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DIPLOMATIC IMMUNITY FROM COURT PROCESS: RESIDENT FOREIGN LEGATIONS.

IN the last few years, we have witnessed the commencement by foreign governments of the practice of establishing in the Dominion accredited ministers and their staffs. Recently, too, we have observed the increase in number of these legations, whose members enjoy an unusual and hitherto-unobserved immunity from the jurisdiction of the Courts in our midst.

The question of the privileged position of resident ministers and their staffs in respect of criminal and civil proceedings must, sooner or later be considered by some practitioners. In fact, already the matter has arisen in relation to the summoning of a member of a legation staff as a witness in criminal and civil proceedings. The other day, as it happened, a military attachè of a foreign legation, having witnessed a running-down accident, was, inadvertently, served with a subpoena to give evidence at the hearing of the resulting action for damages. He declined to attend, as he claimed privilege, as it was his duty to do. The purpose of this article is to examine the extent of the privilege attaching to ambassadors or diplomatic agents, in which terms resident ministers and chargés d'affaires are conveniently comprehended.

I.—The Sources of Immunity.

"The rules of international law," says Sir William Holdsworth in the title "Constitutional Law" in *6 Halsbury's Laws of England*, 2nd Ed., p. 504, para. 623, "are part of the law of England, but only in so far as they can be proved, by legislation, judicial decision, or established usage, to have been received into English law."

A consensus of international jurists, even if unanimous, does not make a rule of international law a part of the law of England: *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B. 391, 407; because such a consensus may point only to what ought to be recognized, not to what is recognized as binding between nations. To the extent that rules of international law are part of English law, they are applied by the Courts in New Zealand, so long as they are not in conflict with an Act of Parliament, or a rule of common law.

We propose, therefore, to consider the rules of international law relative to resident foreign ministers and their staffs, in the light of those principles.

First of all, we turn to legislation.

We commence with the Diplomatic Privileges Act, 1708 (7 Anne, c. 12) (*3 Halsbury's Complete Statutes of England*, 503), which is expressed to be "An Act for preserving the Privileges of Ambassadors and other publick Ministers of Foreign Princes and States." This Act was passed, as its preamble indicates, as the result of the seizure and imprisonment of Matueof, the Czar's ambassador, by taking him out of his coach and putting him in a debtor's prison, and detaining him there in custody for several hours "in contempt of the protection granted by her Majesty contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers authorized and received have at all times been thereby possessed of and ought to be kept sacred": see *The Muskovy Ambassador's Case*, (1709) 10 Mod. Rep. 4; 88 E.R. 598, where it was held that neither an ambassador nor any of his train can be prosecuted for any debt or contract in the Courts of the kingdom in which he is sent to reside.

By s. 3 it is enacted,

> All writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or state authorized and received as such by her Majesty her heirs or successors or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods and chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatsoever.

And s. 4 provides,

> And . . . in case any person or persons shall presume to sue forth or prosecute any such writ or process such person and persons and all attorneys and sollicitors prosecuting and solliciting in such case and all officers executing any such writ or process . . . shall be deemed violators of the laws of nations and disturbers of the publick repose and shall suffer such pains penalties and corporal punishment . . . fit to be imposed and inflicted.

In *The Amazone*, (*infra*), Slesser, L.J., said that he did not know if any attorney has ever been corporally punished under the statute for such proceedings. It may well be, he added, that, in a certain view, the attorneys in the case then before their Lordships, were in peril of receiving such punishment, but they had not to adjudicate upon that point.

The statute does not add anything to the law by its subsequent sections. Section 5 provides that traders—

persons subject to the bankruptcy laws—who put themselves in the service of any public minister, take no benefit or immunity under the statute. The section also gives immunity from the penalties of the statute if a solicitor sues a person who is not on what is commonly called the Diplomatic List (to which we shall refer later).

This statute is in force in New Zealand. It was introduced into the new Colony with the arrival of British sovereignty by the silent operation of constitutional principles. It may well be that this statute does not appear in any list of statutes in force at the passing of the English Laws Act, 1858 (now the English Laws Act, 1908). It is true, as Lord Mansfield had pointed out earlier, our first settlers of a Colony carried with them to their new home only such of the laws of England as were applicable to them: *Campbell* v. *Hall*, (1774) 1 Cowp. 204, 98 E.R. 1045, and, at the material date, there were no foreign legations or public ministers of foreign powers accredited to Her Majesty in New Zealand. It is of the inchoate class mentioned in the judgment of the Judicial Committee of the Privy Council in *Cooper* v. *Stuart*, (1889) 14 App. Cas. 286, 292, where after commenting on the relative passage in *1 Blackstone's Commentaries*, 107, where the learned author said that the "colonists carry with them only so much of the English law as is applicable to the condition of the infant Colony," their Lordships said:

> Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant Colony of that kind. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the colonial Legislature.

But the point is immaterial, for this reason: In *Magdalena Steam Navigation Co.* v. *Martin*, (1859) 2 El. & El. 94, 111; 121 E.R. 36, 44, Lord Campbell, L.C.J., in delivering the judgment of the Court, said that s. 3 of the Diplomatic Privileges Act, 1708, is only declaratory of the common law. The Russian Ambassador had been taken from his coach and imprisoned, but the statute could not be considered as directed only against bailable process. He continued:

> The writs and processes described in the 3rd section are not to be confined to such as directly touch the person or goods of an ambassador, but extend to such as, in their usual consequences, would have this effect. At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors, that they shall not be impleaded in the Courts of the country to which they are accredited.

Turning to the common law, in general, Lord Campbell, at p. 43, said:

> The great principle is to be found in *Grotius de Jure Belli et Pacis*, lib. 2, c. 18, s. 9. "*Omnis coactio abesse a legato debet.*" He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the Courts of the country in which he resides as ambassador. Whatever exceptions there may be, they acknowledge and prove this rule.

Other eminent Judges have pointed out that s. 3 of the statute was declaratory of the common law, and must, therefore, be construed according to the common law, of which international law must be deemed a part. It was so pointed out by Lord Mansfield in *Triquet* v. *Bath*, (1764) 1 Wm. Bl. 471; 97 E.R. 636; by Lord Ellenborough in *Viveash* v. *Becker*, (1814) 3 M. & S. 284, 105 E.R. 619; by Abbott, C.J., in *Novello* v. *Toogood*, (1823) 1 B. & C. 554; 107 E.R. 204; by Jervis, C.J., in *Taylor* v. *Best*, (1854) 14 C.B. 487, 121 E.R. 36; and, in recent years, in addition to other cases elsewhere cited, by the Court of Appeal (per Brett, L.J., as Lord Esher then was) in *The Parlement Belge*, (1880) 5 P.D. 197; by Swinfen Eady, L.J., in *In re Suarez, Suarez* v. *Suarez*, [1918] 1 Ch. 176, and by the Court of Appeal in *Hemeleers-Shanley* v. *The Amazone*, *Re The Amazone*, [1940] 1 All E.R. 269. In fact, the whole matter is summed up in the speech of Lord Warrington of Clyffe in *Engelke* v. *Musmann*, [1928] A.C. 433, 458, where he said: "It is well settled that the questions we have been discussing do not depend on the statute [the Diplomatic Privileges Act, 1708], but are principles of common law having their origin in the idea of the comity of nations."

Now, before considering the above-statedp rinciples in their practical application, we shall clear off any legislation that bears on our subject.

In 1941, when there were a number of refugee governments resident in England, the Parliament at Westminster passed the Diplomatic Privileges (Extension) Act, 1941 (4 & 5 Geo. 6, c. 7), (*34 Halsbury's Complete Statutes of England*, 78) which extended diplomatic privileges and immunities to the members of the governments of any foreign power, or of a provisional government and to the members of any national committee or other foreign authority, established in the United Kingdom. This statute was of purely local application; and was of a temporary nature. We need not concern ourselves further with it.

Last year, by the Diplomatic Privileges Extension Act, 1945, the New Zealand Legislature enacted a statute which is on all fours with the Diplomatic Privileges Extension Act, 1944 (U.K.) (7 & 8 Geo. 6, c. 44), whereby machinery is provided for the extension of diplomatic immunity to any organization declared by the Governor-General by Order in Council to be an organization of which His Majesty's Government in New Zealand or Governments of one or more foreign sovereign Powers are members, and to be one to which the statute is applied. So far, no such Order in Council has been made; but it is clear that the purpose of the statute is to provide the means, when the occasion arises, for acknowledging, in the case of such organizations as the United Nations or the United Nations Relief Organization, and so on, the applicability to them as organizations, to their High Officers and Government representatives, and their other officers and servants, freedom from suit and legal process and other immunities as respectively set out in the schedule to the statute. In this statute, the extent of the privileges conferred are not so wide as those conferred on ambassadors and their staffs by the common law; and such privileges and immunities as may be conferred on the organizations and their personnel are given detailed definition. For the purposes of the present article, we need not consider further this limitation of the common-law rights and privileges, as the statute is framed to cover only the organizations

and persons whom it enumerates as the subjects of future Orders in Council to which and to whom it will be applied.

II.—THE NATURE OF THE PRIVILEGE.

The exterritoriality which must be granted to diplomatic envoys by the municipal laws of all the members of the family of nations is based on the necessity that envoys must, for the purpose of fulfilling their duties be independent of the jurisdiction, the control, and the like, of the receiving State. Exterritoriality, in this as in every case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term "exterritoriality" is nevertheless valuable, because it demonstrates that envoys must, in most respects, be treated as though they were not within the territory of the receiving States: see *1 Oppenheim's International Law*, 5th Ed., p. 619, para. 389. The so-called exterritoriality of diplomatic agents is given practical form in a body of privileges and immunities conferred by the comity of nations, by common law, and by statute.

