B.'s decease before reaching twenty-one years, and this does not occur. Therefore, A. has no interest in the policy and it does not form part of his estate.

As the policy is on B.'s life, the provisions of s. 5 (1) (*f*) of the Death Duties Act, 1921, have no application. It is assumed that the amount of the premiums paid is not sufficiently large to attract gift duty.

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2. Stamp Duty.—*Deed revoking Power of Attorney.*

QUESTION: By deed dated September 1, 1940, A.B. appointed C.D. and E.F. to be his attorneys jointly and severally. It was used only once to effect a discharge of mortgage in respect of which A.B. was the mortgagee. A.B. now desires to revoke the power. Can you suggest a suitable short form? Will it require stamping? Will it be necessary to register in any public office?

ANSWER: As the original must have been in the form of a deed, the instrument of revocation should also be in the form of a deed. After the usual recitals, the operative part could read: "NOW THIS DEED WITNESSETH that I the said A.B. hereby revoke the said deed and power of attorney thereby conferred Provided that nothing herein contained shall affect the validity of any act and thing done by the said C.D. and E.F. or either of them by virtue of the powers conferred on them by the said deed before they or either of them shall receive notice of the revocation thereof."

The instrument should be signed and attested in the usual manner for a deed. In connection with powers of attorney, sealing is still the custom in New Zealand. The stamp duty will be 15s. under s. 168 of the Stamp Duties Act, 1923.

It is not necessary for its validity to register the revocation, but, as the power itself must have been deposited in the Land Transfer Office, it is prudent to deposit the revocation there also. The fee will be 10s.: see the Ninth Schedule to the Land Transfer Act, 1915.