The inviolability of the person of an ambassador is the source of his exemption from the local criminal and civil jurisdictions: for the offence committed by any person who violates any privilege conferred on the diplomatic representatives of any foreign country, see *Stephen's Digest of the Criminal Law*, 5th Ed., Arts. 100, 101. The right attaches to the privileged person from the moment that he has set foot in the country to which he is sent, if previous notice of his mission has been imparted to the Government of the receiving State; and extends over the time so far as the State to which he is accredited is concerned, over the time occupied by him in his arrival, his sojourn, and his departure.

The immunity also extends and continues for such period after his recall as is reasonably necessary for the winding-up of his official business and private affairs. The fact that his successor enters upon his official duties before the termination of this reasonable period does not affect the immunity: *Musurus Bey* v. *Gadban*, (1894) 2 Q.B. 352. We learn, however, that a diplomatic agent cannot expect to enjoy inviolability when he commits an illegal act necessitating the immediate application of personal restraint, apart from legal process; for instance, if curiosity induced him to break through the cordon of police drawn around a burning building, or if he exceeded the limit of speed when motoring on a highway or through the streets (see the cases quoted in *Foster's Practice of Diplomacy*). "It may be generally said that the condition of his personal inviolability is the correctness of his own conduct, just as if he were a private individual": *1 Satow's Diplomatic Practice*, 243.

If the diplomatic agent commits an ordinary crime, he cannot be arrested or tried or punished by the local Courts. A curious claim on the ground of diplomatic immunity from the local criminal jurisdiction was made in 1916, in the case of the first secretary of the Italian Embassy in England, who was found shot in the bedroom of a London hotel. It was *prima facie* the duty of the local coroner to hold an inquest into the cause of death, but the Italian ambassador appears to have objected. As the jurisdiction of the coroner in such a case is clearly criminal, it is pointed out that "the well-settled rule of international law, which exempts a diplomatic envoy and his suite from criminal process, excludes the jurisdiction over the dead body of any member of an ambassador's suite": see *60 Solicitors' Journal* (London), 285.

Both under the common law, and under the Diplomatic Privileges Act, 1708, a diplomatic agent accredited to the Crown by a foreign State is absolutely privileged from being sued in our Courts, and any writ issued against him is absolutely null and void.

Some writers consider that, except for the purposes of such administrative and police regulations as have been mentioned, the consent of a diplomatic agent is required for the exercise of all local jurisdiction, and that consequently it can only assert itself in so far as he is willing to conform to its rules in non-contentious matters, or when he has chosen to plead the action, or to bring one himself. In cases of the latter kind, he consents to the effects of an action in so far as they do not interfere with his personal liberty, or with the property exempted by virtue of his office. In other matters, according to this view, he is subject to the laws of his own State, and satisfaction of claims upon him, of whatever kind they may be, can only be obtained, either by application through the government to which he is accredited to his own sovereign, or by having recourse to the courts of his own country: *Hall's International Law*, 5th Ed. 174.

In *In re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139, Astbury, J., said that whether diplomatic privileges can be waived is a point of considerable difficulty. The privilege of a resident minister of a foreign government is to have his person sacred and free from arrest, not on his own account, but on account of those he represents; and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, when they cannot meet themselves. As Talbot, L.C., said in *Barbuit's Case*, (1737) Cas. t. Talb. 281, 25 E.R. 777,

> If the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for the sake of the business he is to do, it is impossible that he can renounce such privilege and protection; for, by his being thrown into prison, the business must inevitably suffer.

This passage, as Astbury, J., said, at p. 144, though only a dictum, as Barbuit was not in fact a public minister, is of very great weight. His Lordship went on to examine the authorities. He referred in detail to *Musurus Bey* v. *Gadban*, [1894] 1 Q.B. 533, 2 Q.B. 352, where it was stated by the Court of Appeal that not only had the Courts no jurisdiction to entertain an action against a diplomatic agent, but the writ itself was null and void, and its issue was a breach of the Diplomatic Privileges Act, 1707, to which we have already referred. In his judgment in *Fisher* v. *Begrez*, (1833) 2 Cr. & M. 240, 242, 243, Bayley, B., said, of the privilege of a member of a diplomatic staff: "The privilege is not the privilege of the servant, but of the ambassador." The decision does not touch the question of waiver by a privileged person. Astbury, J., came to the following conclusion in the *Republic of Bolivia* case, at p. 156:

> It seems to me that both at common law and under the statute [Diplomatic Privileges Act, 1708] all writs against foreign public ministers accredited to the Court of this country are absolutely null and void, and that if and so far as waiver of that diplomatic privilege is possible it must be confined to cases of some very special nature, as was the case in *Taylor* v. *Best* (14 C.B. 487) . . . It seems to me

that on this question, there are three matters to be considered. In the first place, having regard to the earlier cases as to the absolute nullity of proceedings against foreign public ministers I am satisfied that waiver, if it be possible, must be strictly proved. It implies a knowledge of the rights waived, and I am not satisfied that R. E. Lembeke [second secretary of the Peruvian Legation] when he entered appearance and took the subsequent steps was aware of his privilege. Secondly, knowledge of our common and statute law cannot be imputed to a foreign subject residing here as diplomatic agent of a foreign State. Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear that, whatever knowledge R. E. Lembeke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation. . . .

Whatever be the true view of R. E. Lembeke's conduct in entering appearance and taking the subsequent steps, it is clear that the summons must prove abortive against him. No judgment or execution can be enforced or levied against him, and the authorities show the impropriety of allowing the action to go on merely for the purpose of defining his liability.

The learned Judge held that no effective waiver of privilege had been established, and that the plea of privilege must prevail.

Before concluding this part of our consideration of the subject, it must be emphasized that diplomatic immunity does not mean that the privileged person is outside or above the local municipal law of the receiving country, or that he is immune from legal liability for any wrongful act. It means that he is not subject to the jurisdiction of the Courts of that country: and accordingly he cannot be made the subject of any legal process, criminal or civil, while he enjoys the immunity. We shall deal more fully with the question of waiver of the privilege at a later stage, with particular reference to the members of the public minister's suite, his family, and his servants (whether or not the last-mentioned are nationals of the receiving country.)

In our next issue, with these principles before us, we propose to consider whether a diplomatic agent may be summoned as a witness in a criminal trial or a civil action; and we hope to give practitioners some guidance as to the proper ascertainment of whether or not a person attached in some way to, or serving, a resident minister of a foreign State is, or is not, privileged in respect of giving evidence in our Courts.

SUMMARY OF RECENT JUDGMENTS.

THE KING v. KAHU.

SUPREME COURT. Hamilton. 1946. February 6. BLAIR, J.

Criminal Law—Evidence—Dying Declaration—Woman with Throat cut nodding Assent to Question whether Accused had done it—Later, Woman in Hospital writing "My husband cut my throat"—Admissible as Dying Declarations—Rejection for Other Reasons.

The accused was indicted on two counts of murder. The first alleged the murder of his wife, the second the murder of A. The Crown's case was that accused murdered A. by smashing his head in with blows of a claw hammer, and murdered his wife about the same time by smashing her head in with the same hammer and by cutting her throat, completely severing the windpipe. A.'s father first found his son grievously injured, and then Mrs. K. in a doorway. He asked her, "Did K. do this?" She nodded her head. He then asked her if she could hear him, and again she nodded her head. He then asked her if she could speak and she shook her head. That incident was tendered as evidence admissible as dying declarations.

At the hospital, to which Mrs. K. was taken, and while she was being prepared for an operation by a sister, the latter stated that Mrs. K. indicated to her that she wished to write, and made a sign of writing on the front of the sister's uniform. Owing to her windpipe being severed, it was impossible for Mrs. K. to speak. The sister then handed Mrs. K. paper and a pen, and she thereupon wrote on it as follows: "I'm cold. My husband cut my throat while he was interviewing me in our house in Manaanui. Please pull the bed clothes over my shoulders. Where's the doctor?"

Evidence was given by Dr. R., who performed the operation on Mrs. K., and by Dr. L., a pathologist, who heard his evidence, that, when first admitted to the hospital, Mrs. K. would be more desperate in her mind than when she wrote that note, the nature of which indicated that she must have considered that death was imminent, and that, when she made the signs described to A.'s father, her mental condition would be on a par with that which constrained her to write the note to the sister.

Held, That both statements were made by Mrs. K. with the imminent shadow of death upon her, and were admissible as dying declarations.

R. v. *Jenkins*, (1869) L.R. 1 C.C.R. 187), and *Reg.* v. *Orpen*, (1898) 17 N.Z.L.R. 402) distinguished.

The learned Judge, however, refused to admit the evidence, for the following reason: There was already before the jury other evidence pointing to the accused as the murderer. If he admitted the statement he would be bound to accede to the request of the defence to state a case for the Court of Appeal thereon: and, if the result of that case was that the declarations were held to be inadmissible, it would not be possible to put that right by ordering a new trial, because mischief would have been done by inadmissible evidence being published. If the evidence were rejected, and the case stated at the request of the Crown, then, if the learned Judge's ruling were found to be erroneous at a new trial such an error on his part could be rectified.

Counsel: *Bain*, for the Crown: *N. I. Smith*, for the accused.

Solicitors: *Crown Solicitor*, Wanganui, for the Crown: *King, McCaw, and Smith*, Hamilton, for the accused.

MASON v. WILLIAM COOK AND SONS, LIMITED.

COMPENSATION COURT. Wellington. 1945. November 30. 1946. March 6. ONGLEY, J.

Workers' Compensation—Liability for Compensation—Assessment—Worker suffering from Arthritis of the Spine before Accident—Accident causing Vertebral Fracture—Whether Worker entitled only to Proportion of Disability due to Accident—Assessment of Compensation payable—Workers' Compensation Act, 1922, s. 3.

A worker had suffered from osteo-arthritis of the spine before he had a fall arising out of and in the course of his employment whereby he suffered a compression fracture of the first lumbar vertebra. The fall was acknowledged to be the cause of the worker's total incapacity to November 13, 1944, but his claim for 40 per cent. permanent incapacity was denied on the ground that not more than 20 per cent. of the permanent disability was due to the accident and the balance to other causes.

Held, (1) That the plaintiff was entitled to be compensated for the total permanent disability unless that disability was or would at some future time within the compensation period be the result of a progressive disease accelerated by accident; and, if it be that result, he was entitled to compensation for the period by which the incapacity had been accelerated by the accident.

Hutton v. *Niddrie and Benhar Coal Co., Ltd.*, [1938] S.C. (Ct. Sess.) 30; 31 B.W.C.C. Supp., 1 followed.

(2) That, on the evidence, the plaintiff's incapacity had resulted from the accident, and he was entitled to be compensated for the total of his permanent partial incapacity, assessed at 33⅓ per cent. of full compensation.

Counsel: *A. M. Ongley*, for the plaintiff; *G. Crossley*, for the defendant.

Solicitors: *A. M. Ongley*, Palmerston North, for the plaintiff; *Fitzherbert, Abraham, and Crossley*, Palmerston North, for the defendant.

LAMMAS v. MANAWATU COUNTY.

COMPENSATION COURT. Wellington. 1945. November 30; 1946. March 7. ONGLEY, J.

Workers' Compensation—Assessment—Permanent Partial Incapacity—Suitable Employment found after Accident by Pre-accident Employer—Lump Sum Award or Weekly Payment—Test to be applied—"Able to earn"—Workers' Compensation Act, 1922, s. 5 (3)—Workers' Compensation Amendment Act, 1943, s. 3.

In awarding a lump sum under s. 5 (3) of the Workers' Compensation Act, 1922, by way of compensation instead of a weekly payment, ability to earn is the test to be applied, notwithstanding s. 3 of the Workers' Compensation Amendment Act, 1943.

Counsel: *A. M. Ongley*, for the plaintiff; *L. Laurenson*, for the defendant.

Solicitors: *A. M. Ongley*, Palmerston North, for the plaintiff; *Innes and Oakley*, Palmerston North, for the defendant.

WILLIAMS v. HENDERSON AND POLLARD, LIMITED.

COMPENSATION COURT. Auckland. 1945. November 1. 1946. February 20. ONGLEY, J.

Workers' Compensation—Liability for Compensation—Delay in Commencing Action—Worker told by Doctor that Disability not compensatable—Whether Delay "occasioned by mistake" of Fact or of Law—Workers' Compensation Act, 1922, ss. 3, 27 (1) (4).

A worker who collapsed while in the course of his employment, consulted a doctor who informed him that he had burst a blood vessel in his heart and that the trouble was not compensatable, and there was nothing he could do about it. Relying on that statement of the doctor, he did not commence proceedings within six months after the date of the alleged accident.

On a preliminary question of law argued before trial, assuming that the accident had arisen out of and in the course of the employment,

Held, That the plaintiff's mistake in thinking that his trouble was not compensatable was a question of fact, and not a question of law, and that the plaintiff was not barred by the delay in commencing the action.

Eaglesfield v. *Marquis of Londonderry*, (1876) 4 Ch.D. 693, applied.

Wilson v. *Gunnaway and Co., Ltd.*, [1937] N.Z.L.R. 843, and *Morey* v. *Residential Construction Co., Ltd.*, [1946] N.Z.L.R. 32, distinguished.

Counsel: *A. M. Finlay*, for the plaintiff; *I. J. Goldstine*, for the defendant.

Solicitors: *A. M. Finlay*, Auckland, for the plaintiff; *Goldstine, O'Donnell, and Wood*, Auckland, for the defendant.

MOTOR COLLISIONS WITH OVERTAKEN PEDESTRIANS.

Law and Usage: A Reply.

By C. C. CHALMERS.

This article is by way of making some comments on the article, under this title, by my friend Mr. R. T. Dixon, appearing in this JOURNAL, *ante* p. 47.

Mr. Dixon divides his article into two parts: (*a*) the obligations of pedestrians walking along a road; and (*b*) the obligations of motorists towards such pedestrians. The present article deals mainly with what Mr. Dixon has to say under topic (*a*). He commences by referring to Reg. 27 of the Traffic Regulations, 1936 (Serial No. 1936/86) which imposes on a pedestrian the obligation to keep to the footpath as much as is practicable where "a reasonably adequate footpath is available"; and he then refers to para. (*a*) of the *New Zealand Road Code*, where it provides, as regards pedestrians, that "where no footpath is available keep to the edge of the roadway, and, if you have a reasonably clear view ahead, keep to your right of the roadway," which Code, however, as he states, has not any legal effect: compare the partial legal consequence of the English Highway Code issued under s. 45 of the Road Traffic Act, 1930 (Eng.): *Mahaffy and Dodson's Road Traffic Acts, and Orders*, 2nd Ed., 1936, 83.

Mr. Dixon then refers to the statement in *Beven's Law of Negligence*, 4th Ed., 684, that, in England, "the custom, or law of the road, is that . . . foot passengers take the right-hand" side of the road, "and this is judicially recognized without proof"; he states that he cannot find any other reference to this custom or law of the road (which I refer to hereafter, for brevity, as "the custom"); also that the statement in *Beven* should be limited in its application to the usage for "vehicles and horses" (*sic*): further that in any case a usage so little noted by legal authorities in the country of its origin would be unlikely to have (receive) judicial effect in this country; and considers that the adoption here of the custom may prove positively dangerous on road bends, and cuttings.

Mr. Dixon goes on to acknowledge that the custom, as set out in *Beven*, is referred to by Sir Michael Myers, C.J., in *Cooper* v. *Symes*, [1929] G.L.R. 463. There the learned Chief Justice found it unnecessary to determine whether the rule operated in New Zealand; stated that the rule was little known here, and considered it desirable to leave the question open until it expressly arose.

In what is an addendum to his article, Mr. Dixon refers also to the recent case of *Ryan* v. *McDonald*, *Lane* v. *McDonald*, [1946] N.Z.L.R. 113, where the rule as to led horses was discussed by Blair, J., a rule similar to the custom as to pedestrians. I shall refer to this decision later, as to that rule as to led horses; but here it should be noted that Blair, J., mentions, also, the custom, as to pedestrians. He said, at p. 116, "It is now commonly advocated that when pedestrians are walking along a road at night time they should walk on the off side of the road, because by doing so they then face approaching traffic and can keep out of its way."

It is submitted that the custom, in England, as set out in *Beven* is correctly stated that it applies to pedestrians walking along a road, and that it is a custom based on sound common sense. Myers, C.J., does not question its existence (in England) in *Cooper* v. *Symes* (*supra*). Blair, J., also, in *Ryan's* case (*supra*) recognizes the custom, (but says, as to walking at night) although it would not seem to be so limited. The custom, to the extent of my research, is supported, also, by the following:

(*a*) *Gibbs' Collisions on Land*, 4th Ed., 119. After referring to the custom, or rule of the road, that vehicles keep to the left (in New Zealand this duty is imposed by Regs. 14 (1), 22 (2) and 25 (1) of the Traffic Regulations, 1936), the author states, "The pedestrian, on the other hand, in observing custom, walks on the right, or off, side of the road. The origin of both these customs must be sought in the manners and customs of our forefathers . . . it seems . . . probable that, with the development of vehicular traffic, drivers adopted the left-hand side out of respect for the custom of those on foot, who already frequented the highways. In this manner the pedestrian would acquire a sense of security in the knowledge that overtaking vehicles would approach from behind upon that part of the roadway which he himself left free."

(*b*) *Oliphant's Law of Horses*, 6th Ed., 1908, 341, where, after referring to the customary rules of driving, it is stated, "It is customary for foot passengers to take the right-hand side" of the road.

(*c*) The existence of the custom in England is recognized by being embodied in cl. 89 of the *Highway Code*, thus, "Never walk along the carriage way where there is a pavement or suitable footpath. If there is no footpath it is generally better to walk on the right of the carriage way so as to face oncoming traffic." It is interesting to note, also, that the custom is observed in America, except that, as the driving rule, there, is to keep to the right, the foot passenger keeps to the left: *19 Encyclopaedia Brittanica*, 14th Ed., 632. In South Australia the custom is embodied in s. 128 (1) of the Road Traffic Act, 1934–36, and the wisdom of this statutory provision is thus expressed by Richards, J., in *Correll* v. *Thomas*, [1939] S.A.S.R. 39, 45, "The section was, obviously, meant for the safety of the pedestrian. It contemplates that he will be walking so as to face, and so be able to see, vehicular traffic which might place him in danger. For practical reasons vehicles frequently have to be driven off the ordinary track, for example, in order to avoid other traffic or something lying on the track, or in order to approach premises abutting on the road. A pedestrian would be in such circumstances be in danger although walking outside the usual track on his left-hand side."

The custom obviously accords with sound common sense. The pedestrian, both by day and by night, can protect himself best by being on the right and facing oncoming traffic, even at bends and at cuttings. In any case, at bends, &c., the pedestrian would be exposed to greater danger if he walked on the left, with vehicles approaching him from behind. A good test of the wisdom of the custom is to take the case of a deaf pedestrian. If he walked on the left, he could easily be run down from behind. By observing the custom, and walking on the right, he can protect himself; by day by observing oncoming vehicles; and by night by observing their lights.

Apart from country roads without footpaths, almost every city and town in New Zealand has its narrow roads and lanes, where there is no footpath provision, and used both by vehicles and pedestrians.

Hence, where there is not a "reasonably adequate footpath" (Reg. 27 of the Traffic Regulations, 1936), it is submitted that the custom, in England, now embodied there in cl. 89 of the *Highway Code*, and in part recognized by the *N.Z Road Code*, should receive judicial recognition in New Zealand, when the point arises for decision here.

With regard to *Ryan's* case (*supra*), Mr. Dixon considers it is unlikely that the usage referred to by Blair, J., there has any application in New Zealand, by reason of s. 4 (1) of the Police Offences Act, 1927; see his article, *ante*, p. 49. With respect, it is submitted that this statutory provision does not displace the custom, or rule of the road, that horses which are led are to be kept to the right-hand side of the road. That statutory provision is concerned with any person "who rides any animal," and is, I submit, restricted merely to a person who is riding, say, a horse, without more, on a road, when the obligation under that provision is to keep to the left. The statutory provision is not, "who rides any animal, or who rides any animal and leads another animal."

As stated in *Charlesworth's Law of Negligence*, quoted by Blair, J., in *Ryan's* case, at p. 116, "The rule of the road as to led horses or other animals is different from the rule applicable to *ridden* or driven horses or vehicles." And a led horse means not merely a horse without a rider being led, but also a horse led by the rider of another horse; and where that is the case the custom is to keep to the right or off side, in order to enable the man who is leading the horse to control it better in passing other occupants of the highway: *23 Halsbury's Laws of England*, 2nd Ed., 638, note (*a*). In *Ryan's* case, it is submitted, the custom applied because, there, a rider on a horse was leading another horse, and s. 4 (1) (*a*) of the Police Offences Act would have no application to those facts.

Commentary on the above Reply.

By R. T. Dixon.

I have been invited by the Editor to make any desired comment in the light of the foregoing criticizm by my friend, Mr. C. C. Chalmers. In view of the very deep respect in which I hold the knowledge possessed by Mr. Chalmers of law in general and traffic law in particular, I have re-read the original article, referred to the authorities mentioned by him, and made further search.

There appear to be three questions at issue between us—namely, (*a*) is there a judicially recognized custom (or more correctly, usage) in England requiring pedestrians to keep to the right in making along the road:

(b) if so, does such usage apply in New Zealand? (c) Does s. 4 (1) (c) of the Police Offences Act, 1927, override the usage (assuming its existence) whereby a rider of a horse when leading another horse is required to keep to the right?

As to the first point, a custom or usage must be certain and consistent, *Browne's Law of Usages and Customs*, 21, 25, and *10 Halsbury's Laws of England*, 2nd Ed. 6. The references in *Beven on Negligence*, 4th Ed. 684, and in *Gibbs* and *Oliphant* as referred to by Mr. Chalmers do not cite any cases in support. This is noteworthy because cases are given in support of the other "Rules of the Road" on which comment is there made. In *42 English and Empire Digest*, 842–846, a section is allotted to "Rules of the Road." In the subsection dealing with "Rights and Duties of Pedestrians," p. 846, no reference is made to the alleged usage. No mention of it is made in *Mazengarb's Negligence on the Highway*. These omissions, together with the omissions from *Halsbury* and other leading text-books as stressed in the first article, appear to me to throw grave doubt on the existence of a usage sufficiently certain and consistent to receive judicial notice in England. The apparent lack of reference to such a usage in English case-law is also most significant, *vide Boss* v. *Litton*, (1832) 5 C. & P. 407, a case often cited on the rights of pedestrians in making along a road. It will be noted that in cl. 89 of the *Highway Code* (Eng.) the clause reads " . . . it is *generally* better to walk on the right of the carriage way . . . " There is no certainty in this statement.

In regard to the application of the alleged usage in this country, I have nothing to add to my first article, except that Mr. Chalmers appears rather to misunderstand my views. I agree that it is desirable practise for a pedestrian to walk along on the right (rather than on the left) of a straight, open roadway; but in this country there are more roads of the winding, hilly type than there are in England. Therefore the doubt concerning the existence of this usage as a legal one deepens when considered in the light of New Zealand conditions. For a pedestrian to keep always to the right of the roadway in making either along a typical winding gorge road with banks on his right, or in approaching the brow of a sharp rise, would require considerable nerve and implicit trust in the brakes and watchfulness of approaching motorists.

So far as led horses are concerned, a usage cannot prevail against statute law, *Brown's Law of Usages and Customs*, 26, and *10 Halsbury's Laws of England*, 2nd Ed., 42. Section 4 (1) (c) of the Police Offences Act, 1927, provides (in brief) that a rider of an animal must keep to the left when meeting another rider or driver and must pass another rider or driver on the right. No exception is stated to apply when the rider of the animal is leading another animal. Therefore, in my opinion the rider of an animal, even when leading another animal, must comply with the statute. Any legal usage which may have existed appears to that extent to have been abrogated.

Finally, I conclude with an extract from *Browne's Law of Usages and Customs*, 27–28. The learned author states that there exists a certain confusion of thought between those customs which form part of the common law and to which definite rules apply (including the rules of consistency and certainty) and those customs which influence the conduct of men. The latter, states *Browne* " are as it were provisional laws, but they lack the obligatory character which attaches to proved and recognized customs."

NO-SURVIVORSHIP TITLE,

Application to Supreme Court for Sanction of Transmission by Survivorship and Transfer to new Trustee.

By E. C. Adams, LL.M.

Explanatory Note.

The No-survivorship provisions are contained in ss. 131–134 of the Land Transfer Act, 1915: as to these, see *In re Denniston and Hudson*, [1940] N.Z.L.R. 255, and the article in (1941) 17 New Zealand Law Journal 137, explaining the law and procedure applicable.

In the following precedents the trustees of E.F., who died many years ago, purchased a family home subject to the trusts of the will, and the land is under the Land Transfer Act. The purpose in having the words "No Survivorship" inserted in the transfer to them was to guard against the possibility of one trustee dying and the survivor committing *devastavit* to the detriment of the remainderman. One trustee was the surviving spouse of testator, and the writer has often thought that where the surviving spouse has beneficially only a limited interest in the trust estate, it is not prudent that he or she should be one of the trustees.

The case just cited (which is the latest New Zealand authority on the point) shows that the consent of the Court is necessary to the transmission by way of survivorship, as well as to the transfer to the new trustee. Previous to this case the Land Transfer Department did not consider that the consent of the Court was necessary to a transmission by way of survivorship. In this respect, however, the New South Wales Court has recently decided similarly to our Supreme Court, and curiously enough *In re Denniston and Hudson* (*supra*) does not appear to have been cited to the New South Wales Court, which nevertheless examines and criticizes all other New Zealand cases dealing with no-survivorship Land Transfer Titles. With this criticizm the writer of this article respectfully agrees. The recent New South Wales case referred to is *In re Robertson*, (1943) 44 N.S.W. S.R. 103.

In the following precedents the registration of the transfer from A.B. (the surviving trustee) to A.B. and M.N. (the new trustee) was immediately followed by a transfer from them to the beneficiary, G.H. It is clear that thereupon the no-survivorship provisions of the Land Transfer Act automatically ceased to apply to the land, for these provisions were invoked for the protection of a trust, and once the trust was validly

extinguished by the vesting of the legal estate in fee-simple in the sole beneficiary, there was no longer any reason for the continuance of these restrictive provisions: *Cessante ratione legis, cessat ipsa lex.*

In *In re Robertson*, (1943) 44 N.S.W. S.R. 103, the devolution (subject to registration) of the legal title had gone one step further than in any of the New Zealand reported cases. Originally there were two registered joint proprietors with No Survivorship, and both had died. The survivor had left two executors, and these two executors claimed that the consent of the Court was not necessary to the registration of a transmission in their favour, because they were equal in number to the original joint tenants. The Court, however, rejected this ingenious submission, holding that, as the last joint proprietor could not have been registered as sole owner without the consent of the Court, his executors could not be in any better position.

From these two leading cases the following deductions may, it is respectfully submitted, be safely made:—

(1.) The presence of the entry "No Survivorship" indicates that the land is trust property: these provisions were designed to provide some protection in favour of *cestuis que trust*, without entering a caveat or notice of trust on the Register. (The Australian Judge, Roper, J., adds that this device is inconvenient and little used.)

(2.) The registered proprietors are joint tenants and not tenants in common and accordingly the *jus accrescendi* applies to the tenancy of persons registered with No Survivorship. Therefore the estate of the joint tenant first dying has no interest in the land, unless (and this is a matter which does not concern the District Land Registrar) it happens that that joint tenant as well as being a trustee is also a beneficiary under the trust.

(3.) The estate of the sole surviving joint tenant by survivorship devolves (subject to registration) on his executors.

(4.) To effect the change in title which follows on a transmission by survivorship is within the words in s. 133 of the Land Transfer Act, 1915 "to transfer or otherwise deal with the said land, estate, or interest," and therefore the consent of the Supreme Court is necessary to such an application.

PRECEDENTS.

No. 1.—PETITION.

IN THE SUPREME COURT OF NEW ZEALAND.

District.
(Registry.)

IN THE MATTER of the Land Transfer Act, 1915, ss. 133 and 134

AND

IN THE MATTER of Certificate of Title, Volume , Folio .

To The Right Honourable Sir Michael Myers, G.C.M.G., Chief Justice of New Zealand.

THE HUMBLE PETITION of A.B. formerly of Woodville but now of Cambridge in the Provincial District of Auckland farmer showeth as follows:—

1. That your petitioner and C.D. of Napier in the Provincial District of Hawke's Bay widow are registered proprietors of an estate in fee-simple as joint tenants in all that parcel of land containing [*Set out here official description of land and area and title reference*].

2. That the aforesaid land is subject to the restriction of "no survivorship" which entry was made on the Register at the time of the registration of the transfer of the said land to your petitioner and the said C.D.

3. That your petitioner and the said C.D. acquired the said land as the trustees of the will of E.F. (who died on the day of ,)probate whereof was granted by this Honourable Court at on the day of , .

4. That a copy of the said will is hereunto attached and marked with the letter "A."

5. That by the said will the said deceased—

(*a*) Bequeathed certain chattels to his widow the said C.D.

(*b*) Devised and bequeathed the residue of his estate to your petitioner and the said C.D. upon trust to allow the said C.D. an estate therein for life or until remarriage.

(*c*) Directed that upon the death of the said C.D. the trustees should pay one hundred pounds (£100) to each of two daughters of the said deceased named in the said will and the balance should go to his son G.H. of Napier carpenter.

(*d*) Directed certain payments in the event of the remarriage of the said C.D.

6. That the said E.F. was survived by his said widow, two daughters and one son.

7. That the said C.D. died on the day of , 1944, as is evidenced by the death certificate hereunto attached marked "B." She left no estate which necessitated applying for probate of her will.

8. That all but one of the trusts of the said will have been duly carried out in that—

(*a*) The chattels bequeathed to the widow were given to her.

(*b*) The widow enjoyed for her life the life estate bequeathed to her.

(*c*) Since the death of the widow the abovementioned sums of one hundred pounds (£100) and interest accrued have been paid by your petitioner to the two daughters of the said deceased to wit I.J. and K.L. as is evidenced by their receipts hereto attached and marked "C" and "D" respectively.

(*d*) The said widow never remarried.

9. That in accordance with the provisions of the said will the said G.H. is now absolutely entitled to the residue of the deceased's estate which includes the lands described in paragraph 1 hereof.

10. That your petitioner being desirous of appointing a trustee in the place and stead of the said C.D. deceased has requested M.N. of Napier aforesaid solicitor to act as such trustee and he has consented to do so.

YOUR PETITIONER THEREFORE HUMBLY PRAYS that His Honour will be pleased to make an order:—

(*a*) Sanctioning the registration of a transmission noting the death of C.D. deceased.

(*b*) Sanctioning a transfer by the petitioner to himself and the said M.N. as joint tenants and authorizing the District Land Registrar to accept such transfer for registration.

(*c*) As to the costs of this petition and the consequences thereof.

(*d*) Such further order as His Honour shall think fit.

And your Petitioner will ever pray.

Dated at this day of , 1944.

SIGNED by the said A.B. in the presence of— } Petitioner.

O.P.,

A Solicitor of the Supreme Court of New Zealand

I, A.B. of Cambridge aforesaid farmer make oath and say—

THAT so much of the foregoing petition as relates to my own acts and deeds is true and so much thereof as relates to the acts and deeds of other persons I believe to be true.

SWORN at this day of 1944 before me— }

O.P.,

A Solicitor of the Supreme Court of New Zealand

This petition is filed by M.N. of Napier the solicitor to the petitioner whose address for service is at the offices of Messieurs , solicitors, Street, Napier.

No. 2.—NOTICE OF MOTION.

IN THE SUPREME COURT OF NEW ZEALAND.
District.
(Registry.)

IN THE MATTER of the Land Transfer Act, 1915, ss. 133 and 134.

AND

IN THE MATTER of Certificate of Title Volume Folio .

Mr. of Counsel to move in Chambers at the Supreme Courthouse on the day of 1944 at 10 o'clock in the forenoon or as soon thereafter as Counsel can be heard FOR AN ORDER—

(a) Sanctioning the registration of a transmission noting the death of C.D. of Napier widow.

(b) Sanctioning a transfer from A.B. named and described in his petition filed in this honourable Court to the petitioner and M.N. also named and described in the said petition as joint tenants of the land comprised and described in the above-mentioned Certificate of Title Volume Folio .

(c) As to costs of the said petition and consequences thereof.

(d) Such further or other order as His Honour shall think fit upon the facts more particularly set out in the Petition of A.B. filed herein.

Dated at Napier this day of 1944.

Certified pursuant to the Rules of the Court to be correct.

Counsel moving.

MEMORANDUM FOR HIS HONOUR.

His Honour is respectfully referred to *In re Denniston and Hudson*, [1940] N.Z.L.R. 255, and *In re Robertson*, (1944) 44 N.S.W. S.R. 103.

No. 3.—ORDER.

IN THE SUPREME COURT OF NEW ZEALAND.
District.
(Registry.)

IN THE MATTER of the Land Transfer Act 1915 ss. 133 and 134.

AND

IN THE MATTER of Certificate of TITLE Volume Folio .

Before the Honourable Mr. Justice a Judge of this Honourable Court.

Saturday the day of 1944.

UPON READING the petition of A.B. and the motion filed herein and the affidavit filed in support of the said petition IT IS ORDERED that the registration of a transmission noting the death of C.D. of Napier widow deceased and a transfer from A.B. named and described in his petition filed in this honourable Court to the said A.B. and M.N. also named and described in the said petition as joint tenants of the land comprised and described in the above-mentioned Certificate of Title Volume Folio BE and the same are hereby sanctioned. AND IT IS FURTHER ORDERED that the costs of and incidental to the order as between solicitors and client be paid out of the residue of the estate of E.F. deceased.

By the Court.

(SEAL.)

Deputy Registrar.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

The Annual Meeting of the Council of the New Zealand Law Society was held on March 15, 1946.

The following Societies were represented: Auckland; Messrs. A. H. Johnstone, K.C., J. B. Johnston, L. P. Leary, and A. Milliken; Canterbury, Messrs. L. D. Cotterill and J. D. Hutchison (proxy); Gisborne, Mr. D. G. Chrisp; Hamilton, Mr. W. Tanner; Hawke's Bay, Mr. M. R. Grant; Marlborough, Mr. W. Churchward; Nelson, Mr. V. R. Fletcher; Otago, Messrs. A. J. Dowling and J. B. Stevenson; Southland, Mr. W. H. Tustin; Taranaki, Mr. R. J. Brokenshire; Wanganui, Mr. R. S. Withers; Westland, Mr. J. Hannan; Wellington, Messrs. H. F. O'Leary, K.C., W. P. Shorland and G. G. G. Watson; and Mr. H. R. Biss was also present by request.

The President, Mr. H. F. O'Leary, K.C., occupied the chair. Mr. A. T. Young (Treasurer) was also present.

An apology for absence was received from Mr. E. A. Lee (Canterbury).

The President welcomed all those who were attending the meeting of the Council for the first time.

Before commencing the ordinary business of the meeting, on the motion of the President, the following resolutions were unanimously carried:

Sir Archibald Blair.—"The Council of the New Zealand Law Society desires to congratulate Mr. Justice Blair on the honour of knighthood conferred on him by His Majesty the King. The conferring of the honour on one who was so closely associated with the Society's activities when he was at the Bar has given particular pleasure to members of the profession throughout New Zealand and the members of the Council express the sincere wish that Sir Archibald and Lady Blair will long enjoy the well-merited honour."

Sir William Perry.—"The Council of the New Zealand Law Society congratulates Sir William Perry, a prominent member of the profession on the honour of knighthood recently conferred on him and expresses the sincere wish that he and Lady Perry will long be spared to enjoy same."

Mr. A. H. Johnstone, K.C., O.B.E.—"The Council tenders to its Vice-President its sincere congratulations on the well-merited honour recently conferred on him by His Majesty the King."

Reference was made to the letter set out in the Annual Report received from the Law Society, England, and it was decided to forward in reply the following resolution:

"The Council of the New Zealand Law Society, at its first Annual Meeting since the cessation of hostilities acknowledges with great pleasure the letter of the 6th day of November, 1945, from the Council of the English Law Society and thanks the members of that Council for the cordiality of the letter and the sentiments and good wishes which it expresses.

"The members of the Council also look forward to future co-operation upon matters of mutual interest. They realise that we in the Dominion are in many ways better circumstanced than our brethren in Great Britain—due to the fact that we had little of the direct impact of war—and willingly offer help in any form that we may be able to give. We trust that any desire for help will be promptly made known to us.

"In conclusion, the Council conveys to the English Council its greetings and best wishes for an early return to pre-war conditions and prosperity."

Annual Report and Balance Sheet.—In his Presidential remarks Mr. O'Leary stated that in seven years this was the first annual meeting held when our country was not at war. There had been times when a pessimistic view had been held as to whether we would ever again live a normal life, and in New Zealand the future had, on occasions, been regarded with apprehension. Although it was realized that many problems still remained, it was hoped that never again in our lifetime, nor at any time, would we face such conditions as had been faced between 1939-45. New Zealand, he stated, had taken no small part in the struggle which had brought about the momentous events of 1945, and the contribution made by the legal profession, both in England and in New Zealand, had been a substantial one. In England, it was said that 50 per cent. of the barristers had been serving, whilst in New Zealand, the records of the Society, which were far from complete, had shown that approximately 750 clerks and principals had been engaged in war services.

In addition, much had been done by the profession at home to generally assist in the war effort.

No record had been kept of the honours bestowed on serving members, but it had been noted that numerous members of the

profession had been so honoured. To them, the Society conveyed its congratulations. Many had paid the supreme sacrifice, and to their loved ones deepest sympathy was extended.

To the men who had returned to these shores, the President conveyed his welcome.

In formally moving the adoption of the annual report and balance sheet for the year ended December 31st, 1945, the President referred to the interest taken in rehabilitation matters by the Committee of the Society, to whom the Council was indebted, and in particular to Mr. C. A. L. Treadwell, its chairman.

The Vice-President, Mr. A. H. Johnstone, K.C., in seconding the motion, added his welcome to the men who had returned during the year to the practice of the profession and wished them every success in the future.

After a general discussion, the annual report and balance sheet were adopted.

Election of Officers.—The following officers, the only nominees for the positions, were elected: *President*: Mr. H. F. O'Leary, K.C.; *Vice-President*: Mr. A. H. Johnstone, K.C.; *Treasurer*: Mr. A. T. Young; *Management Committee of Solicitors' Fidelity Guarantee Fund*: Messrs. E. P. Hay, A. H. Johnstone, K.C., H. F. O'Leary, K.C., D. Perry and A. T. Young; *Audit Committee*: Messrs. H. E. Anderson and J. R. E. Bennett; *Library Committee—Judges' Library*: Messrs. T. P. Cleary and G. G. G. Watson; *Disciplinary Committee*: Messrs. H. F. O'Leary, K.C., A. H. Johnstone, K.C., C. H. Weston, K.C., M. R. Grant, A. N. Haggitt, J. D. Hutchison, J. B. Johnston and G. G. G. Watson; *New Zealand Council of Law Reporting* (No. 4 (b) Minutes of 12/3/43): Messrs. P. B. Cooke, K.C., and M. J. Gresson were re-elected members of the New Zealand Council of Law Reporting, the term of appointment to expire on the 1st Monday in March, 1950. *Rules Committee*: Messrs. P. B. Cooke, K.C., W. J. Sim, K.C., and T. P. Cleary were nominated as members of the Rules Committee; *Conveyancing Committee*: Messrs. C. H. Weston, K.C., E. P. Hay and E. F. Hadfield.

United Nations' League of Lawyers.—The following letters were received from the Prime Minister's Department:—

"With reference to earlier correspondence on the subject of the United Nations League of Lawyers, I enclose herewith a copy of the draft Constitution and By-Laws in the form finally approved by the Preparatory Committee. These have just been received from Mr. Reid, First Secretary of the New Zealand Legation, Washington, who states that numerous alterations have been made from the previous drafts and that it should be understood that this is simply meant to be a working paper which is to be considered at a constituent conference which will probably be held in Washington some time early in the New Year.

"Mr. Reid adds:—

"'The present situation is that copies of the draft Constitution together with an explanatory statement now being prepared, will be given to representatives in Washington of all the United Nations, with a request that they should be communicated to the official organization of lawyers in their own countries. Contacts are being made by members of the Preparatory Committee with foreign lawyers attached to missions here. On the American side, discussions are to take place with the largest organization of lawyers, the American Bar Association, and later with the other organizations, and it is expected that the proposals will be supported by a large number of influential lawyers in this country.

"'In each country it is suggested that the initial conference should be sponsored by a group comprizing a few of the leading lawyers, who will be invited to join the Preparatory Committee for that purpose. As soon as the reactions of the American lawyers are clear the final arrangements for the initial conference will be settled.'

"It is suggested that the Society might consider whether they can nominate a few leaders of the profession in New Zealand who would permit their names to be added to the Sponsoring Committee.

"I take it that you will inform Mr. Reid direct of your decision, but should be glad if I could be informed of it."

"With further reference to previous correspondence on the subject of the United Lawyers Association, I subscribe below an extract from a communication dated 4th December, on the subject received from Mr. J. S. Reid, First Secretary, New Zealand Legation, Washington."

Enclosure:

". . . I might mention that Sir Frederick Eggleston has been in touch with some of the leading members of the American Bar Association within the last few days. The Bar Association, at its Conference twelve months ago, directed a Sub-Committee of its International Law Committee to consider and report on a proposal to form an International Organization of Lawyers on a similar basis to the Inter-American Bar Association. This Sub-Committee has never met, but I understand that its Chairman, Mr. Anderson, who attended the first meeting called to discuss the United Nations League of Lawyers, is proposing to report to the International Law Committee recommending consideration of an organization of Bar Associations and Law Societies rather than one of individual lawyers. The Bar Association is due to meet next week and Anderson's report to his Committee is set down for the last afternoon of the Conference so that it is not likely to come down on to the floor of the Conference. I should mention that Anderson made the same suggestion at the initial meeting for organizing the League of Lawyers, but several of the European representatives objected to this form of organization because of the lack of Associations with popular support in their countries.

"Copies of the Constitution and By-Laws with an explanatory covering letter are being sent by Sir Frederick Eggleston to the President and other prominent members of the Bar Association in time for the meeting next week, and several prominent lawyers have already been approached and have indicated their general support. Within the next two or three weeks it should be possible to give you a much better idea of the extent of the support that will be forthcoming in the United States."

"I have to refer to previous correspondence on the subject of the United Nations League of Lawyers and to say that a message has been received from the Chargé d'Affaires of the New Zealand Legation, Washington, stating that the Organizing Committee, at a meeting on February 18, will probably decide to call the first Conference for about the end of March in Washington, in order to inaugurate the League.

"It is added that Chief Justice Stone of the United States Supreme Court and the Chief Justices of several State and Federal Courts have agreed to the use of their names as sponsors. Furthermore that other countries are being invited urgently to nominate two or three of their leading lawyers as sponsors.

"The Charge d'Affaires inquires whether leading New Zealand lawyers will agree to be named as sponsors, and requests that advice as to this, and the names of the sponsors, might be communicated to him before the end of this week. This is apparently desired so that the names of any New Zealand lawyers can be included in the formal notice to be sent by the League to all countries.

"I regret the limited time which remains to consider this but would be glad if you would be so good, and you might conveniently do this by telephone in the first instance, as to inform me whether or not the New Zealand Law Society will name two lawyers for the position of sponsors."

The President reported that additional correspondence had been received with a request that names of sponsors from the profession should be submitted immediately. After discussing the matter with the authorities, it was decided to cable Mr. J. S. Reid advising that, until particulars of the League were received no action would be taken.

After considering the matter the Council decided to request His Honour the Chief Justice to act as a sponsor and that the President of the New Zealand Law Society should be asked to act as the other sponsor.

However, failing the acceptance by His Honour the Chief Justice, it was decided that the President and Vice-President should be asked to act as sponsors.

Rehabilitation Act—Chattel Securities: Releases of Mortgages.—Mr. H. R. Biss reported as follows:

"As requested by the Council at its last meeting, I took up with the solicitor for the State Advances Corporation the matter of the requirements of the Corporation in connection with the preparation of chattel securities to secure advances made under the Rehabilitation Act.

"I have had a number of conferences on this matter, which I think have now resulted in a manner which should be satisfactory to practitioners.

"I pointed out that when the Society agreed on behalf of practitioners that the costs of preparing chattel securities would be reduced for the benefit of returned servicemen it was intended that such reduction should apply to the preparation of such securities and the work and responsibility normally attaching thereto. Practitioners, however, com-

plain that the conditions which the Corporation attaches to what it calls 'business loans' were such as to add very largely to the practitioners' work and were in many cases not conditions which a solicitor would normally require to satisfy himself upon if he was acting for a client lender.

"The Solicitor agreed in principle with my contentions but could not himself make the decision which had to be referred to the Board of his office.

"The result of my conferences with him, which, as mentioned above, is I think satisfactory, is that in future the conditions which the Corporation will require solicitors preparing chattel securities to see complied with, will be amended as follows:—

(*a*) Certificate as to quality and value of stock:—
Where the value is less than £400 no check will be required by the Corporation, but where the stock is of a value in excess of £400 a valuer will be appointed by the Corporation who will give a Certificate to the Solicitor.

(*b*) Equipment—the State Advances Corporation will deal with this matter and all reference to it will be eliminated from the instructions.

(*c*) Warrants and Certificates of Fitness.—If a Warrant or Certificate of Fitness requires endorsement or assignment on transfer, as is the case of a traffic license, the solicitor will be asked to certify that the grantor holds a current warrant or certificate duly assigned or transferred. Where no assignment is required, as in the case of a private motor car, nothing will be required of the solicitor.

(*d*) Motor Drivers' License—the solicitor will not be asked to make any inquiries in this regard.

(*e*) Licenses and Contracts—the Corporation will explicitly state in the instructions the licenses and contracts held by the vendor of the business which are to be transferred to the borrower, and the necessary consents to such transfers will require to be obtained by the solicitor.

(*f*) Hindrance—this condition will be eliminated entirely.

(*g*) Restriction on Competition—this condition will be qualified by the addition of the words 'in so far as the contract provides.' A copy of the contract will be available to the solicitor preparing the security.

(*h*) Subrogation—this condition will be eliminated entirely from future instructions.

"I suggest that the District Societies should be circularized and advised of this result, and asked to notify you if the arrangement is not being complied with by any Branch of the Corporation from which instructions emanate."

Mr. Biss stated that a draft circular in connection with releases had been handed to the Solicitor of the State Advances Corporation which would be submitted to the Board for its consideration.

It was decided to forward the report of Mr. Biss to each district society, particularly drawing attention to the last paragraph.

The President stated that the Council was indebted to Mr. Biss not only for his work in connection with this matter but for all the work done by him in the interests of the New Zealand Law Society during his term of office.

Legal Aid Act, 1939.—Letters were received from the Taranaki, Wellington, Wanganui, Auckland, Canterbury, and Hamilton Societies and the position was then discussed at some length.

In reply to Mr. Johnstone's inquiry as to the rules drawn by Mr. A. E. Currie and by Mr. A. C. Stephens, the Secretary reported that the rules drafted by Mr. Currie had been considered too cumbersome and were discarded. The Committee dealing with the matter in 1940 reported accordingly to the Law Revision Committee recommending that the New Zealand rules should be based on the English rules. Mr. Stephens had apparently been asked by the Law Revision Committee in 1940 to draft further rules which were accordingly prepared, but the Law Society was not aware of this until the latter part of last year.

Mr. Hutchinson reported that the matter had been considered at a general meeting of members in Christchurch and had been regarded somewhat seriously. A Special Committee had been asked to look into the position and its report had been submitted to the New Zealand Society.

The opinion of Canterbury was that there should be no confusion between what was termed the eleemosynary scheme and the scheme for "assisted persons" as dealt with by the Rusheliffe report.

Members thought that whilst it was necessary that the present rules should be confined to purely eleemosynary scheme, it was also thought essential that the Rusheliffe report should receive consideration so that the Society should be familiar with scheme and be prepared for any need that may arise.

On the motion of Mr. Hutchison it was decided that the present Committee be asked to prepare rules if possible in time for the Law Revision Committee's meeting on the 11th April and that the rules should apply to strictly poor persons, that a draft of the rules should be circulated immediately and that copies should be given to representatives of the Law Society on the Law Revision Committee.

It was also decided that the members of the Standing Committee should meet Messrs. Cousins, Leicester and Spratt and discuss with them the views of the Council.

Although the Committee had asked for a direction of the Council on certain points, it was thought that the matter could be left with the Committee and the Standing Committee to discuss with the Legal Aid Committee.

(To be concluded)

LAND AND INCOME TAX PRACTICE.

Deduction against Profits—Division or return in proportion to purchases.—The position relating to rebates and division of profits based on purchases is covered by s. 7 of the Land and Income Tax Amendment Act, 1935, which reads as follows:—

"(1) For the purposes of the principal Act the assessable income of a company shall be deemed to include any profits or gains arising from transactions of the company with its members which would be included in its profits or gains if those transactions were with non-members, save that in computing the assessable income of any company the Commissioner shall allow as expenses—

"(*a*) Any sums which represent a discount, rebate, dividend, or bonus granted by the company to members or other persons in respect of amounts paid or payable by or to them on account of their transactions with the company, being transactions which are taken into account in computing the assessable income:

"(*b*) Any sums which are calculated by reference to the said amounts or to the magnitude of the said transactions and not by reference to any share or interest in the capital of the company.

"(2) Nothing in this section shall affect the extent of the exemption from income-tax of any co-operative company to which the provisions of paragraph (*ee*) of section seventy-eight of the principal Act . . . are applicable."

This section of the New Zealand Income Tax Act closely follows corresponding English provision (s. 31 of the Finance Act, 1933 (Gt. Brit.)) and accordingly *Pope* v. *Beaumont*, [1941] 3 All E.R. 9, decided on the interpretation of the latter section, would apply in determining tax liability.

Comments on the above section: The section applies to *any* company.

No amount or rate is fixed by the section at which the rebate, discount, or dividend is to be computed. Provided that discount or divided is computed with relation to the transactions of members or other persons, a deduction is permissible from the income of the company.

Date on which the rebate, discount or dividend is to be declared in favour of the members or other persons. The Commissioner of Taxes, advises that he is prepared to consider applications for deduction:

(*a*) Where the rebate, discount or dividend is declared payable to members or other persons during the income year.

(*b*) Where the rebate, discount or dividend is declared payable to members or other persons after the close of annual accounts of the year. The Commissioner is prepared to allow a reasonable time for the declaration thereof. A copy of the minute declaring the rebate, discount or dividend should be furnished together with a copy of the necessary adjusting book entries.

Liability of recipient of rebate, discount or dividend for taxation.

(a) Individual member or other person who makes purchases from the company of goods only for his private consumption and not for business purposes—no liability.

(b) Individual member or other person who makes business purchases from the company such rebate, discount, or dividend must be taken into account in determining his profit or loss for taxation purposes—*vide Pope* v. *Beenmont*, [1941] 3 All E.R. 9.

Interest paid at a rate in excess of rate provided by National Expenditure Adjustment Act, 1932.—Section 31 of the National Expenditure Adjustment Act, 1932 as amended by s. 84 (1) (*a*) of the Mortgagors and Lessees Rehabilitation Act, 1936 provides:

"Subject to the provisions of this Part of this Act rates of interest payable under mortgages of property situated in New Zealand and rents payable in respect of land or of any interest in land or in respect of any building or part of a building so situated, payable under contracts in force at the passing of this Act, shall be reduced as provided in this Part of this Act, and the rates as so reduced shall not be increased, except by leave of a competent Court."

Section 29 (1) of the National Expenditure Adjustment Act, 1932, as amended by s. 2 (1) of the National Expenditure Adjustment Amendment Act, 1932, provides as follows:—

"'Contract' includes every binding agreement whether in writing or not, whereby any person undertakes to pay any interest or rent:

"'Chattels' has the meaning given thereto by Section two of the Chattels Transfer Act, 1924.

"'Mortgage' means any deed, memorandum of mortgage, instrument, or agreement whereby security for the payment of moneys or for the performance of any contract is granted over land or chattels or any interest therein respectively; and includes—

"(*a*) Any debenture or debenture stock heretofore issued by any company carrying on business in New Zealand, or by any incorporated society or other body corporate, not being a debenture or other security of a class specified in subsection one of section forty-five hereof; or

"(*b*) Any instrument of security granted over or in respect of any policy for securing a life insurance, endowment, or annuity; or

"(*c*) Any agreement for the sale or purchase of land; or

"(*d*) Any customary hire-purchase agreement within the meaning of section fifty-seven of the Chattels Transfer Act, 1924."

It is clear from the provisions of s. 31 of the National Expenditure Adjustment Act, 1932, that where the rate of interest payable under the debentures was reduced by such Act such rate cannot be increased without the leave of a competent Court.

Any interest claimed in excess of the statutory rate being an illegal payment would be non-deductible.

SUPREME COURT PRACTICE.

Revocation of Emergency Probate Rules.

The attention of practitioners is drawn to the two following amendments of important emergency regulations affecting practice:

Rule 2 of the Supreme Court Emergency Revocation Rules, 1946 (*1946 New Zealand Gazette*, 384), is as follows:—

"Rule 531DD of the Code of Civil Procedure set forth in the Second Schedule to the Judicature Act, 1908, as enacted by the Supreme Court Emergency Rules, 1939, and amended by the Supreme Court Emergency Rules, 1940, and Rule 531EE of the said Code as enacted by the Supreme Court Emergency Rules, 1939, are revoked."

Under R. 3 the Supreme Court Emergency Rules, 1939, and the Supreme Court Emergency Rules, 1940, are consequentially revoked.

These rules provided that, upon any application to the Supreme Court for a grant of probate or letters of administration or for re-sealing of probate or letters of administration, an affidavit was to be filed as to whether or not the applicant, and the deceased person were alien enemies. If alien enemies, then the consent of the Attorney-General to the application had to be filed.

Additional clauses by the executor or administrator were required in the affidavits supporting the application.

As from March 20, 1946, these clauses are no longer necessary.

EXECUTORS AND TRUSTEES.

Distribution to Enemies of Trust Property.

It is provided by the Enemy Property Emergency Regulations, 1939, Amendment No. 5 (Serial No. 1946/30), as follows:—

"No executor, administrator, or trustee of the estate of any deceased person shall, without the written consent of the Attorney-General, distribute or pay any part of the assets or proceeds of that estate to any beneficiary or creditor who is an enemy, or to any person on his behalf."

RULES AND REGULATIONS

Orchard and Garden Diseases Act Extension Order, 1946. (Orchard and Garden Diseases Act, 1928.) No. 1946/15.

Labour Legislation Suspension Orders revoked. (Labour Legislation Emergency Regulations, 1940). No. 1946/16.

Wool Board Election Regulations, 1946. (Wool Industry Act, 1944.) No. 1946/17.

Local Authorities (Temporary Housing) Emergency Regulations, 1944, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1946/18.

Education Board Grants Regulations, 1946. (Education Act, 1914.) No. 1946/19.

Post-primary School Grants Regulations, 1946. (Education Act, 1914.) No. 1946/20.

Poisons (General) Regulations, 1937, Amendment No. 5. (Poisons Act, 1934.) No. 1946/21.

Economic Stabilization Emergency Regulations, 1942, Amendment No. 8. (Emergency Regulations, Act 1939.) No. 1946/22.

Employment (Information) Regulations, 1946. (Employment Act, 1945.) No. 1946/23.

Social Security (Laboratory Diagnostic Services) Regulations, 1946. (Social Security Act, 1938.) No. 1946/24.

Dangerous Drugs Order, 1946, No. 1. (Dangerous Drugs Act, 1927.) No. 1946/25.

Employment Orders Revocation Order, 1946. (Industrial Manpower Emergency Regulations, 1944.) No. 1946/26.

Lemon Marketing Regulations, 1946. (Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934.) No. 1946/27.

Breadmaking Revocation Notice, 1946. (Supply Control Emergency Regulations, 1939, Amendment No. 1.). No. 1946/28.

Banking Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1946/29.

Enemy Property Emergency Regulations, 1939, Amendment No. 5. (Emergency Regulations Act, 1939.) No. 1946/30.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

This Imp.—In the shoulder-references in Part I of the Evidence Amendment Act, 1945, the statute of 1928 which that Part reproduces section by section is referred to as "(Imp.)." What is the reason or the purpose for such a reference? If it means "Imperial," it is wrong: there is no Imperial Parliament, and there is no source of legislation for the whole Empire. The compiler of our statutes must know his Statute of Westminster which is the last statute that can ever have any "Imperial" significance. The reference is all the more incorrect as s. 7 of the so called "Imp." statute declares that it "shall not extend to Scotland or Northern Ireland." Why, therefore, "Imp." as referable to a statute operating exclusively in England (and Wales)? It is time this nonsense disappeared from our statute-book, and that the use of "Imp." is restricted by our legislators to malignant little devils or wicked spirits in which sense we could the better understand it. Caesar was dignified by being described as "imperial," but even this word (that once had majesty about it) lost face when it came to be applied to a miniature beard.

Rewards in Heaven.—The projected rules under the Legal Aid Act, 1939, draw attention to the fact that in this Dominion a large amount of work is performed by practitioners for poor persons who pay no fees or very inadequate ones. This position applies particularly to cases under the Destitute Persons Act, 1910, and in a less degree to other branches of matrimonial and welfare work. According to one story related to Scriblex, these ill-rewarded efforts are not always without appreciation, even if the method of expressing it takes a surprising form. In this instance, the client was a middle-aged, harassed little woman whose husband had deserted her and her six children for parts unknown. This was before the present era when such a woman occupies a high place in the pension scheme of things. Her complaint was that a neighbour, maliciously-inclined as neighbours often are, had slandered her to the local hospital relief officer, with the result that he had accepted the neighbour's version of her mode of living in preference to her own and had in consequence deprived her of the small benefits which she had received by way of hospital and charitable maintenance. After several interviews and a great deal of correspondence, the practitioner finally convinced the relief officer that information upon which he had acted was unreliable and defamatory, and the benefits were restored. On the morning after the glad tidings had been conveyed to the impoverished client, she arrived at his waiting-room accompanied by her eldest daughter, a girl of about fifteen. "We have talked this matter over," she said, when the spate of her thanks had subsided. "We are not able to pay you, as you know, but if anything crops up in the future we have all agreed on this—you are to be the family solicitor."

Professorial Meaning.—In a learned and lengthy discourse upon "Language and the Law," now in its fourth instalment in the *Law Quarterly Review* (October, 1945), Professor Glanville Williams, Ph.D., deals with the "proper" meaning of words. Scientifically speaking, he contends, words have no true or proper meaning, except in two senses. There is first the ordinary or commonly accepted meaning which words have, and then there is the special meaning of a word which a particular person who uses it may assign to it: here, the "proper" meaning of the word for his purpose becomes the assigned meaning. "The ordinary meaning need not be current among the community as a whole: it may be confined to a particular section of the community, such as *educated persons, business men, scientists or lawyers.*" What, it may be asked, is the meaning which the reader is asked to give to the words which Scriblex has ventured to put in italics. In their ordinary sense, they appear to exclude lawyers from that particular section which consists of educated persons. Do they have some assigned meaning which Dr. Williams considers thus becomes therefore their "proper" meaning. Businessmen can look after themselves, and generally do; and, in this atomic age, so do scientists. But, as it is important that we should be regarded as fitting into the section which includes educated persons, the only course is to rely upon the *noscitur a sociis* rule of interpretation and throw ourselves upon the mercy of the Court.

Non-access in Divorce.—Section 15 of the Evidence Amendment Act, 1945, provides that in any proceedings, whether civil or criminal, either of two spouses may give evidence proving or tending to prove that the spouses did not have sexual relations with each other at any particular time, notwithstanding the evidence would tend to show that any child born to the wife during marriage was illegitimate. In this instance, New Zealand has lagged behind Tasmania which passed similar legislation in 1943, but is in advance of Canada, where similar legislation is now being promoted. Apparently, however, the remarks of Smith, J., did not pass unobserved, for in *Lambie* v. *Lambie* [1942] N.Z.L.R. 60, he said:—

> I confess that the sight of the parties sitting in Court unable to give evidence but unable at times to prevent the play of their real emotions upon their features evoked in my mind a sense of frustration. I thought the truth could have been much more readily ascertained if the parties had been allowed to go into the witness-box, and it is worthy of note that *Lord Birkenhead* himself allowed them to do so in *Gaskill* v. *Gaskill*, [1921] P. 425.

In *Hare* v. *Hare*, [1943] 2 D.L.R. 215, Urquhart, J., held that evidence that a husband was on war service in England while his wife continued to reside in Canada was not adequate to prove non-access by him, as he might have slipped home by bomber plane during his week-end leave. The emphasis which this case laid upon the task of proving non-access by independent evidence is one of the grounds upon which the Ontario Commissioners on Uniformity of Legislation have now recommended the abolition of the rule in *Russell* v. *Russell*. Their report claims that the rule, in its application to suits for dissolution of marriage, was misunderstood and wrongly applied in this case—a view that many Judges of single instance have obviously thought but hesitated to express.

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. Land Transfer.—*Both Executors deceased—Vesting of land in New Trustees duly appointed by Deed—Procedure for Completion of Title.*

QUESTION: A. died in 1925 registered proprietor of a parcel of land under the Land Transfer Act, 1915. He appointed B. and C. his executors, who at present appear on the Register Book as proprietors by transmission. B. died in 1935 and C. has now just died. By A.'s will D. has authority to appoint new trustees in the circumstances which have arisen and has duly appointed E. and F. trustees by deed. I am quite satisfied that the deed of appointment of new trustees is in order but having regard to s. 80 (4) (*b*) of the Trustee Act, 1908, I should be pleased if you would inform me how I can procure E. and F. registered proprietors of the land.

ANSWER: The provision of the Trustee Act cited (s. 80 (4) (*b*)), prevents E. and F. from applying by transmission, for the legal estate in fee simple has not vested in them by operation of law: *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839.

But (subject to registration) the legal estate has vested in C.'s executor, if he left one: s. 4 of the Administration Act, 1908, *14 Halsbury's Laws of England*, 2nd Ed., 168, *Baird's Real Property*, 70, 71. Therefore, if C. has left an executor, the proper course is for the executor to apply by transmission, and then to transfer simultaneously to E. and F., who are entitled to call for a transfer of the legal estate in fee simple.

If C. has no executor, then a vesting order by the Supreme Court will be necessary.

X1.

2. Land Transfer.—*Mortgage — Mortgagee Purchaser at Registrar's Sale—Mortgagee dying before Registrar executes Transfer.*

QUESTION: M. is the registered mortgagee of A., and about three years ago duly exercised power of sale through the Registrar of the Supreme Court. M. was the highest bidder at the sale and became the purchaser, but omitted to get a transfer from the Registrar. M. is now dead and E. is his executrix under his will, which has just been proved. How can title to the fee simple be obtained? Can the Registrar now transfer to M. and the transfer be followed up by a transmission in favour of E. in the usual manner?

ANSWER: The Registrar cannot now transfer to M., as a transfer to a dead person is a nullity. The Registrar should execute a transfer in favour of E., the executrix of M. E., as the legal personal representative of M. who, as such, merely stands in the shoes of M.: *In re Mangatainoka* IBC No. 2, (1913) 33 N.Z.L.R. 23, 41.

X1.

3. Vendor and Purchaser.—*Land Sales—Option to purchase Land at Valuation created by Will—Whether exercise requires Consent of Land Sales Court.*

QUESTION: Deceased's will reads: "In the division of my estate amongst my children my sons shall have the option of purchasing either jointly or as tenants-in-common my freehold farm or such part or parts thereof as such sons shall agree with my trustees so to purchase." It is further provided that the price is to be fixed at valuation to be made in manner set out in the will. Deceased left two sons and each son intends purchasing half of deceased's farm in manner provided as aforesaid. Is the consent of the Land Sales Court necessary? Is exemption under s. 43 (2) (*f*) of the Land Sales Act applicable?

ANSWER: Section 43 (2) (*f*) does not appear applicable, and the consent of the Land Sales Court appears necessary.

Until the contracts of sale are entered into, the two sons would have no equitable estate in any specific parcel of land, and therefore the transfers would not be to beneficiaries of *land* to which they are entitled under a will. The case of *Commissioner of Stamp Duties* v. *Schultz*, [1934] N.Z.L.R. 652, may be cited in support of this opinion. X1.

4. Land Transfer.—*Transfer to Tenants-in-common without Right of Partition—Whether Registrable.*

QUESTION: A. proposes to transfer a small parcel of land to B. and C. as tenants-in-common in equal shares, without right of partition. Is this permissible? The land is under the Land Transfer Act. The reason for the transfer in this form is that there is an artesian well on the land which serves the properties of B. and C.

ANSWER: It is considered that this could not be done, and that no District Registrar would register such a transfer in view of the provisions of Part XIII of the Property Law Act, 1908. The right to partition which dates back to the reign of Henry VIII, appears to be inherent in every tenancy-in-common, and novel estates and interests in land cannot be created at the whim of landowners. A transfer to tenants-in-common without the right of partition would appear to be an attempt to oust the jurisdiction of the Supreme Court.

It is considered that A. should transfer one half of the parcel of land to B. and the other half to C. and that B. and C. should execute mutual grants of water rights. In other words follow the custom of conveyancers in creating party walls. X1.

5. Land Transfer.—*Land held under Long-term Agreement for Sale and Purchase—Purchase Price paid but Vendor missing—Procedure for Acquisition of Title by Purchaser.*

QUESTION: My client has been in possession of a parcel of land transfer land for many years under an agreement for sale and purchase, but has neglected to obtain a title from the registered proprietor the vendor, who is now not available, he is probably dead, but if alive his whereabouts are unknown. How can my client obtain title? Will the consent of the Land Sales Court be necessary?

ANSWER: The only way to obtain title is to petition the Supreme Court for a vesting order under the Trustee Act, 1908: *In re Park*, (1907) 10 G.L.R. 111, *In re Chrystall*, (1903) 22 N.Z.L.R. 1007.

The consent of the Land Sales Court will not be necessary, as the question obviously refers to a transaction entered into long before the coming into operation of the Land Sales Act, 1943. X1.